

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

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Those who believe contraception, abortion, and same-sex relationships are sinful are increasingly seeking religious exemptions from laws protecting these practices. This essay examines the spread of culture-war conscience claims in the United States and across borders.

Religious liberty claims asserted in these culture-war contexts differ from claims for the accommodation of religious ritual observance in ways that warrant principled legal response. When a person of faith seeks an exemption from legal duties to another in the belief that the citizens the law protects are sinning, granting the religious exemption can inflict material and dignitary harms on those whom the law protects. Employing cross-borders comparisons to illustrate, we argue that religious accommodation of such claims serves pluralist ends only when the accommodation is structured to shield other citizens from harm. Our analysis includes the U.S. Supreme Court’s recent decision in *Burwell v. Hobby Lobby Stores*<sup>1</sup> and its forthcoming decision in *Zubik v. Burwell*<sup>2</sup> and reaches beyond U.S. borders to the European Court of Human Rights, including its decision in *Eweida and Others v. United Kingdom*.<sup>3</sup>

**I. An Introduction to Culture-War Conscience Claims**

These days, conservatives seem to own “conscience.” 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 Supreme Court’s marriage equality decision, recognized.<sup>4</sup> In the most 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

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<sup>1</sup> 134 S. Ct. 2751 (2014).

<sup>2</sup> 136 S.Ct. 444 (U.S. 2015) (granting petition for *certiorari*).

<sup>3</sup> Nos. 48420/10, 59842/10, 51671/10, 46516/10, para. 26, p. 8, para. 34, p. 11 (Eur. Ct. H. R. 2013).

<sup>4</sup> See *Obergefell v. Hodges*, 576 U.S. \_\_\_, slip op. at 19, 27 (2015) (majority); *id.* at 27-28 (Roberts, C.J., dissenting); *id.* at 15 (Thomas, J., dissenting). Opponents greeted the *Obergefell* decision with movement claims for religious exemptions. See Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES, June 26, 2015, <http://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article>.

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>5</sup>

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>6</sup> As the Heritage Foundation’s Ryan Anderson argues: “Some 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>7</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. 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>8</sup> The Court ruled 5–4 in favor of the employers’ conscience objections.<sup>9</sup> Today, the Court is considering challenges by religiously-affiliated nonprofit organizations who object to the government’s framework for accommodating employers religiously opposed to providing employees contraceptive insurance; these organizations reject the government’s accommodation mechanism because they claim that applying for an accommodation would make them complicit in arrangements that provide their employees’ alternative coverage of contraception.<sup>10</sup>

In Europe, some with objections to abortion and same-sex marriage are also asserting conscience claims. In the healthcare 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 that oblige the objector to refer for abortion<sup>11</sup> or to sell contraception.<sup>12</sup> In Europe, as in the U.S., conscience claims, including claims based on complicity, have now begun to appear in the LGBT context. Consider a recent case from the United Kingdom. In *Bull v. Hall*, innkeepers refused to rent a double-bed room to a

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<sup>5</sup> See Appellant Kim Davis’s Emergency Motion for Immediate Consideration and Motion for Injunction Pending Appeal at 7-8, *Miller v. Davis*, Case No. 15-5961 (6th Cir. Sept. 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)”).

<sup>6</sup> See Andrew Walker, *The Equality Act: Bad Policy that Poses Great Harms*, PUBLIC DISCOURSE (July 24, 2015 7:00 a.m.), <http://www.thepublicdiscourse.com/2015/07/15381/>.

<sup>7</sup> Ryan T. Anderson, *Indiana Protects Religious Liberty. Why That’s Good Policy*, DAILY SIGNAL (Mar. 26, 2015), <http://dailysignal.com/2015/03/26/indiana-protects-religious-liberty-why-thats-good-policy>.

<sup>8</sup> 134 S. Ct. 2751 (2014).

<sup>9</sup> *Id.* In *Hobby Lobby*, the religious liberty challenge to the healthcare act arose under a law known as the Religious Freedom Restoration Act (RFRA), which allows people to claim exemptions from federal laws that “substantially burden” their religious practice. 42 U.S.C. § 2000bb-1(a) to (b) (2012). Opponents of same-sex marriage are now making claims under state laws that mirror the federal RFRA. See S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014); S. B. 975, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); S.B. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

<sup>10</sup> See *infra* note 80.

<sup>11</sup> See Council of Europe, Parliamentary Assembly, *Report: Women’s access to lawful medical care: the problem of unregulated use of conscientious objection*, at 11 (July 20, 2010) (discussing the need for national requirements that objecting providers timely refer patients, given that objecting providers often refuse to provide referrals).

<sup>12</sup> See S.T.C., July 7, 2015 (S.T.C., No. 52) (Spain),

[http://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 22/2007, Art. 75; Decreto 104/2001, Art. 2.

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>13</sup>

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Drawing on our earlier work on conscience claims emerging in U.S. culture wars<sup>14</sup> and expanding our analysis beyond U.S. borders, this essay offers a political diagnosis of why the claims are appearing, and then suggests a principled legal response.

We begin by showing how, in the U.S., conscience claims became entangled in conflicts over laws that break with traditional sexual morality—such as those 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 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 healthcare 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 in the belief that citizens the law protects are 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>15</sup> yet we call for special scrutiny of the claims because of their distinctive capacity to harm other citizens.

As scholars who respect conscience and who are committed to reproductive rights and LGBT equality, we support accommodating claims for religious exemption, but only on the condition that their accommodation does not impair attainment of major societal goals or inflict targeted material or dignitary

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<sup>13</sup> Bull v. Hall, (2013) U.K.S.C., pg. 11 ¶ 34.

<sup>14</sup> Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Douglas NeJaime & Reva B. Siegel, *Conscience and the Culture Wars*, AMERICAN PROSPECT (Summer 2015).

<sup>15</sup> See *infra* note 70.

harms on other citizens.<sup>16</sup> Our approach finds support in diverse bodies of law. While we have serious concerns about the U.S. Supreme Court’s decision in *Hobby Lobby*,<sup>17</sup> we nonetheless show how it joins a body of constitutional and statutory religious liberty decisions that understand third-party harm as a reason to limit religious accommodation. The *Hobby Lobby* Court accepted the claim to exemption in part because it believed “[t]he effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero.”<sup>18</sup> Concern about the impact of accommodation on other citizens guides approaches outside the U.S. as well, which we show by surveying national and transnational law in Europe.<sup>19</sup>

Religious accommodation is conventionally thought to promote pluralism. But, the comparative analysis of religious accommodation regimes we offer in this essay illustrates in concrete and practical ways 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 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.

