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TRIBUTE

A TRIBUTE TO PROFESSOR PENNY WHITE

E. Alan Groves*

In August 2017, Professor Penny White stepped down from her position as faculty advisor to the Tennessee Journal of Law and Policy. On behalf of the journal’s editors, I write to express our warmest thanks and deepest appreciation for Professor White’s steadfast commitment to the journal and its members, both past and present.

Professor White’s relationship with the Tennessee Journal of Law and Policy dates back to the journal’s founding in 2004 when she agreed to serve as one of the journal’s original faculty advisors. As a former Tennessee Supreme Court justice, a successful former litigator, and an accomplished academic, Professor White brought a wealth of experience to the journal. She shared this experience by helping the journal with fundraising,

* J.D. Candidate, May 2018, The University of Tennessee College of Law.

1 Penny White serves The University of Tennessee College of Law in three different capacities: She is the E.E. Overton Distinguished Professor of Law, the Director of the Center for Advocacy and Dispute Resolution, and the Interim Director of Clinical Programs.
article solicitation, and publishing a written work of her own.²

Further, Professor White has been instrumental in allowing the Tennessee Journal of Law and Policy to co-host an annual symposium with the College of Law’s Center for Advocacy and Dispute Resolution. Each year, the journal invites professionals from various academic disciplines to speak about contemporary issues in law and public policy. The annual symposium continues to ignite the imagination of the campus community and provides journal members with unique opportunities to interact with policy experts and well-respected members of the bench and bar. These annual events are made possible by the vision of Professor White, the administrative support of her assistant Jenny Lackey, and the financial support of the Center for Advocacy and Dispute Resolution.

Finally, Professor White has served as a remarkable mentor and role model for the student editors of the journal. Students who have served as Editor in Chief or Symposium Editor have personally witnessed the time and energy Professor White has invested in the journal. These students have also witnessed the grace and humility with which Professor White conducts her daily affairs; she does not lord her titles over students or colleagues, and, no matter how busy she is, Professor White always makes time to meet with students in her office. To everyone on campus, Professor White is known for her strength, her integrity, and (most of all) her love for people.

Thus, it is with sad hearts that the editors of the Tennessee Journal of Law and Policy bid farewell to our longtime faculty advisor. Of course, we will no doubt

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continue to learn from Professor White in clinics and in the classroom, and we will forever be touched by the example of her life and her legacy in the law. Turning the page, we now look forward to continuing this journal’s tradition of excellence under the supervision of our current faculty advisor, Professor Bradley A. Areheart.
ARTICLE

JUDICIAL HOT POTATO
AN ANALYSIS OF BIFURCATED COURTS OF LAST RESORT IN TEXAS AND OKLAHOMA

Brent M. Hanson

I. History

A. Texas
1. Pre-Civil War
2. Reconstruction
   a. Constitution of Texas (1866)

* Brent M. Hanson received his Juris Doctor from the University of Pennsylvania Law School, magna cum laude. He also holds a bachelor’s degree in political science from California State University, Fresno, summa cum laude. He currently practices commercial and securities litigation in Houston, Texas as an Associate at Skadden, Arps, Slate, Meagher & Flom LLP. He has graciously accepted a clerkship with the Honorable Leslie H. Southwick of the U.S. Court of Appeals for the Fifth Circuit in 2018. He would like to thank his wife, Kyle Hanson, for all her support; his professors Amy Wax and Cathy Struve, who provided much needed direction, criticism, and guidance; and the editors of the Tennessee Journal of Law and Policy for their diligent work and helpful suggestions. The views expressed in this Article are his own, and do not necessarily reflect the views of Skadden Arps or any one or more of its clients, nor do they necessarily reflect the views of Judge Southwick.

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On April 29, 2014, Clayton Lockett was executed by lethal injection in Oklahoma.¹ Lockett was convicted of murdering nineteen-year-old Stephanie Neiman, whom he shot twice with a shotgun and then buried while still alive, with the help of his accomplices.² Of his own volition,³ Lockett confessed three days later and was subsequently convicted and sentenced to death. Lockett’s death resulted from a botched lethal injection.⁴ The drugs

² Id.
³ Id.
⁴ See id. (“Governor Fallin gave a press conference to remind everyone about Lockett’s crimes, voice her support for the

[162]
used to execute Lockett were both confidential and experimental.\(^5\) The intravenous line ("IV") used to render Lockett unconscious was pulled from his vein and became infiltrated, and much of the lethal drugs did not make it into Lockett’s bloodstream.\(^6\) As a result, Lockett awoke and sat up on the gurney in the middle of his execution, unable to speak, with blood pooling beneath him caused by the infiltrated IV.\(^7\) The execution was botched to such a level that the warden actually tried to stop it, eventually calling and briefing the governor on the situation.\(^8\) However, there were already enough drugs in Lockett’s system; he died ten minutes later, apparently in agony the entire time.\(^9\)

Prior to this incident, on April 23, 2014, the Oklahoma Supreme Court dissolved a stay of execution and rendered a per curiam opinion that resulted in Lockett’s execution.\(^10\) Lockett v. Evans is the result of more than ten years of interrelated appeals and constitutional challenges, spanning federal courts of appeals and state courts of last resort.\(^11\) Lockett’s later appeals, challenging a lethal injection disclosure prohibition statute, also included Charles Warner, a man

\(^5\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id. ("Ten minutes later, at 7:06 p.m., Clayton Lockett was declared dead. He had been dying amidst all the chaos, just very slowly and in apparent agony.").
\(^10\) Lockett v. Evans, 330 P.3d 488, 492 (Okla., 2014) ("The stay of execution entered by this Court on April 21, 2014, is hereby dissolved.").
facing execution for raping and murdering an eleven-month-old baby.12 The state of Oklahoma executed Warner on January 15, 2015,13 after a 180-day stay of execution during which authorities investigated the botched execution of Lockett.14 Warner’s last words were, “My body is on fire.”15

Warner’s and Lockett’s appeal process was unique because they challenged the constitutionality of a law that classified the lethal injection drugs used to execute them.16 If Warner and Lockett succeeded in their constitutional challenge, their executions would be stayed. In forty-eight states, there would be no question that a court of last resort could render a decision on the constitutionality of a lethal injection classification law. Oklahoma, however, is not one of them, due to its bifurcated court of last resort structure. The only other state that maintains a bifurcated structure of civil and

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14 Katie Fretland, Oklahoma Agrees to 180 Day Stay of Execution for Death-row Inmate, THE GUARDIAN (May 8, 2014), http://www.theguardian.com/world/2014/may/08/oklahoma-180-day-stay-execution-charles-warner. The Oklahoma Court of Criminal Appeals issued the stay of execution for Mr. Warner, rather than the Oklahoma Supreme Court. Id.
16 Lockett, 356 P.3d at 61 (“The appeal by the DOC and its interim Director has placed the issue of the secrecy provision of section 1015(B) undisputedly within this Court's appellate jurisdiction.”).
This Article explores the history of Texas’s and Oklahoma’s bifurcated courts of last resort, the similarities and differences between the two systems, as well as some of the controversies that have arisen due to jurisdictional questions. The Article concludes with a recommendation that Oklahoma and Texas each adopt a unified court of last resort.

When cases arise that implicate both civil and criminal issues, the Oklahoma and Texas judiciaries are likely to suffer from “judicial hot potato,” by sending the cases back and forth between the criminal and civil divisions of the respective court. That is not to say, however, that questions of jurisdiction do not arise in unified systems, such as the United States federal courts. The key difference there lies in the vesting of a single court, rather than dual courts, with the final decision on whether a case is civil or criminal in nature. Although no system is perfect, by adopting a unified court of last resort, Texas and Oklahoma will have a single decision-maker with a clear grant of jurisdiction to determine the classification of cases.

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17 LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 220 (1939) (“[N]o state in the Union except Texas and Oklahoma has a separate court of criminal appeals.”); see also Ben L. Mesches, Bifurcated Appellate Review: The Texas Story of Two High Courts, 53 JUDGES’ J. 4 (2014).

18 The colloquial phrase “hot potato” is defined as “a controversial question or issue that involves unpleasant or dangerous consequences for anyone dealing with it.” Hot Potato, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/hot%20potato. The phrase derives from the popular children’s party game in which participants toss to each other a small object resembling a potato while music is playing. See generally JACK MAGUIRE, HOPSCOTCH, HANGMAN, HOT POTATO & HA HA HA: A RULEBOOK OF CHILDREN’S GAMES (1990). When the music stops playing, the player holding the object is eliminated and cannot proceed to the next round. Id.
I. History

Both Texas’s and Oklahoma’s court structures have evolved over time, becoming the labyrinths they remain today. Political motivations and increased case volume have contributed to the byzantine network of trial and appellate courts that Texas maintains. In Oklahoma, large-scale reforms were achieved in the wake of scandal, but those reforms failed to address the problems inherent in bifurcated courts of last resort. Both states have failed to eliminate their bifurcated structures throughout their history, despite attempts to do so.

A. Texas

1. Pre-Civil War

Texas became a republic in 1836, after declaring independence from Mexico. Texas’s first judiciary as an independent nation had a single supreme court composed of a chief justice and associate justices. The associate justices were judges of the district courts and functioned as the supreme court when a majority was present, which constituted a quorum. These provisions were in the original draft of the constitutional convention of 1836 as well, likely indicating that the judiciary was not a contested issue throughout the convention.

19 REP. OF TEX. CONST. pmbl. (1836).
20 TEX. DECLARATION OF INDEPENDENCE (1836).
21 REP. OF TEX. CONST. art. IV, §§ 1–9 (1836).
22 Id. § 7.
In 1845, the United States annexed Texas.\textsuperscript{24} With its annexation, Texas adopted a state constitution.\textsuperscript{25} The new constitution changed the structure of the judiciary, with three justices (one chief justice and two associate justices) sitting on the supreme court, any two of whom would constitute a quorum.\textsuperscript{26} The 1845 Constitution specifically granted habeas corpus jurisdiction to the Texas Supreme Court, a power it did not retain in the 1836 Constitution of the Republic of Texas.\textsuperscript{27} In addition, the 1845 Constitution gave district courts original jurisdiction in all criminal cases, which those courts did not retain under the 1836 Constitution.\textsuperscript{28}

In 1861, Texas seceded from the United States and ratified a new constitution upon joining the Confederate States of America.\textsuperscript{29} Notably, the 1861 Secession Constitution did not come with changes to the judicial department, however. The Constitution of 1861 kept the judiciary provisions in Article IV, and even maintained the same sections.\textsuperscript{30} Texas became a member of the Confederate States of America on March 23, 1861, when the Secession Convention adjourned for the last time.\textsuperscript{31}

2. Reconstruction

After the Civil War, Texas began a tumultuous period of constitutional change in its judiciary. During Reconstruction, Texas was subject to federal military

\textsuperscript{24} C.T. Neu, \textit{Annexation}, HANDBOOK OF TEXAS ONLINE (Sept. 23, 2015), https://tshaonline.org/handbook/online/articles/mga02.
\textsuperscript{25} Id.
\textsuperscript{26} TEX. CONST. art. IV, § 2 (1845).
\textsuperscript{27} Id. § 3.
\textsuperscript{28} Id. § 10.
\textsuperscript{30} TEX. CONST. art. IV, § 1–5, 10 (1861).
occupation and ousted all five supreme court justices on September 10, 1867.\textsuperscript{32} Between 1866 and 1876 Texas had three different constitutions.\textsuperscript{33}

\textit{a. Constitution of Texas (1866)}

The Constitution of 1866 was written in order to regain admittance to the Union. Among other changes, the Constitution of 1866 significantly changed the structure of the Texas judiciary. Section 1 of Article IV added new constitutional courts (courts created by the constitution) including criminal courts, county courts, and corporation courts.\textsuperscript{34} The county courts had original jurisdiction in “all misdemeanors and petty offences, as the same are now, or may hereafter be defined by law; of such civil cases, where the matter in controversy shall not exceed five hundred dollars.”\textsuperscript{35} The Constitution of 1866 also added justices of the peace, whose jurisdiction is further defined by law, and who had jurisdiction in civil matters totaling less than $100.\textsuperscript{36}

The Constitution of 1866 also added two more justices to the Texas Supreme Court, for a total of four associate justices and one chief justice.\textsuperscript{37} The appellate jurisdiction of the supreme court changed slightly in 1866. Formerly, the supreme court had appellate jurisdiction that extended to all matters, but the legislature could limit appellate jurisdiction in criminal cases and interlocutory judgments.\textsuperscript{38} In the 1866

\begin{itemize}
\item \textsuperscript{32}Hans W. Baade, \textit{Chapters in the History of the Supreme Court of Texas: Reconstruction and “Redemption”} (1866-1882), 40 ST. MARY’S L.J. 17, 25 (2008).
\item \textsuperscript{33}TEX. CONST. art. V (1876); TEX. CONST. art. V (1869); TEX. CONST. art. IV (1868); TEX. CONST. art. IV (1866).
\item \textsuperscript{34}TEX. CONST. art. IV, § 1 (1866).
\item \textsuperscript{35}Id. § 16.
\item \textsuperscript{36}Id. § 19.
\item \textsuperscript{37}Id. § 2.
\item \textsuperscript{38}TEX. CONST. art. IV, § 3 (1861).
\end{itemize}
Constitution, the legislature could no longer limit felony criminal jurisdiction from the supreme court through law.\textsuperscript{39} The Constitution of 1866 also provided for the election of district judges and expanded their jurisdiction beyond that of the Constitution of 1861 to include appellate jurisdiction from the inferior courts, original jurisdiction in cases dealing with slander or libel, and suits for the trial or title to land.\textsuperscript{40}

\textit{b. Constitution of 1869}

Shortly after the ratification of the Constitution of 1866, Winfield Scott Hancock, the military commander over Texas during Reconstruction, called for an election in Texas to determine whether a new constitution should be created.\textsuperscript{41} Texans overwhelmingly voted for a new constitutional convention, and the convention assembled on June 1, 1868.\textsuperscript{42} The convention lasted 150 days but the delegates did not complete a constitution.\textsuperscript{43} Nonetheless, what was written was submitted to the voters of the state and became the Constitution of 1869.\textsuperscript{44}

The judicial department, particularly the Texas Supreme Court, was significantly changed in the Constitution of 1869. The supreme court was reduced to three justices\textsuperscript{45} who were subjected to nine-year term limits, rather than the ten-year terms under the Constitution of 1866.\textsuperscript{46} The district court judges retained appellate jurisdiction of inferior courts.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{39} TEX. CONST. art. IV, § 3 (1866).
\item \textsuperscript{40} Id. § 6.
\item \textsuperscript{41} Claude Elliot, Constitutional Convention of 1868-69, HANDBOOK OF TEXAS ONLINE (June 12, 2010), http://www.tshaonline.org/handbook/online/articles/mjc04.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} TEX. CONST. art. V, § II (1869).
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. § VII.
\end{itemize}
courts were merged with the justice of the peace courts, the extent of their jurisdiction to be delineated by the legislature.\textsuperscript{48}

c. Constitution of 1876

The Constitution of 1876 is the current constitution of Texas, but it has been amended numerous times since its ratification in 1876.\textsuperscript{49} The Constitution of 1876 differed greatly from the Constitution of 1869. It included, as constitutional requirements, a supreme court, a court of appeals, district courts, county courts, commissioners’ courts, courts of justices of the peace, and other courts that may be established by law.\textsuperscript{50} The Constitution of 1876 also gave the legislature the ability to establish specifically criminal district courts as long as the city had over 30,000 residents.\textsuperscript{51} The Texas Supreme Court remained a three-justice court,\textsuperscript{52} but, critically, its jurisdiction over criminal matters was eliminated. The supreme court had civil appellate jurisdiction only, reaching only the cases in which the district courts had original or appellate jurisdiction.\textsuperscript{53} With the absence of criminal jurisdiction, the supreme court also lost the ability to issue writs of habeas corpus.

The Constitution of 1876 created the Texas Court of Appeals, possibly in response to a congested docket.\textsuperscript{54} Contrary to its usual nomenclature, the court of appeals was not an intermediate appeals court. Rather, it had exclusive jurisdiction in all criminal matters, as well as

\begin{footnotes}
\footnotetext[48]{Id. § XX.}
\footnotetext[50]{TEX. CONST. art. V, § 1 (1876).}
\footnotetext[51]{Id.}
\footnotetext[52]{Id. § 2.}
\footnotetext[53]{Id. § 3.}
\footnotetext[54]{In re Reece, 341 S.W.3d 360, 379 (Tex. 2011).}
\end{footnotes}
some civil cases arising from the county courts. The court of appeals was also elected every six years and consisted of three sitting judges.

There are multiple theories for the bifurcation of civil and criminal jurisdiction between the Texas Supreme Court and the Texas Court of Appeals. Most hold the view that the courts’ jurisdiction was bifurcated due to a backlog of cases.

Others hold the view that the Constitution of 1876 was a “revanchist document: The fruition of a resurgence of state power by segregationist, mostly ex-Confederate Democrats after a decade under Union-run Reconstruction.” The resurgence of state power by segregationists allowed the Texas Democrats to change the constitution in order to bypass a “radical Republican” reconstruction court. This new court would allow the Democrats to ignore odious precedent laid down by the Texas Supreme Court, further reinforced by the fact that in the new constitution only the Texas Court of Appeals could hear habeas petitions during a time of martial law. The state could now avoid a reconstruction court when trying to enforce Jim Crow laws.

Either way, the bifurcated system failed to achieve what the drafters wanted. By 1879, the courts continued to fall behind in their caseloads, and the

55 TEX. CONST. art. V, § 6 (1876).
56 Id. § 5.
58 Henson, supra note 57.
59 Id.
60 Id.
61 Id.
legislature created a commission of appeals.\textsuperscript{62} This too failed, and by 1891, the citizenry of Texas voted to entirely supplant the judicial article of the Constitution of 1876.\textsuperscript{63}

3. Amendments to 1876 Constitution

\textit{a. 1891 Amendment}

In 1891, the state of Texas adopted a wholesale replacement of its judiciary through an amendment.\textsuperscript{64} The 1891 amendment removed the Texas Court of Appeals and replaced it with the Texas Court of Criminal Appeals and the Texas Court of Civil Appeals.\textsuperscript{65} Thus, the new system added a mid-level appeals court and gave the Texas Supreme Court the responsibility of resolving conflicts between the courts of civil appeals.\textsuperscript{66}

The Texas Supreme Court maintained its limit of three sitting justices, as did the Texas Court of Criminal Appeals.\textsuperscript{67} The Texas Court of Civil Appeals was also composed of three judges per court.\textsuperscript{68} After adopting the 1891 amendment, the Texas legislature added two more

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 35.
  \item See generally S.J. Res. 16, 22d Leg., Reg. Sess. (Tex. 1891).
  \item Id. § 1.
  \item Id. Additionally, it is important to note that the 1891 amendment gave the Texas Supreme Court the ability to issue writs of habeas corpus, which had not been present in the Constitution of 1876. S.J. Res. 16, 22d Reg. Sess. § 3 (Tex. 1891); see also Tex. Const. art. V § 3 (1876). The 1891 amendment also explicitly eliminated the use of the writ of mandamus by the Texas Supreme Court against the Governor. S.J. Res. 16, 22d Reg. Sess. § 3 (Tex. 1891).
  \item S.J. Res. 16, 22d Reg. Sess. at §§ 2, 4 (Tex. 1891).
  \item Id. § 6.
\end{enumerate}
\end{footnotesize}
courts of appeal. The term limits remained six years for each justice and judge, with each elected by popular vote. No additional courts were changed by the 1891 amendment.

The next set of constitutional amendments affecting the judiciary did not occur until 1954. That does not mean, however, that there were no legislative changes to the judiciary. Between 1893 and 1967, Texas added eleven new appellate districts. The further constitutional changes were concerned, primarily, with the supreme court and the court of criminal appeals. Before addressing these changes, I will briefly describe what has occurred at the trial court level since 1876.

b. Trial Courts in Texas

Texas has a dizzying array of trial courts. Constitutional trial courts include district, county, and justice of the peace courts. There are currently 507 district courts across the state. Unfortunately, the legislature, in an effort to deal with changing caseloads, has created statutory district courts that have specific jurisdictional preferences. Thus, a litigant will have to determine the correct district court in which to bring her

70 S.J. Res. 16, 22d Reg. Sess. at §§ 2, 4, 6 (Tex. 1891).
71 There still remained district courts, county courts, commissioner’s courts, and courts of justices of the peace. S.J. Res. 16, 22d Reg. Sess. § 1 (Tex. 1891).
72 Texas Legislative Counsel, Amendments to the Texas Constitution Since 1876 65–70 (Feb. 2016).
73 See Worthen, supra note 62 at 36.
claim, even though she may live within the geographical confines of multiple district courts. Litigation in Texas is further confused by the existence of the county courts, which consist of statutory county courts and constitutional county courts. Statutory county courts actually have no common thread: They are simply a patchwork creation of local judicial needs. There is no commonality among them. Constitutional county courts are required in each county, where the judge is the chief executive officer of the county. A county court judge is not constitutionally required to be an attorney, and she has limited jurisdiction in both civil and criminal cases.

Finally, there are the justice of the peace courts. These courts have varying jurisdiction by statute and primarily operate as small claims courts and cases involving traffic fines. Only about eight percent of the justices of the peace are lawyers, yet justice of the peace courts are responsible for a significant portion of state revenue.

There are many other forms of trial courts in Texas, but the subject is beyond the scope of this Article. It is enough to know that the Texas judicial system includes a confusing mass of overlapping jurisdictions and courts, oftentimes run by non-lawyers. The existence of this patchwork only adds to the confusion of litigants. As will be discussed later, litigants struggle already in

76 Id. at 41, 45.
77 Id. at 41–43.
78 Id. at 48.
79 Id. at 49.
80 In re Reece, 341 S.W.3d 360, 383 (Tex. 2011).
the quest for the proper trial court. Bifurcated courts of last resort only add to the confusion and headache faced by litigants, especially when they do not know which appeals court has jurisdiction in their case.


