
**MORAL DISAPPROVAL AND THE MEANING, BOUNDARY,
AND ACCOMMODATION OF BIGOTRY**

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INTRODUCTION

The subtitle of Linda McClain's book is "Learning from Conflicts over Marriage and Civil Rights Law."¹ In *Who's the Bigot?*, McClain covers a range of topics and case studies, providing detailed and penetrating historical, legal, social, and conceptual analyses. Others may draw additional lessons. This review focuses on the way in which McClain juxtaposes moral disapproval of desegregation with moral disapproval of homosexuality. This review, in turn, is in two parts. Part I explains how McClain frames this juxtaposition, and Part II explains why this is significant for understanding the meaning, boundary, and even accommodation of bigotry.

I. JUXTAPOSITION

Usually, when we discuss social justice or moral progress, we focus on equality or rights. We consider moral arguments for advancing or furthering the cause of justice. McClain's book is distinctive for breaking from that usual focus. Although McClain does discuss religious and moral arguments in favor of social equality, her narrative novelly focuses on moral *disapproval* of both racial equality and gay equality. In particular, McClain shows how moral disapproval of desegregation and homosexuality has both a public face and a private face. This Part considers these forms of disapproval separately.

A. *Moral Disapproval of Racial Desegregation*

Cases such as *Brown v. Board of Education*² and *Loving v. Virginia*,³ along with civil rights laws such as the Civil Rights Act of 1964,⁴ vindicated the moral principle of desegregation. These cases and laws repudiate and condemn racial segregation. They treat racial desegregation as part of the project of racial justice and equality. We may therefore be more familiar with the moral arguments in favor of desegregation—for instance, with Dr. Martin Luther King Jr.'s defense of desegregation on religious grounds than with Reverend G.T. Gillespie's disapproval of it, which rested on religious and even biblical grounds.

Although McClain outlines the theological case for desegregation, she also outlines the moral disapproval of it—something that we may be likely to forget. McClain quotes historian Peggy Pascoe, who says that "most White Americans somehow managed to forget how fundamental they had once believed these bans [on interracial marriage] to be and . . . to persuade themselves that they, and their government, had always been firmly committed to civil rights and racial

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

² 347 U.S. 483 (1954).

³ 388 U.S. 1 (1967).

⁴ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. § 2000 (2012)).

equality.”⁵ McClain confronts this perhaps forgotten history, when many Americans disapproved of desegregation on moral—and even religious—grounds.⁶ In particular, McClain demonstrates that this moral disapproval took the form of a public and private morality.⁷

1. Public Morality

McClain shows that those who disapproved of desegregation often did so by invoking a “theology of segregation.”⁸ For instance, individuals such as Reverend Gillespie appealed to

several forms of authority to support “the principle of segregation”: “scientific, historical, and Biblical data,” “moral and ethical grounds,” and consistency with the “principles of Christianity and the great traditions of American democracy.”

As for “Biblical data,” Gillespie argues that “the principle of segregation is in harmony with the purpose and will of God as revealed in His Word, and is consistent with the teaching and spirit of Our Lord Jesus Christ.”⁹

McClain excavates arguments such as these that reveal the way in which moral disapproval of desegregation was part of a larger, more comprehensive public morality. She describes this kind of moral disapproval or “segregationist theology” as part of a “civil religion.”¹⁰ This civil religion drew on the idea that “the most successful [civilizations] maintained their racial purity, while those who mixed declined” and that “segregation is in keeping with American history, traditions, and constitutional principles.”¹¹ In turn, these kinds of “religiously infused defenses of segregation illustrate a form of Southern *civil* religion, fusing ‘civil and religious legitimations’ for segregation and the Southern ‘way of life.’”¹²

This moral disapproval drew on a public morality because it drew not just on biblical passages but also melded the “creed of segregation” with the “American Creed.”¹³ McClain expresses Campbell and Pettigrew’s tenets of this public

⁵ MCCLAIN, *supra* note 1 (manuscript at 140) (omission in original) (quoting PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 291 (2009)).

⁶ *See id.* (manuscript at 80-86).

⁷ *See id.* (manuscript at 157-58).

⁸ *Id.* (manuscript at 80-86).

⁹ *Id.* (manuscript at 82) (quoting 103 CONG. REC. app. at A6512 (Aug. 9, 1957) (extension of remarks of Hon. John Bell Williams) (entering into the record Rev. G.T. Gillespie, *A Southern Christian Looks at the Race Problem*, SOUTHERN PRESBYTERIAN J., June 5, 1957)).

¹⁰ *Id.* (manuscript at 83-86).

¹¹ *Id.* (manuscript at 83).

¹² *Id.* (manuscript at 84) (quoting ANDREW M. MANIS, *SOUTHERN CIVIL RELIGIONS IN CONFLICT: CIVIL RIGHTS AND THE CULTURE WARS* 99, 133 (2002)).

