

## Cakes and Communication: A Trans-Atlantic Conversation Between the U.S. and U.K. Supreme Courts on the Tension Between Anti-Discrimination Law and the Freedoms of Religion and Speech

CARLO A. PEDRIOLI

Carlo A. Pedrioli is Professor of Law at Southern University (U.S.A.). He holds a J.D. from the University of the Pacific (U.S.A.) and a Ph.D. in Communication from the University of Utah (U.S.A.). He is also a member of the State Bar of California (U.S.A.).

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@ carlo.pedrioli@sulc.edu

 0000-0001-5027-6054

### ABSTRACT

In 2018, anti-discrimination law clashed with the freedoms of religion and speech at the tops of two major common law systems on both sides of the Atlantic Ocean. On June 4, the United States Supreme Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a case that involved a Christian baker who refused to bake a cake for a same-sex wedding. Several months later, on October 10, the United Kingdom Supreme Court decided *Lee v. Ashers Baking Company, Ltd.*, a case that involved a Christian family business that refused to bake a cake that promoted same-sex marriage. A key legal issue in both cases was whether the government, in the interest of furthering anti-discrimination law, may compel speech against one's religious beliefs. Also, permeating the two cases were especially rich issues of human communication.

Taking a comparative approach, and with an eye toward some of the communication-related matters involved in the cases, this paper examines *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Lee v. Ashers Baking Company, Ltd.*, ultimately proposing that court systems consider, at a minimum, several factors in cases in which anti-discrimination law clashes with the freedoms of religion and speech in the sale of baked goods like cakes. The paper urges courts to consider at least the following factors: (1) the specificity of the message, (2) the likelihood that the baker will be identified as the creator of the baked good and thus potentially as a sender of the message, and (3) whether the baker knows the situation in which the baked good will be used. The paper unfolds by providing background on the cases, reviewing the various legal opinions, and then offering analysis of key communication issues presented.



KEYWORDS

*Anti-Discrimination Law; Sexual Orientation; Freedom of Religion; Freedom of Speech; Same-Sex Marriage*

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INTRODUCTION

In 2018, anti-discrimination law clashed with the freedoms of religion and speech at the tops of two major common law systems on both sides of the Atlantic Ocean. On June 4, the United States Supreme Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a case that involved a Christian baker who refused to bake a cake for a same-sex wedding.<sup>1</sup> Several months later, on October 10, the United Kingdom Supreme Court decided *Lee v. Ashers Baking Company, Ltd.*, a case that involved a Christian family business that refused to bake a cake that promoted same-sex marriage.<sup>2</sup> A key legal issue in both cases was whether the government, in the interest of furthering anti-discrimination law, may compel speech against one's religious beliefs.

Permeating the two cases were especially rich issues of human communication. For instance, do both a cake with a specific message and a generic cake convey messages? Who would be behind sending the messages? Who would constitute the audience? Does context matter?

Conversation between and among courts in different jurisdictions around the world has led to constitutional cross-fertilization.<sup>3</sup> Through persuasive authority from another jurisdiction, a court in a given jurisdiction may gain insight into a similar problem elsewhere, whether the receiving court eventually adopts the same approach or not.<sup>4</sup> In *Lee v. Ashers Baking Company, Ltd.*, Lady Brenda Hale, the President of the U.K. Supreme Court, specifically referenced and engaged the opinions of the Justices of the

<sup>1</sup> See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

<sup>2</sup> See *Lee v. Ashers Baking Company, Ltd.* [2018] UKSC 49 (N. Ir.). *Ashers Baking* citations are to the paragraphs in the U.K. Supreme Court's opinion.

<sup>3</sup> See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194-95 (2003).

<sup>4</sup> *Id.* at 199-202.

U.S. Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>5</sup> Beyond the United States and the United Kingdom, similar matters regarding anti-discrimination law and speech against one's religious beliefs can arise in various jurisdictions around the world, which opens up the possibility for additional cross-fertilization.<sup>6</sup>

Moreover, a supranational court was invited to enter the discourse. After the U.K. Supreme Court's decision in *Ashers Baking*, Gareth Lee, who originally had complained against the Ashers Baking Company, made an application to the European Court of Human Rights [hereinafter E.Ct.H.R.] based on rights under the European Convention on Human Rights [hereinafter E.C.H.R.].<sup>7</sup> Although the E.Ct.H.R. found the case inadmissible because Lee had not expressly raised his Convention rights in the domestic courts,<sup>8</sup> the E.Ct.H.R., in addition to referring to the U.K. Supreme Court case, also referred to the U.S. Supreme Court's *Masterpiece Cakeshop* decision.<sup>9</sup>

Taking a comparative approach, and with an eye toward some of the communication-related matters involved in the cases, this paper examines *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Lee v. Ashers Baking Company, Ltd.*, ultimately proposing that court systems consider, at a minimum, several factors in cases in which anti-discrimination law clashes with the freedoms of religion and speech in the sale of baked goods like cakes. The paper will urge courts to consider at least the following factors: (1) the specificity of the message, (2) the likelihood that the baker will be identified as the creator of the baked good and thus potentially as a sender of the message, and (3) whether the baker knows the situation in which the baked good will be used. The paper will unfold by providing background on the cases, reviewing the various legal opinions, and then offering analysis of key communication issues presented.

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<sup>5</sup> See *Ashers Baking*, UKSC 49 at [59]-[62].

<sup>6</sup> See, e.g., Liam Elphick, *Sexual Orientation and "Gay Wedding Cake" Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions*, 38 ADELAIDE L. REV. 149 (2017).

<sup>7</sup> See, e.g., *Ashers "Gay Cake" Row Referred to European Court*, BBC NEWS (Aug. 15, 2019), <https://www.bbc.co.uk/news/uk-northern-ireland-49350891>.

<sup>8</sup> See *Lee v. United Kingdom*, App. No. 18860/19, ¶ 77 (Jan. 6, 2022), <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-202151%22>. For context, see Eimear Flanagan, *Ashers "Gay Cake" Case: European Court Rules Case Inadmissible*, BBC NEWS (Jan. 6, 2022), <https://www.bbc.com/news/uk-northern-ireland-59882444>.

<sup>9</sup> See *Lee*, App. No. 18860/19 at ¶¶ 38-42, 75.

