

## Conscience and Complicity: Assessing Pleas for Religious Exemptions in *Hobby Lobby's* Wake

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*In the paradigmatic case of conscientious objection, the objector claims that his religion forbids him from actively participating in a wrong (for example, by fighting in a war). In the religious challenges to the Affordable Care Act's employer mandate, on the other hand, employers claim that their religious convictions forbid them from merely subsidizing insurance through which their employees might commit a wrong (for example, by using contraception). The understanding of complicity underpinning these challenges is vastly more expansive than the standard that legal doctrine or moral theory contemplates. Courts routinely reject claims of conscientious objection to taxes that fund military initiatives or to university fees that support abortion services. In *Hobby Lobby*, however, the Supreme Court took the corporate owners at their word: the mere fact that *Hobby Lobby* believed that it would be complicit, no matter how idiosyncratic its belief, sufficed to qualify it for an exemption. In this way, the Court made elements of an employee's health-care package the "boss's business" (to borrow from the nickname of the Democrats' proposed bill to overturn *Hobby Lobby*).*

*Much of the critical reaction to *Hobby Lobby* focuses on the issue of corporate rights of religious freedom. Yet this issue is a red herring. The deeper concerns that *Hobby Lobby* raises—about whether employers may now refuse, on religious grounds, to subsidize other forms of health coverage (for example, blood transfusions or vaccinations) or to serve customers whose lifestyles they deplore (for example, gays and lesbians)—do not turn on the organizational form that the employer*

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has adopted. Instead, the more significant issue goes to our understanding of complicity: When is it reasonable for an employer (for-profit or nonprofit, corporate or individual) to think itself complicit in the conduct of its employees or customers? And when is a reasonable claim of complicity compelling enough to warrant an accommodation, especially when that accommodation would impose costs on third parties?

Hobby Lobby does not provide the proper guidance for answering these questions, and no wonder: as I argue here, the concept of complicity pervading the treatment of conscientious objection in the law is murky and misleading, and it often yields unjust results. This Article offers the guidance that the doctrine does not. To that end, it exposes the flaws in the understandings of complicity evident in both the majority and dissenting opinions in *Hobby Lobby*, as well as in *Religious Freedom Restoration Act* cases more generally. It then seeks to disaggregate the elements of a complicity claim and to identify which of these elements deserves to be treated deferentially.

Deference, however, is not decisive. The Article's second ambition is to expose an oversight in the law's treatment of conscientious objection—namely, its failure to inquire into how a religious accommodation will affect third parties. Exemption opponents contend that the law already requires courts to deny an accommodation when the accommodation would impose substantial burdens on third parties. I believe that these opponents have a mistaken and overly sanguine view of the protection that the doctrine currently affords. I end the Article by proposing a revised balancing test—one that reflects a far more nuanced grasp of what is at stake for the objector while yielding far more just outcomes for third parties.

|   |      |
|---|------|
| INTRODUCTION .....  | 1899 |
| I. COMPLICITY AND DEFERENCE .....   | 1911 |
| A. Moral, Empirical, and Relational Elements of Complicity Claims .....   | 1911 |
| B. Complicity as Intentional Participation.....   | 1913 |
| 1. Decisionmaking and complicity.....   | 1915 |
| 2. Complicity as direct participation.....  | 1918 |
| C. Complicity as Subjective Implication.....  | 1922 |
| D. Deference to Nonstandard Beliefs.....  | 1923 |
| 1. Moral deference.....   | 1927 |
| 2. Empirical deference.....   | 1930 |
| 3. Relational deference.....  | 1934 |
| II. COMPLICITY IN LAW AND ETHICS.....   | 1938 |
| III. THE TROUBLING ROLE OF PROXIMITY IN COMPLICITY DETERMINATIONS....   | 1944 |
| A. Proximity as the Prevailing Criterion for Conscientious Objection .....                                      | 1945 |
| B. The Grounds of Conscientious Objection .....   | 1948 |
| C. Proximity versus First Person Perceptions of Complicity.....   | 1951 |
| D. Morally Mandated Indifference to Proximity .....   | 1958 |
| IV. MISSING THIRD PARTIES: A TROUBLING OVERSIGHT .....  | 1959 |
| A. The <i>Hobby Lobby</i> Dissent's Strained Efforts to Find Third-Party<br>Considerations in the Doctrine..... | 1961 |
| B. The Troubling Omission of Third-Party Costs .....  | 1966 |

|   |      |
|---|------|
| 1. The compelling-interest prong of RFRA. ....  | 1967 |
| 2. The Establishment Clause. ....   | 1967 |
| 3. The “shoals” causing claims for religious accommodation to founder. ....                   | 1970 |
| 4. Third-party intervention. ....   | 1972 |
| C. Balancing Concerns for Complicity against Third-Party Costs.....                           | 1973 |
| 1. Assessing the strength of complicity claims. ....  | 1973 |
| 2. Balancing deference against third-party interests.....                                     | 1974 |
| 3. Bringing third-party interests before a court. ....  | 1976 |
| D. Assessing <i>Hobby Lobby</i> and Its Progeny in Light of the Proposed Balancing Test ..... | 1977 |
| CONCLUSION AND A PERSONAL APOLOGIA .....  | 1979 |

## INTRODUCTION

In *Burwell v Hobby Lobby Stores, Inc.*,<sup>1</sup> the Supreme Court faced a plea for an exemption from the Patient Protection and Affordable Care Act<sup>2</sup> (ACA) based on an unusually broad conception of complicity: Hobby Lobby, a closely held for-profit corporation, claimed that it would be participating in a wrong merely by subsidizing insurance through which its employees *might* access contraception that *might* destroy embryos.<sup>3</sup> The understanding of complicity underpinning this claim is vastly more expansive than that which standard legal doctrine or moral theory contemplates.<sup>4</sup> As such, the Court could have rejected Hobby Lobby’s claim—and, in doing so, denied it an exemption from the so-called contraceptive mandate<sup>5</sup>—on the ground that Hobby Lobby’s connection to the conduct it found objectionable was too

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

<sup>2</sup> Pub L No 111-148, 124 Stat 119 (2010).

<sup>3</sup> See Aaron E. Carroll, *How Hobby Lobby Ruling Could Limit Access to Birth Control* (NY Times, June 30, 2014), archived at <http://perma.cc/E2WP-LJTN> (describing the medical consensus that the possibility of the challenged methods of contraception involving embryo destruction is highly speculative and improbable). See also George J. Annas, Theodore W. Ruger, and Jennifer Prah Ruger, *Money, Sex, and Religion — the Supreme Court’s ACA Sequel*, 371 New Eng J Med 862, 862 (2014) (“[I]n the opinion of medical experts, the four methods of contraception under scrutiny do not induce abortion; rather, they prevent abortion by preventing pregnancy.”); notes 130–34 and accompanying text.

<sup>4</sup> See Part II.

<sup>5</sup> See ACA § 1001(5), 124 Stat at 131, codified at 42 USC § 300gg-13(a)(4). I join Professor Marty Lederman and others in thinking that the term “mandate” is misleading here. See Marty Lederman, *Hobby Lobby Part III—There Is No “Employer Mandate”* (Balkinization, Dec 18, 2013), archived at <http://perma.cc/2XLJ-5PEN>. See also Micah Schwartzman, Rich Schragger, and Nelson Tebbe, *Hobby Lobby and the Establishment Clause: Gedicks and the Government* (Balkinization, Jan 21, 2014), archived at <http://perma.cc/6D4J-JDMQ>.

tenuous to be cognizable. Courts have proceeded in just this way in countless other cases in which, say, taxpayers have lodged conscientious objections to subsidizing military spending,<sup>6</sup> or students have lodged conscientious objections to paying university fees that cover medical services providing abortion counseling.<sup>7</sup> Instead, the Court took Hobby Lobby at its word: the mere fact that Hobby Lobby *believed* that it would be complicit, no matter how idiosyncratic its belief, sufficed to qualify it for an exemption.<sup>8</sup> In a similar vein, the Court proceeded with grand deference in an order that it issued just three days after rendering its *Hobby Lobby* decision.<sup>9</sup> There, the Court acceded to Wheaton College's request for a preliminary injunction exempting it not from having to cover its employees' contraception

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<sup>6</sup> See, for example, *United States v Lee*, 455 US 252, 263 (1982) (Stevens concurring) (“[T]here is virtually no room for a ‘constitutionally required exemption’ on religious grounds from a valid tax law that is entirely neutral in its general application.”); Michelle O’Connor, *The Religious Freedom Restoration Act: Exactly What Rights Does It “Restore” in the Federal Tax Context?*, 36 Ariz St L J 321, 329 (2004) (“Aside from the licensing tax cases . . . the Supreme Court never has held that the Free Exercise Clause requires the government to grant a person an exemption from a generally applicable, neutral tax law.”); Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 Wis L Rev 939, 971 (surveying cases and concluding that “[e]ach has held that . . . [the Religious Freedom Restoration Act] . . . does not require the income tax laws to accommodate religious beliefs, specifically those of conscientious objectors to war”). See also notes 161–62 (collecting cases in which courts have rejected claims of conscientious objection to taxes aimed at funding initiatives that the taxpayer opposes).

