THE UNIVERSITY OF TENNESSEE KNOXVILLE

Tennessee Journal of Law and Policy

Volume 12 | Issue 2 Article 4

October 2021

The Case for Complicity-Based Religious Accomodations

Joshua Craddock
University of Tennessee College of Law, joshjcraddock@protonmail.com

Tennessee Journal of Law and Policy

Volume 12
Issue 2 *(Winter 2018)*

Article 5

January 2018

The Case for Complicity-Based Religious Accommodations

TENNESSEE JOURNAL
OF LAW AND POLICY

VOLUME 12 WINTER 2018 ISSUE 2

ARTICLE

THE CASE FOR COMPLICITY-BASED RELIGIOUS ACCOMMODATIONS

Joshua J. Craddock[*]

[*] J.D. expected May 2018, Harvard Law School; B.A., Politics, Philosophy, and Economics, 2013, The King's College. I would like to thank Professor Mary Ann Glendon, Learned Hand Professor of Law at Harvard Law School, and Mark Rienzi, Senior Counsel at Becket Law and Associate Professor of Law at The Catholic University of America for their instruction, encouragement, and direction.

Introduction

Complicity is an ancient concept in law and ethics. One becomes complicit in the wrongdoing of someone else by performing actions that contribute to that wrongdoing.[1] This principle is found in the teachings of many religious faiths,[2] and it is embedded throughout the American legal system.[3] It should be no surprise then

---

[1] GREGORY MELLEMA, COMPLICITY AND MORAL ACCOUNTABILITY 10 (2016) ("When someone is complicit in the wrongdoing of one or more principal agents, it is by virtue of performing a contributing action.").

[2] *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGIAE pt. II-II, Q. 62, art. 7 (addressing accomplice liability); JOHN CALVIN, COMMENTARIES ON THE EPISTLE OF PAUL TO THE GALATIANS AND EPHESIANS 310 (William Pringle trans., 1854) ("It is not enough that we do not, of our own accord, undertake anything wicked. We must beware of joining or assisting those who do wrong. In short, we must abstain from giving any consent, or advice, or approbation, or assistance; for in all these ways we *have fellowship*."); CATECHISM OF THE CATHOLIC CHURCH pt. 3, ¶ 1868; NIK MOHAMED AFFANDI BIN NIK YUSOFF, ISLAM & BUSINESS 231 (Ismail Noor ed., 2002) (observing that in Islam, "whatever is conducive towards what is prohibited is itself forbidden"); Mark L. Rienzi, *God and the Profits: Is there Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 68 (2013) (noting that "Judaism prohibits even Jewish *consumers* from facilitating a business owner's violation of Jewish law").

[3] *See, e.g.*, Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014) (acknowledging that facilitator liability "reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission"); U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL tit. 9, § 2474 (1998),

that complicity also appears in the context of religious exemptions from laws of general applicability, in which the objector believes his conduct would facilitate another's wrongdoing. Over the past few years, high-profile religious liberty cases such as *Burwell v. Hobby Lobby Stores, Inc.*[4] and *Zubik v. Burwell*[5] have highlighted the role of complicity in Free Exercise Clause and Religious Freedom Restoration Act (RFRA) jurisprudence.

Critics of religious exemptions have deployed a new argument against accommodations in such cases by suggesting that they impose "third-party harm."[6] In particular, Professors Douglas NeJaime and Reva Siegel argue that these complicity-based claims are novel and that the claims "differ in *form* and in *social* logic" from other free exercise claims.[7] For example, a Muslim inmate's religious objection to shaving his beard does not

---

https://www.justice.gov/usam/criminal-resource-manual-2474-elements-aiding-and-abetting [https://perma.cc/Z62T-W8CB] ("The level of participation [in an unlawful venture] may be of relatively slight moment. Also, it does not take much evidence to satisfy the facilitation element once the defendant's knowledge of the unlawful purpose is established." (citations omitted)); Matthew Kacsmaryk, *Moral Complicity at Court: Who Decides?*, PUB. DISCOURSE (Apr. 6, 2016), http://www.thepublicdiscourse.com/2016/04/16709/ [https://perma.cc/W6BJ-SN3X] ("In the modern era, federal, state, and territorial governments have enacted myriad statutes, regulations, and rules protecting the conscience rights of Americans who abstain from practices, procedures, or products that would violate their moral duty not to kill or cause harm.").

[4] 134 S. Ct. 2751 (2014).

[5] 136 S. Ct. 1557 (2016) (per curiam).

[6] *See, e.g.*, Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2522 (2015).

[7] *Id.* at 2519.

stem from any complicity with another's alleged wrongdoing.[8] Complicity-based claims, they argue, impose "material and dignitary harms" on third parties that are not adequately accounted for under current doctrine.[9]

Professors NeJaime and Siegel define material harm as "deterring or obstructing access to goods and services,"[10] such as abortion or same-sex spousal benefits.[11] Dignitary harms "refer to the social meaning, including stigma, which may result from accommodating complicity-based objections."[12] This social meaning is communicated when religious objectors treat "third parties as sinners in ways that can stigmatize and demean."[13] Complicity-based claims are particularly stigmatizing, they argue, when refusal of services "reflects a widely understood message about a contested sexual norm."[14] Because of these third-party harms, Professors NeJaime and Siegel argue that religious accommodations should be diminished or eliminated in many complicity cases.[15]

This Article argues that the third-party harm theory is fundamentally flawed and that complicity-based religious accommodations are both a traditional and necessary part of the American legal framework.

---

[8] *See id.* at 2524 (citing Holt v. Hobbs, 135 S. Ct. 853 (2015)).
[9] *Id.* at 2587 ("[O]ne group of citizens should not bear the significant costs of another's claim to religious exercise.").
[10] *Id.* at 2566 ("[Material harm] can also occur as objectors withhold information that would enable an individual to pursue alternative providers.").
[11] *Id.*
[12] *Id.* at 2522.
[13] *Id.* at 2576.
[14] *Id.* at 2577.
[15] *Id.* at 2516 ("At issue is not only whether but how complicity claims are accommodated.").

Part I examines Supreme Court precedent in the area of free exercise and finds significant support for complicity-based accommodations. Part II reevaluates the magnitude and legitimacy of the asserted third-party harms, then weighs the inconveniences imposed on third parties against the injuries to religious objectors should accommodations be withdrawn. Part III contends that culture war conflicts will not be resolved through the elimination of religious accommodations in the complicity context and proposes a subsidiarity-based alternative to imposing coercive legal penalties on religious objectors.

I. Complicity-Based Accommodations Are Not Novel

Professors NeJaime and Siegel acknowledge the longstanding and "richly elaborated" theory of complicity.[16] Yet they assert that religious exemptions based on complicity were practically unheard of prior to *Hobby Lobby* and are fundamentally different from the precedents RFRA invoked as exemplars.[17] Historically, however, the law has treated complicity-based claims with the same regard as other claims for religious accommodation. In fact, *Hobby Lobby* reaffirmed the Supreme Court's long-established solicitude toward complicity-related claims.

In *Wisconsin v. Yoder*,[18] Amish parents objected to the state's compulsory secondary schooling requirement and sought an exemption for Amish children who had completed the eighth grade.[19] They condemned the "values" promoted by high schools and asserted that

[16] *Id.* at 2522–23.
[17] *Id.* at 2524–29.
[18] 406 U.S. 205 (1972).
[19] *Id.* at 207.

attendance entangled their families in "a 'worldly' influence in conflict with their beliefs."[20] By participating in the high school system, the Amish feared their children would be affected by the corrupting activities and influences of third-party students, teachers, and administrators.[21] Thus, on a plausible reading of *Yoder*, the Amish parents pleaded for precisely the sort of complicity-based religious exemption that Professors NeJaime and Siegel suggest are novel.[22]

Furthermore, accommodation for the Amish carried the risk of "third-party harm." The parents implicitly condemned those involved with high schooling as being engaged in objectionable conduct. Indeed, it might be inferred they believed that those who embraced the worldly influences of high school would suffer damnation.[23] If Professors NeJaime and Siegel's characterization of dignitary harm were to be accepted, these aspersions would certainly qualify as "dignitary harms." Even potential material harms were at risk. Professors NeJaime and Siegel are correct to observe that *Yoder* "conceptualized the interests of the Amish children as aligned with their parents, such that the accommodation benefited, rather than potentially

---

[20] *Id.* at 210–11.

[21] *Id.* at 209 ("They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children.").

[22] *See* Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 136–37 (2016) (advancing this interpretation of *Yoder*).

[23] *See Yoder*, 406 U.S. at 210 ("Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.").

harmed, the children themselves."[24] But the accommodation was not limited to such cases, and indeed, the extent to which an eighth grader can make informed decisions about such matters is questionable. The Supreme Court granted the accommodation *despite* the potential material and dignitary harms to third parties.

Another important precedent that Professors NeJaime and Siegel gloss over is *Thomas v. Review Board of Indiana Employment Security Division*.[25] In that case, a Jehovah's Witness who refused work in a tank turret factory was denied unemployment compensation.[26] Although Professors NeJaime and Siegel acknowledge that *Thomas* involved a complicity-based claim for accommodation, they attempt to distinguish it from *Hobby Lobby* by claiming that Thomas did "not single out a particular group of citizens as sinning."[27] This is both inaccurate and irrelevant.[28]

First, Thomas *did* suggest that those who manufactured the tank turrets—as well as those who would eventually use them to kill—were engaged in sinful conduct.[29] It was precisely because Thomas

---

[24] NeJaime & Siegel, *supra* note 6, at 2526 (citing *Yoder*, 406 U.S. at 209).
[25] 450 U.S. 707 (1981).
[26] *Id.* at 709.
[27] NeJaime & Siegel, *supra* note 6, at 2526 n.45. The Supreme Court views *Thomas* as directly analogous to the complicity-based claims that Professors NeJaime and Siegel criticize. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014) (calling the issue raised in *Thomas* "nearly identical" to the one raised in *Hobby Lobby*).
[28] *See* DeGirolami, *supra* note 22, at 137–38.
[29] Thomas had told the hearing referee: "I really could not, you know, conscientiously continue to work with armaments. It would be against all of the . . . religious principles that . . . I have come to learn. . . ." *Thomas*, 450 U.S. at 714 (alteration in

believed the creation of armaments to be sinful that he quit his job. By plausible implication, one could infer that Thomas believed those who continued to construct armaments (or those who would ultimately use them) were acting sinfully.