In 1945 Texas increased the size of its supreme court from three to nine justices.\(^{83}\) In 1966, Texas increased the criminal court of appeals from three to five members.\(^{84}\) Then, in 1977 the criminal court of appeals increased to nine sitting judges.\(^{85}\) The court of appeals has also changed significantly since 1891, including the addition of criminal jurisdiction.

In 1978, Texas adopted a constitutional amendment allowing for more than three members on the court of civil appeals.\(^{86}\) In 1980, the criminal backlog was so great that the average disposition of a criminal appeal was three years.\(^{87}\) The resulting constitutional amendment gave the court of appeals appellate jurisdiction over all civil and criminal appeals, except death penalty cases.\(^{88}\) This system is how the Texas appellate courts operate today. There are fourteen appellate districts, with varying numbers of judges on each court. This appellate court has both civil and criminal jurisdiction, with the sole exception of death penalty cases. The Texas Supreme Court and Texas

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\(^{85}\) Id. at 552.

\(^{86}\) Worthen, supra note 62 at 38.

\(^{87}\) Guittard, supra note 84, at 552.

Court of Criminal Appeals each have nine justices and exercise only civil or only criminal jurisdiction, respectively. The stopgap legislation and patchwork courts in Texas used to alleviate backlogs of cases has led to the jurisdictional issues which will be taken up in Part II, infra.

B. Oklahoma

1. 1907 Constitution

The original judiciary article of the Oklahoma Constitution, ratified in 1907, provided specifically for a supreme court, district courts, county courts, courts of justices of the peace, municipal courts, and allowed for the creation of a criminal court of appeals.\(^89\) The Oklahoma Supreme Court maintained criminal jurisdiction as long as there was not a statutorily created criminal court of appeals.\(^90\) The Oklahoma Supreme Court was composed of five justices, divided into five judicial districts, nominated by political parties, and voted for by the state in an at-large election.\(^91\) The term of office was six years.\(^92\)

District courts were courts of general jurisdiction, and divided into twenty-one districts.\(^93\) County courts were specifically for probate, matters in controversy less than $1,000, and misdemeanors.\(^94\) County courts were also courts of appeals for justice of the peace courts.\(^95\) Justice of the peace courts had concurrent jurisdiction with county courts, but for less money, and lesser offenses.\(^96\)

\(^{89}\) OKLA. CONST. art. VII § 1 (1907).
\(^{90}\) Id. § 2.
\(^{91}\) Id. § 3.
\(^{92}\) Id.
\(^{93}\) Id. §§ 9, 10.
\(^{94}\) Id. §§ 12, 13.
\(^{95}\) Id. § 14.
\(^{96}\) Id. § 18.
The first criminal court of appeals was created in the 1907–1908 session of the Oklahoma legislature, which was the first legislative session of Oklahoma. This act gave the Oklahoma Criminal Court of Appeals exclusive criminal appellate jurisdiction, with the exception that the Oklahoma Supreme Court was to make determinations of constitutionality, should they arise. The 1909 legislature perpetuated the criminal court of appeals, repealed all prior acts in conflict, and gave it exclusive appellate jurisdiction of criminal matters. The 1909 act created three judicial districts, and provided for general elections of the judges. In 1959, the legislature changed the name of the Oklahoma Criminal Court of Appeals to the Oklahoma Court of Criminal Appeals.

2. 1967 Amendment to the 1907 Constitution

There were other changes along the way, but in 1967, in response to serious criticism and cries for reform, Oklahoma adopted a new judicial system. According to Dean Earl Sneed of the University of Oklahoma Law School, the judicial system of Oklahoma by the 1960s was, “ancient, creaky, inefficient, outmoded, complex, costly, and antiquated.” He further stated that the system “was not good in 1907, and has grown progressively worse in the fifty-eight years since statehood[.]” While Oklahoma’s appeals courts

98 Id.
99 Id.
100 Id.
101 Id.
102 See, e.g., Earl Sneed, Unfinished Business or All the Way in One Play, 19 OKLA. L. REV. 5, 6 (1966) (expounding his dissatisfaction with the system of justice in Oklahoma).
103 Sneed, supra note 102, at 7.
104 Id.
remained largely unchanged since 1907, its lower courts were a mess by the 1960s. Dean Sneed provided an anecdote that illustrates the frustrating complexity of the lower court system.

Fred [a research assistant to Dean Sneed] produced seven pages of legal size, single spaced material with just the most basic facts about our court system. It would have been longer, but I told Fred that because of the virtual impossibility of the task, he should omit any detail about police and municipal courts and courts of specialized jurisdiction such as the juvenile court in Tulsa County, and that he should just mention the superior and common pleas courts which exist only in a few counties in Oklahoma. And of course, since Fred did that work in 1954, we have created small claims courts, the children's court in Oklahoma County, the aforementioned special session courts, and city courts. I have added three more pages to Fred's work.105

At the appellate level, Dean Sneed's derision of the Oklahoma court system focused on judicial appointment and selection, judicial salaries, and centralized rulemaking power.106

One central impetus for the revision of the Oklahoma judiciary was the scandal of the 1960s. It came to be known that from the 1930s until the 1950s, Justice N.S. Corn, along with possibly four other justices, took bribes in exchange for dispositions in supreme court

105 Id. at 10.
The scandal came to a head in 1956, with a $150,000 bribe in the Selected Investment case. In July of 1964, Justice Corn was sentenced to eighteen months in prison. Justice Welch was also sentenced to prison, and Justice Johnson was impeached. In 1966, Oklahoma adopted a court on the judiciary.

The battle for reform was hardly over. Once it was clear that reform was necessary, Dean Sneed and the legislature went to work. Dean Sneed would have to go to the voters with an initiative petition in order to bypass the legislature. During this time, anti-reformers were ousted in the election of 1966. The Sneed plan was submitted to the voters, but the legislature had already devised its own reform plan. The voters rejected Sneed’s plan, but reform was ultimately achieved through the legislature.

In July 1967, the constitutional provisions that repealed and replaced the 1907 Article VII of the Oklahoma Constitution were approved. “The two most significant changes . . . [to Article VII were the creation of] one state trial court of general jurisdiction[,] and . . . [the creation of a judicial system] under the supervision and control of the [S]upreme Court.” The Article

107 Id.
110 Id.
111 Id. at 8.
112 Id. at 8–9.
113 Id. at 9.
114 Id.
115 Id. at 9–12.
116 Id. at 12.
118 Id. Note that although the Oklahoma Supreme Court is the highest court, it still does not maintain jurisdiction in criminal
further provides that justices of the supreme court and court of criminal appeals shall be nominated by a commission and appointed by the governor,\(^{119}\) and that other judges are selected through a non-partisan election.\(^{120}\) The constitution kept the Oklahoma Court of Criminal Appeals, and the Oklahoma Supreme Court was to have the final say regarding jurisdiction if a disagreement between the supreme court and the court of criminal appeals arose.\(^{121}\)

3. Current Operation

Oklahoma’s judiciary currently includes four courts of limited jurisdiction, one trial court of general jurisdiction, one civil appeals court, and the Oklahoma Supreme Court and Oklahoma Court of Criminal Appeals as courts of last resort.\(^{122}\)

The four courts of limited jurisdiction are statutory courts.\(^{123}\) They include the Workers’ Compensation Court of Existing Claims, the Court of Tax Review, the Municipal Courts not of Record, and the Municipal Courts of Record.\(^{124}\) The workers’ compensation court and Court of Tax Review are appealable directly to the Oklahoma Supreme Court. The Municipal Court not of Record is appealed to the district court.\(^{125}\) The Municipal Court of Record is appealable

matters. Criminal appeals still only go to the Oklahoma Court of Criminal Appeals. OKLA. CONST. art. VII, § 4.
\(^{119}\) OKLA. CONST. art. VII-B, § 4.
\(^{120}\) OKLA. CONST. art. VII, § 9.
\(^{121}\) Id. § 4. Unfortunately, as will be discussed infra, the court of criminal appeals does not always follow the jurisdictional mandates of the Oklahoma Supreme Court.
\(^{122}\) The Oklahoma Judicial Center, Supreme Court Brochure (2016), http://www.oscn.net/oscn/schome/fullbrochure.htm.
\(^{123}\) OKLA. CONST. art. VII, § 1.
\(^{124}\) The Oklahoma Judicial Center, supra note 122.
\(^{125}\) Id.
directly to the Oklahoma Court of Criminal Appeals.\footnote{Id.} District court decisions can be appealed to both the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals, depending on whether the matter is civil or criminal.\footnote{Id.; see also OKLA. CONST. art. VII, § 4.}

The civil appellate court in Oklahoma operates differently than most judicial systems. The constitutional amendment of 1967 allowed for the adoption of an intermediate appellate court, and the resulting statute requires the appeal to go to the Oklahoma Supreme Court, which then may assign appeals to the intermediate courts unless otherwise provided by statute.\footnote{OKLA. CONST. art. VII, § 5.} In other words, all appeals go to the supreme court, which then decides which cases it gives to the court of civil appeals. All decisions by the court of civil appeals are final unless the Oklahoma Supreme Court grants certiorari.\footnote{Id. The statutes governing the Oklahoma Court of Civil Appeals can be found in OKLA. STAT. ANN. tit. 20, § 30.1 (West 2017).}

The court of civil appeals currently has four divisions, each with three judges. Two divisions are in Tulsa County and the other two are in Oklahoma County.\footnote{OKLA. STAT. ANN. tit. 20, § 30.2 (West 2017). This law became effective in 1982. 5 OKLA. PRAC., APPELLATE PRAC. § 1:26 (2016 ed.).}

The courts of last resort in Oklahoma are set up differently than they are in Texas because Oklahoma places ultimate power to decide jurisdictional conflicts in the Oklahoma Supreme Court.\footnote{OKLA. CONST. art. VII, § 4. Texas courts of last resort are coequal, which can result in instances where jurisdiction is contested and there is no resolution. See discussion infra Part II.A.}

The Oklahoma Supreme Court is composed of nine members coming
from nine different districts. The Oklahoma Court of Criminal Appeals maintains exclusive jurisdiction in criminal appeals, and is composed now of five members.

II. Current Issues in Jurisdiction

Both Texas and Oklahoma suffer from “judicial hot potato,” where the courts of last resort either fight over jurisdiction to hear a case, or pass a case back and forth until the case is either dismissed or forced upon one of the courts. This usually results from hard cases that have both civil and criminal aspects. Below, I will provide examples of different cases that resulted in “judicial hot potato” in each of the states’ courts of last resort, and compare issues, where relevant, to the federal system.

A. Texas

This section will explore a few examples that demonstrate the issues caused by Texas’s bifurcated court structure. These cases involve contempt, a civil exercise of a stay of execution, appeals from property forfeiture orders in criminal prosecution, and the exercise of equity jurisdiction to enjoin enforcement of arguably unconstitutional penal laws. In the analysis section, I will tie together the when and why of these jurisdictional tangles.

133 Id. § 40 (West 2017).
134 Id. (West 2017). The Texas Court of Criminal Appeals is composed of nine members. TEX. GOV’T CODE ANN. § 22.112 (West 2017).
135 In re Reece, 341 S.W.3d 360 (Tex. 2011).
The primary drawback in a bifurcated court of last resort system is determining which courts get which cases when there are both civil and criminal aspects. In Texas, an illustrative example of this situation occurred in In Re Reece. In Reece, the Texas Supreme Court grappled with the question of whether a litigant can be held in contempt for perjury committed during a deposition. The Texas Court of Criminal Appeals refused to grant habeas review because the case that gave rise to the contempt order was civil. The Texas Supreme Court held that it could exercise mandamus jurisdiction because the relator did not have an adequate remedy by appeal, precisely because there was not a criminal appeals court that would hear his habeas petition.

The Texas Supreme Court can only exercise habeas jurisdiction when “the contemnor’s confinement is on account of a violation of an order, judgment, or decree previously made in a civil case.” The Texas Court of Criminal Appeals, on the other hand, maintains general habeas jurisdiction. The law giving the Texas Supreme Court habeas jurisdiction was designed to keep civil trials on the civil side of the bifurcated courts. Because the Texas Court of Criminal Appeals refused to hear the relator’s habeas petition, and the Texas Supreme Court did not have habeas jurisdiction because there was not a violation of a specific court order, the relator claimed he was without adequate remedy by appeal.

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139 341 S.W.3d 360 (Tex. 2011).
140 Id. at 362.
141 Id.
142 Id.
143 Id. at 369 (citing TEX. GOV’T CODE ANN. § 22.002(e)).
144 TEX. CONST. art. V, § 5.
146 Reece, 341 S.W.3d at 369.
The Texas Supreme Court, through statutory construction and reliance on prior case law, determined that mandamus jurisdiction was broad enough to cover instances in which an individual was wrongly held in contempt.\textsuperscript{147} Because the statute in question grants broad mandamus jurisdiction, and because there was no prohibition on the use of mandamus to free someone from confinement, the court reasoned that mandamus jurisdiction was permissible.\textsuperscript{148} Ultimately, because the Texas Supreme Court found that the underlying case here was civil and there was no habeas jurisdiction, there was no adequate remedy by appeal, and thus mandamus jurisdiction could be used.\textsuperscript{149}

Justice Willett’s dissent is the most informative aspect of this case for this Article’s purposes, because he outlines many of the flaws in Texas’s bifurcated court system.\textsuperscript{150} Justice Willett noted the court of criminal appeals’ “lateral[ed]” to the Texas Supreme Court because they mistakenly believed that the supreme court had habeas jurisdiction in this case.\textsuperscript{151} The supreme court agreed, 9-0, that there was not habeas jurisdiction.\textsuperscript{152} The

\begin{itemize}
\item \textsuperscript{147} Id. at 373–75.
\item \textsuperscript{148} Id; see also TEX. GOV’T CODE ANN. § 22.002(a).
\item \textsuperscript{149} Reece, 341 S.W.3d at 376.
\item \textsuperscript{150} See id. at 378–402 (Willett, J., dissenting). Justice Willett begins his jurisdictional diatribe with statements such as, “Unfortunately, the juris-imprudent design of the Texas judiciary does not make the list. Today's case is a byproduct of that recondite web, sparking a game of jurisdictional hot potato between us and our constitutional twin, the Court of Criminal Appeals.” Id. at 378.
\item \textsuperscript{151} Id. at 378 n.1. (“Although this Court does have the authority to act in this case pursuant to Article 5, § 5, of the Texas Constitution, we decline to do so. Effective 1981, Article 5, § 3(a) of the Texas Constitution was amended to give the Texas Supreme Court and the Justices thereof the authority to issue writs of habeas corpus.”) (quoting \textit{In re} Reece, No. WR–72,199–02, slip op. at *2 (Tex. Crim. App. June 29, 2009)).
\item \textsuperscript{152} See id. at 378.
\end{itemize}
point Justice Willett made was that even the Texas Court of Criminal Appeals, the state court of last resort for criminal cases, made a mistake navigating the judicial labyrinth that Texas created.

Justice Willett also pointed out how difficult this jurisdictional issue was (and continues to be) for litigants. There is a stock letter informing litigants that the Texas Supreme Court has no jurisdiction in a particular area, directing them to re-file in the Texas Court of Criminal Appeals. Justice Willett described other instances, discussed infra, in which there have been jurisdictional quandaries between the two courts of last resort.

When Justice Willett arrived at the heart of the immediate case, he argued that the Texas Supreme Court did not have jurisdiction to grant mandamus. Both he and the majority recognized that the supreme court is prohibited by statute from using habeas jurisdiction. Nevertheless, Justice Willett contended that using mandamus jurisdiction as a patch to do exactly what habeas jurisdiction entails is prohibited by statute. Justice Willett countered the majority’s argument that mandamus existed because there was no adequate remedy at law by pointing out that there was an adequate remedy by appeal through a motion for rehearing in the court of criminal appeals. Justice Willett then pointed out the perils of deciding this case via mandamus jurisdiction: If the court granted mandamus here, when

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153 Id. at 380.
154 Id. at 384 (including a notable case dealing with anti-sodomy laws in 1992).
155 Id. at 391.
156 Id.
157 Id. (“Where the Legislature has spoken clearly and removed the kind of case now before us from our jurisdiction, it is disingenuous to circumvent the rule by renaming the remedy.”).
158 Id. at 399.
the court of criminal appeals also has habeas jurisdiction, litigants will be unsure of the proper court in which to file.\textsuperscript{159} Finally, Justice Willett pointed to the issue of a civil court hearing cases in which the appeal arises from a criminal penalty.\textsuperscript{160} The Texas Supreme Court acknowledged that the bifurcation issue between civil and criminal cases is determined by the nature of the court’s punishment.\textsuperscript{161} Justice Willett concluded his dissent with some judicial “shade-throwing,”\textsuperscript{162} by stating, “At the very least (and it grieves me to use these six words) Texas should be more like Oklahoma” by vesting one court with final determination of jurisdictional questions.\textsuperscript{163}

It is important to note that the distinction between civil and criminal contempt in federal court can also be a difficult line to draw. My argument throughout is that a bifurcated system takes a difficult question and

\textsuperscript{159} Id. (“Similarly, this case leaves open the question of whether and when a petitioner may seek review in both courts, and in what order. Such confusion could lead to an unnecessarily increased docket in either court, or at least wasted resources spent shuffling cases between the two systems (or discussing whether to do the shuffle in the first place).”).

\textsuperscript{160} Id. at 401 (“Further, hearing this case, and perhaps future cases like it, may force us to handle appeals from civil cases with criminal penalties, and force us at least in part to take on quasi-criminal matters.”).

\textsuperscript{161} Id. at 371.


\textsuperscript{163} Reece, 341 S.W.3d 360 at 402 (describing his desire for a court that has clear authority to determine jurisdiction, similar to what Oklahoma’s judicial system contains).
makes it harder. The decision as to whether an appeal from a contempt order is civil or criminal “drives the process that is required, including the type of notice, the standard of proof, the relevance of the validity of the underlying order, and the level of intent.”\textsuperscript{164} As Judge Hartz has noted, the way federal courts determine civil and criminal appeals hinges upon “the essential nature of the action, not the underlying proceeding it arose from . . . .”\textsuperscript{165} For contempt, this means the distinction is whether the judgment is ordered to achieve compliance with an order or to punish.\textsuperscript{166}

Texas’s habeas statute attempts to meet this distinction by only granting habeas powers to the Texas Supreme Court if the confinement is in violation of a court order. An individual was found in contempt of court for lying during a deposition, not as a result of a court order or decree previously made. It is clear that the purpose of the contempt order in this case was to punish. The real problem in this case was that the underlying civil case resulted in what appears to be a criminal contempt judgment. Thus, the purpose was criminal, but the underlying proceeding was civil. While the federal system may have difficulty distinguishing between criminal and civil contempt at times, at least the courts and litigants know which judge or court will decide the issue. In Texas, the status of the underlying action is added to the mix, which means that Judge Hartz’s observation will not provide redress to Texas state court litigators. One must take into account both the purpose of the order and the underlying action. And, the litigator, without the supreme court’s creation of the mandamus


\textsuperscript{165} In re Special Grand Jury 89–2, 450 F.3d 1159, 1167 (10th Cir. 2006) (citing United States v. Holland, 214 F.3d 523, 526 (4th Cir. 2000)).

loophole, would actually be without a court to appeal a
criminal contempt order arising out of civil trial.

In Holmes, the Texas Court of Criminal Appeals
held that they could exercise mandamus jurisdiction to
prevent an appeals court from exercising civil jurisdiction
over a stay of execution pending a hearing on clemency.\textsuperscript{167}
The case concerned inmate Gary Graham, who was
convicted of murder and sentenced to death. This
particular case was an attempt by Graham to force the
Board of Pardon and Paroles to hear Graham’s request
for clemency through an injunction. The district court
entered an order to either provide a hearing or enjoin the
execution until the hearing occurred.\textsuperscript{168} The Board
appealed, and the court of appeals entered an injunction
preventing the execution.\textsuperscript{169} The relators (the district
attorney and the Board of Pardons and Pleas) appealed
up to the court of criminal appeals seeking a writ of
mandamus.\textsuperscript{170} The Texas Court of Criminal Appeals
found that the stay of execution was a criminal law
matter because capital punishment only arises from
capital murder convictions.\textsuperscript{171}

Judge Meyers noted in dissent that the
controversy surrounding this case arose from the
bifurcated nature of Texas courts of last resort,\textsuperscript{172}
identifying the language in the Texas Constitution that
gave rise to the confusion in this case.\textsuperscript{173} If “criminal law

\begin{footnotesize}
\begin{itemize}
\item[168] Id. at 391.
\item[169] Id.
\item[170] Id.
\item[171] Id. at 394.
\item[172] Id. at 418 (Meyers, J., dissenting).
\item[173] Id. (“Our Constitution provides that the Supreme Court’s ‘appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters,’” while “[t]his Court, on the other hand, has ‘final appellate jurisdiction . . . in all criminal cases of whatever grade . . . .’” (quoting TEX. CONST. art. V, §§ 3, 5)).
\end{itemize}
\end{footnotesize}
matters” and “criminal cases,” as used in the state constitution, mean the same thing, then the court of criminal appeals would have exclusive jurisdiction. But if they mean something different, then it is possible that there is overlapping jurisdiction with civil courts.

Judge Meyers suspected that the majority of the court refused to allow this case to go through a normal appeal process for fear of it being appealed to the Texas Supreme Court instead of the Texas Court of Criminal Appeals, and thus stepped in to prevent that possibility. Judge Meyers ended his dissent with a scathing statement regarding the jurisdictional warfare that he accused the majority of waging:

Our entire manner has had the appearance of a guerilla raid, when it should instead have been a cooperative effort to construe fundamental aspects of Texas constitutional law. In the process, we have violated basic principles of our own mandamus jurisprudence, encouraged the misuse of habeas corpus, and shamelessly interrupted an appellate process which was running exactly as prescribed by law, and which might very well have produced results better than expected by the majority had it been permitted to proceed to final judgment.

_Bretz v. State_, which involved an individual acquitted of receiving and concealing stolen property and

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175 _Id._

176 _Id._ at 418–19. (stating that Judge Meyers himself is not willing to “fight a turf war with other Texas courts”).