<sup>7</sup> See, for example, *Goehring v Brophy*, 94 F3d 1294, 1300 (9th Cir 1996), overruled on other grounds by *City of Boerne v Flores*, 521 US 507 (1997) (holding that the use of university registration fees to fund a student health insurance plan that included abortion coverage did not substantially burden the free exercise rights of students who objected to abortion on religious grounds, in part because the “plaintiffs [were] not required to accept, participate in, or advocate in any manner for the provision of abortion services”); *Erzinger v Regents of University of California*, 187 Cal Rptr 164, 166–68 (Cal App 1982).

<sup>8</sup> See *Hobby Lobby*, 134 S Ct at 2778 (noting that federal courts will not address whether a religious belief asserted in a Religious Freedom Restoration Act (RFRA) case is reasonable). *Hobby Lobby* in fact consolidated two cases involving claims of conscientious objection on the parts of three employers. In the first case, an appeal from the Tenth Circuit, two closely held corporations owned by the Green family—Hobby Lobby, a chain of craft stores, and Mardel, a publisher of Christian texts—challenged the contraceptive mandate and won. See generally *Hobby Lobby Stores, Inc v Sebelius*, 723 F3d 1114 (10th Cir 2013). In the second case, an appeal from the Third Circuit, Conestoga Wood, a closely held corporation owned by the Hahn family that manufactures kitchen cabinets, also challenged the contraceptive mandate but lost. See generally *Conestoga Wood Specialties Corp v Secretary of United States Department of Health and Human Services*, 724 F3d 377 (3d Cir 2013). For ease of exposition, I refer in the text only to Hobby Lobby, though everything I say about that company applies to Mardel and Conestoga as well, unless otherwise indicated.

<sup>9</sup> See generally *Wheaton College v Burwell*, 134 S Ct 2806 (2014).

costs—the government had already released Wheaton from the contraceptive mandate<sup>10</sup>—but from having to fill out the form that would formalize its exemption.<sup>11</sup> Thus, the mere fact that Wheaton College *believed* that filling out the form would make it complicit in contraceptive coverage was sufficient to qualify it, too—at least preliminarily—for an exemption.<sup>12</sup>

These cases suggest that we have entered an era of unstinting deference to religious belief, often based on fantastical conceptions of complicity exercised at the expense of third parties who incur a burden in light of an accommodation obtained by the religious adherent. As Professor Sanford Levinson puts it, “‘Because this is the way I feel’ seems to be a conclusive

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<sup>10</sup> The original accommodation procedure required a nonprofit to complete a form certifying that it is a religious nonprofit that opposes contraception. See 45 CFR § 147.131(b)(4). The nonprofit had to then submit that form to its third-party administrator (TPA), which would then be on notice that it had to provide contraception in the nonprofit’s stead. See 29 CFR § 2590.715-2713A(a)(b). For the form itself, see *EBSA Form 700—Certification* (Aug 2014), archived at <http://perma.cc/5JX5-8SBD>.

In response to the *Wheaton College* order, the Obama administration revised the accommodation procedure. The new procedure permits a religious nonprofit to register its objection directly with the Department of Health and Human Services (HHS) instead of with its TPA. It is then HHS’s responsibility to notify the TPA. See Department of the Treasury, Department of Labor, and Department of Health and Human Services, Coverage of Certain Preventive Services under the Affordable Care Act, 79 Fed Reg 51092, 51094–95 (2014); Department of the Treasury, Department of Labor, and Department of Health and Human Services, Coverage of Certain Preventive Services under the Affordable Care Act, 80 Fed Reg 41318, 41323 (2015); 29 CFR § 2590.715-2713A(b)(1)(ii)(B). I discuss the merits of the challenges to the old and new procedures in note 91.

<sup>11</sup> *Wheaton College*, 134 S Ct at 2807. In a Seventh Circuit case raising an almost identical challenge, Judge Richard Posner emphasized the “novelty” of the claim at issue in this pithy way: the plaintiff asked “not for the exemption, which it ha[d], but for the right to have it without having to ask for it.” *University of Notre Dame v Sebelius*, 743 F3d 547, 557 (7th Cir 2014).

<sup>12</sup> Seven of the eight federal appellate courts to hear appeals in which religious nonprofits have objected to the filing requirement have rejected the nonprofits’ claims, stating that it is the ACA itself, and not the filing of the form, that triggers coverage for contraceptive use. See, for example, *Priests for Life v United States Department of Health and Human Services*, 772 F3d 229, 252–53 (DC Cir 2014), cert granted, 2015 WL 6759640 (US). See also *Challenges to the Federal Contraceptive Coverage Rule* (ACLU, 2015), archived at <http://perma.cc/24GF-EMFU> (providing a list of citations to the decisions addressing religious challenges to the accommodation). In the most recent of these cases, however, the Eighth Circuit affirmed lower court orders granting injunctive relief to religious organizations, holding that the organizations deserved to prevail in their challenges to the accommodation procedures. See *Dordt College v Burwell*, 2015 WL 5449504, \*2 (8th Cir); *Sharpe Holdings, Inc v United States Department of Health and Human Services*, 2015 WL 5449491, \*13 (8th Cir). In both cases, the Eighth Circuit agreed with the nonprofits that the filing of the form imposed a substantial burden on the nonprofits’ religious exercise, and it found that the government’s interest, while compelling, could be served by a less-restrictive means.

argument in the religio[us] realm.”<sup>13</sup> Invocations of religion, that is, threaten to function as trumps,<sup>14</sup> foreclosing legal intervention for everything from discrimination against gays and lesbians to refusals to cover lifesaving care. *Hobby Lobby*, then, would have religion reign supreme.<sup>15</sup>

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<sup>13</sup> Sandy Levinson, *Justice Ginsburg's Inexplicable First Two Pages* (Balkinization, June 30, 2014), archived at <http://perma.cc/H35H-RX4S>.

<sup>14</sup> See Ronald Dworkin, *Taking Rights Seriously* xi (Harvard 1977) (“Individual rights are political trumps held by individuals.”); Ronald Dworkin, *Rights as Trumps*, in Jeremy Waldron, ed., *Theories of Rights* 153, 153 (Oxford 1984). For a critical reaction to the conception of rights as trumps, focusing especially on the conception’s atomistic implications, see, for example, Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* 25–26 (Belknap 1996); Charles Taylor, *Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada*, in Alan Cairns and Cynthia Williams, eds., *Constitutionalism, Citizenship and Society in Canada* 183, 209 (Toronto 1985) (describing the rights model as identifying “the dignity of the free agent . . . more with the bearer of rights than with the citizen participator”); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 *J Legal Stud* 725, 729 (1998); Robin West, *Rights, Harms, and Duties: A Response to Justice for Hedgehogs*, 90 *BU L Rev* 819, 819 (2010).