Second, it is irrelevant because complicity analysis should be focused on the *objector's* conduct and state of mind, not the *principal's* conduct and character.[30] Thus, the only relevant point of inquiry is whether Thomas's conduct (assisting the construction of tank turrets) violated his religious beliefs, as he understood them.[31] Thomas's moral judgments about his fellow

---

original) (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 391 N.E.2d 1127, 1132 (1979)).

[30] *See* DeGirolami, *supra* note 22, at 138; *see also* Marc DeGirolami, *Three Thoughts on Complicity, Dignity, and Religious Accommodation*, MIRROR JUST. (July 10, 2015), http://mirrorofjustice.blogs.com/mirrorofjustice/2015/07/three-thoughts-on-complicity-dignity-and-religious-accommodation [https://perma.cc/RJ8S-GPZ4] ("[T]he conflation of conduct and character is a recognizable though deeply regrettable move in many of the sorts of disputes implicating these issues.").

[31] *See Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981)); *see also* Eugene Volokh, *The Religious Freedom Restoration Act and Complicity in Sin*, WASH. POST: VOLOKH CONSPIRACY (June 30, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-religious-freedom-restoration-act-and-complicity-in-sin/ [https://perma.cc/YWL5-6JM5] (observing that precisely "[w]here the connection becomes too attenuated and morally or religiously culpable complicity stops is a question on which reasonable people will differ" in a discussion of *Hobby Lobby* and *Thomas*). Thus, "when the person believes that complicity itself is sinful, the question is not whether our secular legal system thinks that he has drawn the right line regarding

factory workers and the ultimate users of the tank turrets never factor into the analysis.

Although complicity-based claims are not themselves novel, attempting to distinguish complicity claims from other religious accommodation claims *is* novel. Presumably, under the third-party harm theory, a *Hobby Lobby*-style case would be resolved differently when (A) the objector believes the use of abortion-inducing drugs is sinful than when (B) the objector believes that insurance or drugs are forbidden as a general matter (that is, the objection arises without the taint of a "sin" claim). This would be a strange result—one that asks judges to scrutinize the form of the objector's religious reasoning. Not only is this a task that judges are unsuited to perform, but it encourages religious people to formulate their objections in creative ways to avoid complicity. Thus, if the Amish families in *Yoder* formulate their objection in terms of objecting to secular education, they will likely win. But if they phrase their objection as avoiding complicity with a corrupt system of education, they will likely lose. It is more reasonable to maintain the current rule that an objector's moral reasoning is irrelevant for exemption purposes.[32]

II. Balancing Harms: Third Parties v. Religious Objectors

---

complicity; it is whether he sincerely believes that the complicity is sinful." *Id.*

[32] Mark L. Rienzi, *Unequal Treatment of Religious Exercises under RFRA: Explaining the Outliers in the HHS Mandate Cases*, 99 VA. L. REV. ONLINE 10, 11 (2013) ("Properly understood, RFRA's 'substantial burden' analysis examines whether the government is coercing a believer to abandon a religious exercise . . . . [T]he underlying religious reasons for the religious exercise should be entirely irrelevant.").

The third-party harm theory focuses on "material and dignitary harms" that those invoking complicity-based religious objections impose on others. But the significance of these harms and the extent to which they should be considered in RFRA analysis is questionable. Furthermore, the emphasis on third parties obscures or ignores the harms that would be imposed on religious individuals if the law no longer accommodated their beliefs to the extent possible. To accurately evaluate the relative social cost of permitting or denying complicity-based accommodations, both sides of the harm equation must be considered.

This Part will first re-examine, with a critical eye, the material and dignitary harms Professors NeJaime and Siegel identify. Then, using their framework of third-party harm, I will weigh the harms imposed on religious objectors should RFRA-style accommodations be weakened or withdrawn in complicity cases.

A. Harms to Third Parties

Professors NeJaime and Siegel identify a series of material and dignitary harms to third parties that they believe set complicity-based claims apart from other requests for religious accommodation. In this section, the scope and magnitude of the alleged harms to third parties will be critically re-examined.

1. Material Harms

Material harms include the inability to obtain certain healthcare information and services, such as abortion, emergency contraception, and assisted

reproduction;[33] difficulty finding wedding venues and vendors for same-sex ceremonies;[34] trouble obtaining privately-provided social services, such as adoption services;[35] and denial of spousal insurance coverage or other employment benefits to same-sex partners.[36] Professors NeJaime and Siegel worry that complicity-based refusals in these areas will lead to "an unpredictable marketplace" for same-sex couples and others seeking sexual and reproductive services.[37]

Significant material harms are indeed a relevant concern and may be a compelling state interest. Nevertheless, there are at least three reasons why Professors NeJaime and Siegel's characterization of these harms is overstated. First, material hardships that third parties might face due to religiously motivated refusals are already doctrinally accounted for under the "compelling state interest" prong of RFRA analysis.[38]

---

[33] *See* NeJaime & Siegel, *supra* note 6, at 2557–58, 2573.
[34] *See id.* at 2562–63.
[35] *Id.* at 2573–74.
[36] *See id.* at 2563 n.195 and accompanying text.
[37] *Id.* at 2574.
[38] *See* DeGirolami, *supra* note 22, at 133 ("Compelling state interests include third party interests within the statutory calculus. Indeed, one might simply say that compelling state interests *just exactly are* third party interests of adequate gravity. Whose interests is the government protecting in resisting a religious accommodation if not those of third parties?"); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 46 (2014) ("The justices said in *Cutter* that . . . 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,' but RFRA, by its own terms, appears to require courts to do precisely that." (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005))); *see also* Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive

Professors NeJaime and Siegel acknowledge this when they observe the latent concern for third-party harms in the *Hobby Lobby* and *Wheaton College v. Burwell*[39] decisions.[40] If courts considered third-party harm as a distinct prong of analysis reserved for complicity cases, they would double-count the harms of accommodation and effectively give the state "another bite at the apple."[41] Under existing doctrine, only the most serious material harms, "endangering paramount [governmental] interests,"[42] are factored into RFRA's compelling state interest analysis. This is appropriate because although "[m]ost exercises of constitutional rights inflict costs on

---

constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" (alteration in original) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1944))) (explaining what constitutes a compelling state interest). RFRA ultimately incorporated this understanding of compelling governmental interests. *See* 42 U.S.C. §§ 2000bb-1(b).

[39] 134 S. Ct. 2806 (2014).

[40] *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("That consideration [of third party harm] will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest."); NeJaime & Siegel, *supra* note 6, at 2530 ("Concern about protecting third parties from harm was a structuring principle of the Court's [*Hobby Lobby*] decision . . . . Justice Alito's majority opinion proceeded on the assumption that the government has a compelling interest in ensuring women's 'cost-free access to . . . contraceptive methods.'" (second alteration in original) (footnote omitted) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779–80 (2014))); *see also Wheaton*, 134 S. Ct. at 2807 ("Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives.").

[41] DeGirolami, *supra* note 22, at 133.

[42] *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1944)).

others . . . . not everyone who feels harmed is harmed in a legally cognizable way."[43] Depending on the circumstance, the mere desire to obtain nonessential goods and services may not be a *significant* material harm deserving of judicial consideration.

Second, market forces are capable of solving most cases of material hardship when religious objectors decline to provide services.[44] Though many business owners and organizational directors hold religious objections to participation in same-sex marriages or providing controversial reproductive services, a greater number hold the opposite view.[45] Even those who object may not be willing to face the legal, social, and economic penalties of refusing service.[46] In most cases, non-objecting wedding vendors and pharmacists will be available to provide their services, and the alleged material harms will be nonexistent.[47] Although Professors NeJaime and Siegel worry that some individuals will be unable to obtain emergency contraception or HIV medication,[48] extensive fact-finding in a pharmacist objection case could not identify a single instance of an individual who was unable to obtain emergency contraception or HIV drugs as a result of a

---

[43] Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to Professors NeJaime and Siegel*, 125 YALE L.J. F. 369, 379 (2016).

[44] *Id.* at 379 ("In a market economy, refusals of service rarely result in anyone having to do without.").

[45] *See id.*

[46] *See id.* ("Even among those with serious moral objections, few are willing to endure the risk of litigation, boycotts, defamatory reviews, and vandalism that can follow in the wake of refusing service on conscientious grounds.").

[47] *See id.* at 379–80 (noting the paucity of complicity-based objections and the lack of empirical evidence supporting claims of widespread refusals).

[48] *See* NeJaime & Siegel, *supra* note 6, at 2539–40, 2573.

religiously motivated refusal.[49] Even "in more conservative, religious, and rural parts of the country"[50] where religious objections are likely more common, individuals will rarely find themselves without an adequate alternative for long.[51]

Finally, the law has already established limiting principles for instances when inability to obtain essential services would inflict serious material harm. Life-threatening medical emergencies are a prominent example. Even though most state medical conscience laws do not have emergency exceptions, "federal law requires hospitals to treat or stabilize patients in emergencies, and that federal mandate overrides all contrary state law."[52] It is appropriate for the law to set reasonable limitations on the circumstances in which religious healthcare providers may refuse to perform

---

[49] *See* Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 948 (W.D. Wash. 2012), *rev'd on other grounds sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433, 2434 (2016) ("[A]fter years of test shopping and litigation, Defendants have not identified even one instance where a pharmacist refused to fill or referred a patient because of a personal, non-conscientious objection. Despite frequent mentions of HIV during the rulemaking process, there is no evidence that any patient has ever been denied HIV drugs due to a conscientious or "personal" objection. . . . Finally, no Board witness, or any other witness, was able to identify any particular community in Washington—rural or otherwise—that lacked timely access to emergency contraceptives or any other time-sensitive medication.").

[50] NeJaime & Siegel, *supra* note 6, at 2574.

[51] Under a Keynesian economic account, demand creates its own supply. *See, e.g.*, Paul Krugman, *Demand Creates Its Own Supply*, N.Y. TIMES: THE CONSCIENCE OF A LIBERAL (Nov. 3, 2015, 1:23 PM), https://nyti.ms/2q7v1nN.