## **II. 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 the U.S. over the last several decades.

### **A. Conscience and Healthcare**

In the wake of *Roe v. Wade*’s recognition of a constitutional right to abortion,<sup>20</sup> newly enacted federal and state laws authorized doctors with religious or moral objections to refuse to perform abortions or sterilizations.<sup>21</sup> Healthcare refusal laws exempt providers from duties of patient care that emerge from

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<sup>16</sup> Our focus is on the accommodation of religious liberty claims, not claims of conscientious objection generally. In this essay, we do not weigh in on whether and in what circumstances exemption regimes should privilege specifically religious interests 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 ABORTION LAW IN TRANSNATIONAL PERSPECTIVE 210 (Rebecca J. Cook et al eds. 2014); see also Rebecca J. Cook & Bernard M. Dickens, *Reproductive Health and the Law*, in INSPIRING A MEDICO-LEGAL REVOLUTION: ESSAYS IN HONOUR OF SHEILA MCLEAN 3, 19 (Pamela R. Ferguson & Graeme T. Laurie eds. 2015).

<sup>17</sup> See NeJaime & Siegel, *supra* note 14, at 2581-83.

<sup>18</sup> 134 S. Ct. at 2760.

<sup>19</sup> See *infra* Part III.B.

<sup>20</sup> 410 U.S. 113 (1973).

<sup>21</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. Between the decision in *Roe* and July 1973, fifteen states passed conscience clauses regarding abortion. By the close of 1974, twenty-eight states had laws allowing physicians to refuse to participate in abortions, and twenty-seven states had laws that applied to hospitals. See *A Review of State Abortion Laws Enacted Since January 1973*, 3 FAM.

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>22</sup>

The focus of a law like the federal Church Amendment, enacted in 1973, was to provide conscience protections for the direct performance of objected-to services. Two decades later, after abortion opponents failed to overturn *Roe* in 1992,<sup>23</sup> they set out to limit the decision’s reach by enacting incremental restrictions on abortion access. As part of the expanding web of laws restricting access, they sought to enact a new and more expansive set of healthcare refusal laws.

The new healthcare 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>24</sup> Mississippi, for example, allows healthcare 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 healthcare institutions.”<sup>25</sup> The Mississippi law also defines “health care provider” as expansively as possible.<sup>26</sup> Concepts of complicity are used to authorize many more persons in healthcare services to object to the provision of care.

States like Mississippi *could* accommodate the conscience objections of healthcare providers while ensuring alternative care for patients; but, crucially, healthcare refusal laws at the federal and state level are rarely written to require institutions to provide alternative care. Many laws authorizing healthcare

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PLAN./POPULATION REP. 88, 88-94 (1974); Sara Dubow, “A Constitutional Right Rendered Utterly Meaningless”: Religious Exemptions and Reproductive Politics, 1973-2014, 27 J. POL’Y HIST. 1, 25 n. 3 (2015). Some of these early laws went beyond the Church Amendment by covering contraception in addition to abortion and/or sterilization, see, e.g., Act of Mar. 7, 1973, No. 235, §4, 1973 Ark. Acts 778, 780 (codified as amended at ARK. CODE ANN. § 20-16-304 (West 2014)), by protecting only individuals who objected to the procedures, rather than also including those whose conscience supported the procedures, see, e.g., Act of Mar. 21, 1974, ch. 177, § 4, 1974 Minn. Laws 265, 267 (codified as amended at MINN. STAT. ANN. § 145.414 (West 2014)), and by including medical personnel beyond doctors and nurses, see, e.g., Act of Oct. 3, 1973, ch. 624, § 1903, 1973 Me. Laws 1259, 1260 (codified as amended at ME. REV. STAT. ANN. tit. 22, § 1903(4) (2014)). On efforts to pass healthcare refusal laws in the years before *Roe*, see Kathleen J. Frydl, *Taking Liberties with Religious Liberty*, WASH. MONTHLY, Jan./Feb. 2016, at 21.

<sup>22</sup> These duties may flow from professional standards enforced by licensing boards, tort law, common law and statutory obligations, and constitutional principles. See NeJaime & Siegel, *supra* note 14, at 2534-35 & notes 72-76.

<sup>23</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>24</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 & Siegel, *supra* note 14, at 2538-39.

Notably, healthcare refusal laws also expanded in terms of subject matter, from abortion and sterilization to contraception. See, e.g., Act of Mar. 7, 1973, No. 235, §4, 1973 Ark. Acts 778, 780 (codified as amended at ARK. CODE ANN. § 20-16-304 (West 2014)) (protecting individuals who objected to the provision of contraception in addition to abortion and/or sterilization). In the 1990s, states began to pass contraceptive equity laws that required healthcare insurance to include coverage of ordinary forms of contraception; these laws often included exemptions for religious employers. See, e.g., Women’s Contraception Equity Act, ch. 538, 1999 Cal. Stat. 3718, 3719 (codified as amended at CAL. INS. CODE § 10123.196(a)(1) (West 2015)); An Act Requiring Health Insurers To Cover Prescription Birth Control, Pub. Act No. 99-79, §§ 1(b)-(c), 1999 Conn. Pub. Acts 198, 198-99 (codified as amended at CONN. GEN. STAT. ANN. § 38a-503e(a) (West 2015)).

<sup>25</sup> MISS. CODE ANN. § 41-107-3(a) (West 2014).

<sup>26</sup> MISS. CODE ANN. § 41-107-3(b) (West 2014).

refusals impose no duty on the refusing provider to ensure that patients turned away receive care.<sup>27</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>28</sup> Importantly, these refusal laws fail to acknowledge obligations of care that flow from other sources of law. The new, expansive, complicity-based healthcare refusal laws alter the provision of healthcare services. In the case we are examining, healthcare 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 anti-abortion group Americans United for Life.<sup>29</sup>

While an early law like the Church Amendment was adopted with bipartisan support and can facilitate a pluralist regime in which healthcare 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.

## **B. Preservation Through Transformation**

What forces have contributed to these changes in the form of conscience legislation in the U.S.?

We commonly understand religious exemptions as protecting persons from 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 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

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<sup>27</sup> See, e.g., MICH. COMP. LAWS ANN. § 333.20181 (West 2014); MISS. CODE ANN. §§ 41-107-3, 41-107-5 (2004).