<sup>15</sup> I focus here largely on religiously based claims of conscientious objection because *Hobby Lobby* was decided under a statute protecting religious freedom. See note 20 and accompanying text (describing RFRA). With that said, I note that conscience can be informed by religious as well as secular moral convictions, and some scholars argue that the law should be equally hospitable to both. See, for example, Sandel, *Democracy’s Discontent* at 55 (cited in note 14); Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* 51–77 (Harvard 2007). For arguments on the other side, see, for example, Chad Flanders, *The Possibility of a Secular First Amendment*, 26 *Quinnipiac L Rev* 257, 301 (2008); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DePaul L Rev* 1, 3 (2000). See also *United States v Seeger*, 380 US 163, 164–66 (1965) (accommodating nonreligious pacifistic objections to the draft because they played the same role in their bearers’ lives that religious convictions play for religious pacifists); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 *U Chi L Rev* 195, 197 (1992) (arguing that each of the Free Exercise Clause and the Establishment Clause entails protections for religious freedom as well as freedom from religion). For an especially searching inquiry into whether religion is special, see Micah Schwartzman, *What If Religion Is Not Special?*, 79 *U Chi L Rev* 1351, 1353 (2012). And for the claim that conscience, whether informed by religious or secular precepts, is both over- and underinclusive when it comes to identifying the set of legal requirements from which one should be able to claim an exemption, see Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 *Legal Theory* 215, 221–24 (2009).

Shortly before this Article went to press, the United States District Court for the District of Columbia became the first court to grant an exemption from the contraceptive mandate on the basis of *secular* objections to the coverage of so-called abortifacients. See *March for Life v Burwell*, 2015 WL 5139099, \*12 (DDC). March for Life is a nonreligious nonprofit dedicated to advancing pro-life causes. On that basis, the district court found the organization’s objections no less sincerely or strongly held than those of a religious nonprofit, and the court found the government’s willingness to accommodate only religious nonprofits but not secular ones a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at \*5–6.

This unprecedented reverence for religious freedom is the decision's key failing and the aspect of the doctrine most in need of interrogation and rectification. It is appropriate, then, that the bill that Democrats have proposed to overturn *Hobby Lobby* has been given the nickname "Not My Boss's Business Act."<sup>16</sup> The central question in *Hobby Lobby*'s inevitable progeny should be: "When *is* a decision about health-care coverage an employer's business?" or, more perspicuously, "When does an employer have a strong-enough reason to think itself complicit in its employees' health-care choices such that it should enjoy an exemption from having to subsidize those choices?" And because the *Hobby Lobby* decision has implications not just for health-care coverage but also for antidiscrimination laws—such as when a business seeks to deny service or employment to gays and lesbians<sup>17</sup>—the question of complicity should be cast more broadly still: "When may a business owner claim an exemption from a legal requirement that would connect him to conduct that he opposes on religious grounds?"<sup>18</sup> Unfortunately, both the *Hobby Lobby* decision and the broader free exercise doctrine provide reason to doubt that courts will arrive at the right answers going forward.

The doctrine at issue in these cases is based on the Religious Freedom Restoration Act of 1993<sup>19</sup> (RFRA), which allows a religious adherent to claim an exemption from a neutral law of general applicability when that law imposes a "substantial burden" on him and the government cannot show that the law aims to serve a "compelling interest" in the "least restrictive" way possible.<sup>20</sup> The legal requirement at issue in *Hobby Lobby* fol-

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<sup>16</sup> See Protect Women's Health from Corporate Interference Act of 2014, HR 5051, 113th Cong. 2d Sess (July 9, 2014). See also Jake Lefferman, *Dems Strike Back on Hobby Lobby Case with 'Not My Boss's Business Act'* (ABC News, July 9, 2014), archived at <http://perma.cc/CVA6-QWK2>.

<sup>17</sup> See, for example, Michael Paulson and Fernanda Santos, *Religious Right in Arizona Cheers Bill Allowing Businesses to Refuse to Serve Gays* (NY Times, Feb 21, 2014), archived at <http://perma.cc/E6HD-KZK3>.

<sup>18</sup> For a survey of some of the issues that might give rise to a clash between claims to religious freedom and legal protection for historically disfavored lifestyle choices, see Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 BC L Rev 1417, 1426–29 (2012).

<sup>19</sup> Pub L No 103-141, 107 Stat 1488, codified as amended at 42 USC § 2000bb et seq.

<sup>20</sup> The precise text of the relevant part of the statute is as follows:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person—(1) is in furtherance

lows from the ACA, which imposes an employer mandate:<sup>21</sup> businesses employing fifty or more full-time workers must provide health insurance,<sup>22</sup> and this health insurance must include preventive care for women.<sup>23</sup> Federal rules promulgated in light of the ACA and developed in consultation with the Institute of Medicine identify precisely which kinds of preventive care employer health-care packages must offer. Among these is the so-called contraceptive mandate: the rules dictate that all methods of FDA-approved contraception must be made available through the health plans offered by large employers.<sup>24</sup> Employers that object on religious grounds to some or all forms of contraception have challenged the contraceptive mandate under RFRA, claiming that it imposes a “substantial burden” on their religious exercise.<sup>25</sup> In *Hobby Lobby*, the Court ruled for the first time that for-profit corporations can claim rights of religious freedom under RFRA, and it thus granted Hobby Lobby an exemption from having to provide the forms of contraception it opposed.<sup>26</sup>

Much has been made of the corporate law implications of the decision.<sup>27</sup> These are important questions in their own right,

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of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 USC § 2000bb-1(a)–(b). RFRA has been deemed “both a rule of interpretation” and “an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place.” Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex L Rev 209, 211 (1994). As such, this “super-statute” can constrain the operation of any federal legislation that fails RFRA’s test. Michael Stokes Paulsen, *A RFRA Runs through It: Religious Freedom and the U.S. Code*, 56 Mont L Rev 249, 253 (1995).

<sup>21</sup> See Sandhya Somashekhar, *As Health-Care Law’s Employer Mandate Nears, Firms Cut Worker Hours, Struggle with Logistics* (Wash Post, June 23, 2014), archived at <http://perma.cc/WKK6-GXZM>.

<sup>22</sup> *Other Information about the Health Care Law for Small Businesses* (Centers for Medicare & Medicaid Services), archived at <http://perma.cc/B2JE-AX2J>.

<sup>23</sup> 42 USC § 300gg-13.

<sup>24</sup> See 80 Fed Reg at 41318 (cited in note 10).

<sup>25</sup> The Becket Fund for Religious Liberty maintains a list of the contraceptive-mandate challenges. See *HHS Mandate Information Central* (The Becket Fund for Religious Liberty), archived at <http://perma.cc/3A7A-SLH6>. As of October 1, 2015, there have been 105 cases filed, with “victories” (mostly preliminary injunctions) for plaintiffs in 71 of them. See *id.*

<sup>26</sup> *Hobby Lobby*, 134 S Ct at 2768, 2784.

<sup>27</sup> I address these implications in Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For-Profit Corporation*, 5 Harv Bus L Rev 173 (2015). See also generally Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 Geo Mason L Rev 59 (2013); Stephen M. Bainbridge, *A Critique of the Corporate Law Professors’ Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 Va L Rev Online 1 (2014); Eric Orts, *The Legal and Social Ontology of the*



but *Hobby Lobby's* deeper significance—and the “parade of horrors” it threatens<sup>28</sup>—do not in fact turn on the employer’s organizational form.<sup>29</sup> This is because the exemptions at issue in *Hobby Lobby* and those predicted to be sought in its wake would be troubling whether it was a corporation, a limited liability company, a partnership, or a sole proprietorship that was seeking the accommodation.<sup>30</sup> The cause for concern lies not so much with the extension of RFRA to for-profit entities, then, as with the doctrine itself, which grants exemptions so long as the religious adherent believes himself to be implicated in the conduct that his religion opposes, and no matter the costs that an exemption imposes on others.<sup>31</sup>

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*Firm* (The Conglomerate, Aug 5, 2014), archived at <http://perma.cc/8HYG-2N7H>; Micah Schwartzman, Richard Schragger, and Nelson Tebbe, *The New Law of Religion* (Slate, July 3, 2014), archived at <http://perma.cc/PXN6-996V>.