[52] Laycock, *supra* note 43, at 381 (citing 42 U.S.C. §§ 1395dd(b)–(c) (2012)).

urgent, life-saving procedures.[53] In the context of abortion, which seems to be Professors NeJaime and Siegel's primary area of concern,[54] such circumstances may never even arise.[55]

2. Dignitary Harms

Next, Professors NeJaime and Siegel catalogue dignitary harms they believe are not adequately accounted for in the RFRA compelling state interest analysis. Refusals to provide abortifacients or services for a same-sex wedding, for example, communicate "a widely understood message about a contested sexual norm."[56] And accommodating such refusals conveys a "social meaning" that stigmatizes lawful conduct.[57] These harms often have emotional or symbolic effects.

---

[53] This may not be the end of the analysis, however. It may be preferable to permit religiously objecting hospitals to continue to operate according to their beliefs (which inflicts some third-party harms) rather than force them to close down altogether (which would inflict a greater aggregate amount of third-party harms). *See infra* notes 103–06 and accompanying text.

[54] *See* NeJaime & Siegel, *supra* note 6, at 2566–69.

[55] Experts in obstetrics and gynecology dispute the assertion that abortion is ever medically necessary. *See* COMM. ON EXCELLENCE IN MATERNAL HEALTHCARE, DUBLIN DECLARATION ON MATERNAL HEALTHCARE (2012), http://www.dublindeclaration.com/ [https://perma.cc/X75K-MRLJ] (declaring that "direct abortion"—the purposeful destruction of the unborn child—"is not medically necessary to save the life of a woman," and affirming "a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child.").

[56] NeJaime & Siegel, *supra* note 6, at 2577.

[57] *Id.* at 2522 ("By dignitary harms, we refer to the social meaning, including stigma, which may result from accommodating complicity-based objections.").

Despite anecdotal accounts that refusals leave some customers feeling hurt or offended,[58] it is unpersuasive that permitting accommodations actually imposes any dignitary harm. There are both practical and theoretical difficulties with demonstrating the reality of dignitary harms. On a practical level, offenses are subjective and difficult to quantify. Does politely and respectfully declining to arrange flowers for a same-sex wedding communicate an injurious "social meaning" to would-be customers?[59] Perhaps for some, perhaps not for others. Reasonable customers might disagree about whether their dignity has been impugned. Would different meanings be communicated if an objector said, "I would be complicit in your sin" rather than "I would be sinning myself"?[60] In effect, courts would have to rely on the testimony of the third party to determine how much harm a refusal inflicted. It would be easy for a politically

[58] *See, e.g.*, *id.* at 2575–78.

[59] *See* Brief for Appellants at 13, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2), 2015 WL 12632392 ("Mr. Ingersoll says that Mrs. Stutzman took his hand and explained 'she could not do the flowers because of her relationship with Jesus Christ.' According to him, she also said, 'You know I love you dearly. I think you're a wonderful person . . . . But my religion doesn't allow me to do this.' Mrs. Stutzman said all of this in a kind and considerate way." (alteration in original)); Answer at 12, State v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. 2015), 2013 WL 10257927 ("Emotional about her convictions and her decision to decline, Barronelle touched Robert's hand and kindly told him that she could not create the floral arrangements for his wedding because of her Christian faith. . . . Barronelle and Mr. Ingersoll hugged each other, and he left the store.").

[60] Laycock, *supra* note 43, at 382; *see also supra* note 30 and accompanying text.

influential interest group to define anything it does not like as "harmful" to its members' dignity.[61]

On the conceptual level, Professors NeJaime and Siegel's account of dignitary harm assumes that dignity is conferred by others or by the government. According to their theory, "the state's authority includes the power to confer individual dignity as a self-standing civic good. People want to be dignified by the state, their self-worth to be accorded official validation, and they perceive state-countenanced indignities meant for the protection of religious freedom as real injuries demanding state remediation."[62] But this is a mistaken understanding of human dignity that is fundamentally at odds with the American tradition. It "rejects the idea—captured in our Declaration of Independence—that human dignity is innate."[63] If dignity is innate to the human person, rather

---

[61] Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1171 (2007) (reviewing MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005)) ("We also have an expansive capacity to define as harmful anything we don't like. A rule that no religious group could do anything the political process defined as harmful would leave all religions at the mercy of any interest group that could persuade some regulatory body to act.").

[62] DeGirolami, *supra* note 22, at 130 (summarizing the theory espoused by Professors NeJaime and Siegel).

[63] Obergefell v. Hodges, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting). Justice Thomas's remarks on the intrinsic nature of human dignity are worth including in full:

> Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That

than conferred by the state, third parties *cannot* be deprived of their dignity through legal accommodations for religious objectors.[64]

Even if dignitary harms could be proven and quantified, it is unclear that the law itself plays any role in imposing such harms. As between the religious

> vision is the foundation upon which this Nation was built.
>
> The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.
>
> The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their amici can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

Id. at 2639.

[64] *See id.*

objector and the third party, the law is neutral. It takes neither the side of the objector (proscribing the conduct the objector views as sinful or requiring everyone similarly situated to decline their services) nor the side of the customer (forcing all providers to engage in objectionable commercial transactions against their will).[65] It allows both parties the opportunity to order their affairs as they see fit. Even if critics of religious accommodations are correct to characterize exemptions as a privilege of private discrimination,[66] it is not obvious that *the law* imposes dignitary harms, or that the dignitary harms stemming from private discrimination constitute a compelling state interest.[67] On the other

---

[65] *See* Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 YALE L.J. F. 399, 403 (2016) ("Legally enforcing a norm against someone suggests coercing her to follow it. So Professors NeJaime and Siegel are lumping traditionalist-conduct *exemptions* together with *legal enforcement* of traditionalist views. That seems fair only if one assumes that the default is not to accommodate these views-so that doing so seems like a gratuitous imposition on others. Only then does *actually* coercing *traditionalists* to violate their consciences seem like the neutral norm.").

[66] This characterization is contested. *See id.* ("[C]alling exemptions a 'special advantage' is tendentious. It assumes that the default in a constitutional democracy is *not* to protect conscience claims that might make a political splash. Only then does protecting them anyway seem like favoritism." (footnote omitted)).

[67] The only free exercise case finding a compelling state interest in eliminating private discrimination was *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983). *See* Alex Reed, *RFRA v. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. SOC. POL'Y & L. 2, 38 (2016). In *Bob Jones*, the state interest in promoting racial equality in education, expressed by all three branches of the federal government over the course of several decades, outweighed the religious claimant's interest in free exercise. *See* 461 U.S. at 604. Racial discrimination in education results in both

hand, if courts adopted the dignitary harm theory, it could become a self-fulfilling prophesy: the more that courts "say that a policy or belief expresses disdain for a group, the more it will take on that social meaning."[68]

Even if the law imposed a dignitary harm, this harm is non-unique and cannot be considered by courts. The First Amendment permits speech and other forms of expression that impose dignitary harms all the time. What makes dignitary harm a trump card for free exercise, but not for other First Amendment liberties, such as free speech or freedom of the press? Because dignitary harms "are expressive harms, based on the 'communicative impact' of the religious practice,"[69] they

---

material and dignitary harms under Professors NeJaime and Siegel's rubric. Nevertheless, there are reasons to believe the Court's judgment was limited in scope and not generally applicable to issues of sexual mores with which Professors NeJaime and Siegel are concerned. *See* Girgis, *supra* note 65, at 411. *See generally* Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL'Y 255 (2017).

[68] *See* Girgis, *supra* note 65, at 404. Professor Richard Epstein expresses a similar concern that countenancing such harms-without-legal-injury would make "virtually all human conduct . . . actionable." Richard A. Epstein, *A Common Law for the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 25 (2018). He continues:

> To protect individuals against mere offensive conduct is to invite people to merit that exalted status by getting angrier and angrier, so that their private resentments give strong claims of rights against one another. Everyone can play this game so that mutual indignation becomes the source of great anxiety or worse.

Id.

[69] Laycock, *supra* note 43, at 376.

are precisely the sorts of harms that the government is normally disallowed from considering as a legitimate state interest.[70] First Amendment jurisprudence is replete with instances of protected speech that impose dignitary harm on third parties: parade organizers may exclude disfavored groups,[71] proselytizers may insult their listeners' most cherished beliefs,[72] private expressive associations may discriminate against members based on their sexual conduct,[73] and protesters

---

[70] *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements." (citations omitted)); United States v. O'Brien, 391 U.S. 367, 377 (1968) (requiring the state interest in regulating conduct be "unrelated to the suppression of free expression"); *see also* Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (8-0 decision) (finding that the government cannot refuse to register a trademark on the grounds that "it expresses ideas that offend").

[71] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 578–79 (1995) (9-0 decision) (ruling that the state's interest in nondiscrimination could not be invoked to require a private parade organizer to modify its expressive conduct by including an LGBT group) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.").

[72] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (affirming the right of a Jehovah's Witness to play a phonograph record that "attacked the [Catholic] religion and church" and "incensed" listeners).

[73] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–61 (2000); *see also* Laycock, *supra* note 43, at 377 (observing that "Dale had been an active and engaged scout for twelve years; the dignitary harm of being excluded from scouting at that point must have been vastly greater than the typical dignitary harm

may express even the most vulgar and offensive slogans at their audience's most vulnerable moments.[74] The effect of such speech on third parties is legally irrelevant.[75] That some third parties will find religiously motivated refusals to be upsetting, offensive, or disagreeable is no doubt true. But the resulting emotional or symbolic injuries are simply not a matter of judicial concern.

It is inconsistent with First Amendment doctrine and norms to assert that religious refusals that either explicitly or implicitly "reflect[] and reiterate[] a familiar message about contested sexual norms"[76] deserve less protection because of the viewpoint expressed by that

---

of being refused a one-time arms-length transaction" but that "no Justice found a compelling interest in preventing [that] harm").

[74] *See* Snyder v. Phelps, 562 U.S. 443, 448 (2011) (8-1 decision) (upholding protection of slogans such as "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell,' and 'God Hates You'" displayed at a soldier's Catholic funeral).

[75] *See Matal*, 137 S. Ct. at 1763 ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" (quoting Street v. New York, 394 U.S. 576, 592 (1969))); *Snyder*, 562 U.S. at 458 ("Such speech cannot be restricted simply because it is upsetting or arouses contempt."); *Hurley*, 515 U.S. at 574 ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."); *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[76] NeJaime & Siegel, *supra* note 6, at 2576.

refusal.[77] This impermissibly singles out religious speakers who affirm traditional sexual moral norms for disfavored status. The viewpoint-neutrality violation here is even more egregious because it specially targets religious groups *because* those groups are politically engaged in culture-wide disputes about the morality of abortion and same-sex marriage.[78] Professors NeJaime

---

[77] *See supra* note 69; *see also* Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (citation omitted)); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 385 (1992) ("We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses . . . .").

