Religious Exemptions, Harm to Others, and the Indeterminacy of a Common Law Baseline

Elizabeth Sepper
Washington University

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Elizabeth Sepper

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1 Professor, Washington University School of Law. Thank you to Jordan Shewmaker, Chris Barber, and the Kentucky Law Journal staff for their excellent planning and editing work. My thanks to Nelson Tebbe, Joseph Singer, Micah Schwartzman, and Chris Lund for their comments on drafts.
INTRODUCTION

Free exercise claimants don’t tend to assert that their religious motives give them a prerogative to harm others; they instead argue that the exemptions they seek are harmless. This highlights an important constitutional principle: exemptions for religious believers may not impose substantial harms on third parties. As a result of this principle, the Supreme Court has regularly rejected exemptions that would transfer the burdens of religious compliance from objectors to other third parties.

So what counts as harm? Of late, this question arises as employers refuse coverage for contraception to employees, wedding vendors deny service to same-sex couples, and social service providers are given license to discriminate against unwed couples and pregnant women for religious reasons. A number of prominent scholars argue that no harm accrues to third parties from exempting these objectors. In these commercial settings, the no-harm argument boils down to a claim that refusing to provide goods,

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3 See generally Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 HARV. C.R.-C.L. L. REV. 343 (2014) (setting out the doctrinal basis of this principle).


services, or employee benefits inflicts no harm because no one has a right to be sold another's goods, to enter into an employment contract, or to rent another's property.9

This libertarian baseline is often implicitly, but sometimes explicitly, defined by tort, contract, and property law.10 On this account, "direct invasions of another's life, liberty, or property—the historic framework of criminal or tortious acts" count as third-party harms,11 but removal of modern-day statutory rights may not rise to the level of harm.12 Proponents of this common law baseline argue that, as defined by statute and regulation, third-party harms are indeterminate and in danger of ever-expanding.13 Dignitary damages face particular scorn as evidence of an overreaching state.14 Moreover, these scholars say, using a statute to set the baseline for free exercise analysis is partial, resorting to values over principles.15

In stark contrast, the pre-regulatory or common law baseline is seen to leave all parties alone, preserving freedom without burdening anyone. From this perspective, exemption from legislation or regulation reverts to a neutral moment before the government acted.16

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9 See Volokh, supra note 2, at 1520, 1526 (summarizing this argument).


11 See id. at 58; Michael W. McConnell, Why Protect Religious Freedom?, 123 YALE L.J. 770, 807 (2013) (["V]ery few free exercise claims seek authorization to invade the private rights of third parties or to inflict harm (in the Millian sense) upon them. Most, instead, resist the blanket enforcement of regulatory schemes that interfere with natural liberty . . .").


13 See infra notes 29–30 and accompanying text.

14 See Esbeck, supra note 13, at 659 (arguing that scholarly supporters of the no-harm doctrine "would reset the baseline to fit their politics. For example, because they favor the Affordable Care Act ('ACA') as a matter of social policy, they make the effective date of this new statutory entitlement the baseline . . .").

15 Brief of Amici Curiae Constitutional Law Scholars in Support of Petitioners at 17, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191) ("A religious exemption in [RFRA's] name simply 'lifts' the burden imposed on religious employers by the Affordable Care Act, returning both the religious employer and its employees to neutral."); McConnell, supra note 12, at 805 ("From the baseline of the regulatory requirement imposed on everyone, an exemption for one individual can be said to 'harm' the intended beneficiaries of the law, because they
Sometimes this claim takes the form of a state action doctrine that contrasts regulation with the government's purported inaction.\textsuperscript{17} I previously have argued that this regulation-free baseline is artificial because law has always structured the market and, even in the absence of statute, has never been neutral as to subsidies and burdens.\textsuperscript{18}

In this symposium Article, I contend that the "pre-regulatory" baseline suffers from an additional difficulty through its reliance on common law. The common law is not set or fixed, but constantly evolving over time and across jurisdictions.\textsuperscript{19} Much more so than statutes or regulations, the common law proves indeterminate. I offer two examples implicated in religious liberty debates: the duty of public accommodations toward customers and the duty of medical providers toward patients. My aim is not to defend the common law's treatment of public accommodations, but rather to demonstrate that no single common law exists.

