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## For Sale: The Threat of State Public Accommodations Law to the First Amendment Rights of Artistic Businesses

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# NOTES

## For Sale

### THE THREAT OF STATE PUBLIC ACCOMMODATIONS LAWS TO THE FIRST AMENDMENT RIGHTS OF ARTISTIC BUSINESSES

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.<sup>1</sup>

#### INTRODUCTION

Over the last fifty years, the changing landscape of the American economy and the continued evolution of state public accommodations laws toward protection of a greater number of suspect classes in a wider variety of places<sup>2</sup> have created an environment of potentially widespread First Amendment violations.<sup>3</sup> Public accommodations laws are the modern conception of the common-law principle that innkeepers and other common carriers could not refuse service to customers without good reason.<sup>4</sup> Historically, this principle was a narrow

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<sup>1</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (invalidating a New Hampshire regulation requiring noncommercial vehicles to carry license plates inscribed with the State's motto because it improperly forced individuals to publicly disseminate the State's ideological message).

<sup>2</sup> Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 217 (1978).

<sup>3</sup> Lauren Rosenblum, Note, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243, 1249 (1997). The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

<sup>4</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 571 (1995); Pamela Griffin, Comment, *Exclusion and Access in Public Accommodations: First Amendment Limitations upon State Law*, 16 PAC. L.J. 1047, 1047 (1985).

one,<sup>5</sup> but upon codification, many states have significantly expanded its scope by increasing both the types of businesses subject to the laws and the classes of people protected by them.<sup>6</sup>

Public accommodations laws are generally designed to ensure equal access for all people to publicly available goods and services, even where privately owned businesses offer those goods and services.<sup>7</sup> The “public character” rationale—which states that owners of inns, restaurants, and other common carriers perform “quasi-public” services while operating for a profit—serves as a primary justification for abridging individual rights in this context.<sup>8</sup> Thus, for a business owner to discriminate in choosing his clients would be unfair to the public and inconsistent with the owner’s profit earning purpose.<sup>9</sup> As some commentators explain, “Citizens’ rights of access to public places must, therefore, be balanced against the right of the owner to control his or her property.”<sup>10</sup>

A predicament arises when a business offers inherently expressive goods or services, such as photography, music, or any other business that involves the commercialization of art.<sup>11</sup> If a customer wishes to hire an artist to provide artwork or other similarly expressive services for a cause with which the artist does not agree, the artist may be compelled by a state public accommodations law to express an idea, or associate himself with an idea, with which he does not agree on pain of

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<sup>5</sup> Griffin, *supra* note 4, at 1047-48.

<sup>6</sup> Lerman & Sanderson, *supra* note 2, at 218. States tend to define place of public accommodation either by listing the types of business the term covers, often qualified by language such as “includes but is not limited to,” or by using a general definition. For an example of a list form statute, see N.Y. EXEC. LAW § 292(9) (McKinney 2010), for an example of a general definition, see CAL. CIV. CODE § 51(b) (West Supp. 2012) (“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”); Griffin, *supra* note 4, at 1052-53 (“Protection under state law is afforded not only from discrimination based upon race, creed, color, religion, and national origin, but also from discrimination upon the bases of sex, age or disability, and in some states, marital status, personal appearance and sexual preference.”).

<sup>7</sup> Lerman & Sanderson, *supra* note 2, at 218.

<sup>8</sup> *Hurley*, 515 U.S. at 571 (explaining that “innkeepers are a sort of public servants”) (quoting *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835)); Griffin, *supra* note 4, at 1055.

<sup>9</sup> Griffin, *supra* note 4, at 1055.

<sup>10</sup> Lerman & Sanderson, *supra* note 2, at 218.

<sup>11</sup> *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting) (“It goes without saying that artistic expression lies within this First Amendment protection.”); Griffin, *supra* note 4, at 1048.

civil sanctions. This compelled expression or association likely violates the artist's First Amendment rights.<sup>12</sup>

A recent example is illustrative of the conflict. In the fall of 2006, Vanessa Willock and Misti Collinsworth sought a photographer for their same-sex commitment ceremony.<sup>13</sup> Willock contacted Elaine Huguenin, co-owner and primary photographer of Elane Photography,<sup>14</sup> through the company's website seeking services.<sup>15</sup> Huguenin declined to provide service.<sup>16</sup> As an artist, Huguenin believed she expressed herself through her photographs and became part of the events that she photographed.<sup>17</sup> For Huguenin to photograph a same-sex ceremony would express an idea contrary to her belief that marriage exists only between two individuals of the opposite sex.<sup>18</sup> Willock filed a discrimination claim against Elane Photography with the New Mexico Human Rights Division. After an investigation, the Human Rights Commission found Elane Photography guilty of discrimination under the New Mexico public accommodations law, the Human Rights Act, § 28-1-7(F),<sup>19</sup> and awarded Willock \$6,637.94 in attorney's fees.<sup>20</sup> The District Court for the Second Judicial District of New Mexico affirmed on appeal.<sup>21</sup> Neither the Human Rights Commission nor the district court gave significant consideration to Huguenin's freedom of expression argument.<sup>22</sup>

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<sup>12</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”); *see also* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); *see also* *Hurley*, 515 U.S. at 573 (“[A] fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.”); Eugene Volokh, *Compelling Speech by Commercial Photographers, Freelance Writers, Musicians, and So On*, VOLOKH CONSPIRACY (Dec. 16, 2009, 4:01 PM), <http://volokh.com/2009/12/16/compelling-speech-by-commercial-photographers-freelance-writers-musicians-and-so-on/>.

<sup>13</sup> *Willock v. Elane Photography, Inc.*, HRD No. 06-12-20-0685, slip op. at 4 (N.M. Human Rights Comm'n Apr. 9, 2008), *available at* <http://volokh.com/files/willockopinion.pdf>.

<sup>14</sup> Elaine Huguenin's studio's name is spelled without an “i.”

<sup>15</sup> *Willock*, HRD No. 06-12-20-0685, slip op. at 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 19.

<sup>21</sup> *Elane Photography, LLC v. Willock*, CV-2008-06632, slip op. at 14 (N.M.2d Jud. Dist. Ct. 2009), *available at* <http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009>.

<sup>22</sup> *Willock*, HRD No. 06-12-20-0685, slip op. at 16-17; *Willock*, CV-2008-06632, slip op. at 8-10. Just prior to going to press, the Court of Appeals for the State of New

The *Elane Photography* case is interesting for two reasons. First, when First Amendment principles are applied, it appears that Huguenin's free speech defense was stronger than either the Commission or the district court acknowledged. Second, it calls into question the constitutionality of state public accommodations laws generally as applied to an enormous class of businesses.<sup>23</sup>

Part I of this note will summarize the *Elane Photography* case and its appeal to the New Mexico district court. Part II will demonstrate how the New Mexico Human Rights Act was unconstitutional as applied to *Elane Photography* under current First Amendment doctrine due to a gradual shift in jurisprudence toward greater First Amendment protection. In Part III, a brief discussion of public accommodations laws generally will show the seriousness of the potential conflict between these laws and the First Amendment freedom of expression<sup>24</sup> and will discuss several suggested solutions to the problem.

## I. *WILLOCK V. ELANE PHOTOGRAPHY*

### A. *The Facts*

Elane Photography is a limited liability company owned by husband and wife Jonathan and Elaine Huguenin<sup>25</sup> and operates in Albuquerque, New Mexico.<sup>26</sup> Elaine Huguenin (Huguenin) was the studio's primary photographer and Jonathan Huguenin was the business manager.<sup>27</sup> The business provided photography services primarily for weddings and engagements

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Mexico handed down its decision on Elane Photography's appeal from the district court. Like the district court, the Court of Appeals rejected the Huguenins' First Amendment arguments. The Court of Appeals reasoned that Huguenin's photography was not sufficiently expressive to warrant First Amendment protection and, therefore, the State could constitutionally apply the New Mexico public accommodations statute to Huguenin's conduct. *Elane Photography v. Willock*, No. 30,203, at ¶ 29 (N.M. Ct. App. May 31, 2012). Further, to the extent Huguenin did produce expression, the Court of Appeals agreed with the district court that Huguenin was a mere conduit of her clients' messages. *Id.* Because the Court of Appeals affirmed the district court's decision and reasoning on Huguenin's First Amendment argument, the analysis and reasoning in this note remain relevant.

<sup>23</sup> This note is limited to discussion of state public accommodations laws only; the federal public accommodations law, 42 U.S.C. § 2000a (2006), embodied in Title II of the Civil Rights Act of 1964, is beyond the scope of this discussion.

<sup>24</sup> To the extent that *Elane Photography* implicates other First Amendment concerns, such as the free exercise of religion, or claims arising under state law other than public accommodations law, such as the New Mexico Constitution or the New Mexico Religious Freedom Reformation Act (N.M. STAT. ANN. § 28-22-1 (2000)), those issues are not addressed by this note.

<sup>25</sup> *Willock*, HRD No. 06-12-20-0685, slip op. at 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

and also for its customers' significant life events.<sup>28</sup> The business had a website which featured sample wedding pictures taken by Huguenin and advertised the studio's services.<sup>29</sup> Huguenin's initial contact with most clients was via e-mail through the website.<sup>30</sup> After meeting with a potential client and agreeing to go forward, Huguenin would provide a written contract in which the company explicitly retained all rights with regard to the prints and proofs of the photographs, including the right to use them for "advertising, display or any other purpose thought proper by [t]he Studio."<sup>31</sup>

In the fall of 2006, Vanessa Willock (Willock) and Misti Collinsworth (Collinsworth)<sup>32</sup> were seeking a photographer to record their same-sex commitment ceremony.<sup>33</sup> On September 21, 2006, Willock e-mailed Huguenin after contacting the Elane Photography website, and specified in her e-mail that she needed a photographer for a same-gender ceremony.<sup>34</sup> Within a day, Huguenin replied with the ambiguous statement that "[a]s a company, we photograph traditional weddings, engagements, seniors, and several other things," but did not give Willock a definite answer whether Elane Photography would take the job.<sup>35</sup> Approximately two months later, Willock sent another e-mail in order to clarify whether Elane Photography would serve same-sex couples.<sup>36</sup> In her second reply, Huguenin responded, "[W]e do not photograph same-sex weddings."<sup>37</sup>

Upset by what appeared to be discrimination, the couple decided to confirm that the studio refused to serve them because of their sexual orientation.<sup>38</sup> To that end, Collinsworth sent an e-mail requesting Elane Photography's services without disclosing that she was having a same-sex ceremony or that she was Willock's partner.<sup>39</sup> Huguenin responded affirmatively with all the information Collinsworth requested and offered to set up a meeting to discuss the job in person.<sup>40</sup> As a result of these events, Willock filed a discrimination claim with the Human

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3.

