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BOOK REVIEW SYMPOSIUM

LESSONS FOR LGBT RIGHTS ADVOCATES FROM *WHO'S THE BIGOT?*

Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law. By Linda C. McClain. Oxford: Oxford University Press, 2020. Pp. 304. $39.95 (cloth); $26.99 (digital). ISBN: 9780190877200.

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INTRODUCTION

I often find myself perplexed by some students' lack of foundational historic knowledge. For example, when I teach a course on sexual orientation, gender identity, and the law, I usually find that a number of students are unaware of the Stonewall Riots. When I teach employment discrimination law, I usually note that many students are unaware of the history of redlining or of the contentious debates around the Civil Rights Act of 1964, the law that includes the centerpiece of the course, Title VII. Now nearly a decade into my law teaching career, spanning three law schools, these historical knowledge gaps no longer surprise me, but they continue to disappoint me. The years of experience, however, have given me a chance to reflect on the larger social and legal contexts in which my students are positioned, and thus better understand their knowledge gap: as Linda McClain points out in *Who's the Bigot: Learning from Conflicts over Marriage and Civil Rights Law*, the United States is a nation steeped in historical amnesia that has led to a collective forgetting (139).

McClain's book is a beacon of remembering, one that does the important work of reminding us of the nature and quality of the opposition to racial justice and its relevance to today's legal and cultural battles regarding sexual orientation and gender identity—referred to collectively as SOGI—discrimination. Beginning with social science research about the cause and character of prejudice and bigotry, then proceeding through seven decades of socio-legal history, McClain excavates and presents a wide array of primary source material, such as congressional hearing testimony and debates, media coverage, case law, amicus briefs, social science studies, the words of ordinary Americans grappling with evolving race relations in the 1960s, and sermons. She marshals these sources to create a deep and rich descriptive account of the relationship among racial civil rights, bigotry, and faith. Her account takes us through marriage equality and up to the present-day controversies surrounding SOGI religious exemptions and transgender civil rights.

McClain paints a vivid portrait of the religiously based arguments that were made—on both sides—concerning the Civil Rights Act, desegregation, and interracial marriage. Centering these faith-based but opposing positions on racial civil rights is an essential reminder that both positions were, at the time they were made, considered by a majority of Americans to be rooted in deeply sincere, "decent and honorable,"[1] understandings of scripture. She further builds out this historical narrative through analysis of the concepts of morality, animus, and bigotry in the U.S. Supreme Court's LGBT rights cases. Her exhaustive historical description is an important

1 Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

contribution to the literature concerning social movements, the law, and the "arc of the moral universe."[2]

Our collective forgetting in the United States concerning the arguments made about past race discrimination is particularly salient and consequential to today's debates over LGBT equality. It is *salient* because such forgetting risks an ahistorical approach to resolving requests for religious exemptions from public accommodations laws that prohibit SOGI discrimination in the marketplace. In these cases, Christian traditionalist[3] business owners, often wedding vendors, claim that they are exempt from complying with a state's public accommodations law because to apply that law to them—to force them to sell, for example, a wedding cake for a same-sex wedding—would violate their First Amendment rights to free speech and to the free exercise of religion.[4] Our collective forgetting concerning the arguments made about past race discrimination is *consequential* because, when LGBT-rights advocates *do* harken back to the history surrounding race discrimination in an effort to reason by analogy, those efforts often are rejected by opponents and judges alike as unfairly casting proponents of religious exemptions as bigots.

In what follows, I utilize McClain's analysis and takeaways to propose a path forward for LGBT rights advocates to resist broad SOGI religious exemptions from public accommodations laws. In particular, I focus on the race analogy in SOGI religious exemption cases, for which I have argued as a scholar and as an advocate.[5] McClain's work on bigotry and faith-based opposition to civil rights scaffolds and strengthens the race analogy in today's cases, and it suggests ways in which the race analogy might be accepted as an appropriate analytic tool rather than rejected as an inapposite comparison that unfairly condemns today's exemption seekers as bigots.

I first briefly describe the race analogy as used in today's religious exemption cases. I then use some of the lessons learned from McClain's analysis to propose a path forward for the race analogy in today's religious exemption cases by (1) framing the argument factually rather than normatively, and (2) embracing the contingency of bigotry to scaffold that factual framing.

