

# The Conscience Wars

RETHINKING THE BALANCE BETWEEN RELIGION,  
IDENTITY, AND EQUALITY

*Edited by*

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*To our children,  
Lucrezia and Federico (SM)  
Maia and Alexis (MR)*

Conscience Wars in Transnational Perspective  
*Religious Liberty, Third-Party Harm, and Pluralism*

Douglas NeJaime and Reva Siegel

These days, conservatives seem to own “conscience.”<sup>1</sup> In the United States, conscience and religious liberty have emerged as the dominant objections to same-sex marriage, as both the majority and dissenting opinions in *Obergefell v. Hodges*, the US Supreme Court’s marriage equality decision, recognized.<sup>2</sup> In a high-profile conflict after *Obergefell*, Kim Davis, the clerk for Rowan County, Kentucky, was jailed for refusing to comply with the Court’s decision and subsequent court orders requiring her to perform her governmental duties. Davis claimed that her conscience prevented her from issuing marriage licenses to same-sex couples or allowing others in her office to do so.<sup>3</sup>

<sup>1</sup> This chapter builds on our work in “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,” *Yale Law Journal* 124 (May 2015): 2516–91, and “Conscience and the Culture Wars,” *American Prospect* 26, no. 2 (Summer 2015): 70–73, <http://prospect.org/article/conscience-and-culture-wars>. We benefited from presenting this chapter at “The Conscience Wars” conference at Cardozo Law School. For helpful comments, the authors thank Bruce Ackerman, Eva Brems, Marie Mercat Bruns, Rebecca Cook, Stephen Gardbaum, Vicki Jackson, Adriana Lamacková, Susanna Mancini, Richard Moon, Judith Resnik, Darren Rosenblum, Michel Rosenfeld, and Julie Suk. For excellent research assistance, the authors thank Violeta Canaves, Jordan Laris Cohen, Hilary Ledwell, Zachary Manfredi, and Seth Williams.

<sup>2</sup> See *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602, 2607 (2015) (majority); *ibid.*, at 2625–26 (Roberts, C. J., dissenting); *ibid.*, at 2638–39 (Thomas, J., dissenting). Opponents greeted the *Obergefell* decision with claims for religious exemptions. See Erik Eckholm, “Conservative Lawmakers and Faith Groups Seek Exemptions after Same-Sex Ruling,” *New York Times*, June 26, 2015, [www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html](http://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html).

<sup>3</sup> See Appellant Kim Davis’s Emergency Motion for Immediate Consideration and Motion for Injunction Pending Appeal at 7–8, *Miller v. Davis*, No. 15–5961 (6th Cir. September 7, 2015) (claiming that her religious beliefs make her unable “to issue [marriage] licenses” to same-sex couples or to provide “the ‘authorization’ to marry [even on licenses she does not personally sign]”).

In the commercial sphere, business owners assert that being required to serve same-sex couples would make them complicit in relationships they deem sinful, and so they claim religious exemptions from antidiscrimination laws.<sup>4</sup> As the Heritage Foundation's Ryan Anderson argues, "[s]ome citizens may conclude that they cannot in good conscience participate in a same-sex ceremony, from priests and pastors to bakers and florists. The government should not force them to choose between their religious beliefs and their livelihood."<sup>5</sup>

Conscience is also the rallying cry of opponents of abortion and contraception. Consider challenges to the health insurance required under the Affordable Care Act (ACA). In *Burwell v. Hobby Lobby Stores*, decided by the Supreme Court in 2014, employers challenged the ACA's requirement that they include contraception in health insurance benefits on the ground that doing so would make them complicit in their employees' use of drugs that the employers believe cause abortion.<sup>6</sup> The Court ruled five to four in favor of the employers' conscience objections.<sup>7</sup> Religious objections continued, as religiously affiliated nonprofit organizations objected to the government's framework for accommodating employers religiously opposed to providing employees with contraceptive insurance. These organizations rejected the government's accommodation mechanism because they claimed that applying for an accommodation would make them complicit in arrangements that provide their employees with alternative coverage of contraception.<sup>8</sup>

In Europe, some with objections to abortion and same-sex marriage are also asserting conscience claims. In the health care context, these may involve objections to direct participation in the performance of abortion; or they may involve objections to complicity in the sins of another – for example, to laws

<sup>4</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S.Ct. 2290 (2017); see also Andrew T. Walker, "The Equality Act: Bad Policy That Poses Great Harms," *Public Discourse* (July 24, 2015), [www.thepublicdiscourse.com/2015/07/15381/](http://www.thepublicdiscourse.com/2015/07/15381/).

<sup>5</sup> Ryan T. Anderson, "Indiana Protects Religious Liberty. Why That's Good Policy," *Daily Signal* (March 26, 2015), <http://dailysignal.com/2015/03/26/indiana-protects-religious-liberty-why-thats-good-policy>.

<sup>6</sup> 134 S.Ct. 2751 (2014). On efforts to stigmatize contraception as "the new abortion," see Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," *Yale Law Journal* 124 (May 2015): 2582, n. 273.

<sup>7</sup> *Ibid.* In *Hobby Lobby*, the religious liberty challenge to the health care act arose under the Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb-1(a) to (b) (2012). Opponents of same-sex marriage sought to enact state laws that mirror the federal RFRA. See, e.g., Ind. Code § 34-13-9-0.7 to -11 (2016).

<sup>8</sup> See *Zubik v. Burwell*, 136 S.Ct. 1557 (2016).

that oblige the objector to refer for abortion<sup>9</sup> or to sell contraception.<sup>10</sup> In Europe, as in the United States, conscience claims, including claims based on complicity, have begun to appear in the LGBT context.<sup>11</sup> Consider a recent case from the United Kingdom. In *Bull v. Hall*, innkeepers refused to rent a double-bed room to a same-sex couple and sought an exemption from antidiscrimination law on the ground that they objected "to facilitat[ing] what they regard as sin."<sup>12</sup>

Drawing on our earlier work on conscience claims emerging in the US culture wars<sup>13</sup> and expanding our analysis beyond US borders, this chapter offers a political diagnosis of why these claims are appearing, and then suggests a principled legal response.

We begin by showing how, in the United States, conscience claims became entangled in conflicts over laws that break with traditional sexual morality – such as laws protecting rights to contraception, abortion, and same-sex relationships. When opponents of such laws have been unable to block them entirely, they have invoked claims of religious liberty and shifted from speaking as a majority seeking to enforce traditional morality to speaking as a minority seeking exemptions from laws that depart from traditional morality; in this way, they can appeal to pluralism and nondiscrimination to justify

<sup>9</sup> See European Parliamentary Association, "Women's Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection," Doc. No. 12347 (July 20, 2010): 11, <http://semantic-pace.net/tools/pdf.aspx?doc=aHRocDovLzFzc2VtYmx5LmNvZS5pbnQvbnVncveG1sLihSZWYvWDJILURXLWV4dHIuYXNwPzZpbGVpZDoxMjUwNiZsYW5nPUVO&xsl=aHRocDovLzNlbWFudGljcGFjZS5uZXQvWHNsdCQvZGYvWFJlZiZXRClBVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkeTEyNTA2> (discussing the need for national requirements that objecting providers timely refer patients, given that objecting providers often refuse to provide referrals).

<sup>10</sup> See *Sentencia Tribunal Constitucional (S.T.C.)*, July 7, 2015 (S.T.C., No. 52) (Spain), available at [www.tribunalconstitucional.es/es/salaPrensa/Documents/NP\\_2015\\_052/2012-00412STC.pdf](http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2015_052/2012-00412STC.pdf). The relevant law was Ley de Farmacia de Andalucía art. 75 (B.O.E. 2007, 45); El Estatuto de Autonomía para Andalucía art. 2 (B.O.C.M. 2001, 171).

<sup>11</sup> See *Eweida and Others v. United Kingdom*, Nos. 48420/10, 59842/10, 51671/10, 46516/10, para. 26, p. 8, para. 34, p. 11 (Eur. Ct. H. R. 2013); *Lee v. McArthur & Others*, [2016] NICA 39.

<sup>12</sup> *Bull v. Hall*, [2013] UKSC 73, [34].

<sup>13</sup> NeJaime and Siegel, "Conscience Wars," 2516. For our most recent work, see Douglas NeJaime and Reva Siegel, "Religious Accommodation, and Its Limits, in a Pluralist Society," in *Religious Freedom and LGBT Rights: Possibilities and Challenges for Finding Common Ground* (Cambridge: Cambridge University Press, forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3078002](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3078002). For our recent writing generally available online, see Douglas NeJaime and Reva Siegel, "Trump and Pence Invoke Conscience to Block Contraception, Contrary to Our Religious Liberty Tradition," *Take Care* (June 4, 2017), <https://takecareblog.com/blog/trump-and-pence-invoke-conscience-to-block-contraception-contrary-to-our-religious-liberty-tradition>.

limiting the recently recognized rights of other citizens. We show how similar developments have also begun to appear in Europe.

The religious liberty claims we examine seek to exempt a person or institution from a legal obligation to another citizen – for instance, from duties imposed by health care or antidiscrimination law. For this reason, conscience claims asserted in conflicts over reproductive rights and LGBT equality are prone to inflict targeted harms on other citizens and so raise concerns less commonly presented by traditional claims for religious exemption – by, for example, the claim to engage in ritual observance. When a person of faith seeks an exemption from legal duties to another citizen in the belief that the citizen the law protects is sinning, granting the religious exemption can inflict material and dignitary harms on those who do not share the claimant's beliefs.

As we demonstrate, concerns about the third-party harms of accommodation are especially acute in culture war contexts, when religious exemption claims are employed, not to protect the practice of minority faiths that may have been overlooked by lawmakers, but instead to extend conflict over matters in society-wide contest. The accommodation of these claims may become a vehicle for opposing emergent legal orders and for limiting the newly recognized rights of those they protect.

In such contexts, religious objectors often seek exemptions from laws that they assert make them complicit in the sins of others. We recognize that “complicity-based conscience claims” of this kind are bona fide faith claims,<sup>14</sup> yet we call for special scrutiny of these claims because of their distinctive capacity to harm other citizens. Indeed, we show how the accommodation of complicity-based conscience claims can undermine efforts to construct a legal regime that mediates the impact of accommodation on third parties.

Religious accommodation is conventionally thought to promote pluralism. But the comparative analysis of religious accommodation regimes we offer in this chapter illustrates that accommodation can serve different ends, not all of which are pluralist. Examining accommodation across borders, we argue that an accommodation regime's pluralism is measured, not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objectors' beliefs. Exemption regimes that (1) accommodate objections to direct and indirect participation in actions of other citizens who do not share the objectors' beliefs, and (2) exhibit indifference to the impact of widespread exemptions on other citizens, do not promote pluralism; they sanction and promote the objectors' commitments. Only when conscience

<sup>14</sup> See *infra* note 68.

exemption regimes are designed to mediate the impact of accommodation on third parties do they provide for the welfare of a normatively heterogeneous citizenry and serve genuinely pluralist ends.<sup>15</sup>

The remainder of this chapter proceeds in four sections. Section 7.1 explains how claims for religious accommodation, including complicity-based conscience claims, have become entangled in culture war conflicts. Section 7.2 shows how accommodating these claims can impose significant burdens on other citizens. The remainder of our chapter argues for limiting religious accommodation in those cases where accommodation would inflict material or dignitary harm on third parties. Section 7.3 demonstrates that US law on religious liberty, as well as legislation and case law in Europe, restricts religious accommodation where accommodation would harm others. Section 7.4 concludes by considering the relationship between religious accommodation and pluralism.