¹³ *Id.* (manuscript at 97-99).

morality as follows: “Racial integration cannot be American since segregation is pleasing to the Lord and America is a Christian nation”; “Were segregation un-Christian, then all of the major Christian bodies would not have established segregated churches”; and “Americans should establish their own racial policies based on God’s Will,” not foreign “reactions.”¹⁴

This melding of religion with the American creed formed the basis of a civil religion that resisted desegregation. We know that *Brown* condemns this public morality. “[S]eparate but equal” is, as Chief Justice Warren famously said, “inherently unequal.”¹⁵ Many who disapproved of desegregation on the basis of this public morality denounced *Brown*, and this moral disapproval was not a fringe position. For instance, Gillespie wrote on behalf of “30 million or more southern Christians” who objected to desegregation, believing that *Brown* was a “tragic mistake.”¹⁶ *Brown* and cases like it condemn this public morality, so it is no surprise that those who disapproved of desegregation saw the case as not just a mistake but a tragic one.

2. Private Morality

This moral disapproval of desegregation took the form of a public morality by which many objected not only to desegregation of public institutions but also to desegregation of private institutions, such as movie theaters, businesses, restaurants, and other such establishments. They objected to treating these private spaces as “public accommodations” that would require desegregation.

Laws such as the Civil Rights Act of 1964 sought to do just that. Those who resisted desegregation outside the public or political sphere appealed to a private morality. Many believed that even if their public schools or institutions would be desegregated, they had a right to keep their private spaces segregated or, as McClain puts it, a “right to be bigoted” when dealing with private property.¹⁷

Writing in 1963, Professor Robert Bork agreed that it was wrong when “stubborn people express their racial antipathies in laws.”¹⁸ But according to Bork, it was “quite another [thing] to tell them that even as individuals they may not act on their racial preferences in particular areas of life.”¹⁹ In resisting civil rights law, Bork says that “[b]ehind that judgment [that racism in private is wrong] lies an unexpressed natural-law view that some personal preferences are rational, that others are irrational, and that a majority may impose upon a

¹⁴ *Id.* (manuscript at 98) (quoting ERNEST Q. CAMPBELL & THOMAS F. PETTIGREW, CHRISTIANS IN RACIAL CRISIS: A STUDY OF LITTLE ROCK’S MINISTRY 60 (1959)).

¹⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

¹⁶ MCCLAIN, *supra* note 1 (manuscript at 81) (quoting 103 CONG. REC. app. at A6512 (Aug. 9, 1957) (extension of remarks of Hon. John Bell Williams) (entering into the record Gillespie, *supra* note 9)).

¹⁷ *Id.* (manuscript at 105).

¹⁸ Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 1963, at 21, 22.

¹⁹ *Id.*

minority its scale of preferences.”²⁰ McClain cites Bork, who resisted Congress’s efforts to legislate morality in the private sphere through public accommodations law.²¹ She states: “Bork feared ‘the danger . . . that justifiable abhorrence of racial discrimination will result in legislation by which the morals of the majority are self-righteously imposed on a minority.’”²²

The idea here is that the government may not interfere with this private morality. By passing laws like the Civil Rights Act, Congress did just that—legislate morality. As McClain explains, this was an affront to many who disapproved of desegregation in their private—including religious—lives. For many, “segregation of the races in social, business, and religious life is of divine origin,” as McClain puts it.²³ Dr. Albert Garner, President of the Florida Baptist Institute and Seminary, resisted this kind of intrusion into private life.²⁴ He expressed to Congress that the seminary and its members had

“deep moral and religious convictions . . . that integration of the races is morally wrong and should be resisted” and that “federal efforts to force integration as a new social pattern of life is morally wrong, un-Christian, and in conflict with the word and will of God as well as historic Christianity.”²⁵

However, the “Mrs. Murphy” exemption in the Fair Housing Act of 1968²⁶ may be viewed as a remnant of this private morality. Although that Act prohibits landlords from discriminating on the basis of race, it contains an exemption for homeowners who seek to rent out rooms or living quarters in which they also live.²⁷ This is called the “Mrs. Murphy” exemption, so named for a hypothetical elderly woman who has converted a portion of her home into a rental apartment. Whoever falls under this exemption can discriminate on the basis of race. In discussing this exemption, McClain says:

When asked what justified the exclusion, Attorney General Kennedy—who condemned the “immoral logic of bigotry”—said that government was not “attempting to become involved in social relationships.” . . . Other defenses of Mrs. Murphy’s right to refuse accommodation “for any

²⁰ *Id.*

²¹ MCCLAIN, *supra* note 1 (manuscript at 122).

²² *Id.* (omission in original) (quoting Bork, *supra* note 18, at 21).

²³ *Id.* (manuscript at 116).

²⁴ *See id.*

²⁵ *Id.* (omission in original) (quoting *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1148 (1963) (statement of Dr. Albert Garner, President, Florida Baptist Institute & Seminary) [hereinafter *Public Accommodations Hearing*]).

²⁶ 42 U.S.C. §§ 3601-3619 (2012).