<sup>28</sup> *Could the Hobby Lobby Ruling Unleash a 'Parade of Horribles'?* (Wharton School, July 2, 2014), archived at <http://perma.cc/6PRH-JQGD>. In September 2014, a district court judge relied on *Hobby Lobby* as precedent to relieve a Mormon from his obligation to testify in a case alleging that the Church had used child labor. Shadee Ashtari, *Judge Cites Hobby Lobby to Excuse Fundamentalist Mormon from Child Labor Testimony* (Huffington Post, Sept 18, 2014), archived at <http://perma.cc/7BT7-JRZ9>. Commenting on the case, Dean Erwin Chemerinsky said, “I fear it is just the start of cases of people claiming religious exemptions from general laws.” *Id.* See also Douglas NeJaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *Yale L J* 2516, 2572–74 (2015) (providing examples of the ways in which opponents of gay rights have wielded *Hobby Lobby* to shirk antidiscrimination measures aimed at protecting gays and lesbians); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 *Harv L Rev* 933, 947 (1989) (“Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.”).

<sup>29</sup> For a narrower argument to this effect, see generally Amy Sepinwall, *Can a Corporation Have a Conscience?* (Wash Post, Mar 21, 2014), archived at <http://perma.cc/D2WR-9563> (“[T]hose who oppose Hobby Lobby’s stance do so because they want to ensure that women have adequate access to reproductive health care. They would object to efforts to circumvent the contraceptive mandate whether it was a corporation or an individual business owner who sought an exemption.”).

<sup>30</sup> See generally, for example, Complaint, *Wieland v United States Department of Health and Human Services*, Civil Action No 13-01577 (ED Mo filed Aug 14, 2013) (available on Westlaw at 2013 WL 4618865) (stating the claims made on behalf of individual insurance subscribers objecting to insurance premiums that partly subsidize contraception for other subscribers to the same insurance plan). For a survey of the different kinds of business forms currently available, see Eric W. Orts, *Business Persons: A Legal Theory of the Firm* 175–222 (Oxford 2013).

<sup>31</sup> See *Korte v Sebelius*, 735 F3d 654, 689 (7th Cir 2013) (Rovner dissenting), cert denied, 134 S Ct 2903 (2014) (noting that the majority’s holding, which exempted two for-profit businesses from the contraceptive mandate, “has the potential to reach far beyond contraception and to invite employers to seek exemptions from any number of federally-mandated employee benefits to which an employer might object on religious grounds”).

*Hobby Lobby* and its anticipated progeny fit into a larger debate about the place of religious freedom in public life,<sup>32</sup> a debate that “continues to divide and trouble the legal system.”<sup>33</sup> But the case and its likely successors also raise distinct questions about the appropriate scope of claims of complicity. In particular, these cases invite us to determine when we ought to accede to the religious adherent’s belief that abiding by a law of general applicability makes him complicit in conduct contrary to his religion. While questions about the general bounds of religious freedom have received ample attention,<sup>34</sup> questions about complicity remain among the “the most serious and difficult” in this area because they raise “fundamental questions about the nature of collective responsibility in a democratic society.”<sup>35</sup>

This Article aims to make progress on these questions, engaging with religious objections to legal requirements that compel the adherent to contribute to conduct by others that his religion opposes. To that end, this Article seeks to diagnose and then remedy two problems afflicting the doctrine and scholarship around conscientious objection—first, the impoverished understanding of *complicity* therein, and second, the near neglect of *third-party effects*. As to the first problem, the doctrine does not dictate the scope of cognizable complicity claims: it offers too little guidance as to when courts should heed a claim that some legal requirement makes the religious adherent morally responsible for conduct to which the religious adherent objects. One sees evidence of this problem in the understandings of complicity contained in both the majority opinion and the principal dissent in *Hobby Lobby*,<sup>36</sup> in the doctrine predating *Hobby Lobby*, and in the RFRA scholarship more generally. As we shall see, courts, as well as scholars, operate with understandings of

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<sup>32</sup> As Professor Michael W. McConnell put it, “[D]oes the freedom of religious exercise . . . require the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations? Or does this freedom guarantee only that religious believers will be governed by equal laws, without discrimination or preference?” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1411 (1990).

<sup>33</sup> *Id.*

<sup>34</sup> See generally, for example, Brian Leiter, *Why Tolerate Religion?* (Princeton 2013); McConnell, 103 Harv L Rev 1409 (cited in note 32); Sullivan, 59 U Chi L Rev 195 (cited in note 15); Koppelman, 15 Legal Theory 215 (cited in note 15).

<sup>35</sup> Micah Schwartzman, *Conscience, Speech, and Money*, 97 Va L Rev 317, 376 (2011).

<sup>36</sup> I focus principally on Justice Samuel Alito’s majority opinion and Justice Ruth Bader Ginsburg’s dissent, although I make passing reference to Justice Anthony Kennedy’s concurrence.

complicity that are murky, undertheorized, and at times just plain wrong.<sup>37</sup>

The doctrine regarding conscientious objection is afflicted by a second problem as well, as it does not take third-party interests into account except to the extent that they align with the government's interest in imposing the legal requirement. As such, women's interests in easy access to the full spectrum of the ACA-approved contraceptive methods are factored into the doctrine's balancing test only if the government takes these interests to be compelling.<sup>38</sup> So too with gays' and lesbians' interests in equal treatment in the commercial sphere. The dissent was sensitive to this concern, faulting the majority in large part because the majority accorded an exemption without due regard for the effect of the exemption on the "thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ."<sup>39</sup> But the doctrine does not support the dissent's complaint. Instead, the relevant precedents treat third-party interests as merely tangential to the inquiry about whether to accommodate the religious believer's objection to the legal requirement with which he disagrees. What matters, according to the doctrine, is the *government's* interest in the contested regulation. But there is no reason to think that the government's interest overlaps with the interests of the third parties who would incur a burden were the religious objector to receive an exemption.<sup>40</sup> As such, the government is poorly placed to defend the interests of third parties in the face of a complaint about governmental infringement of religious freedom. And yet the doctrine's failure here has escaped the notice of virtually all commentators,<sup>41</sup> who contend either that third parties suffer no

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<sup>37</sup> See Part III.A–B.

<sup>38</sup> See Part IV.A–B.

<sup>39</sup> *Hobby Lobby*, 134 S Ct at 2787 (Ginsburg dissenting). See also *id* at 2801 (Ginsburg dissenting) ("No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.").

<sup>40</sup> I provide an example to this effect in Part IV.B.

<sup>41</sup> But see Frederick Mark Gedicks and Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Vand L Rev En Banc 51, 65 (2014) ("The most depressing aspect of discussions surrounding the *Hobby Lobby* litigation is the total failure to acknowledge the women who would be harmed by RFRA exemptions from the Mandate."). Professor Alan E. Garfield does not fault the doctrine for overlooking women's interests, but he does contend that the doctrine on religious freedom underdetermines the issues here. Given the indeterminacy, and assuming that women's interests are more important than those of the religious objectors, Garfield concludes that the exemption should be denied. Alan E. Garfield, *The*

cognizable harm from an exemption<sup>42</sup> or else that the doctrine really does factor in third-party costs.<sup>43</sup>

In short, the question whether contraception (or blood transfusions, or sexual orientation, for that matter) is a “boss’s business” is one that the doctrine is ill equipped to answer, both because it lacks a well-founded theory of complicity and because it does not adequately consider how the boss’s interests should interact with those of the employees or potential customers whom the boss’s interests affect. The purpose of this Article is to provide the missing theoretical and doctrinal pieces in a way that leads to much more justifiable, and just, results. The revised doctrine at which I arrive comes out in favor of Hobby Lobby, but it avoids the troubling implications to which the *Hobby Lobby* decision could give rise, if unchecked.