## 7.1 HOW CONSCIENCE CLAIMS HAVE BECOME ENTANGLED IN THE CULTURE WARS

Conscience has been drawn into the culture wars. But why, and how? What follows is the story of the spread and evolution of conscience claims in recent decades, in the United States and in Europe.

### 7.1.1 Conscience and Health Care

In the wake of *Roe v. Wade*'s recognition of a constitutional right to abortion,<sup>16</sup> newly enacted federal and state laws authorized doctors with religious or moral objections to refuse to perform abortions or sterilizations.<sup>17</sup> Health care refusal laws exempt providers from duties of patient care that emerge

<sup>15</sup> In this chapter, we do not weigh in on whether exemption regimes should privilege religious interests only or accommodate conscience generally. For an argument in favor of general conscience protections in the abortion context, including both for those who oppose and those who support provision of abortion, see Bernard M. Dickens, “The Right to Conscience,” in Rebecca J. Cook, Joanna M. Erdman, and Bernard M. Dickens, eds., *Abortion Law in Transnational Perspective* (Philadelphia: University of Pennsylvania Press, 2014), 210–38; see also Rebecca J. Cook and Bernard M. Dickens, “Reproductive Health and the Law,” in Pamela R. Ferguson and Graeme T. Laurie, eds., *Inspiring a Medico-Legal Revolution: Essays in Honour of Sheila McLean* (Burlington, VT: Ashgate, 2015), 3–23, at 19.

<sup>16</sup> 410 U.S. 113 (1973).

<sup>17</sup> The original federal exemption law, on which many of the state laws were modeled, is the Church Amendment, passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b)-(c), 87 Stat. 91, 95. By the end of 1974, twenty-eight states had laws allowing physicians to refuse to perform abortions, and twenty-seven states had laws that

from various bodies of law – not only the constitutional principles announced in *Roe* but also obligations imposed as a matter of professional licensing, tort liability, common law, and statutory law.<sup>18</sup>

The US Congress responded to *Roe* by providing conscience protections to medical professionals for the direct performance of objected-to services. After failing to overturn *Roe* in 1992,<sup>19</sup> opponents set out to limit the decision's reach by enacting incremental restrictions on abortion access. In this period, opponents of abortion enacted a new and more expansive set of health care refusal laws.

The new health care refusal laws use concepts of complicity to authorize conscience objections, not only by the doctors and nurses directly involved in the objected-to procedure, but also by others indirectly involved who object on grounds of conscience to being made complicit in the procedure.<sup>20</sup> Mississippi, for example, allows health care providers to assert conscience objections to providing “any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health-care providers or health-care institutions.”<sup>21</sup> The Mississippi law also defines “health-care provider” as expansively as possible.<sup>22</sup> Concepts of complicity are used to authorize many more persons in health care services to object to the provision of care.

States like Mississippi *could* accommodate the conscience objections of health care providers while ensuring alternative care for patients; but, crucially, in the United States, health care refusal laws at the federal and state levels are rarely written to require institutions to provide alternative care. Many laws authorizing health care refusals impose no duty on the refusing

applied to hospitals. See “A Review of State Abortion Laws Enacted since January 1973,” *Family Planning/Population Reporter* 3, no. 2 (1974): 88–94; Sara Dubow, “‘A Constitutional Right Rendered Utterly Meaningless’: Religious Exemptions and Reproductive Politics, 1973–2014,” *Journal of Policy History* 27, no. 1 (2015): 1–35, at 25, n. 3. On efforts to pass health care refusal laws in the years before *Roe*, see Kathleen J. Frydl, “Taking Liberties with Religious Liberty,” *Washington Monthly* (January/February 2016): 21–28, at 21.

<sup>18</sup> See NeJaime and Siegel, “Conscience Wars,” 2534–35, and notes 72–76.

<sup>19</sup> *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>20</sup> For a more general discussion of the trajectory and expansion of exemption legislation after the Supreme Court's 1992 decision reaffirming *Roe*, see NeJaime and Siegel, “Conscience Wars,” 2538–39. Notably, health care refusal laws also expanded in terms of subject matter, from abortion and sterilization to contraception. See, e.g., Act of Mar. 13, 1998, ch. 226, 1998 S.D. Sess. Laws 292, 293 (codified as amended at S.D. Codified Laws § 36-11-70 [2015]).

<sup>21</sup> Miss. Code Ann. § 41-107-3(a) (West 2016).

<sup>22</sup> Miss. Code Ann. § 41-107-3(b) (West 2016).

provider to ensure that patients turned away receive care.<sup>23</sup> Laws like Mississippi's expressly authorize objecting providers to refuse to provide the patients they turn away counseling or referrals that might help them find alternative care.<sup>24</sup> Importantly, these refusal laws fail to acknowledge obligations of care that flow from other sources of law. The new, expansive, complicity-based health care refusal laws alter the provision of health care services. In the case we are examining, health care refusal laws function to restrict access to abortion. It is perhaps not surprising that laws such as Mississippi's are based on model statutes promulgated by the antiabortion group Americans United for Life.<sup>25</sup>

While an early law like the Church Amendment was adopted with bipartisan support and can facilitate a pluralist regime in which health care providers and patients with different moral outlooks may coexist, later laws, of which Mississippi is an extreme example, protect conscientious objection on a different model. Such laws provide conscience exemptions without providing for the needs of patients with different beliefs and may be understood as part of an effort to build a legal order that would restrict access to abortion services for all.

### 7.1.2 Preservation through Transformation

What forces have contributed to these changes in the form of conscience legislation in the United States?

We commonly understand religious exemptions as protecting members of minority faith traditions not considered by lawmakers passing laws of general application that burden religious exercise. But in the case we have just considered, those seeking religious exemptions are engaged in political struggle over laws of general application. Unable to reverse *Roe* and reinstate

<sup>23</sup> See, e.g., Mich. Comp. Laws Ann. § 333.20181 (West 2016); Miss. Code Ann. §§ 41-107-3, 41-107-5 (West 2016).

<sup>24</sup> See Miss. Code Ann. § 41-107-3(a) (West 2016); Ark. Code Ann. § 20-16-304 (West 2015); Colo. Rev. Stat. Ann. § 25-6-102 (West 2015); Fla. Stat. Ann. § 381.0051 (West 2016); 745 Ill. Comp. Stat. § 70/4 (2014). The federal government has enacted legislation allowing providers to refuse to refer patients to alternative care. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 245(a), 110 Stat. 1321, 1321–245 (codified as amended at 42 U.S.C. § 238n(a) [2012]).

<sup>25</sup> See Americans United for Life, “Mississippi 2014 Report Card,” [www.aul.org/states/mississippi](http://www.aul.org/states/mississippi). For the model act on which the Mississippi law and other state legislation is based, see Americans United for Life, “Healthcare Freedom of Conscience Act: Model Legislation and Policy Guide for the 2014 Legislative Year” (2013), [www.aul.org/downloads/2014-Legislative-Guides/ROC/Healthcare\\_Freedom\\_of\\_Conscience\\_Act\\_-\\_2014\\_LG.pdf](http://www.aul.org/downloads/2014-Legislative-Guides/ROC/Healthcare_Freedom_of_Conscience_Act_-_2014_LG.pdf).

restrictions on abortion for all, abortion opponents continued to pursue this general goal in whatever ways constitutional law would allow, including the enactment of expansive conscience legislation that would simultaneously protect religious liberty and restrict and stigmatize the practice of abortion.

The changing form of conscience exemptions reflects a dynamic that recurs in political conflicts. When advocates suffer defeat and their arguments lose legitimacy, they look for new rules and reasons that may help them attain similar ends – a dynamic we term “preservation through transformation.”<sup>26</sup> Restricting access to abortion through expansive religious exemptions illustrates this dynamic. When unable to enforce traditional values through laws of general application, opponents of abortion have mobilized to seek expansive exemptions from laws departing from traditional morality. Without change in numbers or belief,<sup>27</sup> they have shifted from *speaking as a majority* to *speaking as a minority*. In this way, claimants can advance traditional values by appeal to different and potentially more persuasive rules and reasons. Laws that restrict access to abortion through expansive conscience exemptions can be justified as vindicating secular values of pluralism and nondiscrimination.<sup>28</sup>

Opponents of same-sex marriage have looked to health care refusals as an inspiration for restraining another legal development they could not entirely block. The religious liberty argument for health care refusals offered a model for restricting equality rights for LGBT persons.<sup>29</sup> As same-sex couples gained the right to marry and state and federal lawmakers pressed for antidiscrimination laws that include sexual orientation, opponents sought religious exemptions to relieve public and private actors from obligations to serve same-sex couples or to recognize their marriages. Before the Supreme Court’s marriage equality ruling in *Obergefell*, Ryan Anderson wrote in the *National Review*: “Whatever happens at the Court will cause less damage if we . . . highlight the importance of religious liberty. Even if the Court were to one day redefine marriage, governmental recognition of same-sex relationships as marriage

<sup>26</sup> Reva B. Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy,” *Yale Law Journal* 105 (January 1996): 2117–207, at 2119; Reva Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action,” *Stanford Law Review* 49 (1997): 1111–48, at 1113.

<sup>27</sup> NeJaime and Siegel, “Conscience Wars,” 2553. <sup>28</sup> *Ibid.*, 2553, 2589.