[78] Professors NeJaime and Siegel place significant emphasis on the fact that many religious objectors to same-sex marriage and abortion are engaged in a broader politically active community. *See* NeJaime & Siegel, *supra* note 6, at 2542–45 (noting with concern that "complicity-based conscience claims are asserted in society-wide conflicts by mobilized groups and individuals acting in coalitions that reach across religious denominational lines"). They assert that dignitary harms are especially pernicious when such "a mass movement amplifies [the refusal's] power to demean." *Id.* at 2578. In other words, Professors NeJaime and Siegel contend, "*Because* these conscientious objectors engage in a political argument, they lose their right to conscientious objection." *See* Laycock, *supra* note 43, at 371 (summarizing their view); *see also* Girgis, *supra* note 65, at 402 ("The implication is clear: Officials should discount claims when granting them might empower believers to push for their views, or even change laws they oppose.").

This is preposterous. It also betrays a desperation to "lock-in" the newly prevailing cultural orthodoxy on contested moral issues. As Laycock put it: "Religious conservatives are

and Siegel would likely have little objection to an "Orthodox Jew with a wholesale grocery business [who] refuses to stock or sell nonkosher items" in violation of local ordinances because "he does not want to tempt or assist any other Jew to consume the nonkosher items."[79] Even though this is a complicity-based objection, it does not implicate a "national political battle over nonkosher food" and Professors NeJaime and Siegel would likely not be concerned about the "social meanings" the shopkeeper communicates to customers who are "harmed or inconvenienced."[80] Their argument depends (at least in part) on the socio-political context of religious accommodations, which is currently concentrated on conflicts with the sexual revolution.

Religious actors are free to express tenets of their faith that either explicitly or implicitly tell non-members that they are sinning or will suffer damnation.[81] Yet the

---

constitutionally entitled to argue for their views on the regulation of sex . . . . And their exercise of that right is not a ground for forfeiting other rights they may have, including their right to religious exemptions. . . . Religious conservatives do not forfeit their right to conscientious objection by making political arguments about the laws they object to, and they do not forfeit their right to make political arguments by invoking their right to conscientious objection." Laycock, *supra* note 43, at 371–72.

[79] Laycock, *supra* note 43, at 382.

[80] *Id.* Laycock observes that this hypothetical also demonstrates that "[c]omplicity is irrelevant to Professors NeJaime and Siegel's argument—unless they mean for readers to assume that complicity claims are a lesser kind of claim, less deserving of protection." *Id.* at 382–83.

[81] *See* Girgis, *supra* note 65, at 406 ("Religious freedom includes nothing if not the rights to worship, proselytize, and convert—forms of conduct (and speech) that can express the conviction that outsiders are wrong. Perhaps not just wrong, but deluded about matters of cosmic importance around which they have

law does not prohibit these more straightforward sources of dignitary injury. It would be perverse to contend that *directly* saying, "You are a murderer!"[82] is protected speech, but that the speaker should be penalized for *indirectly* communicating that same "social meaning" through her refusal of services.[83] The notion that religious accommodations should be curtailed to shelter third parties from messages about sin they do not like is truly remarkable for its audacity.

B. Harms to Religious Objectors

There is serious reason to doubt the model of third-party harm that Professors NeJaime and Siegel propose. But assuming material and dignitary harms should be considered in complicity cases, how should courts evaluate the harms to third parties as compared to the harms to the religious objectors themselves? To gather a sense of the true social cost of accommodation versus non-accommodation, the potential material and dignitary harms imposed on religious objectors must also be considered.

If complicity-based accommodations were to be significantly weakened or withdrawn, it is improbable that sincere religious objectors would continue to engage in business that makes them complicit with what they

---

ordered their lives—even *damnably* wrong." (footnote omitted)).

[82] NeJaime & Siegel, *supra* note 6, at 2576.

[83] *See id.* at 2586 ("Are there ways to accommodate religious persons without giving legal sanction to their view that other law-abiding citizens are sinning? If the government grants an accommodation, is the accommodation structured to block or amplify dissemination of religious claims about the sins of other citizens?").

believe to be sinful.[84] In the long run, sincere religious objectors might leave an entire industry altogether. In the short term, religious objectors will be subjected to catastrophic fines and penalties, as has been the case when RFRA-style protections are unavailing. As will be seen, the material and dignitary harms imposed on religious objectors would be significant, both in scope and magnitude, if RFRA accommodations were diminished or eliminated in complicity cases.

1. Material Harms

When RFRA protections are unavailable or denied, religious objectors commonly face grave consequences for refusing to provide goods or services in situations they believe would make them complicit with

[84] Cases are plentiful in which religious objectors choose to close their businesses rather than operate in a manner contrary to their convictions. *See infra* notes 85–97 and accompanying text; *see also* Epstein, *supra* note 68, at 36 ("The religious organizations only ask that people, for a limited subset of services, go down the block to another business that is happy to serve them. The human rights proponents ask people to give up their religious beliefs or go out of business entirely.").

sin. Florists,[85] bakers,[86] wedding photographers,[87] and other artistic professionals[88] who object to participating

---

[85] *See, e.g.*, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017). Baronelle Stuzmann, the elderly owner of Arlene's Flowers in Richland, Washington, declined to provide wedding flower arrangements for a longtime customer's same-sex wedding. *Id.* at 549. As a result, Stuzmann was found personally liable for violating Washington's law against discrimination and Consumer Protection Act. *Id.* at 550. The Washington Supreme Court affirmed the judgment ordering Stuzmann to pay monetary damages, attorneys' fees, and costs. *Id.* at 568. In a media statement, Stuzmann's lawyers alleged that the judgment threatens "not only her business, but also her family's savings, retirement funds, and home." *Washington Floral Artist to Ask US Supreme Court to Protect Her Freedom*, ALLIANCE DEFENDING FREEDOM (Feb. 16, 2017), http://www.adfmedia.org/News/PRDetail/8608 [https://perma.cc/4ZLB-N7XP].

Although the State of Washington has a religious freedom clause in its constitution, it has no RFRA statute. WASH. CONST., art. I, § 11; *see* Hunter Schwarz, *19 States that have 'Religious Freedom' Laws Like Indiana's that No One is Boycotting*, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/03/27/19-states-that-have-religious-freedom-laws-like-indianas-that-no-one-is-boycotting/ [https://perma.cc/QKP6-XHQL].

[86] *See, e.g.*, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017). A same-sex couple brought complaint against the proprietor of Masterpiece Cakeshop, Jack Phillips, for violating Colorado's Anti-Discrimination Act (CADA) when he declined to bake a cake for their wedding ceremony. *Id.* at 277. Phillips was found guilty and ordered to re-educate his staff and amend his company policies to comply with CADA to avoid financial penalties. *Id.* Masterpiece Cakeshop no longer offers wedding cakes. *See Bakery Will Stop Making Wedding Cakes After Losing Discrimination Case*, CBS DENVER (May 30, 2014), http://denver.cbslocal.com/2014/05/30/bakery-will-stop-making-wedding-cakes-after-losing-discrimination-case/

in same-sex ceremonies frequently face catastrophic fines and even potential jail time, which threatens their livelihoods and well-being. Owners of small bed-and-

---

[https://perma.cc/7423-AFXE]. Although the State of Colorado has a religious freedom clause in its constitution, it has no RFRA statute. *See* COLO. CONST. art. II, § 4; Schwarz, *supra* note 85.

For the case of Sweet Cakes by Melissa, see *infra* notes 94–98 and accompanying text.

[87] *See, e.g.*, Elane Photography, L.L.C. v. Willock, 284 P.3d 428 (N.M. App. 2012). When Jonathan and Elaine Huguenin, the owners of Elane Photography, declined to photograph Vanessa Willock's same-sex commitment ceremony, Willock filed a complaint with the New Mexico Human Rights Commission. *Id.* at 433. An administrative hearing found Elane Photography guilty of violating the New Mexico Human Rights Act and awarded $6,637.94 in attorneys' fees to Willock. *See id.* The New Mexico Supreme Court affirmed the judgment. Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013). In a separate concurrence, Justice Bosson wrote that although the Huguenins "now are compelled by law to compromise the very religious beliefs that inspire their lives," this sacrifice "is the price of citizenship." *Id.* at 79, 80 (Bosson, J., concurring).

[88] Joanna Duka and Breanna Koski, the owners of a Phoenix-based art studio that specializes in lettering and calligraphy for wedding invitations, have appealed the denial of a pre-enforcement challenge against a local ordinance that requires them to provide services to same-sex weddings and prevents them from communicating their faith-based reasons for celebrating marriages between one man and one woman. *See* Brief for Appellant at 1–2, Brush & Nib Studio v. City of Phoenix, No. CV2016-052251, 2017 WL 1113222 (Ariz. Ct. App. Mar. 8, 2017). Violation of the ordinance carries penalties of up to $2,500 in fines and six months in jail. *See* PHX., ARIZ., CODE §§ 1-5, 18-4, 18-7 (2010); *see also Artists to Appeals Court: Halt Phoenix Ordinance that Punishes Artistic Freedom with Jail Time*, ALLIANCE DEFENDING FREEDOM (Mar. 9, 2017), http://www.adfmedia.org/News/PRDetail/10037 [https://perma.cc/T9VE-J8HB].

breakfast establishments[89] and wedding venue providers[90] are often subjected to the same fate.

---

[89] *See, e.g.*, Will Brumleve, *B&B Ordered to Pay Damages to Same-Sex Couple, Stop Discriminating*, FORD CTY. REC. (Mar. 29, 2016), http://www.paxtonrecord.net/news/courts-police-and-fire/2016-03-29/bb-ordered-pay-damages-same-sex-couple-stop-discriminating [https://perma.cc/T9VE-J8HB]. Jim and Beth Walder, who own TimberCreek Bed & Breakfast in Illinois, face large fines for refusing to rent their facility for a same-sex wedding ceremony. *Id.*

In 2016, an administrative law judge ordered the Walders to pay a total of $80,000 in "emotional distress" damages and attorneys' fees for making a same-sex couple feel "embarrassed and humiliated." *Id.* The judge even "ordered the B&B to offer the Wathens access to the facility, within one year, for an event celebrating their civil union." *Id.* The judgment is being appealed. *See* Will Brumleve, *B&B Owner Taking Appeal to Court, Foregoing IHRC Hearing*, FORD CTY. REC. (Dec. 26, 2016), http://www.paxtonrecord.net/news/courts-police-and-fire/2016-12-26/bb-owner-taking-appeal-court-foregoing-ihrc-hearing [https://perma.cc/V4GL-WF6H].