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

<sup>31</sup> *Id.* at 4 (quoting testimony of Elaine Huguenin and Jonathan Huguenin; Ex. A).

<sup>32</sup> Known at the time of the events as Misti Pascottini. *Id.* at 4, 7.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* at 6, 7.

<sup>40</sup> *Id.* at 7.

Rights Division<sup>41</sup> of the New Mexico Department of Labor<sup>42</sup> against Elane Photography on December 20, 2006.

*B. The Human Rights Commission*

In its Decision and Final Order, the New Mexico Human Rights Commission (the Commission)<sup>43</sup> made a number of significant findings of fact based on the testimony of the parties. Among other facts, the Commission found that “Elane Photography also had an unwritten company policy, which was shared between its co-owners, [the Huguenins], that Elane Photography would not photograph any image or event which was contrary to the religious beliefs of its co-owners.”<sup>44</sup> Huguenin held the religious belief that marriage could only be between individuals of the opposite sex.<sup>45</sup> The photographer also believed that “as an artist, [Huguenin] became a part of the events which she photographed and an owner of the images or messages conveyed in her photographs.”<sup>46</sup> She therefore declined to provide her services to Willock because to do so would help convey a message that was contrary to her religious beliefs.<sup>47</sup>

Willock’s claim asserted that Elane Photography’s denial of service violated section 28-1-7(F) of the New Mexico Human Rights Act.<sup>48</sup> The statute states that it is unlawful discrimination for “any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodation or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or

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<sup>41</sup> Currently the Human Rights Bureau. *Id.* at 8.

<sup>42</sup> Currently the New Mexico Department of Workforce Solutions. *Id.* at 8.

<sup>43</sup> On its Frequently Asked Questions page, the New Mexico Department of Workforce Solutions explains:

The Human Rights Commission is comprised of eleven citizens appointed by the governor to conduct hearings involving discrimination complaints. The eleven members volunteer their services and are not employees of the state. A commission hearing may be conducted by a single hearing officer or a three-member panel. The final decision in every case is made by a three-member panel either on cases the panel has heard or recommendations from [sic] the hearing officer.

*Human Rights*, N.M. DEP’T WORKFORCE SOLUTIONS, <http://www.wia.state.nm.us/HR-FAQ.html#HRCommission> (last visited Feb. 2, 2012).

<sup>44</sup> *Willock*, HRD No. 06-12-20-0685, slip op. at 4.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 10.

physical or mental handicap.”<sup>49</sup> The Commission found that the e-mail correspondence between Willock and Huguenin established a prima facie case of discrimination in violation of the statute because Huguenin made a distinction in offering the services provided by Elane Photography based on Willock’s sexual orientation.<sup>50</sup> Elane Photography submitted two defenses to the charge. First, Elane Photography challenged the application of section 28-1-7 to the business on the grounds that Elane Photography was not a “public accommodation.”<sup>51</sup> Specifically, Elane Photography asserted that it was exempt from application of the statute because “a business entity of an expressive or artistic nature . . . [does] not meet the statutory definition of a ‘public accommodation’ under the [New Mexico Human Rights Act].”<sup>52</sup> Second, Elane Photography argued that, even if it were a public accommodation subject to the New Mexico Human Rights Act, the Act was preempted by the First Amendment, which protected Elane Photography’s rights to free exercise of religion and free speech, including its right to refuse photographic service for those reasons.<sup>53</sup> Elane Photography failed to assert any of the various exemptions to the statute expressly contained in section 28-1-9.<sup>54</sup>

Based on its investigation, the Commission found that Elane Photography qualified as a public accommodation, because it was registered as a limited liability company, held itself open to the public by soliciting business through its website, and openly sold its services to the public.<sup>55</sup> The Commission also rejected Elane Photography’s contention that expressive and artistic businesses are exempt from liability under section 28-1-7(F), because the statute provides no express exemption for such businesses.<sup>56</sup>

In addressing Elane Photography’s First Amendment defenses, the Commission relied generally on Supreme Court precedent upholding the constitutionality of provisions similar

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<sup>49</sup> N.M. STAT. ANN. § 28-1-7(F) (2011). “[P]ublic accommodation’ means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private.” *Id.* § 28-1-2(H). *Willock*, HRD No. 06-12-20-0685, slip op. at 10.

<sup>50</sup> *Willock*, HRD No. 06-12-20-0685, slip op. at 14.

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

<sup>52</sup> *Id.* at 15.

<sup>53</sup> *Id.* at 14.

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

<sup>55</sup> *Id.* at 15, 16.

<sup>56</sup> *Id.* at 15.

to section 28-1-7(F).<sup>57</sup> The Commission explained that such provisions are justified because the State has a compelling interest in preventing “acts of invidious discrimination in the distribution of publicly available goods [and] services.”<sup>58</sup> However, the Commission clarified that two important issues were not before the Commission for determination and were beyond the scope of the opinion. Those issues included the constitutionality of the New Mexico Human Rights Act and the preemption of the Act by the United States Constitution or other state law, including the New Mexico Constitution and the New Mexico Religious Freedom Restoration Act.<sup>59</sup> Therefore, the decision of the Commission was limited to a finding that Willock had made out a prima facie antidiscrimination claim under section 28-1-7(F)<sup>60</sup> and that Elane Photography failed to assert a valid exemption to the statute or otherwise rebut Willock’s showing.<sup>61</sup> The Commission awarded Willock \$6,637.94 in attorney’s fees and costs.<sup>62</sup> Under section 28-1-11(E), Willock was entitled to actual damages under the statute as well as attorney’s fees.<sup>63</sup> However, Willock declined to seek actual damages, even though she was given the opportunity to show proof of such damages at the hearing.<sup>64</sup>

### C. *The Appeal*

Elane Photography appealed the Human Rights Commission’s decision to the Second Judicial District Court of the State of New Mexico (the district court). In its appeal, Elane Photography asked the district court to reverse the Commission’s judgment because the judgment violated Elane Photography’s First Amendment rights of free exercise of religion and freedom of expression (including freedom from

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<sup>57</sup> *Id.* at 17.

<sup>58</sup> *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984)).

<sup>59</sup> *See id.* at 18.

<sup>60</sup> *See id.* at 14.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 19.

<sup>63</sup>

Upon the conclusion of a hearing conducted by a hearing officer, the hearing officer shall prepare a written report setting forth proposed findings of fact and conclusions of law and recommending the action to be taken by the commission. . . . As part of its order, the commission may require the respondent to pay actual damages to the complainant and to pay reasonable attorneys’ fees.

N.M. STAT. ANN. § 28-1-11(E) (2011).

<sup>64</sup> *Willock*, HRD No. 06-12-20-0685, slip op. at 18.

compelled expression).<sup>65</sup> Elane Photography also revived its argument that the business was not a public accommodation and therefore not subject to section 28-1-7, and it contended that its conduct was not discriminatory.<sup>66</sup>

The district court issued its opinion on the parties' cross motions for summary judgment on December 11, 2009. Finding no issue of material fact, the court denied Elane Photography's motion for summary judgment and granted Willock's motion.<sup>67</sup> The district court found, as a matter of law, that Elane Photography was a public accommodation.<sup>68</sup> Similarly, the district court affirmed the Commission's finding that there was direct evidence of discrimination on Huguenin's part, because Elane Photography had a policy to distinguish between opposite-sex couples and same-sex couples in providing wedding photography services.<sup>69</sup>

Next, the district court found that the Commission's application of the New Mexico Human Rights Act did not violate Elane Photography's freedom of expression.<sup>70</sup> The district court began its analysis by distinguishing Supreme Court precedent that supported Elane Photography's position, which stood for the proposition that various art forms, including "pictures, films, paintings, drawings, and engravings[,]” enjoyed full First Amendment protection because of their communicative nature.<sup>71</sup> By characterizing Elane Photography as a case dealing only with restrictions on who can buy artwork after the artist has offered it for sale, rather than with restrictions on the artwork's dissemination, the district court found the precedent's reasoning to be inapposite.<sup>72</sup> Further distinguishing the precedent, the district court pointed out the fact that Huguenin, as a hired photographer, did not choose the content of her own work, whereas the precedential cases all involved an artist whose works contained content of their own choosing or creation.<sup>73</sup>

Like the Commission, the district court made a point of noting that nondiscrimination laws, such as New Mexico's public

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<sup>65</sup> Appeal from the Decision and Final Order of the N.M. Human Rights Comm'n at 5, *Elane Photography, LLC v. Willock*, HRD No. 06-12-20-0685 (June 30, 2008), available at <http://www.scottfillmer.com/wp-content/uploads/2008/07/ElanePhotoAppeal.pdf>.

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

<sup>67</sup> *Elane Photography, LLC v. Willock*, CV-2008-06632 (N.M.2d Jud. Dist. Ct. 2009).

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *See id.* at 8.

<sup>70</sup> *See id.* at 11.

<sup>71</sup> *Id.* at 8.

<sup>72</sup> *See id.*

<sup>73</sup> *Id.*

accommodations law, are generally constitutional.<sup>74</sup> Further analyzing Supreme Court precedent finding state compulsion of speech unconstitutional,<sup>75</sup> the district court found that, as a commercial photographer, Huguenin's only message was "fine photography of special moments."<sup>76</sup> Thus, application of state public accommodations law was not an impermissible compulsion of an individual to affirm or disseminate the state's ideological message, as a requirement to salute the flag or to carry the state motto on a license plate would be.<sup>77</sup> Furthermore, the district court asserted that Huguenin was far from a communicator of artistic expression.<sup>78</sup> Rather, the photographer was merely a conduit for her clients' messages and thus was not afforded any constitutional protection from compelled speech, since no message of her own was affected by application of the statute.<sup>79</sup>

## II. A FIRST AMENDMENT VIOLATION

Two distinct, but related, lines of First Amendment doctrine are applicable to *Elane Photography*: the compelled expression doctrine and the compelled expressive association doctrine. These doctrines independently demonstrate that the application of New Mexico's public accommodations statute to *Elane Photography*<sup>80</sup> was an unconstitutional compulsion of speech.

### A. *The Compelled Speech Doctrine*

Applying section 28-1-7(F) to *Elane Photography* is a violation of the Huguenins' First Amendment right to be free from compelled speech.<sup>81</sup> It is a well-established principle of

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<sup>74</sup> *Id.* at 9 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 572 (1995)).

<sup>75</sup> *See id.* at 10 (citing *Hurley*, 515 U.S. at 566; *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986)).

<sup>76</sup> *Id.* at 11.

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* at 11.