²⁷ *Id.* § 3604. The Fair Housing Act of 1968 exempts dwellings “occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.” *Id.* § 3603(b)(2).

reason—good, bad, or indifferent—that strikes her fancy” stressed freedom of association, the right to privacy, and the sanctity of one’s home.²⁸

This exemption, which is still part of the Fair Housing Act, may be a remnant of the private morality that disapproved of desegregation and resisted federal efforts at legislating morality.

B. *Moral Disapproval of Homosexuality*

After analyzing the moral disapproval of desegregation, McClain focuses on debates over homosexuality and gay marriage and, most recently, the debate over the reach of public accommodations law in our private lives. In cases such as *Romer v. Evans*,²⁹ *Lawrence v. Texas*,³⁰ and *Obergefell v. Hodges*,³¹ the U.S. Supreme Court has invalidated antigay laws and policies, suggesting that the moral disapproval of homosexuality is no longer a part of our public morality. Yet, as McClain shows, moral disapproval based on private morality and religious conscience still exists. Here, too, there are public and private aspects to the moral disapproval of homosexuality.

1. Public Morality

In *Bowers v. Hardwick*,³² the Supreme Court upheld criminal laws banning sodomy.³³ The Court held that moral disapproval of homosexuality was a sufficient basis for arresting someone who had gay sex in private.³⁴ Indeed, criminal law represents one of the strongest ways to express this moral disapproval. Those who defended such criminal legislation often saw homosexuality as an affront to public morality. McClain describes the response of Georgia’s Attorney General as he defended the law: “Bowers insisted that Georgia had the power to prohibit an ‘immoral’ act. ‘Homosexual sodomy’ was ‘an unnatural means of satisfying an unnatural lust, . . . declared by Georgia to be morally wrong.’ Decriminalizing that act would threaten the family and marriage.”³⁵

²⁸ MCCLAIN, *supra* note 1 (manuscript at 114) (first quoting *Public Accommodations Hearing*, *supra* note 25, at 22 (statement of Att’y Gen. Robert F. Kennedy); then quoting *Civil Rights: Hearings on H.R. 7152 as Amended by Subcomm. No. 5 Before the H. Comm. on the Judiciary*, 88th Cong. 2700 (1963) (response to question by Rep. Richard H. Poff); then quoting Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951, 974 (2015)).

²⁹ 517 U.S. 620 (1996).

³⁰ 539 U.S. 558 (2003).

³¹ 135 S. Ct. 2584 (2015).

³² 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

³³ *Id.* at 196.

³⁴ *Id.*

³⁵ MCCLAIN, *supra* note 1 (manuscript at 158) (omission in original) (endnote omitted) (quoting Brief of Petitioner Michael J. Bowers Attorney General of Georgia at *27, *Bowers*, 478 U.S. 186 (No. 85-140), 1985 WL 667939, at *27).

The Court had another opportunity to address such criminal laws some seventeen years later in *Lawrence*. That case concerned a sodomy law in Texas that, as enforced, singled out gay sex as a crime.³⁶ In *Lawrence*, the Court, speaking through Justice Kennedy, struck down the law, reasoning that mere moral disapproval of homosexuality is not a constitutionally permissible reason to pass a law.³⁷ *Lawrence* therefore made it difficult for political bodies to pass laws and policies based on such disapproval.

In *Romer*, the Court considered a challenge to laws protecting gay men and women from discrimination passed by various liberal cities in Colorado, such as Denver and Boulder.³⁸ In response, Colorado passed a state amendment prohibiting towns from passing such laws.³⁹ Colorado defended the amendment as a way to express its towns' moral disapproval of homosexuality: "Petitioners and their amici drew on *Bowers* to argue that Colorado voters had the authority to promote their moral values through the political process. [Colorado for Family Values] contended that 'states have the power to pass a wide variety of laws to protect the family and community morality.'"⁴⁰

Writing for the Court, Justice Kennedy struck down the state amendment in *Romer*, holding that a state may not prevent gays and lesbians from accessing the political process to secure protections from discrimination.⁴¹ That, as Kennedy wrote, is a form of "animus" that the Constitution forbids.⁴² In *Obergefell*, Justice Kennedy wrote for a Court that expanded the institution of marriage to include gays and lesbians.⁴³ Marriage is both a public and a moral institution.⁴⁴ *Obergefell* even says that marriage is "sacred" and "transcendent."⁴⁵ No other civil status invokes this kind of religious and ethical underpinning. This is why the debate over gay marriage was, as McClain suggests, a debate over public morality.⁴⁶ Who may get married matters. By

³⁶ *Lawrence*, 539 U.S. at 563.

³⁷ *Id.* at 577-78. See generally SONU BEDI, BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY ch. 2 (2013); Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447 (2005).

³⁸ *Romer v. Evans*, 517 U.S. 620, 623-24 (1996).

³⁹ See *id.*

⁴⁰ McClain, *supra* note 1 (manuscript at 164) (quoting Brief Amicus Curiae of Colorado for Family Values in Support of the Petitioners at *1, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 17008427, at *1).

⁴¹ *Romer*, 517 U.S. at 632.