More specifically, I argue that we should treat complicity claims with great deference: I hope to show that we are, in many cases, without the moral clarity or authority to challenge someone’s belief that the conduct legally required of him would make him complicit in what he perceives as a wrong. Yet if we are restricted in challenging the truth of his assertion of complicity, then it becomes especially important to be able to assess his objection on the basis of the cost that honoring it would impose on others. Thus, I contend that the smaller the burden of a religious exemption on third parties, the more readily courts should grant the requested exemption. By the same token, the greater the burden that a conscience-based exemption would impose on third parties, the less willing courts should be to accede to the

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*Contraception Mandate Debate: Achieving a Sensible Balance*, 114 Colum L Rev Sidebar 1, 22–23 (2014). For an opposing viewpoint, see Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 Drake L Rev 433, 470–74 (2014) (noting that the case law sometimes adverts to third-party interests, but nonetheless concluding that, “generally speaking, the legal standards do not have a consistent way of taking account of these impacts”).

<sup>42</sup> See, for example, Marc DeGirolami, *On the Claim That Exemptions from the Mandate Violate the Establishment Clause* (Law Professor Blogs Network, Dec 5, 2013), archived at <http://perma.cc/8GBW-T57U>.

<sup>43</sup> See, for example, Gedicks and Koppelman, 67 Vand L Rev En Banc at 54–56 (cited in note 41); Micah Schwartzman, Richard Schragger, and Nelson Tebbe, *The Establishment Clause and the Contraception Mandate* (Balkinization, Nov 27, 2013), archived at <http://perma.cc/665Q-EE23>; Micah Schwartzman and Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall* (Slate, Nov 26, 2013), archived at <http://perma.cc/Q96D-4AS8>; Frederick Mark Gedicks and Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv CR–CL L Rev 343, 356–72 (2014).

religious objector's request. I end the Article with a proposal for a revised balancing test that captures this interplay.

Part I begins with a critical assessment of the understandings of complicity in both the majority and dissenting opinions in *Hobby Lobby*. I argue that the majority was overly deferential to the religious believer's assertions of complicity, while the dissent operated with a conception of complicity that was too stringent. Looming over both positions is a disagreement about the role that courts may play in evaluating complicity claims. A subsidiary aim of Part I is to tease apart what kinds of claims—moral, empirical, or relational—courts must treat deferentially out of respect for religion.

In Parts II and III, I draw out and critique the conception of complicity immanent in the law. The aim here is twofold: First, I seek to demonstrate that, had the Court relied on that conception rather than deferring to the more expansive one underpinning *Hobby Lobby's* claims, the Court would have denied *Hobby Lobby* an exemption. The Court's own precedents, that is, would have found *Hobby Lobby* to be too tenuously connected to the conduct that it opposes to give its claim of complicity credence, as I aim to show in Part II.<sup>44</sup> But I also argue, in Part III, that the law's understanding of complicity is not unassailable. In particular, I aim to establish that considerations of proximity play too prominent a role in complicity determinations and that proximity is neither a reliable nor always a compelling guide when it comes to judging whether someone has reason to feel implicated in conduct that he deems wrong. I argue that proximity is given this prominence because we tend to feel more implicated in conduct to which we bear a closer causal relation, whether or not we are in fact more complicit. In other words, proximity tracks a *subjective* sense of complicity. But if what matters is one's subjective sense, then there is no reason to privilege the law's conception of complicity over that of the religious objector when the religious objector happens to *feel* complicit in a greater range of conduct than the standard legal account contemplates. I conclude then that courts should, in general, take claims of complicity at face value, at least when they do not rest on factual errors.

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<sup>44</sup> See Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 *Am U J Gender, Soc Pol & L* 303, 329–30 (2014).

That conclusion does not automatically entail that the religious objector is entitled to an exemption, however. For even while courts should in general treat as true the religious adherent's claim of complicity, they must still consider whether acceding to a request for an accommodation would impose undue burdens on third parties. In Part IV, I argue (pace Ginsburg's dissent) that the doctrine does not currently mandate the consideration of third-party costs and that this oversight is deeply problematic. I then propose a revision to the test for religious accommodations that aims to include third-party considerations. I conclude with some personal reflections.

A note about terminology before proceeding: I frame the issues here in reference to a *business's* rights of conscience or religious freedom, or to those of its *owners*. I do not mean to imply that the business itself, whether or not it is incorporated, can exercise religion in its own right or have its own conscience. Indeed, elsewhere I argue that it cannot.<sup>45</sup> Instead, I use the term "business" as a shorthand for "the members of the business who have reason to feel implicated in its acts." This is in keeping with *Hobby Lobby*, which grounds its extension of RFRA rights to the corporation in the free exercise rights of the corporation's individual members.<sup>46</sup>

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<sup>45</sup> See Sepinwall, 5 Harv Bus L Rev at 178–90 (cited in note 27). For a preview of some of these arguments, see Sepinwall, *Can a Corporation Have a Conscience?* (cited in note 29); Amy Sepinwall, *Corporate RFRA Rights and Complicity* (The Conglomerate, July 16, 2014), archived at <http://perma.cc/SU52-WVE7>. See also Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 Hastings L J 411, 428–30 (2012) (arguing that corporations are not persons and thus cannot bear moral responsibility); Elizabeth Sepper, *Taking Conscience Seriously*, 98 Va L Rev 1501, 1540–55 (2012) (arguing that institutions do not possess a conscience).

<sup>46</sup> See *Hobby Lobby*, 134 S Ct at 2768–72. I note that *Hobby Lobby* assumes, without argument, that the relevant members consist of only the closely held corporation's owners. Others have contested this assumption on the grounds that the company's decisions about the provision of health care might contravene the deeply held convictions of its employees and that employees too have reason to care about what the company does. See, for example, *id* at 2795 (Ginsburg dissenting); *Korte*, 735 F3d at 722 (Rovner dissenting); Orts, *The Legal and Social Ontology of the Firm* (cited in note 27) ("Rights of employees may be equal to those of owners and managers in this context."); Sepper, 22 Am U J Gender, Soc Pol & L at 319 (cited in note 44) ("In the case of disagreeing shareholders, whose beliefs matter? And what of employees who may not share the owners' beliefs?"). But I do not seek to challenge this assumption here. Instead, I first assume that there is a set of members who have exclusive authority over the corporation's acts and so have reason to care about how its acts redound to them. Second, I assume that these members are entitled to seek exemptions from legal requirements to which the corporation is otherwise subject by virtue of their own rights. I will refer to these members as "owners," but I use that term provisionally. Those who think that there are

## I. COMPLICITY AND DEFERENCE

In this Part, I argue that the RFRA doctrine lends itself to confusion about the scope of permissible complicity claims because it requires the person seeking an exemption to demonstrate that a neutral law of general applicability imposes a “substantial” burden on the religious believer<sup>47</sup> and the question of when a burden becomes “substantial” is undertheorized and controversial.<sup>48</sup>

In Part I.A, I begin with the Hobby Lobby owners’ claims in an effort to clarify what is at stake—morally, for them, and conceptually, for the courts assessing these claims. To that end, I distinguish among three different bases for evaluating the truth of these claims—on moral, empirical, or relational grounds. I then turn to the conceptions of complicity advanced in the Court’s opinions. In Part I.B, I argue that the dissent accorded too little deference to the owners’ beliefs. By contrast, the majority, as we shall see in Part I.C, was too solicitous, as it suggested that challenging the owners on any ground was beyond the competence and prerogative of the Court. Part I.D returns to the three dimensions on which conscientious objections might be evaluated and addresses the extent of deference to be accorded to each one.

## A. Moral, Empirical, and Relational Elements of Complicity Claims

The ACA’s contraceptive mandate requires coverage of all FDA-approved forms of contraception.<sup>49</sup> Hobby Lobby objected to four of these methods, on the ground that they pose a risk of functioning as “abortifacients”—that is, drugs or devices that

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non-owning members who are entitled to press their rights through the corporate form may substitute for “owners” the generic name of these other constituents (for example, employees, creditors, and so forth). For accounts of ownership that reveal its complexity, see A.M. Honoré, *Ownership*, in A.G. Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work* 107, 107–34 (Oxford 1961); Orts, *Business Persons* at 104–05 (cited in note 30).

<sup>47</sup> See notes 19–20 and accompanying text.