177 _Id._ at 421.
ordered to return the property to the complaining witness, provides a much simpler example.\textsuperscript{178} The defendant in the case appealed the order to the Texas Court of Criminal Appeals,\textsuperscript{179} but the court held that it did not have jurisdiction.\textsuperscript{180} Judge Roberts concurred and took time to expound the issues presented with bifurcated appeals.\textsuperscript{181} Judge Roberts lamented that even though this appeal came from a judgment in a criminal trial governed by the Code of Criminal Procedure in Texas, the court had to send Bretz “on his way to begin yet another search for the proper forum,”\textsuperscript{182} which, in this case, was the Texas Supreme Court.

In addition to forfeiture, Judge Roberts brought to light a few other instances of the confusion litigants face in Texas’s bifurcated court system.\textsuperscript{183} For example, bond forfeiture proceedings are reviewed by the Texas Court of Criminal Appeals, yet are governed by the rules of civil procedure.\textsuperscript{184} When a defendant seeks a writ of mandamus to enforce his right to a speedy trial, the defendant must file his petition for the writ in the Texas Supreme Court, not the Texas Court of Criminal Appeals, where presumably the defendant later will be able to appeal a conviction and argue that he was denied the right to a speedy trial.\textsuperscript{185}

The federal courts face similar issues. Bond forfeiture proceedings are civil;\textsuperscript{186} property forfeiture

\begin{itemize}
\item \textsuperscript{178} Bretz v. State, 508 S.W.2d 97, 97 (Tex. Crim. App. 1974).
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id. at 98 (“Further, I feel that this case presents an excellent example of a problem often encountered in this State.”).
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id. at 98–99.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id.; see also Fariss v. Tipps, 463 S.W.2d 176 (Tex. 1971) (judgment set aside on other grounds).
\item \textsuperscript{186} United States v. Plechner, 577 F.2d 596, 597 (9th Cir. 1978).
\end{itemize}
proceedings are criminal. But in Texas, the outcomes can be absurd. A court that has jurisdiction solely in criminal matters must use the rules of civil procedure. That scenario cannot exist in a unified system.

One high profile case in Texas highlighting the problems inherent in a bifurcated court structure came in 1994 with a challenge to Texas’s anti-sodomy law. In *State v. Morales*, the Texas Supreme Court ruled that the Texas anti-sodomy law, a criminal statute, could be declared unconstitutional by the Texas Supreme Court only if it resulted in an irreparable injury to a property right. The majority held that the court should avoid construing rights concerning a penal statute and further expressed pragmatic concerns with conflicting opinions between the two courts of last resort, noting that the Texas Court of Criminal Appeals also refused to exercise its jurisdiction in this Texas constitutional challenge. It is not clear why the Texas Court of Criminal Appeals declined to hear this case, although one could postulate that because there was no criminal prosecution, the court saw no need to take jurisdiction. As a result, the lower court’s decision declaring the law unconstitutional was reversed, and the matter was remanded to the trial court to dismiss the case for want of jurisdiction. Thus, both of Texas’s courts of last resort decided that they lacked jurisdiction in this case. What is the point of having two courts of last resort if neither of them can take a particular case?

Another question arises from the *Morales* cases: How might one case end up in front of both courts of last resort? The Attorney General appealed to both courts at the same time. The Attorney General was quoted as

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187 United States v. De Los Santos, 260 F.3d 446, 448 (5th Cir. 2001).
188 State v. Morales, 869 S.W.2d 941 (Tex. 1994).
189 *Id.* at 942.
190 *Id.* at 948 n.16.
191 *Id.* at 949.
saying, “We want to make sure we're not locked out of an appeal. It was either file with both or roll the dice.”192 Even the Attorney General’s office, the law firm of Texas, was unsure how to navigate the bifurcated court structure.

B. Oklahoma

Oklahoma’s judiciary, although not loved by all members of the Oklahoma bar, seems to enjoy fewer jurisdictional quandaries than Texas as a result of the 1967 large-scale judicial reforms. However, issues still remain with Oklahoma’s bifurcated system of courts, including the exercise of civil jurisdiction to enjoin an execution, juvenile delinquency, and contempt.193

The procedural paths of Clayton Lockett and Charles Warner’s cases through the Oklahoma judiciary form a most tangled web. Warner was convicted at trial of first-degree murder and first-degree rape.194 The trial court’s conviction was reversed, and the case was remanded for a new trial.195 Warner’s second trial also resulted in conviction for first-degree murder and first-degree rape.196 This time, on appeal, Warner’s conviction was upheld.197 After losing in the Oklahoma Court of

195 Id. at 575.
197 Id.
Criminal Appeals, Warner appealed to the U.S. Supreme Court, which denied certiorari.\(^{198}\) Warner then filed a writ of habeas corpus in the U.S. District Court for the Western District of Oklahoma.\(^{199}\) The writ was denied, and Warner appealed to the Tenth Circuit, where the district court’s decision was affirmed.\(^{200}\) Warner then appealed to the U.S. Supreme Court, and the writ of certiorari once again was denied.\(^{201}\)

Clayton Derrell Lockett was charged with conspiracy, first-degree burglary, assault with a dangerous weapon, forcible oral sodomy, first-degree rape, kidnapping, robbery by force and fear, and first-degree murder.\(^{202}\) Lockett was convicted on all nine counts and sentenced to death.\(^{203}\) The Oklahoma Court of Criminal Appeals affirmed the trial court below.\(^{204}\) Lockett then appealed to the U.S. Supreme Court, where the petition for a writ of certiorari was denied.\(^{205}\) Lockett then filed for a writ of habeas corpus in the U.S. District Court for the Western District of Oklahoma, where the writ was denied and judgment was entered against Lockett.\(^{206}\) Lockett appealed to the Tenth Circuit where the judgment was affirmed.\(^{207}\) Certiorari was denied by the U.S. Supreme Court.\(^{208}\)

Lockett and Warner then joined as plaintiffs and filed a petition for declaratory relief and requested an injunction against the Oklahoma Department of

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203 Id.
204 Id. at 431.
207 Lockett v. Trammel, 711 F.3d 1218, 1255 (10th Cir. 2013).
Corrections on a challenge to the constitutionality of an Oklahoma statute\(^{209}\) that concealed the identity of the drugs to be used in their executions.\(^{210}\) The Oklahoma Attorney General’s Office removed the case to the United States District Court, due to Lockett and Warner’s invocation of the Eighth Amendment of the U.S. Constitution.\(^{211}\) Lockett and Warner then amended their complaint to remove federal issues, and the case was remanded back to the Oklahoma district court.\(^{212}\) The Oklahoma district court then found that jurisdiction for issuing a temporary injunction lays solely in the Oklahoma Court of Criminal Appeals.\(^{213}\) Plaintiffs appealed the trial court’s order finding jurisdiction lays solely in the Oklahoma Court of Criminal Appeals to the Oklahoma Supreme Court.\(^{214}\) The Oklahoma Supreme Court remanded the declaratory judgment matter to the trial court for resolution of civil matters, and transferred the emergency stay of execution motion to the Oklahoma Court of Criminal Appeals.\(^{215}\) During this time, however, the state of Oklahoma was unable to procure execution drugs, and thus a thirty-day stay was entered and the Oklahoma Court of Criminal Appeals dismissed the emergency stay motion as moot.\(^{216}\)

The district court then ruled on the declaratory judgment and found the confidentiality law unconstitutional under the Oklahoma Constitution as a

\(^{209}\) See generally OKLA. STAT. tit. 22 § 1015(B) (2011) (“The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.”).

\(^{210}\) Lockett v. Evans, 356 P.3d 58, 58 (Okla. 2014).

\(^{211}\) Id. at 59.

\(^{212}\) Id.

\(^{213}\) Id.

\(^{214}\) Id.

\(^{215}\) Id.

\(^{216}\) Id. at 60.
denial of the plaintiffs’ right to access the courts.\footnote{217} The plaintiffs then sought a stay of execution pending the appeal of the district court’s declaratory judgment.\footnote{218} The Oklahoma Court of Criminal Appeals, however, denied the stay of execution, holding that it may only issue a stay of execution pending a challenge to conviction or sentence of death.\footnote{219} The plaintiffs again appealed to the Oklahoma Supreme Court, which exercised jurisdiction in deciding the constitutional question\footnote{220} but ruled that the Oklahoma Court of Criminal Appeals maintained jurisdiction to issue a stay of execution.\footnote{221} Thus, the Oklahoma Supreme Court—per its constitutional authority— instructed the court of criminal appeals to take jurisdiction.\footnote{222} Unfortunately, this was not the end of the judicial hot potato.

Upon receiving the case from the Oklahoma Supreme Court for a second time, and after a clear pronouncement of jurisdiction from that court, the Oklahoma Court of Criminal Appeals refused to exercise its jurisdiction and held:

\begin{quote}
While the Oklahoma Supreme Court has authority to deem an issue civil and so
\end{quote}

\footnote{217} Id.

\footnote{218} Id.

\footnote{219} Lockett v. State, 329 P.3d 755, 759 (Okla. Crim. App. 2014). Note the similarity to the Texas Court of Criminal Appeal’s denial of review in \textit{Reece}. Because the appeal arose out of a civil matter, the \textit{Reece} court denied relief.

\footnote{220} Lockett v. Evans, 377 P.3d 1254, 1254 (Okla. 2014).

\footnote{221} Id.

\footnote{222} Id. at 1254–55 (“In exercising our constitutional power to determine jurisdiction, we transfer ‘only’ the Application for Emergency Stay to the Court of Criminal Appeals. In so doing, we urge the appellate criminal court to be cognizant of the time restraints associated with the submission of the appeal(s) to this Court along with the gravity of the first impression constitutional issues this Court will be charged with in addressing the civil appeal, or appeals.”).
within its jurisdiction, it does not have the power to supersede a statute and manufacture jurisdiction in this Court for Appellants’ stay request by merely transferring it here. Therefore, Appellants’ application for stays of execution is DENIED.\textsuperscript{223}

In response to the court of criminal appeals’ refusal to exercise its jurisdiction, the Oklahoma Supreme Court wrote:

On April, 17, 2014, Thursday last, \textit{we exercised our constitutional authority to determine the appropriate tribunal for resolution of the stay issue under the Oklahoma Constitution, Article 7, section 4, vesting this Court with the sole power to determine whether the jurisdiction of the stay issue was within this Court or the Court of Criminal Appeals}. In so doing, \textit{we transferred the request for stay “alone” to the Court of Criminal Appeals.}

\textit{The majority of the Court of Criminal Appeals refused to exercise this Court's order and to address the merits of the stay}. That order, which we consider to be invalid as not having followed the constitutional directive of this Court, have [sic] now resulted in a situation never contemplated by the drafters of Oklahoma's ultimate rule of law—that this tribunal be inserted into death penalty

\textsuperscript{223} \textit{Lockett}, 329 P.3d at 758.
cases. A position generally reserved for the Court of Criminal Appeals.\textsuperscript{224}

As a result, the Oklahoma Supreme Court determined that the rule of necessity required them to take jurisdiction in this case to issue a stay of execution pending the outcome of the civil challenge to the confidentiality statute.\textsuperscript{225} For the first time in the state’s history, the Oklahoma Supreme Court took jurisdiction in a death penalty appeal.\textsuperscript{226} Unfortunately, the stay of execution was not the end of the matter.

In the final opinion issued before the executions of Lockett and Warner, the Oklahoma Supreme Court appeared to backpedal. The supreme court reversed the trial court’s decision, which held section 22.1015(B) unconstitutional.\textsuperscript{227} The supreme court also dissolved its stay of execution.\textsuperscript{228} The concurrence rings of “I told you so,” when Justice Taylor writes:

I warned this Court in my previous dissents against crossing the Rubicon and now that crossing has caused a quagmire. Had this Court transferred all issues in this appeal to the Court of Criminal Appeals as I previously advocated, the matter would have been resolved without this Court ignoring precedent and the Court of Criminal Appeals’ role in our judicial system.\textsuperscript{229}

\textsuperscript{224} Lockett v. Evans, 356 P.3d 58, 61 (Okla. 2014) (emphasis in original).
\textsuperscript{225} Id.
\textsuperscript{226} Id. at 62 (Taylor, J., dissenting).
\textsuperscript{227} Lockett v. Evans, 330 P.3d 488, 491 (Okla. 2014).
\textsuperscript{228} Id. at 492.
\textsuperscript{229} Id. at 493 (Taylor, J., concurring).
Why did the court experience such a rapid about-face regarding these jurisdictional issues? Between the opinion issuing a stay of execution on April 21, 2014, and the opinion dissolving the stay of execution on April 23, 2014, some unusual events transpired in the governance of Oklahoma. First, Governor Mary Fallin proclaimed that she would not comply with the Oklahoma Supreme Court’s stay of execution, stating, “I cannot give effect to the order by that honorable court.”

Let that sink in: The executive branch of Oklahoma refused to comply with the stay of execution issued by the Oklahoma Supreme Court, and would execute the inmates regardless, by reasoning that the supreme court’s “attempted stay of execution is outside the constitutional authority of that body” and that only an order by the Oklahoma Court of Criminal Appeals would be binding in this case. The next day Representative Mike Christian of the Oklahoma legislature began impeachment proceedings against the justices in the majority opinion issuing the stay of execution. As a result, the supreme court reversed its position and allowed the executions to proceed, despite the secrecy of the drugs—the very same drugs that caused Warner’s last word to be, “My body is on fire.”

What ultimately caused this jurisdictional hot potato was the insertion of a civil suit into a death row case. The Oklahoma Supreme Court felt compelled by necessity to enter the “quagmire” of a suit requesting a stay of execution in order to decide the constitutional implications of the government’s policy forbidding disclosure of the lethal injection drugs. Events like this could not occur in the federal system. Every Article III

231 Id.
232 Id.
233 Murphy, supra note 15.
court has the authority to decide the entire controversy (subject to subject matter jurisdiction) regardless of the civil or criminal aspects. A federal court may struggle to determine which rules of procedure may apply, but there is no question as to which court has the ability to hear a case. While the story of Charles Warner and Clayton Lockett is certainly a dramatic example of the pitfalls of bifurcated courts of last resort, there are others that generate less controversy.

In *Carder v. Court of Criminal Appeals*, the Oklahoma Supreme Court held that the court of criminal appeals lacked jurisdiction to issue a writ of prohibition, a demand for a change of custody hearing for a juvenile who had been adjudicated delinquent and a ward of the state.\(^{234}\) The Oklahoma Supreme Court held that the Oklahoma Court of Criminal Appeals does not have general supervisory jurisdiction of lower courts, and cannot hear cases that do not arise out of criminal matters.\(^{235}\) It is important to note that had this appeal originated from an adjudication of delinquency or certification to stand trial as an adult, the result would have been different. But because the matter was instead a subsequent court action where the father sought to return his son to his custody, there was no longer court of criminal appeals jurisdiction.

A jurisdictional tug-of-war between the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals that remains unresolved is that of contempt, which, as already noted, has aspects of both criminal and civil jurisdiction. Contempt, according to the Oklahoma Supreme Court, is *sui generis* and not criminal. In the federal system, contempt can be either criminal or civil. The distinction lies in whether the purpose is to punish or to induce compliance.

In *State ex rel. Attorney General v. Owens*, the dispute arose out of the contempt conviction of a certain

\(^{234}\) 595 P.2d 416, 418 (Okla. 1978).
\(^{235}\) *Id.* at 419.
Mr. O. O. Owens, who published defamatory statements about some of the Oklahoma Supreme Court’s members. From a federal perspective, the purpose was to punish Mr. Owens for his statements. Owens filed a habeas petition with the Oklahoma Court of Criminal Appeals after being found in contempt by the Oklahoma Supreme Court. The supreme court directed a writ of prohibition to the court of criminal appeals regarding the habeas petition, but the court of criminal appeals proceeded anyway and ordered Owens’s release. Once again, here is an instance in which the constitutionally-superior Oklahoma Supreme Court is defied by the Oklahoma Court of Criminal Appeals. One can hardly blame the court of criminal appeals, however, because the punishment of Mr. Owens for his defamatory statements appears to be criminal through any lens.

The Oklahoma Supreme Court subsequently quashed the order of release in Dancy v. Owens. Fortunately, in this case—juxtaposed with the Lockett v. Evans saga—the Oklahoma Court of Criminal Appeals did not act in further contravention of the holding of the supreme court. Less fortunate is the fact that there still remains jurisdictional confusion with regard to contempt because the court of criminal appeals held that contempt is a misdemeanor in Roselle v. State and the supreme court still maintained that contempt is sui generis in Young v. Woodson. As noted above in my

237 See Ricketts, supra note 193, at 216.
239 258 P. 879 (1927).
240 See Ricketts, supra note 193, at 217 (noting that it was not until forty years after Dancy that the Oklahoma Supreme Court once again addressed contempt).
242 519 P.2d 1357 (Okla. 1974).
discussion of contempt in Texas, it is often difficult to
determine whether contempt is civil or criminal. But once
again, the difficulty is exacerbated when two courts of
last resort have to decide the question.

III. Attempts to Eliminate Bifurcated Courts
A. Texas

Texas has not been silent in its desire to eliminate
the bifurcated court system. There have been four
distinct proposals in the past twenty years to eliminate
the bifurcated court system, some introduced more than
once.\footnote{243} The 1993 effort proposed to eliminate the Texas
Court of Criminal Appeals and transfer all criminal cases
to the Texas Supreme Court. A 1999 proposal would have
merged the two courts into one high court composed of
fifteen justices: seven would be appointed by the
 governor, seven would be elected, and the chief justice
would be appointed and had to be from a different district
than the previous appointment.\footnote{244} In 2003, the proposal
was substantially the same as 1993—eliminate the Texas
Court of Criminal Appeals and transfer jurisdiction to
the Texas Supreme Court.\footnote{245} In 2011 and 2013, the same
bill to eliminate the Texas Court of Criminal Appeals was
introduced.\footnote{246} Unfortunately, none of the bills presented
received any real consideration.\footnote{247}

\footnote{243} Bill Raftery, Trying to Eliminate the Texas Court of
Criminal Appeals: Will Fourth Attempt in 20 years Succeed?,
GAVEL TO GAVEL (Dec. 6, 2012), http://gaveltogavel.us/
2012/12/06/trying-to-eliminate-the-texas-court-of-criminal-
appeals-will-fourth-attempt-in-20-years-succeed/.

\footnote{244} Id.

\footnote{245} Id.

\footnote{246} Id.

\footnote{247} See id. (noting that only a few bills even received a hearing).

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B. Oklahoma

Oklahoma, despite the controversies it has endured, has had far less legislative attempts to eliminate its bifurcated court structure. Although it has been criticized on record as early as 1919 at a meeting of the Oklahoma State Bar Association, there have only been two instances of proposed reforms since the Sneed plan in 1967. One was an attempt to create a third court of last resort specifically for capital cases. Oklahoma’s other attempt to modify its court structure occurred in 2012; the proposal called for the elimination of the Oklahoma Court of Criminal Appeals as well as the transfer of the power of constitutional review by the Oklahoma Supreme Court to an ad hoc court of constitutional review created by the legislature.

IV. Analysis

A bifurcated court system causes unique jurisdictional “quagmires.” Bifurcating criminal and civil jurisdiction is usually intuitive and simple in the vast majority of cases, but there are enough significant issues

248 PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING OF THE OKLAHOMA STATE BAR ASSOCIATION 126 (Walter Lybrand, ed.1919) (discussing a wholesale replacement of the Oklahoma judiciary, including a single supreme court).
249 See Simpson, supra note 106 (noting that the Sneed plan was defeated).
250 H.R.J. Res. 1022, 55th Leg., 1st Sess. (Okla. 2015) (introduced by the same individual who introduced articles of impeachment against the Oklahoma Supreme Court in response to the Lockett debacle).
251 See S.J. Res. 83, 53d Leg., 2d Sess. (Okla. 2012); Bill Raftery, Recent Legislative Efforts to Eliminate, or Create, Bifurcated Criminal and Civil Appellate Courts, GAVEL TO GAVEL (Apr. 30, 2014), http://gaveltogavel.us/2014/04/30/recent-legislative-efforts-to-eliminate-or-create-bifurcated-criminal-and-civil-appellate-courts/.

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to justify greater scrutiny of the system. Oklahoma and Texas are the only two states in the union that maintain this judicial system. No other state (including those with large populations such as California, New York, and Florida) maintains a bifurcated system of courts of last resort. If the overwhelming majority of states and the federal system maintain a single court of last resort, there might be good reason for Oklahoma and Texas to consider following the crowd.

Texas and Oklahoma suffer from failures to distinguish between civil and criminal jurisdiction in cases that maintain aspects of both. These cases create confusion for litigants as well as inter-judicial warring. Texas and Oklahoma do not have a compelling justification for maintaining bifurcated courts and should either combine the two courts into one, or develop a bifurcated system of intermediate appellate courts, with one court of last resort that has full appellate jurisdiction for all matters.

When one looks at the cases listed in Part II, one can find a unifying theme in the jurisdictional quandaries in which these courts have found themselves. In every single case outlined above, there have been aspects of both civil and criminal jurisdiction. In re Reece involved contempt in the context of a civil deposition.252 This case arose out of a civil case, but was essentially a habeas petition, which the Texas Supreme Court generally cannot hear.253 However, the Texas Court of Criminal Appeals refused to hear the habeas petition because it determined the case was civil in nature, arising from a civil case.254 In Oklahoma, contempt jurisdiction is still unresolved. The Oklahoma Supreme Court determined that contempt is sui generis,255 but the Oklahoma Court of Criminal Appeals decided that

252 In Re Reece, 341 S.W.3d 360 (Tex. 2011).
253 Id.
254 Id. at 362.
255 Young v. Woodson, 519 P.2d 1357 (Okla. 1974).
contempt is a misdemeanor and thus under its sole jurisdiction.256

One might point to the federal system and suggest that contempt is a difficult distinction even for a unified court system.257 This underscores my point. If it is difficult for a single court, it is even more complicated for a bifurcated system. At the end of the process, at least the litigant has the promise of finality in a unified system. The U.S. Supreme Court can make a determination and it will be the end of the matter. In Oklahoma and Texas, the litigant still does not know! If past performance is evidence of future conduct, Texas’s and Oklahoma’s high courts will play judicial hot potato again.