## 1. BACKGROUND ON THE TWO CASES

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Jack Phillips operated a bakery in Lakewood, Colorado, which is near Denver.<sup>10</sup> Phillips, who was Christian, had operated the bakery for twenty-four years.<sup>11</sup> With his work, the baker attempted to honor God.<sup>12</sup> In line with his religious convictions, Phillips believed that God intended for marriage to be an exclusively heterosexual institution.<sup>13</sup>

During the summer of 2012, Charlie Craig and Dave Mullins, a gay couple, went to Phillips' shop and told him that they wanted to order a wedding cake for their wedding.<sup>14</sup> They offered no particular design for the cake.<sup>15</sup> At that time, same-sex marriage was not yet legal in Colorado, so the couple intended to marry in Massachusetts, where same-sex marriage was legal,<sup>16</sup> and then return to Colorado.<sup>17</sup> The baker informed the two men that he did not make cakes for same-sex weddings, although he would make the two men goods such as cakes for showers and birthdays.<sup>18</sup>

One day later, Craig's mother phoned Phillips to inquire why Phillips had refused to make the cake for her son and his fiancé.<sup>19</sup> Phillips explained his objection based on religious grounds; his understanding was that same-sex marriage contradicted biblical teachings.<sup>20</sup>

Craig and Mullins filed a civil rights complaint via the administrative system in Colorado.<sup>21</sup> After several steps, the Colorado Civil Rights Commission agreed that Phillips had violated the right of Craig and Mullins to be free from discrimination based on sexual orientation, a right that the Colorado Anti-Discrimination Act provided.<sup>22</sup> The Colorado Court of Appeal affirmed the decision, and the Colorado Supreme Court declined to hear the case.<sup>23</sup>

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<sup>10</sup> See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1724 (2018).

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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

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

<sup>16</sup> For a discussion of the case that legalized same-sex marriage in Massachusetts, see Carlo A. Pedrioli, *Goodridge v. Department of Public Health, Same-Sex Marriage, and the Massachusetts Supreme Judicial Court as Critical Social Movement Ally*, 54 *LOY. L.A. L. REV.* 515 (2021).

<sup>17</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

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

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

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

<sup>21</sup> *Id.* at 1725.

<sup>22</sup> *Id.* at 1725-26.

<sup>23</sup> *Id.* at 1726-27.

Of interest, in a 2017 matter not before the Supreme Court in *Masterpiece Cakeshop*, Phillips, citing his religious beliefs, refused to make a birthday cake for a transgender individual.<sup>24</sup> The proposed cake would have had a blue exterior and a pink interior.<sup>25</sup> In 2021, the state court that heard a lawsuit which the potential customer had brought found that Phillips had violated Colorado's anti-discrimination statute.<sup>26</sup> Phillips appealed.<sup>27</sup>

Thousands of miles away, on the other side of the Atlantic Ocean, in *Lee v. Ashers Baking Company, Ltd.*, Daniel and Amy McArthur, a married heterosexual couple, operated a bakery in Belfast, Northern Ireland.<sup>28</sup> The McArthurs were Christian and believed that sexual expression, if biblically-informed, should take place only in a heterosexual marriage.<sup>29</sup> They also accepted the idea that biblically-informed marriage was exclusively heterosexual.<sup>30</sup> Although they did not specifically advertise their beliefs, they named their business Ashers based on *Genesis 49:20*, which, in one translation, states, "Bread from Asher shall be rich and he shall yield royal dainties".<sup>31</sup>

Gareth Lee, who was gay, worked with QueerSpace, an entity that advocated for the queer community in Belfast, including the community's interest in promoting civil marriage for its members.<sup>32</sup> To a QueerSpace event in May 2014, Lee opted to bring a cake.<sup>33</sup> From Ashers, he ordered a cake with Bert and Ernie from the U.S. public television children's show *Sesame Street*; the desired cake would have had the message "Support Gay Marriage" and the QueerSpace logo on it.<sup>34</sup> Although the bakery took the order, and Lee then paid for it, the bakery later called Lee and indicated that, based on the religious beliefs of the McArthurs, the bakery could not fulfill the order.<sup>35</sup> The bakery refunded the charge to Lee, who then successfully ordered the cake from another bakery.<sup>36</sup> Staff members at Ashers were not aware of Lee's sexual orientation, and Lee was not aware

<sup>24</sup> *A Colorado Baker Is Fined for Refusing to Make a Cake for a Transgender Woman*, NAT'L PUB. RADIO (June 17, 2021, 10:46 AM ET), <https://www.npr.org/2021/06/17/1007594289/baker-fined-for-refusing-to-make-cake-for-transgender-woman>.

<sup>25</sup> *Id.*

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

<sup>27</sup> *Colorado Baker Fighting Ruling Over Gender Transition Cake*, NBC NEWS (Oct. 6, 2022, 9:58 AM CDT), <https://www.nbcnews.com/nbc-out/out-news/colorado-baker-fighting-rulinggender-transition-cake-rcna51018>.

<sup>28</sup> *See Lee v. Ashers Baking Company, Ltd.* [2018] UKSC 49, [9], [11] (N. Ir.).

<sup>29</sup> *Id.* at [9].

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

<sup>31</sup> *Id.* Other translations use *produce*, *food*, etc. instead of *bread*. *See generally* BIBLEGATEWAY, <https://www.biblegateway.com/> (allowing for comparison of numerous translations of the Bible) (last visited Oct. 29, 2022).

<sup>32</sup> *See Ashers Baking*, UKSC 49 at [10].

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

<sup>34</sup> *Id.* at [12].

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

<sup>36</sup> *Id.* at [12], [14].

of the McArthurs' religious beliefs, including those on marriage.<sup>37</sup> In the past, Lee had bought cakes at Ashers, but the staff members did not know him personally.<sup>38</sup>

Lee complained about the refusal of the McArthurs to bake his cake to the Equality Commission of Northern Ireland, which supported him in subsequent legal action.<sup>39</sup> Both the trial court and appellate court found unlawful discrimination by the McArthurs.<sup>40</sup>

## 2. THE OPINION OF THE U.S. SUPREME COURT AND ASSOCIATED OPINIONS

Justice Anthony Kennedy wrote the opinion for the U.S. Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>41</sup> He admitted that the case involved “difficult questions as to the proper reconciliation of at least two principles”.<sup>42</sup> Kennedy recognized that U.S. society “ha[d] come to the recognition that gay persons and gay couples [could] not be treated as social outcasts or as inferior in dignity and worth”.<sup>43</sup> At the same time, the Justice noted that objections to same-sex marriage based on religion or other beliefs were legally protected.<sup>44</sup> Despite such objections, a business owner generally would not be allowed to refuse goods and services to someone in a protected group.<sup>45</sup> However, the government would not be able to compel a minister who held an objection to same-sex marriage to perform same-sex marriages.<sup>46</sup>

Kennedy acknowledged Phillips' argument that, if the baker were forced to make the cake, Colorado would be forcing him “to make an expressive statement, a wedding endorsement in his own voice and of his own creation”.<sup>47</sup> As Phillips saw it, this situation would have implicated both speech and religious belief.<sup>48</sup>

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<sup>37</sup> *Id.* at [11].

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

<sup>39</sup> *Id.* at [14].

<sup>40</sup> *Id.* at [15]-[16].

<sup>41</sup> See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723 (2018). Kennedy's opinion received criticism for its narrow ruling, which failed to give substantial guidance in cases in which anti-discrimination law clashed with freedom of religion and speech. See, e.g., Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISCOURSE 154 (2019).