<sup>28</sup> See MISS. CODE ANN. § 41-107-3(a) (West 2014); ARK. CODE ANN. § 20-16-304 (2014); COLO. REV. STAT. ANN. § 25-6-102 (2014); FLA. STAT. ANN. § 381.0051 (West 2014); 745 ILL. COMP. STAT. § 70/4 (2014). See also Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, GUTTMACHER REP. ON PUB. POL’Y, Aug. 2005, <http://www.guttmacher.org/pubs/tgr/08/3/gro80307.pdf> (“[M]ost do not require health care providers to notify their employers if they intend to opt-out of certain services, and only three require any notice to patients; and about a dozen go so far as to allow providers to refuse to provide information.”). 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>29</sup> See *Mississippi 2014 Report Card*, AMS. UNITED FOR LIFE, <http://www.aul.org/states/mississippi>. For the model act on which the Mississippi law and other state legislation is based, see *Healthcare Freedom of Conscience Act: Model Legislation and Policy Guide for the 2014 Legislative Year*, AMS. UNITED FOR LIFE (2013), [http://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).

help them attain similar ends—a dynamic we term preservation through transformation.<sup>30</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>31</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>32</sup>

Opponents of same-sex marriage have looked to healthcare refusals as an inspiration for restraining another legal development they could not entirely block. The religious liberty argument for healthcare refusals offered a model for restricting equality rights for LGBT persons.<sup>33</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 need not and should not require third parties to recognize a same-sex relationship as a marriage.”<sup>34</sup> The mobilized faithful—and those who court their votes—have begun to argue for limiting equality protections for gays and lesbians in the language of antidiscrimination.<sup>35</sup> They appeal to antidiscrimination values to oppose

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<sup>30</sup> Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

<sup>31</sup> NeJaime & Siegel, *supra* note 14, at 2553.

<sup>32</sup> *Id.* at 2553, 2589.

<sup>33</sup> See Matthew Kacsmaryk, *The Inequality Act: Weaponizing Same-Sex Marriage*, PUBLIC DISCOURSE (Sept. 4, 2015 7:00 a.m.), <http://www.publicdiscourse.com/2015/09/15612/> (in seeking to limit the implications of same-sex marriage and LGBT antidiscrimination law, looking to “twenty-first century” healthcare 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, Feb. 2013, at 77, [http://www.fed-soc.org/library/doclib/20130628\\_ConscienceExemptions.pdf](http://www.fed-soc.org/library/doclib/20130628_ConscienceExemptions.pdf) (“At least forty-seven states and the District of Columbia also have enacted conscience-protection laws relating to abortion. Likewise, when it appeared that some state [sic] might legalize same-sex marriage, and especially since 2003 when the [sic] Massachusetts became the first state to announce that it would legalize same-sex marriage, there has been proposal, discussion, and some limited adoption of ‘conscience exemptions’ that protect some individuals and entities with religious or moral objection to same-sex marriage from any legal duty to or liability for declining to assist in creating same-sex marriages.” (internal citations omitted)).

<sup>34</sup> Ryan T. Anderson, *Marriage: Where Do We Go From Here?*, NATIONAL REVIEW (May 22, 2015), <http://www.nationalreview.com/article/378538/marriage-where-do-we-go-here-ryan-t-anderson>.

<sup>35</sup> In the U.S., opponents of LGBT rights have advocated state-level Religious Freedom Restoration Acts (RFRA) as a way to secure exemptions from antidiscrimination laws that include sexual orientation. See, e.g., ADF, *Will You Take a Stand for Religious Freedom?*, <http://www.adflegal.org/campaigns/stand-for-rfra> (last visited Aug. 3, 2015) (outlining campaign to have every state pass a RFRA to “prevent governmental interference in the free exercise of religion” and citing enforcement of sexual orientation nondiscrimination provisions against religious objectors to illustrate the need for such laws). Similarly, opponents of LGBT rights are appealing to religious freedom in opposing the recently introduced federal Equality Act, which provides protections based on sexual orientation and gender identity. See, e.g., Ryan T. Anderson, *How So-Called ‘Equality Act’ Threatens Religious Freedom*, DAILY SIGNAL (July 23, 2015), <http://dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/>.

the spread of antidiscrimination laws. Positioning himself for a run for the White House, Jeb Bush warned that if the Supreme Court recognizes marriage equality, “that automatically then shifts the focus to people of conscience,” adding, “people that act on their conscience shouldn’t be discriminated against, for sure.”<sup>36</sup>

The turn to conscience appears in the dissenting opinions in *Obergefell*.<sup>37</sup> And opponents have appealed to religious liberty in protesting the decision. As in the case of healthcare, conscience objections have generally taken two forms—the refusal of some state officials to officiate same-sex marriages,<sup>38</sup> and complicity-based objections to antidiscrimination laws governing the sale of goods and services to same-sex couples.<sup>39</sup> Here, as in the case of abortion, the enactment of expansive conscience legislation would simultaneously protect religious liberty and limit and stigmatize same-sex marriage.<sup>40</sup>

### C. 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>41</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>42</sup> Alongside planks opposing abortion and same-sex marriage, the statement offers support for claims of

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<sup>36</sup> Chris Johnson, *Jeb Bush endorses religious discrimination legislation*, WASHINGTON BLADE (Mar. 20, 2015), <http://www.washingtonblade.com/2015/03/20/jeb-bush-endorses-religious-discrimination-legislation>.

<sup>37</sup> In the dissenting opinions in *Obergefell v. Hodges*, the Justices drew attention to emerging religious liberty objections. In dissent, Chief Justice Roberts asserted: “Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex couples, or a religious adoption agency declines to place children with same-sex couples.” 576 U.S. \_\_ (2015) (slip op. at 28) (Roberts, C.J., dissenting). And Justice Thomas predicted conflicts “as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.” 576 U.S. \_\_ (2015) (slip op. at 15) (Thomas, J., dissenting).

<sup>38</sup> See, e.g., Cheryl Wetzstein, *Gay Marriage Foes Dig In for Extended Culture War after Landmark Supreme Court Ruling*, WASH. TIMES (Dec. 21, 2015), <http://m.washingtontimes.com/news/2015/dec/21/gay-marriage-foes-reject-supreme-court-ruling-dig-/?page=all> (reporting on judges in Oregon and Alabama); *Ohio Judge Wants to Know if He Can Refuse Gay Weddings*, N.Y. TIMES, July 8, 2015, <http://www.nytimes.com/aponline/2015/07/08/us/ap-us-gay-marriage-ohio.html>.