<sup>79</sup> *Id.*

<sup>80</sup> In the interest of clarity, for the duration of the paper, no distinction will be made between "Elane Photography" the business and "Elaine Huguenin" the individual. Because corporations have the same First Amendment rights as individuals, *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010), this will not affect the integrity of the legal analysis.

<sup>81</sup> Indeed, this was Professor Eugene Volokh's first reaction to the Human Rights Commission's decision on April 9, 2008, even before he had read the opinion. In a post on his eponymous blog, Professor Volokh posited that, by applying the public accommodation statute to photography-as-art, the State of New Mexico may have run afoul of the First Amendment prohibition against compelled speech as articulated in *Wooley v. Maynard*, 430

constitutional law that the First Amendment freedom of speech includes the right to choose what not to say.<sup>82</sup> The right not to speak is most famously set forth in two Supreme Court cases, *West Virginia State Board of Education v. Barnette* and *Wooley v. Maynard*.<sup>83</sup>

### 1. *West Virginia State Board of Education v. Barnette*

In *Barnette*, the Court struck down a West Virginia Board of Education resolution<sup>84</sup> requiring all students to salute the flag and recite the Pledge of Allegiance.<sup>85</sup> The first step in the Court's analysis was to find that a flag salute and recital of the Pledge constituted expression for the purposes of the First Amendment.<sup>86</sup> There was no question that the flag salute and pledge together constituted expression, because the ceremony was both "a compulsion of students to declare a belief" and a "require[d] affirmation of a belief and an attitude of mind."<sup>87</sup> That students were actually compelled to participate in the recital was

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U.S. 705 (1977) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Eugene Volokh, *Photographers Denied the Freedom to Choose What They Photograph*, VOLOKH CONSPIRACY (Apr. 9, 2008, 2:03 PM), <http://volokh.com/2008/04/09/photographers-denied-the-freedom-to-choose-what-they-photograph/>.

<sup>82</sup> *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."); *Wooley*, 430 U.S. at 714 ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *Harper & Row, Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) ("The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect" (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (1968))).

<sup>83</sup> *Barnette*, 319 U.S. at 642; *Wooley*, 430 U.S. at 714.

<sup>84</sup> The text of the resolution, in pertinent part, stated:

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States . . . now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

*Barnette*, 319 U.S. at 626 n.2.

<sup>85</sup> *Id.* at 642.

<sup>86</sup> *Id.* at 632 ("There is no doubt that, in connection with the pledges the flag salute is a form of utterance.").

<sup>87</sup> *Id.* at 632-33.

equally clear since refusal to comply was treated as insubordination and punished with expulsion pending compliance.<sup>88</sup> Because the notion that the government could compel an individual to affirm an opinion or belief was anathema to the Court, the Court indicated that such a compulsion would be constitutional only if it passed an even higher standard than that applicable to government *restrictions* of speech.<sup>89</sup>

The opinion then went on to analyze and overrule *Minersville School District v. Gobitis*, decided just three years earlier, which held that schools could condition access to public schools on participation in the flag pledge and salute.<sup>90</sup> The Court rejected what it termed “the heart” of the *Gobitis* decision—the false premise that because “[n]ational unity is the basis of national security,” the government had authority to institute compulsory measures to achieve that goal.<sup>91</sup> The First Amendment’s purpose is to guard against any such coercion of thought.<sup>92</sup> By setting this clear boundary, the First Amendment prevents the slippery slope that begins with persuasion toward national unity and quickly devolves into compulsion of thought and then extermination of dissenters.<sup>93</sup> Thus, the Court reasoned, although the state’s interest in promoting national unity was legitimate, that interest did not justify a compulsion of speech.<sup>94</sup>

The *Barnette* decision therefore established the method for analyzing instances of government-compelled speech under the First Amendment. First analyze whether a law has the effect of eliciting some sort of expression, then decide whether the expression amounts to a “declaration” or “affirmation” of belief. If there are sanctions for noncompliance with the statute, an impermissible compulsion will be found and will

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<sup>88</sup> In fact, not only were the children punished, but parents of non-complying children were also sanctioned. The children’s absence for insubordination was treated as unlawful delinquency, for which parents were subject to a fine and jail time, if convicted. *Id.* at 629.

<sup>89</sup> *Id.* at 633-34 (“It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression.”).

<sup>90</sup> *Id.* at 642; see *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595 (1940).

<sup>91</sup> *Gobitis*, 310 U.S. at 595; *Barnette*, 319 U.S. at 640.

<sup>92</sup> *Barnette*, 319 U.S. at 642.

<sup>93</sup> *Id.* at 641.

<sup>94</sup> *Id.* at 640.

possibly be an even greater First Amendment harm than a restriction of speech.<sup>95</sup>

## 2. *Wooley v. Maynard*

In *Wooley*, the Supreme Court confronted a very different set of facts than those of *Barnette* but struck down a state law on much the same reasoning. As Jehovah's Witnesses, George and Maxine Maynard felt the New Hampshire state motto, "Live Free or Die," directly contravened their religious and moral beliefs.<sup>96</sup> In an attempt not to disseminate the objectionable message, the Maynards began to cover the portion of their license plate where the motto was displayed.<sup>97</sup> After being found guilty three times for violating a New Hampshire statute prohibiting the covering up of any letter or number on a state-issued license plate, Maynard brought a civil rights action under § 1983 for declaratory relief and to enjoin enforcement of this and another statute requiring that the license plates for all noncommercial vehicles bear the New Hampshire motto.<sup>98</sup>

At the outset of its analysis, the Court framed the issue as "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."<sup>99</sup> Thus, much of the *Barnette* analysis was already satisfied, since the court implicitly found the New Hampshire statute required individuals to express a message. By directly analogizing the license plate statute to the requirement in *Barnette* to salute and pledge the flag, the Court reasoned that the New Hampshire statute co-opted the Maynards' private property as a "mobile billboard" for the state's own message.<sup>100</sup> Even if passively carrying the license plate on one's car was not as great a First Amendment harm as requiring active affirmation of a belief through speech and conduct, the Court nevertheless found the requirement was not constitutional.<sup>101</sup> As in *Barnette*, the statutes at issue carried a penalty for

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<sup>95</sup> *Id.* at 633.

<sup>96</sup> *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

<sup>97</sup> *Id.* at 707-08.

<sup>98</sup> The statute prohibiting the covering up of any letters or numbers was interpreted to include the State motto. *Id.* at 708-09.

<sup>99</sup> *Id.* at 713.

<sup>100</sup> *Id.* at 715.

<sup>101</sup> *Id.* at 717.

noncompliance.<sup>102</sup> Also as in *Barnette*, the Court rounded out its reasoning by inquiring into “whether the State’s countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.”<sup>103</sup> The Court determined the state’s first interest—easily identifying passenger vehicles—did not justify the infringement on drivers’ rights because such an interest could be achieved by more narrowly tailored means that did not so “broadly stifle fundamental personal liberties.”<sup>104</sup> More importantly, the state’s second interest—fostering state pride—did not justify an infringement of rights because, “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s *First Amendment* right to avoid becoming the courier for such message.”<sup>105</sup>

### 3. *Elane Photography* Is a Case of Compelled Speech

As *Barnette* and *Wooley* explain, the analysis for the compelled speech doctrine has two steps. First, analyze whether a state law, regulation, or policy compels citizens to express or affirm a belief that they do not themselves hold. Then, ask whether the state’s interest in enforcing that law is compelling so that it justifies such a great constitutional harm. Under this analysis, it is likely that forcing Huguenin to take photographs of ceremonies that she believes are inherently wrong is a form of compelled speech. The Supreme Court recognizes artistic expression, including photography, as protected by the First Amendment, and it is unclear whether any legitimate state interest would justify this compulsion.

#### a. *Photography as Speech*

As a threshold matter, it must be determined whether there is expression compelled by a statute that compels expression in a way prohibited by the First Amendment.<sup>106</sup> The

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<sup>102</sup> Appellee George Maynard was issued a citation for cutting the words “or Die” off his plate and taping over the resulting hole as well as the words “Live Free.” At a hearing, a trial judge fined him \$25, but suspended the fine so long as he complied with the statute going forward. Maynard was fined \$50, ordered to pay the original \$25 fine, and sentenced to fifteen days in jail upon violating the statute a second time. *Id.* at 708.

<sup>103</sup> *Id.* at 716.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 717.

<sup>106</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

protection of speech on political issues or issues of public concern is at the core of the First Amendment.<sup>107</sup> The fight over marriage is not just over sincere religious and moral beliefs but also about entitlement to “legal, financial, and social benefits” the government affords married couples.<sup>108</sup> The issue of marriage itself has been a public issue since before the United States existed.<sup>109</sup> Further, the growing national Defense of Marriage movement opposing same sex marriage in recent years demonstrates that same-sex marriage specifically is an issue of political concern.<sup>110</sup> In 2003, Massachusetts became the first state to allow marriages between individuals of the same sex.<sup>111</sup> Currently, a majority of states, including New Mexico, do not allow same-sex marriage.<sup>112</sup> In the past decade, there have been several high-profile attempts to overturn bans, and to pass new legislation achieving marriage equality for same-sex couples, several of which were successful.<sup>113</sup> Therefore,

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<sup>107</sup> *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

<sup>108</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

<sup>109</sup> The First interracial marriage ban in the Colonies was enacted by Maryland in 1661. Marriage continued to be regulated as a matter of national concern through the early twentieth century. Aderson Bellegarde François, *As Iowa Goes, So Goes The Nation: Varnum v. Brien and Its Impact on Marriage Rights for Same-Sex Couples: Symposium Article: To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. GENDER RACE & JUST. 105, 113 (2009).

<sup>110</sup> For a discussion of this movement, see Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL’Y & L. 253, 272-74 (2006).

<sup>111</sup> *Goodridge*, 798 N.E.2d at 948 (finding that the Massachusetts Constitution prohibits treating same-sex couples differently than opposite-sex couples for the purposes of the state’s marriage statute).

<sup>112</sup> New Mexico currently has no provision addressing same-sex marriage. See N.M. STAT. ANN. §§ 40-1-1 to -4 (2010). On January 4, 2011, the Office of New Mexico Attorney General Gary King released an opinion letter concluding that, “While we cannot predict how a New Mexico court would rule on this issue . . . it is our opinion that a same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico.” N.M. Validity for Same-Sex Marriages Performed in Other Jurisdictions, Op. N.M. Att’y Gen., Gary K. King, No. 11-01 (2011), available at <http://www.nmag.gov/pdf/4%20Jan%2011-Rep.%20Al%20Park-Opinion%2011-01%5B1%5D.pdf>.