[90] *See, e.g.*, Ocean Grove Camp Meeting Ass'n Of The United Methodist Church v. Papaleo, No. CIV.A.07-3802 (JAP), 2007 WL 3349787 (D.N.J. Nov. 7, 2007), *aff'd in part and remanded sub nom.* Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo, 339 F. App'x 232 (3d Cir. 2009). New Jersey's Ocean Grove Camp Meeting Association was ordered to offer their pavilion as a wedding venue for same-sex couples under the New Jersey Law Against Discrimination. *Id.* at *2. Immediately thereafter, the Association shuttered its wedding venue service. *See* MaryAnn Spoto, *State Sides with Lesbian Couple in Fight against Ocean Grove Association*, NJ.COM (Dec. 30, 2008), http://www.nj.com/news/index.ssf/2008/12/judge_rules_monmouth_church_gr.html [https://perma.cc/774T-ESGL] (noting that the parachurch organization no longer permits wedding ceremonies on its property).

In 2011, a lesbian couple successfully sued the Catholic owners of the Wildflower Inn in Vermont for declining to host their same-sex reception. *See* Katie Zezima, *Couple Sues a Vermont Inn for Rejecting Gay Wedding*, N.Y. TIMES (July 19,

Pharmacists and other health care professionals who decline to provide birth control they believe to be abortifacient can also be confronted with hefty penalties.[91] Both for-profit and non-profit organizations

---

2011), https://nyti.ms/2psU7iK. As punishment, the owners had to pay $10,000 in civil fines to the Vermont Human Rights Commission and put $20,000 in a charitable trust for the lesbian couple. *See* Katie J.M. Baker, *'Family Friendly' Inn Decides it Would Rather Stop Hosting Wedding Receptions Altogether Than Cater to Lesbian Couple*, JEZEBEL (Aug. 24, 2012), http://jezebel.com/5937548/family-friendly-inn-decides-it-would-rather-stop-hosting-weddings-altogether-than-cater-to-lesbian-couple [https://perma.cc/XS8D-RZEZ]. Jim and Mary O'Reilly no longer host wedding receptions on their property. *Id.*

Robert and Cynthia Gifford, the residents of a New York farm that also serves as a wedding venue, were fined $13,000 in a similar case in 2014. *See* Kirsten Andersen, *Catholic Couple Fined $13,000 for Refusing to Host Same-Sex 'Wedding' at Their Farm*, LIFESITENEWS (Aug. 20, 2014), https://www.lifesitenews.com/news/catholic-couple-fined-13000-for-refusing-to-host-same-sex-wedding-at-their [https:// perma.cc/ F9SL-D89F]. The Giffords ultimately decided not to appeal the ruling and have stopped using the farm for wedding ceremonies. *See* Valerie Richardson, *New York Farm Owners Give up Legal Fight after Being Fined $13,000 for Refusing to Host Gay Wedding*, WASH. TIMES (Feb. 23, 2016), http://www.washingtontimes.com/news/2016/feb/23/robert-cynthia-giffords-give-legal-fight-over-same/ [https://perma.cc/ F9SL-D89F].

[91] *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1072 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). In 2007, the Washington State Pharmacy Board passed regulations eliminating conscience-based referrals and requiring pharmacies to carry "morning-after pills" Plan B and ella. *Id.* at 1072. Failure to comply with the regulations may result in "discipline or other enforcement actions." WASH. ADMIN. CODE § 246-869-010 (2007). The Storman family, which owns Ralph's Thriftway pharmacy, and two pharmacists objected to the regulations because of their belief that "dispensing these drugs

may suffer when complicity-based religious objections are not respected.[92] Perhaps most radically of all,

---

'constitutes direct participation in the destruction of human life.'" *Stormans*, 794 F.3d at 1073 n.3. The trial court found that the State's regulations were designed to target religious health care providers. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 987 (W.D. Wash. 2012), *rev'd sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015). Nevertheless, the Ninth Circuit denied the plaintiffs' claims and held that the regulations did "not infringe a fundamental right." *Stormans*, 794 F.3d 1064. at 1088.

Over the objection of Chief Justice Roberts and Justices Alito and Thomas, the Supreme Court denied review. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016). Justice Alito observed that Washington's regulations "are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications." *Id.* at 2433 (Alito, J., dissenting from denial of certiorari). Anticipating the effect of the regulations, he suggested that Washington "would rather have no pharmacy than one that doesn't toe the line on abortifacient emergency contraceptives." *Id.* at 2440. Marveling at the policy's "hostility toward religious objections" and the Court's failure to review the case, Justice Alito warned, "If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern." *Id.* at 2433.

[92] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76 (2014). Hobby Lobby, Conestoga Wood, and Mardel faced crippling fines for non-compliance with the Department of Health and Human Services (HHS) regulations about contraceptive provision. The Court detailed the various costs of non-compliance for Hobby Lobby:

> If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. For Hobby Lobby, the bill could amount to $1.3

Professors NeJaime and Siegel suggest that religious leaders—including priests, pastors, imams, and rabbis—

> million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

Id. at 2275–76 (citation omitted). In addition to these for-profit examples, consider the non-profit petitioners in *Zubik v. Burwell,* 136 S. Ct. 1557, 1559 (2016) (per curiam). The Roman Catholic Bishop of Pittsburgh, Priests for Life, the Roman Catholic Archbishop of Washington, East Texas Baptist University, the Little Sisters of the Poor, Southern Nazarene University, and Geneva College were among the organizations that challenged the Department's contraceptive mandate on RFRA grounds. *Id.* Organizations that fail to comply with the contraceptive mandate or obtain an exemption would be subject to a daily fine of $100 per employee. *See* Sarah Torre, *Religious Liberty at the Supreme Court: Little Sisters of the Poor Take on Obamacare Mandate*, HERITAGE FOUND. (Mar. 22, 2016), http://www.heritage.org/religious-liberty/report/religious-liberty-the-supreme-court-little-sisters-the-poor-take-obamacare [https://perma.cc/M5V7-U9ZA].

If unable to obtain an exemption, the Little Sisters of the Poor could be fined "up to $70 million a year" for noncompliance. *Id.* Catholic Charities in Pittsburgh, which has a total operating budget of $10 million, would face between "$2 million to $4 million a year" in federal fines. *See* Brian Bowling, *Bishops Zubik, Persico Say They Can't Cooperate with Health Care Mandate*, TRIBLIVE (Nov. 12, 2013), http://triblive.com/news/adminpage/5054656-74/mandate-catholic-coverage [https://perma.cc/8ZVB-XYG4]. California's tiny Thomas Aquinas College "faces fines of up to $2.8 million a year if it does not comply with the mandate." Kurt Jensen, *Ultimate Relief from Mandate May Lie Beyond the Courts, Say Plaintiffs*, CATH. NEWS SERV. (Mar. 23, 2016), http://www.catholicnews.com/services/englishnews/2016/ultimate-relief-from-mandate-may-lie-beyond-the-courts-say-plaintiffs [https://perma.cc/8ZVB-XYG4].

should have no choice but to solemnize same-sex ceremonies.[93]

Among the many penalties imposed on religious objectors in complicity cases, one particularly draconian instance stands out: In 2013, Aaron and Melissa Klein, the proprietors of a small Oregon bakery called Sweet Cakes by Melissa, declined to bake a cake for a same-sex wedding ceremony.[94] When the same-sex couple filed a complaint, Oregon Labor Commissioner Brad Avakian ordered the Kleins to pay $135,000 in damages to compensate the couple for "emotional, mental and physical suffering" related to the refusal.[95] Although the judgment is still being appealed, the massive penalty and their vulnerability to future litigation forced the Kleins to close their bakery in October 2016.[96] "We lost our business," Melissa Klein said.[97] "You work so hard to build something up, and something you've poured your

---

[93] *See* NeJaime & Siegel, *supra* note 6, at 2561 ("Many states that allow same-sex couples to marry have enacted legislation making clear that religious denominations and clergy have no obligation to solemnize a same-sex marriage."); *cf.* Complaint at 2, Knapp v. City of Coeur d'Alene, 172 F. Supp. 3d 1118 (D. Idaho 2016) (No. 2:14-CV-00441-REB) (describing the plight of Christian ministers at a wedding chapel who faced up to 180 days in jail and up to $1,000 in fines for each day they refused to perform same-sex ceremonies in violation of a local nondiscrimination ordinance).

[94] *See In re* Melissa Elaine Klein, Nos. 44-14, 45-14, 2015 WL 4868796, at *3 (OR BOLI July 2, 2015).

[95] *Id.* at *23.

[96] *See* Casey Parks, *Sweet Cakes by Melissa, Bakery that Turned Away Lesbians, Closes*, OREGONIAN (Oct. 6, 2016), http://www.oregonlive.com/portland/index.ssf/2016/10/sweet_cakes_by_melissa_bakery.html [https://perma.cc/R7TV-543Y].

[97] *Id.*

heart into and was your passion, to lose that has been devastating for me."[98]

These heavy-handed fines and penalties ultimately drive religious objectors out of their chosen service, trade, or industry. In addition to the economic harms imposed on the objectors themselves, the vacuum created imposes material harms on third parties—particularly foster children, victims of human trafficking, the elderly poor, and all those who depend on religious hospitals and healthcare providers. The withdrawal of faith-based adoption services from states where "anti-discrimination" legislation would force organizations like Catholic Charities to place children with adoptive same-sex couples,[99] for instance, has left a gaping vacuum that harms thousands of children who languish in the foster care system.[100] A member of the U.S. Commission on

---

[98] *Id.*

[99] *See* Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES (Dec. 28, 2011), https://nyti.ms/2n7lwCY (noting Catholic Charities' withdrawal of adoption services from Massachusetts, Illinois, and Washington, D.C.).