As Part I shows, common law duties of public accommodations are not static, but rather responsive to societal values. Judicial interpretations of the duties of public accommodations developed in conversation with regulatory and legislative efforts.\textsuperscript{20} For much of U.S. history, businesses open to the public had a common law duty to provide equal access to their facilities—a duty that statutes in many states rejected and, eventually, partially restored.\textsuperscript{21} And, in the nineteenth and twentieth centuries, courts regularly awarded dignitary damages for denial of equal treatment in public accommodations under the common law, albeit under circumstances that few modern courts would countenance.\textsuperscript{22}

Part II offers a second example that exposes the inutility of baselines built around a pre-regulatory moment: the enactment of conscience legislation permitting hospitals and individual providers to refuse to perform abortions for religious or moral reasons. These statutes came into effect at a time when the common law duties of doctors and hospitals were in the process of transformation.\textsuperscript{23} These statutes

will not receive the benefit. But from the standpoint of the Millian Harm Principle, an exemption to such regulation merely returns the parties to the position they occupied before law coercively intervened.\textsuperscript{24}

\textsuperscript{17} See generally Esbeck, supra note 13.
\textsuperscript{18} See generally Elizabeth Sepper, Free Exercise Lochnerism, 115 COLUM. L. REV. 1453 (2015). Often, proponents of the pre-regulatory baseline overlook existing regulations, subsidies, and statutes. For example, regarding employer-based insurance, the Affordable Care Act did not create, whole-cloth, a comprehensive regulatory structure, but rather amended the Employee Retirement Investment Security Act ("ERISA"), see LAWRENCE A. FROLIK & KATHRYN L. MOORE, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS 109-14 (3d ed. 2012), which has been amended at various times over the past thirty years to add coverage mandates to employer-based insurance. Id. at 94–100, 105–09. Similarly, the ACA's tax on employers offering inadequate insurance coverage—the so-called employer mandate—properly might be understood, not as a "new" tax, but rather as a condition on receipt of the substantial pre-existing tax subsidy for employer health insurance. Sepper, supra, at 1484–86.

\textsuperscript{19} The classic example of this phenomenon is products liability shifting from a contract theory of breach of warranty to a negligence cause of action and then to strict liability and then largely back to negligence again. See generally David G. Owen, The Evolution of Products Liability Law, 26 REV. LITIG. 955 (2007).

\textsuperscript{20} See infra Part I.

\textsuperscript{21} See infra Section 1.A.

\textsuperscript{22} See infra Section 1.B.

\textsuperscript{23} See infra Part II.
simultaneously upended longstanding duties, altered relations between hospitals and doctors, and thwarted further evolution of common law. So much was in flux that any single common law is virtually impossible to identify and, in any event, proves unhelpful to evaluate harms that these religious exemptions impose today.

Given the malleability of the common law, proponents of a pre-regulatory baseline face a challenge. They must identify what they mean to be the common law—or the law structuring private rights as opposed to government action. And because the common law reflects judicial implementation of social norms and policy choices, they must then articulate the values behind that choice—just like those scholars who propose a statutory baseline.

I. THE SHIFTING DUTIES OF PUBLIC ACCOMMODATIONS

Much invocation of the common law baseline occurs in the context of religious objections to public accommodations laws. In particular, hotels, wedding venues, florists, photographers, bridal shops, and bakers have refused service to same-sex couples. Objectors to same-sex marriage and their defenders in the academy frequently juxtapose antidiscrimination statutes with the common law freedom of owners of private property to exclude anyone for any reason. While inns and trains, scholars say, had to serve all, exemptions from antidiscrimination law for other businesses simply restore the status quo prior to a statute's enactment, inflicting no
harm on same-sex couples or any other group.\(^{28}\)

In particular, many proponents of a pre-regulatory baseline express skepticism of dignitary damage from discrimination as third-party harm. As the story goes, through increasing governmental regulation, “more injuries are transformed into legally—and perhaps even constitutionally—cognizable rights” than existed at common law.\(^{29}\) Remedies for dignitary harms are “the most extreme example” of an overreaching state.\(^{30}\)

This Part argues that this framing of the baseline invokes a particular moment in common law, not a universal standard. Obligations of public accommodations differed across time periods and between jurisdictions. The law adapted to and reflected the social, political, and moral commitments of its time. Statutes did not intervene in a pre-regulatory space, but rather codified, abrogated, and amended judge-made law.

A. From Duty to Serve to Right to Exclude

Over the course of U.S. history, public accommodation law repeatedly evolved to meet emerging needs and mold to societal mores. For example, inns—which proponents of the common law baseline tend to view as having had a set duty of equal access under the common law—owed duties only to travelers until the mid-nineteenth century.\(^{31}\) Beginning with the Supreme Court of New Hampshire’s decision in *Markham v. Brown* in 1837,\(^{32}\) innkeeper obligations “broadened to apply not just to travelers, but to the general public” in most jurisdictions within two decades.\(^{33}\) According to historian Alexander Sandoval-Strausz, the social, ideological, and technological currents of eighteenth-century society fueled this rapid movement in the common law of innkeepers.\(^{34}\)

More fundamentally, a pre-Civil War conception of businesses as “common callings” with a duty to serve the general public gave way to an idea of businesses as private property with a right, and ultimately an obligation, to exclude unwanted customers. Those shifts tracked the societal and legal entrenchment of racial exclusion and segregation during the post-Reconstruction period.

