The Conscience Wars

RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY

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To our children,
Lucrezia and Federico (SM)
Maia and Alexis (MR)
These days, conservatives seem to own "conscience." In the United States, conscience and religious liberty have emerged as the dominant objections to same-sex marriage, as both the majority and dissenting opinions in Obergefell v. Hodges, the US Supreme Court's marriage equality decision, recognized. In a high-profile conflict after Obergefell, Kim Davis, the clerk for Rowan County, Kentucky, was jailed for refusing to comply with the Court's decision and subsequent court orders requiring her to perform her governmental duties. Davis claimed that her conscience prevented her from issuing marriage licenses to same-sex couples or allowing others in her office to do so.
In the commercial sphere, business owners assert that being required to serve same-sex couples would make them complicit in relationships they deem sinful, and so they claim religious exemptions from antidiscrimination laws. As the Heritage Foundation’s Ryan Anderson argues, “[s]ome citizens may conclude that they cannot in good conscience participate in a same-sex ceremony, from priests and pastors to bakers and florists. The government should not force them to choose between their religious beliefs and their livelihood.”

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

In Europe, some with objections to abortion and same-sex marriage are also asserting conscience claims. In the health care context, these may involve objections to direct participation in the performance of abortion; or they may involve objections to complicity in the sins of another – for example, to laws that oblige the objector to refer for abortion or to sell contraception. In Europe, as in the United States, conscience claims, including claims based on complicity, have begun to appear in the LGBT context. Consider a recent case from the United Kingdom. In *Bull v. Hall*, innkeepers refused to rent a double-bed room to a same-sex couple and sought an exemption from antidiscrimination law on the ground that they objected “to facilitate [ing] what they regard as sin.”

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

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

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

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

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

Religious accommodation is conventionally thought to promote pluralism. But the comparative analysis of religious accommodation regimes we offer in this chapter illustrates that accommodation can serve different ends, not all of which are pluralist. Examining accommodation across borders, we argue that an accommodation regime’s pluralism is measured, not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objectors’ beliefs. Exception regimes that (1) accommodate objections to direct and indirect participation in actions of other citizens who do not share the objectors’ beliefs, and (2) exhibit indifference to the impact of widespread exemptions on other citizens, do not promote pluralism; they sanction and promote the objectors’ commitments. Only when conscience exemption regimes are designed to mediate the impact of accommodation on third parties do they provide for the welfare of a normatively heterogeneous citizenry and serve genuinely pluralist ends.15

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

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

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

#### 7.1.1 Conscience and Health Care

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

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14 See infra note 68.

15 In this chapter, we do not weigh in on whether exemption regimes should privilege religious interests only or accommodate conscience generally. For an argument in favor of general conscience protections in the abortion context, including both for those who oppose and those who support provision of abortion, see Bernard M. Dickens, “The Right to Conscience,” in Rebecca J. Cook, Joanna M. Erdman, and Bernard M. Dickens, eds., *Abortion Law in Transnational Perspective* (Philadelphia: University of Pennsylvania Press, 2014), 310-358; see also Rebecca J. Cook and Bernard M. Dickens, “Reproductive Health and the Law,” in Pamela R. Ferguson and Greene T. Laute, eds., *Inspiring a Medico-Legal Revolution: Essays in Honor of Sheila McLean* (Burlington, VT: Ashgate, 2015), 3-23, at 19.