<sup>113</sup> As of March 2012, eight states and the District of Columbia allow same-sex marriage: Connecticut, Iowa, New Hampshire, Maryland, Massachusetts, New York, Vermont, and Washington. Other states prohibit same-sex unions, but provide all or some legal benefits of marriage to same-sex couples. In February 2012, the United States Court of Appeals for the 9th Circuit declared California’s ban on same-sex marriage unconstitutional. *Perry v. Brown*, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012); see

expression on the issue of same-sex marriage deserves full First Amendment protection.<sup>114</sup>

That the expression is in the form of photography, or, rather, a decision not to photograph, does not lessen the expression's degree of protection. It has long been recognized that the Constitution protects various forms of expression, including most art forms.<sup>115</sup> Photography specifically has been identified as art that falls within the protection of the First Amendment.<sup>116</sup> Further, the Supreme Court has decided that, in addition to its protected status as a medium for the content it expresses, art is protected for its own sake because of its inherent expressive character.<sup>117</sup> As the Court has explained,

[C]onstitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, "rest[s] upon [the] ideal]" of governmental viewpoint neutrality.<sup>118</sup>

Thus, Elaine Huguenin's photographs should be protected as expression under the First Amendment for conveying a message on a prominent social and political issue and as artistic works.<sup>119</sup>

Further, the mere fact that clients may commission and pay for Huguenin's photography does not diminish its expressive ability or First Amendment protection.<sup>120</sup> There is a

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*also Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (July 6, 2011), [http://www.hrc.org/files/assets/resources/Relationship\\_Recognition\\_Laws\\_Map\(1\).pdf](http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf) (periodically updated information on the current status of same-sex union laws by state). For a discussion of the fight for recognition of same-sex unions on the state level, see David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115 (2010).

<sup>114</sup> *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion))).

<sup>115</sup> *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602-03 (1998) (Souter, J., dissenting) ("It goes without saying that artistic expression lies within this First Amendment protection.").

<sup>116</sup> *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("Pictures, films, paintings, drawings, and engravings . . . have First Amendment protection").

<sup>117</sup> *Finley*, 524 U.S. at 602-03 (Souter, J., dissenting).

<sup>118</sup> *Id.* at 602-03 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

<sup>119</sup> *Id.*

<sup>120</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that otherwise constitutionally protected expression does not lose its First Amendment protection merely because it was bought and paid for); Griffin, *supra* note 4, at 1062 ("The Supreme Court clearly has rejected the significance of profit motive to [First Amendment] claims, indicating that this basis for regulation would be incompatible

long tradition of patronage in the arts and some of the most lauded classical artwork was produced on commission.<sup>121</sup> Nor are the photographs subject to lesser constitutional protection as mere commercial speech.<sup>122</sup> Commercial speech is speech that proposes a commercial transaction, such as flyers advertising the sale of goods, not speech that was commissioned from a provider by a client.<sup>123</sup>

Because art, even if bought and commissioned, has protection as expression under the First Amendment, the facts of *Elane Photography* likely lead to a compelled speech problem under *Barnette* and *Wooley*. To be sure, one could argue that commercial photographers merely capture a memorable moment and contain little, if any, actual expression. But that argument contradicts both case law and reason. As discussed, the Supreme Court has emphasized that art is an inherently expressive medium, whatever the purpose behind its creation.<sup>124</sup> The fact

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with the first amendment. That conclusion requires only the recognition that newspapers and books are sold for profit . . .”).

Professor Eugene Volokh poses a hypothetical to demonstrate this point:

Say you're a freelance writer, who holds himself out as a business offering to perform a service. Someone tries to hire you to write materials—press releases, Web site materials, and the like—for his same-sex marriage planning company, or his Scientology book distribution company, or whatever else. May the government force you, on pain of damages liability, to write those materials, even if you would prefer not to because of the sexual orientation, religion, or whatever else to which the materials would be related? Or do you have a First Amendment right to choose which words you write and which you decline to write? If you do have such a right, why shouldn't Elaine Huguenin have the same right as a photographer?

Eugene Volokh, *First Amendment and Photography/Writing/Publishing/Book Distribution for Money*, VOLOKH CONSPIRACY (Apr. 9, 2008, 3:07 PM), <http://volokh.com/2008/04/09/first-amendment-and-photographywritingpublishingbook-distribution-for-money/>.

<sup>121</sup> Books and newspapers are also sold for profit, yet are accorded full constitutional protection. Griffin, *supra* note 4, at 1062; Volokh, *supra* note 81; Volokh, *supra* note 120.

<sup>122</sup> *Cincinnati v. Discovery Network*, 507 U.S. 410, 423 (1993) (affirming “the proposal of a commercial transaction as ‘the test for identifying commercial speech’”); *see also* Volokh, *supra* note 120.

<sup>123</sup> *Discovery Network*, 507 U.S. at 423; *see also Sullivan*, 376 U.S. at 266 (finding that an advertisement that a newspaper was paid to publish was not commercial speech, and thereby subject to less First Amendment protection, merely because the newspaper was paid to publish it). Even if this could be considered commercial speech, it is not clear that it would receive less constitutional protection as a result. In *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503-08 (1996), the Supreme Court appears to have ratcheted up the scrutiny restrictions commercial speech must pass in order to be permissible. Although the Court did not formally declare they were giving commercial speech full constitutional protection, its application of higher scrutiny implies the law is moving towards greater protection for commercial speech. Ashutosh Bhagwat, *A Brief History of the Commercial Speech Doctrine (With Some Implications for Tobacco Regulation)*, 2 HASTINGS SCI. & TECH. L.J. 103, 111 (2010).

<sup>124</sup> *See supra* notes 115-22.

that there is comparatively more expression in an Ansel Adams photograph than in one taken by Elaine Huguenin, in any case debatable, is a question of degree that does not change the fact that expression exists, even if it is just the expression of a celebratory moment from a particular perspective.<sup>125</sup>

One could also argue that the expression is not the photographer's own message, but rather that of the clients or subjects of the photograph. It is certainly the case that clients have their own views of the celebrated event, and it is possible that the photographer incorporates those views into her photographs as she takes them. But that is not necessarily the case, nor does that preclude the photographer's own expression from being simultaneously produced. The difficulty in commercialized-art-public-accommodations cases is that the main purpose of the expression is to provide a service to clients. However, to raise the question is not to answer it. Providing a service and creating expression are not mutually exclusive activities. It may even be the case that clients seek particular service providers specifically because the messages they project through their services is one the clients desire to support. This is a common phenomenon, observable in every neighborhood where environmentally friendly dry cleaners and free trade coffee shops flourish.<sup>126</sup> Whether it is the case here that Huguenin's photography contained expression that was her own depends on the extent of the artistic involvement in creating the finished image. Huguenin asserts in her appeal to the district court that "it takes great skill, planning and aesthetic judgment to create a photograph,"<sup>127</sup> which is probably accurate to a greater or lesser extent, depending on the circumstances. It stands to reason that the photographer exercises the skill, planning, and aesthetic judgment when a photograph is taken, rather than the commissioner of the

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<sup>125</sup> Volokh, *supra* note 81.

<sup>126</sup> See Richard A. Epstein, *Articles and Essays: The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CALIF. L. REV. 119, 140 (2000) (arguing that it is nearly impossible to draw the line between expressive and non-expressive corporations today); *id.* ("[I]t is sheer fantasy to assume that any successful organization fits this odd caricature of the firm [whose sole goal is profit], and is wholly indifferent to how it is perceived in the external world or by its own staff. It is commonplace to speak of 'corporate cultures' and to understand that these refer to the way in which particular firms position themselves in the many markets, internal and external, in which they do business.")

<sup>127</sup> Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 3, *Willock v. Elane Photography, Inc.*, HRD No. 06-12-20-0685 (N.M. Human Rights Comm'n Apr. 9, 2008), available at <http://oldsite.alliancedefensefund.org/userdocs/ElanePhotoAppeal.pdf>.

photograph or its subject. If Huguenin actively formed the content of the photograph through her artistic manipulation of the medium, then the photograph likely contained her own expressive interpretation of the scene. Thus, Huguenin was probably not merely a conduit for her clients' messages, as the district court found.<sup>128</sup>

Finally, the fact that Huguenin's expressive photography does not itself contain a specific message is not an issue under the compelled speech doctrine. The violation occurs when an individual is forced to utter or affirm a belief not her own.<sup>129</sup> There is no requirement that the individual has already expressed a view to the contrary.

Other facts of the case further support the conclusion that the expression in the photographs was Huguenin's rather than her clients'. Not only did Huguenin produce the physical photos from the negatives she shot, Huguenin also retained ownership rights to all the images in the photographs.<sup>130</sup> The images themselves were like her personal property, similar to George Maynard's car in *Wooley*. To force Huguenin to include images that conflict with her beliefs in her photographs is similar to forcing a driver to carry an unwanted ideological message on his license plate.<sup>131</sup> The analogy is not perfect because, unlike in *Wooley*, the expression itself is being co-opted, rather than an object with no inherently expressive nature. Therefore, the facts are closer to *Barnette* where the violation was based on active expression of a contrary belief, rather than *Wooley*'s more passive, forced dissemination. Requiring a photographer, on pain of civil sanction, to portray certain events in a positive light that she believes should not be so portrayed is essentially forcing her to support or adopt an idea not her own. This is similar to obliging a child to affirm a belief through recitation of a pledge, on pain of punishment, with which she does not agree.<sup>132</sup> Because of this compelled

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<sup>128</sup> *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 11 ¶ 25 (N.M.2d Jud. Dist. Ct. 2009).

<sup>129</sup> See generally *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>130</sup> *Willock*, HRD No. 06-12-20-0685, slip op. at 4 (quoting testimony of Elaine Huguenin and Jonathan Huguenin; Ex. A), available at <http://volokh.com/files/willockopinion.pdf>.

<sup>131</sup> *Wooley*, 430 U.S. at 713.

<sup>132</sup> Even if taking photographs involved no artistic skill or choices of light effect, perspective, angle, speed or layout, generic retail photography may still be protected by the First Amendment. Professor Eugene Volokh explains:

action, applying the public accommodations law may be an even greater infringement on Huguenin's First Amendment rights than that found in *Wooley*.<sup>133</sup>

*b. State's Interest in Compelling Speech*

The second prong of the compelled speech analysis investigates whether the state interest served by the infringing action justifies such a grave First Amendment violation.<sup>134</sup> The Court has held that a state's legitimate interest in promoting national unity,<sup>135</sup> or in facilitating state enforcement of its laws,<sup>136</sup> cannot justify compelling expression. Indeed, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."<sup>137</sup> Because enforcing the New Mexico public accommodations law against Elane Photography would coerce individual promotion of the state's ideological message, it would be absurd if the state's interest in disseminating that ideological message could justify the constitutional violation that coercive dissemination would cause.<sup>138</sup> To hold otherwise would undermine the primary purpose behind the First

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I suppose that some will say that writing press releases or Web pages on commission isn't really literary or political, the way that writing fiction or opinion columns is . . . Yet I take it that even being compelled to write bland, relatively generic copy about the virtues of some same-sex marriage planning company would be seen as a speech compulsion. Why wouldn't being compelled to take bland, relatively generic photographs likewise qualify (especially since taking and selecting good photos does involve at least some artistic decisionmaking)?