[100] *See* Ryan Anderson & Sarah Torre, *Adoption, Foster Care, and Conscience Protection*, HERITAGE FOUND. (Jan. 15, 2014), http://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection [https://perma.cc/R3VU-FJTD].

In the two decades before Catholic Charities of Boston ended its adoption program, it helped place at least 720 children in permanent adoptive homes. *See* Archdiocese of Boston, *Catholic Charities of Boston To Discontinue Adoption Services* (Mar. 10, 2006), http://www.bostoncatholic.org/uploadedFiles/News_releases_2006_statement060310-1.pdf; *see also* U.S. Conference of Catholic Bishops, *Discrimination Against Catholic Adoption Services* (2016), http://www.usccb.org/issues-and-action/religious-liberty/upload/Adoption-Services-Fact-Sheet-2016.pdf ("Catholic Charities of Boston, which had been one of the nation's oldest adoption agencies,

Civil Rights observed with concern in 2016: "It is possible, perhaps even probable, that in the near future there will be no orthodox Christian organizations partnering with the government to provide adoption and foster care services in the United States."[101]

Forcing religious-affiliated organizations, such as Christian colleges, to provide health insurance plans that include allegedly abortifacient forms of birth control led some institutions to end health insurance coverage for their students and employees altogether.[102] If forced to

---

faced a very difficult choice: violate its conscience, or close its doors.").

In 2011, Illinois passed civil union legislation that, in conjunction with an existing "anti-discrimination" law, required faith-based foster care and adoption service providers to place children with cohabiting and same-sex couples. *See* Manya A. Brachear, *3 Dioceses Drop Foster Care Lawsuit*, CHI. TRIB. (Nov. 15, 2011), http://articles.chicagotribune.com/2011-11-15/news/ct-met-catholic-charities-foster-care-20111115_1_civil-unions-act-catholic-charities-religious-freedom-protection. As a result, Catholic Charities, the Evangelical Child and Family Agency, and other faith-based adoption service providers had to drop the adoption services of more than 2,000 children. *See* Anderson & Torre, *supra*. Even when these children's cases are transferred to other agencies, the ostracism of conscientious faith-based providers burdens the foster care system. *Id.*

[101] *See* U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 61 (2016) (statement of Comm'r Peter Kirsanow).

[102] *See* Wheaton Coll. v. Burwell, 791 F.3d 792, 793 (7th Cir. 2015). When the Seventh Circuit refused to issue a preliminary injunction against the contraceptive mandate, Wheaton College chose to drop its health insurance plan altogether rather than violate its religious principles or pay substantial fines. *See* Manya Brachear Pashman, *Wheaton College Ends Coverage amid Fight Against Birth Control Mandate*, CHI. TRIB. (July 29, 2015), http://www.chicagotribune.com/news/local/

choose between their charitable work and their religious beliefs, the Little Sisters of the Poor would be compelled to stop serving the 13,000 elderly poor they care for on a regular basis.[103]

Likewise, victims of human trafficking are harmed when religious groups' anti-trafficking work is defunded simply because those groups do not provide or refer for abortion, contraception, or sterilization services.[104] The failure to respect faith-based providers'

---

breaking/ct-wheaton-college-ends-student-insurance-met-20150728-story [https://perma.cc/6ZGB-EUYQ].

[103] *See Who Are the Little Sisters of the Poor?*, THE LITTLE SISTERS OF THE POOR, http://thelittlesistersofthepoor.com/who-are-the-little-sisters-of-the-poor-1/#who-are-the-little-sisters-of-the-poor [https://perma.cc/Y5L7-XLS8] (last visited Dec. 20, 2017) ("The Little Sisters serve more than 13,000 elderly poor in 31 countries around the world. The first home opened in America in 1868 and now there are nearly 30 homes in the U.S. where the elderly and dying are cared for with love and dignity until God calls them home."); *see also* Loraine Maguire, *Obamacare Attacks Religious Liberty: Little Sisters Mother Provincial*, USA TODAY (Mar. 22, 2016), https://www.usatoday.com/story/opinion/2016/03/22/little-sisters-poor-obamacare-hhs-mandate-supreme-court-religious-liberty-column/82076170/ [https://perma.cc/BKS3-ES3Q] ("Most of the people who live in my residence have nowhere else to go.").

[104] *See* Chris Boyette, *Federal Program Denies Grant to Catholic Group to Help Sex Trafficking Victims*, CNN (Dec. 6, 2011), http://religion.blogs.cnn.com/2011/12/06/federal-program-denies-grant-to-catholic-group-to-help-sex-trafficking-victims/ (reporting on the defunding of the United States Conference of Catholic Bishops' Migrant and Refugee Service). The offending language in the USCCB's contract read:

> As we are a Catholic organization, we need to ensure that our victims services funds are not used to refer or fund activities that would be contrary to our moral convictions and religious beliefs. . . . Specifically,

complicity-based objections to participating in such services ultimately harms "thousands of victims" of human trafficking.[105]

Finally, if the Church Amendment and other so-called "healthcare refusal" laws—which protect the conscience rights of health care providers to refuse to perform or assist with abortions—are withdrawn or diminished as Professors NeJaime and Siegel propose,[106] many faith-based hospitals and physicians would exit the healthcare industry rather than violate their beliefs. This would represent a massive disruption of American healthcare delivery since "one in six patients in the United States is treated by a Catholic hospital"[107] and

---

> subcontractors could not provide or refer for abortion services or contraceptive materials for our clients pursuant to this contract.

KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR 229 (1st ed. 2009) (alteration in original) (quoting the terms of the contract). Representative Chris Smith, the author of the Trafficking Victims Protection Act of 2000, remarked, "If you are a Catholic, or other faith-based [non-governmental organization], or a secular organization of conscience, there is now clear proof that your grant application will not be considered under a fair, impartial and totally transparent process . . . ." *See* Boyette, *supra*.

[105] *See* Boyette, *supra* note 104; *see also* Pete Winn, *HHS Withholds Grant from U.S. Conference of Catholic Bishops Apparently Because Church Opposes Abortion*, CATH. NEWS SERV. (Oct. 24, 2011), http://www.cnsnews.com/news/article/hhs-withholds-grant-us-conference-catholic-bishops-apparently-because-church-opposes (noting that federal grants to the USCCB's Migrant and Relief Services had helped "more than 2,700 victims" of human trafficking).

[106] *See* NeJaime & Siegel, *supra* note 6, at 2566.

[107] *Id.* at 2556–57 (citing *Catholic Health Care in the United States*, CATH. HEALTH ASS'N OF THE U.S. 1 (Jan. 2014), https://www.chausa.org/docs/default-source/general-files/cha_miniprofile_final.pdf [http://perma.cc/J3WL-Z4SA]).

"[r]eligious hospitals represent nearly a fifth of the healthcare delivery system in the United States."[108] The extent to which Professors NeJaime and Siegel successfully demonstrate the United States' dependence on faith-based healthcare is exactly the extent to which they reveal the devastation that would result if Catholic and other religious healthcare providers were forced to close their doors. Millions of Americans would experience reduced access and greater difficulty in obtaining life-saving treatment and other medical services.[109]

2. Dignitary Harms

Professors NeJaime and Siegel assert that providing exemptions for complicity-based claims "has potential to harm those whom the claimants view as sinning."[110] But requiring religious actors to either violate their beliefs or close their businesses imposes dignitary harms on those religious objectors. Unlike the existing legal regime—which offers latitude for both individuals seeking services and religious objectors to live in accordance with their beliefs—weakening RFRA protections would marginalize religious dissenters' views

---

[108] *Id.* at 2557 (citing Jennifer Harper, *Doctors Face Religious Conflicts at Hospitals*, WASH. TIMES, Apr. 14, 2010, http://www.washingtontimes.com/news/2010/apr/14/doctors-report-religious-conflicts-at-hospitals [http://perma.cc/TN3T-UDBE]).

[109] *See Catholic Health Care in the United States*, CATH. HEALTH ASS'N OF THE U.S. (Jan. 2017), https://www.chausa.org/about/about/facts-statistics [https://perma.cc/GE7B-UNQJ] (indicating that 649 Catholic hospitals annually admit more than five million patients, provide 105 million outpatient visits, and receive more than twenty million emergency room visits).

[110] *See* NeJaime & Siegel, *supra* note 6, at 2516.

with the force of law. The "social meaning" of revoking RFRA protections for pharmacists who do not wish to dispense abortifacients or adoption agencies which do not wish to place children with same-sex couples is clear: traditional views on contested sexual norms cannot be acted upon in public life. It sends a message that individuals with religiously motivated beliefs about sexual morality are not welcome in certain industries. ("No Evangelicals need apply.") Indeed, if an individual *does* act upon her religious convictions and integrates her faith and work, the law will not shield her and may actually impose penalties for her divergence from the new political orthodoxy on sexual morality.

Such a legal regime imposes a far greater stigma on religious believers than does the status quo on third parties seeking services. This is for two reasons. First, because the force of law would be used to actively penalize complicity-based refusals, this legal regime would be more coercive. Without robust RFRA protections, the law would directly disfavor religious individuals who hold traditional views by making their refusals illegal. The status quo minimizes coercion by permitting the religious actor to refuse or not, and by allowing the third party seeking services to select any other willing provider. Second, weakening or eliminating accommodations for complicity-based refusals has a pedagogical effect that stigmatizes religious actors who hold traditional views on sexual morality. Rather than remain neutral as between the religious objector and the third party and allowing both sides to retain maximal freedom to organize their affairs, such a rule would explicitly *disfavor* the religious objector.[111] It would treat the dignitary interests of the third party as *more* worthy

[111] *See supra* note 65.

of legal solicitude. The "social meaning" of this favoritism would communicate that the religious objector has sinned by acting on her archaic moral beliefs. It would convey, in short, that she is a bigot.[112]

Thus, using Professors NeJaime and Siegel's reasoning and definition of dignitary harm, the religious objector is harmed at least as much (if not more) when accommodations are denied than the third party seeking services when accommodations are permitted.