16 *40 U.S. 113 (1973).*

17 The original federal exemption law, on which many of the state laws were modeled, is the Church Amendment, passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-95, § 421(b)-(c), 87 Stat. 95. By the end of 1974, twenty-eight states had laws allowing physicians to refuse to perform abortions, and twenty-seven states had laws that
Many laws authorizing health care refusals impose no duty on the refusing levels are rarely written to require institutions to provide alternative care. Significantly, in the United States, health care refusal laws at the federal and state levels are rarely written to require institutions to provide alternative care. This includes the United States, where health care refusal laws at the federal and state levels are rarely written to require institutions to provide alternative care. The new health care refusal laws use concepts of complicity to authorize conscience objections, not only by the doctors and nurses directly involved in the objected-to procedure, but also by others indirectly involved who object on grounds of conscience to being made complicit in the procedure. For example, allows health care providers to assert conscience objections to providing "any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health-care providers or health-care institutions." The Mississippi law also defines "health-care provider" as expansively as possible. Concepts of complicity are used to authorize many more persons in health care services to object to the provision of care. States like Mississippi could accommodate the conscience objections of health care providers while ensuring alternative care for patients; but, crucially, in the United States, health care refusal laws at the federal and state levels are rarely written to require institutions to provide alternative care. Many laws authorizing health care refusal laws impose no duty on the refusing provider to ensure that patients turned away receive care. Laws like Mississippi's expressly authorize objecting providers to refuse to provide the patients they turn away counseling or referrals that might help them find alternative care. Importantly, these refusal laws fail to acknowledge obligations of care that flow from other sources of law. The new, expansive, complicity-based health care refusal laws alter the provision of health care services. In the case we are examining, health care refusal laws function to restrict access to abortion. It is perhaps not surprising that laws such as Mississippi's are based on model statutes promulgated by the antiabortion group Americans United for Life.

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

7.1.2 Preservation through Transformation

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

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

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10 Mississippi's expressly authorize objecting providers to refuse to provide the patients they turn away counseling or referrals that might help them find alternative care. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 245(a), 110 Stat. 1321, 1321-245 (codified as amended at 42 U.S.C. § 238n(a) [2012]).


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

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

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

need not and should not require any third party to recognize a same-sex relationship as a marriage.”

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

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

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27 NeJamae and Siegel, “Conscience Wars,” 2553. 28 Ibid., 2557, 2593.
36 Miss. H.B. No. 1523, at § 8.
37 Ibid., § 5. Strikingly, Mississippi law expresses little concern for the interests of same-sex couples. State law does not prohibit discrimination on the basis of sexual orientation. And the conscience legislation addresses the third-party impact of refusals in only one context: it
expansive conscience legislation simultaneously protects religious liberty and limits and stigmatizes same-sex marriage.38

7.1.3 Faith in Politics

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

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

provides that when a state official or employee refuses to perform, solemnize, license, or authorize a same-sex couple’s marriage, the government “shall take all necessary steps to ensure that the performance, solemnization, authorization, or licensing” is not impeded or delayed.” Ibid., § 18.


Ibid., 2.

For another example of such cross-denominational organizing, see the work of the Family Research Council (FRC). See NeJaime and Siegel, “Conscience Wars,” 2548-49.

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

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

While we are primarily reporting on developments in the United States, there are related developments in Europe. Some European actors are mobilizing around conscience.45 A progressive advocate with the European Parliamentary Forum on Population and Development46 describes the agenda of his opponents in Europe in terms that echo the Manhattan Declaration and the platform of the Republican National Committee:

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


Ibid., 12.

For work on conservative transnational mobilization more generally, see Clifford Bob, The Global Right Wing and the Clash of World Politics (Cambridge: Cambridge University Press, 2011).

This is “a network of members of parliaments from across Europe who are committed to protecting sexual and reproductive health” and “a network of parliamentarians from across Europe who are committed to protecting the values of life, family and religious freedom.” European Parliamentary Forum on Population & Development, “About EFF,” www.epfweb.org/node/144 (accessed April 7, 2016).

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

The assertion of conscience claims in culture war conflicts is a transnational phenomenon, and the organizations and activists encouraging these claims work across borders. American organizations have reached into Europe. The European Center for Law and Justice is the European offshoot of the American Center for Law and Justice, the organization founded by Pat Robertson. The Alliance Defending Freedom (ADF, formerly the Alliance Defense Fund) and the Becket Fund for Religious Liberty are both now active in Europe. And these US-based organizations are backing up their institutional affiliations with financial support.