<sup>29</sup> See Matthew Kacsmaryk, “The Inequality Act: Weaponizing Same-Sex Marriage,” *Public Discourse* (September 4, 2015), [www.thepublicdiscourse.com/2015/09/15612/](http://www.thepublicdiscourse.com/2015/09/15612/) (in seeking to limit the implications of same-sex marriage and LGBT antidiscrimination law, looking to “twenty-first century” health care refusal laws as a model for limiting newly recognized rights “with more and more protections for conscientious objectors”). See also Lynn D. Wardle, “Religious Liberties: ‘Conscience Exemptions,’” *Engage* 14, no. 1 (February 2013), 77–80, [www.fed-soc.org/library/doclib/20130628\\_ConscienceExemptions.pdf](http://www.fed-soc.org/library/doclib/20130628_ConscienceExemptions.pdf).

need not and should not require any third party to recognize a same-sex relationship as a marriage.”<sup>30</sup>

The mobilized faithful – and those who court their votes – now argue for limiting equality protections for gays and lesbians in the language of antidiscrimination. They appeal to antidiscrimination values to oppose the spread of antidiscrimination laws. Positioning himself for a run for the White House, Jeb Bush warned that recognition of marriage equality “shifts the focus to people of conscience,” adding, “people that act on their conscience shouldn’t be discriminated against, for sure.”<sup>31</sup> Mississippi again provides a striking example. After *Obergefell*, the state enacted the nation’s most expansive conscience legislation aimed at LGBT people – the Protecting Freedom of Conscience from Government Discrimination Act.<sup>32</sup> For those engaging in refusals based on “religious beliefs or moral convictions . . . that . . . [m]arriage is or should be recognized as the union of one man and one woman,” the law protects them from “any discriminatory action.”<sup>33</sup>

As in the case of health care, conscience objections generally take two forms – the refusal of some state officials to officiate same-sex marriages,<sup>34</sup> and complicity-based objections to antidiscrimination laws governing the sale of goods and services to same-sex couples.<sup>35</sup> The Mississippi law exempts judges and magistrates with religious or moral objections to same-sex marriage “from performing or solemnizing lawful [same-sex] marriages.”<sup>36</sup> And it authorizes conscience-based refusals by businesses and individuals who decline to provide “services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage.”<sup>37</sup> Here, as in the case of abortion, the enactment of

<sup>30</sup> Ryan T. Anderson, “Marriage: Where Do We Go From Here?,” *National Review* (May 22, 2014), [www.nationalreview.com/article/378538/marriage-where-do-we-go-here-ryan-t-anderson](http://www.nationalreview.com/article/378538/marriage-where-do-we-go-here-ryan-t-anderson).

<sup>31</sup> Chris Johnson, “Jeb Bush Endorses Religious Discrimination Legislation,” *Washington Blade* (March 20, 2015), [www.washingtonblade.com/2015/03/20/jeb-bush-endorses-religious-discrimination-legislation](http://www.washingtonblade.com/2015/03/20/jeb-bush-endorses-religious-discrimination-legislation).

<sup>32</sup> Miss. H.B. No. 1523 (2016). <sup>33</sup> *Ibid.*, §§ 2–3.

<sup>34</sup> See, e.g., Cheryl Wetzstein, “Gay Marriage Foes Dig In for Extended Culture War after Landmark Supreme Court Ruling,” *Washington Times* (December 21, 2015), [www.washingtontimes.com/news/2015/dec/21/gay-marriage-foes-reject-supreme-court-ruling-dig-/](http://www.washingtontimes.com/news/2015/dec/21/gay-marriage-foes-reject-supreme-court-ruling-dig-/) (reporting on judges in Oregon and Alabama); John Seewer, “Ohio Judge Wants to Know if He Can Refuse Gay Weddings,” *Associated Press* (July 8, 2015), [www.apnews.com/051eae1df3b64745a345915bec79a4f](http://www.apnews.com/051eae1df3b64745a345915bec79a4f).

<sup>35</sup> See, e.g., Richard Wolf, “Legal Battles Follow Gay-Marriage Ruling: Bakers,” *USA Today*, July 23, 2015, A8.

<sup>36</sup> Miss. H.B. No. 1523, at § 8.

<sup>37</sup> *Ibid.*, § 5. Strikingly, Mississippi law expresses little concern for the interests of same-sex couples. State law does not prohibit discrimination on the basis of sexual orientation. And the conscience legislation addresses the third-party impact of refusals in only one context: it

expansive conscience legislation simultaneously protects religious liberty and limits and stigmatizes same-sex marriage.<sup>38</sup>

### 7.1.3 Faith in Politics

These developments are not spontaneous. Political leaders have encouraged the faithful to mobilize in support of religious exemptions to laws authorizing abortion and same-sex marriage. In recent years, conscience has become a rallying cry for a cross-denominational coalition opposing abortion and same-sex marriage and supporting religious liberty. For example, the "Manhattan Declaration" – a 2009 manifesto of Christian principles endorsed by Catholic and evangelical Protestant leaders as well as conservative political activists – is subtitled "A Call of Christian Conscience."<sup>39</sup> The declaration asks Christians to unite across denominational lines in support of three central principles: "the sanctity of human life, the dignity of marriage as a union of husband and wife, and the freedom of religion."<sup>40</sup> Alongside planks opposing abortion and same-sex marriage, the statement offers support for claims of conscientious refusal to be complicit in either one.<sup>41</sup> This call to conscience is not just a statement of creed; it is the manifesto of a movement that calls upon its adherents to enact its principles in law.<sup>42</sup>

As Jeb Bush's comments suggest, the cross-denominational coalition asserting conscience claims in health care and marriage has the backing of the

provides that when a state official or employee refuses to perform, solemnize, license, or authorize a same-sex couple's marriage, the government "shall take all necessary steps to ensure that the [performance, solemnization, authorization, or licensing] is not impeded or delayed." Ibid., § 8.

<sup>38</sup> Richard Moon makes a similar observation about the political dynamics in Canada. See Richard Moon, "Conscientious Objections by Civil Servants: The Case of Marriage Commissioners and Same Sex Civil Marriages," *Social Science Research Network* (July 20, 2015): 1–26, at 6, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2631570](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631570).

<sup>39</sup> "Manhattan Declaration: A Call of Christian Conscience" (November 2009): 1–9, [http://manhattandeclaration.org/man\\_dec\\_resources/Manhattan\\_Declaration\\_full\\_text.pdf](http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf).

<sup>40</sup> Ibid., 2.

<sup>41</sup> For another example of such cross-denominational organizing, see the work of the Family Research Council (FRC). See NeJaime and Siegel, "Conscience Wars," 2548–49.

<sup>42</sup> The Manhattan Declaration invokes Christian principles as it urges signers "to labor ceaselessly to preserve the legal definition of marriage as the union of one man and one woman" and "to roll back the license to kill that began with the abandonment of the unborn to abortion." Manhattan Declaration, 3, 7; *infra*, note 39. Similarly, the FRC "believes that homosexual conduct is harmful" and "supports state and federal constitutional amendments" banning same-sex marriage. Family Research Council, "Homosexuality," [www.frc.org/homosexuality](http://www.frc.org/homosexuality). It also seeks to "build a culture of life" and to ensure that *Roe*'s "grave error will be corrected." Family Research Council, "Abortion," [www.frc.org/abortion](http://www.frc.org/abortion) (accessed April 7, 2016).

Republican Party, which invokes conscience to decry a so-called war on religion.<sup>43</sup> As the party's 2012 platform asserted: "The most offensive instance of this war on religion has been the current Administration's attempt to compel faith-related institutions, as well as believing individuals, to contravene their deeply held religious, moral, or ethical beliefs regarding health services, traditional marriage, or abortion."<sup>44</sup>

While we are primarily reporting on developments in the United States, there are related developments in Europe. Some European actors are mobilizing around conscience.<sup>45</sup> A progressive advocate with the European Parliamentary Forum on Population and Development<sup>46</sup> describes the agenda of his opponents in Europe in terms that echo the Manhattan Declaration and the platform of the Republican National Committee:

Their strategy, deployed equally at national and European levels, is threefold: 1) protection of life (from the moment of conception to natural death); 2) protection of the family (which this group defines as the "natural" heterosexual family with the father as its head); and 3) religious freedom (i.e., undermining equality legislation, often through conscience clauses, and then when these objections are denied, terming this discrimination).<sup>47</sup>

<sup>43</sup> See Republican National Committee, "Republican Platform 2012: We Believe in America" (2012), 10, 12, 14, [www.presidency.ucsb.edu/papers\\_pdf/101961.pdf](http://www.presidency.ucsb.edu/papers_pdf/101961.pdf).

<sup>44</sup> Ibid., 12.

<sup>45</sup> For work on conservative transnational mobilization more generally, see Clifford Bob, *The Global Right Wing and the Clash of World Politics* (Cambridge: Cambridge University Press, 2012).

<sup>46</sup> This is "a network of members of parliaments from across Europe who are committed to protecting ... sexual and reproductive health." European Parliamentary Forum on Population & Development, "About EPF," [www.epfweb.org/node/114](http://www.epfweb.org/node/114) (accessed April 7, 2016).

<sup>47</sup> Neil Datta, "Keeping It All in the Family," *Conscience: The News Journal of Catholic Opinion* (June 2013): 22–27, at 23. For additional documentation of this movement in Europe, see Amir Hodžić and Nataša Bijelić, "Neo-Conservative Threats to Sexual and Reproductive Health & Rights in the European Union," *Center for Education, Counseling and Research* (2014): 1–30, at 11–13, [www.cesi/\\_n/neo-conservative\\_threats\\_to\\_srlr\\_in\\_eu.pdf](http://www.cesi/_n/neo-conservative_threats_to_srlr_in_eu.pdf). (explaining how a European movement that includes organizations such as CitizenGO, HazteOir [Speak Up], European Dignity Watch, and the European Center for Law and Justice represents itself as protecting the values of "life, family and religious freedom"). Some activists frame their efforts against reproductive rights and LGBT equality as mobilization against "gender ideology." See, e.g., Women of the World Foundation, "The EU Seeks to Enshrine Devastating Gender Ideology in Upcoming Vote," *CitizenGO* (June 4, 2015), [www.citizenngo.org/en/24661-eu-seeks-enshrine-devastating-gender-ideology-upcoming-vote](http://www.citizenngo.org/en/24661-eu-seeks-enshrine-devastating-gender-ideology-upcoming-vote); European Dignity Watch, "Estrela Revisited: Noichl Report Calls for Aggressive Sex Ed Programmes, Abortion, and Medically-assisted Reproduction" (June 5, 2015), <http://europeandignitywatch.org/day-to-day/detail/article/estrela-revisited-noichl-report-calls-for-aggressive-sex-ed-programmes-abortion-and-medically-ass.html>. For work on the relationship between "gender ideology" and Catholic mobilization, see Mary



As in the United States, some European groups seek to expand conscience protections. The Brussels-based European Dignity Watch,<sup>48</sup> a watchdog for European institutions, has argued for extending conscience protection in health care to a wider universe of objectors.<sup>49</sup> European Dignity Watch also argues that recognition of LGBT rights gives “special protection” to “a tiny minority” and in doing so, “puts freedom of speech, of conscience, of religion . . . at great risk.”<sup>50</sup> Advocates act not only in European institutions but also in national governments.<sup>51</sup>

The assertion of conscience claims in culture war conflicts is a transnational phenomenon, and the organizations and activists encouraging these claims work across borders. American organizations have reached into Europe.<sup>52</sup> The European Center for Law and Justice is the European offshoot of the

Anne Case, “After Gender the Destruction of Man? The Vatican’s Nightmare Vision of the ‘Gender Agenda’ for Law,” *Pace Law Review* 31, no. 3 (2011): 802–17.

<sup>48</sup> European Dignity Watch, “About European Dignity Watch,” <http://europeandignitywatch.org/about-us/about-us.html>.

<sup>49</sup> In celebrating the Council of Europe’s adoption of a conscience-protective resolution, European Dignity Watch explained:

The vote constitutes . . . an affirmation that “No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.”