As Joseph Singer has demonstrated meticulously and at length, the antebellum common law rule dictated that businesses open to the public had a duty to serve

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\(^{30}\) See id. at 130.


\(^{32}\) Markham v. Brown, 8 N.H. 523, 530–31 (1837).


\(^{34}\) Id. at 69–70, 73.
people equally. While early treatises and cases often focused on innkeepers and common carriers, the rule appears to have applied more broadly, to barber shops, victuallers, bakers, tailors, and traders, indeed, "to all businesses that hold themselves out as ready to serve the public." A business that met this definition could not exclude customers without good cause, regardless of whether the customer could find another business willing to serve him. For a brief period after the Civil War, it seemed that these rights of access would extend to newly freed slaves. As Erwin Chemerinsky observes, "At the time the fourteenth amendment was ratified, it still was believed that the common law provided protection against private interference with individual rights," and, in 1883, in deciding the *Civil Rights Cases*, the Supreme Court assumed that discrimination in public accommodations was prohibited by the common law. Between 1865 and 1873, eight states of the former Confederacy and three northern states explicitly affirmed the duty of equal access by enacting public accommodation laws.

Courts frequently took early antidiscrimination statutes to codify then-extant common law. The Mississippi Supreme Court, for example, said that the common law had "always" demanded that inns, common carriers, and "public shows and amusements" be open to all "unless sufficient reason were shown." The public accommodation law therefore "deal[t] with subjects which have always been under

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36 Id. at 1327–31.

37 JOSEPH STORY, *COMMENTARIES ON THE LAW OF BAILMENTS* § 475, at 413 (Edmund H. Bennett trans., Boston, Little, Brown & Co. 7th ed. 1863) (1856) (describing an inn subject to this rule as "a common inn, or *dixeratorium*, that is, an inn kept for travellers [sic] generally (and not merely for a short season of the year, and for select persons, who are lodgers"); see also Chevallier v. Straham, 2 Tex. 115, 121 (1847) (contrasting a carrier "only employed, by a special contract, to transport goods for a particular person and carriers—though working as farmers most of the year—who "run their wagon whenever they meet with an opportunity. . . for such persons as see fit to employ them").

38 Phil Nichols, *Note, Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 508 (1987) (discussing the common law development of a "widely accepted" definition of common carriers by the mid-1800s that included the holding-out criteria, but did not depend on "the market positions of individual common carriers"); Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 77 (1992) ("Historically, one of the most important determinants of common carrier status was whether one held oneself out as a common carrier. . . A common carrier achieved certain benefits by holding itself out as an inn, blacksmith (farrier), stage line, railroad, telephone company, or other similar business."); Singer, supra note 35, at 1319 ("[T]he presence of competition was never a reason for denying the duty to serve . . . .").


40 Id. ("[T]he wrongful act of an individual, unsupported by any such authority, is simply a private wrong [subject to tort liability]." (quoting *The Civil Rights Cases*, 109 U.S. 3, 17 (1883))); id. ("Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation[s] to all unobjectionable persons who in good faith apply for them." (quoting *Civil Rights Cases*, 109 U.S. at 25)).

41 Singer, supra note 35, at 1374.

legal control” and “in no sense appropriate[d] the private property” of a theater owner who had been fined for excluding black patrons. Other state supreme courts agreed that even in the absence of a statute, black people would have had common law rights to equal treatment. And those courts upheld these public accommodations statutes as applied to businesses beyond common carriers and inns.

The waning of Reconstruction signaled contestation over, and constriction of, the prior duty to serve. The courts played a significant role. For example, “[b]y the 1870s and 1880s, the law of common carriers had emerged as a crucial battleground in the working out of the social, political, and economic order in the New South” — as courts and litigants struggled with the role of race in a train system categorized by gender and class. While for a period of time courts sided with black plaintiffs, soon it became clear that common carriers would be authorized to segregate passengers by race. Some courts then extended the prerogative more widely. For example, the Missouri Supreme Court concluded that the ability of common carriers to segregate passengers supported applying a similar rule to theaters, observing that