<sup>42</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

<sup>43</sup> *Id.* at 1727.

<sup>44</sup> *Id.*

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

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

<sup>47</sup> *Id.* at 1728.

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

Rather than addressing the coerced expression, Kennedy opted to address the requirement that the government approach religion from a perspective of neutrality. This approach provided a more efficient way to resolve the case, without the Court's having to formulate new constitutional doctrine. Kennedy's opinion reflected the ideal of U.S. constitutional theorist Alexander Bickel, who promoted what he called the *passive virtues*, via which a court avoids deciding cases on the merits when it can dispose of them in less involved ways.<sup>49</sup> Such an approach can avoid judicial overreach.

Specifically, as Kennedy observed things, the Colorado Civil Rights Commission had not taken a neutral position toward religion in handling the case before it.<sup>50</sup> At one meeting, a commissioner had stated the following:

“Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others”.<sup>51</sup>

Other commissioners apparently had not objected to this discourse.<sup>52</sup>

Adding to the above, Kennedy discussed three different cases in which the Civil Rights Division, a subpart of the Commission, had allowed bakers to refuse to make cakes that expressed anti-same-sex marriage messages. In the other cases, the Division had not addressed the issue of whether attribution of the messages on the cakes would be to the customers or the bakers.<sup>53</sup> In contrast, in Phillips' case, the Commission had decided that the attribution of the message from the cake would be to the two men who bought the cake, and not to the man who made the cake.<sup>54</sup> Kennedy believed that the Commission had given Phillips' religious objection less weight than the other bakers' non-religious objections.<sup>55</sup> Government assessment of the offensive nature of a message was an impermissible means of distinguishing between Phillips' case and those of the other bakers.<sup>56</sup>

<sup>49</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1st ed. 1962).

<sup>50</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

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

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

<sup>53</sup> *Id.* at 1730.

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1731.

With the lack of neutrality toward religion in the proceedings below, Kennedy found a violation of the First Amendment.<sup>57</sup> Still, he admitted that the result in a case with neutrality toward religion would have to wait.<sup>58</sup> He instructed lower judicial and quasi-judicial entities to act “with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they [sought] goods and services in an open market”.<sup>59</sup>

Several other Justices wrote opinions in *Masterpiece Cakeshop*. Since Kennedy’s majority opinion resolved the case based on a lack of neutrality to religion in the lower proceedings, and thus, in avoiding a decision on the merits, employed the passive virtues,<sup>60</sup> the other opinions offered more substantively-oriented thinking.

Justice Elena Kagan, writing for herself and Justice Stephen Breyer, concurred.<sup>61</sup> She determined that Phillips had refused to make the cake for the couple based on the couple’s sexual orientation, but that he would have made the cake for a straight couple.<sup>62</sup>

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<sup>57</sup> *Id.* at 1732.

<sup>58</sup> *Id.* Laws that burden religion and are “not neutral or not of general application” must withstand strict scrutiny, the most exacting form of judicial review. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring). Because the Supreme Court resolved *Masterpiece Cakeshop* on lack of neutrality grounds, the Court did not have the opportunity to re-consider the standard appropriate for infringement of free exercise of religion when government action does not specifically target religious exercise, but rather impacts such free exercise via a neutral law of general application. In *Masterpiece Cakeshop*, this likely would have been the situation with the Colorado Anti-Discrimination Act if the administrative process had lacked the hostility toward religion on which Kennedy hung the Court’s decision. As of *Masterpiece Cakeshop*, the standard for judicial review of neutral laws of general application that happen to burden free exercise remained rational basis, the most deferential form of judicial review. See *Employment Division v. Smith*, 494 U.S. 872 (1990). See also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1375 (6th ed. 2019).

*Employment Division v. Smith* has been controversial, with some calls for overturning the decision to promote greater protection for free exercise rights. See, e.g., *Church of Lukumi Babalu Aye*, 508 U.S. at 520 (Souter, J., concurring in part and concurring in the judgment); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment). In his *Fulton v. City of Philadelphia* concurrence, which Justices Clarence Thomas and Neil Gorsuch joined, Justice Samuel Alito stated, “As long as [*Smith*] remains on the books, it threatens a fundamental freedom”. *Id.* at 1924. One possible replacement for *Smith* would be to require a law that would put “a substantial burden on religious exercise” to pass strict scrutiny review. *Id.* In effect, this would reinstate the standard prior to *Smith*. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (articulating strict scrutiny as the standard of judicial review for a law that burdened free exercise of religion).

Despite *Smith*, the Supreme Court has assumed that the Religious Freedom Restoration Act of 1993 [hereinafter R.F.R.A.], a political response to *Smith* by the U.S. Congress, effectively elevated the standard of judicial review for infringement of free exercise of religion by neutral federal laws, as opposed to those of the states, to strict scrutiny. See, e.g., *Burwell v. Hobby Lobby*, 573 U.S. 682, 694-95 (2014). The Court struck down R.F.R.A. as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (maintaining that Congress could not create or enhance rights under Section 5 of the Fourteenth Amendment). Nonetheless, the Court has applied R.F.R.A. against federal action. See, e.g., *Hobby Lobby*, 573 U.S. at 682 (upholding, under R.F.R.A., the free exercise rights of owners of closely-held corporations against a U.S. Department of Health and Human Services requirement that for-profit companies provide employees with health insurance that included contraceptive methods, which the owners considered to be abortifacients, or pay fines).

<sup>59</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

<sup>60</sup> See BICKEL, *supra* note 49, at 111-98.

<sup>61</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1733.

<sup>62</sup> *Id.*

Because Phillips had not discussed a specific message for the cake with his two potential customers, Kagan saw the cake as something that celebrated a generic marriage.<sup>63</sup> Nonetheless, Kagan agreed with the Court that the state proceedings had suffered from an infusion of hostility toward religion.<sup>64</sup>

Justice Neil Gorsuch, writing for himself and Justice Clarence Thomas, also concurred.<sup>65</sup> Gorsuch offered a detailed treatment of what he agreed was a lack of religious neutrality to Phillips in the state proceedings. He noted that Phillips was aware that the two men were asking him to make a cake for their wedding, which would have involved making a cake for a same-sex wedding; preparing a cake for such a wedding violated Phillips' religious convictions.<sup>66</sup> Unlike Kagan, Gorsuch viewed the cake as one that celebrated same-sex marriage.<sup>67</sup> Phillips testified that he would have declined to make a cake for any customer, regardless of sexual orientation, who ordered a cake for a same-sex wedding.<sup>68</sup> As Gorsuch saw it, Phillips lacked the intent to discriminate based on the potential customers' sexual orientation; the cake, not the customers, made the difference.<sup>69</sup>

The concurring Justice pointed out that the Commission presumed Phillips to have had a negative intent, but did not so presume of the bakers in the Jack cases, the other bakery cases that Justice Kennedy had mentioned.<sup>70</sup> The Commission would not be allowed to "apply a more generous legal test to secular objections than religious ones".<sup>71</sup>

Gorsuch maintained that, whether they had words or not, wedding cakes were involved in communication. He suggested that if Jack had asked for a cake with a purely nonverbal message, rather than a verbal message, against same-sex marriage, the bakers still would have refused to make the cake.<sup>72</sup> A wedding cake was like a flag or an emblem; words were not necessary for a message to occur.<sup>73</sup>

On a related note, Gorsuch insisted that the Commission be consistent in applying the level of generality to different parties that appeared before it. The Commission should not have told Phillips that the wedding cake was "a generic wedding cake" when it had agreed with the bakers in the Jack cases "that the specific cakes Mr.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1734.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1735.