European Dignity Watch, “Council of Europe for Freedom of Conscience!,” (October 13, 2010), <http://europeandignitywatch.org/pl/codzienny/detail/article/council-of-europe-for-freedom-of-conscience.html>.

<sup>50</sup> European Dignity Watch, “A Turning Tide: What Is Really Going On at the European Parliament?” (February 5, 2014), [www.europeandignitywatch.org/day-to-day/detail/article/a-turning-tide-what-is-really-going-on-at-the-european-parliament.html](http://www.europeandignitywatch.org/day-to-day/detail/article/a-turning-tide-what-is-really-going-on-at-the-european-parliament.html) (explaining opposition to LGBT-focused Lunacek report).

<sup>51</sup> See Datta, *infra* note 47. In some European countries, this “anti-gender” mobilization receives support from conservative political parties. For reporting on these developments in France, Germany, Hungary, Poland, and Slovakia, see Foundation for European Progressive Studies, *Gender as Symbolic Glue: The Position and Role of Conservative and Far Right Parties in the Anti-Gender Mobilizations in Europe*, ed. Eszter Kováts and Maari Põim (Foundation for European Progressive Studies, 2015).

<sup>52</sup> See Peter Montgomery, “New Report on Religious Right in Europe – And Its U.S. Backers,” *Right Wing Watch* (January 7, 2015), [www.rightwingwatch.org/content/new-report-religious-right-europe-and-its-us-backers](http://www.rightwingwatch.org/content/new-report-religious-right-europe-and-its-us-backers). See also Hodžić and Bijelić, “Neo-Conservative Threats,” 16–17, *supra* note 47 (documenting similar influence of US groups and funders on European organizations and mobilization). American organizations are also active in other regions. See Cole Parke, “Natural Deception: Conned by the World Congress of Families,” *Political Research Associates* (January 21, 2015), [www.politicalresearch.org/wp-content/uploads/2015/07/Parke\\_Winter2015.pdf](http://www.politicalresearch.org/wp-content/uploads/2015/07/Parke_Winter2015.pdf) (describing Illinois-based World Congress of Families’ work with networks of conservative advocates and leaders around the world to achieve law and policy that reflects what it describes as the “natural family”).

American Center for Law and Justice, the organization founded by Pat Robertson.<sup>53</sup> The Alliance Defending Freedom (ADF, formerly the Alliance Defense Fund) and the Becket Fund for Religious Liberty are both now active in Europe. And these US-based organizations are backing up their institutional affiliations with financial support.<sup>54</sup>

European actors also have reached into the United States.<sup>55</sup> Board members of CitizenGO, the Spanish group that used new media to help defeat the Report on Sexual and Reproductive Health and Rights (often called the Estrela report) in the European Parliament in 2013,<sup>56</sup> have joined with the leadership of the National Organization for Marriage (NOM), the United States’ leading anti-same-sex-marriage organization. In a 2014 meeting in Washington, DC, activists from approximately seventy countries began working to establish an International Organization for Marriage.<sup>57</sup>

Religious objections to same-sex relationships are now being asserted in litigation in Europe. Again, these conscience claims take two forms. For example, in *Eweida and Others v. United Kingdom*, a case that reached the European Court of Human Rights, a government official objected to direct performance – conducting same-sex civil partnerships – while another claimant objected to complicity in what he deemed sinful conduct – by providing

<sup>53</sup> Pat Robertson is a former Southern Baptist minister who now runs a religious ministry through the media as chief executive officer of the Christian Broadcasting Network. Christian Broadcasting Network, “The 700 Club: Pat Robertson,” [www.cbn.com/700club/pat-robertson](http://www.cbn.com/700club/pat-robertson).

<sup>54</sup> In 2012, the American Center for Law and Justice sent \$1.1 million to its European branch, and the ADF spent more than \$750,000 on European programs. Montgomery, “New Report on Religious Right in Europe,” *supra* note 52.

<sup>55</sup> European activists are coming to the United States to support social conservative groups and causes. In June 2014, Ignacio Arsuaga (board member of both CitizenGO and HazteOir) and Ludovine de La Rochère (the president of anti-gay French group La Manif Pour Tous) publicly supported “The March for Marriage” in Washington, DC. See J. Lester Feder, “The Rise of Europe’s Religious Right,” *BuzzFeed* (July 28, 2014), [www.buzzfeed.com/lesterfeder/the-rise-of-europes-religious-right](http://www.buzzfeed.com/lesterfeder/the-rise-of-europes-religious-right).

<sup>56</sup> For the 2013 Estrela report, see “Report on Sexual and Reproductive Health and Rights,” European Parliament Doc. A7-0426/2013 (December 3, 2013), [www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0426&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0426&language=EN). CitizenGO has continued to organize against similar efforts. See Federation of Catholic Family Associations in Europe, “Stop Tarabella Relaunching Estrela! No EU Support to Abortion,” *CitizenGO* (January 14, 2016), [www.citizenngo.org/en/15605-protection-subsidiarity-and-no-eu-support-abortion](http://www.citizenngo.org/en/15605-protection-subsidiarity-and-no-eu-support-abortion).

<sup>57</sup> Feder, “The Rise of Europe’s Religious Right,” *supra* note 55. The 2016 World Congress of Families X, which focused on “the fight for the family . . . moving south and east,” was held in the Republic of Georgia and included as co-conveners the European groups CitizenGO and HazteOir as well as the US groups NOM, the ADF, and the Howard Center for Family, Religion & Society. See World Congress of Families, “World Congress of Families X,” <http://worldcongress.ge> (accessed May 1, 2016).

"psychosexual" therapy to same-sex couples.<sup>58</sup> The European Center for Law and Justice intervened in support of the claimants.<sup>59</sup>

## 7.2 RESPONDING TO CULTURE WAR CONSCIENCE CLAIMS

How might those concerned about the proliferation of conscience claims in the culture wars respond?

While some would deny persons of faith religious exemptions from laws of general application,<sup>60</sup> we write as observers who respect conscience and are committed to reproductive rights and LGBT equality. We support recognition of religious exemptions from laws of general application where the exemptions do not (1) obstruct the achievement of major social goals or (2) inflict targeted material or dignitary harms on other citizens. We believe the accommodation of religious liberty claims should be structured to shield other citizens from material and dignitary harm; where accommodation would inflict significant harm, accommodation is not appropriate. We understand our position to affirm the role that a well-designed system of conscience exemptions can play in promoting pluralism in a heterogeneous society.

### 7.2.1 Religious Accommodation and Third-Party Harm

Many religious liberty claims do not ask one group of citizens to bear the costs of another's religious exercise. For instance, in *Holt v. Hobbs*, a case decided by the US Supreme Court in 2015, a prisoner sought a religious exemption from a rule prohibiting prisoners from wearing beards.<sup>61</sup> The Court granted the accommodation, with Justice Ginsburg pointing out in her concurring opinion that "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief."<sup>62</sup>

<sup>58</sup> Nos. 48420/10, 59842/10, 51671/10, 46516/10, paras. 26, 34 (Eur. Ct. H.R. 2013).

<sup>59</sup> See Observations Relating to Third Party Intervention, *Ladele and McFarlane v. United Kingdom*, Nos. 51671/10, 36516/10 (Eur. Ct. H.R. 2011). The US-based ADF also intervened in the case, in support of the other two religious claimants, who sought to wear religious dress or symbols at work. See Written Observations of Third Party Interveners, *Eweida and Chaplin v. United Kingdom*, Nos. 48420/10, 59842/10 (E. Ct. H.R. 2011). For an analysis of the ways in which US-based nongovernmental organizations have begun to engage in transnational advocacy specifically through litigation featuring struggles over interpretations of human rights law, see Christopher McCrudden, "Transnational Culture Wars," *International Journal of Constitutional Law* 13 (April 2015): 434–62.

<sup>60</sup> See, e.g., Brian Leiter, *Why Tolerate Religion* (Princeton, NJ: Princeton University Press, 2013); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>61</sup> 135 S.Ct. 853 (2015). <sup>62</sup> *Ibid.*, 867 (Ginsburg, J., concurring).

The most significant constitutional free exercise cases in the United States involve claims like the one against the prison beard rule in *Holt*. In these cases, religious minorities sought exemptions based on unconventional beliefs or practices generally not considered by lawmakers when they adopted the challenged laws.<sup>63</sup> The costs of accommodating their claims were minimal and widely shared. For example, if the government grants an exemption from drug laws to members of the Native American Church who use peyote in ritual ceremonies, the burden of the accommodation does not fall on an identified group of citizens.<sup>64</sup>

Unlike claims for religious exemption asserted by practitioners of minority faiths overlooked by lawmakers, claims for religious exemption from laws concerning health care and marriage grow out of wide-ranging societal conflict. Because large groups are encouraged to assert the claims, the claims may be numerous. Because the claims concern sexual norms in long-running political contest, the claims are fraught with legible and powerful social meaning. Accommodation of these conscience claims can impose material and dignitary harms on those the law has only recently come to protect. Material harms include restrictions on access to goods and services and information about them. Dignitary harms may be inflicted when refusals to serve or to interact create stigmatizing social meaning, a dynamic classically illustrated by regimes of racial segregation.

Conscience-based refusals can obstruct access to services and to information about alternative providers, and they can inflict dignitary harm, as one citizen seeks an exemption from a legal duty to serve another on the ground that she believes her fellow citizen is sinning. For these reasons, we believe that conscience objections by those acting in professional roles should only be accommodated when the institution in which they are situated mitigates the material and dignitary effects on third parties. Accommodation regimes must be designed in such a way as to shield other citizens from the deprivations and denigrations that refusals can inflict. In settings where there is no feasible way of organizing a regime that can accomplish this, we are deeply skeptical of accommodation.

### 7.2.2 Third-Party Harm and the Problem of Complicity

Concerns about third-party harm lead us to focus on a special kind of conscience claim – complicity-based conscience claims. Here we are not referring

<sup>63</sup> *Smith*, 494 U.S. at 874; *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

<sup>64</sup> *Smith*, 494 U.S. at 911–12, 916 (Blackmun, J., dissenting). See also *Sherbert*, 374 U.S. at 407 (noting that accommodation imposed at most generalized costs on the state unemployment system).

to the conscience claims of those directly participating in the objected-to conduct – for example, those who refuse to perform abortions or to officiate at a marriage. Rather, we are focusing on the conscience objections of those who assert they are being asked indirectly to participate in objected-to conduct. They object to complying with laws requiring health care professionals to serve patients, or requiring businesses not to discriminate, on the grounds that compliance enables *others* to engage in sin or sanctions their wrongdoing. For example, the employers in *Hobby Lobby* objected to complying with provisions of the health care law that required the insurance benefits they provide their employees to cover contraception, reasoning that the law forced them to provide “insurance coverage for items that risk killing an embryo [and thereby] makes them complicit in abortion.”<sup>65</sup> In *Bull v. Hall*, innkeepers in the United Kingdom objected to complying with antidiscrimination law by boarding a same-sex couple and thereby “facilitat[ing] what they regard as sin.”<sup>66</sup> Similarly, business owners in the wedding industry engaged in baking cakes, providing flowers, or hosting events object to antidiscrimination obligations that they contend force them to “participate” in or “facilitate” same-sex weddings.<sup>67</sup>

Why draw special attention to complicity claims?