Eugene Volokh, *Legal Requirements that You Write Things or Create Photographs*, VOLOKH CONSPIRACY (Apr. 9, 2008, 7:46 PM), <http://volokh.com/2008/04/09/legal-requirements-that-you-write-things-or-create-photographs/>.

<sup>133</sup> *Wooley*, 430 U.S. at 713; *id.* at 715 ("Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree.").

<sup>134</sup> *Id.* at 716 (After finding the petitioner's First Amendment rights are implicated, the Court "must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring [the compelled expression].").

<sup>135</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

<sup>136</sup> *Wooley*, 430 U.S. at 716.

<sup>137</sup> *Id.* at 717.

<sup>138</sup> David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 101 (2001).

Amendment—to protect expression of individual belief, irrespective of content, against government interference.<sup>139</sup>

Nevertheless, in the closely analogous compelled association cases, the Supreme Court has found that the interest of eliminating discrimination is sufficient to justify infringement on First Amendment rights.<sup>140</sup> The elimination of discrimination is a primary purpose of public accommodations laws,<sup>141</sup> and it was the compelling justification cited by the New Mexico Human Rights Commission for rejecting Huguenin’s First Amendment defenses.<sup>142</sup> Although never explicitly overruled, the current status of the compelling interest test is in question following several important cases on the closely related expressive association doctrine.<sup>143</sup>

### B. *The Compelled Association Doctrine*

Although not an enumerated right, the Supreme Court has found “implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>144</sup> Without such protection for group effort, the Court reasoned, an individual’s other First Amendment freedoms would be significantly diminished.<sup>145</sup> Just as the Court found that freedom

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<sup>139</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (the purpose of the First Amendment is to preserve a democratic form of government by ensuring government does not have the power to repress the public by coercing acceptance of a government approved message), *overruled in part on other grounds*, *Brandenburg v. Ohio*, 274 U.S. 357 (1927).

<sup>140</sup> *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (“Even if the [public accommodations statute] does work some slight infringement on [the association’s] right of expressive association, that infringement is justified because it serves the State’s compelling interest in eliminating discrimination against women.”); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (“[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.”).

<sup>141</sup> Lerman & Sanderson, *supra* note 2, at 238-40.

<sup>142</sup> *Willock v. Elane Photography, Inc.*, HRD No. 06-12-20-0685, slip op. at 17 (N.M. Human Rights Comm’n Apr. 9, 2008), *available at* <http://volokh.com/files/willockopinion.pdf>.

<sup>143</sup> Bernstein, *supra* note 138, at 116.

<sup>144</sup> *Roberts*, 468 U.S. at 622.

<sup>145</sup> *Id.* (“According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”); *Boy Scouts of Am. v. Dale*, 530

of expression corresponded with a right to be free from compelled expression,<sup>146</sup> so has the Court found a corresponding right of freedom from compelled association.<sup>147</sup> Thus, the Court views the right of freedom of association as a necessary corollary to the enumerated First Amendment rights,<sup>148</sup> and the compelled association doctrine is directly analogous to the compelled speech doctrine because the Court derived both from the same rationale.<sup>149</sup>

The Supreme Court's most significant freedom of association cases involve the application of state public accommodations laws to expressive activities that result in compelled association problems.<sup>150</sup> The three most instructive cases in this area are *Roberts v. United States Jaycees*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, and *Boy Scouts of America v. Dale*.<sup>151</sup>

### 1. *Roberts v. United States Jaycees*

The United State Jaycees, a nonprofit educational and charitable membership organization, limited their regular membership to men ages eighteen to thirty-five.<sup>152</sup> Women were admitted as nonvoting associate members only.<sup>153</sup> In the mid-1970s, two Minnesota chapters, St. Paul and Minneapolis,

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U.S. 640, 647-48 (2000) ("This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.").

<sup>146</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

<sup>147</sup> *Dale*, 530 U.S. at 648; *Roberts*, 468 U.S. at 623.

<sup>148</sup> *Dale*, 530 U.S. at 647-48, *Roberts*, 468 U.S. at 622.

<sup>149</sup> *See Barnette*, 319 U.S. at 641 (explaining that the First Amendment was designed to protect against attempts of the government or a majority from imposing on a minority any "uniformity of sentiment").

<sup>150</sup> *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 572-73 (1995) (holding that the Massachusetts public accommodations law was unconstitutional as applied to the sponsor of Boston's annual St. Patrick's Day parade because the parade's sponsor could not be compelled to include any group whose message would alter the expression of the parade as a whole); *Dale*, 530 U.S. at 648 (finding unconstitutional the application of the New Jersey public accommodations law to a private non-profit civic and educational association because "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints"); *Roberts*, 468 U.S. at 623 (holding that the Minnesota public accommodations law infringed upon the civic organization's First Amendment freedoms when it compelled the organization to admit women as members, but the infringement was justified because the burden on the members' speech was incidental when compared with the State's compelling interest in abolishing sex discrimination.).

<sup>151</sup> *Roberts*, 468 U.S. 609; *Hurley*, 515 U.S. 557; *Dale*, 530 U.S. 640.

<sup>152</sup> *Roberts*, 468 U.S. at 613.

<sup>153</sup> *Id.*

began to admit women as regular voting members in violation of the organization's bylaws.<sup>154</sup> After the national organization imposed various sanctions and threatened to revoke the offending chapters' charters, the chapters filed discrimination suits with the Minnesota Department of Human Rights.<sup>155</sup> The local chapters alleged a violation of the Minnesota public accommodations law, which prohibited the denial to "any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."<sup>156</sup>

Reversing a decision by the Court of Appeals for the Eighth Circuit, the Supreme Court found that the Minnesota public accommodations law was constitutionally applied to the national organization to require the admission of women as full voting members.<sup>157</sup> To reach that conclusion, the Court inquired whether applying this statute to the Jaycees would infringe upon the group's First Amendment rights, and found there was no infringement because admitting women would not in any way impede the Jaycees from disseminating their views.<sup>158</sup> However, the Court clarified that a finding of infringement does not end the analysis; infringement on a group's right to expressive association may be "justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."<sup>159</sup> After this pronouncement, the Court quickly concluded that the compelling interest of eradicating sex discrimination served by Minnesota's public accommodations law justified any imposition on the Jaycees.<sup>160</sup>

## 2. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*

In *Hurley*, the Supreme Court unanimously held that the Massachusetts public accommodations law was unconstitutional

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<sup>154</sup> *Id.* at 614.

<sup>155</sup> Sanctions included denying members of the offending chapters access to awards programs, not counting members' votes at national conventions, and excluding members from office. *Id.*

<sup>156</sup> MINN. STAT. § 363.03, subdiv. 3 (1982).

<sup>157</sup> *Roberts*, 468 U.S. at 628.

<sup>158</sup> *Id.* at 621-22, 627.

<sup>159</sup> *Id.* at 623.

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

as applied to a private, unincorporated group that organized Boston's yearly St. Patrick's Day-Evacuation Day Parade.<sup>161</sup> The private council of veterans was authorized to organize the yearly parade by Boston's mayor in 1947.<sup>162</sup> In 1992, the respondents formed the Irish-American Gay, Lesbian and Bisexual group of Boston (GLIB) in order to join the parade "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade."<sup>163</sup> The council denied GLIB's application to join the parade, but GLIB marched anyway pursuant to a state court order granting the group the right to participate.<sup>164</sup> When GLIB's application was denied again in 1993, the group brought suit against the council under Massachusetts's public accommodations law.<sup>165</sup>

Like the analyses in the compelled speech cases, the Court first identified that there was expression involved entitled to First Amendment protection.<sup>166</sup> It is important to note that although the parade did not have any specific message to convey, the Court held its expression was nevertheless protected.<sup>167</sup> The fact that the organizers did not originate the message that each contingent expressed was not a reason for denying constitutional protection to the parade as a whole, because the mere act of selecting each piece for inclusion was sufficient to impart constitutional protection.<sup>168</sup> A key part of the Court's analysis involved a discussion of the history of public accommodations laws, and concluded that "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."<sup>169</sup> Additionally, the Court

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<sup>161</sup> Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 557 (1995).

<sup>162</sup> *Id.* at 560.

<sup>163</sup> *Id.* at 561.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 568-69.

<sup>167</sup> *Id.* at 569.

<sup>168</sup> *Id.* at 570 ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.")

<sup>169</sup> *Id.* at 572.

found the statute at issue unproblematic, because it was neither directed at speech nor a content-based restriction of speech.<sup>170</sup>

However, the Court found the statute was nevertheless unconstitutional as applied since it would compel the parade organizers to change the content of their expression.<sup>171</sup> The Court explained that, “[s]ince every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.”<sup>172</sup> The state improperly converted the organizers’ expression into the public accommodation, rather than apply the statute properly.<sup>173</sup> A different result would have obtained had GLIB shown that the organizers excluded its members or other people from participating in the approved parade units on the basis of a protected classification (sexual orientation).<sup>174</sup> Rather, the issue was whether they could be excluded as a group because of their message.<sup>175</sup> To apply a public accommodations statute in this manner infringes on an essential First Amendment principle, “that a speaker has the autonomy to choose the content of his own message.”<sup>176</sup>

The *Hurley* Court also explicitly rejected GLIB’s argument that the parade was merely a conduit for the participants’ messages, which does not have a right to free expression, rather than expression in and of itself.<sup>177</sup> Finally, and most importantly, the Court conspicuously avoided all mention of the *Roberts* compelling interest analysis.<sup>178</sup> In fact,

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<sup>170</sup> *Id.* (“Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.”).

<sup>171</sup> *Id.* at 573.

<sup>172</sup> *Id.* at 572-73.

<sup>173</sup> *Id.* at 573.

<sup>174</sup> *Id.* at 572.

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

<sup>176</sup> *Id.* at 573.

<sup>177</sup> *Id.* at 575.