THE RACE ANALOGY IN TODAY'S RELIGIOUS EXEMPTION CASES

As I have previously discussed, the LGBT rights movement has analogized to race at least since the 1950s.[6] As used in today's religious exemption cases, the race analogy proceeds as follows: Advocates and judges across ideological and religious spectrums concur that courts should—and would—reject a religious exemption claim seeking to turn away a different-sex African American couple or an different-sex interracial couple based on the vendor's religious belief that white people

2 Martin Luther King Jr., "Our God Is Marching On!" (speech, Montgomery, AL, March 25, 1965), https://kinginstitute.stanford.edu/our-god-marching.

3 I use the term *Christian traditionalist* to refer to Christians who adhere to traditional religious teachings regarding the authority of scripture and tradition, marriage, sex and gender, and sexuality.

4 See, for example, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (wedding cake baker); Brush & Nib Studio, LC, v. City of Phx., 448 P.3d 890 (Ariz. 2019) (custom wedding invitation designer); Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019) (wedding videographers); 303 Creative LLC v. Elenis, 746 F. Appx. 709 (10th Cir. 2018) (designers of wedding websites); State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019) (florist). These cases have also arisen in when faith-based adoption and foster care agencies have policies to turn away LGBT parents. See, for example, Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

5 See Kyle C. Velte, "Recovering the Race Analogy in LGBTQ Religious Exemption Cases," *Cardozo Law Review* 42, no. 1 (2020): 68–143; Brief of Amicus Curiae Legal Scholars in Support of Equality in Support of Respondents, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021).

6 Velte, "Recovering the Race Analogy," 85.

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are a superior race or that the races should not mix. Analogizing to race means that courts similarly should reject religious exemption claims seeking to turn away a same-sex couple based on the vendor's religious beliefs about marriage.

The race analogy appeals to LGBT rights advocates because the Court has rejected a claim for religious exemptions from the Civil Rights Act's public accommodations provision in the context of racial discrimination. It reached that conclusion more than fifty years ago, in the 1968 case of *Newman v. Piggie Park*.[7] In that case, African American customers alleged that the Piggie Park BBQ restaurant violated the Civil Rights Act by refusing them service on the same terms as white customers.[8] Maurice Bessinger, the proprietor, admitted the discrimination but argued that he was exempt from complying with the Civil Rights Act. Specifically, he contended that the Civil Rights Act violated his First Amendment right to freedom of religion because his faith "compel[led] him to oppose any integration of the races whatever."[9] The district court swiftly rejected this claim, holding that while Bessinger "undoubtedly" had a "constitutional right to espouse the religious beliefs of his own choosing," he did not have "the absolute right to exercise and practice such beliefs" to discriminate against African American customers.[10] The Fourth Circuit and the U.S. Supreme Court affirmed this holding.

Today's exemption seekers make an argument similar to the one rejected in *Piggie Park*, namely that they should be exempt from SOGI public accommodations laws pursuant to the First Amendment's right to free exercise of religion. Given that the Court rejected a religious exemption to a public accomodations law to discriminate based on race in *Piggie Park*, LGBT rights advocates argue that today's exemption seekers should similarly be denied.

A PATH FORWARD FOR THE RACE ANALOGY IN TODAY'S RELIGIOUS EXEMPTION CASES

Notwithstanding the striking parallels between the religious exemption seekers in the 1960s and today's religious exemption seekers, the race analogy is controversial for reasons that McClain cogently and thoroughly explores in *Who's the Bigot?* In short, the analogy is rejected by wedding vendors, their *amici*, and some justices because of what McClain describes as the "backward-looking" nature of bigotry: "Defining a belief or practice as bigotry may be possible only after society had repudiated it as wrong or unjust. Once there is general agreement that such past beliefs and practices were bigoted, it becomes hard for people to understand that anyone every seriously defended them" (2). Because society has largely rejected racial discrimination as anachronistic and bigoted (backward-looking), analogizing today's cases to those now-repudiated, collectively scorned race discrimination cases makes today's exemption seekers "bristle at the notion that religious resistance to racial integration is of any relevance to present-day controversies, suggesting either that such religious objections were a pretext or simply not a reasonable position" (126). They contend that to apply the race analogy to today's cases could brand today's exemption seekers as bigots; McClain describes this as forward-looking bigotry, which occurs when "past examples of bigotry on which there is consensus become the basis for prospective judgments about analogous forms of bigotry" (2).