⁴² *Id.*

⁴³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

⁴⁴ See, e.g., Sonu Bedi, *An Illiberal Union*, 26 WM. & MARY BILL RTS. J. 1081, 1097-111 (2018) (discussing predominant role marriage plays both in the public-legal sphere and in the private-moral sphere).

⁴⁵ *Obergefell*, 135 S. Ct. at 2599.

⁴⁶ See McCLAIN, *supra* note 1 (manuscript at ch. 7) (discussing moral bases of disagreements over gay marriage).

allowing gay men and women to marry, the Court makes it nearly impossible to have a public morality that disapproves of homosexuality. Gay marriage is now part of our public morality.

2. Private Morality

The debate, then, is no longer so much about moral disapproval in the public sphere. It is now about disapproval in the private sphere. Does the Constitution allow individuals who disapprove of homosexuality to refuse, for instance, to provide a wedding cake to a gay couple? Specifically, the focus of the debate is about whether individuals can discriminate in their private lives on the basis of their religious beliefs. Recently, for example, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁴⁷ a case that McClain analyzes, Jack Phillips refused to bake a wedding cake for a gay couple because he morally disapproved of gay marriage.⁴⁸ Colorado prohibited individuals such as Phillips, who operated a wedding cake business, from discriminating on the basis of sexual orientation in serving customers.⁴⁹ His refusal was based on religious beliefs about the sanctity of marriage as a union between a man and a woman. In a narrow opinion, the Supreme Court sided with the baker but did not decide definitively whether the First Amendment permits individuals to express their moral disapproval of homosexuality by not providing wedding cake services to gays and lesbians.⁵⁰ McClain's book culminates with the current public and legal debate over the reach of public accommodations law into our private lives.⁵¹

II. BIGOTRY AND THE REACH OF CURRENT PUBLIC ACCOMMODATIONS LAW

In her book, McClain juxtaposes the moral disapproval of desegregation with the moral disapproval of homosexuality as outlined above. This is significant because it provides an interesting and provocative way to think about the meaning, boundary, and even accommodation of bigotry in the current debate over the reach of public accommodations law.

A. *The Meaning of Bigotry*

McClain likens bigotry to a “lagging indicator.”⁵² McClain expounds upon this in the following way:

Claims about bigotry are simultaneously backward- and forward-looking. To draw an analogy to economics, bigotry is a “lagging indicator.” Defining a belief or practice as bigotry may be possible only after society

⁴⁷ 138 S. Ct. 1719 (2018).

⁴⁸ *Id.* at 1724.

⁴⁹ *Id.* at 1725-26.

⁵⁰ *Id.* at 1731.

⁵¹ McClain, *supra* note 1 (manuscript at 154-81) (discussing legal and social implications of recent Supreme Court gay rights cases).

⁵² *Id.* (manuscript at 2).

has repudiated it as wrong and unjust. Once there is general agreement that such past beliefs and practices were bigoted, it becomes hard for people to understand that anyone ever seriously defended them. Racial discrimination and segregation are powerful examples.⁵³

This idea of a lagging indicator is revealing, and McClain's explanation is significant for understanding the meaning of bigotry. Put simply, it means that what was yesterday's morality may be today's bigotry. This is clearest in the case of the moral disapproval of desegregation. That disapproval is now a form of bigotry, and most people would call it out as such. But that moral consensus did not always exist. As McClain details, there was a large group of Christians who disapproved of desegregation on moral or religious grounds and did not see segregation as a form of bigotry.⁵⁴ There was a lag before society arrived at a moral consensus that opposing desegregation is a form of bigotry.

How do we understand this lagging indicator in the current moral debate about homosexuality? McClain provides the following answer:

When society has not yet reached a consensus about whether a treatment of a group is unjust or unreasonable, people reach for analogies to the past both to seek such a consensus and to resist it. *Obergefell* and *Masterpiece Cakeshop* suggest that society is at different points in terms of evaluating the reasonableness of moral or religious opposition to interracial marriage and to same-sex marriage. . . . Kennedy's opinion implicitly argues that "we need to recognize the virtue of civility as being especially important in . . . transitional moments."⁵⁵

The way in which society currently reaches to the past both to seek and to resist this moral consensus is clear. In seeking a consensus, it is remarkable how quickly society has moved on this issue. As recently as 2003, the *Lawrence* Court said that mere moral disapproval of homosexuality was not enough for a law to pass constitutional muster.⁵⁶ However, twelve years later, the Court held that civil marriage must be open to all without regard to sexual orientation.⁵⁷ Additionally, a March 2019 Pew Research Center survey found that 61% of Americans approve of gay marriage—almost double the approval rate from ten

⁵³ *Id.*

⁵⁴ MCCLAIN, *supra* note 1 (manuscript at 78) (describing how some white, southern, religious leaders offered "a religious defense of segregation and critique of *Brown*").

⁵⁵ *Id.* (manuscript at 214) (second omission in original) (quoting Stephen Macedo, Commentary on Linda McClain's Rhetoric of Bigotry and Conscience (2019) (unpublished manuscript) (on file with author)).

⁵⁶ *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (stating that majorities may not use State power to impose their views on minorities and that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion))).