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43 Id. at 681–82.
44 Decuir v. Benson, 27 La. Ann. 1, 5 (1875), (“In truth [sic] the right of the plaintiff to sue the defendant for damages would be the same, whether [the act] existed or not[,]”), rev’d on other grounds sub nom. Hall v. DeCuir, 95 U.S. 485 (1877); Ferguson v. Gies, 46 N.W. 718, 720 (Mich. 1890) (“The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places.”).
Some courts took later civil rights acts to similarly codify existing rights. See Orloff v. Los Angeles Turf Club, Inc., 227 P.2d 440, 453 (Cal. 1951) (“The so-called civil rights statutes . . . do not necessarily grant theretofore non-existent rights or freedoms. The enactments are declaratory of existing equal rights and provide the means for their preservation by placing restrictions upon the power of proprietors to deny the exercise of the right and by providing penalties for violation.”). But see Orloff, 227 P.2d at 455 (Spence, J., concurring) (“[C]ontrary to the implications in the majority opinion, the source of plaintiff’s right . . . to be admitted to a place of public amusement rests solely in the statutes . . . [N]o such right existed at common-law.”). Defending Title II of the Civil Rights Act, the federal public accommodation provision, then Solicitor General Archibald Cox invoked “centuries” of “Anglo-American common law” that required equal access from “innkeepers, hackmen, carriers, wharfage men, ferriers, all kinds of other people holding themselves out to serve the public.” Transcript of Oral Argument at 41-42, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), in 60 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 541, 541, 582–83 (Philip B. Kurland & Gerhard Casper eds., 1975).
45 Sauvinet v. Walker, 27 La. Ann. 14, 14–15 (1875), aff’d, 92 U.S. 90, 90 (1875) (applying Louisiana’s constitutional and statutory public accommodation provisions, which applied to “all places of business,” to a keeper of a coffee house); People v. King, 18 N.E. 245, 248–49 (N.Y. 1888) (upholding public accommodations law as applied to private skating-rink owner and rejecting attempted distinction of the “business of an innkeeper or a common carrier”).
47 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 89 (2004) (“Common-law challenges to racially unequal railroad accommodations had frequently succeeded through the mid-1880s, but such cases virtually disappeared thereafter.”).
“[W]hen colored persons attend theaters and other places of amusement conducted and carried on by white persons, custom assigns to them separate seats.”

In other states, courts sided with black plaintiffs seeking equal access to train and steamship facilities. Applying a statute that it viewed as codifying common law, the Michigan Supreme Court rejected segregation in no uncertain terms:

The cases which permit in other states the separation of the African and the white races in public places can only be justified on the principle that God made a difference between them, which difference renders the African inferior to the white[...]. This doctrine... runs through and taints justice in all these cases... .

Thus, the court concluded, a restaurant could not segregate customers and live up to its duties under common law and statute. Judicial interpretations—and reinterpretations—of the common law both reflected and constituted postbellum society, with widely differing results between states.

As Reconstruction ended, legislatures intervened in these common law conversations, rejecting the duty-to-serve rule. Initially, state laws across the South gave businesses a right to exclude customers at will. Whether one views such laws as abrogating or codifying the common law depends crucially on the baseline (and the jurisdiction). By 1900, however, that right to exclude had become a duty in every state in the former Confederacy and in Kentucky, as statutes required segregation in places of public accommodation.

Even as de jure segregation has faded away, the no-duty-to-serve common law rule reflects a moment, not free of legislative involvement, but very much affected by it.

In the fight to gain equal access to public accommodations, civil rights leaders of the 1950s and 1960s explicitly sought—not to reject—but to reclaim the antebellum view of common law rights of access. And they succeeded, at least partially, through

48 Younger v. Judah, 19 S.W. 1109, 1111 (Mo. 1892).
49 See, e.g., Chicago & Nw. Ry. Co. v. Williams, 55 Ill. 185, 188 (1870); Coger v. N.W. Union Packet Co., 37 Iowa 145, 152-53 (1873) (interpreting the common law to prohibit denial of first-class ticket and meal to a black woman on a steamboat as it would for a white woman).
51 Id. at 719-21.
52 A similar phenomenon existed with regard to statutory duties, as judicial decisions often narrowed the kinds of businesses subject to a duty to serve. See, e.g., Bowlin v. Lyon, 25 N.W. 766 (Iowa 1885) (exempting places of entertainment); Rhone v. Loomis, 77 N.W. 31 (Minn. 1898) (applying the same exemption to saloons, despite law covering "places of... refreshment").
53 See, e.g., Act of Mar. 24, 1875, ch. 130, § 1, 1875 Tenn. Acts 216, 216-17 ("[H]ereafter no keeper of any hotel, or public house, or carrier of passengers for hire, or conductors, drivers, or employees [sic] of such carrier or keeper, shall be bound, or under any obligation to entertain, carry or admit, any person, whom he shall for any reason whatever, choose not to entertain, carry, or admit... ").
54 Singer, supra note 35, at 1388.
55 Jack Greenberg, Race Relations and American Law 81-87, 96-101 (1959); id. at 112 ("There is no established way of legally getting at private action without a civil rights law—the various common law rules have usually, as a practical matter, been nullified."); see also Bell v. Maryland, 378 U.S. 226, 296-300 (1964) (Goldberg, J., concurring) (reviewing history of common law duty to serve).
the enactment of public accommodation law. In much of the country, to the extent
the common law ever permitted a right to exclude people on any basis, that right
terminated for most businesses half a century ago.\(^6\) In a handful of other states, the
no-duty-to-serve common law rule, which "originated in an attempt to deny equal
rights to African-Americans," continues to permit discrimination in public places
based on the race, religion, sexual orientation, or any other characteristic of a
patron.\(^7\)