<sup>178</sup> *Roberts v. United States Jaycees* is cited by the *Hurley* Court only four times in the entire opinion, never once relying on the *Roberts* analysis: twice in the Court’s summary of the case’s previous history in the Massachusetts trial court and Supreme Judicial court (at 563 and 565); once for the proposition that public accommodations laws are generally constitutional (at 572); and a last time to support the Court’s distinguishing of a different compelled association case, *New York State Club Ass’n v. City of New York*, 487 U.S. 1 (1988). *Hurley*, 515 U.S. at 580. The lack of the Court’s reliance on *Roberts* left open two possible interpretations of the continued validity of *Roberts*. One possibility was that the Court felt expressive association deserved the same First Amendment protection as pure expression, in which case *Roberts* and its “compelling interest” test were essentially overruled. Alternatively, it could merely have signified that the Court saw *Hurley* as a pure expression case and,

the Court explicitly rejected the idea that a public accommodations law could be constitutionally applied to restrict expression and declared that, “While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”<sup>179</sup>

### 3. *Boy Scouts of America v. Dale*

In *Dale*, the Supreme Court again considered whether a state public accommodations law could be constitutionally applied to compel association. This time the issue was whether New Jersey could apply its public accommodations law to compel a national nonprofit educational association to keep on as a member an individual whose message was at odds with the views the organization wished to express.<sup>180</sup> After ten years as a model Boy Scout, James Dale’s application to become an adult member and assistant scout-master was approved.<sup>181</sup> Shortly thereafter, Dale openly acknowledged his homosexuality, became involved with the on-campus Lesbian/Gay Alliance at his university, and gave an interview in a local newspaper discussing his efforts to address “homosexual teenagers’ need for gay role models.”<sup>182</sup> Following publication of this interview, Dale’s adult membership in the Scouts was revoked.<sup>183</sup> Dale sued under New Jersey’s public accommodations statute, which prohibits discrimination in places of public accommodation on the basis of sexual orientation.<sup>184</sup>

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therefore, *Roberts* simply did not apply. In *Dale*, the Court resolved the confusion in favor of the first interpretation by clarifying that, where a First Amendment violation has been found in the expressive association context, *Hurley*, not *Roberts*, controls. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); Bernstein, *supra* note 138, at 118.

<sup>179</sup> *Hurley*, 515 U.S. at 579. This statement is not irreconcilable with *Roberts*. The *Roberts* analysis permitted application of a public accommodations law so long as the resulting infringement was “justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Thus, if a law interferes with speech for the sole purpose of promoting a state-sponsored message, the Court seems to imply by the above statement in *Hurley*, the law would not satisfy the “unrelated to the suppression of ideas” requirement of the *Roberts* standard. *Id.* Nevertheless, the Court did not apply the *Roberts* reasoning to *Hurley*.

<sup>180</sup> *Dale*, 530 U.S. at 644.

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

<sup>182</sup> *Id.* at 645.

<sup>183</sup> *Id.*

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

The Court began its analysis with the established principle that “forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”<sup>185</sup> Finding that the Boy Scouts of America was engaged in expression protected by the First Amendment, the Court then considered whether inclusion of an individual with contrary views would burden the organization’s expression.<sup>186</sup> The Court found that it did.<sup>187</sup>

At this point, rather than engaging in the *Roberts* compelling interest balancing analysis, the Court distinguished *Roberts* by deemphasizing the extent to which its holding relied upon the compelling interest test.<sup>188</sup> The Court insisted the *Roberts* decision rested on the fact that no “serious burden on the male members’ freedom of expressive association” was demonstrated.<sup>189</sup> Because the burden on the group’s First Amendment rights was not serious, it was proper to take the state’s interest in enforcing the statute into account.<sup>190</sup> However, in this case, applying the public accommodations statute to the Boy Scouts did infringe the group’s associational rights, and thus *Hurley*’s “traditional First Amendment analysis” controlled.<sup>191</sup> Just as in *Hurley*, the state’s interest could not overcome the “severe intrusion on the Boy Scouts’ right to freedom of expressive association.”<sup>192</sup>

Finally, in responding to an argument made by the dissenters, the Court took care to emphasize that the content of the Boy Scouts’ message did not influence the majority’s conclusion.<sup>193</sup> The Court echoed *Hurley*, explaining that,

[P]ublic or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message. “While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than

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<sup>185</sup> *Id.* at 648.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 656.

<sup>188</sup> *Id.* at 657-58; Bernstein, *supra* note 138, at 111.

<sup>189</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

<sup>190</sup> *Dale*, 530 U.S. at 658-59 (the organization’s “interest in freedom of expression has been set on one side of the scale, and the State’s interest on the other”).

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

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 661.

promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”<sup>194</sup>

Despite the fact that there were four dissenters, none of them appear to disagree with the majority over dropping the compelling interest analysis for cases where public accommodations law present First Amendment problems.<sup>195</sup> Rather, the dissenters disagreed with the majority over whether the association expressed a message, its rights were infringed, and its message impaired by compelling the group to keep Dale on as an employee.<sup>196</sup>

#### 4. The Compelled Association Doctrine Further Demonstrates a First Amendment Violation in *Elane Photography*

By applying the principles that evolved in *Roberts*, *Hurley*, and *Dale*, it is evident that the New Mexico public accommodations statute cannot be constitutionally applied to *Elane Photography*.<sup>197</sup>

##### a. *Roberts Distinguished*

Even if *Roberts* remains good law, which has been questioned after *Hurley* and *Dale*,<sup>198</sup> its reasoning cannot be applied to *Elane Photography*. Although the Court found the Jaycees engaged in protected expression, there was “no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”<sup>199</sup> In *Elane Photography*, however, application of the New Mexico statute would directly impede Huguenin’s ability to disseminate her preferred views; it would force the photographer to affirm and possibly even endorse an ideology<sup>200</sup>

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<sup>194</sup> *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 579 (1995)).

<sup>195</sup> *Id.* at 665; Bernstein, *supra* note 138, at 125-26.

<sup>196</sup> Bernstein, *supra* note 138, at 124-26.

<sup>197</sup> Eugene Volokh, *The Breadth of the New Mexico Human Rights Commission’s Rationale*, VOLOKH CONSPIRACY (Apr. 15, 2008, 1:48 PM), <http://volokh.com/2008/04/15/the-breadth-of-the-new-mexico-human-rights-commissions-rationale/>.

<sup>198</sup> Bernstein, *supra* note 138, at 124.

<sup>199</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984). Many commentators take issue with the Court’s assertion that admitting women to an all male organization would not materially alter that organization’s stance on social or political issues. Bernstein, *supra* note 138, at 97.

<sup>200</sup> *See supra* Part II.A.3.a.

that she claims she sincerely believes is wrong.<sup>201</sup> For this reason, *Elane Photography* more closely resembles *Hurley* and *Dale*, where the Court found direct and severe intrusions on the groups' First Amendment rights.<sup>202</sup>

*b. Hurley and Dale Control the Outcome of Elane Photography*

In *Hurley*, the Court began its investigation into whether application of the Massachusetts public accommodations law violated the parade organizers' First Amendment rights with the observation that the statute had been applied to the parade "in a peculiar way."<sup>203</sup> Rather than seeking access to the parade as participants in the organizers' message, the group sought to have their own message included as part of the parade over the organizers' objections.<sup>204</sup> This application of the statute "had the effect of declaring the sponsors' speech itself to be the public accommodation."<sup>205</sup> To condone such an application of the statute would eviscerate the axiomatic First Amendment principle "that a speaker has the autonomy to choose the content of his own message."<sup>206</sup> To apply the New Mexico statute to Huguenin's photographs would have the same unconstitutional effect of co-opting expression itself as the public accommodation, rather than the retail photography service Huguenin provides.

Also in *Hurley*, the Court explicitly found that no individual petitioner was excluded from participation in the parade; the petitioners were only excluded to the extent they sought to alter the parade sponsors' message.<sup>207</sup> Similarly, there was no showing the Huguenins denied service to individuals on discriminatory grounds.<sup>208</sup> Rather, the Huguenins asserted, they purposefully selected the content of their photographs so that their expression did not promote activities that conflict with their beliefs.<sup>209</sup> For example, the

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<sup>201</sup> Appeal from the Decision and Final Order of the N.M. Human Rights Comm'n at 2, *Elane Photography, LLC v. Willock* (N.M.2d Jud. Dist. Ct. June 30, 2008), available at <http://www.scottfillmer.com/wp-content/uploads/2008/07/ElanePhotoAppeal.pdf>.

<sup>202</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995).

<sup>203</sup> *Hurley*, 515 U.S. at 572.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 573.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Appeal from the Decision and Final Order of the N.M. Human Rights Comm'n, at 2, *Elane Photography, LLC*.

<sup>209</sup> *Id.*

Huguenins claim they refuse to take any “photographs that present abortion or horror movies or pornography in a favorable light.”<sup>210</sup> Thus the Huguenins, like the parade organizers in *Hurley*, were merely exercising their First Amendment right to select the content of their expression and not discriminating in providing service on an impermissible basis.<sup>211</sup>

The district court attempted to distinguish *Hurley* by arguing that Huguenin’s free speech rights were not implicated because her own message was not being co-opted.<sup>212</sup> Rather, the district court claimed that Huguenin was merely “a conduit or an agent for its clients.”<sup>213</sup> This counterargument was rejected by the court in *Hurley* and should be rejected here as well.<sup>214</sup> Huguenin asserts that she does not simply point and shoot her camera to convey her “client’s message of a day well spent.”<sup>215</sup> The court need not take her word for it; it stands to reason that this assertion must be at least partially true. If anyone could arrange the composition, lighting, and angles of a photograph, and if there was only one possible way to take a picture such that only one possible picture of any give scene existed, no one would ever hire a professional photographer. But arranging composition, lighting, and angles is not always a simple matter, and there are an infinite number of possible pictures to take. Thus, there must be at least some skill and selection to the process that makes the district court’s conduit analogy inappropriate. The selection of what to include and how to include it is more like the parade organizers exercise of editorial control over the content of the parade “upon which the State can not intrude.”<sup>216</sup> In fact, Huguenin’s control over her photographs may be even greater than the organizer’s control over the parade because Elane Photography explicitly retains the rights to all photographs taken.<sup>217</sup> Thus, the “conduit” analogy is inappropriately applied to *Elane Photography*.<sup>218</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> *Hurley*, 515 U.S. at 570.

<sup>212</sup> *Elane Photography, LLC v. Willock*, CV-2008-06632, 11 (N.M.2d Jud. Dist. Ct. Dec. 11 2009), available at <http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009>.

<sup>213</sup> *Willock*, CV-2008-06632, at 11.

<sup>214</sup> *Hurley*, 515 U.S. at 575.

<sup>215</sup> Appeal from the Decision and Final Order of the N.M. Human Rights Comm’n, at 1-2, *Elane Photography, LLC*; see also *Willock*, CV-2008-06632, at 11.

<sup>216</sup> *Hurley*, 515 U.S. at 575.