⁵⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015) ("It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage . . .").

years prior.⁵⁸ That number is even higher, 79%, for those Americans who are religiously unaffiliated.⁵⁹ Strikingly, there is even a relatively high approval rate among white mainline Protestants and Catholics—66% and 61% respectively.⁶⁰ The consensus of public morality no longer disapproves of homosexuality as it did before. At the time of this writing, there is even an openly gay man, Pete Buttigieg, running to be the Democratic nominee for president. And when a reporter asked President Trump how he feels about Buttigieg running for office with his husband on the stage, Trump responded: “I think it’s absolutely fine.”⁶¹ He continued, “I think that’s something that perhaps some people will have a problem with,” but then quickly added, “I have no problem with it whatsoever.”⁶²

McClain proposes that this moral progress benefitted from the *Obergefell* Court’s comparison of the case before them to *Loving*.⁶³ Marriage is an important way of expressing moral approval of certain relationships and not others. Marriage is both a public institution and a moral symbol in our society. Due to the central importance of family in society, the fact that marriage is now open to gays and lesbians is indicative of a redefined public morality. By allowing gay people to marry, *Obergefell* makes it difficult to sustain a public morality that disapproves of homosexuality. By invoking *Loving*, those who challenged bans on gay marriage sought to affirm a moral consensus that accepted homosexuality.

This change in public morality is why McClain devotes an entire chapter of her book to discussing the importance of *Loving* in this debate.⁶⁴ She makes clear that “*Loving* and its meaning, over fifty years later, are crucial to understanding puzzles about the rhetoric of bigotry, especially bigotry’s backward- and forward-looking dimensions.”⁶⁵ McClain continues:

Loving illustrates generational moral progress in our constitutional jurisprudence: Laws once justified by appeals to nature, God’s law and plan

⁵⁸ David Masci, Anna Brown & Jocelyn Kiley, *5 Facts About Same-Sex Marriage*, PEW RES. CTR. (June 24, 2019), <https://www.pewresearch.org/fact-tank/2019/06/24/same-sex-marriage/> [<https://perma.cc/ZL6Q-P3NG>] (demonstrating that percentage of Americans who favored gay marriage was only 37% in 2009 but that it has increased significantly in past ten years).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Rebecca Morin, *Trump Supports Buttigieg Campaigning with His Husband: ‘It’s Good,’* USA TODAY (May 16, 2019, 7:55 PM), <https://www.usatoday.com/story/news/politics/2019/05/16/donald-trump-pete-buttigieg-campaigning-husband-its-good/3699207002/> [<https://perma.cc/8ASV-T394>].

⁶² *Id.*

⁶³ McCLAIN, *supra* note 1 (manuscript at 142-53) (describing impact of *Loving* on later Supreme Court decisions such as *Obergefell* and on how society understands marriage today).

⁶⁴ *Id.*

⁶⁵ *Id.* (manuscript at 129).

for the races, and the well-being of children and society are repudiated as rooted in prejudice. . . . In *Obergefell*, Justice Kennedy invoked *Loving* to show the role played by “new insights” about injustice and what the Constitution’s commitments to liberty and equality demand.⁶⁶

Interestingly, McClain explains that, although the Commonwealth of Virginia defended the ban on interracial marriage in court, Virginia’s Attorney General Mark Herring decided not to defend the state ban on gay marriage.⁶⁷ Signaling to the historic and moral importance of *Loving*, Herring said that “it is time for the Commonwealth [of Virginia] to be on the right side of history and the right side of the law.”⁶⁸ The appeal to the past was a way to achieve a moral consensus that marriage should be open to gays and lesbians.

Simultaneously, those who defended bans on gay marriage also looked to the past.⁶⁹ They looked to the past not to seek a moral consensus but rather to resist it. They argued that bans on gay marriage are not like bans on interracial marriage.⁷⁰ Many people resisted the idea of gay marriage, holding on to the antiquated idea that homosexuality is wrong. They may now be on the losing side of history because, as referenced above, much of society now approves of gay marriage and homosexuality. Those who say that civil marriage should not be open to gays and lesbians would likely be viewed as bigots. This suggests that bigotry can be a form of moral resistance to social justice or progress. However, only society has made social progress on an issue does that become clear. Hence, McClain’s account of the moral disapproval of desegregation provides instructive examples of bigotry. In fact, in reading McClain’s passages on the current moral consensus, it is difficult to imagine that “anyone ever seriously defended” segregation.⁷¹ But, as McClain makes clear, many did.⁷²

In the same way, it may be hard to imagine that society used to criminalize homosexuality and prevent gays and lesbians from marrying. This illustrates that what society sees as bigotry changes over time. What may not have been bigoted in the past—the idea, for instance, that mere moral disapproval of homosexuality can be the basis of discriminatory laws and policies—may seem bigoted now. This is evidence of the lagging indicator at work and is significant for understanding how the understanding of bigotry changes with time.

⁶⁶ *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015)).

⁶⁷ *Id.* (manuscript at 130).