<sup>48</sup> See generally, for example, Steven D. Smith and Caroline Mala Corbin, Debate, *The Contraception Mandate and Religious Freedom*, 161 U Pa L Rev Online 261 (2013) (staking opposite positions on how courts should think about the term “substantial” in ascertaining whether the burden on the religious adherent is “substantial”).

<sup>49</sup> See 80 Fed Reg at 41318 (cited in note 10) (incorporating by reference the Health Resources and Services Administration’s guidelines on women’s preventive services). For these guidelines, see *Preventive Care Benefits for Women* (HHS), archived at <http://perma.cc/4JD2-QGEM>.

destroy embryos.<sup>50</sup> The majority described Hobby Lobby's concerns about subsidizing these forms of contraception in this way:

The owners of the businesses have [(1)] religious objections to abortion, and [(2)] according to their religious beliefs the four contraceptive methods at issue are abortifacients. [(3)] If the owners comply with the HHS mandate, they believe they will be facilitating abortions.

...

[Doing so will connect them] to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.<sup>51</sup>

Claim (1) is a moral claim: the owners believe (on religious grounds) that abortion is wrong. Moral claims assert propositions about right and wrong. Claim (2) is an empirical claim: the owners believe that four of the forms of contraceptive coverage that the ACA mandates work by aborting embryos. Claim (3) is a relational claim: the owners believe that complying with the HHS mandate—that is, “providing the coverage demanded by the HHS regulations”<sup>52</sup>—connects them to the conduct they deem wrong, or relates them to the wrong, in a way that would make them complicit.<sup>53</sup>

All three of these claims are controversial, and many people would reject each one. Clearly, a good many people deny that abortion is wrong.<sup>54</sup> A greater percentage still think that abortion should be legal.<sup>55</sup> Claim (2) is even more controversial, as the medical establishment firmly rejects the notion that any of the contested forms of contraception works by destroying an embryo.<sup>56</sup> Finally, given how remote an employer's contribution is to his employees' contraceptive choices, Hobby Lobby's claim

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<sup>50</sup> See Cathy Lynn Grossman, *What's Abortifacient? Disputes over Birth Control Fuel Obamacare Fight* (Wash Post, Jan 28, 2014), archived at <http://perma.cc/P767-8SPN>.

<sup>51</sup> *Hobby Lobby*, 134 S Ct at 2759, 2778. Note that the numbers in parentheses were added to the block quotation to ease the exposition that follows.

<sup>52</sup> *Id* at 2778.

<sup>53</sup> This third claim in fact contains both a moral element and a relational one. I elaborate on these elements in Part I.D.

<sup>54</sup> See Lydia Saad, *Americans Still Split along “Pro-Choice,” “Pro-Life” Lines* (Gallup, May 23, 2011), archived at <http://perma.cc/Q9Y5-2W6R> (reporting the results of a Gallup poll indicating that 39 percent of Americans think that abortion is “morally acceptable,” while 51 percent think that it is “morally wrong”).

<sup>55</sup> See *id* (reporting on a contemporaneous poll in which 49 percent of Americans identified as pro-choice, while 45 percent identified as pro-life).

<sup>56</sup> See notes 131–34 and accompanying text.



that the contraceptive mandate connects it to the supposedly wrongful conduct flies in the face of the standard accounts of complicity in law and morality, as we shall see in Part II.

In light of the idiosyncratic nature of Hobby Lobby's views on the permissibility of using or subsidizing others' use of these modes of contraception, the justices faced the difficult question of whose views should prevail. Should they defer to Hobby Lobby's contention that it was complicit? Or was it within the Court's purview to judge the merits of the moral, empirical, and relational predicates of that contention? As Part I.B demonstrates, the dissent took issue with the moral and relational bases of Hobby Lobby's complicity claim; the majority, on the other hand, refused to consider the merits of any of them.

### B. Complicity as Intentional Participation

The dissent in *Hobby Lobby* maintained that the Court may determine for itself whether the conscientious objector has reason to believe himself complicit in the conduct he opposes, and that the locus for that determination is the substantial-burden prong of RFRA's test.<sup>57</sup> Other jurists and commentators agree.<sup>58</sup> They seize on the word "substantial" and contend that this word requires courts "to distinguish large or considerable burdens from minor or incidental ones."<sup>59</sup> Otherwise, "any honestly-perceived burden on religion resulting from government action would suffice to make out a prima facie free exercise claim."<sup>60</sup>

Notwithstanding the semantic plausibility of the argument, however, it is far from clear that the doctrine's treatment of the substantial-burden prong in fact contemplates an inquiry into whether the religious adherent is right to think himself complicit in the conduct his religion opposes, let alone an inquiry into whether he is rendered sufficiently complicit such that his burden counts as "substantial." Nor does Ginsburg make good on

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<sup>57</sup> *Hobby Lobby*, 134 S Ct at 2798–99 (Ginsburg dissenting).

<sup>58</sup> See, for example, *Wheaton College v Burwell*, 134 S Ct 2806, 2812 (2014) (Sotomayor dissenting) ("Not every sincerely felt 'burden' is a 'substantial' one, and it is for courts, not litigants, to identify which are."); *Korte v Sebelius*, 735 F3d 654, 708 (7th Cir 2013) (Rovner dissenting), cert denied, 134 S Ct 2903 (2014). In her closing statement in the *University of Pennsylvania Law Review Online* debate, Professor Caroline Corbin presages Justice Ginsburg's contention that the term "substantial" means that not just any burden should count under RFRA. Smith and Corbin, Debate, 161 U Pa L Rev Online at 279 (cited in note 48).

<sup>59</sup> *Korte*, 735 F3d at 708 (Rovner dissenting).

<sup>60</sup> *Id* (Rovner dissenting).

her contention that judges enjoy a prerogative to assess the strength of complicity claims.<sup>61</sup> If anything, in many cases the substantial-burden inquiry elides the question of complicity altogether and focuses exclusively on the extent of the penalty the adherent would face were he to decline to follow the law.<sup>62</sup> The burden, then, tracks the consequences of noncompliance with the challenged legal requirement, not the repercussions of compliance.

The dissent in *Hobby Lobby*, however, was unperturbed, and it sought to contest Hobby Lobby's claim of complicity on moral

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<sup>61</sup> Ginsburg articulated a distinction between “factual allegations that [the plaintiffs] believe are sincere and of a religious nature, which a court must accept as true, and the ‘legal conclusion . . . that [the plaintiffs] religious exercise is substantially burdened,’ an inquiry the court must undertake.” *Hobby Lobby*, 134 S Ct at 2798 (Ginsburg dissenting), quoting *Kaemmerling v Lappin*, 553 F3d 669, 679 (DC Cir 2008). But the two cases she cited do not support her assertion that courts may judge whether the religious adherent is right to believe himself complicit in the conduct contravening his religious convictions. Instead, in both cases, the Court punted on the question whether the adherent's burden was substantial because, in both, the Court concluded that the asserted burden was not of the kind that courts need to recognize in the first place. Thus, in the first case Ginsburg cited, *Bowen v Roy*, 476 US 693 (1986), the Court asserted that the Free Exercise Clause did not include a right of the religious believer to mandate that the government conduct its affairs in a manner consistent with the believer's faith. Id at 699–700. The issue there, then, was not so much whether the believer would be complicit in the government's conduct of its own affairs as it was whether his concerns about his (supposed) complicity warranted accommodation. The second case, *Hernandez v Commission of Internal Revenue*, 490 US 680 (1989), did speculate about whether the alleged burden was substantial, but it did not conclusively decide the issue, arguing that even if the burden were substantial, the government's compelling interest would justify the burden's imposition. Id at 699. Put differently, we might see the issue here in terms similar to those in *Roy*: the question might be not “Does the regulation impose a substantial burden on the religious adherents?” so much as it is (and as it was in *Roy*) “Is this the kind of burden we have reason to accommodate?” Neither *Roy* nor *Hernandez*, then, stands for the proposition that the substantial-burden inquiry invites the Court to challenge a believer's assertion that he is complicit (although, again, it does permit the Court to determine whether to exempt him at the end of the day).