7 390 U.S. 400 (1968).

8 See Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 943–44 (1966); see also *Piggie Park*, 390 U.S. at 400.

9 *Piggie Park*, 256 F. Supp. at 944.

10 *Piggie Park*, 256 F. Supp. at 944 ("This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.").

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McClain's detailed and thorough history belies this position by reminding us that "religious beliefs about segregation were not 'fringe' in the mid-1960s and were sincerely and widely held" (126). Her work provides insights about how LGBT rights advocates may deploy the race analogy in a way that increases the likelihood of its acceptance by courts because it is consistent with *Obergefell v. Hodges*' observation that religious beliefs about same-sex marriage are not being disparaged when LGBT civil rights are being protected.[11] The following lessons from McClain's work lay the groundwork for this possible result.

Facts, Not Normative Rhetoric

McClain brings into sharp relief the parallels between today's battle over religious exemptions for SOGI discrimination and the battle over racial civil rights (both positive statutory protections and religious exemptions to that statutory law). Because there is "strong moral blame attached to a charge of bigotry" (13), the strategic question for LGBT rights advocates is how to leverage those parallels in ways that do not send a message of bigotry to courts or people of faith.

An important piece of McClain's contribution is the reminder of the historical *fact* of religious opposition to racial civil rights and the fact that this religious opposition was deployed as a legal claim for a religious exemption from the Civil Rights Act—just as is occurring in today's wedding vendor cases. Critically, McClain simply recounts these facts; she lays out the historical record through the words of those who spoke or wrote them. McClain presents this historical record unencumbered by hindsight and stripped of normative characterization or moral judgment.[12] The factual retelling is positioned within its historical moment. It is a snapshot of that moment, frozen in time. It speaks for itself. The fact that today, most Americans look back at that historical moment and cringe at what we now see as overt racism does not change the historical fact that opponents of desegregation, interracial marriage, and racial antidiscrimination protections often relied on conscience and faith as grounds for that opposition. And when they did so, that reliance was considered sincere and mainstream (15).[13] This "theology of segregation" was seen as reasonable by many and even "virtuous" by some (80–81). Many Christians who opposed desegregation did so with the "highest of motives" (98, 115–20).

McClain concludes, and I agree, that reviving this factual history of religious opposition to racial civil rights "casts doubt on arguments today that play down the extent of religious support for segregation and antimiscegenation laws or view them as merely pretextual" (15). I build on this conclusion by taking another lesson from McClain: To make the factual analogy in today's religious

11 *Obergefell*, 576 U.S. at 672 (holding that same-sex couples share in the fundamental right to marry, while observing "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here").

12 To be sure, McClain correctly notes that today, most Americans look back at that historical record and attach the normative characterization of bigotry to it. She also describes condemnation of these views at the time they were expressed in the 1960s. But the important point for this essay is her primary source recounting of religious opposition to racial civil rights in the 1950s and 1960s, which were accepted as mainstream by many and which she lays out without attaching normative judgments.

13 McClain notes that religion was also used as a rallying cry to *support* racial civil rights. Because the U.S. Supreme Court seems to be particularly concerned about the perception and treatment of people of faith who *oppose* same-sex marriage in today's cases, I focus on McClain's recounting of religious opposition to racial civil rights. To be sure, the fact that religion has been marshaled on both sides of racial and LGBT civil rights issues is an important antidote to the common "framing that pits conscience and religious liberty against LGBTQ rights" (17). It is also important because, in rejecting such a dichotomy, it creates space to recognize that there are many LGBT people of faith and that "religious traditions differ in their views and also evolve, sometimes spurred by legal change" (192).