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

Religious objections to same-sex relationships are now being asserted in litigation in Europe. Again, these conscience claims take two forms. For example, in Eweida v. United Kingdom, a case that reached the European Court of Human Rights, a government official objected to direct performance—conducting same-sex civil partnerships—while another claimant objected to complicity in what he deemed sinful conduct—by providing...
"psychosexual" therapy to same-sex couples. The European Center for Law and Justice intervened in support of the claimants.

7.2 RESPONDING TO CULTURE WAR CONSCIENCE CLAIMS

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

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

7.2.1 Religious Accommodation and Third-Party Harm

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

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

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

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

7.2.2 Third-Party Harm and the Problem of Complicity

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

64 Smith, 494 U.S. at 911-12, 916 (Blackmun, J., dissenting). See also Sherbert, 374 U.S. at 407 (noting that accommodation imposed at most generalized costs on the state unemployment system).
to the conscience claims of those directly participating in the objected-to conduct – for example, those who refuse to perform abortions or to officiate at a marriage. Rather, we are focusing on the conscience objections of those who assert they are being asked indirectly to participate in objected-to conduct. They object to complying with laws requiring health care professionals to serve patients, or requiring businesses not to discriminate, on the grounds that compliance enables others to engage in sin or sanctions their wrongdoing. For example, the employers in Hobby Lobby objected to complying with provisions of the health care law that required the insurance benefits they provide their employees to cover contraception, reasoning that the law forced them to provide “insurance coverage for items that risk killing an embryo [and thereby] makes them complicit in abortion.”

In Bull v. Hall, innkeepers in the United Kingdom objected to complying with antidiscrimination law by boarding a same-sex couple and thereby “facilitating what they regard as sin.” Similarly, business owners in the wedding industry engaged in baking cakes, providing flowers, or hosting events object to antidiscrimination obligations that they contend force them to “participate” in or “facilitate” same-sex weddings.

Why draw special attention to complicity claims?

Complicity claims are bona fide faith claims. For example, Catholic principles of “cooperation” and “scandal” warn the faithful against complicity in the sins of others. Evangelical Protestants also assert religious claims based on complicity. The structure of these religious exemption claims is relevant, not to the claims’ sincerity or religious significance, but instead to the claims’ potential to harm others. Because complicity claims single out other citizens as sinners, their accommodation has the potential to inflict material and dignitary harm on those the objector claims are sinning. Other aspects of the claims increase the likelihood of third-party harm. Complicity claims expand the universe of potential objectors, from those directly involved to those who consider themselves indirectly involved in the objected-to conduct. Where complicity claims become entangled in society-wide conflicts, the number of potential claimants multiplies. The universe of objectors is especially likely to expand in regions where majorities still oppose recently legalized conduct. Under these circumstances, barriers to access to goods and services may spread, and refusals may demean and stigmatize members of the community.

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

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

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

66 Bull v. Hall, [2013] UKSC 37, [34].

Sin is a personal act. Moreover, we have a responsibility for the sins committed by others when we cooperate in them:
- by participating directly and voluntarily in them;
- by ordering, advising, praising, or approving them;
- by not disclosing or not hindering them when we have an obligation to do so;
- by protecting evil-doers.

69 See NeJaime and Siegel, “Conscience Wars,” 2523 and n. 24, 25. 70 See ibid., 2566.
71 See supra notes 21, 24.
“accommodation” is no more compatible with their religious beliefs than being forced to comply with that mandate directly.

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

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

73 NeJaime and Siegel, “Conscience Wars,” 2576-78, n. 246-58 and accompanying text.
75 For instance, a lesbian couple turned away from a wedding venue reported feeling “horrible” and “shell-shocked”; indeed, one of the women reported that the refusal constituted a “kind of blow” to her coming-out process. Notice and Final Order at 10, McCarthy v. Liberty Ridge Farm, LLC, No. 10-5795, 10-5765 (N.Y. Div. Hum. Rs. July 2, 2014).
76 See NeJaime and Siegel, “Conscience Wars,” 2574-79.
77 See, e.g., Little Sisters of the Poor Home for the Aged v. Burwell, 794 F. 3d 1151, 1178-82 (10th Cir. 2015); East Texas Baptist Univ. v. Burwell, 793 F. 3d 449, 459 (5th Cir. 2015).