B. Differing Dignitary Harms Across Decades

Dignitary damages in public places provide a second example of the fluidity of
the common law. Contrary to proponents of the common law baseline, the common
law in its various manifestations through our history has not been indifferent
to damage to dignity. Numerous torts of the nineteenth and early twentieth
centuries—such as outrage and heart balm—aimed at remedying injury that was
primarily emotional, not physical.\(^8\) Of particular relevance, innkeepers, common
carriers, and other places open to the public could be held liable for inflicting insult,
humiliation, and distress on actual and would-be customers.\(^9\)

Courts viewed the principal harm of denial of equal access as the insult to dignity.
In 1887, for example, the Georgia Supreme Court held that "wounding a man's
feelings is as much actual damage as breaking his limbs."\(^10\) The public nature of the
affront distinguished the public accommodations context from others.\(^11\) Courts
reasoned that humiliation damages were essential, because otherwise the plaintiff
would be allowed to recover mere contract damages—the cost of the ticket, for
example—damages that did not adequately reflect the injury.\(^12\) In 1912, the Alabama
Supreme Court observed:

\(^{56}\) Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259–60 (1964) (noting that by the
year of the Civil Rights Act's passage, thirty-two states had public accommodation laws).

\(^{57}\) Singer, supra note 35, at 1448.

\(^{58}\) See generally Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49
Harv. L. Rev. 1033 (1936); see also John E. Duda, Damages for Mental Suffering in Discrimination
Cases, 15 Clev.-Marshall L. Rev. 1, 8 (1966) ("There is a class of conduct considered by society to
be so outrageous as to warrant an award for humiliation, indignity, and mental suffering when it is not
followed by physical injury[,] including wrongful eviction and insult by public carriers and innkeepers.

\(^{59}\) See, e.g., Chicago, St. L. & P. R. Co. v. Holdridge, 20 N.E. 837, 839 (Ind. 1889) (compiling cases
allowing recovery for the "humiliation and degradation" of wrongful denial of carriage by a common
carrier); De Wolf v. Ford, 86 N.E. 527, 530 (N.Y. 1908) (noting that "the guest . . . has affirmative rights
which the innkeeper is not at liberty to willfully ignore or violate," including a right not to be subjected to
insults or "distress of mind").


\(^{61}\) See, e.g., Aaron v. Ward, 96 N.E. 736, 738 (N.Y. 1911) ("[I]t is the publicity of the thing that
causes the humiliation.").

\(^{62}\) Chicago & Nw. Ry. Co. v. Williams, 55 Ill. 185, 190 (1870) (holding that where a common carrier
inflicts delay, vexation, and indignity by excluding a passenger from the first-class car, the actual pecuniary
damages sustained "would, most often, be no compensation at all, above nominal damages, and no salutary
effect would be produced on the wrong doer by such a verdict").
To prescribe the duty of protection from insults and indignities, and yet hold the carrier immune to liability for the only consequence that can ordinarily result therefrom, viz., mental suffering, would be simply a contradiction in terms. That damages are recoverable in such cases, without physical injury, is by no means a novel doctrine.\footnote{Birmingham Ry., Light & Power Co. v. Glenn, 60 So. 111, 112 (Ala. 1912); see also Missouri, K. & T. Ry. Co. v. Bull, 61 S.W. 327, 329 (Tex. Civ. App. 1901) ("That damages for mental pain, anxiety, distress, or humiliation suffered... may be recovered, though unaccompanied with physical injury, pain, or suffering, is now too well settled in this state to admit of question.").}

The dignitary damages awarded were often substantial.\footnote{Singer, supra note 35, at 1367 & 1377 (discussing "enormous sum" awarded in Brown v. Memphis & C. R. Co., 7 F. 51, 68 (C.C.W.D. Tenn. 1881) and large award in Houck v. S. Pac. Ry. Co., 38 F. 226, 229-30 (C.C.W.D. Tex. 1888)).} For example, in 1938, a fourteen-year-old girl received nearly \textdollar{}18,000 in today's dollars as a result of having been refused admittance to a movie and accused, apparently incorrectly, of the "indecent conduct" of previously "talking and giggling during the performances and... walking or running up and down the aisles."\footnote{Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86, 87 (1938).}