<sup>39</sup> See, e.g., Richard Wolf, *Legal Battles Follow Gay-Marriage Ruling: Bakers*, USA TODAY, July 23, 2015, at A8.

<sup>40</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* (manuscript at 6) (“The exemption claim is a rear-guard or defensive action. The claimants are not ‘directly’ challenging the legal recognition of same sex marriages; nevertheless, they are ‘personally’ opposing the law’s recognition of such relationships. The public debate about same-sex marriage did not go as they wanted and so now they are seeking to opt out of the legal ban on sexual orientation discrimination or to personally reject the legal recognition of same-sex relationships.”) (on file with authors).

<sup>41</sup> *Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 2009), [http://manhattandeclaration.org/man\\_dec\\_resources/Manhattan\\_Declaration\\_full\\_text.pdf](http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf).

<sup>42</sup> *Id.* at 2.



conscientious refusal to be complicit in either one.<sup>43</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>44</sup>

As Jeb Bush’s comments suggest, the cross-denominational coalition asserting conscience claims in healthcare and marriage has the backing of the Republican Party, which invokes conscience to decry a so-called “war on religion.”<sup>45</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>46</sup>

While we are primarily reporting on developments in the U.S., there are analogs in and intersections with Europe. There are indications that some European actors are mobilizing around conscience.<sup>47</sup> A progressive advocate with the European Parliamentary Forum on Population and Development<sup>48</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>49</sup>

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<sup>43</sup> For another example of such cross-denominational organizing, see the work of the Family Research Council (FRC). See NeJaime & Siegel, *supra* note 14, at 2548-49.

<sup>44</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, *supra* note 41, at 3, 7. Similarly, FRC “believes that homosexual conduct is harmful” and “supports state and federal constitutional amendments” banning same-sex marriage. *Homosexuality*, FAM. RES. COUNCIL, <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.” *Abortion*, FAM. RES. COUNCIL, <http://www.frc.org/abortion>. In fact, FRC sponsors “Watchmen on the Wall,” a conference that brings hundreds of Christian pastors to Washington, D.C. to advocate for laws reflecting their religious principles. See *Watchmen on the Wall 2014: Schedule of Events*, FAM. RES. COUNCIL (May 9, 2014), <http://www.watchmenpastors.org/wp-content/uploads/2014/05/Abbreviated-schedule.pdf>; Elizabeth Dias, *Watchmen on the Wall: Pastors Prepare to Take Back America*, TIME, May 30, 2014, <http://time.com/138134/watchmen-on-the-wall-pastors-prepare-to-take-back-america>.

<sup>45</sup> See *Republican Platform 2012: We Believe in America*, MANHATTAN REPUBLICAN NAT’L CONVENTION 10, 12, 14 (2012), [http://www.presidency.ucsb.edu/papers\\_pdf/101961.pdf](http://www.presidency.ucsb.edu/papers_pdf/101961.pdf).

<sup>46</sup> *Id.* at 12.

<sup>47</sup> For work on conservative transnational mobilization more generally, see CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS* (2012).

<sup>48</sup> This is “a network of members of parliaments from across Europe who are committed to protecting . . . sexual and reproductive health.” EPF, About EPF, <http://www.epfweb.org/node/114> (last visited July 31, 2015).

<sup>49</sup> Neil Datta, *Keeping It All in the Family*, 34.2 CONSCIENCE 22, 23 (2013). For additional documentation of this movement in Europe, see Amir Hodzic & Natasa Bijelic, *Neo-Conservative Threats to Sexual and Reproductive Health & Rights in the European Union*, at 1, 11-13 (Center for Education, Counseling and Research 2014) (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., CitizenGO, *The EU seeks to enshrine devastating gender ideology in upcoming vote* (June 4, 2015), <http://www.citizenngo.org/en/24661-eu-seeks-enshrine-devastating-gender-ideology-upcoming-vote> (last visited Oct. 4, 2015); European Dignity Watch, *Estrela revisited: Noichl report calls for aggressive sex ed*

As in the U.S., some European groups seek to expand conscience protections. The Brussels-based European Dignity Watch,<sup>50</sup> a watchdog for European institutions, has argued for extending conscience protection in healthcare to a wider universe of objectors.<sup>51</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>52</sup> Advocates act not only in European institutions but also in national governments.<sup>53</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>54</sup> The European Center for Law and Justice is the European offshoot of the

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*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> (last visited Oct. 4, 2015). For work on the relationship between “gender ideology” and Catholic mobilization, see Mary Anne Case, *After Gender the Destruction of Man? The Vatican’s Nightmare Vision of the “Gender Agenda” for Law*, 31 PACE L. REV. 802 (2011).

<sup>50</sup> European Dignity Watch, <http://europeandignitywatch.org/about-us/about-us.html> (last visited June 16, 2015).

<sup>51</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.”

We especially celebrate the turn-over of the initial radical intention of the report to limit freedom of conscience for medical doctors and staff and its transformation into a strong “Yes” for the rule of law as fundament of free, democratic societies thanks to the many good amendments voted.

European Dignity Watch, *Council of Europe for Freedom of Conscience!* (Oct. 13, 2010), <http://europeandignitywatch.org/pl/codzienny/detail/article/council-of-europe-for-freedom-of-conscience.html>. Indeed, European Dignity Watch warns that the “curtailment of freedom of conscience [is being used] to eradicate any obstacle to an abortion culture.” European Dignity Watch, *Estrela Report Rejected: Massive Popular Protest Wins over Well Funded Lobby Groups*, <http://www.europeandignitywatch.org/day-to-day/detail/article/estrela-report-rejected-massive-popular-protest-wins-over-well-funded-lobby-groups-at-the-european.html> (last visited Jun. 15, 2015).

<sup>52</sup> European Dignity Watch, *A turning tide: What is really going on at the European Parliament?* (Feb. 5, 2014) (explaining opposition to LGBT-focused Lunacek report), <http://www.europeandignitywatch.org/day-to-day/detail/article/a-turning-tide-what-is-really-going-on-at-the-european-parliament.html>.

<sup>53</sup> See Datta, *supra* note 49. In some European countries, this “anti-gender” mobilization receives support from some conservative political parties. For reporting on these developments in France, Germany, Hungary, Poland, and Slovakia, see GENDER AS SYMBOLIC GLUE: THE POSITION AND ROLE OF CONSERVATIVE AND FAR RIGHT PARTIES IN THE ANTI-GENDER MOBILIZATIONS IN EUROPE (Eszter Kovats & Maari Poim eds., 2015).