7.3 ACCOMMODATION AND THIRD-PARTY HARM: THE LAW

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

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

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

7.3.1 US Law on Third-Party Harm

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

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

80 494 U.S. 872. The Court has been invited to address the scope of free exercise protections in Masterpiece Cakeshop.
The Court even addressed this concern in *Hobby Lobby*, which recognized exemption claims in some far-reaching ways. Yet, at the same time, the majority opinion recognized concerns about the potential third-party harm of accommodation, presumably to secure Justice Kennedy as a crucial fifth vote. Kennedy’s concurring opinion recognized the government’s compelling interest in protecting women’s health and expressed concern with the impact of the sought-after accommodation on female employees. These concerns structured the majority’s decision. Because the government could provide Hobby Lobby’s employees contraception without involving their employer, the majority granted the exemption on the assumption that “[t]he effect of the accommodation on the women employed by Hobby Lobby … would be precisely zero.”

The *Hobby Lobby* Court was incorrect in its assumption about the effect of accommodation, but its reasoning shows how third-party harm is an integral part of the RFRA inquiry, even though the statute itself does not expressly discuss third-party harm. What *Hobby Lobby* illustrates is that third-party harm matters in determining whether unobstructed enforcement of the law is, in the language of RFRA, the “least restrictive means” of furthering the government’s “compelling” ends. If the government’s interests are compelling and if religious accommodation would impose material or dignitary harm on the individuals protected by the law or otherwise undermine the societal interests the law promotes, then unimpared enforcement of the law is likely the least restrictive means of furthering the government’s compelling ends.

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

This approach furnishes a useful lens to understand *Zubik v. Burwell*, the case in which the religiously affiliated nonprofits argued that the government’s method of accommodating employers with religious objections to including contraception in the health insurance benefits they provide their employees (as US law requires). In *Zubik*, the organizations objected to the accommodation the government offered, asserting that even though it relieved them of the obligation to provide their employees with health insurance covering contraception, the accommodation made them complicit in their employees receiving contraceptive insurance coverage from alternative sources.

The objecting organizations rejected this accommodation and sought a complete exemption from the health insurance law. They contended that...
their employees should not receive coverage of contraception through their health insurance benefits as other employees do, but instead argued that employees should purchase their own insurance policies for contraception in the private market (even though no such policies actually exist).90

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

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

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

90 See Brief for Petitioners at 75–76, Zubik, No. 15–35 (U.S. 2016) (arguing that the employees of objecting organizations should buy their own health insurance policies and noting that the government could enact a new law to subsidize them).
91 136 S.Ct. at 1960.
92 In its constitutional free exercise jurisprudence, the Supreme Court has refused to provide a religious exemption to tax laws on the ground that the potential multiplication of such claims threatens the government's ability to run a system of taxation. See Lee, 455 U.S. at 260 (denying a free exercise claim for exemption from social security taxes on the ground that "[t]he tax system could not function if denominations were allowed to challenge the tax system" and observing that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax"). In so doing, the Court identified complicity-based claims as having obvious potential for multiplication. See ibid. ("If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.").
93 See supra note 81.
94 See NeJaime and Siegel, "Conscience Wars," 3282–85 and notes 70–54. In late 2017, the Trump administration issued interim final rules allowing employers that provide health insurance for their employees to withhold coverage for contraception if they have religious or moral objections to providing such coverage. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 82 Fed. Reg. 47,792 (interim final rule October 6, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 82 Fed. Reg. 47,838 (interim final rule October 6, 2017). The regulations go well beyond what the Court sanctioned in Hobby Lobby and Zubik in two ways. First, they offer a complete exemption while making no effort to provide any alternative source of coverage for employees. Second, they authorize employers to refuse to provide coverage on the basis of moral, as well as religious, objections. In their disregard for the impact of accommodation on other citizens, the regulations resemble health care refusal laws and in this respect stand well outside the mainstream of American constitutional and statutory religious liberties traditions. See NeJaime and Siegel, "Trump and Pence Invoke Conscience to Block Contraception," supra note 81.