Not only innkeepers and common carriers bore this duty. Similar liability was imposed on theaters, amusement parks, resorts, restaurants, bathhouses, and other places of amusement.\footnote{See, e.g., Saenger Theatres, 178 So. at 87-88 (discussing duties imposed on theaters); Davis v. Tacoma Ry. & Power Co., 77 P. 209, 210-11 (Wash. 1904) (discussing duties imposed on amusement parks and resorts); Boyce v. Greeley Square Hotel Co., 126 N.E. 647, 648-49 (N.Y. 1920) (noting public resorts bore duties toward patrons); Odum v. E. Ave. Corp., 34 N.Y.S.2d 312, 316 (1942) (observing that that restaurants held such duties under common law; Aaron, 96 N.E. at 738 (holding that bathhouses owed duties of equal access).}

Public accommodation laws continue the tort law tradition.\footnote{See, e.g., TENN. CODE ANN. § 4-21-306(7) (West 2017) (allowing damages for "an injury, including humiliation and embarrassment, caused by... discrimination"); Reese v. Sears, Roebuck & Co., 731 P.2d 497, 501 (Wash. 1987) (noting that public accommodation law "seeks to remedy nonphysical injuries, similar to dignitary torts").} Hearing a case under the state public accommodation statute, the 1921 Washington Supreme Court...
observed that racial discrimination by a movie theater “was a tort, and an action
founded thereon lies in tort.” The theater argued that its policy of racial segregation
and denial of a floor seat to the plaintiff inflicted no personal injury and that recovery
was limited to breach of contract. Drawing on common law cases going back to the
1890s, the court held:

[T]his is not the rule. The act alleged in itself carries with it the elements
of an assault upon the person, and in such cases the personal indignity
inflicted, the feeling of humiliation and disgrace engendered, and the
consequent mental suffering are elements of actual damages for which a
compensatory award may be made. This we have held since the early
history of the court.

While common law and statute remedied dignitary injury in public
accommodations, courts’ appraisals of which dignitary affronts count as injury, of
course, have varied over time. Our society is not that of the nineteenth century. Today,
many courts would likely hesitate to uphold dignitary damages that a century ago seemed
self-evident in common law cases. No contemporary court would award white plaintiffs
damages for the affront of being seated next to people of other races—as the common
law once allowed. Nor would the common law judge the dignitary harm inflicted
by disparagement by the standard of whether it is “offensive to ordinary female sensibilities,
or disrespectful to the female presence . . .” But, as society has come to recognize and
work to eradicate discrimination, courts in most states have come to permit recovery for
the damage of emotional distress from racial, ethnic, or religious abuse or
discrimination. The category of dignitary harm has not remained fixed.

72 Id.
73 Id.
74 Compare Saenger Theatres Corp. v. Herndon, 178 So. 86, 87–88 (Miss. 1938) (awarding a
fourteen-year-old girl $1,000 for “shame and humiliation” at a ticket-taker’s denying her a seat and
accusing her of “indecent conduct as rendered her unfit and an improper character to enter the show . . .”),
with White v. Walker, 950 F.2d 972, 978 (5th Cir. 1991) (“Saenger Theatres Corporation v. Herndon,
decided in 1938, . . . judged the outrageousness of the conduct at issue by standards now more than a
half-century out of date. We doubt that a contemporary court would impose liability for those actions.”
(footnote omitted)).
to recover such damages for discomfort and humiliation related to a train conductor’s leaving his white
wife and their children in the car reserved for blacks).
77 Roland F. Chase, Annotation, Recovery of Damages for Emotional Distress Resulting from Racial,
Ethnic, or Religious Abuse or Discrimination, 40 A.L.R.3d 1290, § 2[a] (2011) (originally published in
1971) (noting that a few states have rejected this majority rule).
II. THE EVOLVING COMMON LAW AND MEDICAL CONSCIENCE LEGISLATION

To see how indeterminate a pre-regulatory baseline can be, consider legislation that permits institutions and individuals to refuse to provide abortions, sterilizations, or other medical care. The enactment of conscientious refusal legislation occurred against a background of evolving common law. While the public accommodation duties discussed in Part I were on-again-off-again, the common law related to hospital and physician duties is significantly more complex. The short synopsis here, therefore, is necessarily an illustrative, rather than complete, account of the common law doctrines at play.

In 1972, a district court in Montana enjoined a Catholic hospital from refusing tubal ligations to women following delivery of their babies on the ground that their receipt of generous Hill-Burton funds created state action. Shortly thereafter, the Supreme Court decided Roe v. Wade, recognizing a right to abortion. Congress quickly responded, amending federal law to prohibit courts from finding that a hospital receiving federal health funding acts under color of state law. It further passed the Church Amendment, a religious exemption that made clear that receipt of federal funds did not require an individual or institution to perform sterilizations or abortions if it "would be contrary to...religious beliefs or moral convictions"; and required institutions to accommodate providers who refused to provide sterilizations or abortions and to refrain from discriminating against providers who perform such procedures outside the institutional facilities based on religious or moral beliefs. State legislatures across the country followed suit. These laws generally allowed refusal even where it would result in harm to women.