Other examples where the federal courts have struggled to determine the difference between civil and criminal jurisdiction include: appeals from criminal forfeiture,258 appeals from firearms prohibitions imposed on felons,259 and appeals from denials of requests to release grand jury transcripts for use in a habeas proceeding.260 In each of these cases there are aspects of both civil and criminal jurisdiction, yet the firearms appeals and the jury transcript requests were both held to be civil and the forfeiture of assets appeal was held to be criminal. In Texas and Oklahoma, the supreme court must think about how the court of criminal appeals would rule, and vice versa, in order to prevent jurisdictional holes or gaps from propagating. Reece is a perfect example. The Texas Supreme Court had to contort its

258 United States v. De Los Santos, 260 F.3d 446, 448 (5th Cir. 2001).
260 United States v. Miramontez, 995 F.2d 56, 58 (5th Cir. 1993).
jurisdiction to meet a gap in habeas jurisdiction. At least unified systems will generate an answer that will effectively guide litigants, and keep them from having to “roll the dice.”

Litigants themselves struggle to navigate the system. In *State v. Morales*, the Attorney General of Texas appealed to both the Texas Supreme Court and the Texas Court of Criminal Appeals, not knowing which court had jurisdiction. In *Bretz v. State*, a litigant appealed an order to return property that he was acquitted of stealing. One could reasonably assume that because the order came from a criminal trial, the appeal would be to the Texas Court of Criminal Appeals. Unfortunately, Texas maintains that this appeal belongs in a civil appeals court, not criminal. Texas does follow the federal rule, but in Texas, one has to file an entirely new motion and appeal to an entirely different court if the original appeal was brought in the wrong court. In federal court, a litigant could simply amend her motion and remain in front of the same court.

Because it is difficult to determine which court of last resort has jurisdiction, litigants have to expend more resources identifying the appropriate appellate forum, and judicial resources are wasted determining which court has jurisdiction. The *Lockett/Warner* debacle is a perfect example: A case was bounced around for years with the courts fighting over who did or did not have jurisdiction.

Texas and Oklahoma have experienced inter-judicial warring because of their bifurcated court structures. *In re Reece* is an example where the Texas Supreme Court essentially had to step in and take

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261 *In Re Reece*, 341 S.W.3d 360 (Tex. 2011).
262 See *supra* note 192.
263 869 S.W.2d 941 (Tex. 1994).
265 See, e.g., United States v. Madden, 95 F.3d 38, 39 n.1 (10th Cir. 1996).
jurisdiction because the Texas Court of Criminal Appeals refused.\textsuperscript{266} In Oklahoma, \textit{Lockett v. Evans} passed in front of the Oklahoma Supreme Court \textit{six} times after being sent to the Oklahoma Court of Criminal Appeals on multiple occasions.\textsuperscript{267} In Texas, it is understandable that the courts of last resort must tread lightly in deferring to the other court. The two courts are coequal, both provided for in the constitution and both with final appellate jurisdiction in their respective spheres.\textsuperscript{268} In Texas there is no ultimate authority to decide jurisdictional mistakes. If both courts deny jurisdiction, there is no court to hear the case. This is a serious problem that could only be resolved through a constitutional amendment, because interpretation of jurisdiction is a constitutional matter.

Although the Oklahoma Supreme Court has the constitutional power to decide final jurisdictional issues, it appears to be illusory. The Oklahoma Supreme Court made a final adjudication in \textit{Lockett v. Evans}, holding that the court of criminal appeals had jurisdiction, yet the Oklahoma Court of Criminal Appeals refused to exercise its jurisdiction in that case.\textsuperscript{269}

Thus, we find that the expense and headache created by the bifurcated system is not worth the candle. The system is inefficient, confusing, and contentious. The arguments in favor of the system are dispelled below.

The argument that Texas and Oklahoma require bifurcated courts to handle a more significant caseload is not a compelling one. For instance, the California Supreme Court received 9,739 matters in 2013.\textsuperscript{270} By comparison, the Texas Supreme Court received only 778 and the Texas Court of Criminal Appeals received 5,875,

\textsuperscript{266} \textit{See supra} Part II.A.
\textsuperscript{268} \textit{See} \textit{Tex. Const.} art. V, §§ 2–3, 5.
\textsuperscript{269} \textit{Lockett}, 330 P.3d 488.
for a total court of last resort case disposition of 6,653 matters. This shows that California, with one court, was able to complete 3,086 more matters than Texas with two courts. Oklahoma, being a far less populous state, also cannot justify its bifurcated system based on the number of matters disposed.

The argument that a bifurcated court of last resort system increases the expertise of the judiciary does not outweigh the problems such a system creates. There is little evidence to suggest that federal courts suffer from a lack of expertise in disposing of criminal or civil matters, except for the occasional issue such as ERISA or patent litigation. Even if Oklahoma and Texas want to keep their expert judges in criminal and civil matters, they could do so through specialized mid-level appeals courts, which I will outline infra.

In light of these jurisdictional issues and the examples from the vast majority of other states, my recommendation is that both Texas and Oklahoma should abolish their bifurcated court system. There should be three constitutional courts including a trial court of general jurisdiction, an appeals court with general appellate jurisdiction, and one supreme court with general appellate jurisdiction. This would require the elimination of the current system in Oklahoma where the Oklahoma Supreme Court handles all appeals and has discretion in passing appeals down to the Oklahoma Court of Appeals.


Texas would eliminate a significant number of its own courts, including county courts and justice of the peace courts. I also recommend that Texas reduce the total number of courts of appeal from the current fourteen to a more manageable six or seven. Texas should increase the number of judges on the courts of appeal, and limit the districts to readily discernable geographic and demographic areas. This will decrease the role of the Texas Supreme Court as an arbiter of district splits and allow it to grant certiorari on appeals that present novel and important issues.

If, on the other hand, Texas and Oklahoma would like to maintain the specialization in having a bifurcated appeals system, there is still room to clean up the jurisdictional conflicts. In the late 1960s, Tennessee and Alabama both instituted bifurcated mid-level appellate courts. Neither state has attempted to amend or eliminate its system in the past twenty years.

There are numerous benefits of a bifurcated mid-level appeals court with a single court of last resort. The mid-level appeals courts would develop significant specialties in their respective jurisdiction, thus maintaining one of the principal arguments in favor of the bifurcated courts of last resort while decreasing jurisdictional headaches. The courts would have less work, and thus could reach a disposition more quickly. Additionally, the supreme court may come to be viewed as playing more of an administrative role, with the mid-level courts acting similar to a court of last resort.

[273] See Raftery, supra note 243 (listing both Alabama and Tennessee as states that have bifurcated mid-level appellate courts).

[274] Id.

would, however, allow mandatory supreme court jurisdiction for death penalty cases due to the incredibly sensitive nature of those cases.

The mid-level court would in most instances be the last court that litigants see. Without a right of appeal to the supreme court (except in capital cases), the mid-level appeals courts would have final authority on nearly all decisions. Only in cases where the supreme court either finds serious errors in reasoning, circuit splits, or jurisdictional mistakes would it review a case. Thus, these specialized courts would for most purposes remain the last court to which litigants argue.

If there are questions regarding jurisdictional issues between the mid-level courts (which, as we have seen from bifurcated courts of last resort, is inevitable) the supreme court could easily dispose of the jurisdictional issue and the lower courts would be bound. There would be no debacles like *Reece* or *Lockett* because the supreme court would have ultimate authority on all issues of state law.

For example, if we apply the novel mid-level bifurcated structure to the facts of *Reece*, where the Texas Supreme Court used a tenuous interpretation of its mandamus power to prevent a significant gap in appellate review, there would have been a different outcome.\(^\text{276}\) If the mid-level court of criminal appeals denied jurisdiction, the civil appeals court would likely have never entered the picture. The appeal of the denial of habeas would go up to the unified supreme court of last resort, where that court presumably would have determined that the court of criminal appeals did have jurisdiction in this case. Because the unified supreme court is a higher court and sets binding precedent for the court of criminal appeals, that court would have heard the case and disposed of the issue.

Cases like *Bretz v. State* would also be avoided. Litigants would have the knowledge that if a mistake

\(^{276}\) *See supra* Part II.A.
concerning jurisdiction was made on their part, the supreme court could remand to the proper court. Additionally, when the mistaken jurisdiction of the litigant is clear to the mid-level court reviewing the case, Texas and Oklahoma could institute a process similar to the process set forth in 28 U.S.C. § 1631. This would allow a civil court to transfer a case to a criminal court and vice versa. The result would be preservation of the case to avoid timing issues in appeals. Further, if there were a mistake on the part of the transferring court, the supreme court would have the authority to make a final determination and remand for adjudication. There would still remain extra expense in litigation, but there also would be the added benefit of judicial expertise in specialized courts.

One might question whether the outcome of Lockett would have been any different in a system of bifurcated intermediate courts. I argue that it would. On the first appeal, Lockett would appeal to either the criminal or civil court of appeals. If he appealed to the wrong court, or the court incorrectly determined that it did not have jurisdiction, the case would be appealed up to the unified supreme court. This court would be able to make a single determination regarding which court had jurisdiction, and its decree would be binding law on all parties. There would not be the denial of the order by the court of criminal appeals because the unified supreme court is objectively higher. Even if the mid-level court of criminal appeals defied the order of the unified supreme court (which is highly unlikely), the supreme court would have jurisdiction to decide the case itself, thus eliminating the tenuous judicial acrobatics necessary to shoehorn civil into criminal, or vice versa. As Justice Jackson famously wrote, “We are not final because we are infallible, but we are infallible only because we are

278 Id.
final.”279 One court of last resort eliminates a contest of equals jockeying for position and creates finality binding on all.

V. Conclusion

“Dissatisfaction with the administration of justice is as old as law. Not to go outside our own legal system, discontent has an ancient and unbroken pedigree.”280 The Texas and Oklahoma judiciary systems are problematic. In Oklahoma, the result of a judicial hot potato led to the botched execution of a convicted murderer using experimental drugs.281 In Texas, the Texas Supreme Court used mandamus jurisdiction for what was essentially a habeas petition, because the Texas Court of Criminal Appeals held that it did not have jurisdiction to hear a writ of habeas corpus arising from an individual being held in contempt in an underlying civil trial, despite the fact that the purpose of the contempt order was criminal punishment.282 These jurisdictional issues affect real human beings and deserve the attention of legislators and reformers. Texas and Oklahoma should seriously consider amending their constitutions to reconstruct their judicial systems to contain only one court of last resort with general appellate jurisdiction in order to ensure there will always be a court to hear a case.

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280 Orley R. Lilly, Jr., Some Thoughts for Judicial Reform in Oklahoma, 10 TULSA L. J. 91, 91 (1974) (quoting Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice (1906)).
282 See In re Reece, 341 S.W.3d 360 (Tex. 2011).
Most attorneys are familiar with the adage: “If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell.”\(^1\) We have entered

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\(^{1}\text{This adage derives from CARL SANDBURG, THE PEOPLE, YES 181 (1937) (‘If the law is against you, talk about the evidence,’}\)
an age where, in any given debate, proponents of a particular position no longer seem to care about the facts or the law. They bypass all reason, attempt no civil discourse, and proceed straight to yelling. This proclivity knows no political, generational, or socio-economic bounds. It is an equal-opportunity philosophy that threatens to tear down the very foundations on which our representative republic was built; for when the objective of the discourse is simply to shout down the other side, very little of substance can be accomplished. Why have we digressed to this point? Can we change course and reintroduce the vital concept of respect for well-reasoned opinions, even if they are diametrically opposed to our own? Is it too late to salvage human dignity in the public sphere?

In my tenth-grade debate class, we discussed the elements of an effective argument. We learned that great debaters were the ones who had a good grasp of the facts, understood both sides of an argument, and methodically laid a foundation in support of their position. Ineffective debaters were the ones who did not understand the facts, relied on unsubstantiated sources, and, more often than not, attacked the other side’s motives and character, neither of which is relevant to the substance of the issues being debated. Attacking your opponent, we were told, is a sure sign of your own weakness.

Despite this maxim of debate, individuals across a range of professions, socio-economic groups, and political parties have no reservations about using the “yell like hell” philosophy as the first, and sometimes only, course of action. Whether they are politicians, comedians, musicians, or authors, they have filled the public forum with anger, accusations, unfair generalities, and unfounded conclusions about the character of “the

said a battered barrister. ‘If the evidence is against you, talk about the law, and, since you ask me, if the law and the evidence are both against you, then pound on the table and yell like hell.”').

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other side.” They oppose the other side’s positions not on merit, but on their hatred of “the other side.” A few recent examples illustrate the escalating problem: (1) a presidential candidate accused another nation of “bringing drugs, and bringing crime, and their rapists” to America;\(^2\) (2) another presidential candidate, though acknowledging ahead of time that her comment would be “grossly generalistic,” stated that half of the supporters of the other candidate belonged in a “basket of deplorables;”\(^3\) (3) a California political leader led a profane chant against the President while he and a crowd of supporters used a profane gesture;\(^4\) (4) a late-night comedian used his national platform to insult the President with a series of escalating comments too offensive to reprint here;\(^5\) (5) a musician included in his concert a message displayed in giant letters across several large video screens disparaging the President;\(^6\) and (6) following a terrorist attack in London in June


2017, a Louisiana congressman posted in a Facebook message that “radicalized Islamic suspect[s]” should be denied entry into America and that we should “[h]unt them, identify them, and kill them. Kill them all.” I could continue ad nauseum, because there are any number of websites dedicated to documenting the ridiculing of various individuals or groups, including climate scientists on one side or the other, politicians of all kinds, celebrities, those of various religious faiths, and many others. 

The advent of social media has compounded the problem. The perceived potential to communicate, quite literally, to the entire technology-connected world is an intoxicant many cannot resist. This potential inflates one’s sense of self-importance and emboldens one to say or write whatever it takes to “go viral.” This desire naturally leads to extremism because a well-reasoned,


calm, methodical approach rarely rises to the top of a search engine result. In a recent example, a host on a prominent cable news network responded to a tweet from the President with his own tweet using vulgar language and calling the President “an embarrassment to America,” “a stain on the presidency,” and “an embarrassment to humankind.” The host later apologized, but not before his tweet went viral.

Moreover, the ability of any individual or group to create its own “publication” at little cost and disseminate it widely has led to the predominance of extreme language and “fake news.” Many such websites, blogs, posts, and other similar media have no need of and no use for journalistic integrity. These new media, in turn, cause once-respected news organizations to lean toward extreme fringes in an effort to compete with the more sensationalistic elements on the internet. This pushes venerated reporters to blur the line between fact and opinion. In short, the media is caught in a “spin cycle” that will not slow down. The perceived demand for constant access to new and salacious news stories means that in-depth investigative journalism, which mandates a time-consuming, methodical approach to interviewing and verifying sources, is shunted to the side in favor of whatever rumor or innuendo is the “flavor of the moment.” Owners and stockholders of legitimate media demand revenue; revenue is generated by advertisers who require ratings and increased subscription bases, which apparently are generated only through “gotcha” headlines, unverified speculation, and outrage. We, the consumers, watch, click on, purchase, and download this drivel. And on it goes.

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10 Id.
One commentator summarized his thoughts on this topic in a recent article:

[W]e’re moving toward two Americas—one that ruthlessly (and occasionally illegally) suppresses dissenting speech and the other that is dangerously close to believing that the opposite of political correctness isn’t a fearless expression of truth but rather the fearless expression of ideas best calculated to enrage your opponents.

. . . For one side, a true free-speech culture is a threat to feelings, sensitivities, and social justice. The other side waves high the banner of “free speech” to sometimes elevate the worst voices to the highest platforms—not so much to protect the First Amendment as to infuriate the hated “snowflakes” and trigger the most hysterical overreactions.11

What does the decline in civil discourse have to do with the law? Consider the impact extreme language has had on national immigration policy. In International Refugee Assistance Project v. Trump,12 the United States Court of Appeals for the Fourth Circuit framed the issue as follows: “whether [the Constitution] protects Plaintiffs’ right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and

discrimination.” The case addressed President Trump’s executive orders that seek to prohibit “foreign nationals who ‘bear hostile attitudes’ toward [America]” from entering the country for a certain period of time. In analyzing whether the plaintiffs could pursue a cause of action to stop the implementation of these orders, a majority of the Fourth Circuit found it relevant and probative to consider “public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump’s assumption of office.” After recounting various public statements in which President Trump described “hatred [and] danger coming into our country,” and claimed that “Islam hates us,” the court agreed with the plaintiffs’ claim that there was an “anti-Muslim message animating [the second executive order].” Following an extensive review of what the court believed to be binding precedent on the constitutional issue, the majority concluded that if the plaintiffs make “an affirmative showing of bad faith” that is “plausibly alleged with sufficient particularity” against the government’s proposed action, then the court may “look behind’ the challenged action to assess its ‘facially legitimate’ justification.” The court then determined that it must “step away from our deferential posture and

13 Id. at 572.
14 Id.
15 Id. at 575.
17 857 F.3d at 576.
18 Id. at 575–76, 576, 578.
19 Id. at 590–91 (quoting Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring)).
look behind the stated reason for the challenged action.”

The court noted that

Plaintiffs point to ample evidence that national security is not the true reason for [the second executive order], including, among other things, then-candidate Trump’s numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting “territories” instead of Muslims directly; the issuance of [the first executive order], which targeted certain majority-Muslim nations and included a preference for religious minorities; [and] an advisor’s statement that the President had asked him to find a way to ban Muslims in a legal way. . . .

The court then concluded that “Plaintiffs have more than plausibly alleged that [the second executive order’s] stated national security interest was provided in bad faith . . . .” Although the court acknowledged that it could not engage in “judicial psychoanalysis of a drafter’s heart of hearts,” it had a duty to consider “the action’s ‘historical context’ and ‘the specific sequence of events leading to [its] passage.’” Moreover, the court determined that “as a reasonable observer, a court has a ‘reasonable memor[y],’ and it cannot ‘turn a blind eye to

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20 Id. at 591.
21 Id.
22 Id. at 592.
23 Id. at 593 (quoting McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 862 (2005)).
24 Id. at 593 (alteration in original) (quoting Edwards v. Aguillard, 482 U.S. 578, 595 (1987)).
the context in which [the action] arose.” The Fourth Circuit concluded that

[t]he evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that [the second executive order’s] primary purpose is religious. Then-candidate Trump’s campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States. For instance, on December 7, 2015, Trump posted on his campaign website a “Statement on Preventing Muslim Immigration,” in which he “call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on” and remarked, “[I]t is obvious to anybody that the hatred is beyond comprehension. . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life.”

In response to the Government’s arguments that the stated purpose of the executive order was secular in nature, that it banned persons of all religions from the designated countries, and that it did not ban Muslims from countries other than the designated countries, the majority commented that the executive order’s “practical operation is not severable from the myriad statements explaining its operation as intended to bar Muslims from

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25 Id. (quoting McCreary, 545 U.S. at 866).
26 Id. at 594.
Regardless of one’s political perspective, religious views, or thoughts on the legal analysis employed by the Fourth Circuit, there can be no doubt that the primary focus of this important legal case was on one thing: language. A candidate’s use of words that some considered ill-advised and inflammatory resulted in a United States Court of Appeals blocking implementation of an executive order that otherwise constituted a facially legitimate exercise of executive discretion. Words matter.

Though certainly not on the same scale as *International Refugee*, other recent litigation has hinged on the ill-advised use of words. In 2014, a high school student in Minnesota was suspended due to a two-word tweet (“actually yes”) he sent off campus and after school hours in response to a Twitter inquiry about a rumored occurrence between the student and a teacher. The student sued, alleging, among other things, that his First Amendment rights had been violated. The school district responded to the complaint by arguing that the student’s tweet was “obscene” and therefore not protected

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27 *Id.* at 597.

28 It should be noted that three judges on the Fourth Circuit dissented in *International Refugee*, arguing that the court had no precedential basis for “look[ing] behind” the Government’s “facially legitimate and bona fide’ exercises of executive discretion,” *id.* at 639 (Niemeyer, J., dissenting) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)), and had no just cause for “consideration of campaign statements to recast a later-issued executive order . . . .” *Id.* at 639 (Neimeyer, J., dissenting).


by the First Amendment. The district court cited Supreme Court precedent holding that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” The district court concluded, however, that the tweet in question was not patently obscene and that the issue should be left for the jury to decide.

Much of the debate surrounding the legal implications of word use and word choice can be traced back to the United States Supreme Court’s decision in Brandenburg v. Ohio, a 1969 free speech case. Clarence Brandenburg was a Ku Klux Klan (“KKK”) leader in rural Ohio who invited a reporter to attend a KKK rally in 1964. Portions of the rally were recorded and broadcast on a local television station and Brandenburg was later convicted of “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . .” The Supreme Court reversed Brandenburg’s conviction and declared the Ohio statute on which the conviction was based unconstitutional. In so holding, the Court stated,

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

31 Id. at 853 (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).
32 Id. (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
33 Id. at 854.
35 Id. at 445.
36 Id. at 444–45 (alteration in original).
37 Id. at 449.
producing imminent lawless action and is likely to incite or produce such action.\textsuperscript{38}

The Court then concluded:

\textit{[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.}\textsuperscript{39}

However, there are limits to the First Amendment’s protective reach. In 2006, the Supreme Court of Michigan issued a controversial opinion addressing public comments made by an attorney about appellate judges who were hearing his client’s case.\textsuperscript{40} After the attorney obtained a large jury verdict for a client in an earlier medical malpractice case, a three-judge panel of the Michigan Court of Appeals reversed the award and directed entry of a judgment notwithstanding the verdict.\textsuperscript{41} The court of appeals commented in its decision that the conduct of the plaintiff’s attorney during the trial was “truly egregious” and that it “completely tainted the proceedings.”\textsuperscript{42} Within a few days of the release of this decision, on a then-daily radio program the attorney hosted on a local station, the attorney made highly derogatory and offensive comments about the three appellate court judges who issued the

\textsuperscript{38} \textit{Id.} at 447.
\textsuperscript{39} \textit{Id.} at 449.
\textsuperscript{40} Grievance Adm’r v. Fieger, 719 N.W.2d 123 (Mich. 2006).
\textsuperscript{42} \textit{Badalamenti}, 602 N.W.2d at 860; \textit{see also} Fieger, 719 N.W.2d at 129.
opinion. However, Michigan’s Attorney Grievance Commission filed a formal complaint against the attorney, alleging that his public comments violated several provisions of the Michigan Rules of Professional Conduct.