<sup>54</sup> See Peter Montgomery, *New Report On Religious Right In Europe - And Its U.S. Backers*, RIGHT WING WATCH, Jan. 7, 2015, <http://www.rightwingwatch.org/content/new-report-religious-right-europe-and-its-us-backers> (last visited June 28, 2015). See also Hodzic & Bijelic, *supra* note 49, at 16-17 (documenting similar influence of U.S. groups and funders on European organizations and mobilization). On disputes over the funding connections among U.S. and European groups, see Philip Ebels, *Anti-Gay Lobby in Brussels Linked to U.S. Neocons*, EU OBSERVER, June 28, 2012, <https://euobserver.com/lgbti/116769>.

American organizations are also active in other regions. See Cole Parke, *Natural Deception: Conned by the World Congress of Families*, POLITICAL RESEARCH ASSOCS., Jan. 21, 2015, [http://www.politicalresearch.org/2015/01/21/natural-deception-conned-by-the-world-congress-of-families/#sthash.JFp9RHwM&st\\_refDomain=&st\\_refQuery=](http://www.politicalresearch.org/2015/01/21/natural-deception-conned-by-the-world-congress-of-families/#sthash.JFp9RHwM&st_refDomain=&st_refQuery=) (last visited Aug. 8, 2015) (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>55</sup> The Alliance Defending Freedom (ADF, formerly Alliance Defend Fund), and the Becket Fund for Religious Liberty are both now active in Europe. And these U.S.-based organizations are backing up their institutional affiliations with financial support.<sup>56</sup>

European actors also have reached into the U.S.<sup>57</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>58</sup> have joined with the leadership of the National Organization for Marriage (NOM), the U.S.’s leading anti-same-sex-marriage organization. In a 2014 meeting in Washington, D.C., activists from approximately 70 countries began working to establish an International Organization for Marriage.<sup>59</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 “psycho-sexual” therapy to same-sex couples.<sup>60</sup> The European Centre for Law and Justice intervened in support of the claimants.<sup>61</sup>

### **III. Responding to Culture-War Conscience Claims**

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

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<sup>55</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.

<sup>56</sup> In 2012, the American Center for Law and Justice sent \$1.1 million to its European branch in 2012, and ADF spent more than \$750,000 on European programs. Montgomery, *supra* note 54.

<sup>57</sup> European activists are coming to the U.S. 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, D.C. See J. Lester Feder, *The Rise of Europe’s Religious Right*, BUZZFEED, Jul. 28, 2014, <http://www.buzzfeed.com/lesterfeder/the-rise-of-europes-religious-right#3qfbd1w> (last visited Jun 15, 2015).

<sup>58</sup> For the 2013 Estrela report, see European Parliament, *Report on Sexual and Reproductive Health and Rights* (Dec. 3, 2013), <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 CitizenGO, *Stop Tarabella relaunching Estrela! No EU support to abortion* (Jan. 14, 2015), <http://www.citizenngo.org/en/15605-protection-subsidiarity-and-no-eu-support-abortion> (last visited Oct. 3, 2015).

<sup>59</sup> *Id.*

<sup>60</sup> Nos. 48420/10, 59842/10, 51671/10, 46516/10, para. 26, p. 8, para. 34, p. 11 (Eur. Ct. H. R. 2013).

<sup>61</sup> See Observations Relating to Third Party Intervention, Dr. Gregor Puppink, Director of the ECLJ, *Ladele and McFarlane v. United Kingdom* (ECHR filed Sept. 15, 2011). The U.S.-based Alliance Defending Freedom (ADF, then the Alliance Defense Fund) 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: Dr. Jan Carnogursky and The Alliance Defense Fund, *Eweida and Chapin v. United Kingdom* (E. Ct. H. R. filed Sept. 14, 2011). For an analysis of the ways in which U.S.-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*, INT’L J. CON. LAW (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2589542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589542).

While some would deny persons of faith religious exemptions from laws of general application,<sup>62</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 this is not feasible, 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.

#### **A. 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 U.S. Supreme Court in 2015, a prisoner sought a religious exemption from a rule prohibiting prisoners from wearing beards.<sup>63</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>64</sup> The most significant constitutional free exercise cases in the U.S. 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>65</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>66</sup>

Unlike claims for religious exemption asserted by practitioners of minority faiths overlooked by lawmakers, claims for religious exemption from laws concerning healthcare 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

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<sup>62</sup> See, e.g., BRIAN LEITER, WHY TOLERATE RELIGION (2013); *Employment Div. v. Smith*, 494 U.S. 872 (1990). Some would limit constitutionally required religious exemptions, but would support more expansive statutory exemptions. See, e.g., Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

<sup>63</sup> 135 S. Ct. 853 (2015).

<sup>64</sup> *Id.* at 867 (Ginsburg, J., concurring).

<sup>65</sup> *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990); *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

<sup>66</sup> *Smith*, 494 U.S. at 911-12, 916 (Blackmun, J., dissenting). See also *Sherbert*, 374 U.S. at 407 (noting accommodation imposed at most generalized costs on the state unemployment system).

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.

## **B. 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 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 healthcare 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 healthcare 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>67</sup> In *Bull v. Hall*, innkeepers in the U.K. objected to complying with antidiscrimination law by boarding a same-sex couple and thereby “facilitat[ing] what they regard as sin.”<sup>68</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>69</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>70</sup> Evangelical Protestants also assert

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<sup>67</sup> Brief for Respondents at 9, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356)

<sup>68</sup> *Bull v. Hall*, [2013] U.K.S.C. p. 11 ¶ 34.

<sup>69</sup> See, e.g., *Odgaard v. Iowa Civil Rights Comm’n*, No. CV046451 (Iowa Dist. Ct. Apr. 3, 2014); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. Ct. App. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *Complaint, Arlene’s Flowers, Inc. v. Ferguson*, No. 13-2-01898-2 (Wash. Super. Ct. Aug. 1, 2013). For an example of this expansion after the U.S. Supreme Court’s decision in *Obergefell v. Hodges*, recognizing same-sex couples’ constitutional right to marry, see Kan. Exec. Order 15-05, which not only authorizes religious refusals “to perform” or “solemnize any marriage” but also authorizes refusals by “a religious organization, including those providing social services, . . . to provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration or recognition of any marriage.”