opponents of same-sex marriage hold up health care refusal laws legislation as a model for shaping law in the LGBT context.95

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

7.3.2 Accommodations Law and Third-Party Harm: Comparative Observations

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

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

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

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

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

In parts of Europe that have adopted LGBT-protective laws - the United Kingdom, for example - conscience claims, which have predominated in conflicts over abortion and contraception, have begun to spread to the LGBT context. Here too, courts have rejected exemption claims to protect...
third parties. For example, in 2013, in *Bull v. Hall*, where innkeepers raised complicity-based conscience objections to boarding a same-sex couple, the UK Supreme Court held that “the protection of the rights and freedoms of [the same-sex couple]” provided a reason to reject the sought-after exemption from antidiscrimination law. 104

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

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

Further, the ECSR has found that, in cases where national law permits conscience-based refusals, the law cannot do so in ways that violate women’s rights to the protection of health under Article 11.108

104 *Bull v. Hall*, [2013] UKSC 37, [53]. The court not only determined that there should be no exemption from antidiscrimination law under domestic law but it also rejected the innkeepers’ claim under the European Convention on Human Rights, and specifically Article 9’s protection of the right “to manifest one’s religion.”

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


107 Ibid., 16.


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

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

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

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


110 Ibid., at para. 107, p. 24. It is important to note that the ECHR has not found that the ECHR provides a right to abortion per se, but it has consistently found flaws under ECHR principles in the way that a country has applied its existing abortion laws. See *A. B. & C. v. Ireland*, No. 25579/05, paras. 232-233 (Eur. Ct. H.R. 2006).


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

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

Yet the Court found no violation, reasoning that both the local government and private employer were pursuing a legitimate interest in protecting the rights of gays and lesbians.\(^\text{119}\) Indeed, the ECtHR's account was sensitive not only to the government's practical interest in promoting equal access but also to the government's expressive interest in communicating its commitment to equality and to inculcating the antidiscrimination norm among citizens:

"[T]he aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being "an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others."\(^\text{120}\)

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

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

7.4 PLURALISM AND THE QUESTION OF CONSCIENCE

The regulation of conscientious objection varies across jurisdictions in more ways than this chapter can hope to chronicle. But our brief exploration of approaches to accommodation in the United States and Europe allows us to observe an important distinction in the functional role that conscience exemptions may play. Pluralism is often invoked as a basis on which to grant interest in securing the rights of others and “providing a service without discrimination.”\(^\text{122}\)


\(^{115}\) Ibid. For an analysis of this case and the conflict between conscience claims and women’s access to reproductive health care, see Adriana Lamackova, “Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v. France,” European Journal of Health Law 15, no. 1 (2008): 7-43.

\(^{116}\) It is important to note that the ECtHR has not at this point found a right to marry for same-sex couples. See Schalk and Kofp v. Austria, No. 30141/04 (Eur. Ct. H.R. 2010). Nonetheless, the court found Italy in violation of Article 8’s protection of privacy and family life for failing to provide “a legal framework allowing for recognition and protection of [same-sex couples’] relationships.” Oliari and Others v. Italy, Nos. 37956/04, 38092/04, para. 200 (Eur. Ct. H.R. 2013). In addition, the ECtHR has interpreted Article 14’s protection against discrimination to include sexual orientation. See Schalk and Kofp, at para. 87.

\(^{117}\) Eweida and Others v. United Kingdom, Nos. 48420/09, 59824/10, 58761/10, 45245/10, paras. 26, 34 (Eur. Ct. H. R. 2011). For a more extensive discussion of the registrar’s claim, see Christopher McDunne’s contribution to this volume.

\(^{118}\) Ibid., paras. 37, 108.

\(^{119}\) In rejecting the registrar’s challenge, the court focused on the importance of the government’s interest in protecting “the rights of others”—specifically same-sex couples. Ibid., para. 106. In rejecting the counselor’s challenge, the court relied on the importance of “the employer’s
widespread religious exemptions. But exemptions can both serve and undermine pluralist ends.