On appeal, a majority of the Supreme Court of Michigan noted that the legal profession, unlike other professions, "impose[s] upon its members regulations concerning the nature of public comment." The First Amendment implications are easily understood in such a regulatory regime,” and the Supreme Court of Michigan "has attempted to appropriately draw the line between robust comment that is protected by the First Amendment and comment that undermines the integrity of the legal system." The court concluded that “these rules are designed to prohibit only ‘undignified,’ ‘discourteous,’ and ‘disrespectful’ conduct or remarks. These rules are a call to discretion and civility, not to silence or censorship, and they do not even purport to prohibit criticism.” The court then determined that the attorney’s disparaging comments about the three judges “warrants no First Amendment protection when balanced against this state’s compelling interest in maintaining public respect for the integrity of the legal process.”

Finally, the majority sought to address the objections of its dissenting colleagues, who concluded

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43 Fieger, 719 N.W.2d at 129.
44 Id. at 130. The subsequent disciplinary proceedings in Fieger, which involved an appeal to the Attorney Disciplinary Board in Michigan, are convoluted and irrelevant to this Article, and therefore this Article does not discuss those proceedings. See generally id. at 130–31.
45 Id. at 131.
46 Id. at 131–32.
47 Id. at 135.
48 Id. at 142 (citing United States v. O’Brien, 391 U.S. 367, 377 (1968)).
that the attorney’s disparaging public comments should be protected by the First Amendment:

In their repudiation of “courtesy” and “civility” rules, the dissents would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove. It is a legal culture in which rational and logical discourse would come increasingly to be replaced by epithets and coarse behavior, in which a profession that is already marked by declining standards of behavior would be subject to further erosion, and in which public regard for the system of law would inevitably be diminished over time.49

Additionally, our nation’s college campuses are increasingly marked by divisive, extreme, and abusive language, as well as attempted censorship:

- In 2015, a professor at the University of Missouri attempted to prohibit a video journalist from recording video at a student protest. The professor yelled, “Who wants to help me get this reporter out of here? I need some muscle over here.”50

49 Id. at 144.
50 Justin Moyer, Michael Miller & Peter Holley, Mass Media Professor Under Fire for Confronting Video Journalist at Mizzou, WASH POST (Nov. 10, 2015), https://www.washingtonpost.com/
• In 2015, a faculty training guide distributed by the University of California cautioned faculty members against using words and phrases that could result in “microaggressions,” including the phrase “America is the land of opportunity.”


• A 2016 Gallup poll found that thirty-one percent of college students say they frequently or occasionally hear someone at their college making “disrespectful, inappropriate or offensive comments” about others’ race, ethnicity, or religion, while fifty-four percent of students surveyed said the climate on their campus “prevents some people from saying what they believe.”


• In 2017, a professor at Evergreen State College sent an email (that was then posted to Twitter) objecting to an event called “Day of Absence,” in which white students and teachers were asked to leave campus for the day so that students of color could organize and attend discussions about race.


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was racist and demanded he be fired, and threats of violence prompted the school to close for two days.\textsuperscript{54}

- In February 2017, a professor at Fresno State University tweeted, “to save American democracy, Drumpf must hang. The sooner and the higher, the better.”\textsuperscript{55}

- In 2017, two conservative commentators were banned from the campus of DePaul University for using “inflammatory speech.”\textsuperscript{56}

- Harvard’s campus newspaper, The Crimson, reported in June 2017 that ten students who had been admitted into the incoming freshmen class had their admissions rescinded when the school discovered sexually explicit and/or racially insensitive memes in a private Facebook chat.\textsuperscript{57}

Despite this disturbing trend, an analysis by CNN reporter Eliott C. McLaughlin concluded that students “will listen to speakers they disagree with if they’re

\textsuperscript{54} Id.

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civil.”58 He cited as an example a 2015 speech Senator Bernie Sanders gave at Liberty University, a well-known Christian college in Virginia. One student commented that although she and most of her fellow students disagreed with Senator Sanders’s views on a variety of topics, she listened to his speech and thoughtfully considered his comments about alleviating poverty in light of her own beliefs, saying “[e]veryone I talked to was glad he came,” and that “[i]t’s important to communicate with those we disagree with.”59

Thus, there can be no doubt that the First Amendment is the great constitutional protector of free speech, as it should be, but it is not without its limits. For purposes of this article, the question is not whether divisive, rude, profane, or derogatory language is constitutional. In most instances, it is certainly protected speech. Instead, the question is whether, in an age where one’s words can be disseminated immediately to millions of people across multiple digital platforms, such language contributes anything useful to society. As Shakespeare’s great character Falstaff said, “The better part of valor is discretion . . . .”60

I believe a significant majority of Americans, who I dub the “Middle Majority,” abhor extremist, hate-filled rhetoric, regardless of which end of the political spectrum produces it. The average American, I maintain, finds the vitriol spewed by white supremacists as distasteful as the far-left’s radicalized malevolence directed at our current President. As one commentator explained, “[r]age and sanctimony always spread like a virus, and become

59 Id.
60 William Shakespeare, The First Part of King Henry the Fourth, act 5, sc. 4.
stronger with each iteration.”\textsuperscript{61} And yet, the Middle Majority feels helpless to stop, or even slow down, this bullet train of bitterness.

The Middle Majority does, however, hold the keys to reversing this descent into hostility and hyperbole. One answer, as is often the case in a capitalist society, lies in our wallets. We can choose to weaken the impact of extremism by refusing to buy that person’s book, or subscribe to that magazine, or watch that television program. We can refuse to click on that story, and, more importantly, ignore the link to that advertiser’s website. Companies take notice when clicks, sales, and ratings fall. It is high time we reacted to extremists in a way that relegates them to the shadows from whence they came. While I will support that person’s constitutional right to speak, I also believe in our right to react to that speech in a way that minimizes its impact on society and opens the door for more thoughtful, well-reasoned, civil discourse. For those who seek a more proactive approach, remember that advertisers crave your dollars. The marketplace compels companies to react in a way that maximizes profit. If enough people register disgust with that company spokesman, or author, or You-Tuber, advertisers will react swiftly to distance themselves from the extremism, and the influence of the extremists will ebb over time. It is the failure to react that leads to the normalization of the extreme.

A second key lies in our own access to the public forum. The Middle Majority needs to contribute to the debate as often as possible in a way that rejects extremism and replaces it with logic and calm, articulate reasoning. It is not a sign of weakness to acknowledge valid points made by those who oppose your view. It furthers the public interest to seek common ground and offer suggestions that move the country forward, as

\textsuperscript{61} Peggy Noonan, \textit{Rage is All the Rage, and It’s Dangerous}, WALL ST. J., June 17-18, 2017, at A13.
opposed to the ongoing stalemate left in the wake of dogmatic extremism. Compromise is not a four-letter word. As one former president memorably stated, “Let us never negotiate out of fear. But let us never fear to negotiate.” It is high time we reject extremism of all kinds, show respect for various viewpoints through civil discourse, and seek common ground for the good of our communities, our states, and our nation.

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THE CASE FOR COMPLICITY-BASED RELIGIOUS ACCOMMODATIONS

Joshua J. Craddock*

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B. Private Ordering and Markets Mitigate Social Conflict

Introduction

Complicity is an ancient concept in law and ethics. One becomes complicit in the wrongdoing of someone else by performing actions that contribute to that wrongdoing. This principle is found in the teachings of many religious faiths, and it is embedded throughout the American legal system. It should be no surprise then

1 Gregory Mellema, Complicity and Moral Accountability 10 (2016) (“When someone is complicit in the wrongdoing of one or more principal agents, it is by virtue of performing a contributing action.”).
2 See, e.g., Thomas Aquinas, Summa Theologicae pt. II-II, Q. 62, art. 7 (addressing accomplice liability); John Calvin, Commentaries on the Epistle of Paul to the Galatians and Ephesians 310 (William Pringle trans., 1854) (“It is not enough that we do not, of our own accord, undertake anything wicked. We must beware of joining or assisting those who do wrong. In short, we must abstain from giving any consent, or advice, or approbation, or assistance; for in all these ways we have fellowship.”); Catechism of the Catholic Church pt. 3, ¶ 1868; Nik Mohamed Affandi Bin Nik Yusoff, Islam & Business 231 (Ismail Noor ed., 2002) (observing that in Islam, “whatever is conducive towards what is prohibited is itself forbidden”); Mark L. Rienzi, God and the Profits: Is there Religious Liberty for Moneymakers?, 21 Geo. Mason L. Rev. 59, 68 (2013) (noting that “Judaism prohibits even Jewish consumers from facilitating a business owner’s violation of Jewish law”).
3 See, e.g., Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014) (acknowledging that facilitator liability “reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission”); U.S. Dep’t of Just., U.S. Attorneys’ Manual tit. 9, ¶ 2474 (1998),
that complicity also appears in the context of religious exemptions from laws of general applicability, in which the objector believes his conduct would facilitate another’s wrongdoing. Over the past few years, high-profile religious liberty cases such as *Burwell v. Hobby Lobby Stores, Inc.* and *Zubik v. Burwell* have highlighted the role of complicity in Free Exercise Clause and Religious Freedom Restoration Act (RFRA) jurisprudence.

Critics of religious exemptions have deployed a new argument against accommodations in such cases by suggesting that they impose “third-party harm.” In particular, Professors Douglas NeJaime and Reva Siegel argue that these complicity-based claims are novel and that the claims “differ in form and in social logic” from other free exercise claims. For example, a Muslim inmate’s religious objection to shaving his beard does not

https://www.justice.gov/usam/criminal-resource-manual-2474-elements-aiding-and-abetting [https://perma.cc/Z62T-W8CB] (“The level of participation [in an unlawful venture] may be of relatively slight moment. Also, it does not take much evidence to satisfy the facilitation element once the defendant’s knowledge of the unlawful purpose is established.” (citations omitted)); Matthew Kacsmaryk, *Moral Complicity at Court: Who Decides?*, PUB. DISCOURSE (Apr. 6, 2016), http://www.thepublicdiscourse.com/2016/04/16709/ [https://perma.cc/W6BJ-SN3X] (“In the modern era, federal, state, and territorial governments have enacted myriad statutes, regulations, and rules protecting the conscience rights of Americans who abstain from practices, procedures, or products that would violate their moral duty not to kill or cause harm.”).

4 134 S. Ct. 2751 (2014).
5 136 S. Ct. 1557 (2016) (per curiam).
7 Id. at 2519.
stem from any complicity with another’s alleged wrongdoing.\textsuperscript{8} Complicity-based claims, they argue, impose “material and dignitary harms” on third parties that are not adequately accounted for under current doctrine.\textsuperscript{9}

Professors NeJaime and Siegel define material harm as “deterring or obstructing access to goods and services,”\textsuperscript{10} such as abortion or same-sex spousal benefits.\textsuperscript{11} Dignitary harms “refer to the social meaning, including stigma, which may result from accommodating complicity-based objections.”\textsuperscript{12} This social meaning is communicated when religious objectors treat “third parties as sinners in ways that can stigmatize and demean.”\textsuperscript{13} Complicity-based claims are particularly stigmatizing, they argue, when refusal of services “reflects a widely understood message about a contested sexual norm.”\textsuperscript{14} Because of these third-party harms, Professors NeJaime and Siegel argue that religious accommodations should be diminished or eliminated in many complicity cases.\textsuperscript{15}

This Article argues that the third-party harm theory is fundamentally flawed and that complicity-based religious accommodations are both a traditional and necessary part of the American legal framework.

\textsuperscript{8} See id. at 2524 (citing Holt v. Hobbs, 135 S. Ct. 853 (2015)).
\textsuperscript{9} Id. at 2587 (“One group of citizens should not bear the significant costs of another’s claim to religious exercise.”).
\textsuperscript{10} Id. at 2566 (“[Material harm] can also occur as objectors withhold information that would enable an individual to pursue alternative providers.”).
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 2522.
\textsuperscript{13} Id. at 2576.
\textsuperscript{14} Id. at 2577.
\textsuperscript{15} Id. at 2516 (“At issue is not only whether but how complicity claims are accommodated.”).
Part I examines Supreme Court precedent in the area of free exercise and finds significant support for complicity-based accommodations. Part II reevaluates the magnitude and legitimacy of the asserted third-party harms, then weighs the inconveniences imposed on third parties against the injuries to religious objectors should accommodations be withdrawn. Part III contends that culture war conflicts will not be resolved through the elimination of religious accommodations in the complicity context and proposes a subsidiarity-based alternative to imposing coercive legal penalties on religious objectors.

I. Complicity-Based Accommodations Are Not Novel

Professors NeJaime and Siegel acknowledge the longstanding and “richly elaborated” theory of complicity. Yet they assert that religious exemptions based on complicity were practically unheard of prior to Hobby Lobby and are fundamentally different from the precedents RFRA invoked as exemplars. Historically, however, the law has treated complicity-based claims with the same regard as other claims for religious accommodation. In fact, Hobby Lobby reaffirmed the Supreme Court’s long-established solicitude toward complicity-related claims.

In Wisconsin v. Yoder, Amish parents objected to the state’s compulsory secondary schooling requirement and sought an exemption for Amish children who had completed the eighth grade. They condemned the “values” promoted by high schools and asserted that

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16 Id. at 2522–23.
17 Id. at 2524–29.
19 Id. at 207.

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attendance entangled their families in “a ‘worldly’ influence in conflict with their beliefs.” By participating in the high school system, the Amish feared their children would be affected by the corrupting activities and influences of third-party students, teachers, and administrators. Thus, on a plausible reading of Yoder, the Amish parents pleaded for precisely the sort of complicity-based religious exemption that Professors NeJaime and Siegel suggest are novel.

Furthermore, accommodation for the Amish carried the risk of “third-party harm.” The parents implicitly condemned those involved with high schooling as being engaged in objectionable conduct. Indeed, it might be inferred they believed that those who embraced the worldly influences of high school would suffer damnation. If Professors NeJaime and Siegel’s characterization of dignitary harm were to be accepted, these aspersions would certainly qualify as “dignitary harms.” Even potential material harms were at risk. Professors NeJaime and Siegel are correct to observe that Yoder “conceptualized the interests of the Amish children as aligned with their parents, such that the accommodation benefited, rather than potentially

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20 Id. at 210–11.
21 Id. at 209 (“They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children.”).
23 See Yoder, 406 U.S. at 210 (“Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.”).
harm, the children themselves.” But the accommodation was not limited to such cases, and indeed, the extent to which an eighth grader can make informed decisions about such matters is questionable. The Supreme Court granted the accommodation despite the potential material and dignitary harms to third parties.

Another important precedent that Professors NeJaime and Siegel gloss over is Thomas v. Review Board of Indiana Employment Security Division. In that case, a Jehovah’s Witness who refused work in a tank turret factory was denied unemployment compensation. Although Professors NeJaime and Siegel acknowledge that Thomas involved a complicity-based claim for accommodation, they attempt to distinguish it from Hobby Lobby by claiming that Thomas did “not single out a particular group of citizens as sinning.” This is both inaccurate and irrelevant.

First, Thomas did suggest that those who manufactured the tank turrets—as well as those who would eventually use them to kill—were engaged in sinful conduct. It was precisely because Thomas

24 NeJaime & Siegel, supra note 6, at 2526 (citing Yoder, 406 U.S. at 209).
26 Id. at 709.
27 NeJaime & Siegel, supra note 6, at 2526 n.45. The Supreme Court views Thomas as directly analogous to the complicity-based claims that Professors NeJaime and Siegel criticize. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014) (calling the issue raised in Thomas “nearly identical” to the one raised in Hobby Lobby).
28 See DeGirolami, supra note 22, at 137–38.
29 Thomas had told the hearing referee: “I really could not, you know, conscientiously continue to work with armaments. It would be against all of the . . . religious principles that . . . I have come to learn. . . .” Thomas, 450 U.S. at 714 (alteration in
believed the creation of armaments to be sinful that he quit his job. By plausible implication, one could infer that Thomas believed those who continued to construct armaments (or those who would ultimately use them) were acting sinfully.

Second, it is irrelevant because complicity analysis should be focused on the objector’s conduct and state of mind, not the principal’s conduct and character. Thus, the only relevant point of inquiry is whether Thomas’s conduct (assisting the construction of tank turrets) violated his religious beliefs, as he understood them. Thomas’s moral judgments about his fellow

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31 See Hobby Lobby, 134 S. Ct. at 2779 (“[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction.’” (quoting Thomas v. Review Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707, 716 (1981)); see also Eugene Volokh, The Religious Freedom Restoration Act and Complicity in Sin, WASH. POST: VOLOKH CONSPIRACY (June 30, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-religious-freedom-restoration-act-and-complicity-in-sin/ [https://perma.cc/YWL5-6JM5] (observing that precisely “[w]here the connection becomes too attenuated and morally or religiously culpable complicity stops is a question on which reasonable people will differ” in a discussion of Hobby Lobby and Thomas). Thus, “when the person believes that complicity itself is sinful, the question is not whether our secular legal system thinks that he has drawn the right line regarding
factory workers and the ultimate users of the tank turrets never factor into the analysis.

Although complicity-based claims are not themselves novel, attempting to distinguish complicity claims from other religious accommodation claims is novel. Presumably, under the third-party harm theory, a *Hobby Lobby*-style case would be resolved differently when (A) the objector believes the use of abortion-inducing drugs is sinful than when (B) the objector believes that insurance or drugs are forbidden as a general matter (that is, the objection arises without the taint of a “sin” claim). This would be a strange result—one that asks judges to scrutinize the form of the objector’s religious reasoning. Not only is this a task that judges are unsuited to perform, but it encourages religious people to formulate their objections in creative ways to avoid complicity. Thus, if the Amish families in *Yoder* formulate their objection in terms of objecting to secular education, they will likely win. But if they phrase their objection as avoiding complicity with a corrupt system of education, they will likely lose. It is more reasonable to maintain the current rule that an objector’s moral reasoning is irrelevant for exemption purposes.32

II. Balancing Harms: Third Parties v. Religious Objectors

The third-party harm theory focuses on “material and dignitary harms” that those invoking complicity-based religious objections impose on others. But the significance of these harms and the extent to which they should be considered in RFRA analysis is questionable. Furthermore, the emphasis on third parties obscures or ignores the harms that would be imposed on religious individuals if the law no longer accommodated their beliefs to the extent possible. To accurately evaluate the relative social cost of permitting or denying complicity-based accommodations, both sides of the harm equation must be considered.

This Part will first re-examine, with a critical eye, the material and dignitary harms Professors NeJaime and Siegel identify. Then, using their framework of third-party harm, I will weigh the harms imposed on religious objectors should RFRA-style accommodations be weakened or withdrawn in complicity cases.

A. Harms to Third Parties

Professors NeJaime and Siegel identify a series of material and dignitary harms to third parties that they believe set complicity-based claims apart from other requests for religious accommodation. In this section, the scope and magnitude of the alleged harms to third parties will be critically re-examined.

1. Material Harms

Material harms include the inability to obtain certain healthcare information and services, such as abortion, emergency contraception, and assisted
reproduction;\textsuperscript{33} difficulty finding wedding venues and vendors for same-sex ceremonies;\textsuperscript{34} trouble obtaining privately-provided social services, such as adoption services;\textsuperscript{35} and denial of spousal insurance coverage or other employment benefits to same-sex partners.\textsuperscript{36} Professors NeJaime and Siegel worry that complicity-based refusals in these areas will lead to “an unpredictable marketplace” for same-sex couples and others seeking sexual and reproductive services.\textsuperscript{37}

Significant material harms are indeed a relevant concern and may be a compelling state interest. Nevertheless, there are at least three reasons why Professors NeJaime and Siegel’s characterization of these harms is overstated. First, material hardships that third parties might face due to religiously motivated refusals are already doctrinally accounted for under the “compelling state interest” prong of RFRA analysis.\textsuperscript{38}

\textsuperscript{33} See NeJaime & Siegel, \textit{supra} note 6, at 2557–58, 2573.
\textsuperscript{34} See \textit{id.} at 2562–63.
\textsuperscript{35} \textit{Id.} at 2573–74.
\textsuperscript{36} See \textit{id.} at 2563 n.195 and accompanying text.
\textsuperscript{37} \textit{Id.} at 2574.
\textsuperscript{38} See DeGirolami, \textit{supra} note 22, at 133 (“Compelling state interests include third party interests within the statutory calculus. Indeed, one might simply say that compelling state interests just exactly are third party interests of adequate gravity. Whose interests is the government protecting in resisting a religious accommodation if not those of third parties?”); Richard W. Garnett, \textit{Accommodation, Establishment, and Freedom of Religion}, 67 \textit{VAND. L. REV. EN BANC} 39, 46 (2014) (“The justices said in \textit{Cutter} that . . . ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,’ but RFRA, by its own terms, appears to require courts to do precisely that.” (quoting \textit{Cutter} v. Wilkinson, 544 U.S. 709, 720 (2005))); see \textit{also} Sherbert v. Verner, 374 U.S. 398, 406 (1963) (“It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive
Professors NeJaime and Siegel acknowledge this when they observe the latent concern for third-party harms in the *Hobby Lobby* and *Wheaton College v. Burwell* decisions.\(^\text{39}\) If courts considered third-party harm as a distinct prong of analysis reserved for complicity cases, they would double-count the harms of accommodation and effectively give the state “another bite at the apple.”\(^\text{41}\) Under existing doctrine, only the most serious material harms, “endangering paramount [governmental] interests,”\(^\text{42}\) are factored into RFRA’s compelling state interest analysis. This is appropriate because although “[m]ost exercises of constitutional rights inflict costs on constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’” (alteration in original) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1944)) (explaining what constitutes a compelling state interest). RFRA ultimately incorporated this understanding of compelling governmental interests. See 42 U.S.C. §§ 2000bb-1(b).