<sup>70</sup> Catholic doctrine on “cooperation” and “scandal” admonishes Catholics to avoid “complicity in the sins of others.” 2 BERNARD HÄRING, *THE LAW OF CHRIST* 494-517 (Edwin G. Kaiser trans., Newman Press 1963) (1954). For more contemporary texts, see ANTHONY FISHER, *CATHOLIC BIOETHICS FOR A NEW MILLENNIUM* 69-98 (2012); 3 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS* 871-97 (1997). 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;

religious claims based on complicity.<sup>71</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>72</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 healthcare provider with conscience objections to performing particular healthcare services (e.g., abortion, sterilization, 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 U.S., some healthcare refusal laws expressly sanction these complicity-based objections, by authorizing refusals to refer or counsel patients who are denied services.<sup>73</sup>

Unconstrained, complicity claims undermine the very logic of a system of religious accommodation. In the U.S., 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 “accommodation” is no more compatible with their religious beliefs than being forced to comply with that mandate directly.<sup>74</sup>

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- by protecting evil-doers.

CATECHISM OF THE CATHOLIC CHURCH pt. 3, ¶ 1868.

<sup>71</sup> See NeJaime & Siegel, *supra* note 14, at 2523 & n.24 & 25.

<sup>72</sup> See *id.* at 2566.

<sup>73</sup> See *supra* notes 25, 28.

<sup>74</sup> Petition for a Writ of Certiorari at 10, *Little Sisters of the Poor Home for the Aged v. Burwell* (No. \_\_\_) (July 2015). While most federal Courts of Appeals had rejected this claim under RFRA, the Eighth Circuit Court of Appeals had accepted it. Compare *Little Sisters of the Poor Home for the Aged v. Burwell*, \_\_\_ F.3d \_\_\_, 2015 WL 4232096 (10th Cir. July 14, 2015); *East Texas Baptist Univ. v. Burwell*, \_\_\_ F.3d \_\_\_, 2015 WL 3852811 (5th Cir. June 22, 2015); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), with *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, \_\_\_ F.3d \_\_\_, 2015 WL 5449491 (8th Cir. Sept. 17, 2015).

At the time of this writing, the Court is considering the religiously-affiliated nonprofits’ challenges in *Zubik v. Burwell*.<sup>75</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>76</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>77</sup> But even when not explicitly communicated, the status-based judgment entailed in the refusal is clear to the recipient.<sup>78</sup> The conscience objection demeans those who act lawfully but in ways that depart from traditional morality.<sup>79</sup> The objection’s power to denigrate is amplified because it reiterates longstanding 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>80</sup> But rather than ask government to distinguish among faith claims in this way,<sup>81</sup> we invite government to focus on the question of whether accommodating the claims will inflict harm on citizens who do not share the claimants’ convictions. If the government accommodates the claims, it must structure the accommodation in ways that shield other citizens from the accommodation’s material and dignitary impact.<sup>82</sup>

#### **IV. 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.

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<sup>75</sup> 136 S.Ct. 444 (U.S. 2015) (granting petition for *certiorari*).

<sup>76</sup> See NeJaime & Siegel, *supra* note 14, at 2576-78 n. 246-258 & accompanying text.

<sup>77</sup> Rachel C., Review for Sweet Cakes, YELP (Jan. 17, 2013), [http://www.yelp.com/user\\_details?userid=a4fuAn84fRddJTt7jJEo7g](http://www.yelp.com/user_details?userid=a4fuAn84fRddJTt7jJEo7g) [<http://perma.cc/7VBA-CY7P>].

<sup>78</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>79</sup> See NeJaime & Siegel, *supra* note 14, at 2574-79.

<sup>80</sup> See, e.g., *Little Sisters of the Poor Home for the Aged v. Burwell*, --- F.3d ----, 2015 WL 4232096, at \*29-31 (10th Cir. July 14, 2015); *East Texas Baptist Univ. v. Burwell*, --- F.3d ----, 2015 WL 3852811, at \*9 (5th Cir. June 22, 2015). Cf. Moon, *supra* note 40, at 2 (explaining how Canadian courts have rejected exemption claims in the same-sex marriage context by emphasizing that the objector “is not required to engage directly in a practice that is contrary to his/her beliefs”).

<sup>81</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*, 5 INT’L J. PUB. THEOLOGY 333, 337-39 (2011); Christopher McCrudden, *Religion, Human Rights, Equality and the Public Sphere*, 13 ECCLESIASTICAL L.J. 26, 30-32 (2011).

<sup>82</sup> NeJaime & Siegel, *supra* note 14, at 2521, 2579.

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, healthcare 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.

### **A. U.S. Law on Third-Party Harm**

U.S. 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.

Of course, free exercise claims have been dramatically cut back since the Supreme Court’s decision in *Employment Division v. Smith*, which held that a free exercise challenge to a generally applicable law merits only minimal constitutional scrutiny, unless the law targets religion.<sup>83</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>84</sup>

Such concern even arises in the Court’s recent and controversial decision in *Hobby Lobby*. That decision recognized exemption claims in some far-reaching ways, granting exemptions to for-profit corporations and expansively interpreting RFRA. But the majority opinion also 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>85</sup> These same concerns structured the majority’s decision. Because the government could provide Hobby Lobby’s employees contraception without involving their employer, the majority granted

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<sup>83</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>84</sup> *Id.* at 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 “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>85</sup> *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Kennedy, J., concurring). For analysis, see NeJaime & Siegel, *supra* note 14, at 2530-31.



the exemption on the assumption that “[t]he effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero.”<sup>86</sup>

The *Hobby Lobby* Court was incorrect in its assumption about the effect of accommodation,<sup>87</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>88</sup> When government enacts a law, it often seeks to vindicate both individual and societal interests, and these interests may have both material and expressive dimensions.<sup>89</sup> If the government’s interests are compelling and if 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>90</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 framework provides one basis on which the Court could reject the claims in *Zubik*, the case in which religiously-affiliated nonprofit organizations challenge the government’s method of accommodating employers who have religious objections to including contraception in the health insurance benefits they provide their employees (as U.S. law requires).<sup>91</sup> The organizations object to the accommodation the government has offered because they assert it makes them complicit in their employees receiving contraceptive insurance coverage from alternative sources<sup>92</sup>: Once the organizations notify the government of their objections, their employees receive coverage through entities with which the

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<sup>86</sup> 134 S. Ct. at 2760.

<sup>87</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*, 38 HARV. J.L. & GENDER AS J.L. & PUB. POL’Y 153, 159-62 (2015); and Andrew Koppelman & Frederick Mark Gedicks, *Is Hobby Lobby Worse for Religious Liberty Than Smith?*, 9 CATHOLIC ST. THOMAS J.L. & PUB. POL’Y (forthcoming 2016) (on file with authors).