In one clear way, conscience legislation upended common law relations. Before the Church Amendment, refusing physicians had no right to demand that a hospital continue to keep them on staff even though they would not assist in abortions. The Church Amendment and state laws granted new rights to providers to wield against...
institutions. Under some state laws, these rights of the religious objector appear unyielding.85

With regard to the treatment of patients, the federal Church Amendment did not change the ability of patients, injured by refusal of abortion or sterilization, to pursue tort remedies—a traditional purview of state law. But state conscience legislation did just that. It immunized refusing institutions and individuals from civil and criminal liability. Patients harmed by refusal no longer had no recourse to courts for common law claims related to medical malpractice or abandonment.86

The common law standards applicable to patient care in 1973 were complex and, in some ways, in flux. Individual doctors had no duty to treat or even examine patients seeking care—a rule that continues today.87 Nor did physicians have any duty to perform abortions or sterilizations under the common law, a rule that Roe v. Wade did not alter. But having undertaken to treat a patient, a physician had longstanding common law duties to treat the patient in accordance with the standard of care and not to abandon her.88

In some places and situations, hospitals did have obligations to treat patients (they also had duties to avoid negligence toward and abandonment of patients). By the early 1970s, a limited duty of hospitals to treat patients in emergencies was slowly beginning to emerge. The century-old no-duty-to-treat rule89 was softening at least in some states by the 1960s and into the 1970s. The first step in this direction was taken in 1961 when, relying on principles of detrimental reliance, the Delaware Supreme Court held that hospitals that maintained an emergency room open to the public had a duty to treat “unmistakable emergenc[ies].”90 In a common law “trend” that continued into the 1970s,91 a minority of courts began to require hospitals to treat patients in emergencies.92 Even in states that did not impose a duty to treat,

85 See, e.g., Swanson v. St. John’s Lutheran Hosp., 597 P.2d 702, 709–10 (Mont. 1979) (determining that the healthcare provider’s right to refuse is unqualified and does not require weighing interests of the employer).
86 See Sepper, supra note 78, at 1509–10.
88 61 AM. JUR. 2D Physicians, Surgeons, etc. § 121 & nn.5–7 (2018).
89 See, e.g., Wilmington Gen. Hosp. v. Manlove, 174 A.2d 135, 138–39 (Del. 1961) (highlighting cases applying the rule that hospitals owed no duty to treat); Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (finding that a medical license did not require the licensee to respond to a patient call even if he was the only physician available).
90 Manlove, 174 A.2d at 139–40.
courts sometimes held actionable a hospital's disregard of a patient with an emergency condition within the emergency department. During the same time period, other courts held that, under certain circumstances, some hospitals open to the public acted under color of state law—due to their extensive government financing and the public's reliance on them—and had to respect constitutional rights, including a woman's right to abortion.

Before the enactment of conscience laws, patients harmed by a physician's or institution's failure to provide an abortion or sterilization would have had civil or criminal recourse. In some states and situations, they could have based their claims on a hospital's duty to treat. After the state conscience laws went into effect, a woman injured, for example, by refusal to provide a D&C in an emergency situation could not bring a common law right of action against the doctors or hospital for abandoning her, failing to live up to the standard of care, or refusing to treat. In this sense, state conscience laws abrogated common law duties of non-abandonment and compliance with the standard of care. They reversed course on hospitals' duty to treat in the context of abortion and sometimes sterilization.

Now, the choice of the pre-regulatory moment is contestable. One might look not to 1972 but back further to charitable immunity to set a baseline for analysis of third-party harms. Under the common law doctrine of charitable immunity, courts "assumed that charitable hospitals served the general good" and were properly excused from liability for negligent acts of their agents. This outcome manifested a theory of justice according to which "protecting charitable activity, charities, and donors was more important than satisfying judgments." Beginning in the 1940s, however, the common law rules related to charitable immunity began to be pared

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95 See, e.g., Elizabeth Sepper, Not Only the Doctor's Dilemma: The Complexity of Conscience in Medicine, 4 FAULKNER L. REV. 385, 401-03 (2013) (describing the effects of state conscience laws).

96 Dilation and Curettage or "D&C" is a medical procedure that removes tissue from inside the uterus to treat certain uterine conditions or to clear the uterine lining after a miscarriage or abortion. Dilation and Curettage (D&C), Mayo Clinic (Oct. 26, 2016), https://www.mayoclinic.org/tests-procedures/dilation-and-curettage/about/pac-20384910 [https://perma.cc/4T8R-58NR].


Courts took notice that nonprofit hospitals had evolved, growing in size and economic power and engaging in sale of goods and services for revenue. Courts embraced the corrective justice rationale of tort law, reasoning that victims should not bear the costs of tortious acts; with the widespread availability of insurance, nonprofits, like other entities, could insure against loss. While the legal rules continued to vary between jurisdictions, the law in most states had moved away from charitable immunity, abandoning it wholesale by the early 1980s.