\(^{39}\) 134 S. Ct. 2806 (2014).

\(^{40}\) See *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (“That consideration [of third party harm] will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.”); NeJaime & Siegel, *supra* note 6, at 2530 (“Concern about protecting third parties from harm was a structuring principle of the Court’s [*Hobby Lobby*] decision . . . . Justice Alito’s majority opinion proceeded on the assumption that the government has a compelling interest in ensuring women’s ‘cost-free access to . . . contraceptive methods.’” (second alteration in original) (footnote omitted) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779–80 (2014))); see also *Wheaton*, 134 S. Ct. at 2807 (“Nothing in this interim order affects the ability of the applicant’s employees and students to obtain, without cost, the full range of FDA approved contraceptives.”).

\(^{41}\) DeGirolami, *supra* note 22, at 133.

\(^{42}\) *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1944)).
others . . . not everyone who feels harmed is harmed in a legally cognizable way.”43 Depending on the circumstance, the mere desire to obtain nonessential goods and services may not be a significant material harm deserving of judicial consideration.

Second, market forces are capable of solving most cases of material hardship when religious objectors decline to provide services.44 Though many business owners and organizational directors hold religious objections to participation in same-sex marriages or providing controversial reproductive services, a greater number hold the opposite view.45 Even those who object may not be willing to face the legal, social, and economic penalties of refusing service.46 In most cases, non-objecting wedding vendors and pharmacists will be available to provide their services, and the alleged material harms will be nonexistent.47 Although Professors NeJaime and Siegel worry that some individuals will be unable to obtain emergency contraception or HIV medication,48 extensive fact-finding in a pharmacist objection case could not identify a single instance of an individual who was unable to obtain emergency contraception or HIV drugs as a result of a

44 Id. at 379 (“In a market economy, refusals of service rarely result in anyone having to do without.”).
45 See id.
46 See id. (“Even among those with serious moral objections, few are willing to endure the risk of litigation, boycotts, defamatory reviews, and vandalism that can follow in the wake of refusing service on conscientious grounds.”).
47 See id. at 379–80 (noting the paucity of complicity-based objections and the lack of empirical evidence supporting claims of widespread refusals).
48 See NeJaime & Siegel, supra note 6, at 2539–40, 2573.
religiously motivated refusal. Even “in more conservative, religious, and rural parts of the country” where religious objections are likely more common, individuals will rarely find themselves without an adequate alternative for long.

Finally, the law has already established limiting principles for instances when inability to obtain essential services would inflict serious material harm. Life-threatening medical emergencies are a prominent example. Even though most state medical conscience laws do not have emergency exceptions, “federal law requires hospitals to treat or stabilize patients in emergencies, and that federal mandate overrides all contrary state law.” It is appropriate for the law to set reasonable limitations on the circumstances in which religious healthcare providers may refuse to perform

49 See Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 948 (W.D. Wash. 2012), rev’d on other grounds sub nom. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015), cert. denied, 136 S. Ct. 2433, 2434 (2016) (“[A]fter years of test shopping and litigation, Defendants have not identified even one instance where a pharmacist refused to fill or referred a patient because of a personal, non-conscientious objection. Despite frequent mentions of HIV during the rulemaking process, there is no evidence that any patient has ever been denied HIV drugs due to a conscientious or “personal” objection. . . . Finally, no Board witness, or any other witness, was able to identify any particular community in Washington—rural or otherwise—that lacked timely access to emergency contraceptives or any other time-sensitive medication.”).

50 NeJaime & Siegel, supra note 6, at 2574.

51 Under a Keynesian economic account, demand creates its own supply. See, e.g., Paul Krugman, Demand Creates Its Own Supply, N.Y. TIMES: THE CONSCIENCE OF A LIBERAL (Nov. 3, 2015, 1:23 PM), https://nyti.ms/2q7v1nN.

52 Laycock, supra note 43, at 381 (citing 42 U.S.C. §§ 1395dd(b)–(c) (2012)).
urgent, life-saving procedures.\textsuperscript{53} In the context of abortion, which seems to be Professors NeJaime and Siegel’s primary area of concern,\textsuperscript{54} such circumstances may never even arise.\textsuperscript{55}

\section*{2. Dignitary Harms}

Next, Professors NeJaime and Siegel catalogue dignitary harms they believe are not adequately accounted for in the RFRA compelling state interest analysis. Refusals to provide abortifacients or services for a same-sex wedding, for example, communicate “a widely understood message about a contested sexual norm.”\textsuperscript{56} And accommodating such refusals conveys a “social meaning” that stigmatizes lawful conduct.\textsuperscript{57} These harms often have emotional or symbolic effects.

\textsuperscript{53} This may not be the end of the analysis, however. It may be preferable to permit religiously objecting hospitals to continue to operate according to their beliefs (which inflicts some third-party harms) rather than force them to close down altogether (which would inflict a greater aggregate amount of third-party harms). \textit{See infra} notes 103–06 and accompanying text.

\textsuperscript{54} \textit{See} NeJaime & Siegel, \textit{supra} note 6, at 2566–69.

\textsuperscript{55} Experts in obstetrics and gynecology dispute the assertion that abortion is ever medically necessary. \textit{See} COMM. ON EXCELLENCE IN MATERNAL HEALTHCARE, DUBLIN DECLARATION ON MATERNAL HEALTHCARE (2012), \url{http://www.dublindeclaration.com/} [https://perma.cc/X75K-MRLJ] (declaring that “direct abortion”—the purposeful destruction of the unborn child—“is not medically necessary to save the life of a woman,” and affirming “a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child.”).

\textsuperscript{56} NeJaime & Siegel, \textit{supra} note 6, at 2577.

\textsuperscript{57} \textit{Id.} at 2522 (“By dignitary harms, we refer to the social meaning, including stigma, which may result from accommodating complicity-based objections.”).
Despite anecdotal accounts that refusals leave some customers feeling hurt or offended, it is unpersuasive that permitting accommodations actually imposes any dignitary harm. There are both practical and theoretical difficulties with demonstrating the reality of dignitary harms. On a practical level, offenses are subjective and difficult to quantify. Does politely and respectfully declining to arrange flowers for a same-sex wedding communicate an injurious “social meaning” to would-be customers? Perhaps for some, perhaps not for others. Reasonable customers might disagree about whether their dignity has been impugned. Would different meanings be communicated if an objector said, “I would be complicit in your sin” rather than “I would be sinning myself”? In effect, courts would have to rely on the testimony of the third party to determine how much harm a refusal inflicted. It would be easy for a politically

58 See, e.g., id. at 2575–78.
59 See Brief for Appellants at 13, State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2), 2015 WL 12632392 (“Mr. Ingersoll says that Mrs. Stutzman took his hand and explained ‘she could not do the flowers because of her relationship with Jesus Christ.’ According to him, she also said, ‘You know I love you dearly. I think you're a wonderful person . . . . But my religion doesn't allow me to do this.’ Mrs. Stutzman said all of this in a kind and considerate way.” (alteration in original)); Answer at 12, State v. Arlene’s Flowers, Inc., No. 13-2-00871-5 (Wash. Super. 2015), 2013 WL 10257927 (“Emotional about her convictions and her decision to decline, Barronelle touched Robert’s hand and kindly told him that she could not create the floral arrangements for his wedding because of her Christian faith . . . . Barronelle and Mr. Ingersoll hugged each other, and he left the store.”).
60 Laycock, supra note 43, at 382; see also supra note 30 and accompanying text.
influential interest group to define anything it does not like as “harmful” to its members’ dignity.\footnote{Douglas Laycock, \emph{A Syllabus of Errors}, 105 Mich. L. Rev. 1169, 1171 (2007) (reviewing Marci A. Hamilton, \emph{God vs. The Gavel: Religion and the Rule of Law} (2005)) (“We also have an expansive capacity to define as harmful anything we don’t like. A rule that no religious group could do anything the political process defined as harmful would leave all religions at the mercy of any interest group that could persuade some regulatory body to act.”).}

On the conceptual level, Professors NeJaime and Siegel’s account of dignitary harm assumes that dignity is conferred by others or by the government. According to their theory, “the state’s authority includes the power to confer individual dignity as a self-standing civic good. People want to be dignified by the state, their self-worth to be accorded official validation, and they perceive state-countenanced indignities meant for the protection of religious freedom as real injuries demanding state remediation.”\footnote{DeGirolami, \emph{supra} note 22, at 130 (summarizing the theory espoused by Professors NeJaime and Siegel).} But this is a mistaken understanding of human dignity that is fundamentally at odds with the American tradition. It “rejects the idea—captured in our Declaration of Independence—that human dignity is innate.”\footnote{Obergefell v. Hodges, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting). Justice Thomas’s remarks on the intrinsic nature of human dignity are worth including in full:}

\begin{quote}
Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That
\end{quote}
than conferred by the state, third parties cannot be deprived of their dignity through legal accommodations for religious objectors. 64

Even if dignitary harms could be proven and quantified, it is unclear that the law itself plays any role in imposing such harms. As between the religious vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their amici can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

Id. at 2639.

64 See id.
objector and the third party, the law is neutral. It takes neither the side of the objector (proscribing the conduct the objector views as sinful or requiring everyone similarly situated to decline their services) nor the side of the customer (forcing all providers to engage in objectionable commercial transactions against their will). It allows both parties the opportunity to order their affairs as they see fit. Even if critics of religious accommodations are correct to characterize exemptions as a privilege of private discrimination, it is not obvious that the law imposes dignitary harms, or that the dignitary harms stemming from private discrimination constitute a compelling state interest. On the other

65 See Sherif Girgis, Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel, 125 YALE L.J. F. 399, 403 (2016) (“Legally enforcing a norm against someone suggests coercing her to follow it. So Professors NeJaime and Siegel are lumping traditionalist-conduct exemptions together with legal enforcement of traditionalist views. That seems fair only if one assumes that the default is not to accommodate these views-so that doing so seems like a gratuitous imposition on others. Only then does actually coercing traditionalists to violate their consciences seem like the neutral norm.”).

66 This characterization is contested. See id. ( “[C]alling exemptions a ‘special advantage’ is tendentious. It assumes that the default in a constitutional democracy is not to protect conscience claims that might make a political splash. Only then does protecting them anyway seem like favoritism.” (footnote omitted)).

67 The only free exercise case finding a compelling state interest in eliminating private discrimination was Bob Jones University v. United States, 461 U.S. 574, 604 (1983). See Alex Reed, RFRA v. ENDA: Religious Freedom and Employment Discrimination, 23 VA. J. SOC. POL’Y & L. 2, 38 (2016). In Bob Jones, the state interest in promoting racial equality in education, expressed by all three branches of the federal government over the course of several decades, outweighed the religious claimant’s interest in free exercise. See 461 U.S. at 604. Racial discrimination in education results in both
hand, if courts adopted the dignitary harm theory, it could become a self-fulfilling prophesy: the more that courts “say that a policy or belief expresses disdain for a group, the more it will take on that social meaning.”

Even if the law imposed a dignitary harm, this harm is non-unique and cannot be considered by courts. The First Amendment permits speech and other forms of expression that impose dignitary harms all the time. What makes dignitary harm a trump card for free exercise, but not for other First Amendment liberties, such as free speech or freedom of the press? Because dignitary harms “are expressive harms, based on the ‘communicative impact’ of the religious practice,” they

material and dignitary harms under Professors NeJaime and Siegel’s rubric. Nevertheless, there are reasons to believe the Court’s judgment was limited in scope and not generally applicable to issues of sexual mores with which Professors NeJaime and Siegel are concerned. See Girgis, supra note 65, at 411. See generally Johnny Rex Buckles, The Sexual Integrity of Religious Schools and Tax Exemption, 40 HARV. J.L. & PUB. POL’Y 255 (2017).


To protect individuals against mere offensive conduct is to invite people to merit that exalted status by getting angrier and angrier, so that their private resentments give strong claims of rights against one another. Everyone can play this game so that mutual indignation becomes the source of great anxiety or worse.

Id.

69 Laycock, supra note 43, at 376.
are precisely the sorts of harms that the government is normally disallowed from considering as a legitimate state interest. First Amendment jurisprudence is replete with instances of protected speech that impose dignitary harm on third parties: parade organizers may exclude disfavored groups, proselytizers may insult their listeners’ most cherished beliefs, private expressive associations may discriminate against members based on their sexual conduct, and protesters

70 See Texas v. Johnson, 491 U.S. 397, 406 (1989) (“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct because it has expressive elements.”) (citations omitted); United States v. O’Brien, 391 U.S. 367, 377 (1968) (requiring the state interest in regulating conduct be “unrelated to the suppression of free expression”); see also Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (8-0 decision) (finding that the government cannot refuse to register a trademark on the grounds that “it expresses ideas that offend”).

71 See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 578–79 (1995) (9-0 decision) (ruling that the state’s interest in nondiscrimination could not be invoked to require a private parade organizer to modify its expressive conduct by including an LGBT group) (“The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.”).

72 See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (affirming the right of a Jehovah’s Witness to play a phonograph record that “attacked the [Catholic] religion and church” and “incensed” listeners).

73 See Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–61 (2000); see also Laycock, supra note 43, at 377 (observing that “Dale had been an active and engaged scout for twelve years; the dignitary harm of being excluded from scouting at that point must have been vastly greater than the typical dignitary harm
may express even the most vulgar and offensive slogans at their audience’s most vulnerable moments.\textsuperscript{74} The effect of such speech on third parties is legally irrelevant.\textsuperscript{75} That some third parties will find religiously motivated refusals to be upsetting, offensive, or disagreeable is no doubt true. But the resulting emotional or symbolic injuries are simply not a matter of judicial concern.

It is inconsistent with First Amendment doctrine and norms to assert that religious refusals that either explicitly or implicitly “reflect[] and reiterate[] a familiar message about contested sexual norms”\textsuperscript{76} deserve less protection because of the viewpoint expressed by that

\textsuperscript{74} See Snyder v. Phelps, 562 U.S. 443, 448 (2011) (8-1 decision) (upholding protection of slogans such as “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You” displayed at a soldier’s Catholic funeral).

\textsuperscript{75} See \textit{Matal}, 137 S. Ct. at 1763 (“We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’” (quoting \textit{Street v. New York}, 394 U.S. 576, 592 (1969))); \textit{Snyder}, 562 U.S. at 458 (“Such speech cannot be restricted simply because it is upsetting or arouses contempt.”); \textit{Hurley}, 515 U.S. at 574 (“[T]he point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”); \textit{Johnson}, 491 U.S. at 414 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

\textsuperscript{76} NeJaime & Siegel, \textit{supra} note 6, at 2576.
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refusal.\textsuperscript{77} This impermissibly singles out religious speakers who affirm traditional sexual moral norms for disfavored status. The viewpoint-neutrality violation here is even more egregious because it specially targets religious groups \textit{because} those groups are politically engaged in culture-wide disputes about the morality of abortion and same-sex marriage.\textsuperscript{78} Professors NeJaime

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\textsuperscript{77} See supra note 69; see also Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (citation omitted)); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 385 (1992) ("We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses . . . .").

\textsuperscript{78} Professors NeJaime and Siegel place significant emphasis on the fact that many religious objectors to same-sex marriage and abortion are engaged in a broader politically active community. See NeJaime & Siegel, supra note 6, at 2542–45 (noting with concern that “complicity-based conscience claims are asserted in society-wide conflicts by mobilized groups and individuals acting in coalitions that reach across religious denominational lines”). They assert that dignitary harms are especially pernicious when such “a mass movement amplifies [the refusal’s] power to demean.” Id. at 2578. In other words, Professors NeJaime and Siegel contend, “Because these conscientious objectors engage in a political argument, they lose their right to conscientious objection.” See Laycock, supra note 43, at 371 (summarizing their view); see also Girgis, supra note 65, at 402 (“The implication is clear: Officials should discount claims when granting them might empower believers to push for their views, or even change laws they oppose.”).

This is preposterous. It also betrays a desperation to “lock-in” the newly prevailing cultural orthodoxy on contested moral issues. As Laycock put it: “Religious conservatives are

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and Siegel would likely have little objection to an “Orthodox Jew with a wholesale grocery business [who] refuses to stock or sell nonkosher items” in violation of local ordinances because “he does not want to tempt or assist any other Jew to consume the nonkosher items.”

Even though this is a complicity-based objection, it does not implicate a “national political battle over nonkosher food” and Professors NeJaime and Siegel would likely not be concerned about the “social meanings” the shopkeeper communicates to customers who are “harmed or inconvenienced.” Their argument depends (at least in part) on the socio-political context of religious accommodations, which is currently concentrated on conflicts with the sexual revolution.

Religious actors are free to express tenets of their faith that either explicitly or implicitly tell non-members that they are sinning or will suffer damnation. Yet the constitutionally entitled to argue for their views on the regulation of sex . . . . And their exercise of that right is not a ground for forfeiting other rights they may have, including their right to religious exemptions . . . . Religious conservatives do not forfeit their right to conscientious objection by making political arguments about the laws they object to, and they do not forfeit their right to make political arguments by invoking their right to conscientious objection.” Laycock, supra note 43, at 371–72.

79 Laycock, supra note 43, at 382.
80 Id. Laycock observes that this hypothetical also demonstrates that “[c]omplicity is irrelevant to Professors NeJaime and Siegel’s argument—unless they mean for readers to assume that complicity claims are a lesser kind of claim, less deserving of protection.” Id. at 382–83.
81 See Girgis, supra note 65, at 406 (“Religious freedom includes nothing if not the rights to worship, proselytize, and convert—forms of conduct (and speech) that can express the conviction that outsiders are wrong. Perhaps not just wrong, but deluded about matters of cosmic importance around which they have
law does not prohibit these more straightforward sources of dignitary injury. It would be perverse to contend that directly saying, “You are a murderer!” is protected speech, but that the speaker should be penalized for indirectly communicating that same “social meaning” through her refusal of services. The notion that religious accommodations should be curtailed to shelter third parties from messages about sin they do not like is truly remarkable for its audacity.

**B. Harms to Religious Objectors**

There is serious reason to doubt the model of third-party harm that Professors NeJaime and Siegel propose. But assuming material and dignitary harms should be considered in complicity cases, how should courts evaluate the harms to third parties as compared to the harms to the religious objectors themselves? To gather a sense of the true social cost of accommodation versus non-accommodation, the potential material and dignitary harms imposed on religious objectors must also be considered.

If complicity-based accommodations were to be significantly weakened or withdrawn, it is improbable that sincere religious objectors would continue to engage in business that makes them complicit with what they ordered their lives—even damnably wrong.” (footnote omitted)).

82 NeJaime & Siegel, supra note 6, at 2576.

83 See id. at 2586 (“Are there ways to accommodate religious persons without giving legal sanction to their view that other law-abiding citizens are sinning? If the government grants an accommodation, is the accommodation structured to block or amplify dissemination of religious claims about the sins of other citizens?”).
believe to be sinful. In the long run, sincere religious objectors might leave an entire industry altogether. In the short term, religious objectors will be subjected to catastrophic fines and penalties, as has been the case when RFRA-style protections are unavailing. As will be seen, the material and dignitary harms imposed on religious objectors would be significant, both in scope and magnitude, if RFRA accommodations were diminished or eliminated in complicity cases.

1. Material Harms

When RFRA protections are unavailable or denied, religious objectors commonly face grave consequences for refusing to provide goods or services in situations they believe would make them complicit with

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84 Cases are plentiful in which religious objectors choose to close their businesses rather than operate in a manner contrary to their convictions. See infra notes 85–97 and accompanying text; see also Epstein, supra note 68, at 36 (“The religious organizations only ask that people, for a limited subset of services, go down the block to another business that is happy to serve them. The human rights proponents ask people to give up their religious beliefs or go out of business entirely.”).
sin. Florists, 85 bakers, 86 wedding photographers, 87 and other artistic professionals 88 who object to participating

85 See, e.g., State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017). Baronelle Stuzmann, the elderly owner of Arlene’s Flowers in Richland, Washington, declined to provide wedding flower arrangements for a longtime customer’s same-sex wedding. Id. at 549. As a result, Stuzmann was found personally liable for violating Washington’s law against discrimination and Consumer Protection Act. Id. at 550. The Washington Supreme Court affirmed the judgment ordering Stuzmann to pay monetary damages, attorneys’ fees, and costs. Id. at 568. In a media statement, Stuzmann’s lawyers alleged that the judgment threatens “not only her business, but also her family’s savings, retirement funds, and home.” Washington Floral Artist to Ask US Supreme Court to Protect Her Freedom, ALLIANCE DEFENDING FREEDOM (Feb. 16, 2017), http://www.adfmedia.org/News/PRDetail/8608 [https://perma.cc/4ZLB-N7XP].

Although the State of Washington has a religious freedom clause in its constitution, it has no RFRA statute. WASH. CONST., art. I, § 11; see Hunter Schwarz, 19 States that have ‘Religious Freedom’ Laws Like Indiana’s that No One is Boycotting, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/03/27/19-states-that-have-religious-freedom-laws-like-indianas-that-no-one-is-boycotting/ [https://perma.cc/QKP6-XHQL].

86 See, e.g., Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), cert. denied, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 137 S. Ct. 2290 (2017). A same-sex couple brought complaint against the proprietor of Masterpiece Cakeshop, Jack Phillips, for violating Colorado’s Anti-Discrimination Act (CADA) when he declined to bake a cake for their wedding ceremony. Id. at 277. Phillips was found guilty and ordered to re-educate his staff and amend his company policies to comply with CADA to avoid financial penalties. Id. Masterpiece Cakeshop no longer offers wedding cakes. See Bakery Will Stop Making Wedding Cakes After Losing Discrimination Case, CBS DENVER (May 30, 2014), http://denver.cbslocal.com/2014/05/30/bakery-will-stop-making-wedding-cakes-after-losing-discrimination-case/
in same-sex ceremonies frequently face catastrophic fines and even potential jail time, which threatens their livelihoods and well-being. Owners of small bed-and-

[https://perma.cc/7423-AFXE]. Although the State of Colorado has a religious freedom clause in its constitution, it has no RFRA statute. See COLO. CONST. art. II, § 4; Schwarz, supra note 85.