<sup>67</sup> *Id.*

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

<sup>69</sup> *Id.* at 1735-36.

<sup>70</sup> *Id.* at 1736.

<sup>71</sup> *Id.* at 1737.

<sup>72</sup> *Id.* at 1738.

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

Jack requested conveyed a message offensive to their convictions and allowed them to refuse service”.<sup>74</sup> “Such results-driven reasoning [was] improper”, Gorsuch concluded.<sup>75</sup>

Justice Clarence Thomas, writing for himself and Justice Gorsuch, wrote an opinion that concurred in part and concurred in the judgment.<sup>76</sup> Acknowledging a free exercise violation, Thomas chose to focus on the free speech issues in the case.<sup>77</sup> Because case law on the First Amendment is often very pro-speaker, Thomas had much on which to draw. The Justice turned to the expressive conduct doctrine. Conduct that was expressive included “nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag”.<sup>78</sup> Thomas acknowledged that, for expressive conduct to receive First Amendment protection, the Court had required both intent to communicate and a likelihood that the audience would understand the conduct as communicative.<sup>79</sup> Still, a message did not have to be “particularized”.<sup>80</sup>

Applying these standards, Thomas noted that Phillips saw himself as an artist.<sup>81</sup> To Phillips, the designer of the cake, “a wedding cake inherently communicate[d] that a wedding ha[d] occurred, a marriage ha[d] begun, and the couple should be celebrated”.<sup>82</sup> If someone entered a room with “a white, multi-tiered cake”, Thomas pointed out, the person most likely would think that a wedding would take place.<sup>83</sup> Words were not necessary for the cake to be communicative.<sup>84</sup>

Thomas concluded that Phillips’ making custom wedding cakes constituted expressive conduct.<sup>85</sup> Designing a cake for a same-sex wedding would mandate that Phillips “acknowledge that same-sex weddings [were] ‘weddings’ and suggest that they should be celebrated—the precise message he believe[d] his faith forb[ade]”.<sup>86</sup> According

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<sup>74</sup> *Id.* at 1738-39.

<sup>75</sup> *Id.* at 1739.

<sup>76</sup> *Id.* at 1740.

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

<sup>78</sup> *Id.* at 1741-42 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991); *Texas v. Johnson*, 491 U.S. 397 (1989); *Spence v. Washington*, 418 U.S. 405, 406, 409-11 (1974) (per curiam); *Schacht v. United States*, 398 U.S. 58, 62-63 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-06 (1969); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (opinion of Fortas, J.); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943); *Stromberg v. California*, 283 U.S. 359, 361, 369 (1931)).

<sup>79</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1742.

<sup>80</sup> *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1743.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1743 n.2.

<sup>85</sup> *Id.* at 1743.

<sup>86</sup> *Id.* at 1744.

to Phillips, such a message would contradict messages that the baker sent via his conduct, including the following conduct: being closed on Sunday; paying employees wages above the minimum required by law; loaning employees funds when needed; not baking cakes with alcohol; not creating cakes with racist, homophobic, or anti-God messages; and not making cakes for Halloween.<sup>87</sup>

Due to the expressive nature of Phillips' conduct, and because the government normally would not have punished someone for refusal to make a custom wedding cake, Thomas decided that the government needed to satisfy strict scrutiny analysis, the most exacting standard of judicial review.<sup>88</sup> This standard followed from the *Texas v. Johnson* flag-burning case.<sup>89</sup>

Thomas examined one particular justification offered for the state law, which was to protect the dignity of same-sex couples.<sup>90</sup> Further drawing upon *Johnson*, Thomas insisted that the government "[could] not punish protected speech because some group [found] it offensive, hurtful, stigmatic, unreasonable, or undignified".<sup>91</sup> Also, in the wedding cake situation, any such offense, hurt, stigma, or similar response surely would be less than that which would have followed a sexual minority's viewing a sign with "God Hates Fags" on it or an African-American's witnessing the burning of a twenty-five-foot-tall cross by white supremacists—types of communication the Court had previously protected under the First Amendment.<sup>92</sup>

Thomas insisted that, after the controversial *Obergefell v. Hodges* decision, in which the Supreme Court had read the U.S. Constitution to protect a right to same-sex marriage, people who disagreed with same-sex marriage still had a constitutional right to voice their views.<sup>93</sup> Quoting Justice Samuel Alito's dissent in *Obergefell*, Thomas warned against using *Obergefell* "to 'stamp out every vestige of dissent' and 'vilify Americans who [were] unwilling to assent to the new orthodoxy'".<sup>94</sup> Consequently, in the absence of a compelling justification for the government action, Thomas found a violation of Phillips' right to free speech.

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<sup>87</sup> *Id.* at 1745.

<sup>88</sup> *Id.* at 1745-46.

<sup>89</sup> *Id.* at 1746. See *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding the right of a protester to burn the U.S. flag). For a discussion of *Johnson* and the ensuing political debate over what proponents called a flag protection amendment to the U.S. Constitution, see David J. Vergobbi, *Texas v. Johnson*, in *FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS* 281 (Richard A. Parker ed., 2003).

<sup>90</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1746.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1747.

<sup>93</sup> *Id.* See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>94</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1748.

Justice Ruth Bader Ginsburg, writing for herself and Justice Sonya Sotomayor, provided the only dissenting opinion, claiming that Craig and Mullins should have won the case.<sup>95</sup> Ginsburg questioned whose message the wedding cake conveyed, the baker's or the couple's, and also queried what the message was.<sup>96</sup>

Ginsburg contrasted the Jack cases with the Craig and Mullins case. Jack had asked for two cakes that opposed same-sex marriage, and he had approached three bakers.<sup>97</sup> Craig and Mullins asked for a wedding cake without indicating a desire for distinguishing features on the cake.<sup>98</sup> In the Jack cases, Ginsburg felt that the bakers would have refused to create the anti-same-sex marriage cake for any customer, regardless of the customer's religion.<sup>99</sup> In contrast, Phillips would not bake a cake for Craig and Mullins, a gay couple, that he would bake for other customers.<sup>100</sup> Ginsburg claimed that, in the first case, the message, rather than the protected category of religion, had been at issue, but, in the second case, the protected category of sexual orientation, not the message, was at issue.<sup>101</sup>

Ginsburg believed that, in Phillips' case, the offensive nature of the message associated with the cake was a function of the identity of the customers who had requested the cake.<sup>102</sup> In the Jack cases, the bakers had refused to make cakes based on a negative message that was "literally display[ed]".<sup>103</sup> The cakes Jack had requested had "particular text".<sup>104</sup>

In terms of the issue of lack of neutrality toward religion in the administrative proceedings, the dissenting Justice downplayed what she described as "the comments of one or two Commissioners".<sup>105</sup> The process, she noted, had "involved several layers of independent decisionmaking, of which the Commission was but one".<sup>106</sup>

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

<sup>96</sup> *Id.* at 1748 n.1.