<sup>217</sup> *Willock v. Elane Photography, LLC*, HRD No. 06-12-20-0685, slip op. at 4 (N.M. Human Rights Comm’n Apr. 9, 2008), available at <http://volokh.com/files/willockopinion.pdf>.

<sup>218</sup> *Hurley*, 515 U.S. at 575.

Because both speakers exercise control over the content of their messages, coercing inclusion of a message not their own would cause the resulting expression to be perceived as “worthy of presentation and quite possibly of support.”<sup>219</sup> As already explained, such a consequence would run afoul of the First Amendment in the most dangerous way.<sup>220</sup>

Similarly, in *Dale*, the Court confirmed that where application of a public accommodations law would significantly burden First Amendment rights, the Court should apply traditional First Amendment analysis rather than the compelling interest balancing of *Roberts*.<sup>221</sup> Thus, once a “severe intrusion” on First Amendment rights was identified, the Court found the infringement could not be justified, even by the state’s interest in enforcing its public accommodations law.<sup>222</sup> Because the Boy Scouts believed Dale’s views were “inconsistent with the values it seeks to instill in its youth members,” forcing the organization to include him would “surely interfere with the Boy Scout’s choice not to propound a point of view contrary to its beliefs.”<sup>223</sup> The Huguenins asserted that they held a similar belief,<sup>224</sup> which if sincerely held, leads to a direct First Amendment infringement since they would be forced to promote or at least portray in a positive light ideas inconsistent with those beliefs.

The Court’s opinion in *Dale* is interesting for deferring to the Boy Scouts views regarding its own expression, declining to investigate into either “the nature of its expression” or the group’s “view of what would impair its expression.”<sup>225</sup> Deferring to the organization claiming infringement certainly makes the analysis in difficult cases simpler. There would have been two opinions in favor of Elane Photography had the Human Rights Commission and the district court deferred to Huguenin’s assertions that she “believes that she implicitly endorses the

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 576 (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”).

<sup>221</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 654.

<sup>224</sup> Appeal from the Decision and Final Order of the N.M. Human Rights Comm’n at 2, *Elane Photography, LLC v. Willock*, No. CV-2008-06632 (N.M. 2d Jud. Dist. Ct. June 30, 2008), available at <http://www.scottfillmer.com/wp-content/uploads/2008/07/ElanePhotoAppeal.pdf>.

<sup>225</sup> *Dale*, 530 U.S. at 653.

viewpoints communicated by her photography,”<sup>226</sup> and that it “compels Elane Photography to participate in and advance a viewpoint it would not do so absent government coercion.”<sup>227</sup> Justice Stevens, in his dissent in *Dale*, criticized this deference as “an astounding view of the law”<sup>228</sup> that will lead to nothing less than “a free pass out of antidiscrimination laws.”<sup>229</sup> Yet, it is probably necessary to sufficiently protect First Amendment rights. As the Supreme Court unanimously stated in *Hurley*, “a narrow, succinctly articulable message is not a condition of constitutional protection.”<sup>230</sup> Requiring an individual to have developed beliefs and already expressed them, either in writing or through other expressive means, may not be sufficiently protective of Free Speech.<sup>231</sup> Nevertheless, the facts of *Elane Photography* do not require so much deference that plausibility is strained. It is not unreasonable to infer that a religious individual sincerely holds beliefs at odds with those that would be promoted by participating in and helping to celebrate a same-sex wedding.

Finally, neither *Hurley* nor *Dale* can be distinguished on the grounds that the cases involved First Amendment infringements on nonprofit organizations, while Elane Photography is a for-profit business. First of all, and most obviously, the United States Jaycees is also a nonprofit organization.<sup>232</sup> Thus, even if *Elane Photography* could be distinguished from *Hurley* and *Dale* on this basis, *Roberts* would be similarly distinguished. Moreover, the organizations in all three cases were either expressly or impliedly deemed to be public accommodations.<sup>233</sup> Thus, since Elane Photography was also a public accommodation, the fact that it was a for-profit business is irrelevant. Lastly, the *Dale* Court clearly explains that the distinguishing factor between applying *Roberts*, on one hand, and *Hurley* on the other, is whether the

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<sup>226</sup> Appeal from the Decision and Final Order of the N.M. Human Rights Comm’n at 2, *Elane Photography, LLC v. Willock*, No. CV-2008-06632 (N.M. 2d Jud. Dist. Ct June 30, 2008), available at <http://www.scottfillmer.com/wp-content/uploads/2008/07/ElanePhotoAppeal.pdf>.

<sup>227</sup> *Id.* at 5.

<sup>228</sup> *Dale*, 530 U.S. at 686 (Stevens, J., dissenting).

<sup>229</sup> *Id.* at 688.

<sup>230</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 559, 569 (1995).

<sup>231</sup> For an excellent argument of this point see Epstein, *supra* note 126, at 126-31.

<sup>232</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984).

<sup>233</sup> *Roberts*, 468 U.S. at 626; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (majority opinion). In *Hurley*, the Court specified that the parade’s expression was not a public accommodation, but assumed that the parade itself was a public accommodation. *Hurley*, 515 U.S. at 579.

First Amendment has been infringed.<sup>234</sup> As demonstrated, applying the New Mexico public accommodations law did infringe the Huguenins' First Amendment rights. Thus, the *Hurley* and *Dale* First Amendment analysis applies, under which the state's interest in eliminating discrimination through enforcing public accommodations laws cannot justify the violation of the Huguenins' rights.<sup>235</sup>

### III. PROPOSALS

*Elane Photography* is a difficult case because it raises sensitive issues that strike at the heart of the moral and religious beliefs of a great many people. It is important to remember that the substance of the expression in cases like these is legally irrelevant.<sup>236</sup> As the Court's admonition at the end of *Dale* makes clear, "[t]he First Amendment protects expression, be it of the popular variety or not."<sup>237</sup> Indeed, a main purpose of the First Amendment is to protect the nation from government efforts to coerce unity of thought, because to do so is the first step toward destroying our democratic system of government.<sup>238</sup> However, the significant purpose of the states in promulgating public accommodations laws—protecting the dignity and rights of access of all citizens—cannot be abandoned. The following suggestions are three possible ways to preserve public accommodations laws without significantly impairing their ability to curb discrimination while at the same time reducing the possibility of First Amendment violations on expressive businesses.

One obvious solution is to simply revert to a more narrow definition of "public accommodation" to exclude expressive businesses. A good definition that would help to limit the conflict between such laws and the Constitution comes from the "public character" rationale behind public accommodations laws.<sup>239</sup> As Pamela Griffon explains,

The public character idea reflects the rationale for common law regulation of inns and common carriers. The owner of such facilities was

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<sup>234</sup> *Dale*, 530 U.S. at 658-59.

<sup>235</sup> *Id.* at 659.

<sup>236</sup> Bernstein, *supra* note 138, at 125 n.222.

<sup>237</sup> *Dale*, 530 U.S. at 660.

<sup>238</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) ("[W]e set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.")

<sup>239</sup> Griffon, *supra* note 4, at 1054.

deemed to be engaged in “quasi-public” service, because the property was put to a use in which the public had an interest. . . . Under this view, the purpose of restaurants, theatres and hotels is the public purpose of making a profit, which indicates that all paying customers will be accepted. In this context, racial or other discrimination among customers is unreasonable because such differences are irrelevant to the purpose for which the facilities operate.<sup>240</sup>

This rationale supports defining public accommodation as “an establishment in which minimal association exists between proprietor and customers, and in which the service relation is brief, casual and routine. In addition, the establishment provides a service necessary to the public, and a high degree of competition exists among establishments of the same kind.”<sup>241</sup> Alaska’s public accommodation definition is not a bad example of one that strikes a nice balance between the competing interests at stake. That statute limits its scope to

a place that caters or offers its services, goods, or facilities to the general public and includes a public inn, restaurant, eating house, hotel, motel, soda fountain, soft drink parlor, tavern, night club, roadhouse, place where food or spiritous or malt liquors are sold for consumption, trailer park, resort, campground, barber shop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, and all other public amusement and business establishments, subject only to the conditions and limitations established by law and applicable alike to all persons.<sup>242</sup>

The list of enumerated businesses is inclusive enough to cover most situations and to promote inclusion of all people in most places. It is true that some of the places listed could be expressive in nature, especially because the list is left open by the clause on the end extending the definition to “all other amusement and business establishments.” However, the entire definition is conveniently qualified by any “conditions and limitations established by law,” which thereby automatically limits the statute to its constitutionally permitted scope, as interpreted by *Hurley* and *Dale*, which prohibits application of these statutes where First Amendment rights are infringed. Although the Constitution automatically limits all state statutes, adding an explicit qualifying clause allows an interpreting court to avoid having to strike down the entire statute on a facial challenge, thereby permitting a fluid

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<sup>240</sup> *Id.* at 1054-55.

<sup>241</sup> *Id.* at 1055.

<sup>242</sup> ALASKA STAT. § 18.80.300(16) (2012).

definition of expressive business to develop slowly and thoughtfully over time without undermining the important equal access goals the statutes further.

Constructions to be avoided are those like California's, which evades the problem of definition altogether by prohibiting discrimination "in all business establishments of every kind whatsoever;"<sup>243</sup> and those like New Jersey's statute, which lists, but does not limit its scope to, more than sixty types of businesses, public places and institutions, including "any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind."<sup>244</sup>

This solution is neither perfect nor original. It is not perfect because it leaves the dirty job of line drawing to the courts on a case-by-case basis. Although, as mentioned earlier, this buys the courts time to develop a workable test for when a business is expressive and for achieving a better balance between the important goals of public accommodations law and the foundational right of free speech, it also leaves room for inconsistent application of the law.

The proposal is not original because a similar solution was recently suggested by James Gottry, as part of a more comprehensive two-pronged approach to alleviating the conflict between the First Amendment and public accommodations laws.<sup>245</sup> The first prong of Gottry's solution suggested that public accommodations laws should be legislatively narrowed in scope, both in term of the types of businesses they cover and the classes of people they protect.<sup>246</sup> The second prong suggested that courts take an active role in avoiding constitutional conflicts by interpreting statutes narrowly, and by engaging in a more robust analysis by 1) inquiring whether there in fact is discrimination of a class denying access to the business or service, rather than a decision not to express an antithetical point of view; 2) investigating whether there in fact is expression involved; 3) investigating the quality of

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<sup>243</sup> CAL CIV. CODE § 51(b) (West 2010).

<sup>244</sup> N.J. STAT. ANN. § 10:5-5(l) (West 2010).

<sup>245</sup> James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 996-97 (2011).