Perhaps, one might say, patients are only restored to this common law baseline where charitable immunity limited suit against hospitals. But, even assuming that was right, in many jurisdictions, courts took charitable immunity to apply only to nonpaying patients, which might lead to the conclusion that only paying patients are harmed by religious exemption. And, for all patients, individual doctors were never protected from liability under the doctrine.

To the extent that it is relevant, the common law also continued to evolve after 1973. Until the late twentieth century, physicians were generally shielded from liability by judicial deference to professional judgment and the locality rule which would have required their local peers to be willing to testify against them. Whereas at the turn of the century consent was assumed as long as a patient did not object to the physician’s judgment, the 1970s saw the development of the doctrine of informed consent, which affirmed the primacy of patient autonomy over medical decision-making in jurisdictions across the United States. In rendering decisions, courts reflected a “more egalitarian approach” to legal accountability for injury. The no-duty-to-treat rule also was rejected as inconsistent with societal values when Congress recognized a limited duty to treat in emergencies through the Emergency Medical Treatment and Labor Act in the mid-1980s. While granting patients greater protections, Congress arguably stalled the further development of a state common law duty to treat.

So, did the Church Amendment and like state statutes impose constitutionally relevant harm at the moment of its enactment? What regulation-free moment should we look to? If we use the state action framework employed by some proponents of the common law baseline, was there no state action when the common law imposed a duty to treat—and did the government then act by exempting objectors? Regardless of one's answer to these questions, distinctions based on

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100 Id. at 354–55.
101 Id. at 355 & n.242.
common law versus statute or state action versus inaction prove unhelpful to identify a determinate baseline for analyzing the harms that conscience legislation might impose. To be sure, conscience exemptions can be seen to revert to a previous moment in time, but not to a single, unitary common law or, in those states with a duty to treat, even to the common law prior to exemption.

Moreover, looking to the day before conscience legislation was enacted does not capture the burdens the legislation imposes on third parties today. In 1973, congressional concerns about the Church Amendment’s potential impact on women’s—in particular poor women’s—access to abortion were assuaged based on reasonable assurances about background norms that do not exist today. At the time, everyone assumed the existence of many public hospitals, presumably subject to a duty to treat. The era’s politics bore little resemblance to ours—more Republicans than Democrats supported legal abortion, and abortion was viewed as a Catholic issue. Today, none of these assumptions holds.

As Professor Marshall intimated in his symposium contribution, the burdens of exemption may shift over time in light of background norms, laws, and practices. Longstanding exemptions might reveal themselves to be newly burdensome and perhaps unconstitutional. Or exemptions once burdensome might become light. In other words, the baseline changes. What makes rights valuable or immaterial and exemptions burdensome or insignificant shifts over time and place.

CONCLUSION

A common law baseline suffers from far greater indeterminacy than a baseline defined by statute or regulation. The common law functions as a vehicle for ideological, technological, and societal change. Through a series of typically gradual steps, courts have reinterpreted and revised the law to adapt to the politics, culture, and values of their time. No single common law exists across states and throughout history.

When courts or scholars advocate for a common law baseline, they choose to revert to a particular time and place. This choice is not neutral, but as partial or value-laden as the choice of a statutory baseline.

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109 Id. at 4.


111 Id.
Ultimately, the notion of a pre-regulatory moment must be discarded if we are to ascend from "baseline hell." Scholars skeptical of statutory harm must specify what they take to be the common law or the legal framework of a "pre-regulatory" moment. More fundamentally, given the absence of a neutral baseline to tell us which harms count, they must construct a theory of justice underlying their choice of baseline. The invocation of the common law, any more than reference to statutory rights, is not talismanic.

112 See Rick Hills, Baseline Hell and the Religion Clauses, PRAWFSBLAWG (Aug. 20, 2016, 3:57 AM), http://prawfsblawg.blogs.com/prawfsblawg/2016/08/20/ [https://perma.cc/VV6P-AV5Y] ("[B]aseline hell' refers to the futility of arguing about whether some burden is the imposition of a 'penalty' or the withholding of a special 'benefit' in the absence of a theory of distributive justice.").

113 Some scholars have begun to make admirable strides to construct such baselines, albeit in often diverging ways. See, e.g., Nelson Tebbe, Religious Freedom in an Egalitarian Age 60 (2017) ("We should determine whether others have been harmed by taking into account all the values at play . . . This normative inquiry may be complicated, but the alternatives are unworkable."); see also Tebbe, Sragger & Schwartzman, supra note 107 (manuscript at 5–7); Kathleen A. Brady, Religious Accommodations and Third-Party Harms: Constitutional Values and Limits, 106 Ky. L.J. 717, 748-49 (2018).