<sup>62</sup> Compare *University of Notre Dame v Sebelius*, 743 F3d 547, 558 (7th Cir 2014) (“Notre Dame may consider the process a substantial burden, but substantiality—like compelling governmental interest—is for the court to decide.”), and *Kaemmerling*, 553 F3d at 678 (“An inconsequential or *de minimis* burden on religious practice does not rise to [the level of a substantial burden under RFRA], nor does a burden on activity unimportant to the adherent's religious scheme.”), with *Korte*, 735 F3d at 683, quoting *Hobby Lobby Stores, Inc v Sebelius*, 723 F3d 1114, 1137 (10th Cir 2013):

[W]e agree with our colleagues in the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the “intensity of the coercion applied by the government to act contrary to [religious] beliefs.” . . . Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions.

and relational grounds.<sup>63</sup> More specifically, the dissent judged the owners' claims of complicity against its own understanding, which can be summarized by this proposition: unless an actor has (1) taken part in the decision to pursue some act and (2) participated directly in that act, he should not be taken to be responsible for that act. I take up each of these supposed requirements in turn.

### 1. Decisionmaking and complicity.

The dissent, along with some commentators and some of the lower court opinions in the contraceptive-mandate challenges, maintained that the mandate does not make the employer complicit in its employees' uses of contraception because the employer does not participate in the decision about whether to use contraception.<sup>64</sup> As Ginsburg stated, "the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers."<sup>65</sup> As such, "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action."<sup>66</sup> Judge Ilana Rovner, dissenting in a Seventh Circuit mandate challenge, made a similar argument, contending that "[a]lthough funds from the company health plan are being used to facilitate [the employee's contraceptive] choice, no objective observer would attribute that choice to the company, let alone its owner."<sup>67</sup> And so, Ginsburg and Rovner each concluded, the

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<sup>63</sup> By contrast, the dissent agreed with the majority that courts "must accept as true" the religious objectors' factual allegations. *Hobby Lobby*, 134 S Ct at 2798 (Ginsburg dissenting). I argue that deference to the objectors' understanding of the facts is unwarranted. See Part I.D.2.

<sup>64</sup> *Hobby Lobby*, 134 S Ct at 2799 (Ginsburg dissenting); *Grote v Sebelius*, 708 F3d 850, 865 (7th Cir 2013) (Rovner dissenting). See also *Autocam Corp v Sebelius*, 2012 WL 6845677, \*7 (WD Mich):

The mandate does not compel the [owners] as individuals to do anything. They do not have to use or buy contraceptives for themselves or anyone else. It is only the legally separate entities they currently own that have any obligation under the mandate. The law protects that separation between the corporation and its owners.

<sup>65</sup> *Hobby Lobby*, 134 S Ct at 2799 (Ginsburg dissenting).

<sup>66</sup> Id (Ginsburg dissenting), quoting *Grote*, 708 F3d at 865 (Rovner dissenting).

<sup>67</sup> *Korte*, 735 F3d at 718 (Rovner dissenting).

employee's decision cannot impose a substantial burden on the employer's exercise of religion.<sup>68</sup>

The argument here is familiar from cases in which taxpayers have raised Establishment Clause objections to public funding for programs when the funding recipient elects to use the funds at a religious institution. Thus, for example, in *Zelman v Simmons-Harris*,<sup>69</sup> the Supreme Court rejected the idea that a school voucher program compelled taxpayers to subsidize religion.<sup>70</sup> The Court reasoned that because the program did not privilege or otherwise single out religious institutions, and because public money reached religious schools solely by way of "genuine and independent private choice," taxpayers had no reason to think that *they* or the government was funding religion.<sup>71</sup>

The general form of these arguments is as follows: the objector does not choose the conduct he deems objectionable, so he is not responsible for that conduct. Yet this is a very cramped view of complicity, for it presumes that one can be complicit only in conduct that one chooses.<sup>72</sup> The real question here is not whether an employee's decision belongs to, or is attributable to, her employer, but instead whether the employer bears some responsibility for the employee's act *even if the employer did not participate in the decision to pursue that act*.

To see that one can bear responsibility for another's act independent of whether one took part in the decision to pursue that act, consider a gun merchant who sells a weapon that she knows the buyer will use to kill someone else. There is no sense in which the decision to kill this other person is the merchant's. Here, as in the contraceptive-mandate case, there is an "interruption" in the causal "linkage" between the merchant's act and

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<sup>68</sup> *Hobby Lobby*, 134 S Ct at 2799 (Ginsburg dissenting); *Korte*, 735 F3d at 718 (Rovner dissenting).

<sup>69</sup> 536 US 639 (2002).

<sup>70</sup> *Id.* at 662–63. See also *Witters v Washington Department of Services for the Blind*, 474 US 481, 489 (1986) (upholding, against an Establishment Clause challenge, the use of state financial aid for tuition at a Christian college at which the recipient was to pursue bible studies); *Zobrest v Catalina Foothills School District*, 509 US 1, 13–14 (1993) (rejecting an Establishment Clause claim objecting to the use of public funding for a sign language interpreter for a student attending a Catholic high school).

<sup>71</sup> *Simmons-Harris*, 536 US at 652.

<sup>72</sup> Compare H.L.A. Hart and Tony Honore, *Causation in the Law* 129 (Oxford 2d ed 1985) (articulating an interventionist position supporting Ginsburg's dissent), with Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* 233–53 (Oxford 2009) (arguing that an accomplice's responsibility does not evaporate simply because the perpetrator's intention "intervenes" in the causal chain).

the killing—namely, the decision on the part of the buyer to commit the killing.<sup>73</sup> But the mere fact that the decision is not the merchant's does not absolve her of moral responsibility for the resulting death. (Nor would she necessarily escape criminal liability under the law.)<sup>74</sup> And indeed, many of us would hold that she *is* complicit in the killing, because she provided the gun to the killer knowing that he would use it as a murder weapon, and without seeking to prevent the killing, warn the victim or police, and so on.

Moreover, on other accounts of shared responsibility, something even less than knowledge can be enough to sustain a judgment of complicity.<sup>75</sup> Thus, on these accounts, a person can be complicit in another's wrong if he merely shares the wrongful attitudes that motivated the wrong (for example, all racist individuals share responsibility for a racially motivated crime),<sup>76</sup> or if he and the perpetrator are participating in a joint project that the wrong furthers, even if he did not know and had no reason to know that the perpetrator would choose wrongful means to advance their shared end.<sup>77</sup> In short, conceptions of complicity may be far more expansive than the dissent recognizes.

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<sup>73</sup> The quoted language here borrows from the terminology Ginsburg used in her dissenting opinion: "It is doubtful that Congress, when it specified that burdens must be 'substantia[...],' had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed." *Hobby Lobby*, 134 S Ct at 2799 (Ginsburg dissenting).

<sup>74</sup> *Backun v United States*, 112 F2d 635, 637 (4th Cir 1940) ("One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun."). For an excellent and probing overview of accomplice liability under domestic and criminal law in the context of weapons provision, see generally James G. Stewart, *The Accomplice Liability of Arms Vendors: A Conceptual Defense* (unpublished manuscript, July 11, 2014) (on file with author).

<sup>75</sup> See, for example, Larry May, *Sharing Responsibility* 50 (Chicago 1992) (noting that one can bear responsibility for a hate crime, for example, simply because one publicly endorsed the attitudes that the crime expresses); Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* 107–12, 147–61 (Cambridge 2000) (grounding shared responsibility in shared ends, even when one party undertakes measures to achieve those ends that another party opposes); Margaret Gilbert, *Sociality and Responsibility: New Essays in Plural Subject Theory* 14–16 (Rowman & Littlefield 2000) (grounding shared responsibility for a group act in the obligations that members owe one another to form and sustain a "plural subject" of their joint activity).

<sup>76</sup> See May, *Sharing Responsibility* at 50 (cited in note 75).