Complicity claims are bona fide faith claims. For example, Catholic principles of “cooperation” and “scandal” warn the faithful against complicity in the sins of others.<sup>68</sup> Evangelical Protestants also assert religious claims based

<sup>65</sup> Brief for Respondents at 9, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (Nos. 13-354, 13-356).

<sup>66</sup> *Bull v. Hall*, [2013] UKSC 37, [34].

<sup>67</sup> See, e.g., *Odgaard v. Iowa Civil Rights Comm’n*, No. CVO46451 (Iowa Dist. Ct. April 3, 2014); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014); Complaint, *Arlene’s Flowers, Inc. v. Ferguson*, No. 13-2-01898-2 (Wash. Super. Ct. August 1, 2013).

<sup>68</sup> See Bernard Häring, *The Law of Christ: Moral Theology for Priests and Laity*, Vol. 2, *Special Moral Theology* (Mercier Press, 1963), 2:494–517. For more contemporary texts, see Anthony Fisher, *Catholic Bioethics for a New Millennium* (Cambridge: Cambridge University Press, 2011), 69–98; Germain Grisez, *The Way of the Lord Jesus*, Vol. 3, *Difficult Moral Questions* (St. Paul’s/Alba House, 1997), 3:871–97. Principles of cooperation address the circumstances under which an individual or institution can be involved in others’ illicit actions. The Catechism of the Catholic Church explains:

Sin is a personal act. Moreover, we have a responsibility for the sins committed by others when we cooperate in them:

- by participating directly and voluntarily in them;
- by ordering, advising, praising, or approving them;
- by not disclosing or not hindering them when we have an obligation to do so;
- by protecting evil-doers.

U.S. Catholic Church, Catechism of the Catholic Church (1995), pt. 3, ¶ 1868.

on complicity.<sup>69</sup> The structure of these religious exemption claims is relevant, not to the claims’ sincerity or religious significance, but instead to the claims’ potential to harm others. Because complicity claims single out other citizens as sinners, their accommodation has the potential to inflict material and dignitary harm on those the objector claims are sinning.<sup>70</sup> Other aspects of the claims increase the likelihood of third-party harm. Complicity claims expand the universe of potential objectors, from those directly involved to those who consider themselves indirectly involved in the objected-to conduct. Where complicity claims become entangled in society-wide conflicts, the number of potential claimants multiplies. The universe of objectors is especially likely to expand in regions where majorities still oppose recently legalized conduct. Under these circumstances, barriers to access to goods and services may spread, and refusals may demean and stigmatize members of the community.

Just as importantly, the logic of complicity offers objectors a ground on which to object to efforts to mediate the impact of their objection on third parties. For example, a health care provider with conscience objections to performing particular health care services (for example, abortion, sterilization, or assisted reproductive technologies) might refer patients to alternate providers. But if that objector raises a complicity-based objection to referring the patient, she will deprive the patient of information about alternate services. As we have seen, in the United States, some health care refusal laws expressly sanction these complicity-based objections by authorizing refusals to refer or counsel patients who are denied services.<sup>71</sup>

Unconstrained, complicity claims undermine the very logic of a system of religious accommodation. In the United States, Catholic and evangelical Protestant organizations even object to seeking an accommodation from laws requiring coverage of contraception in health insurance benefits, on the ground that registering their objection to complying with the law would make them complicit in employees receiving contraceptives through an alternate route. As the Catholic organization Little Sisters of the Poor argued in its petition to the Supreme Court:

[T]hese organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object to facilitating, or being complicit in, access to contraceptives; to paving the way for contraceptives to be provided under their plans; and to directly transferring their own obligations onto others. Being forced to “comply” with the mandate via the regulatory

<sup>69</sup> See NeJaime and Siegel, “Conscience Wars,” 2523 and n. 24, 25. <sup>70</sup> See *ibid.*, 2566.

<sup>71</sup> See *supra* notes 21, 24.

"accommodation" is no more compatible with their religious beliefs than being forced to comply with that mandate directly.<sup>72</sup>

To this point, we have been largely focusing on the material harms that the accommodation of complicity-based conscience claims can inflict. But the accommodation of complicity claims can inflict dignitary harm as well. Complicity claims focus on citizens who do not share the objector's beliefs. By their terms, complicity claims call out other citizens as sinners. In the culture war context in which complicity claims are arising, the social meaning of conscience objections is readily intelligible to those whose conduct is condemned.<sup>73</sup> For example, a gay customer reported being told by a bakery owner, "[we] don't do same-sex weddings because [we] are Christians and being gay is an abomination."<sup>74</sup> But even when not explicitly communicated, the status-based judgment entailed in the refusal is clear to the recipient.<sup>75</sup> The conscientious objection demeans those who act lawfully but in ways that depart from traditional morality.<sup>76</sup> The objection's power to denigrate is amplified because it reiterates long-standing judgments of conventional morality.

One might challenge complicity claims on the grounds that the claimant is not directly involved in prohibited religious conduct and therefore the burden on religious exercise is not substantial.<sup>77</sup> But rather than ask government to distinguish among faith claims in this way,<sup>78</sup> we invite government to focus on the question whether accommodating the claims will inflict harm on citizens who do not share the claimants' convictions. If the government accommodates

<sup>72</sup> Petition for Writ of Certiorari at 10, *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 15-105 (U.S. July 23, 2015).

<sup>73</sup> See NeJaime and Siegel, "Conscience Wars," 2576-78, n. 246-58 and accompanying text.

<sup>74</sup> Rachel C., "Review for Sweet Cakes," *Yelp* (January 17, 2013), [www.yelp.com/user\\_details?userid=a4fuAn84fRddJT7jEo7g](http://www.yelp.com/user_details?userid=a4fuAn84fRddJT7jEo7g) [<http://perma.cc/7VBA-CY7P>].

<sup>75</sup> For instance, a lesbian couple turned away from a wedding venue reported feeling "horrible" and "shell-shocked"; indeed, one of the women reported that the refusal constituted a "kind of blow" to her coming-out process. Notice and Final Order at 10, *McCarthy v. Liberty Ridge Farm, LLC*, Nos. 10157952, 10157963 (N.Y. Div. Hum. Rts. July 2, 2014).

<sup>76</sup> See NeJaime and Siegel, "Conscience Wars," 2574-79.

<sup>77</sup> See, e.g., *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1178-82 (10th Cir. 2015); *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015).

<sup>78</sup> Christopher McCrudden argues that courts should take a "cognitively internal" perspective, rather than an external viewpoint, when approaching religious issues. See Christopher McCrudden, "Catholicism, Human Rights and the Public Sphere," *International Journal of Public Theology* 5, no. 3 (2011): 331-51, at 337-39; Christopher McCrudden, "Religion, Human Rights, Equality and the Public Sphere," *Ecclesiastical Law Journal* 13 (January 2011): 26-38, at 30-32.

the claims, it must structure the accommodation in ways that shield other citizens from the accommodation's material and dignitary impact.<sup>79</sup>

### 7.3 ACCOMMODATION AND THIRD-PARTY HARM: THE LAW

Pluralism is often advanced as a justification for expansive religious accommodations. In ideal form, religious accommodations facilitate a pluralist social order in which those with different moral views can coexist. For instance, laws allowing abortion can include conscience provisions while also protecting patient access to services.

But as we have seen, religious accommodations may function in practice to undermine pluralism by obstructing access to objected-to services for persons who do not share the religious claimants' beliefs. For instance, in the United States, health care refusal laws sanction complicity-based conscience objections to counseling and referring patients, and thus deprive them of knowledge essential to identifying alternative providers.

In our view, genuinely pluralist accommodation regimes are structured with attention to mediating their impact on citizens who do not share the claimants' beliefs. As we now show, this pluralist approach to religious accommodation finds support in law.

#### 7.3.1 US Law on Third-Party Harm

US law features significant precedent for limiting faith claims when accommodation would inflict targeted harm on third parties. The underlying intuition seems to be that one group of citizens should not be singled out to bear significant costs of another citizen's religious exercise.

The Supreme Court's decision in *Employment Division v. Smith* holds that a free-exercise challenge to a generally applicable law merits only minimal constitutional scrutiny, unless the law targets religion.<sup>80</sup> In *Smith's* wake, federal and state laws, including the federal Religious Freedom Restoration Act (RFRA), have been enacted to recognize religious liberty as a statutory civil right. Concern with third-party harm appears intermittently across both constitutional and statutory decisions as a limit on religious accommodation.<sup>81</sup>

<sup>79</sup> NeJaime and Siegel, "Conscience Wars," 2521, 2579.

<sup>80</sup> 494 U.S. 872. The Court has been invited to address the scope of free exercise protections in *Masterpiece Cakeshop*.

<sup>81</sup> NeJaime and Siegel, "Conscience Wars," 2529-33. Constitutional limitations have arisen as a matter of both free exercise law and Establishment Clause doctrine. See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982) (in free exercise case, rejecting exemption claims that would

The Court even addressed this concern in *Hobby Lobby*, which recognized exemption claims in some far-reaching ways. Yet, at the same time, the majority opinion recognized concerns about the potential third-party harm of accommodation, presumably to secure Justice Kennedy as a crucial fifth vote. Kennedy's concurring opinion recognized the government's compelling interest in protecting women's health and expressed concern with the impact of the sought-after accommodation on female employees.<sup>82</sup> These concerns structured the majority's decision. Because the government could provide Hobby Lobby's employees contraception without involving their employer, the majority granted the exemption on the assumption that "[t]he effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero."<sup>83</sup>

The *Hobby Lobby* Court was incorrect in its assumption about the effect of accommodation,<sup>84</sup> but its reasoning shows how third-party harm is an integral part of the RFRA inquiry, even though the statute itself does not expressly discuss third-party harm. What *Hobby Lobby* illustrates is that third-party harm matters in determining whether unobstructed enforcement of the law is, in the language of RFRA, the "least restrictive means" of furthering the government's "compelling" ends.<sup>85</sup> If the government's interests are compelling and if

"impose the employer's religious faith on the employees"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 720 (1985) (invalidating accommodations that impose "significant burdens" on third parties). Statutory accommodation regimes, including the Religious Land Use and Institutionalized Persons Act (RLUIPA) and Title VII of the Civil Rights Act of 1964, also have been limited by a concern about third-party harm. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (explaining that in applying RLUIPA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 584-85 (7th Cir. 2007), holding under Title VII that "an accommodation that requires other employees to assume a disproportionate workload (or divert them from their regular work) is an undue hardship as a matter of law". Only in rare circumstances have courts accommodated religious liberty claims that have a targeted impact on third parties. For instance, the Court has explained that there is a ministerial exception that shields churches from the claims of employees, such as clergy, whose jobs involve substantial religious duties. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 702 (2012).