⁶⁸ *Id.* (alteration in original) (quoting Timothy Williams & Trip Gabriel, *Virginia’s New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES, Jan. 24, 2014, at A12).

⁶⁹ *Id.* (explaining that some conservative commentators believe that bans on interracial marriage were anomalies based on prejudice, while bans on gay marriage were based on reason).

⁷⁰ *Id.*

⁷¹ *Id.* (manuscript at 2).

⁷² *Id.* (manuscript at 80-86) (describing how segregationists believed that racial segregation was proper ordering of society).

B. *The Boundary of Bigotry*

Less explicitly—but no less importantly—McClain considers the boundary of bigotry.⁷³ Certainly, those who opposed desegregation in restaurants, businesses, movie theaters, and other such establishments did not view themselves as bigots. As McClain reminds us, they invoked moral conscience and religion.⁷⁴ For example, in *Newman v. Piggie Park Enterprises, Inc.*,⁷⁵ a case concerning the constitutionality of public accommodations law, a restaurant owner argued that his faith held that “racial intermixing or any contribution thereto contravenes the will of God.”⁷⁶ This case is significant because it suggests that sometimes there may not be a boundary to bigotry where the law restricts what individuals can do in the private sphere.

In addition to *Piggie Park*, McClain discusses *Elane Photography, LLC v. Willock*,⁷⁷ in which photographer Elaine Huguenin objected to taking pictures of a gay wedding because of her religious beliefs.⁷⁸ The case reached the New Mexico Supreme Court, which held that Huguenin did not have a right to refuse her services to gays and lesbians on religious or moral grounds.⁷⁹

McClain instructively analyzes Justice Bosson’s concurring opinion in that case as follows:

Bosson nowhere says the Huguenins are bigots for the sincere beliefs they hold. To the contrary, “their religious convictions deserve our respect.” . . . Nonetheless, he would tell the Huguenins, “with the utmost respect,” that this is part of the “price of citizenship” that we all have to pay in “our civic life.” Civic life in a “multicultural, pluralistic society” requires some “compromise” with and “accommodation” of the “contrasting values of others.” The Huguenins retain the constitutional protection “to think, to say, to believe, as they wish,” . . . [but they have] “to leave space for other Americans who believe something different.”⁸⁰

Justice Bosson warned that the photographer could not discriminate in the marketplace of commerce and public accommodation.⁸¹ This legal protection against discrimination in public accommodations suggests that moral

⁷³ *Id.* (manuscript at 9) (“Just as the boundaries of reasonable and unreasonable views shift over time, so, too, do society’s understandings of permitted and proscribed forms of prejudice.”).

⁷⁴ *Id.* (manuscript at 80-86).

⁷⁵ 390 U.S. 400 (1968) (per curiam).

⁷⁶ Petition for Writ of Certiorari app. at 9a, *Piggie Park Enters.*, 390 U.S. 400 (No. 339) (reproducing Defendant L. Maurice Bessinger’s statements in his February 5, 1965, Answer to the Complaint).

⁷⁷ 2013-NMSC-040, 309 P.3d 53.

⁷⁸ *Id.* ¶ 1, 309 P.3d at 59.

⁷⁹ *Id.* ¶ 79, 309 P.3d at 77.

⁸⁰ McCLAIN, *supra* note 1 (manuscript at 190) (endnote omitted) (quoting *Elane Photography*, ¶¶ 83, 91-92, 309 P.3d at 78-80 (Bosson, J., concurring)).

⁸¹ *Elane Photography*, ¶ 92, 309 P.3d. at 80.

disapproval of homosexuality has no place in the sphere of commerce and the marketplace. In the same way, cases such as *Piggie Park* and the civil rights statutes they affirm hold that racial bigotry has no place in restaurants, movie theaters, businesses, and other such nongovernmental spaces. These cases provide numerous examples of bigotry that courts have attempted to restrict with antidiscrimination laws.

Masterpiece Cakeshop further illustrates the boundary of bigotry. Those who defended the Christian baker looked to the past and said that discrimination against a gay couple was not the same as racial discrimination. For instance, both the baker's lawyer and the U.S. Solicitor General, who also argued in favor of the baker, said to the Court that "race is different."⁸² This is why the counsel for the respondent remarked that "both [the baker] and the United States recognize that these [acts of discrimination] are unacceptable with respect to race."⁸³ They, in turn, suggested that the Court "draw a distinction between race discrimination and sexual orientation discrimination and the state's ability to protect it."⁸⁴ This justification of sexual orientation discrimination by comparing it to racial discrimination is what makes *Masterpiece Cakeshop* such an interesting and provocative example of the question of boundary.

Similarly, Ryan Anderson, a researcher at the Heritage Foundation, argues that "sexual orientation and gender identity are not like race."⁸⁵ While he believes that an employer or public accommodation that discriminates on the basis of race acts wrongly, he argues that discrimination on the basis of sexual orientation or gender identity is not analogous to discrimination on the basis of race.⁸⁶ According to Anderson, this is because race is an immutable characteristic that does not speak to one's actions, while sexual orientation and gender identity are descriptions of one's actions.⁸⁷

The Supreme Court will soon decide whether the law can be interpreted to provide protections from sexual orientation discrimination.⁸⁸ Anderson does not

⁸² Transcript of Oral Argument at 22, 32, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

⁸³ *Id.* at 75.