<sup>97</sup> *Id.* at 1749.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1750.

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

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

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1750-51.

<sup>104</sup> *Id.* at 1751 n.5.

<sup>105</sup> *Id.* at 1751.

<sup>106</sup> *Id.*

### 3. THE OPINION OF THE U.K. SUPREME COURT

On the other side of the Atlantic Ocean, Lady Brenda Hale wrote an opinion for the U.K. Supreme Court on the substantive issue in *Lee v. Ashers Baking Company, Ltd.*<sup>107</sup> Lord Jonathan Mance provided an opinion for the Supreme Court on the Court's jurisdiction regarding an appeal,<sup>108</sup> which is beyond the scope of this paper. All five Justices who heard the case joined both opinions.<sup>109</sup>

Lady Hale inquired whether a bakery's declining, based on the religious beliefs of its owners, to make a cake with "support gay marriage" on it, was unlawful discrimination based on sexual orientation or religious belief or political opinion.<sup>110</sup> If there were unlawful discrimination, then questions would arise regarding the bakers' rights of freedom of religion and expression under the E.C.H.R.<sup>111</sup>

For sexual orientation discrimination, Hale considered the case under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, also known as S.O.R.s.<sup>112</sup> She looked at the various types of discrimination based on sexual orientation to see if any of those types had been present in the case.

She determined that there was no direct discrimination. Direct discrimination would occur if, based on sexual orientation, someone treated someone else less favorably than the first person would treat other people with different sexual orientations.<sup>113</sup> Hale noted that the district judge had found that the reason that the McArthurs refused to fulfill the order was that they opposed same-sex marriage.<sup>114</sup> The issue was with "the message, not the messenger".<sup>115</sup>

Hale also determined that there was no indissociability at work in any discrimination. Indissociability occurs in a situation when an express criterion employed to justify discrimination is a proxy for a protected characteristic.<sup>116</sup> In this case, people of differing sexual orientations, not just sexual minorities, could support same-sex

<sup>107</sup> See *Lee v. Ashers Baking Company, Ltd.* [2018] UKSC 49, [5] (N. Ir.). For a discussion of how the Northern Ireland Court of Appeal addressed the case under Article 10 of the E.C.H.R., see David Capper, *Free Speech Is Not a Piece of Cake*, in *FREE SPEECH AND MEDIA LAW IN THE 21ST CENTURY* 105 (Russell L. Weaver, András Koltay, Mark D. Cole & Steven I. Friedland eds., 2019).

<sup>108</sup> See *Ashers Baking*, UKSC 49 at [62.5].

<sup>109</sup> *Id.* at [.5], [62.5].

<sup>110</sup> *Id.* at [1].

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at [3], [20].

<sup>113</sup> *Id.* at [20].

<sup>114</sup> *Id.* at [22].

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at [25].

marriage, so supporting same-sex marriage would not necessarily be a proxy for someone to be a sexual minority.<sup>117</sup>

Likewise, Hale refused to find a case for associative discrimination. Such discrimination would be based on someone else's sexual orientation, rather than that of the person who made the claim.<sup>118</sup> In this case, the record indicated that the McArthurs had employed and done business with sexual minorities, just as the couple had employed and done business with straight people.<sup>119</sup> The couple had not acted based on Lee's association with sexual minorities, but on its religious belief about marriage.<sup>120</sup>

In terms of sexual orientation discrimination, Hale concluded that "the objection was to the message and not to any particular person or persons".<sup>121</sup> Nonetheless, she made an effort to acknowledge what she described as "the very real problem of discrimination against gay people".<sup>122</sup>

For religious belief or political opinion discrimination, Hale considered the case in light of various acts, including the Government of Ireland Act 1920, the Northern Ireland Constitution Act 1973, and the Northern Ireland Act 1998, all of which had afforded constitutional status to protection from discrimination based on religious belief or political opinion.<sup>123</sup> In particular, the Fair Employment and Treatment (Northern Ireland) Order 1998 [hereinafter F.E.T.O.] prohibited such discrimination regarding goods and services.<sup>124</sup>

At this point in her opinion, Hale saw three related questions. First, had the McArthurs discriminated against Lee because of his political opinions?<sup>125</sup> Second, if there were such discrimination, was F.E.T.O. invalid, or should the Court read down F.E.T.O.,<sup>126</sup> based on incompatibility with Articles 9 and 10 of the E.C.H.R.?<sup>127</sup> Third, if the answer to the first question were affirmative, and the answer to the second question were negative, would F.E.T.O. be invalid under the Northern Ireland Constitution Act

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at [27].

<sup>119</sup> *Id.* at [28].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at [34].

<sup>122</sup> *Id.* at [35].

<sup>123</sup> *Id.* at [37].

<sup>124</sup> *Id.* at [3]. From the 1970s to the 1998 Good Friday Agreement, anti-discrimination legislation proved controversial in a politically divided Northern Ireland. Christopher McCrudden, *The Gay Cake Case: What the Supreme Court Did, and Didn't, Decide in Ashers*, 9 OXFORD J.L. & RELIGION 238, 268 (2020).

<sup>125</sup> See *Ashers Baking*, UKSC 49 at [40].

<sup>126</sup> In this context, reading down a statute is reading the statute narrowly to facilitate its compatibility with the E.C.H.R. See also Neil Duxbury, *Reading Down*, 20 GREEN BAG 2D 155 (2017).

<sup>127</sup> See *Ashers Baking*, UKSC 49 at [40].