<sup>82</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2787 (2014) (Kennedy, J., concurring). For analysis, see NeJaime and Siegel, "Conscience Wars," 2530-31.

<sup>83</sup> 134 S.Ct. at 2760.

<sup>84</sup> For commentators questioning the accuracy of the Court's premises, see Frederick Mark Gedicks, "One Cheer for *Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens," *Harvard Journal of Law and Gender* 38 (2015): 153-76, at 159-62; and Andrew Koppelman and Frederick Mark Gedicks, "Is Hobby Lobby Worse for Religious Liberty Than Smith?," *University of St. Thomas Journal of Law and Public Policy* 9 (2015): 223-47.

<sup>85</sup> See NeJaime and Siegel, "Conscience Wars," 2580-84.

religious accommodation would impose material or dignitary harm on the individuals protected by the law or otherwise undermine the societal interests the law promotes, then unimpaired enforcement of the law is likely the least restrictive means of furthering the government's compelling ends.<sup>86</sup>

Accordingly, our reading of RFRA shows that where the government is pursuing a compelling interest, an accommodation of religious exercise must minimize, to the extent feasible, adverse material and dignitary effects on third parties. In some cases, third-party harm is a sufficient reason to deny the accommodation.

This approach furnishes a useful lens to understand *Zubik v. Burwell*, the case in which religiously affiliated nonprofit organizations challenged the government's method of accommodating employers with religious objections to including contraception in the health insurance benefits they provide their employees (as US law requires).<sup>87</sup> In *Zubik*, the organizations objected to the accommodation the government offered, asserting that even though it relieved them of the obligation to provide their employees with health insurance covering contraception, the accommodation made them complicit in their employees receiving contraceptive insurance coverage from alternative sources.<sup>88</sup> (Once the organizations notified the government of their religious objections, their employees were to receive coverage through entities with which the religiously affiliated nonprofits may be in contractual relations.<sup>89</sup>) The objecting organizations rejected this accommodation and sought a complete exemption from the health insurance law. They contended that

<sup>86</sup> See *ibid.*, 2580-81. ("An antidiscrimination law can illustrate. In enacting an antidiscrimination law, legislators seek to provide the citizens the law protects equal access to employment, housing, and public accommodations and to ensure that they are treated with equal respect; legislators also seek to promote the growth of a more integrated and less stratified society. If granting a religious accommodation would harm those protected by the antidiscrimination law or undermine societal values and goals the statute promotes, then unencumbered enforcement of the statute is the least restrictive means of achieving the government's compelling ends. If, however, the government can accommodate the religious claimant in ways that do not impair pursuit of the government's compelling interests in banning discrimination, then RFRA requires the accommodation.")

<sup>87</sup> Many federal appellate courts rejected the religiously affiliated nonprofits' claims by focusing instead on the "substantial burden" inquiry. See, e.g., *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014).

<sup>88</sup> See *supra* text accompanying note 72.

<sup>89</sup> See Brief for Petitioners at 51, *Zubik v. Burwell*, No. 15-35 (U.S. 2016) (objecting "to facilitating . . . provision [of contraceptive insurance coverage] by providing the notice and maintaining a contract with the coverage provider"); Brief for Petitioners at 44, *East Texas Baptist Univ. v. Burwell*, No. 15-35 (U.S. 2016). ("By [the government's] own telling, petitioners' execution and delivery of the requisite paperwork is 'necessary' to enable the provision of coverage through their own plan infrastructure.")

their employees should not receive coverage of contraception through their health insurance benefits as other employees do, but instead argued that employees should purchase their own insurance policies for contraception in the private market (even though no such policies actually exist).<sup>90</sup>

In *Zubik*, the Court issued a *per curiam* order remanding the cases to the lower courts that echoed *Hobby Lobby's* concern with third-party harm. The parties, according to the Court, should have "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"<sup>91</sup>

*Zubik* demonstrates the special concerns about third-party harm that complicity-based conscience claims raise. Without a limiting principle, complicity objections can undermine the government's ability to administer a workable system of religious accommodation and thus to pursue social aims in a fashion that respects religious pluralism.<sup>92</sup>

*Hobby Lobby* and *Zubik* demonstrate that RFRA analysis requires attention to third-party harm. Outside RFRA, judges deciding constitutional and statutory cases have regularly limited religious exemptions in order to protect third parties from harm.<sup>93</sup> But US health care refusal laws, from which so many of today's complicity claims descend, are not in conformity with this principle.<sup>94</sup> This discrepancy in US law is especially important to recognize as

<sup>90</sup> See Brief for Petitioners at 75–76, *Zubik*, No. 15–35 (U.S. 2016) (arguing that the employees of objecting organizations should buy their own health insurance policies and noting that the government could enact a new law to subsidize them).

<sup>91</sup> 136 S.Ct. at 1560.

<sup>92</sup> In its constitutional free exercise jurisprudence, the Supreme Court has refused to provide a religious exemption to tax laws on the ground that the potential multiplication of such claims threatens the government's ability to run a system of taxation. See *Lee*, 455 U.S. at 260 (denying a free exercise claim for exemption from social security taxes on the ground that "[t]he tax system could not function if denominations were allowed to challenge the tax system" and observing that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax"). In so doing, the Court identified complicity-based claims as having obvious potential for multiplication. See *ibid.* ("If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.").

<sup>93</sup> See *supra* note 81.

<sup>94</sup> See NeJaime and Siegel, "Conscience Wars," 2528–29 and notes 50–54. In late 2017, the Trump administration issued interim final rules allowing employers that provide health insurance for their employees to withhold coverage for contraception if they have religious or moral objections to providing such coverage. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care

opponents of same-sex marriage hold up health care refusals legislation as a model for shaping law in the LGBT context.<sup>95</sup>

We now turn to conscience claims in other jurisdictions. Without endeavoring comprehensively to survey law in Europe, we note a variety of contexts in which concern about third-party harm shapes approaches to religious accommodation. We offer this comparison for the limited purpose of illustrating that many practical approaches to religious accommodation are feasible. Some systems accommodate conscience claims without regard to their impact on citizens who do not share the claimants' beliefs, while other systems restrict accommodation with attention to third-party harm. In this way, cross-borders comparison illustrates our claim that only some forms of religious accommodation protect heterogeneity of belief and so genuinely promote pluralist ends.

### 7.3.2 Accommodations Law and Third-Party Harm: Comparative Observations

In Europe, as in the United States, religious objectors seek exemptions from generally applicable laws that impose duties with respect to third parties – for instance, to provide health care services, or to provide goods and services on a nondiscriminatory basis.

We illustrate how, under both national law and European human rights law and standards, third-party harm may operate as a limit on accommodation. Of course, application of the harm principle in the accommodation of conscience is subject to dispute and debate. For example, there have been struggles in the Council of Europe over the contours of conscientious objection in health care. In 2010, a resolution that sought to limit conscience objections in order to protect the rights of patients was proposed in the Parliamentary Assembly of the Council of Europe but ultimately passed, after significant struggle, in a much more conscience-protective

Act, 82 Fed. Reg. 47,792 (interim final rule October 6, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 82 Fed. Reg. 47,838 (interim final rule October 6, 2017). The regulations go well beyond what the Court sanctioned in *Hobby Lobby* and *Zubik* in two ways. First, they offer a complete exemption while making no effort to provide any alternative source of coverage for employees. Second, they authorize employers to refuse to provide coverage on the basis of moral, as well as religious, objections. In their disregard for the impact of accommodation on other citizens, the regulations resemble health care refusal laws and in this respect stand well outside the mainstream of American constitutional and statutory religious liberties traditions. See NeJaime and Siegel, "Trump and Pence Invoke Conscience to Block Contraception," *supra* note 13.

<sup>95</sup> For an analysis of the relationship between health care refusal laws and exemption proposals in the same-sex marriage context, see Elizabeth Sepper, "Doctoring Discrimination in the Same-Sex Marriage Debates," *Indiana Law Journal* 89, no. 2 (2014): 703–62.



posture.<sup>96</sup> Nonetheless, both legislation and case law in a variety of jurisdictions recognize third-party harm as a reason to limit accommodation of conscience claims, particularly those involving complicity.

Some countries allow conscience exemptions in health care as a matter of national law, yet on terms that differ from many US health care refusal laws. In particular, the statutes authorize refusals in frameworks that restrict complicity-based claims. For instance, UK regulations require those with conscience objections to performing abortion to provide “prompt referral to another provider of primary medical services who does not have such conscientious objections.”<sup>97</sup> Similarly, France’s abortion law allows individuals to claim conscience protections, but requires objecting physicians who are asked about the possibility of abortion to provide patients with a list of names and addresses where abortion is practiced.<sup>98</sup> Further, though French law permits private hospitals to refuse to provide abortions, it prevents hospitals with certain public contracts from doing so if other establishments are not available to respond to local needs.<sup>99</sup>

<sup>96</sup> Compare supra note 8, with The Right to Conscientious Objection in Lawful Medical Care, Eur. Parl. Ass. Res. 1763 (2010), available at <http://assembly.coe.int/nw/xml/News/Features/Manager-View-EN.asp?ID=950>. This resolution is nonbinding for the members of the Parliamentary Assembly of the Council of Europe. On the developments surrounding this resolution, see Christina Zampas and Ximena Andión-Ibañez, “Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice,” *European Journal of Health Law* 19, no. 3 (2012): 231, 243–44.

<sup>97</sup> The National Health Service (General Medical Services Contracts) Regulations, sched. 2(3) (2)(3), cl. 9.7.1(c), 2004, S.I. 2004/291.

<sup>98</sup> Loi n° 75-17 du 17 janvier 1975 relative à l’interruption volontaire de la grossesse [Law 75-17 of January 17, 1975 Relating to the Voluntary Interruption of Pregnancy], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], January 17, 1975, art. L 162-3. Codified at Code de la Santé Publique [Public Health Code], art. L2212-3.