<sup>88</sup> *See id.* at 2580-84

<sup>89</sup> *See Roberts v. Jaycees*, 468 U.S. 609, 626 (1984) (explaining “the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that historically plagued certain disadvantaged groups, including women”).

<sup>90</sup> *See NeJaime & Siegel, supra* note 14, at 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>91</sup> We note that 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>92</sup> *See supra* text accompanying note 74.

religiously-affiliated nonprofits may be in contractual relations.<sup>93</sup> The objecting organizations reject the accommodation and seek a complete exemption from the health insurance law. They contend that their employees should not receive coverage of contraception through their health insurance benefits as other employees do, but instead should purchase their own insurance in the private market.<sup>94</sup> This complicity-based challenge to the accommodation is flatly at odds with the concern about third-party harm that structures the *Hobby Lobby* decision. As we have seen, in *Hobby Lobby*, Justice Kennedy explained that the accommodation of religious liberty may not “unduly restrict other persons, such as employees, in protecting their own interests.”<sup>95</sup> And the majority emphasized that the government had ways of accommodating the religious objections with “precisely zero” effect on the objecting employers’ employees.<sup>96</sup>

*Zubik* demonstrates the special concerns about third-party harm that complicity-based conscience claims raise. As *Zubik* illustrates, 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>97</sup> The complicity objections in this case would prevent the government from regulating health insurance benefits in matters about which persons of religious faith disagree. If the claims in *Zubik* were to prevail, religious liberty objections would routinely trump the government’s interest in protecting other citizens. When viewed from this perspective, *Zubik* presents a critical case for limiting the accommodation of complicity-based conscience claims in order to prevent third-party harm.

*Hobby Lobby* demonstrates 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>98</sup> But U.S. healthcare refusal laws, from which so many of today’s complicity claims descend, are not in conformity with this principle. This discrepancy in U.S. law is especially important to recognize as the claims in *Zubik* threaten to dramatically expand the

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<sup>93</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.”).

<sup>94</sup> See Brief for Petitioners at 75-76, *Zubik v. Burwell*, 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>95</sup> 134 S. Ct. at 2787 (Kennedy, J., concurring).

<sup>96</sup> *Id.* at 2760.

<sup>97</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 *United States v. Lee*, 455 U.S. 252, 260 (1982) (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 *id.* (“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>98</sup> See *supra* note 84.

accommodation of complicity-based conscience claims under RFRA and as opponents of same-sex marriage hold up healthcare refusals legislation as a model for shaping law in the LGBT context.<sup>99</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.

## **B. Accommodations Law and Third-Party Harm: Comparative Observations**

In Europe, as in the U.S., religious objectors seek exemptions from generally applicable laws that impose duties with respect to third parties—for instance, to provide healthcare 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 healthcare. 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 posture.<sup>100</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 healthcare as a matter of national law, yet on terms that differ from many U.S. healthcare refusal laws. In particular, the statutes authorize refusals in frameworks that restrict complicity-based claims. For instance, U.K. 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>101</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

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<sup>99</sup> For an analysis of the relationship between healthcare refusal laws and exemption proposals in the same-sex marriage context, see Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703 (2014).

<sup>100</sup> *Compare* Council of Europe, Parliamentary Assembly, Report: Women’s access to lawful medical care: the problem of unregulated use of conscientious objection (July 20, 2010), *with* Council of Europe, Parliamentary Assembly, Resolution 1763, The right to conscientious objection in lawful medical care (2010). This resolution is non-binding for the members of the Parliamentary Assembly of the Council of Europe. On the developments surrounding this resolution, see Christina Zampas & Ximena Andion-Ibanez, *Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice*, 19 EUR. J. HEALTH L. 231, 243-44 (2012).

<sup>101</sup> National Health Service (General Medical Services Contracts) Regulations 2004 (S.I. 2004/291), Schedule 2(3)(2)(3) and clause 9.7.1(c) of the NHS England Standard General Medical Services Contract.

practiced.<sup>102</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>103</sup>

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 U.K. 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 healthcare providers *directly* performing or assisting in abortions,<sup>104</sup> and it required objecting healthcare professionals to refer patients to willing providers.<sup>105</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>106</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>107</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 U.K., 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 third parties. For example, in 2013, in

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<sup>102</sup> Loi n° 75-17 du 17 janvier 1975 relative à l’interruption volontaire de la grossesse, Art. L 162-3 (1975). Codified at Code de la santé publique, Art L2212-3.

<sup>103</sup> *Id.* at L2212-8(4). While we cannot draw conclusions about the laws of each European country and we recognize that some countries have failed to adequately protect patients seeking lawful services, we note that many countries have limited conscience objections in healthcare by (1) allowing only those who are directly involved in the objected-to procedure to claim conscience objections, *see, e.g.*, Norway Abortion Act [Abortloven], June 13, 1975, nr. 50, ch. II, § 20; Italian Rules for the Interruption of Pregnancy [Norme per la Tutela Sociale Sella Maternita e sull’Interruzione Volontaria Della Gravidanza], May 22, 1978, art. 9; (2) requiring practices such as counseling and referral that reduce the adverse impact of conscience objections on patients, *see, e.g.*, Norway Abortion Act [Abortloven], June 13, 1975, nr. 50, ch. II, §§ 2-3; Portugal Deontological Code [Codigo Deontologico da Orden dos Medicos], art. 41; Portaria No. 189/98, Mar. 21, 1998, Voluntary Termination of Pregnancy and Obstetric Services [Interrupcao voluntaria da gravidez/Servicos obstetricia]; Slovenian Code of Medical Deontology Practice, art. 42 (1992); and (3) restricting or denying conscience protections for institutions, *see, e.g.*, Danish Health Act, Law No. 546 [Lov om ansvaret for og styringen af den active beskaeftigelsesindats, Lovtidende], Part A, June 25, 2005, No. 92, pp. 3914-3954; Hungary, Act No. 79 of 1992: Protection of the Life of the Fetus [torveny a magzati elet vedelmerol], §§ 5(1), 13(2).

<sup>104</sup> In response to the broad interpretation of “participate” in “treatment” urged by the objectors, the U.K. 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.” *Doogan*, [2014] U.K.S.C. ¶¶ 33, 37.

<sup>105</sup> “[I]t 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*, ¶ 40.

<sup>106</sup> S.T.C., July 7, 2015 (S.T.C., No. 52) (Spain), [http://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 22/2007, Art. 75; Decreto 104/2001, Art. 2.