1974 for facilitating civil liability for the refusal to convey a politically-based opinion that violated the religious beliefs of the individuals who refused to convey that opinion?<sup>128</sup>

Hale determined that, under F.E.T.O., less favorable treatment had to be based on the religious belief or the political opinion of another person besides the person who discriminated.<sup>129</sup> Again, Hale accepted that any discrimination that may have occurred “was afforded to the message not to the man”.<sup>130</sup> The McArthurs, she wrote, faced a situation similar to that of a Christian printing business that was “required to print leaflets promoting an atheist message”.<sup>131</sup> Still, Hale acknowledged the possibility that Lee’s political opinions and the message he sought to promote were indissociable.<sup>132</sup>

Because of the possibility of indissociability, Hale looked to the McArthurs’ rights under the E.C.H.R. Article 9 of the E.C.H.R. protects freedom of thought, conscience, and religion.<sup>133</sup> The E.Ct.H.R. had decided that forcing someone to express a belief that contradicted that person’s beliefs was a violation of Article 9.<sup>134</sup> This principle had arisen in a case in which non-believers, to retain their seats in their parliament, had to take a Christian oath.<sup>135</sup>

Hale also noted that Article 10 of the E.C.H.R., which protects freedom of expression, implied a freedom against expressing views one did not hold.<sup>136</sup> She expounded upon the principle by drawing upon the U.S. Supreme Court’s development, under the First Amendment, of the compelled speech doctrine.<sup>137</sup> Hale accepted that, in

<sup>128</sup> *Id.* at [40].

<sup>129</sup> *Id.* at [45].

<sup>130</sup> *Id.* at [47].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at [48].

<sup>133</sup> *Id.* at [49]. See European Convention on Human Rights §1, art. 9, Nov. 4, 1950, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) [hereinafter E.C.H.R.].

<sup>134</sup> See *Ashers Baking*, UKSC 49 at [50].

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at [52]. See E.C.H.R., *supra* note 133, at art. 10.

<sup>137</sup> See *Ashers Baking*, UKSC 49 at [53].

For U.S. case law on the compelled speech doctrine, see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that a state could not force public schoolchildren, whose parents objected on religious grounds, to salute the U.S. flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (determining that a state could not punish a driver for covering the state motto “Live Free or Die” on his license plate, when the driver objected to the motto on religious grounds); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that the government could not require a private group that organized a parade to include in the parade messages contrary to the group’s views). In *Barnette*, Justice Robert Jackson wrote, “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 *Barnette*, 319 U.S. at 642.

Prior to *Ashers Baking*, the Justices of the U.K. Supreme Court, including those who were sitting as the Judicial Committee of the Privy Council, had begun to sketch out their own understanding of the compelled speech doctrine. See *RT (Zimbabwe) v. Secretary of State for the Home Department* [2012] UKSC 38, [32]-[39] (consulting various international and comparative authorities to develop the compelled speech doctrine in the U.K.); *Commodore of the Royal Bahamas Defence Force v. Laramore* [2017] UKPC 13 (finding compelled participation of a member of the armed forces in a Christian ceremony to be unconstitutional).

having to make a cake that promoted same-sex marriage, the McArthurs were forced to communicate “a message with which they deeply disagreed”.<sup>138</sup> A relatively specific message confronted the Court. While the nature of the cake in *Masterpiece Cakeshop* was not necessarily clear,<sup>139</sup> the nature of the cake in *Ashers Baking* was.<sup>140</sup> As noted above, the proposed cake in the U.K. case contained the Ernie and Bert characters, the logo of QueerSpace, and the words “Support Gay Marriage”.<sup>141</sup> Although the McArthurs could not refuse to sell a cake to Lee based on his sexual orientation or his political views, the Court would not, in the absence of suitable justification, read F.E.T.O. as allowing the government to force the McArthurs to communicate against their beliefs.<sup>142</sup>

The Human Rights Act 1998 requires the higher courts in the U.K. to read legislation in a manner compatible with the rights in the E.C.H.R., provided that this is possible.<sup>143</sup> As such, and based on the above discussion, Hale read F.E.T.O. in a manner compatible with Articles 9 and 10 of the Convention.<sup>144</sup>

Of particular interest to the present paper, Hale included a postscript in her opinion that referred to the *Masterpiece Cakeshop* case decided earlier the same year. Hale distinguished the facts of the two cases. The U.S. case, Hale observed, did not include a specific message on the cake.<sup>145</sup>

Hale acknowledged that the majority in *Masterpiece Cakeshop* had focused on the apparent lack of neutrality toward religion in the prior proceedings, but she also paid attention to the other opinions in the case, even though they were not controlling.<sup>146</sup> She pointed out that Justices Ginsburg and Sotomayor had made a distinction between objecting to a cake’s message and objecting to the individual who sought to purchase the cake; in *Masterpiece Cakeshop*, the dissenters thought that the objection was to the individual who sought to purchase the cake.<sup>147</sup> Hale read Justices Kagan and Breyer as

<sup>138</sup> *Ashers Baking*, UKSC 49 at [54].

<sup>139</sup> See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1724 (2018).

<sup>140</sup> See *Ashers Baking*, UKSC 49 at [12].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at [55]-[56]. Hale did not explain how she balanced the McArthurs’ rights of freedom of religion and speech against Lee’s right to be free from discrimination. See Steve Foster, *Accommodating Intolerant Speech: Religious Free Speech Versus Equality and Diversity*, 2019 EUR. HUM. RTS. L. REV. 609, 614-15.

Hale did note that technically the limited company *Ashers Baking* refused to sell the cake. See *Ashers Baking*, UKSC 49 at [57]. Companies do not have a right to freedom of religion under the E.C.H.R., but the McArthurs did. *Id.* Companies do have other rights under the Convention, including to property, fair trial, privacy, and freedom of expression. See Stéfanie Khoury, *Transnational Corporations and the E.Ct.H.R.: Reflections on the Indirect and Direct Approaches to Accountability*, 4 SORTUJ: ONATI J. EMERGENT SOCIO-LEGAL STUD. 68, 75, 75 n.17 (2010).

<sup>143</sup> See *Ashers Baking*, UKSC 49 at [56]. See Human Rights Act 1998 § 3(1) (UK).

<sup>144</sup> See *Ashers Baking*, UKSC 49 at [56].

<sup>145</sup> *Id.* at [59].

<sup>146</sup> *Id.* at [60]-[61].

<sup>147</sup> *Id.* at [61].

accepting the possibility that Phillips had objected to the sexual orientations of the potential customers.<sup>148</sup> To the contrary, Hale noted that Justices Thomas and Alito had focused on the idea that making a cake for a same-sex wedding was expressive conduct and that Justice Gorsuch had declined to distinguish between a cake that had words and a cake that lacked words.<sup>149</sup> Overall, Hale read the opinions in *Masterpiece Cakeshop*, as relevant to *Ashers Baking*, to say that denying the sale of a cake with a specific message to anyone was lawful, but that denying the sale of a cake to someone because of that person's sexual orientation was not.<sup>150</sup>

#### 4. ANALYSIS OF KEY COMMUNICATION ISSUES IN THE CASES

Placed in conversation with each other, the opinions in *Masterpiece Cakeshop* and *Ashers Baking* present some thought-provoking communication issues. For instance, do both a specific cake and a generic cake convey messages? Who would be behind sending those messages? Who would constitute the audience? Does context matter? These issues draw upon many of the key elements in the process of human communication, including channel/medium, message, speaker/sender, listener/receiver/audience, feedback, and situation/context.<sup>151</sup> The precise nomenclature for elements of communication can vary from theorist to theorist.