<sup>246</sup> *Id.* at 997.

expression;<sup>247</sup> and 4) applying *Hurley* to balance states' interests against any First Amendment infringement found.<sup>248</sup>

This proposal raises several issues that require comment. First, as suggested above, narrowing the scope of public accommodations laws to more traditional common carriers and purveyors of necessary services is supported by the historical purpose of the law, and it helps avoid major First Amendment conflicts. However, limiting the suspect classes protected by public accommodations does not serve both these goals. The historical purpose of the law is not served because a blind adherence to the text of the original civil rights statutes, which protected only race, fails to do justice to the fundamental principle of equality upon which this nation is built and which has been recognized by many states as evidenced by the addition of gender, national origin, marital status and sexual orientation as protected classes in their public accommodations statutes.<sup>249</sup> Second, restricting the scope of the protected classes does not help avoid First Amendment conflicts. National debates on race and gender are far from resolved. Even if public accommodations laws were restricted to protect the two least controversial "suspect classes," the risk of First Amendment violations for expressive business would remain huge. Restricting the coverage of suspect classes would therefore both undermine the principles of equality on which historical public accommodations laws were based and fail to avoid the essential conflict between those laws and the First Amendment.

The second prong of the proposal is vulnerable to the same criticism as the first proposed solution above, which restricts only business types—it would require endless litigation and factual analysis of what types of businesses are expressive.<sup>250</sup> This is a daunting proposition considering the vast array of artistic businesses that are potentially expressive—for example, custom baked goods,<sup>251</sup> theme party

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<sup>247</sup> It is universally understood that certain types of speech are entitled to more First Amendment protection than others. See *supra* notes 107, 114 (explaining that political speech is the essence of speech afforded First Amendment protection).

<sup>248</sup> See Gottry, *supra* note 245, at 1000-02.

<sup>249</sup> See *supra* note 6.

<sup>250</sup> *But see* *Roberts v. United States Jaycees*, 468 U.S. 609, 635 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (suggesting a standard to distinguish between expressive and non-expressive associations).

<sup>251</sup> Baked goods may already be a problem. For several years in a row, a ShopRite in New Jersey declined to provide a birthday cake inscribed with the name of a young boy called Adolf Hitler Campbell. See *3-Year-Old Hitler Can't Get Name on Cake*, MSNBC (Dec. 17, 2008, 6:40 PM), [http://www.msnbc.msn.com/id/28269290/ns/us\\_news-weird\\_news/t/-year-old-hitler-cant-get-name-cake/](http://www.msnbc.msn.com/id/28269290/ns/us_news-weird_news/t/-year-old-hitler-cant-get-name-cake/).

planning services, or calligraphers for hire. If sorting through these, one business at a time, is not difficult enough, the issue becomes further complicated by the fact that it is very difficult to identify instances of expressive activity without a preexisting identifiable message.<sup>252</sup> *Elane Photography* exemplifies this issue. After determining that Huguenin herself expressed no particular message of her own through her photographs, the district court found her First Amendment rights were not burdened by having to express someone else's message.<sup>253</sup> But the court has stated and reaffirmed that there need not be an identifiable message in order to constitute expression.<sup>254</sup> All that is required is expressive activity,<sup>255</sup> which could be anything.

The second proposal's guidelines for determining whether expression exists do not help make this analysis any easier. Those guidelines suggest that courts follow the standard set out in *Texas v. Johnson*<sup>256</sup> for identifying expression. The *Johnson* test asks whether there is an intent to convey a particularized message, and whether it is likely that viewers would understand the message being conveyed.<sup>257</sup> That standard will not aid the courts because it was developed to identify expression conveyed via conduct—for example, the symbolic act of burning a flag, which is distinct from the more conventional modes of expression through utterance or modes akin to utterance.<sup>258</sup> Indeed, the Court's failure to apply that standard in *Dale* or *Hurley* emphasizes its inapplicability to cases involving utterance or analogous expression. *Elane Photography* demonstrates the difference—Huguenin does not intend to make a statement by the act of taking or refusing to take a photograph; rather, the photographs themselves are the expression. There is no magic formula for identifying an expressive business, and at the same time, a case-by-case development will necessarily entail a long and bumpy road.

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<sup>252</sup> See Epstein, *supra* note 126, at 126-27.

<sup>253</sup> *Elane Photography, LLC v. Willock*, CV-2008-06632, 11 (N.M.2d Jud. Dist. Ct. Dec. 11, 2009), available at <http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009>.

<sup>254</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) (organizations need not be organized for the purpose of expounding a message to be protected: "An association must merely engage in expressive activity that could be impaired in order to be entitled to protection"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995) ("a narrow, succinctly articulable message is not a condition of constitutional protection").

<sup>255</sup> *Dale*, 530 U.S. at 655.

<sup>256</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>257</sup> *Id.* at 404.

<sup>258</sup> *Id.* at 402-03.

A third possible solution avoids the difficulties of distinguishing between expressive and nonexpressive businesses altogether. Professor Richard Epstein believes it is nearly impossible to draw the line between expressive and nonexpressive businesses, but after *Dale*, there is no need to.<sup>259</sup> All that is required for constitutional protection is that a business “engages in expressive activity that could be impaired.”<sup>260</sup> Epstein argues that the epitome of a nonexpressive business—“the profit-making corporation that ships goods, provides services, and cares only for its bottom line”—is a caricature that no real business fits.<sup>261</sup> Corporations today have corporate cultures that help win the loyalty and approval of both employees and clients.<sup>262</sup> These corporate identities are built through expressive activity, whether by donating to causes, participating in community service projects, taking voluntary environmental protection measures, or conducting employee health initiatives.<sup>263</sup> This means that the *Dale* standard for expressive activity is always met, because all organizations engage in expressive activity by building their corporate identity.<sup>264</sup>

In addition to his argument that it is meaningless to draw lines between expressive and nonexpressive businesses, Epstein contends that no legal basis exists for government control over decisions of private individuals to discriminate in providing goods or services.<sup>265</sup> Further, he makes the case that in developed private markets there is no need for it, since “voluntary segmentation of population groups” may be beneficial for their members, and people may prefer it.<sup>266</sup>

This does not, however, mean that discrimination by anyone, anywhere is okay; there are still compelling justifications for upholding public accommodations laws in at least one class of business.<sup>267</sup> Where there is no possibility for voluntary segmentation antidiscrimination laws may be justified.<sup>268</sup> That is, wherever a business holds a monopoly position in the market, and people cannot benefit from the social and economic efficiencies that result from voluntary

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<sup>259</sup> Epstein, *supra* note 126, at 139-40.

<sup>260</sup> *Dale*, 530 U.S. at 655.

<sup>261</sup> Epstein, *supra* note 126, at 139.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 140.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 133.

<sup>266</sup> *Id.* at 134.

<sup>267</sup> *Id.* at 121.

<sup>268</sup> *Id.* at 136.

organizing into internally coherent groups, the government should apply public accommodations laws to protect against the economic and social harms that monopolies have the disproportionate power to cause.<sup>269</sup> Thus, public accommodations laws should only apply to government institutions, which have a monopoly as a matter of law,<sup>270</sup> and other essential businesses that “typically supply standard commodities—electrical power, telephone service, railroad transportation—and only work because the firm is largely indifferent to the identity and personal characteristics of its customers.”<sup>271</sup> Recognizing the major weakness in this theory, Epstein points out that the main problem with his suggestion will be defining what exactly constitutes a monopoly.<sup>272</sup> This is complicated not just by the haziness of characteristics that imply monopoly status—stable, long term, and having minimal competition—but also the difficulty of identifying the geographic scope of the business, and the relevant market that should underlie the analysis.

None of the theories discussed in this section provide a magic antidote to the conflicts raised by *Elane Photography*. Nevertheless, identifying the common ground among them may help illuminate potential areas of future reform. All of the theories discussed agree with the basic proposition that the application of public accommodations laws to businesses that provide standard or essential services and have no reason to distinguish between their customers on the basis of any personal characteristics would not violate the First Amendment.<sup>273</sup> That, at least, is a start. All three theories would probably also agree that the application of public accommodations laws to businesses where the provider-consumer interaction is “brief, casual and routine” are similarly unlikely to be sites of frequent First Amendment infractions. In all other types of businesses, the presence of expression will serve as a threshold issue that will likely do most of the “work” in the First Amendment analysis. This is because once expression is found, it is comparatively simple to determine whether the expression has been coerced or would be altered by the application of a public accommodations

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 121.

<sup>271</sup> *Id.* at 137.

<sup>272</sup> *Id.* at 121.

<sup>273</sup> Griffin, *supra* note 4, at 1055; Gottry, *supra* note 245, at 997, 965-68 (recommending a return to the historical contours of public accommodations laws, which limited their scope to “essential goods and services”); Epstein, *supra* note 126, at 137.

statute; and if there is no expression, there is no problem. Perhaps the best (but likely not ideal) solution then is to focus on when a business is engaging in expression in a particular circumstance, rather than whether it is an expressive business as a matter of law. The precise standard will have to be developed over time, likely through some sort of imprecise totality of the circumstances analysis. This instance-focused approach (in contrast to the approaches that focus on definitions of expressive businesses above) gives more consideration to the high values of equality and access that public accommodations laws serve, while protecting First Amendment values as well. It also takes into account the fact that similar behavior may be found to be expressive in some circumstances and not in others, even if done by the same person.<sup>274</sup> Although this method will also result in case by case doctrinal development, perhaps a factual approach will eventually lead to more clarity in the law. In the meantime, statutory definitions of public accommodations need not be completely rewritten. A simple qualification, like Alaska's, that the definition is subject "to the conditions and limitations established by law"<sup>275</sup> will allow the doctrine to unfold in the courts.

*Elane Photography* may be one of the first cases to highlight the tension between public accommodations laws and the First Amendment right to be free from compelled speech, but it will not be the last. One can easily imagine, for example, that the development of new technology and the rise of social media as a commercialize-able form of expression will lead to an infinite number of possible First Amendment violations. But these new issues reflect old problems, and it is appropriate to look to old wisdom for guidance. Justice Brandeis once opined that the Framers of the U.S. Constitution "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine."<sup>276</sup> The best way to fight "invidious discrimination" in expressive

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<sup>274</sup> For example, photography may not always be automatically determined to be expressive. A photographer who takes private jobs, plays an active part in staging her photographs and exercises judgment in choosing lighting, perspective, and composition is not the same as an employee of a Sears photography studio, which is a large national chain, characterized by general openness to the public whose employees likely have little discretion in discharging their responsibilities.

<sup>275</sup> See *supra* note 242.

<sup>276</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part on other grounds*, *Brandenburg v. Ohio*, 274 U.S. 357 (1927).

businesses is, therefore, through means that encourage more speech and discussion and not through speech restrictions.

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