III. Accommodations Promote Social Peace

Professors NeJaime and Siegel argue that accommodations for complicity-based religious objections will only prolong and intensify conflict over culture war issues.[113] They argue that the "social logic" of "cross-denominational mobilization"[114] means politically active religious traditionalists will try "to enforce traditional morality in the law of abortion and marriage and to seek conscience-based exemptions from laws that depart from traditional morality."[115] Having lost the primary battle, traditionalists now use complicity-based claims as "a way

---

[112] It is commonly asserted that protections for religious freedom shelter bigotry. *See, e.g.*, Valerie Tarico, *Right-Wing Christianity Teaches Bigotry: The Ugly Roots of Indiana's New Anti-Gay Law*, SALON (Apr. 4, 2015), http://www.salon.com/2015/04/04/right_wing_christianity_teaches_bigotry_the_ugly_roots_of_indianas_new_anti_gay_law_partner/ [https://perma.cc/BU6R-H5QZ] (describing a state RFRA law as motivated by "bigotry and homophobia"). Curtailing RFRA protections because of the "dignitary harms" imposed on third parties grants these accusations legal imprimatur.

[113] *See* NeJaime & Siegel, *supra* note 6, at 2553–63 ("[A]ccommodating religious exemption claims may not settle conflict, as many contend.").

[114] *Id.* at 2544.

[115] *Id.* at 2548.

to continue conflict over community-wide norms in a new form."[116] Widespread healthcare refusal laws, for example, can be used to impede access to abortion[117]—especially in areas dominated by religiously affiliated healthcare providers.[118] Conscience protections for wedding vendors could be used "to forestall or restrict an antidiscrimination regime that includes sexual orientation."[119] Thus, religious accommodations perpetuate culture war rivalries that Professors NeJaime and Siegel would rather put an end to.

Even if Professors NeJaime and Siegel are right that religious exemptions perpetuate culture war conflicts, there is no reasonable or equitable alternative. There is reason for hope, however, that accommodations can promote social peace rather than intensify conflict.

A. No Reasonable Alternatives to Accommodation Exist

No matter how much Professors NeJaime and Siegel wish that the culture wars would disappear if religious accommodations were curtailed, the reality is that crushing the "other side" will not work.[120] This is

---

[116] *Id.* at 2553.
[117] *Id.* at 2555.
[118] *Id.* at 2557.
[119] *Id.* at 2564.
[120] *See generally* Girgis, *supra* note 65, at 413. Although NeJaime and Siegel may not be motivated by political vindictiveness, there is an undercurrent of victor's justice present among opponents of religious accommodations. This attitude is best reflected by Professor Mark Tushnet, who wrote in a revealing and now infamous blog post:

> The culture wars are over; they lost, we won. . . . For liberals, the question now is how to deal with the losers in the culture wars. That's

> mostly a question of tactics. My own judgment is that taking a hard line ("You lost, live with it") is better than trying to accommodate the losers . . . . Trying to be nice to the losers didn't work well after the Civil War, nor after *Brown*. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.) I should note that LGBT activists in particular seem to have settled on the hard-line approach, while some liberal academics defend more accommodating approaches. . . . Of course all bets are off if Donald Trump becomes President.

Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [https://perma.cc/DCW5-BZKU].

In a later clarification blog post, Tushnet noted that reactions to his post claimed that he believed religious objectors, especially in complicity cases, should be treated like defeated Confederates and Nazis:

> In the context I was writing about, for example, "taking a hard line" means opposing on both policy and constitutional grounds free-standing so-called "religious liberty" laws. . . . [T]he exemptions that might satisfy "our side" would have to be pretty narrow [including] . . . some sort of constraint on the exemptions' availability in cases of claimed "complicity." (I don't know whether even these would be acceptable to activists on "our side.") . . . [L]ike the Japanese soldiers who were stranded on islands in the Pacific and didn't know the war was over, so too many people on their side haven't yet come to terms with the fact that they lost the culture wars.

Mark Tushnet, *What Does "Taking a Hard Line" Mean?*, BALKINIZATION (May 9, 2016, 8:28 PM), https://balkin.

because the clash runs deeper than the surface legal conflict between free exercise and nondiscrimination: it is a "conflict between two worldviews, both held with the intensity generally associated with religious belief."[121] The most fundamental convictions about the nature of God, man, and morality are at stake. A take-no-prisoners legal approach is unlikely to change the deeply held beliefs of religious traditionalists who, as of yet, still constitute a sizable nationwide minority. This is especially true while conscience protections in complicity cases still enjoy substantial support.[122] Subjecting sympathetic religious objectors to severe penalties and

---

blogspot.com/2016/05/what-does-taking-hard-line-mean.html [https://perma.cc/G84Q-F77S].

[121] *See* Statement of Comm'r Peter Kirsanow, *supra* note 101, at 43.

[122] *See* PEW RES. CTR., WHERE THE PUBLIC STANDS ON RELIGIOUS LIBERTY VS. NONDISCRIMINATION 3 (2016) (finding that 30% of U.S. adults believe "[e]mployers who have a religious objection to the use of birth control should be . . . able to refuse to provide it in health insurance plans for their employees," and that 48% believe "[b]usinesses that provide wedding services should be . . . able to refuse to provide those services to same-sex couples if the business owner has religious objections to homosexuality"); *National Poll Shows Majority Support Healthcare Conscience Rights, Conscience Law*, CHRISTIAN MED. ASS'N (May 2011), http://www.freedom2care.org/docLib/200905011_Pollingsummaryhandout.pdf [https://perma.cc/6D3Z-FS3T] (finding that 77% of U.S. adults believe healthcare professionals should not be "forced to participate in procedures or practices to which they have moral objections," and that 50% support "a law under which federal agencies and other government bodies that receive federal funds could not discriminate against hospitals and health care professionals who decline to participate in abortions.").

jail time may alienate those who would otherwise support socially liberal policies on abortion and LGBT issues.[123]

Court rulings which are perceived to crush religious dissenters may unintentionally revive the specter of persecution (perhaps plausibly), leading disfavored religious objectors to cling more intensely to their beliefs.[124] A hard line approach would socially exclude and marginalize religious objectors, driving many people of faith out of entire industries and segments of society.[125] Indeed, activists demanding the

---

[123] PEW RES. CTR, *supra* note 122, at 5. (finding that 22% of U.S. adults sympathized with both sides of the contraceptive coverage issue, and that 18% of U.S. adults sympathized with both sides of the wedding vendor issue).

[124] *See* Bradford Richardson, *Persecution of Christians is on the Rise, Americans Say*, WASH. TIMES, Apr. 5, 2016, http://www.washingtontimes.com/news/2016/apr/5/christians-facing-increased-persecution-america-po/ [https://perma.cc/FKA3-CGX8] (reporting that 63% of LifeWay survey respondents believe Christians face growing levels of persecution); *see also* Right Wing Watch Staff, *The Persecution Complex: The Religious Right's Deceptive Rallying Cry*, RIGHT WING WATCH 2 (2014), http://files.rightwingwatch.org/uploads/persecution_report_V2.pdf ("The religious persecution narrative is nothing new . . . but it has taken off in recent years in reaction to advances in gay rights and reproductive freedom."); *cf. Matthew* 5:11 (New King James) ("Blessed are you when they . . . persecute you . . . for My sake.").

[125] *See* Statement of Comm'r Peter Kirsanow, *supra* note 101, at 111 ("People who live in accordance with their unfashionable religious beliefs will be unable to work in many professions. When a baker or a photographer or a CEO is forced to participate in activities that offend their religious beliefs, what hope is there for a doctor, a counselor, a lawyer? Traditional believers will have very few careers where they can both make a living and live according to their faith. It is an unofficial form of the legal disabilities imposed on English Catholics following the Glorious Revolution."); *cf.* Sohrab Ahmari, *Sweden Blacklists an Antiabortion Midwife*, WALL ST. J. (Apr. 10, 2017,

withdrawal of religious liberty protections may themselves be engaged in a form of social hostility toward religious groups that adhere to traditional moral beliefs.[126] If "pluralist democracy is dynamic and fragile,"[127] then maintaining it "depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains."[128] This is a distinct danger because pluralistic democracy "needs emerging groups to commit to its processes just as much as it needs established groups to stick to those processes."[129]

Removing accommodations and imposing stiff penalties on religious objectors may also entrench resistance to ascendant sexual mores and foment social backlash. When courts aggressively implement a social agenda, it can be interpreted that the courts engage opponents more intensely than supporters, which could lead to political exploitation and widespread resistance to

---

2:33 AM), https://www.wsj.com/articles/sweden-blacklists-an-antiabortion-midwife-1491768904 [https://perma.cc/HF7Q-AGDQ] (describing the legal and professional ostracism of a Swedish midwife who refuses to perform abortions).

[126] *See, e.g.*, Tushnet, *Abandoning Defensive Crouch*, *supra* note 120.

[127] William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005).

[128] *Id.* Eskridge adds, "Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them . . . or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion." *Id.* at 1293.

[129] *Id.* at 1294.

that agenda.[130] Widespread support for conscience exceptions in complicity cases, the deeply held nature of religious belief, and the backing of a major political party increases the likelihood of political backlash. The elimination of accommodations in complicity cases is unlikely to dampen the flame of cultural contests. Not only are these conflicts inevitable, they may even be desirable when properly channeled.[131]

Since "total war" tactics are deleterious to social cohesion, living in a sharply divided pluralistic society requires both accommodation of religious believers and respect for those who do not share their moralistic views. Professors NeJaime and Siegel's explanation that complicity claims are unique in their "social logic" is inadequate. Even if religious accommodations are sometimes used "to enforce traditional norms against those who do not share their beliefs"[132] rather than to "preserv[e] space for distinctive religious beliefs and

---

[130] *See* Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 148–51 (2013); *see also* Neal Devins, *I Love You, Big Brother*, 87 CAL. L. REV. 1283, 1297 (1999) (remarking on "the disastrous backlash that occurred in the wake of Roe v. Wade"); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994). Professor Siegel, while acknowledging destructive aspects of backlash, believes that it nonetheless has redeeming and socially beneficial qualities. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 388–91 (2007).

[131] *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 101, at 214 (testimony of Marc O. DeGirolami) ("Conflict is an essential and deep feature of our society—both unavoidable and actually desirable, since its source is our different backgrounds, different outlooks, and different memories.").