To begin with, do both a specific cake and a generic cake convey messages? If communicative, the cakes would be the channels of communication. Flour, sugar, butter, eggs, baking powder, and other ingredients would serve communicative purposes. In terms of message, as Lady Hale saw it, the U.K. cake would have been specific, but the U.S. cake would not have been.<sup>152</sup> On the U.K. cake, Bert and Ernie from *Sesame Street* would have appeared along with “Support Gay Marriage” and the QueerSpace logo.<sup>153</sup> Although disputed, one reading of Bert and Ernie, two bachelors who live together, is queer.<sup>154</sup> The verbal imperative of the message would have been explicit in promoting

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at [62].

<sup>151</sup> See STEPHEN E. LUCAS & PAUL STOB, *THE ART OF PUBLIC SPEAKING* 17-21 (13th ed. 2020). Interference/noise is another important element of human communication. See *id.* at 20. For a discussion of how models of communication developed from linear (one-way) to interactive (two-way) to transactional (communicators as both senders and receivers of messages), see JULIA T. WOOD, *COMMUNICATION IN OUR LIVES* 8-11 (8th ed. 2018).

<sup>152</sup> See *Ashers Baking*, UKSC 49 at [59].

<sup>153</sup> *Id.* at [12].

<sup>154</sup> See Martin Pengelly, *Sesame Street Disputes Writer's Claim That Bert and Ernie Are Gay*, *GUARDIAN* (Sept. 18, 2018, 5:51 PM EDT), <https://www.theguardian.com/tv-and-radio/2018/sep/18/sesame-street-bert-and-ernie-remain-puppets-and-do-not-have-a-sexual-orientation>.

support for same-sex marriage, and the QueerSpace logo would have identified the associated organization. Thus, a specific message in support of same-sex marriage was present.

This U.K. cake may have been more specific than the cake that Craig and Mullins were going to order for their wedding. They apparently did not discuss a specific type of cake with Phillips.<sup>155</sup> For the sake of discussion, the assumption will be that they wanted a generic white wedding cake with flowers on it. A generic wedding cake does let the audience know that a wedding is taking place or will take place. While the cake is not necessarily clear about whether the wedding is civil or religious, queer or heterosexual, if someone entered a room with a generic white cake with flowers on it, the person most likely would know that two adults would be joined in marriage, a point Justice Thomas raised in his opinion.<sup>156</sup> Because of cultural conditioning via media and personal experience, an association exists between marriage and a white cake with flowers on it. Words are not necessary for communication,<sup>157</sup> a principle that Justice Gorsuch recognized.<sup>158</sup> With the generic wedding cake, a message exists, even in the absence of words or other symbols that would add specificity.

If a generic cake were not communicative,<sup>159</sup> it could not impart a message, but such a cake can impart a message, so it is communicative. Here, a hypothetical is instructive. First, one can imagine the inscription “Congratulations, Bill and Steve!” by itself. Without more, one may have little idea as to what the inscription refers. Perhaps Bill and Steve had a successful first year of operating a business, retired at the same time, won the men’s doubles at Wimbledon, or returned safely from conquering Mount Everest. Any of these may be possible. Second, one can imagine the inscription “Congratulations, Bill and Steve!” placed upon an otherwise generic white cake with flowers on it. Under this scenario, Bill and Steve most likely are marrying each other. The otherwise generic cake, when carrying the inscription, changes the message of the inscription dramatically, from addressing almost anything positive that two men could have done to commemorating a marriage between two men.

Difference exists between a cake with a more explicit message and a cake with a less explicit message. The meaning of the former is less fuzzy. While not offering a full

<sup>155</sup> See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1724 (2018).

<sup>156</sup> *Id.* at 1743.

<sup>157</sup> See Franklyn S. Haiman, *The Rhetoric of the Streets: Some Legal and Ethical Considerations*, 53 Q.J. SPEECH 99, 99 (1967).

<sup>158</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1738.

<sup>159</sup> See András Koltay, *Confectionery Excellence in the Flow of Religion and Politics: Cakes and Constitutional Rights Before the British and American Supreme Courts*, in *CHRISTIANITY AND HUMAN RIGHTS: PERSPECTIVES FROM HUNGARY* 357, 374 (András Koltay ed., 2021) (maintaining that a cake, without an inscription, is not communicative).

policy plan, the cake with the specific message, “Support Gay Marriage”,<sup>160</sup> did offer a position on a controversial political topic. A generic cake would not. Still, as noted above, a generic wedding cake would inform an audience that a wedding of some sort would be taking place. Although both cakes would be involved in the communication process, the latter would have a fuzzier message.

If both cakes would have served as channels for sending messages, who would have sent the messages? Justice Kennedy touched on this issue in his opinion but did not get very far with it because of the way the U.S. Supreme Court resolved the case on the grounds of a lack of government neutrality toward religion.<sup>161</sup> Nonetheless, since Craig and Mullins planned to order the cake to announce their wedding, they would have been behind the wedding cake’s message. Likewise, since Lee ordered the cake to promote same-sex marriage, he would have been behind the cake’s message. One could argue that an organization for whom someone volunteers is also behind a message, but, in this case, Lee apparently decided by himself to bring the particular cake to the party in question.<sup>162</sup>

The prospective purchasers may not have been the only people who would have been behind the proposed messages. If one thinks of bakers as ghostwriters, who are frequently anonymous, the bakers might not have been known to have been behind the proposed messages; no one other than the people who wished to hire the bakers would have known who would have crafted the cakes. To the contrary, if the bakers were known, something entirely possible when people at gatherings ask about where the cakes came from, especially in a smaller community, then members of the community might wonder whether the bakers were intending to send the messages. For example, if members of Phillips’ worship community were aware that he knowingly had crafted a cake designed especially for a same-sex wedding, the members may have thought of Phillips as a hypocrite. However, if members of his worship community knew that he merely had sold a generic cake off the shelf, which later was used at a same-sex wedding, they may have been less likely to think of him as a hypocrite because the degree of involvement would have been lower. If members of the McArthurs’ worship community were aware that the McArthurs had crafted a cake that called for support of same-sex marriage, the members may have thought of the McArthurs as hypocrites. Whether anyone besides those who attempted to place the orders knew that the bakers had crafted the cakes would be important to determining who may have sent, or been perceived to have sent, the messages.

<sup>160</sup> See *Lee v. Ashers Baking Company, Ltd.* [2018] UKSC 49, [12] (N. Ir.).

<sup>161</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

<sup>162</sup> See *Ashers Baking*, UKSC 49 at [10].