<sup>107</sup> S.T.C., July 7, 2015 (S.T.C., No. 52) (Spain), [http://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).

*Bull v. Hall*, where innkeepers raised complicity-based conscience objections to boarding a same-sex couple, the U.K. 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>108</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>109</sup> The ECSR has denied exemption claims asserted under the European Social Charter’s rights to protection of health or nondiscrimination. In rejecting a challenge to Sweden’s failure to accommodate conscience objections in healthcare, the ECSR found no “positive obligation to provide a right to conscientious objection for healthcare workers.”<sup>110</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 healthcare providers.<sup>111</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>112</sup> 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>113</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

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<sup>108</sup> *Bull v. Hall*, [2013] U.K.S.C. ¶ 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>109</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>110</sup> *Federation of Catholic Families in Europe (FAFCE) v. Sweden* 16 (ECSR 2015). ADF participated in the case as a third-party observer. *Id.* at 3.

<sup>111</sup> *Id.* at 16.

<sup>112</sup> *International Planned Parenthood Federation – European Network v. Italy* at ¶¶ 175, 177 (ECSR 2013).

<sup>113</sup> *Id.* at ¶ 163.

violated when conscience refusals were invoked in ways that impeded her access to abortion.<sup>114</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>115</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>116</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>117</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.

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>118</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>119</sup>

In the LGBT context,<sup>120</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

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<sup>114</sup> See *P. and S. v. Poland*, No. 57375/08, para. 112, p. 27 (Eur. Ct. H. R. 2012).

<sup>115</sup> *Id.* 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, para. 232-233 (Eur. Ct. H. R. 2010).

<sup>116</sup> *R.R. v. Poland*, No. 27617/04, para. 206, p. 47 (Eur. Ct. H. R. 2011).

<sup>117</sup> European Convention on Human Rights, Art. 9. Similar language is found in Article 18 of the International Covenant on Civil and Political Rights. ICCPR Art. 18.

<sup>118</sup> See *Pichon and Sajous v. France*, App. No. 49853/99, 4 (2001).

<sup>119</sup> *Id.* For analysis of this case and the conflict between conscience claims and women’s access to reproductive healthcare, see Adriana Lamacková, *Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v. France*, 15 EUR. J. HEALTH L. 7 (2008).

<sup>120</sup> It is important to note that the ECtHR has not at this point found a right to marry for same-sex couples, but instead has given countries a wide margin of appreciation. 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, p. 58 (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, p. 20.

objecting to employer regulations requiring counseling same-sex couples in “psycho-sexual therapy”).<sup>121</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>122</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>123</sup> Indeed, the ECtHR’s account of the governmental interest in promoting equality was sensitive both to the interest in creating social meaning, as well to the interest in fairly distributing opportunities. It noted that the government’s interest “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>124</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>125</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 U.S., this body of law is contested and still evolving. And debate continues in conflicts over reproductive healthcare and LGBT equality.

## **V. Pluralism and the Question of Conscience**

The regulation of conscientious objection varies across jurisdictions in more ways than this essay can hope to chronicle. But our brief exploration of approaches to accommodation in the U.S. 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 widespread religious exemptions. But exemptions can both serve and undermine pluralist ends.

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<sup>121</sup> *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). For a more extensive discussion of the registrar’s claim, see Christopher McCrudden’s contribution to this volume.

<sup>122</sup> *Id.* at para. 103, p. 37; para. 108, p. 38.

<sup>123</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. *Id.* at para. 106, p. 38. In rejecting the counselor’s challenge, the court relied on the importance of “the employer’s interest in securing the rights of others” and “providing a service without discrimination.” *Id.* at para. 109, p. 39.

<sup>124</sup> *Id.* at para. 105, p. 37 (quoting *Ladele v. London Borough of Islington* ¶ 45 [2009] EWCA Civ. 1357, which quoted statement by local government).

<sup>125</sup> See Robert Wintemute, *Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve*, 77 MODERN L. REV. 223, 243 (2014) (“by 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”).

On one model, protection of conscience facilitates a pluralist regime in which those with different moral outlooks may coexist.<sup>126</sup> Laws decriminalizing abortion have included conscience provisions that simultaneously seek to protect patient access to services. The U.K. and France, which decriminalized abortion in the 1960s and 1970s, institutionalized protection for conscience on this model.<sup>127</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 U.S., since the 1990s, healthcare 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>128</sup> In Poland, for example, conscience 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>129</sup> Looking outside Europe to Latin America, the Colombian Constitutional Court has recognized—and accordingly sought to constrain—conscience as a locus of open efforts to resist implementation of the court’s judgment declaring a limited constitutional right to abortion.<sup>130</sup>

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<sup>126</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, p. 29 (citing *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A. no. 260-A).

<sup>127</sup> See *supra* notes 101-103 and accompanying text.

<sup>128</sup> In 2005, the E.U. 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 Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See* 31 (Dec. 14, 2005) (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), [http://ec.europa.eu/justice/fundamental-rights/files/cfr\\_cdfopin4\\_2005\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopin4_2005_en.pdf).

<sup>129</sup> See *supra* notes 114-116.

<sup>130</sup> For the decision recognizing the constitutional right, see Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm> (in Spanish). For the court’s treatment of conscientious objection as a tactic to thwart patient rights, see Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2009 Sentencia T-388/09 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2009/T-388-09.htm> (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*, 22 HEALTH MATTERS 42, 45-46 (2014). 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* (Apr. 26, 2014), <http://hemisphericinstitute.org/devotion/2014/04/juan-marco-vaggione-the-politics-of-camouflage-conscientious-objection-as-a-strategy-of-the-catholic-church/>.



In short, conscience exemptions can, but do not always, serve pluralist ends.<sup>131</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>132</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>133</sup>

Building a genuinely pluralist exemptions 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-wars 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* her fellow citizens is the most pluralism-promoting path.

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<sup>131</sup> Cf. Jean L. Cohen, *Freedom of Religion, Inc.: Whose Sovereignty?*, 44 NETH. J. LEGAL PHIL. 169, 205 (2015) (rejecting pluralist justifications, featured in much of the “freedom of religion” discourse supporting claims to religious accommodation in the contemporary U.S. context, by showing how such justifications may draw on liberal rights discourse to mask anti-democratic, integralist claims to religious jurisdiction or sovereignty).

<sup>132</sup> *Pichon and Sajous v. France*, App. No. 49853/99, 4 (2001).

<sup>133</sup> In *Eweida*, the ECLJ, 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 61, at 15.