<sup>99</sup> Art. L2212-8(4). While we cannot draw conclusions about the laws of each European country and recognize that some countries have failed to adequately protect patients seeking lawful services, we note that many countries have limited conscience objections in health care by (1) allowing only those who are directly involved in the objected-to procedure to claim conscience objections, see, e.g., Lov om svangerskapsavbrudd [abortionloven] [Norway Abortion Act], Lov no. 50, ch. II, § 20 of June 13, 1975; Legge 22 maggio 1978, n. 194. Norme per la Tutela Sociale Sella Maternità e sull’Interruzione Volontaria Della Gravidanza [Law May 22, 1978, n. 194. Provisions on the Social Protection of Maternity and the Voluntary Interruption of Pregnancy], art. 9, G.U. May 22, 1978, no. 140, art. 9; (2) requiring practices such as counseling and referral that reduce the adverse impact of conscience objections on patients, see, e.g., Lov om svangerskapsavbrudd [abortionloven] [Norway Abortion Act], Lov no. 50, ch. II, §§ 2-3 of June 13, 1975; Código Deontológico da Orden dos Medicos, Portaria No. 189/1998, de 21 de Marco [Code of Medical Ethics, Admin. Rule No. 189/1998, Mar. 21, 1990], Interrupcao voluntaria da gravidez/Servicos obstetrician [Voluntary Termination of Pregnancy and Obstetric Services] (Portugal); Slovenian Code of Medical Deontology Practice, art. 42

Similarly, some national courts have limited conscience exemptions, rejecting complicity-based objections where accommodating them would impose targeted harm on third parties. For instance, in the 2014 case of *Greater Glasgow Health Board v. Doogan*, the UK Supreme Court rejected complicity-based conscience objections to complying with obligations imposed by national abortion legislation. The court limited conscience exemptions so that they would only cover health care providers *directly* performing or assisting in abortions,<sup>100</sup> and it required objecting health care professionals to refer patients to willing providers.<sup>101</sup>

But these types of limits are not universal. Recently, Spain’s Constitutional Court exempted a pharmacist with complicity-based objections to selling contraceptives, which he was obliged to sell under Andalusia law.<sup>102</sup> The court upheld the pharmacist’s objection to selling emergency contraception, reasoning it could be bought elsewhere in Seville, but refused to extend the same reasoning to the pharmacist’s refusal to sell condoms.<sup>103</sup> (It is difficult to discern a principle that justifies this differential treatment, which seems to reflect views about gender or the merits of the claimant’s religious beliefs.)

In parts of Europe that have adopted LGBT-protective laws – the United Kingdom, for example – conscience claims, which have predominated in conflicts over abortion and contraception, have begun to spread to the LGBT context. Here too, courts have rejected exemption claims to protect

(1992); and (3) restricting or denying conscience protections for institutions, see, e.g., Sundhedsloven, LBK nr. 546 af 25/6/2005 [Danish Health Act, Law No. 546 of June 25, 2005], Lov om ansvaret for og styringen af den active beskæftigelsesindsats [Law on Responsibility and Employment Management], part A, June 25, 2005, No. 92, pp. 3914–54; 1992. évi LXXIX. törvény a Magzati élet Védelméről (Act LXXIX of 1992 on the protection of fetal life), §§ 5(1), 13(2) (Hung.).

<sup>100</sup> In response to the broad interpretation of “participate” in “treatment” urged by the objectors, the UK Supreme Court found that the treatment “authorized by the Act,” and hence covered by the conscientious objection provision, only encompassed “the whole course of medical treatment bringing about the ending of pregnancy,” and that “participate . . . means taking part in a ‘hands-on’ capacity.” *Greater Glasgow & Clyde Health Board v. Doogan*, [2014] UKSC 68, [33], [37].

<sup>101</sup> The court explained, “it is a feature of conscience clauses generally within the health care profession that the conscientious objector be under an obligation to refer the case to a professional who does not share that objection. This is a necessary corollary of the professional’s duty of care towards the patient.” *Doogan*, [2014] UKSC [40].

<sup>102</sup> S.T.C., July 7, 2015 (S.T.C., No. 52) (Spain), available at [www.tribunalconstitucional.es/es/salaPrensa/Documents/NP\\_2015\\_052/2012-00412STC.pdf](http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2015_052/2012-00412STC.pdf). The relevant law was Ley de Farmacia de Andalucía art. 75 (B.O.E. 2007, 45); El Estatuto de Autonomía para Andalucía art. 2 (B.O.C.M. 2001, 171).

<sup>103</sup> S.T.C., July 7, 2015 (S.T.C., No. 52).

third parties. For example, in 2013, in *Bull v. Hall*, where innkeepers raised complicity-based conscience objections to boarding a same-sex couple, the UK Supreme Court held that “the protection of the rights and freedoms of [the same-sex couple]” provided a reason to reject the sought-after exemption from antidiscrimination law.<sup>104</sup>

Looking beyond national law, we see that, to this point, European institutions applying human rights law and standards have neither provided nor sanctioned expansive exemptions. Concern with third-party harm has played a role in these decisions.

First, consider the European Committee on Social Rights (ECSR).<sup>105</sup> The ECSR has denied exemption claims asserted under the European Social Charter’s rights to protection of health and nondiscrimination. In rejecting a challenge to Sweden’s failure to accommodate conscience objections in health care, the ECSR found no “positive obligation to provide a right to conscientious objection for health care workers.”<sup>106</sup> Indeed, the ECSR emphasized that in the abortion context, Article 11 of the European Social Charter, which provides for the protection of health, is “primarily concerned” with the rights of “pregnant women” and not health care providers.<sup>107</sup>

Further, the ECSR has found that, in cases where national law permits conscience-based refusals, the law cannot do so in ways that violate women’s rights to the protection of health under the Charter. In 2013, in *International Planned Parenthood Federation – European Network v. Italy*, the ECSR determined that Italy had violated the Charter because patients did not have access to non-objecting personnel who could perform abortions. The ECSR expressed concern that the exercise of conscientious objection “may involve considerable risks for the health and well-being of the women concerned” and thereby violate women’s rights to the protection of health under Article 11.<sup>108</sup>

<sup>104</sup> *Bull v. Hall*, [2013] UKSC 37, [51]. The court not only determined that there should be no exemption from antidiscrimination law under domestic law but it also rejected the innkeepers’ claim under the European Convention on Human Rights, and specifically Article 9’s protection of the right “to manifest one’s religion.”

<sup>105</sup> The ECSR is part of the Council of Europe and is charged with implementing the European Social Charter. That treaty, which was adopted in 1961 and revised in 1996, focuses on social and economic rights. In contrast, the European Convention on Human Rights (ECHR), which was drafted by the Council of Europe and adopted in 1953, protects fundamental civil and political rights and falls within the jurisdiction of the European Court of Human Rights (ECtHR).

<sup>106</sup> *Fed’n of Catholic Families in Eur. (FAFCE) v. Sweden* at 16 (ECSR 2015). ADF participated in the case as a third-party observer. *Ibid.*, 3.

<sup>107</sup> *Ibid.*, 16.

<sup>108</sup> *Int’l Planned Parenthood Fed’n – Eur. Network v. Italy* at paras. 175, 177 (ECSR 2013).

Accordingly, it required Italy to take “adequate measures . . . to ensure the availability of non-objecting medical practitioners and other health personnel when and where they are required to provide abortion services.”<sup>109</sup>

Next, consider the European Court of Human Rights (ECtHR). A growing body of law addresses conscience exemptions in relation to the European Convention on Human Rights (ECHR). The court has interpreted the ECHR to deny accommodation, or to limit accommodation, in the interest of protecting the rights of other citizens.

When national authorities have implemented conscience protections in particularly expansive ways, the ECtHR has invoked third-party harm in imposing limits on such protections. In *P. and S. v. Poland*, the court determined that the patient’s right to respect for private life under Article 8 of the ECHR was violated when conscience refusals were invoked in ways that impeded her access to abortion.<sup>110</sup> The objections had not been accommodated, as required by Polish law, so as to “allow the right to conscientious objection to be reconciled with the patient’s interests, . . . by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service.”<sup>111</sup> Indeed, a year earlier, in another case involving Poland, the ECtHR declared: “States are obliged to organize the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.”<sup>112</sup>

When national authorities have refused to accommodate conscience objections, the ECtHR has invoked third-party harm as a basis for denying claims to exemption under the ECHR. Article 9 of the ECHR protects the “[f]reedom to manifest one’s religion or beliefs” but subjects this right to “limitations . . . necessary in a democratic society . . . for the protection of the rights and freedoms of others.”<sup>113</sup> The Article 9 framework invokes third-party harm as a limit on religious liberty – though it is unclear whether or when Article 9 itself protects religious-liberty objections to reproductive and LGBT rights.

<sup>109</sup> *Ibid.*, ¶ 163. <sup>110</sup> See *P. and S. v. Poland*, No. 57375/08, para. 112 (Eur. Ct. H.R. 2012).

<sup>111</sup> *Ibid.*, at para. 107, p. 24. It is important to note that the ECtHR has not found that the ECHR provides a right to abortion per se, but it has consistently found flaws under ECHR principles in the way that a country has applied its existing abortion laws. See *A, B & C v. Ireland*, No. 25579/05, paras. 232–233 (Eur. Ct. H.R. 2010).

<sup>112</sup> *R.R. v. Poland*, No. 27617/04, para. 206 (Eur. Ct. H.R. 2011).

<sup>113</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, November 4, 1950, 213 U.N.T.S. 221. Similar language is found in the International Covenant on Civil and Political Rights, art. 18, December 19, 1966, 999 U.N.T.S. 171.



In *Pichon and Sajous v. France*, the ECtHR held that pharmacists with complicity-based objections to a legal requirement that they stock and dispense contraception did not suffer an interference with their Article 9 rights to manifest their religious beliefs.<sup>114</sup> Invoking third-party harm, the court reasoned that so long as the pharmacies are the sole suppliers of the prescribed items, “the applicants cannot give precedence to their religious beliefs and impose them on others.”<sup>115</sup>

In the LGBT context,<sup>116</sup> where the ECtHR found that the religious objectors asserted claims that fell within Article 9, the court nonetheless limited accommodation – of claims involving direct performance and claims involving complicity – in order to shield other citizens from material and dignitary harm. The 2013 case of *Eweida and Others v. United Kingdom* addressed conscience objections to direct performance (a government registrar objecting to conducting the same-sex civil partnerships recently authorized by national legislation), as well as objections to indirect facilitation (a private employee objecting to employer regulations requiring counseling same-sex couples in “psychosexual therapy”).<sup>117</sup> The objectors invoked Article 9’s right to manifest religion, as well as Article 14’s right to nondiscrimination. In contrast to *Pichon*, the *Eweida* Court found that these complaints “fell within the ambit of Article 9.”<sup>118</sup>

Yet the Court found no violation, reasoning that both the local government and private employer were pursuing a legitimate interest in protecting the rights of gays and lesbians.<sup>119</sup> Indeed, the ECtHR’s account was sensitive not only to the government’s practical interest in promoting equal access but also

<sup>114</sup> See *Pichon and Sajous v. France*, App. No. 49853/99, para. 4 (Eur. Ct. H.R. 2001).

<sup>115</sup> Ibid. For analysis of this case and the conflict between conscience claims and women’s access to reproductive health care, see Adriana Lamacková, “Conscientious Objection in Reproductive Health Care: Analysis of *Pichon and Sajous v. France*,” *European Journal of Health Law* 15, no. 1 (2008): 7–43.

<sup>116</sup> It is important to note that the ECtHR has not at this point found a right to marry for same-sex couples. See *Schalk and Kopf v. Austria*, No. 30141/04 (Eur. Ct. H.R. 2010). Nonetheless, the court found Italy in violation of Article 8’s protection of privacy and family life for failing to provide “a legal framework allowing for recognition and protection of [same-sex couples] relationship[s].” *Oliari and Others v. Italy*, Nos. 18766/11, 36030/11, para. 200 (Eur. Ct. H.R. 2015). In addition, the ECtHR has interpreted Article 14’s protection against discrimination to include sexual orientation. See *Schalk and Kopf*, at para. 87.