Who would constitute the audience for the message? Presumably, the guests at a wedding would be the intended audience for the message associated with a wedding cake. Likewise, the guests at a political event would be the intended audience for a politically-oriented cake. In a digital world, online individuals could also be secondary audiences, as people who attended an event may share photos of an event cake online. Furthermore, as suggested above, if members of a baker's religious or other community were to find out who made a cake in question, they could constitute an unintended audience for the message. Unintended audience perceptions of religious hypocrisy, specifically putting profit above one's beliefs, may have caused damage to the reputations of Phillips and the McArthurs in their respective worship communities. Such damage may have resulted in negative feedback from members of the worship communities.

Additionally, does the communication situation matter? A situation in which a baker, ignorant of the context in which a wedding cake would be used, merely sold a generic wedding cake, even one he had crafted himself for anyone's wedding, to a member of a same-sex couple for that couple's wedding would not involve the baker's knowingly having crafted a message, generic or specific, for a same-sex wedding. The baker would have sold someone a generic product, albeit still one with a message, without any discussion of the context for the cake. This situation would be somewhat akin to renting a hotel room to a gay couple, which, in *Bull v. Hall*,<sup>163</sup> the U.K. Supreme Court required an objecting Christian couple to do. However, the hypothetical situation would involve a lower level of knowledge than the actual situation in *Bull v. Hall*. Key is the absence of being forced to knowingly craft a message in violation of one's religious, political, or other beliefs that would fall under the rubric of compelled speech, which Lady Hale addressed in her opinion in *Ashers Baking*.<sup>164</sup> If Justices Kagan and Ginsburg's vision of a generic wedding cake had not included the baker's involvement in a creative process with knowledge of the context for the cake,<sup>165</sup> and thus involved compelled speech, their vision would be applicable here.

This discussion of various communication issues suggests that, at a minimum, legal systems ought to consider several factors in determining whether the law should require a baker to sell a baked good like a cake to a customer where the baked good conveys a message in opposition to the baker's religious, political, or other beliefs. As

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<sup>163</sup> See *Bull v. Hall* [2013] UKSC 73.

<sup>164</sup> See *Ashers Baking*, UKSC 49 at [53].

<sup>165</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1733. Ginsburg called the cake "a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings". See *id.* However, the wedding for which Craig and Mullins tried to order a cake was a same-sex wedding. The situation would change the message associated with the cake.

Lady Hale wrote, the objection should be “to the message not to the man”.<sup>166</sup> If the objection is to the potential customer and not the message, the legal inquiry would not need to proceed further. Otherwise, various factors, including the following, should be considered.

First, how specific is the message? The more specific the message is, the less likely the baker should be forced to help create it. For instance, a generic white wedding cake, already on display, would not be very specific, but a custom-made wedding cake with two women on it would be more specific, as would a custom-made wedding cake with the words “Congratulations on Your Wedding, Chantal and Judith”.

Second, how likely is the baker to be identified as the creator of the baked good and potentially a sender of the associated message? Making a custom cake, even one with a somewhat fuzzier message, would take a greater degree of involvement than simply selling a cake off the shelf. Moreover, the size of the community is important. The larger the community is, the less likely a particular baker’s involvement in making a baked good would be to stand out. Nonetheless, if a baker is known in the community for having taken a particular position on a religious matter in the public sphere, making a baked good that would contradict that position would be problematic.

Third, is the baker aware of the situation in which the baked good will be used? The more the baker knows the situation, and thus is potentially more actively involved in that context, such as by baking a custom-made wedding cake, the less likely the baker should be forced to create the baked good. To the contrary, selling a cake off the shelf would require minimal, if any, discussion of a wedding, and thus less knowledge of the situation by the baker.

While reflecting special concern about government-compelled speech, much like Justice Thomas<sup>167</sup> and Lady Hale,<sup>168</sup> the above factors recognize that the rights of freedom of religion and speech are not absolute.<sup>169</sup> The right to be free from discrimination based on a particular classification, itself also not absolute, has its place, too.<sup>170</sup>

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<sup>166</sup> See *Ashers Baking*, UKSC 49 at [47].

<sup>167</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1743-44.

<sup>168</sup> See *Ashers Baking*, UKSC 49 at [53]-[54].

<sup>169</sup> See René Reyes, *Masterpiece Cakeshop and Ashers Baking Company: A Comparative Analysis of Constitutional Confections*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 139 (2020).

<sup>170</sup> *Id.*

Inevitably, some give and take will be necessary,<sup>171</sup> and these will play out in the balancing process in court.<sup>172</sup>

## CONCLUSION

From a comparative perspective, this paper has examined the opinions of the U.S. and U.K. Supreme Courts in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Lee v. Ashers Baking Company, Ltd.*, focusing on key communication issues in the two cases. Based on this analysis, the paper has maintained that court systems should consider, at a minimum, several factors in cases in which anti-discrimination law clashes with the freedoms of religion and speech in the sale of baked goods such as cakes. The factors that courts should consider include the following: (1) the specificity of the message, (2) the likelihood that the baker will be identified as the creator of the baked good and thus potentially as a sender of the message, and (3) whether the baker knows the the situation in which the baked good is to be used. A particular concern, although not the only one, is the risk of compelled speech.

Despite objections from some commentators and members of the bench, “[c]onstitutional borrowing and transplantation” do occur.<sup>173</sup> The above discussion of *Masterpiece Cakeshop* and *Ashers Baking* should contribute to a greater understanding of the comparative legal issues, as well as the related communication issues, that these two important cases presented. The ongoing likelihood remains that clash between anti-discrimination law and the freedoms of religion and speech will occur again not only in the U.S. and the U.K., but in other jurisdictions as well.<sup>174</sup>

<sup>171</sup> See Gerald A. Hornby, *Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty*, 58 DUQ. L. REV. 377, 405-07 (2020). But see generally Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249 (2020).

<sup>172</sup> See Sarah Fraser Butlin, *Cakes in the Supreme Court*, 78 CAMBRIDGE L.J. 280, 283 (2019). But see generally Richard Moon, *Conscientious Objection and the Politics of Cake-Making*, 9 OXFORD J.L. & RELIGION 329 (2020) (contending that courts should move away from balancing the competing rights of free exercise and freedom from discrimination).

<sup>173</sup> See Michel Rosenfeld & András Sajó, *Introduction*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1, 13 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>174</sup> See generally Elphick, *supra* note 6. In the U.S., several years after the Supreme Court decided *Masterpiece Cakeshop*, the Court agreed to hear *303 Creative, LLC v. Elenis*, a case in which a Colorado web designer wished to provide wedding webpages, but, based on religious belief, planned to refuse to offer her services for same-sex weddings. Adam Liptak, *Supreme Court to Hear Case of Web Designer Who Objects to Same-Sex Marriage*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/us/colorado-supreme-court-same-sexmarriage.html>. The web designer wanted to post on her website a message that indicated why she would decline to serve potential clients who were involved with same-sex weddings, but such a message would have violated Colorado law. *Id.*