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exemption cases, which in turn facilitates use of the *Piggie Park* race analogy, LGBT rights advocates must be explicit that they are presenting the facts of religious objections to racial civil rights as just that—a *factual* comparison—rather than a *normative* comparison between opponents of racial equality and today's exemption seekers. The distinction is important and is one that may be lost if not amplified. If advocates are attentive to this distinction in framing, the race analogy may be better received by courts. Thus, a clearer and more intentional analogy should be considered, such as the one I offer here: *In the 1960s, there was no consensus on interracial marriage, desegregation, or racial equality more generally. People of faith on both sides of the issue reasoned from religious teachings to support their positions. Because the issue was unsettled, religious opposition to racial civil rights was mainstream and a common part of the cultural and legal conversations about racial equality. Similarly, today there is no consensus on same-sex marriage or antidiscrimination protections for LGBT people more generally. People of faith on both sides of the issue reason from religious teachings to support their positions. Because the issue is unsettled, religious opposition to SOGI civil rights is mainstream and a common part of the cultural and legal conversations about SOGI equality. At the moment in time when religious opposition to racial civil rights was mainstream and a common part of the cultural and legal conversations about racial equality, courts considered requests for religious exemptions from race public accommodations laws. Those courts rejected those claims, finding that sincerely held religious beliefs do not trump generally applicable public accommodations laws. Given the parallels between requests for racial religious exemptions and SOGI religious exemptions, these courts' reasoning and holdings are applicable precedent in today's religious exemption cases.*

Framing the analogy in this way may help counter the arguments made by some of today's exemption seekers that seek to minimize the historical fact of religious opposition to racial civil rights laws (196–97), and, importantly, holds the potential do so without raising the specter of bigotry. Historical context is critical in using the race analogy.

LGBT rights advocates thus should avoid attaching normative assessments to these historical facts. To do so—to put the "focus on bigotry and bad versus sincere motives" (18)—diverts attention from the central question in discrimination cases. That question "'is not whether any particular person should face moral condemnation as a bigot,' but whether there is discrimination that has caused harm to a person" (18). McClain observes that not many LGBT rights advocates actually resort to the language of bigotry in their court filings (199–203). In addition to omitting the language of bigotry, I suggest explicit language disclaiming the language of bigotry alongside language that situates these historical facts in their own historical moment to emphasize that *factual* comparisons rather than normative comparisons are being made. McClain's work informs and supports this approach through its evenhanded treatment of history.

This explicitly factual, normatively neutral approach is further supported by McClain's observation that "it is not necessary to label a belief 'bigoted' to uphold an anti-discrimination law limiting people's ability to act on their sincere religious beliefs when doing so harms or interferes with the rights of others" (6). Pointing out that the public accommodations laws at issue in today's cases protect all enumerated classes (such as race, sex, SOGI) equally and without hierarchy may further legitimize the race analogy: To treat SOGI discrimination differently than race or sex discrimination both contravenes the statute's plain language and contradicts precedent (*Piggie Park*).

Embracing the Contingency of Bigotry to Advance the Race Analogy

In addition to making clear that they are using historical facts in the context of their own historical moment, without attaching normative judgments to those facts, LGBT rights advocates' use of the

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race analogy likely will be further strengthened by harnessing McClain's observations about the contingency of bigotry. She observes that "[o]ne lesson about the rhetoric of bigotry is that ideas about what is reasonable and unreasonable change over time." Presenting historical facts within the context of their own historical moment, rather than the current moment, may be easier if courts are familiarized with the notion that bigotry is, as McClain points out, both backward- and forward-looking.

To appease the concerns of some judges regarding the race analogy, LGBT rights advocates should consider being explicit that they are presenting the facts of religious objections to racial civil rights as just a snapshot in time, not as a means to overlay our backward-looking consensus that opponents of racial equality were bigots to then inform a forward-looking conclusion that today's exemption seekers too are bigots. Instead, LGBT rights advocates should consider making clear that the analogy is being made on a fact-to-fact basis *as those facts are situated in their own historical moment*; and that it is not an analogy to "bigot then, bigot now." In other words, courts must be assured that the race analogy is not being used as a forward-looking mechanism to brand today's exemption seekers as bigots. Explaining McClain's insight that concepts of bigotry are both backward-looking and forward-looking may be a necessary first step in having courts accept that using the race analogy does not equate to or result in the casting of today's exemption seekers as bigots.