⁸⁴ *Id.*

⁸⁵ Ryan T. Anderson, *Sexual Orientation and Gender Identity Are Not Like Race: Why ENDA Is Bad Policy*, PUB. DISCOURSE (Mar. 18, 2015), www.thepublicdiscourse.com/2015/03/14649/ [<https://perma.cc/QGM3-5BV4>] (arguing that because sexual orientation and race are conceptually and historically different, protections against discrimination should not be applied in same way to both groups).

⁸⁶ *Id.*

⁸⁷ *Id.* (surmising that one should be judged only by content of his or her character, i.e., by one's voluntary actions, which, according to Anderson, include sexual orientation).

⁸⁸ In its upcoming term, the Court will decide whether the federal ban on employment discrimination covers sexual orientation and/or gender identity. *See Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (per curiam) (mem.), cert. granted, 139 S. Ct. 1599 (2019) (mem.) (granting cert to decide whether Title VII protects against sexual orientation discrimination); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560

think Congress should amend federal civil rights law to include such protections.⁸⁹ His line of reasoning suggests that a baker or others in the wedding business should have the right to discriminate against gays and lesbians in expressing their disapproval of homosexuality.⁹⁰ Here, Anderson attempts to restrict the boundaries of bigotry by suggesting that private disapproval of homosexuality is not a form of bigotry.⁹¹

On the other hand, McClain points out that these arguments about private morality and religious conscience were also made in the context of desegregation.⁹² Many resisted desegregating public accommodations because they saw segregation as part of their private morality and something that Congress could not interfere with.⁹³ As Bork said, Congress could not tell “individuals” that “they may not act on their racial preferences in particular areas of life.”⁹⁴ It was one thing to desegregate public institutions, but it was quite another to desegregate private ones.⁹⁵ Despite disapproval by many, this desegregation affecting private morality is exactly what civil rights law and cases such as *Piggie Park* did.

McClain highlights that the NAACP, in its amicus brief in *Masterpiece Cakeshop*, observed that at the time of *Piggie Park*, “the religious beliefs of Mr. Bessinger, owner of Piggie Park, ‘were relatively mainstream’ and he was not viewed as ‘fringe or disingenuous.’”⁹⁶ McClain goes on to conclude that the fact “that these religious beliefs were not marginal, but sincerely and widely

(6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.) (granting cert to decide whether Title VII protects transgender people against discrimination either on their status as transgender people or on sex stereotyping); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.) (granting cert to decide whether Title VII protects against sexual orientation discrimination).

⁸⁹ Anderson, *supra* note 85.

⁹⁰ See, e.g., Michael W. McConnell, *Dressmakers, Bakers, and the Equality of Rights, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* 378, 381 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018) (“[The government] cannot force people engaged in an expressive activity to create or convey messages they disagree with.”); Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL’Y 123, 143-45 (2018) (“The law should not be used to punish and hound those who believe that marriage unites husband and wife.”).

⁹¹ Anderson, *supra* note 90, at 144-45.

⁹² McClain, *supra* note 1 (manuscript at 80-86).

⁹³ *Id.* (manuscript at 120-22) (discussing segregationists’ disapproval of federal desegregation efforts).

⁹⁴ *Id.* (manuscript at 122) (quoting Bork, *supra* note 18, at 22).

⁹⁵ *Id.*

⁹⁶ *Id.* (manuscript at 203) (quoting Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents at 14, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127302, at *14).

held, made the Court's ruling all the more significant."⁹⁷ The Court condemned this kind of private racism even though many individuals supported racial discrimination or segregation in restaurants, movie theaters, and other such establishments on religious grounds.⁹⁸ If society views private disapproval of homosexuality in the same way it views disapproval of desegregation, does this suggest that those who resist social or moral progress of gay rights in the private sphere are also bigots?

After all, those who resisted civil rights law, such as Bork, did so because they did not want to enlarge the boundary of racial justice. Professors Robert C. Post and Reva B. Siegel put it this way:

Before 1964, it was still commonplace for public figures like Robert Bork and Milton Friedman to decry the prospect of federal interference with the freedom of business owners to discriminate in their choice of customers or employees, and to equate it with McCarthyism, communism, fascism, socialism, involuntary servitude, or worse. It is a measure of the fundamental changes wrought by the second Reconstruction that these public and prominent objections to federal enforcement of antidiscrimination norms now sound like voices from another world.⁹⁹

McClain discusses precisely those "voices from another world," revealing that the debate over desegregation was also a debate over the public and private spheres.¹⁰⁰ Bigotry can also occur when individuals resist social progress in the private sphere. McClain's book is significant for raising this issue of private morality and the boundary of bigotry. This is why I draw on this book in my own work, *Private Racism*, which seeks to enlarge the boundary of racial justice.¹⁰¹

C. *The Accommodation of Bigotry*

In discussing the "Mrs. Murphy" exemption from the Fair Housing Act of 1968, McClain suggests one way society has accommodated bigotry.¹⁰² Although McClain does not revisit this exemption in the context of the current

⁹⁷ *Id.*

⁹⁸ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam) (affirming decision to enjoin drive-in restaurant and sandwich shop from discriminating on basis of race).