<sup>117</sup> *Eweida and Others v. United Kingdom*, Nos. 48420/10, 59842/10, 51671/10, 46516/10, paras. 26, 34 (Eur. Ct. H. R. 2013). For a more extensive discussion of the registrar’s claim, see Christopher McCrudden’s contribution to this volume.

<sup>118</sup> Ibid., paras. 37, 108.

<sup>119</sup> In rejecting the registrar’s challenge, the court focused on the importance of the government’s interest in protecting “the rights of others” – specifically same-sex couples. Ibid., para. 106. In rejecting the counselor’s challenge, the court relied on the importance of “the employer’s

to the government’s expressive interest in communicating its commitment to equality and to inculcating the antidiscrimination norm among citizens:

[T]he aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being “an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others.”<sup>120</sup>

Still, having found that the religious objectors’ claims in this context fell within the ambit of Article 9, the ECtHR may be asked in future conflicts to consider whether a refusal to accommodate a religious objection is a proportionate means of achieving the legitimate interest in promoting equality and in shielding individuals from discrimination. Of course, given that *Eweida* involved a situation in which no accommodation had been granted by the national actors, the decision does not speak directly to the *limits on accommodation* the court might impose, especially given the margin of appreciation for national authorities.<sup>121</sup>

Our analysis shows that across Europe different decision makers have recognized third-party harm as a sufficient reason to deny or limit religious accommodation under disparate bodies of law. In Europe, as in the United States, this body of law is contested and still evolving. And debate continues in conflicts over reproductive health care and LGBT equality.

#### 7.4 PLURALISM AND THE QUESTION OF CONSCIENCE

The regulation of conscientious objection varies across jurisdictions in more ways than this chapter can hope to chronicle. But our brief exploration of approaches to accommodation in the United States and Europe allows us to observe an important distinction in the functional role that conscience exemptions may play. Pluralism is often invoked as a basis on which to grant

interest in securing the rights of others” and “providing a service without discrimination.” Ibid., para. 109.

<sup>120</sup> Ibid., para. 105 (quoting *Ladele v. London Borough of Islington*, [2009] EWCA (Civ) 1357, [45], which quoted statement by local government).

<sup>121</sup> See Robert Wintemute, “Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve,” *Modern Law Review* 77, no. 2 (March 2014): 223–53, at 243 (“[B]y granting governments a wide margin of appreciation with regard to conflicts between religion and sexual orientation, the ECtHR chose an ambiguous, potentially neutral position: accommodation is not required, but might be permitted.”)

widespread religious exemptions. But exemptions can both serve and undermine pluralist ends.

On one model, protection of conscience facilitates a pluralist regime in which those with different moral outlooks may coexist.<sup>122</sup> Laws decriminalizing abortion have included conscience provisions that simultaneously seek to protect patient access to services. The United Kingdom and France, which decriminalized abortion in the 1960s and 1970s, institutionalized protection for conscience on this model.<sup>123</sup> This balance is consistent with international human rights principles. The UN Committee on the Elimination of Discrimination against Women, providing guidance on application of the Convention on the Elimination of Discrimination against Women (CEDAW), instructs that “if health service providers refuse to perform [reproductive health] services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.”<sup>124</sup>

Protection of conscience, however, can serve not a pluralist but a monist regime that seeks to constrain access to objected-to services. In the United States, since the 1990s, health care refusal laws have recognized complicity-based conscience objections and have expressly authorized refusals to counsel and refer patients. Laws of this sort are openly championed by those who seek the (re)criminalization of abortion. While the particulars may differ, this approach to conscience has visibly shaped law in some European jurisdictions, particularly in Central and Eastern Europe, where there is widespread hostility to the legalization of abortion.<sup>125</sup> In Poland, for example, conscience

<sup>122</sup> The ECtHR reasoned in this way about Article 9 claims of conscience in *Eweida*:

[A]s enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics, and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. *Eweida*, at para. 79 (citing *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. [ser. A] [1993]).

<sup>123</sup> See supra notes 97–99 and accompanying text.

<sup>124</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 24, para 11, Women and Health (Twentieth session, 1999), U.N. Doc. A/54/38 at 5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/I/Rev.6 at 271 (2003).

<sup>125</sup> In 2005, the EU Network of Independent Experts on Fundamental Rights, set up by the European Commission, issued an opinion criticizing the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience. E.U. Network of Independent Experts on Fundamental Rights, Opinion N° 4-2005: The Right to

legislation quickly followed in the wake of the first laws restricting access to abortion in the 1990s, and the European Court of Human Rights has criticized the government’s failure to enforce limits on conscientious objection in order to protect patient rights.<sup>126</sup>

The conflict between newly protected rights and expansive claims to religious accommodation exists outside the United States and Europe. In Latin America, courts have taken different approaches to conscientious objection in the context of abortion. After Uruguay enacted legislation protecting the right to abortion in 2012,<sup>127</sup> the government expressly regulated conscientious objection in ways that limited complicity-based refusals and protected patient access to services. But when doctors challenged these regulations, the Supreme Administrative Court of Uruguay in 2015 rejected the regulations for impermissibly restricting the right to conscientious objection.<sup>128</sup> The court issued this decision despite evidence that, especially in the interior of Uruguay, there are not enough health professionals available to perform abortions, and that in several cities practically all health professionals have claimed conscience protections.<sup>129</sup>

The Colombian Constitutional Court, in contrast, has limited conscientious objection to protect women’s access to abortion. In 2009, the court sought to constrain conscience as a locus of open efforts to resist implementation of the court’s 2006 judgment declaring a limited constitutional right to abortion.<sup>130</sup> The court recognized the threat posed by conscientious objection in situations in which objected-to “rights developed out of struggles led by sectors of the society that have historically been discriminated against and whose successes have generally not been well-received by many sectors of society.”<sup>131</sup>

Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See 31 (December 14, 2005), [http://ec.europa.eu/justice/fundamental-rights/files/cfr\\_cdfopinion4\\_2005\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopinion4_2005_en.pdf) (objecting to the draft treaty’s “broad recognition of the right to exercise objection of conscience in the field of reproductive healthcare, without providing for . . . compensatory measures,” such as obligations to refer and counsel patients and to effectively ensure their access to abortion).

<sup>126</sup> See supra notes 108–10. <sup>127</sup> Law 18,987, Article 1 (2012) (in Spanish).

<sup>128</sup> *Alonso Justo y otros contra Poder Ejecutivo* (2015) (in Spanish).

<sup>129</sup> *Asegurar y Avanzar Sobre lo Logrado: estado de situación de la salud y los derechos sexuales y reproductivos en uruguay* (monitoreo 2010–2014) (in Spanish).

<sup>130</sup> For the decision recognizing the constitutional right, see Corte Constitucional [C.C.] [Constitutional Court], May 10, 2006, Sentencia C-355/06 (Colom.), available at [www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm](http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm) (in Spanish).

<sup>131</sup> Corte Constitucional [C.C.] [Constitutional Court], May 28, 2009 Sentencia T-388/09, available at [www.corteconstitucional.gov.co/relatoria/2009/T-388-09.htm](http://www.corteconstitucional.gov.co/relatoria/2009/T-388-09.htm) (in Spanish).

As conflicts across the United States, Europe, and Latin America demonstrate, conscience exemptions can, but do not always, serve pluralist ends.<sup>132</sup> As we have seen, the law of conscientious objection can also be deployed to enforce indirectly restrictions on access that, for constitutional or political reasons, cannot be enforced directly.

By contrast, conscience exemptions of a genuinely pluralist kind endeavor to mediate the impact of accommodation on third parties, providing for the welfare of a normatively heterogeneous citizenry. An accommodation regime's pluralism is measured, not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objectors' beliefs. A system of accommodation does not serve pluralist ends when, in the words of the ECtHR in *Pichon*, religious objectors are allowed to "give precedence to their religious beliefs and impose them on others."<sup>133</sup> Exemption regimes that (1) accommodate objections to direct and indirect participation in the lawful actions of others who do not share the objectors' beliefs, and (2) exhibit indifference to the impact of widespread exemptions on others, do not promote pluralism; they sanction and promote the objectors' commitments.<sup>134</sup>

Building a genuinely pluralist exemption regime that limits the accommodation of complicity claims in the interest of protecting other citizens from material and dignitary harms is especially important where conscience claims are entangled in society-wide conflict, such as the conflict over sexual mores we term the "culture wars." In the culture war context, religious claimants seek

exemptions from laws that protect citizens whose conduct departs from traditional roles and customary morality. In these situations, the demand for accommodation is potentially widespread and will reiterate recently disestablished social norms. In seeking exemptions from laws that religious claimants assert make them complicit in sins of their fellow citizens, religious claimants may speak as a minority and yet assert what have long been the norms of the majority against those whose rights the law has only recently and fragilely come to protect. Under these circumstances, limiting accommodation in ways that respect the convictions of the believer *and* one's fellow citizens is the most pluralism-promoting path.

Responding to government actors resisting its 2009 decision, the court issued another judgment in 2012 reiterating the limits on conscientious objection. Decision T-627/2012 (in Spanish). For an account of the struggle over conscience in Colombia, see Alba Ruibal, "Movement and Counter-Movement: A History of Abortion Law Reform and the Backlash in Colombia 2006-2014," *Reproductive Health Matters* 22, no. 44 (2014): 42-51, at 45-46. For observations about such conflicts within the region more generally, see Juan Marco Vaggione, "The Politics of Camouflage: Conscientious Objection as a Strategy of the Catholic Church," *States of Devotion* (April 26, 2014), <http://hemisphericinstitute.org/devotion/2014/04/juan-marco-vaggione-the-politics-of-camouflage-conscientious-objection-as-a-strategy-of-the-catholic-church/>.

<sup>132</sup> Cf. Jean L. Cohen, "Freedom of Religion, Inc.: Whose Sovereignty?," *Netherlands Journal of Legal Philosophy* 44, no. 3, (2015): 169-210, at 205 (rejecting pluralist justifications, featured in much of the "freedom of religion" discourse supporting claims to religious accommodation in the contemporary US context, by showing how such justifications may draw on liberal rights discourse to mask antidemocratic, integralist claims to religious jurisdiction or sovereignty).

<sup>133</sup> *Pichon and Sajous v. France*, App. No. 49853/99, para. 4 (Eur. Ct. H.R. 2001).

<sup>134</sup> In *Eweida*, the ECtJ, in arguing on behalf of Ladele and McFarlane, repeatedly appealed to pluralism as the basis for granting exemptions, claiming that "to ensure . . . pluralism, . . . the State's attitude cannot be justified by the protection of the rights of others[.]" *Observations Relating to Third Party Intervention*, supra note 58, at 15.