For the case of Sweet Cakes by Melissa, see infra notes 94–98 and accompanying text.

87 See, e.g., Elane Photography, L.L.C. v. Willock, 284 P.3d 428 (N.M. App. 2012). When Jonathan and Elaine Huguenin, the owners of Elane Photography, declined to photograph Vanessa Willock’s same-sex commitment ceremony, Willock filed a complaint with the New Mexico Human Rights Commission. Id. at 433. An administrative hearing found Elane Photography guilty of violating the New Mexico Human Rights Act and awarded $6,637.94 in attorneys’ fees to Willock. See id. The New Mexico Supreme Court affirmed the judgment. Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013). In a separate concurrence, Justice Bosson wrote that although the Huguenins “now are compelled by law to compromise the very religious beliefs that inspire their lives,” this sacrifice “is the price of citizenship.” Id. at 79, 80 (Bosson, J., concurring).

88 Joanna Duka and Breanna Koski, the owners of a Phoenix-based art studio that specializes in lettering and calligraphy for wedding invitations, have appealed the denial of a pre-enforcement challenge against a local ordinance that requires them to provide services to same-sex weddings and prevents them from communicating their faith-based reasons for celebrating marriages between one man and one woman. See Brief for Appellant at 1–2, Brush & Nib Studio v. City of Phoenix, No. CV2016-052251, 2017 WL 1113222 (Ariz. Ct. App. Mar. 8, 2017). Violation of the ordinance carries penalties of up to $2,500 in fines and six months in jail. See PHX., ARIZ., CODE §§ 1-5, 18-4, 18-7 (2010); see also Artists to Appeals Court: Halt Phoenix Ordinance that Punishes Artistic Freedom with Jail Time, ALLIANCE DEFENDING FREEDOM (Mar. 9, 2017), http://www.adfmedia.org/News/PRDetail/10037 [https://perma.cc/T9VE-J8HB].
breakfast establishments and wedding venue providers are often subjected to the same fate.


In 2016, an administrative law judge ordered the Walders to pay a total of $80,000 in “emotional distress” damages and attorneys’ fees for making a same-sex couple feel “embarrassed and humiliated.” Id. The judge even “ordered the B&B to offer the Wathens access to the facility, within one year, for an event celebrating their civil union.” Id. The judgment is being appealed. See Will Brumleve, B&B Owner Taking Appeal to Court, Foregoing IHRC Hearing, FORD CTY. REC. (Dec. 26, 2016), http://www.paxtonrecord.net/news/courts-police-and-fire/2016-12-26/bb-owner-taking-appeal-court-foregoing-ihrc-hearing [https://perma.cc/V4GL-WF6H].


In 2011, a lesbian couple successfully sued the Catholic owners of the Wildflower Inn in Vermont for declining to host their same-sex reception. See Katie Zezima, Couple Sues a Vermont Inn for Rejecting Gay Wedding, N.Y. TIMES (July 19,
Pharmacists and other health care professionals who decline to provide birth control they believe to be abortifacient can also be confronted with hefty penalties.91 Both for-profit and non-profit organizations


Robert and Cynthia Gifford, the residents of a New York farm that also serves as a wedding venue, were fined $13,000 in a similar case in 2014. See Kirsten Andersen, Catholic Couple Fined $13,000 for Refusing to Host Same-Sex ‘Wedding’ at Their Farm, LIFESITENEWS (Aug. 20, 2014), https://www.lifesitenews.com/news/catholic-couple-fined-13000-for-refusing-to-host-same-sex-wedding-at-their [https://perma.cc/F9SL-D89F]. The Giffords ultimately decided not to appeal the ruling and have stopped using the farm for wedding ceremonies. See Valerie Richardson, New York Farm Owners Give up Legal Fight after Being Fined $13,000 for Refusing to Host Gay Wedding, WASH. TIMES (Feb. 23, 2016), http://www.washingtontimes.com/news/2016/feb/23/robert-cynthia-giffords-give-legal-fight-over-same/ [https://perma.cc/F9SL-D89F].

91 See Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1072 (9th Cir. 2015), cert. denied, 136 S. Ct. 2433 (2016). In 2007, the Washington State Pharmacy Board passed regulations eliminating conscience-based referrals and requiring pharmacies to carry “morning-after pills” Plan B and ella. Id. at 1072. Failure to comply with the regulations may result in “discipline or other enforcement actions.” WASH. ADMIN. CODE § 246-869-010 (2007). The Storman family, which owns Ralph’s Thriftway pharmacy, and two pharmacists objected to the regulations because of their belief that “dispensing these drugs
may suffer when complicity-based religious objections are not respected.92 Perhaps most radically of all, ‘constitutes direct participation in the destruction of human life.’” Stormans, 794 F.3d at 1073 n.3. The trial court found that the State’s regulations were designed to target religious health care providers. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 987 (W.D. Wash. 2012), rev’d sub nom. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015). Nevertheless, the Ninth Circuit denied the plaintiffs’ claims and held that the regulations did “not infringe a fundamental right.” Stormans, 794 F.3d 1064. at 1088.

Over the objection of Chief Justice Roberts and Justices Alito and Thomas, the Supreme Court denied review. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016). Justice Alito observed that Washington’s regulations “are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications.” Id. at 2433 (Alito, J., dissenting from denial of certiorari). Anticipating the effect of the regulations, he suggested that Washington “would rather have no pharmacy than one that doesn’t toe the line on abortifacient emergency contraceptives.” Id. at 2440. Marveling at the policy’s “hostility toward religious objections” and the Court’s failure to review the case, Justice Alito warned, “If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.” Id. at 2433.

92 See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76 (2014). Hobby Lobby, Conestoga Wood, and Mardel faced crippling fines for non-compliance with the Department of Health and Human Services (HHS) regulations about contraceptive provision. The Court detailed the various costs of non-compliance for Hobby Lobby:

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. For Hobby Lobby, the bill could amount to $1.3
Professors NeJaime and Siegel suggest that religious leaders—including priests, pastors, imams, and rabbis—

million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

Id. at 2275–76 (citation omitted). In addition to these for-profit examples, consider the non-profit petitioners in Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (per curiam). The Roman Catholic Bishop of Pittsburgh, Priests for Life, the Roman Catholic Archbishop of Washington, East Texas Baptist University, the Little Sisters of the Poor, Southern Nazarene University, and Geneva College were among the organizations that challenged the Department’s contraceptive mandate on RFRA grounds. Id. Organizations that fail to comply with the contraceptive mandate or obtain an exemption would be subject to a daily fine of $100 per employee. See Sarah Torre, Religious Liberty at the Supreme Court: Little Sisters of the Poor Take on Obamacare Mandate, HERITAGE FOUND. (Mar. 22, 2016), http://www.heritage.org/religious-liberty/report/religious-liberty-the-supreme-court-little-sisters-the-poor-take-obamacare [https://perma.cc/M5V7-U9ZA].

If unable to obtain an exemption, the Little Sisters of the Poor could be fined “up to $70 million a year” for noncompliance. Id. Catholic Charities in Pittsburgh, which has a total operating budget of $10 million, would face between “$2 million to $4 million a year” in federal fines. See Brian Bowling, Bishops Zubik, Persico Say They Can’t Cooperate with Health Care Mandate, TRIBLIVE (Nov. 12, 2013), http://triblive.com/news/adminpage/5054656-74/mandate-catholic-coverage [https://perma.cc/8ZVB-XYG4]. California’s tiny Thomas Aquinas College “faces fines of up to $2.8 million a year if it does not comply with the mandate.” Kurt Jensen, Ultimate Relief from Mandate May Lie Beyond the Courts, Say Plaintiffs, CATH. NEWS SERV. (Mar. 23, 2016), http://www.catholicnews.com/services/englishnews/2016/ultimate-relief-from-mandate-may-lie-beyond-the-courts-say-plaintiffs [https://perma.cc/8ZVB-XYG4].
should have no choice but to solemnize same-sex ceremonies.⁹³

Among the many penalties imposed on religious objectors in complicity cases, one particularly draconian instance stands out: In 2013, Aaron and Melissa Klein, the proprietors of a small Oregon bakery called Sweet Cakes by Melissa, declined to bake a cake for a same-sex wedding ceremony.⁹⁴ When the same-sex couple filed a complaint, Oregon Labor Commissioner Brad Avakian ordered the Kleins to pay $135,000 in damages to compensate the couple for “emotional, mental and physical suffering” related to the refusal.⁹⁵ Although the judgment is still being appealed, the massive penalty and their vulnerability to future litigation forced the Kleins to close their bakery in October 2016.⁹⁶ “We lost our business,” Melissa Klein said.⁹⁷ “You work so hard to build something up, and something you’ve poured your

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⁹³ See NeJaime & Siegel, supra note 6, at 2561 (“Many states that allow same-sex couples to marry have enacted legislation making clear that religious denominations and clergy have no obligation to solemnize a same-sex marriage.”); cf. Complaint at 2, Knapp v. City of Coeur d’Alene, 172 F. Supp. 3d 1118 (D. Idaho 2016) (No. 2:14-CV-00441-REB) (describing the plight of Christian ministers at a wedding chapel who faced up to 180 days in jail and up to $1,000 in fines for each day they refused to perform same-sex ceremonies in violation of a local nondiscrimination ordinance).

⁹⁴ See In re Melissa Elaine Klein, Nos. 44-14, 45-14, 2015 WL 4868796, at *3 (OR BOLI July 2, 2015).

⁹⁵ Id. at *23.


⁹⁷ Id.
heart into and was your passion, to lose that has been devastating for me."

These heavy-handed fines and penalties ultimately drive religious objectors out of their chosen service, trade, or industry. In addition to the economic harms imposed on the objectors themselves, the vacuum created imposes material harms on third parties—particularly foster children, victims of human trafficking, the elderly poor, and all those who depend on religious hospitals and healthcare providers. The withdrawal of faith-based adoption services from states where “anti-discrimination” legislation would force organizations like Catholic Charities to place children with adoptive same-sex couples, for instance, has left a gaping vacuum that harms thousands of children who languish in the foster care system. A member of the U.S. Commission on

98 Id.

In the two decades before Catholic Charities of Boston ended its adoption program, it helped place at least 720 children in permanent adoptive homes. See Archdiocese of Boston, Catholic Charities of Boston To Discontinue Adoption Services (Mar. 10, 2006), http://www.bostoncatholic.org/uploadedFiles/News_releases_2006_statement060310-1.pdf; see also U.S. Conference of Catholic Bishops, Discrimination Against Catholic Adoption Services (2016), http://www.usccb.org/issues-and-action/religious-liberty/upload/Adoption-Services-Fact-Sheet-2016.pdf ("Catholic Charities of Boston, which had been one of the nation’s oldest adoption agencies,
Civil Rights observed with concern in 2016: “It is possible, perhaps even probable, that in the near future there will be no orthodox Christian organizations partnering with the government to provide adoption and foster care services in the United States.”

Forcing religious-affiliated organizations, such as Christian colleges, to provide health insurance plans that include allegedly abortifacient forms of birth control led some institutions to end health insurance coverage for their students and employees altogether. If forced to faced a very difficult choice: violate its conscience, or close its doors.”

In 2011, Illinois passed civil union legislation that, in conjunction with an existing “anti-discrimination” law, required faith-based foster care and adoption service providers to place children with cohabiting and same-sex couples. See Manya A. Brachear, 3 Dioceses Drop Foster Care Lawsuit, CHI. TRIB. (Nov. 15, 2011), http://articles.chicagotribune.com/2011-11-15/news/ct-met-catholic-charities-foster-care-20111115_1_civil-unions-act-catholic-charities-religious-freedom-protection. As a result, Catholic Charities, the Evangelical Child and Family Agency, and other faith-based adoption service providers had to drop the adoption services of more than 2,000 children. See Anderson & Torre, supra. Even when these children’s cases are transferred to other agencies, the ostracism of conscientious faith-based providers burdens the foster care system. Id.


102 See Wheaton Coll. v. Burwell, 791 F.3d 792, 793 (7th Cir. 2015). When the Seventh Circuit refused to issue a preliminary injunction against the contraceptive mandate, Wheaton College chose to drop its health insurance plan altogether rather than violate its religious principles or pay substantial fines. See Manya Brachear Pashman, Wheaton College Ends Coverage amid Fight Against Birth Control Mandate, CHI. TRIB. (July 29, 2015), http://www.chicagotribune.com/news/local/
choose between their charitable work and their religious beliefs, the Little Sisters of the Poor would be compelled to stop serving the 13,000 elderly poor they care for on a regular basis.\footnote{See Who Are the Little Sisters of the Poor?, THE LITTLE SISTERS OF THE POOR, http://thelittlesistersofthepoor.com/who-are-the-little-sisters-of-the-poor-1/#who-are-the-little-sisters-of-the-poor [https://perma.cc/Y5L7-XLS8] (last visited Dec. 20, 2017) (“The Little Sisters serve more than 13,000 elderly poor in 31 countries around the world. The first home opened in America in 1868 and now there are nearly 30 homes in the U.S. where the elderly and dying are cared for with love and dignity until God calls them home.”); see also Loraine Maguire, Obamacare Attacks Religious Liberty: Little Sisters Mother Provincial, USA TODAY (Mar. 22, 2016), https://www.usatoday.com/story/opinion/2016/03/22/little-sisters-poor-obamacare-hhs-mandate-supreme-court-religious-liberty-column/82076170/ [https://perma.cc/BKS3-ES3Q] (“Most of the people who live in my residence have nowhere else to go.”).}

Likewise, victims of human trafficking are harmed when religious groups’ anti-trafficking work is defunded simply because those groups do not provide or refer for abortion, contraception, or sterilization services.\footnote{See Chris Boyette, Federal Program Denies Grant to Catholic Group to Help Sex Trafficking Victims, CNN (Dec. 6, 2011), http://religion.blogs.cnn.com/2011/12/06/federal-program-denies-grant-to-catholic-group-to-help-sex-trafficking-victims/ (reporting on the defunding of the United States Conference of Catholic Bishops’ Migrant and Refugee Service). The offending language in the USCCB’s contract read:

As we are a Catholic organization, we need to ensure that our victims services funds are not used to refer or fund activities that would be contrary to our moral convictions and religious beliefs. . . . Specifically,}

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complicity-based objections to participating in such services ultimately harms “thousands of victims” of human trafficking.  

Finally, if the Church Amendment and other so-called “healthcare refusal” laws—which protect the conscience rights of health care providers to refuse to perform or assist with abortions—are withdrawn or diminished as Professors NeJaime and Siegel propose, many faith-based hospitals and physicians would exit the healthcare industry rather than violate their beliefs. This would represent a massive disruption of American healthcare delivery since “one in six patients in the United States is treated by a Catholic hospital” and

subcontractors could not provide or refer for abortion services or contraceptive materials for our clients pursuant to this contract.

Kevin Bales & Ron Soodalter, The Slave Next Door 229 (1st ed. 2009) (alteration in original) (quoting the terms of the contract). Representative Chris Smith, the author of the Trafficking Victims Protection Act of 2000, remarked, “If you are a Catholic, or other faith-based [non-governmental organization], or a secular organization of conscience, there is now clear proof that your grant application will not be considered under a fair, impartial and totally transparent process . . . .” See Boyette, supra.

105 See Boyette, supra note 104; see also Pete Winn, HHS Withholds Grant from U.S. Conference of Catholic Bishops Apparently Because Church Opposes Abortion, CATH. NEWS SERV. (Oct. 24, 2011), http://www.cnsnews.com/news/article/hhs-withholds-grant-us-conference-catholic-bishops-apparently-because-church-opposes (noting that federal grants to the USCCB’s Migrant and Relief Services had helped “more than 2,700 victims” of human trafficking).

106 See NeJaime & Siegel, supra note 6, at 2566.

“[r]eligious hospitals represent nearly a fifth of the healthcare delivery system in the United States.” The extent to which Professors NeJaime and Siegel successfully demonstrate the United States’ dependence on faith-based healthcare is exactly the extent to which they reveal the devastation that would result if Catholic and other religious healthcare providers were forced to close their doors. Millions of Americans would experience reduced access and greater difficulty in obtaining life-saving treatment and other medical services.

2. Dignitary Harms

Professors NeJaime and Siegel assert that providing exemptions for complicity-based claims “has potential to harm those whom the claimants view as sinning.” But requiring religious actors to either violate their beliefs or close their businesses imposes dignitary harms on those religious objectors. Unlike the existing legal regime—which offers latitude for both individuals seeking services and religious objectors to live in accordance with their beliefs—weakening RFRA protections would marginalize religious dissenters’ views


110 See NeJaime & Siegel, supra note 6, at 2516.
with the force of law. The “social meaning” of revoking RFRA protections for pharmacists who do not wish to dispense abortifacients or adoption agencies which do not wish to place children with same-sex couples is clear: traditional views on contested sexual norms cannot be acted upon in public life. It sends a message that individuals with religiously motivated beliefs about sexual morality are not welcome in certain industries. (“No Evangelicals need apply.”) Indeed, if an individual does act upon her religious convictions and integrates her faith and work, the law will not shield her and may actually impose penalties for her divergence from the new political orthodoxy on sexual morality.

Such a legal regime imposes a far greater stigma on religious believers than does the status quo on third parties seeking services. This is for two reasons. First, because the force of law would be used to actively penalize complicity-based refusals, this legal regime would be more coercive. Without robust RFRA protections, the law would directly disfavor religious individuals who hold traditional views by making their refusals illegal. The status quo minimizes coercion by permitting the religious actor to refuse or not, and by allowing the third party seeking services to select any other willing provider. Second, weakening or eliminating accommodations for complicity-based refusals has a pedagogical effect that stigmatizes religious actors who hold traditional views on sexual morality. Rather than remain neutral as between the religious objector and the third party and allowing both sides to retain maximal freedom to organize their affairs, such a rule would explicitly disfavor the religious objector.111 It would treat the dignitary interests of the third party as more worthy

111 See supra note 65.
of legal solicitude. The “social meaning” of this favoritism would communicate that the religious objector has sinned by acting on her archaic moral beliefs. It would convey, in short, that she is a bigot.\footnote{It is commonly asserted that protections for religious freedom shelter bigotry. See, e.g., Valerie Tarico, Right-Wing Christianity Teaches Bigotry: The Ugly Roots of Indiana’s New Anti-Gay Law, SALON (Apr. 4, 2015), http://www.salon.com/2015/04/04/right_wing_christianity_teaches_bigotry_the_ugly_roots_of_indianas_new_anti_gay_law_partner/ [https://perma.cc/BU6R-H5QZ] (describing a state RFRA law as motivated by “bigotry and homophobia”). Curtailing RFRA protections because of the “dignitary harms” imposed on third parties grants these accusations legal imprimatur.}

Thus, using Professors NeJaime and Siegel’s reasoning and definition of dignitary harm, the religious objector is harmed at least as much (if not more) when accommodations are denied than the third party seeking services when accommodations are permitted.

### III. Accommodations Promote Social Peace

Professors NeJaime and Siegel argue that accommodations for complicity-based religious objections will only prolong and intensify conflict over culture war issues.\footnote{See NeJaime & Siegel, supra note 6, at 2553–63 (“[A]ccommodating religious exemption claims may not settle conflict, as many contend.”).} They argue that the “social logic” of “cross-denominational mobilization”\footnote{Id. at 2544.} means politically active religious traditionalists will try “to enforce traditional morality in the law of abortion and marriage and to seek conscience-based exemptions from laws that depart from traditional morality.”\footnote{Id. at 2548.}

Having lost the primary battle, traditionalists now use complicity-based claims as “a way
to continue conflict over community-wide norms in a new form.”116 Widespread healthcare refusal laws, for example, can be used to impede access to abortion117—especially in areas dominated by religiously affiliated healthcare providers.118 Conscience protections for wedding vendors could be used “to forestall or restrict an antidiscrimination regime that includes sexual orientation.”119 Thus, religious accommodations perpetuate culture war rivalries that Professors NeJaime and Siegel would rather put an end to.

Even if Professors NeJaime and Siegel are right that religious exemptions perpetuate culture war conflicts, there is no reasonable or equitable alternative. There is reason for hope, however, that accommodations can promote social peace rather than intensify conflict.

A. No Reasonable Alternatives to Accommodation Exist

No matter how much Professors NeJaime and Siegel wish that the culture wars would disappear if religious accommodations were curtailed, the reality is that crushing the “other side” will not work.120 This is

116 Id. at 2553.
117 Id. at 2555.
118 Id. at 2557.
119 Id. at 2564.
120 See generally Girgis, supra note 65, at 413. Although NeJaime and Siegel may not be motivated by political vindictiveness, there is an undercurrent of victor’s justice present among opponents of religious accommodations. This attitude is best reflected by Professor Mark Tushnet, who wrote in a revealing and now infamous blog post:

The culture wars are over; they lost, we won. . . For liberals, the question now is how to deal with the losers in the culture wars. That’s
mostly a question of tactics. My own judgment is that taking a hard line (“You lost, live with it”) is better than trying to accommodate the losers . . . . Trying to be nice to the losers didn’t work well after the Civil War, nor after Brown. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.) I should note that LGBT activists in particular seem to have settled on the hard-line approach, while some liberal academics defend more accommodating approaches . . . . Of course all bets are off if Donald Trump becomes President.


In a later clarification blog post, Tushnet noted that reactions to his post claimed that he believed religious objectors, especially in complicity cases, should be treated like defeated Confederates and Nazis:

In the context I was writing about, for example, “taking a hard line” means opposing on both policy and constitutional grounds free-standing so-called “religious liberty” laws. . . . [T]he exemptions that might satisfy “our side” would have to be pretty narrow [including] . . . some sort of constraint on the exemptions’ availability in cases of claimed “complicity.” (I don’t know whether even these would be acceptable to activists on “our side.”) . . . [L]ike the Japanese soldiers who were stranded on islands in the Pacific and didn't know the war was over, so too many people on their side haven’t yet come to terms with the fact that they lost the culture wars.

because the clash runs deeper than the surface legal conflict between free exercise and nondiscrimination: it is a “conflict between two worldviews, both held with the intensity generally associated with religious belief.”\textsuperscript{121} The most fundamental convictions about the nature of God, man, and morality are at stake. A take-no-prisoners legal approach is unlikely to change the deeply held beliefs of religious traditionalists who, as of yet, still constitute a sizable nationwide minority. This is especially true while conscience protections in complicity cases still enjoy substantial support.\textsuperscript{122} Subjecting sympathetic religious objectors to severe penalties and

\textsuperscript{121} See Statement of Comm’r Peter Kirsanow, supra note 101, at 43.