⁹⁹ Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L.J.* 441, 492-93 (2000) (footnotes omitted); see also Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 *MD. L. REV.* 83, 141-48 (2011) (discussing society's changing understanding of federal government's role in policing discrimination since 1964).

¹⁰⁰ *McCLAIN*, *supra* note 1 (manuscript at 114) (explaining that those who supported the Mrs. Murphy exemption "stressed freedom of association, the right to privacy, and the sanctity of one's home").

¹⁰¹ See generally SONU BEDI, *PRIVATE RACISM* (2019).

¹⁰² *McCLAIN*, *supra* note 1 (manuscript at 114).

debate over private homophobia, it may be useful to do so. This exemption, which still exists in the law today, allows certain individuals to engage in private racism.¹⁰³ The law therefore allows them to discriminate on the basis of race, i.e., to express their opposition to desegregation by not renting rooms in their house to individuals of another race.¹⁰⁴ This exception seems to be a way that society and lawmakers have accommodated bigotry.

Certainly, Jack Phillips and Elane Huguenin are not landlords but owners of businesses that serve the public. This may suggest that the law should not entertain any exception in this case. A similar argument could be made in the context of fair housing. After all, if there should be equal opportunity in finding housing, the law should not exempt any landlord from a ban on racial discrimination. But the Fair Housing Act contemplates an exemption in certain limited cases where the landlord “actually maintains and occupies one of such living quarters as his residence.”¹⁰⁵ This suggests that, as a historical matter, lawmakers decided to accommodate private racism in this kind of case.

Would such a limited exception be available in the debate over private homophobia? Some have argued that society should consider accommodating this kind of private disapproval of homosexuality in the limited case where the business provides certain wedding-related services. For instance, Professor Andrew Koppelman says that

[b]usinesses that serve the public, such as wedding photographers, should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory. That cost will make discrimination rare almost everywhere. Employers—some of whom also object to recognizing same-sex marriages—should not however be allowed to discriminate in providing benefits for their employees, such as denying health insurance to same-sex spouses. You can find another wedding photographer, but you only have one insurance plan.¹⁰⁶

The “Mrs. Murphy” exemption may support this approach for an exemption to laws on sexual orientation discrimination. Although Koppelman does not explicitly discuss this exemption, Professor Robin Fretwell Wilson, cited by McClain, suggests that providing a religious exemption to certain businesses may be a way to accommodate the private morality of individuals like Jack Phillips and Elane Huguenin.¹⁰⁷

¹⁰³ 42 U.S.C. § 3603(b)(1) (2012) (providing exemption for owners selling or renting their house while they are still residing in it).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 3603(b)(2); *see also supra* note 27 and accompanying text (discussing exemption).

¹⁰⁶ Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 620 (2015).

¹⁰⁷ *See* Fretwell Wilson, *supra* note 28, at 952 (discussing viability of possible exemptions for business owners who do not want to facilitate gay marriage celebrations on grounds that they conflict with their religious beliefs, similar to Mrs. Murphy exception).

McClain makes clear that the claim for social equality of gays and lesbians draws on the historical claim about racial equality.¹⁰⁸ Looking to the past is a way to advance our moral consensus. Here, we can consider the “Mrs. Murphy” exemption as a way to look to the past to accommodate bigotry as society morally progresses. Congress originally created the “Mrs. Murphy” exemption to accommodate the private racism of certain landlords who wanted to rent out their own house to people of a particular race.¹⁰⁹ Congress may have done so in order to ensure passage of civil rights laws such as the Fair Housing Act. Perhaps lawmakers today could also accommodate those wedding-related businesses who privately disapprove of homosexuality. In discussing the “Mrs. Murphy” exemption, McClain shows one historical example of accommodating bigotry even as society pursues social or moral progress.

CONCLUSION

In her book, McClain instructively juxtaposes the moral disapproval of desegregation alongside the moral disapproval of homosexuality. This makes her book significant because it provides readers a way to understand the meaning, the boundary, and even the accommodation of bigotry. The book would be of interest not just to legal scholars but also to those studying law from a perspective of political theory, sociology, or history. The book discusses the role of the private sphere in thinking about racial and sexual orientation equality, the social bases of bigotry, and the historical idea of moral progress. The scope and depth of McClain’s book is impressive. Put simply, McClain has a lot to teach her readers beyond what I have outlined here. I surmise that society is still learning, and I highly recommend this book to anyone who wants to learn more about society’s “conflicts over marriage and civil rights law.”

¹⁰⁸ MCCLAIN, *supra* note 1 (manuscript at 142-53) (describing how legacy of *Loving* and Civil Rights movement heavily impacts gay rights cases today).

¹⁰⁹ *Id.* (manuscript at 114).