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

Protection of conscience, however, can serve not a pluralist but a monist regime that seeks to constrain access to objected-to services. In the United States, since the 1990s, health care refusal laws have recognized complicity-based conscience objections and have expressly authorized refusals to counsel and refer patients. Laws of this sort are openly championed by those who seek the (re)criminalization of abortion. While the particulars may differ, this approach to conscience has visibly shaped law in some European jurisdictions, particularly in Central and Eastern Europe, where there is widespread hostility to the legalization of abortion. In Poland, for example, conscience legislation quickly followed in the wake of the first laws restricting access to abortion in the 1990s, and the European Court of Human Rights has criticized the government’s failure to enforce limits on conscientious objection in order to protect patient rights.

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

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

123 The ECtHR reasoned in this way about Article 9 claims of conscience in Eweida: “The emphasis in Article 9, freedom of thought, conscience and religion is on the foundations of a “democratic society” within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics, and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.” Eweida, at para. 79 (citing Kokkinakis v. Greece, 250 Eur. Ct. H.R. [ser. A] [1993]).


125 In 2005, the EU Network of Independent Experts on Fundamental Rights, set up by the European Commission, issued an opinion criticizing the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience. E.U. Network of Independent Experts on Fundamental Rights, Opinion No 4-2005: The Right to

Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See 31 (December 14, 2005), http://ec.europa.eu/justice/fundamental-rights/files/chr_cdt opinion4_2005_en.pdf (objecting to the draft treaty’s "broad recognition of the right to exercise objection of conscience in the field of reproductive healthcare, without providing for ... compensatory measures," such as obligations to refer and counsel patients and to effectively ensure their access to abortion).

126 See supra notes 108-110.


129 Asegurar y Avanzar Sobre lo Logrado: estado de situación de la salud y los derechos sexuales y reproductivos en uruguay (monitoreo 2010-2014) (in Spanish).

130 For the decision recognizing the constitutional right, see Corte Constitucional [C.C.] [Constitutional Court], May 20, 2006, Sentencia C-355/06 (Colom.), available at www.cortecomunicales.gov.co/refatoria/2006/C-355-06.htm (in Spanish).

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

By contrast, conscience exemptions of a genuinely pluralist kind endeavor to mediate the impact of accommodation on third parties, providing for the welfare of a normatively heterogeneous citizenry. An accommodation regime’s pluralism is measured, not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objectors’ beliefs. A system of accommodation does not serve pluralist ends when, in the words of the ECtHR in Pichon, religious objectors are allowed to “give precedence to their religious beliefs and impose them on others.”

Exemption regimes that (1) accommodate objections to direct and indirect participation in the lawful actions of others who do not share the objectors’ beliefs, and (2) exhibit indifference to the impact of widespread exemptions on others, do not promote pluralism; they sanction and promote the objectors’ commitments.

Building a genuinely pluralist exemption regime that limits the accommodation of complicity claims in the interest of protecting other citizens from material and dignitary harms is especially important where conscience claims are entangled in society-wide conflict, such as the conflict over sexual mores we term the “culture wars.” In the culture war context, religious claimants seek exemptions from laws that protect citizens whose conduct departs from traditional roles and customary morality. In these situations, the demand for accommodation is potentially widespread and will reiterate recently disestablished social norms. In seeking exemptions from laws that religious claimants assert make them complicit in sins of their fellow citizens, religious claimants may speak as a minority and yet assert what have long been the norms of the majority against those whose rights the law has only recently and fragilely come to protect. Under these circumstances, limiting accommodation in ways that respect the convictions of the believer and one’s fellow citizens is the most pluralism-promoting path.


134 In Eweida, the ECLJ, in arguing on behalf of Ladele and McFarlane, repeatedly appealed to pluralism as the basis for granting exemptions, claiming that “to ensure . . . pluralism, . . . the State’s attitude cannot be justified by the protection of the rights of others.” Observations Relating to Third Party Intervention, supra note 58, at 15.