\textsuperscript{122} See P\textsc{ew R\textsc{es. Ctr.}, Where the P\textsc{ublic S\textsc{tands on R\textsc{eligious L\textsc{iberty} vs. N\textsc{ondiscrimination}}}} 3 (2016) (finding that 30\% of U.S. adults believe “[e]mployers who have a religious objection to the use of birth control should be . . . able to refuse to provide it in health insurance plans for their employees,” and that 48\% believe “[b]usinesses that provide wedding services should be . . . able to refuse to provide those services to same-sex couples if the business owner has religious objections to homosexuality”); National Poll Shows Majority Support Healthcare Conscience Rights, Conscience Law, CHRISTIAN MED. ASS’N (May 2011), http://www.freedom2care.org/docLib/200905011_Pollingsummaryhandout.pdf [https://perma.cc/6D3Z-FS3T] (finding that 77\% of U.S. adults believe healthcare professionals should not be “forced to participate in procedures or practices to which they have moral objections,” and that 50\% support “a law under which federal agencies and other government bodies that receive federal funds could not discriminate against hospitals and health care professionals who decline to participate in abortions.”).
jail time may alienate those who would otherwise support socially liberal policies on abortion and LGBT issues.\textsuperscript{123}

Court rulings which are perceived to crush religious dissenters may unintentionally revive the specter of persecution (perhaps plausibly), leading disfavored religious objectors to cling more intensely to their beliefs.\textsuperscript{124} A hard line approach would socially exclude and marginalize religious objectors, driving many people of faith out of entire industries and segments of society.\textsuperscript{125} Indeed, activists demanding the

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\textsuperscript{123} Pew Res. Ctr, \textit{supra} note 122, at 5. (finding that 22\% of U.S. adults sympathized with both sides of the contraceptive coverage issue, and that 18\% of U.S. adults sympathized with both sides of the wedding vendor issue).


\textsuperscript{125} See Statement of Comm’r Peter Kirsanow, \textit{supra} note 101, at 111 (“People who live in accordance with their unfashionable religious beliefs will be unable to work in many professions. When a baker or a photographer or a CEO is forced to participate in activities that offend their religious beliefs, what hope is there for a doctor, a counselor, a lawyer? Traditional believers will have very few careers where they can both make a living and live according to their faith. It is an unofficial form of the legal disabilities imposed on English Catholics following the Glorious Revolution.”); cf. Sohrab Ahmari, \textit{Sweden Blacklists an Antiabortion Midwife}, WALL ST. J. (Apr. 10, 2017,
withdrawal of religious liberty protections may themselves be engaged in a form of social hostility toward religious groups that adhere to traditional moral beliefs. If “pluralist democracy is dynamic and fragile,” then maintaining it “depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains.” This is a distinct danger because pluralistic democracy “needs emerging groups to commit to its processes just as much as it needs established groups to stick to those processes.”

Removing accommodations and imposing stiff penalties on religious objectors may also entrench resistance to ascendant sexual mores and foment social backlash. When courts aggressively implement a social agenda, it can be interpreted that the courts engage opponents more intensely than supporters, which could lead to political exploitation and widespread resistance to

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126 See, e.g., Tushnet, Abandoning Defensive Crouch, supra note 120.  
128 Id. Eskridge adds, “Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them . . . or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion.” Id. at 1293.  
129 Id. at 1294.
that agenda.\textsuperscript{130} Widespread support for conscience exceptions in complicity cases, the deeply held nature of religious belief, and the backing of a major political party increases the likelihood of political backlash. The elimination of accommodations in complicity cases is unlikely to dampen the flame of cultural contests. Not only are these conflicts inevitable, they may even be desirable when properly channeled.\textsuperscript{131}

Since “total war” tactics are deleterious to social cohesion, living in a sharply divided pluralistic society requires both accommodation of religious believers and respect for those who do not share their moralistic views. Professors NeJaime and Siegel’s explanation that complicity claims are unique in their “social logic” is inadequate. Even if religious accommodations are sometimes used “to enforce traditional norms against those who do not share their beliefs”\textsuperscript{132} rather than to “preserv[e] space for distinctive religious beliefs and

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\textsuperscript{131} See U.S. COMM’N ON CIVIL RIGHTS, supra note 101, at 214 (testimony of Marc O. DeGirolami) (“Conflict is an essential and deep feature of our society—both unavoidable and actually desirable, since its source is our different backgrounds, different outlooks, and different memories.”).
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\textsuperscript{132} NeJaime & Siegel, supra note 6, at 2591.
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practices,” this use is no more injurious to pluralism than the proposal for which Professors NeJaime and Siegel advocate. On balance, offering robust protections for religious objectors is more likely to contribute to a diverse public square.

Rather than viewing social conflict as “a barely contained threat to individual rights and peaceful coexistence” and “evincing skepticism that shared life is at all possible between groups locked in intractable conflict,” skeptics of religious accommodations should embrace what Professor John Inazu calls, confident pluralism. This approach calls both religious believers and skeptics alike to acknowledge that “shared existence is not only possible, but also necessary.” According to Inazu, both sides should accept a constitutional commitment to both inclusion (that we are continually reshaping the boundaries of our political community) and dissent (that even as we work to extend and

133 Id. at 2590.
135 Girgis, supra note 65, at 413.
136 See id. (suggesting that the “honest Rousseauian fear that “[i]t is impossible to live at peace with those whom we regard as damned” motivates the quest to retract religious accommodations (quoting JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 122 (Maurice Cranston trans., Penguin ed., 1968) (1762)).
137 JOHN D. INAZU, CONFIDENT PLURALISM (2016).
138 Id. at 6. Professor Inazu adds that confident pluralism “does not suppress or ignore conflict—it invites it.” Id. at 7.
139 Id. at 15–16.
renegotiate these boundaries, we recognize the freedom of citizens in the voluntary groups of civil society to differ from established norms).\textsuperscript{140} Although neither of these principles are absolute, they can help foster a modest agreement on the individual rights of both parties. Rather than seeking to impose their own orthodoxy, both sides must allow room for mutual toleration.\textsuperscript{141}

Confident pluralism also proposes a civic aspiration of “living speech,” which prioritizes dialogue and persuasion over combativeness and coercion.\textsuperscript{142} Both traditionalists and advocates clamoring for the withdrawal of conscience protections would do well to recall the Court’s advice to the Texans who proscribed flag desecration: “The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.”\textsuperscript{143}

B. Private Ordering and Markets Mitigate Social Conflict

Rather than using the coercive force of law to impose a new orthodoxy on matters of sexual politics, private ordering—guided by principles of confident pluralism\textsuperscript{144}—should be allowed to flourish. Market-

\textsuperscript{140} Id. at 16.

\textsuperscript{141} Ward v. Polite, 667 F.3d 727, 735 (6th Cir. 2012) (“Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination.”).

\textsuperscript{142} INAZU, supra note 137, at 101.

\textsuperscript{143} Texas v. Johnson, 491 U.S. 397, 419 (1989).

\textsuperscript{144} Professor Inazu affirms that “[b]oycotts, strikes, and protests against private actors are in most cases compatible with confident pluralism,” but warns that “[w]hen we engage in these forms of collective action, we should bear in mind the civic aspirations of tolerance, humility, and patience.” See supra note 137, at 115.
based systems, which permit businesses and civil society groups to shape social norms, are preferable to a compulsory legal approach that eliminates accommodations for religious objectors.\textsuperscript{145} Rather than impose a uniform orthodoxy on society about contested moral issues, “subsidiary institutions [should] hav[e] spheres of private ordering that allow them to organically . . . come to their own conclusions about those contested matters.”\textsuperscript{146}

Civic organizations—whether motivated by profit or conviction—have already begun to develop their own approaches to navigating conflicts between religious liberty and issues of gender, sexuality, and reproduction. For example, the popular room-rental service Airbnb recently adopted a policy prohibiting all of its users from discriminating on the basis of “sexual orientation, gender identity, or marital status.”\textsuperscript{147} Airbnb’s policy shapes social norms by excluding many religious traditionalists

\textsuperscript{145} See Adam J. MacLeod, \textit{Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace}, 2016 Mich. St. L. Rev. 643, 672 (2016) (arguing that laws impinging on religious liberty “do not leave space for mediating conflicts between actors within the domains of private ordering. Instead, they turn all important questions into zero-sum contests and raise the stakes even higher”); id. at 679–80 (observing that when civic goods “require cooperation for their realization, legal coercion destroys both the economic and the moral value of those plural practices and institutions of private ordering.”).


from using its service.\textsuperscript{148} But religious traditionalists remain at liberty to use other online room-rental services, or to set up their own service that complies with the dictates of conscience. Ride-hailing services such as Uber and Lyft prohibit both drivers and passengers from discriminating on the basis of “sexual orientation or gender identity.”\textsuperscript{149} If for some reason a religious objector refused to use Uber on that basis, they would remain free to hail a taxi or launch their own ride-hailing service.

Boycotts can serve a similar purpose, so long as they are used to “represent[] minority viewpoints against majoritarian norms” rather than “harness[] majoritarian power to squelch dissenting viewpoints.”\textsuperscript{150} Most


\textsuperscript{150} \textit{See INAZU, supra} note 137, at 107; \textit{see also} Ross Douthat, \textit{The Case of Brendan Eich}, N.Y. TIMES: EVALUATIONS (Apr. 8, 2014), https://nyti.ms/2mpxYAr (“[Although] a healthy pluralism inevitably involves community norms and community policing in some form, I suspect that an elite culture that enforces the new norms on marriage this strictly, and polices its own ranks this rigorously, is likely to find
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consumer boycotts—such as those against Target, Chick-fil-A, and Hobby Lobby\(^{151}\)—“occur in reasonably pluralistic settings.”\(^{152}\) Others forms of collective action, which resemble witch-hunting more than constructive norm-shaping, might violate the principles of pluralism.\(^{153}\)

Instances of market-driven norm-shaping are healthy insofar as they seek to nudge attitudes and behaviors rather than coerce them. If businesses such as Airbnb and Uber can use market power to express their views and influence public opinion (even when doing so imposes material or “dignitary harms” on third parties), why not ChristianMingle when its core religious beliefs

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\(^{152}\) INAZU, supra note 137, at 113.

\(^{153}\) See, e.g., Mary Bowerman, Indiana Pizza Shop that Won’t Cater Gay Weddings to Close, USA TODAY (Apr. 1, 2015), https://www.usatoday.com/story/news/nation-now/2015/04/01/indiana-family-pizzeria-wont-cater-gay-weddings/70813430/ [https://perma.cc/VA7N-3KVS] (describing how journalists baited a small, rural pizza parlor into saying that it would not serve same-sex weddings and how, as a result, the parlor was overwhelmed by threatening messages and forced to close).
are implicated? Why not religious business owners—such as florists, bakers, and pharmacists? By the same principle, civic institutions with religious commitments should be accommodated so that they may set their own codes of conduct when possible. Private ordering can alleviate social tensions when its structures embody “tolerance, humility, and patience” rather than exacerbate division.

Conclusion

Complicity is a long-established concept in our legal tradition. It neither operates differently in the context of religious liberty claims, nor does it deserve the law’s special disfavor. The third-party harm theory exaggerates complicity’s perceived differences from other religious liberty claims and invents its own novel concept of “dignitary harms,” which has never before been countenanced in First Amendment jurisprudence. Even if the third-party harm theory were coherent and cognizable, its current formulation regrettably excludes the material and dignitary harms that would be imposed on religious objectors should accommodations be narrowed or revoked. In other words, “dignitary harm” is a two-edged sword. Eliminating religious accommodations in these situations is unlikely to foster social peace.

155 INAZU, supra note 137, at 83.
Thus, instead of using the coercive force of law to censor expressive conduct and to lock-in the gains of the sexual revolution, market-based systems and private ordering should be allowed to take their course. If we are to have a truly diverse and pluralistic public square, there must be consideration for both religious actors and third parties. That includes robust accommodations for religious objectors in complicity cases. Perhaps most importantly, it includes a posture of humility and mutual respect.
COMMENT

THE ILLUSORY CONSTITUTIONAL PROTECTION OF “NO TRESPASSING” SIGNS IN TENNESSEE

STATE V. CHRISTENSEN, 517 S.W.3D 60 (TENN. 2017).

Rainey Lankford*

In State v. Christensen,1 the Tennessee Supreme Court decided whether police officers violated the defendant’s constitutional right against unreasonable searches and seizures when the officers entered the defendant’s property despite the presence of “No Trespassing” signs. The court ruled that the officers’ entrance did not constitute a violation of the defendant’s constitutional rights.2 Thus, the court upheld the ruling of the Tennessee Court of Criminal Appeals, stating that “No Trespassing” signs, alone, do not prohibit officers

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1 517 S.W.3d 60, 68–69 (Tenn. 2017).

2 Id. at 63–64.
from coming onto the curtilage of a home to conduct a consensual knock-and-talk encounter. Therefore, the ruling by the trial court, finding the defendant guilty, was upheld.³

On August 3, 2013, two narcotics investigators responded to a tip regarding a pseudoephedrine purchase.⁴ The tip eventually led them to the defendant’s home, which had a gravel driveway.⁵ Two “No Trespassing” signs were posted at the entrance to the driveway.⁶ Further, there were no physical obstructions preventing entrance to the driveway.⁷ The defendant came out to meet the investigators as they approached his porch.⁸ When the defendant opened the door, the investigators smelled the distinct odor that comes with the production of methamphetamine.⁹ The officers then spoke to the defendant and asked for consent to search his home.¹⁰ The defendant told the investigators that he had done nothing illegal and would not consent to the search.¹¹ At this point, the investigators determined that, due to the present exigent circumstances (namely the volatile nature of the chemicals used in methamphetamine production), they had to enter the home to investigate further.¹² One investigator forced open the locked door to the home and began searching.¹³ This initial entry led to the discovery of a methamphetamine lab and several firearms.¹⁴

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³ Id. at 79.
⁴ Id. at 64.
⁵ Id. at 65.
⁶ Id. at 67.
⁷ Id. at 64.
⁸ Id. at 65.
⁹ Id.
¹⁰ Id.
¹¹ Id.
¹² Id.
¹³ Id.
¹⁴ Id. at 66.
At trial, the defendant filed a motion to suppress the evidence gathered as a result of the warrantless search of his home, claiming that the presence of a “No Trespassing” sign meant that a warrant was required to enter his property.\footnote{State v. Christensen, No. W2014-00931-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 357, at *2 (Tenn. Crim. App. May 14, 2015).} The defendant’s motion was denied and he was convicted of five separate criminal charges.\footnote{Christensen, 517 S.W.3d at 63.} Later, on direct appeal, the defendant contended that the trial court erred in denying his motion to suppress the evidence found within his home.\footnote{Christensen, 2015 Tenn. Crim. App. LEXIS 357, at *7.} Conducting de novo review, the court of appeals determined that the growing legal consensus was that “the implied invitation of the front door can be revoked but that the revocation must be obvious to the casual visitor who wishes only to contact the residents of a property.”\footnote{Id. at *13 (citing State v. Grice, 767 S.E.2d 312, 319 (N.C. 2015)).} Based on this determination, the court of appeals found the presence of a mere “No Trespassing” sign insufficient to revoke any aforementioned implied invitation.\footnote{Id. at 69.}

On appeal, the Tennessee Supreme Court began its review by affirming the rights enshrined in the federal and state constitutions forbidding warrantless searches of homes and specific Fourth Amendment protections against searches on the curtilage of one’s home.\footnote{Christensen, 517 S.W.3d at 68–69 (citing U.S. CONST. amend. IV; TENN. CONST. art. I, § 7). The court here “assume[d]” without deciding that the driveway was part of the curtilage of the defendant’s home. Id. at 69.} The court pointed out, however, that not every police interaction on the curtilage of one’s home constitutes a search under the Fourth Amendment.\footnote{Id. at 69.} Citing the U.S.
Supreme Court’s ruling in *Florida v. Jardines*, the court recognized the right of police officers to approach the curtilage of a home under “knock-and-talk” rules. It was further established that “knock-and-talk” interactions are not considered searches under the Fourth Amendment; therefore, the question became whether the defendant had revoked this implied invitation to “knock-and-talk.”

The issue of whether “No Trespassing” signs are enough to revoke any implied license to “knock-and-talk” has been the subject of many state and federal cases. However, the majority of states have found that such signs were not enough revoke an implied license to “knock-and-talk.” The court specifically noted *State v. Rigoulot*, which stated that “No Trespassing” signs “cannot reasonably be interpreted to exclude normal, legitimate inquiries.” In order to determine when a “No Trespassing” sign may be reasonably interpreted to forbid “knock-and-talk” situations, the court turned to the Tenth Circuit case of *United States v. Carloss*. The court specifically pointed to a concurring opinion in *Carloss*, in which Chief Judge Tymkovich said that the

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22 *Id.* at 69–70 (quoting *Florida v. Jardines*, 133 S. Ct. 1409, 1415–16 (2013) (holding that while police officers have a license to approach the home and knock, if they are engaging in conduct that is clearly a search, around the curtilage, any such evidence gathered as a result should be suppressed)).
23 *Id.* at 70 (citing *State v. Cothran*, 115 S.W.3d 513, 522 (Tenn. Crim. App. 2003)).
24 *Id.* (citing *Jardines*, 133 S. Ct. at 1417–18).
25 *Id.* at 72 (citing cases).
26 *Id.* at 73 (citing cases).
27 846 P.2d 918, 923 (Idaho Ct. App. 1992) (stating that “No Trespassing” signs are not enough to forbid normal legitimate requests, and that police officers do not violate the Fourth Amendment if they enter the curtilage under these circumstances).
28 *Id.* at 923.
29 818 F.3d 988, 990 (10th Cir. 2016).
legal standard to be applied in these cases should be whether a reasonable person, under a totality of the circumstances, would view a “No Trespassing” sign as something that would place any bearing on one’s ability to go up to the curtilage of the home and knock. The Tennessee Supreme Court adopted this totality of the circumstances standard. In examining the totality of the circumstances in the defendant’s case, the court determined that the simple presence of “No Trespassing” signs did not suffice to deter officers from approaching the curtilage of his home. The court suggested, however, that if the defendant’s driveway had been blocked by a locked gate or a fence, then it would have been more clear to the officers that any license to approach the home had been revoked. No such barrier existed in the defendant’s case. Based on this determination, the court found that the defendant had no expectation of privacy in regards to individuals approaching his home. Thus, the ruling of the trial court was upheld.

The dissent rebuffed the court’s assertion that it might take a locked fence or gate for a citizen to invoke his Fourth Amendment rights. In writing the dissent, Justice Sharon Lee pointed out that the court’s physical barriers standard would leave poorer citizens without the means to invoke their rights. Justice Lee further stated that “No Trespassing” signs clearly state the property owner’s desire to not have visitors. Many other

30 Christensen, 517 S.W.3d at 74–75 (citing Carloss, 818 F.3d at 999–1000).
31 Id. at 75.
32 Id. at 75–76.
33 Id. at 78–79.
34 Id. at 76–77.
35 Id. at 78.
36 Id. at 79.
37 Id. (Lee, J., dissenting).
38 Id.
39 Id. at 80.
jurisdictions have taken such a stance.\textsuperscript{40} One such example is \textit{People v. Scott},\textsuperscript{41} where the New York Court of Appeals declared that physical barriers and/or appropriate signage was enough to make clear that entry was not permitted by the property owner.\textsuperscript{42} However, the dissent also considered the totality of the circumstances standard set forth by the court.\textsuperscript{43} Justice Lee contended that, even under the totality of the circumstances standard, the defendant made it clear that he wanted no visitors.\textsuperscript{44} Justice Lee argued that while the majority claimed it was applying a totality of the circumstances standard, it failed to actually weigh the significance of the signs.\textsuperscript{45} Citing a case from the Maryland Court of Appeals, Justice Lee contended that the presence of two clearly visible “No Trespassing” signs was enough to make it clear to the investigators that no one was welcome to approach the home.\textsuperscript{46} Justice Lee also argued that because the defendant had made clear that no one was welcome on his property, he had a reasonable expectation of privacy on his curtilage, and those expectations were violated by the warrantless intrusion by the investigators.\textsuperscript{47}

\textit{Christensen} will have an effect on homeowners across the state of Tennessee by raising the bar for what revokes the implied invitation for individuals to approach the curtilage of their home and knock. Now, Tennesseans must utilize a physical barrier, such as a locked fence or gate, to put the public on notice that unsolicited visitors are not welcome to approach their home. While this

\textsuperscript{40} See, \textit{e.g.}, \textit{id.} at 80–81 (citing cases).
\textsuperscript{41} 593 N.E.2d 1328, 1338 (N.Y. 1992).
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Christensen}, 517 S.W.3d at 82 (Lee, J., dissenting).
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} (citing Jones v. State, 943 A.2d 1, 12 (Md. Ct. Spec. App. 2008)).
\textsuperscript{47} \textit{Id.} at 83.
ruling follows most other jurisdictions in making physical barriers the standard for revocation of the implied invitation to “knock-and-talk,” it still leaves some questions. One such question is whether such a rule will create a burden on lower income households that wish to invoke their Fourth Amendment rights.\(^48\) It will be important to follow future cases to see if there are any disparities based on income. Another question is how other courts will treat the varying rulings taken by jurisdictions on this issue. While most jurisdictions have adopted the same rule as Tennessee, others have chosen the alternative.\(^49\) Until there is a significant divergence on this issue in the federal courts, however, this area of Fourth Amendment jurisprudence will likely remain one governed by jurisdiction-specific rules.

\[^48\text{ See id. at 79.}\]
\[^49\text{ Id. at 80.}\]