There may be particular importance in situating the *Piggie Park* analogy within the backward-looking/forward-looking framework. Using *Piggie Park* to make a race analogy in today's religious exemption cases appeals to LGBT rights activists not only because its facts and applicable statute closely track the facts and law of today's cases, but also presumably because of the case's age. The fact that the Court decided the question of race-based religious exemptions from public accommodations laws more than fifty years ago supports LGBT rights advocates' argument that the law is already equipped with long-settled, well-established antidiscrimination frameworks that ought to be applied to resolve today's religious exemption cases; to depart from that longstanding framework would amount to improper LGBT exceptionalism.[14]

Establishing a clear division between backward-looking bigotry (there is a consensus today that the racial segregation of the past reflected bigotry) and forward-looking bigotry (the position of today's exemption seekers can be considered decent, honorable, and sincere rather than bigoted, *even when analogizing to Piggie Park*, because we have not reached a consensus on LGBT antidiscrimination) may assist courts in accepting the race analogy. Put another way, the temporal nature of claims of bigotry means that each of the following statements may be simultaneously true: (1) religious objections to racial civil rights were sincere, honorable, decent, and mainstream at the time they were made and at the time *Piggie Park* was decided; (2) today, religious objections to racial civil rights are considered bigoted by a majority of Americans; (3) religious objections to LGBT civil rights are sincere, honorable, decent, and mainstream today; and (4) today, religious objections to LGBT civil rights are not considered bigoted by many Americans.

To date, it appears that some jurists struggle to appreciate that all of these statements may be simultaneously true and, as a result, have rejected or expressed skepticism about the race analogy. In doing so, they appear to collapse the rhetoric of bigotry into a single, ahistorical, and fixed concept. McClain teaches us that such a collapsing of the rhetoric of bigotry into a static category—one that would lump today's sincere religious exemption seekers together with now-maligned

14 Carlos A. Ball, "Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations," *Journal of Civil Rights and Economic Development* 31, no. 2 (2018): 237–38.

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segregationists—erases historical facts and fails to appreciate the process of our collective "moral learning and coming to new understandings about injustice and justice" (14). As such, she cautions, "we should pay careful attention to the rhetoric of bigotry" (14). I agree. I propose that to inoculate against the risk of a judicial collapsing of the rhetoric of bigotry, which in turn often leads to a rejection of the race analogy, LGBT rights advocates provide courts with explicit education about the temporal nature of the rhetoric of bigotry. This discussion would point out that our backward-looking normative assessments of religious opposition to civil rights as bigoted does not foreclose the use of the race analogy in today's religious exemption cases because, given that religious opposition to racial civil rights was sincere and mainstream at the time it was asserted, we do not have to engage in forward-looking accusations of bigotry to implement the race analogy.

CONCLUSION

McClain's book is essential reading for LGBT rights advocates. She presents a compelling picture of a through-line of the rhetoric of bigotry from the 1950s to the present day. Making that through-line clear and explicit provides a foundation for resisting collective forgetting, so that we may harness the lessons from past contests over the meaning and applicability of the "bigot" label as we consider claims by today's exemption seekers for religious exemptions from SOGI antidiscrimination laws.

Her book is important on many levels; here I focused on two. First, it shakes us out of our collective historical amnesia about the nature of the opposition to racial civil rights in the 1950s and 1960s. McClain's reminder that religiously based arguments against racial civil rights were considered mainstream at the time they were made may help LGBT advocates persuade judges that the race analogy is appropriate and that it does not equate to an accusation of bigotry against today's exemption seekers. Second, in illustrating the temporal nature of the rhetoric of bigotry, the book provides LGBT rights activists with a useful tool for educating judges about the race analogy—what it does do (provides well-settled antidiscrimination principles for resolving today's cases in a way that creates a coherent body of antidiscrimination law) and what it does not do (suggest or compel a conclusion that today's exemption seekers are bigots).[15] It is my hope that LGBT rights advocates might utilize the lessons from McClain's book, along with my proposals that build on the book, to persuade courts that the "mere step of drawing analogies between past and present forms of discrimination . . . is not a charge of bigotry" (209) and convince courts that we may all "concede religious sincerity while upholding the legitimacy of state anti-discrimination laws" (210).

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15 To be sure, even if LGBT rights advocates harness these lessons from McClain as I am proposing, some justices may continue to "see" a charge of bigotry where none had been made (17; noting that Justice Kennedy did not use the language of bigotry in any of his pro-LGBT decisions, yet the dissenting justices argued that the Court had branded as bigots those who disagree with same-sex marriage on moral or religious grounds). But while we cannot control how some justices may characterize a rejection of religious exemptions in a future wedding vendor case, we can control the framing of our arguments and the tenor and tone of our narratives. McClain's work illustrates that careful, intentional attention to such framing, tenor, and tone is essential to engaging both judges and traditional Christians in ways that enhance LGBT equality.

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