[132] NeJaime & Siegel, *supra* note 6, at 2591.

practices,"[133] this use is no more injurious to pluralism than the proposal for which Professors NeJaime and Siegel advocate. On balance, offering robust protections for religious objectors is more likely to contribute to a diverse public square.[134]

Rather than viewing social conflict as "a barely contained threat to individual rights and peaceful coexistence"[135] and "evincing skepticism that shared life is at all possible between groups locked in intractable conflict,"[136] skeptics of religious accommodations should embrace what Professor John Inazu calls, *confident pluralism*.[137] This approach calls both religious believers and skeptics alike to acknowledge that "shared existence is not only possible, but also necessary."[138] According to Inazu, both sides should accept a constitutional commitment to both *inclusion* (that we are continually reshaping the boundaries of our political community)[139] and *dissent* (that even as we work to extend and

---

[133] *Id.* at 2590.

[134] *See* Ryan T. Anderson, *The Defense of Marriage Isn't Over*, PUB. DISCOURSE (Oct. 8, 2014), http://www.thepublicdiscourse.com/2014/10/13889 [http://perma.cc/UA54-7EH5] ("Protecting religious liberty and the rights of conscience is the embodiment of a principled pluralism that fosters a more diverse civil sphere. Indeed, tolerance is essential to promoting peaceful coexistence even amid disagreement.").

[135] Girgis, *supra* note 65, at 413.

[136] *See id.* (suggesting that the "honest Rousseauian fear that "[i]t is impossible to live at peace with those whom we regard as damned" motivates the quest to retract religious accommodations (quoting JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 122 (Maurice Cranston trans., Penguin ed., 1968) (1762)).

[137] JOHN D. INAZU, CONFIDENT PLURALISM (2016).

[138] *Id.* at 6. Professor Inazu adds that confident pluralism "does not suppress or ignore conflict—it invites it." *Id.* at 7.

[139] *Id.* at 15–16.

renegotiate these boundaries, we recognize the freedom of citizens in the voluntary groups of civil society to differ from established norms).[140] Although neither of these principles are absolute, they can help foster a modest agreement on the individual rights of both parties. Rather than seeking to impose their own orthodoxy, both sides must allow room for mutual toleration.[141]

Confident pluralism also proposes a civic aspiration of "living speech," which prioritizes dialogue and persuasion over combativeness and coercion. [142] Both traditionalists and advocates clamoring for the withdrawal of conscience protections would do well to recall the Court's advice to the Texans who proscribed flag desecration: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."[143]

B. Private Ordering and Markets Mitigate Social Conflict

Rather than using the coercive force of law to impose a new orthodoxy on matters of sexual politics, private ordering—guided by principles of confident pluralism[144]—should be allowed to flourish. Market-

---

[140] *Id.* at 16.
[141] Ward v. Polite, 667 F.3d 727, 735 (6th Cir. 2012) ("Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination.").
[142] INAZU, *supra* note 137, at 101.
[143] Texas v. Johnson, 491 U.S. 397, 419 (1989).
[144] Professor Inazu affirms that "[b]oycotts, strikes, and protests against private actors are in most cases compatible with confident pluralism," but warns that "[w]hen we engage in these forms of collective action, we should bear in mind the civic aspirations of tolerance, humility, and patience." *See supra* note 137, at 115.

based systems, which permit businesses and civil society groups to shape social norms, are preferable to a compulsory legal approach that eliminates accommodations for religious objectors.[145] Rather than impose a uniform orthodoxy on society about contested moral issues, "subsidiary institutions [should] hav[e] spheres of private ordering that allow them to organically . . . come to their own conclusions about those contested matters."[146]

Civic organizations—whether motivated by profit or conviction—have already begun to develop their own approaches to navigating conflicts between religious liberty and issues of gender, sexuality, and reproduction. For example, the popular room-rental service Airbnb recently adopted a policy prohibiting all of its users from discriminating on the basis of "sexual orientation, gender identity, or marital status."[147] Airbnb's policy shapes social norms by excluding many religious traditionalists

---

[145] *See* Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 MICH. ST. L. REV. 643, 672 (2016) (arguing that laws impinging on religious liberty "do not leave space for mediating conflicts between actors within the domains of private ordering. Instead, they turn all important questions into zero-sum contests and raise the stakes even higher"); *id.* at 679–80 (observing that when civic goods "require cooperation for their realization, legal coercion destroys both the economic and the moral value of those plural practices and institutions of private ordering.").

[146] Michael P. Moreland, *Religious Freedom and Discrimination*, 4 J. CHRISTIAN LEGAL THOUGHT 10 (2014).

[147] *See Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect [https://perma.cc/495K-2DZ2] (last visited Dec. 20, 2017).

from using its service.[148] But religious traditionalists remain at liberty to use other online room-rental services, or to set up their own service that complies with the dictates of conscience. Ride-hailing services such as Uber and Lyft prohibit both drivers and passengers from discriminating on the basis of "sexual orientation or gender identity."[149] If for some reason a religious objector refused to use Uber on that basis, they would remain free to hail a taxi or launch their own ride-hailing service.

Boycotts can serve a similar purpose, so long as they are used to "represent[] minority viewpoints against majoritarian norms" rather than "harness[] majoritarian power to squelch dissenting viewpoints."[150] Most

---

[148] Users who decline "won't be able to host or book using Airbnb" and are invited to close their accounts. *General questions about the Airbnb Community Commitment*, AIRBNB, https://www.airbnb.com/help/article/1523/general-questions-about-the-airbnb-community-commitment [https://perma.cc/8AJN-JWF5] (last visited Dec. 20, 2017).

[149] Ben Wear, *Uber, Lyft Say Policies Ban Discrimination Based on Sexual Orientation*, AUSTIN AM-STATESMAN (Apr. 24, 2017), http://www.statesman.com/news/transportation/uber-lyft-say-policies-ban-discrimination-based-sexual-orientation/eWDh5e48iN3OXCBP1rmDEM/ [https://perma.cc/PJK3-VFNM]; *Uber Non-Discrimination Policy*, UBER, https://www.uber.com/legal/policies/non-discrimination-policy/en/ [https://perma.cc/8JKY-X6LT] (last visited Dec. 20, 2017) (prohibiting "discrimination on the basis of discrimination against riders or drivers based on . . . sexual orientation, . . . marital status, [or] gender identity"). Violators "lose access to the Uber platform." *Id.*

[150] *See* INAZU, *supra* note 137, at 107; *see also* Ross Douthat, *The Case of Brendan Eich*, N.Y. TIMES: EVALUATIONS (Apr. 8, 2014), https://nyti.ms/2mpxYAr ("[Although] a healthy pluralism inevitably involves community norms and community policing in some form, I suspect that an elite culture that enforces the new norms on marriage *this* strictly, and polices its own ranks *this* rigorously, is likely to find

consumer boycotts—such as those against Target, Chick-fil-A, and Hobby Lobby[151]—"occur in reasonably pluralistic settings."[152] Others forms of collective action, which resemble witch-hunting more than constructive norm-shaping, might violate the principles of pluralism.[153]

Instances of market-driven norm-shaping are healthy insofar as they seek to nudge attitudes and behaviors rather than coerce them. If businesses such as Airbnb and Uber can use market power to express their views and influence public opinion (even when doing so imposes material or "dignitary harms" on third parties), why not ChristianMingle when its core religious beliefs

---

reasons (and, indeed, is already adept at finding them) to become increasingly anti-pluralist whenever it has the chance to enforce those same norms on society as a whole.").

[151] *See, e.g.*, Hayley Peterson, *The Target Boycott Cost More than Anyone Expected — and the CEO was Blindsided*, BUS. INSIDER (Apr. 6, 2017), http://www.businessinsider.com/target-ceo-blindsided-by-boycott-2017-4 [https://perma.cc/T32U-XRSJ] (describing the effects of a boycott related to Target's transgender restroom policy); Editorial, *Progressives Against Lunch*, WALL ST. J. (May 8, 2016), https://www.wsj.com/articles/progressives-against-lunch-1462744747 [https://perma.cc/LCC9-K52H] (describing both boycotts and counter-boycotts of Chick-Fil-A); Trudy Ring, *Here's Why George Takei Wants You to Boycott Hobby Lobby*, ADVOCATE (July 2, 2014), http://www.advocate.com/politics/2014/07/02/heres-why-george-takei-wants-you-boycott-hobby-lobby [https://perma.cc/E6YG-C4M3].

[152] INAZU, *supra* note 137, at 113.

[153] *See, e.g.*, Mary Bowerman, *Indiana Pizza Shop that Won't Cater Gay Weddings to Close*, USA TODAY (Apr. 1, 2015), https://www.usatoday.com/story/news/nation-now/2015/04/01/indiana-family-pizzeria-wont-cater-gay-weddings/70813430/ [https://perma.cc/VA7N-3KVS] (describing how journalists baited a small, rural pizza parlor into saying that it would not serve same-sex weddings and how, as a result, the parlor was overwhelmed by threatening messages and forced to close).

are implicated?[154] Why not religious business owners—such as florists, bakers, and pharmacists? By the same principle, civic institutions with religious commitments should be accommodated so that they may set their own codes of conduct when possible. Private ordering can alleviate social tensions when its structures embody "tolerance, humility, and patience"[155] rather than exacerbate division.

Conclusion

Complicity is a long-established concept in our legal tradition. It neither operates differently in the context of religious liberty claims, nor does it deserve the law's special disfavor. The third-party harm theory exaggerates complicity's perceived differences from other religious liberty claims and invents its own novel concept of "dignitary harms," which has never before been countenanced in First Amendment jurisprudence. Even if the third-party harm theory were coherent and cognizable, its current formulation regrettably excludes the material and dignitary harms that would be imposed on religious objectors should accommodations be narrowed or revoked. In other words, "dignitary harm" is a two-edged sword. Eliminating religious accommodations in these situations is unlikely to foster social peace.

---

[154] *See* Jacob Gershman & Sara Randazzo, *ChristianMingle Opens Doors to Gay Singles Under Settlement*, WALL ST. J.: L. BLOG (June 30, 2016), https://blogs.wsj.com/law/2016/06/30/christianmingle-com-opens-doors-to-gay-singles-under-settlement/ (reporting that ChristianMingle has agreed to permit same-sex matches after settling a discrimination lawsuit).

[155] INAZU, *supra* note 137, at 83.

Thus, instead of using the coercive force of law to censor expressive conduct and to lock-in the gains of the sexual revolution, market-based systems and private ordering should be allowed to take their course. If we are to have a truly diverse and pluralistic public square, there must be consideration for both religious actors and third parties. That includes robust accommodations for religious objectors in complicity cases. Perhaps most importantly, it includes a posture of humility and mutual respect.