<sup>77</sup> See Kutz, *Complicity* at 156–61 (cited in note 75). The understanding of complicity here is embodied in the kind of conspiracy liability captured in the *Pinkerton* doctrine. See *Pinkerton v United States*, 328 US 640, 647–48 (1946) (establishing a rule of conspiracy liability in which a conspirator may be liable for criminal offenses committed by a

With that said, it is certainly not the case that facilitation always makes the facilitator responsible for the act or choice that he facilitates.<sup>78</sup> The point is instead that an account denying that one can be complicit in an act unless one chooses that act overlooks a great many ways in which one can be responsible.

## 2. Complicity as direct participation.

Ginsburg's overly narrow view of complicity finds an echo in Justice Sonia Sotomayor's dissent in *Wheaton College v Burwell*,<sup>79</sup> which the two other female justices joined. In that case, Wheaton College, "an explicitly Christian" institution,<sup>80</sup> contended that it would be complicit in contraceptive use as a result of its filling out a form registering its objection to the contraceptive mandate, because filling out the form would "trigger[ ] the obligation for someone else to provide the services to which it objects."<sup>81</sup> In response, the dissent argued that Wheaton's "claim ignores that the provision of contraceptive coverage is triggered not by its completion of the self-certification form, but by federal law."<sup>82</sup> To buttress its argument, the dissent borrowed an analogy that Judge Posner invoked in another contraceptive-mandate challenge.

In *University of Notre Dame v Sebelius*,<sup>83</sup> Posner described a scenario involving a Quaker who seeks an exemption from a wartime draft because he subscribes to his religion's pacifism.<sup>84</sup>

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coconspirator that are within the scope of the conspiracy, in furtherance of the conspiracy, and reasonably foreseeable as a necessary or natural consequence of the conspiracy).

<sup>78</sup> For example, if one is innocently ignorant of the fact that one acts in facilitation of a crime, one will not bear responsibility for that crime. Further, the same result obtains if one knows that one facilitates a crime but one does not do anything additional to what one was on track to do anyway. See Benton Martin and Jeremiah Newhall, *Technology and the Guilty Mind: When Do Technology Providers Become Criminal Accomplices?* J Crim L & Crimin \*41–42 (forthcoming), archived at <http://perma.cc/JUQ9-9T85> (arguing that the bus driver who knowingly drives a passenger to the passenger's intended crime scene is not culpable, but the taxi driver who does so is, since the bus driver does not deviate from his scheduled route—he literally does not go out of his way to provide the assistance—whereas the taxi driver's act is directly responsive to the criminal's plan).

<sup>79</sup> 134 S Ct 2806 (2014).

<sup>80</sup> *About Wheaton* (Wheaton College), archived at <http://perma.cc/43JN-KYJH>.

<sup>81</sup> *Wheaton College*, 134 S Ct at 2808 (Sotomayor dissenting). See also *Notre Dame*, 743 F3d at 554.

<sup>82</sup> *Wheaton College*, 134 S Ct at 2808 (Sotomayor dissenting). Seven of the eight federal appellate courts to hear challenges to the proposed accommodation have adopted similar reasoning and have thus ruled against the challengers. See note 12.

<sup>83</sup> 743 F3d 547 (7th Cir 2014).

<sup>84</sup> *Id* at 556.

The selective service officer grants the Quaker the exemption but then notes that someone else will be drafted in his place.<sup>85</sup> The Quaker is indignant, insisting that recruiting someone else will violate the very religious belief that prompted him to seek the exemption in the first instance: “Because [the Quaker’s] religion teaches that *no one* should bear arms, drafting another person in his place would make him responsible for the military activities of his replacement.”<sup>86</sup> But, Posner continued, the Quaker is in fact responsible neither for the drafting of a replacement nor for any fighting in which the replacement participates.<sup>87</sup> By “exempting him[,] the government [has not] forced him to ‘trigger’ the drafting of a replacement who was not a conscientious objector.”<sup>88</sup> As such, Posner concluded that RFRA does not “require a draft exemption for both the Quaker and his non-Quaker replacement.”<sup>89</sup>

The conclusion here is right: RFRA does not require the military to forsake finding a replacement for the pacifist to whom it grants an exemption. But the conclusion does not follow from the argument preceding it. The Quaker does in fact cause military participation that would not have occurred otherwise: someone will end up serving who would not have served but for the Quaker’s exemption. The situation would be different if the military called someone up—call him Smith—but then turned Smith away, deciding that he was unfit for service. The selective service officer would then go to the next name on the list and someone—say, Jones—would end up serving who would not have been recruited but for the unfitness of Smith. Smith would not have “triggered” Jones’s recruitment. What distinguishes Smith from the Quaker, then? It is the very choice that the exemption opponents invoke as the consideration that makes the moral difference: The Quaker *chooses* not to serve, thereby altering the set of individuals who do serve by virtue of his intentional act. But Smith is turned away; the fact that someone else will serve in his place is not attributable to him.

Moreover, suppose that Posner and Sotomayor were right that it is the draft itself that does the triggering, not the

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<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> *Notre Dame*, 743 F3d at 556.

<sup>88</sup> Id. This quotation, as well as the one in the text accompanying the following note, has been altered such that the rhetorical questions in the original are recast here as the assertions that the rhetorical questions are meant to imply.

<sup>89</sup> Id.

Quaker's successful bid for an exemption. The Quaker and Smith are still distinguishable on moral grounds because the Quaker would have an independent reason for caring about the fact that someone will be replacing him that Smith (who presumably is not a pacifist) does not have. What matters for the Quaker is not (or not only) that his choice places someone in battle who would have escaped the draft were it not for the Quaker's exemption; it is that the Quaker's exemption is undermined if the result for the world—one more soldier fighting—is the same whether or not the Quaker is granted the exemption. One does no more than an end run around the moral prohibitions that should constrain one's conduct—in the Quaker's case, the prohibition against participating in warfare—if one merely outsources the prohibited conduct.<sup>90</sup> This is not to say that the military must, as a matter of respecting the Quaker's objection, desist from finding someone to take his place; the cost to the war effort of reducing the number of available soldiers so that no conscientious objector is replaced might well be too great. But it is to point out that the Quaker's objection to the military's replacing him has some merit, Posner's (or Sotomayor's) rejection of it notwithstanding. If there is a reason to deny the Quaker's request that no one replace him, then, it is not because he has no legitimate reason to think himself complicit in the fighting in which his replacement will engage but because the burden on others of acceding to the request is more than he has a right to impose. A similar line of argument can be used to demonstrate that the religious nonprofits' objections to HHS's accommodation procedure are also on firmer footing than most rulings on their challenges have recognized.<sup>91</sup>

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<sup>90</sup> See, for example, Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 *Const Comm* 365, 375 (2006) (“If it would be a violation of your conscience to *do X*, it should similarly be a violation of conscience if you *pay other people* to do X.”); Ed Hedemann, ed, *Guide to War Tax Resistance* 94 (War Resisters League 3d ed 1986) (“[I]t’s immoral to pay someone to do what it would be immoral to do yourself . . . War is immoral, and I can’t pay taxes that will buy war.”). The idea that one cannot escape complicity by having someone else do the thing that one’s religion prohibits is common in religious doctrine and practice. In Jewish law, for example, it is impermissible to employ a “Shabbos goy”—that is, a non-Jew whom one asks to carry out on one’s behalf some of the tasks prohibited on Shabbat. See Aryeh Citron, *The Myth of the “Shabbos Goy”* (Chabad-Lubavitch Media Center), archived at <http://perma.cc/SLV9-VN8Z>; Joseph Jacobs and Judah David Eisenstein, *Shabbat Goy* (Jewish Encyclopedia), archived at <http://perma.cc/X6X8-2FU5>.

<sup>91</sup> Most of the courts considering these challenges have contended that nonprofits do not trigger contraceptive coverage by filling out a form registering their objections to the contraceptive mandate and so they are not complicit in that contraceptive coverage;



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as such, the accommodation procedure does not substantially burden their religious exercise. See note 12. For a succinct statement of the argument against the objectors, see *University of Notre Dame v Burwell*, 786 F3d 606, 614 (7th Cir 2015).

These cases address the revised accommodation procedure. The original procedure, challenged in *Wheaton College*, required the religious nonprofit to notify its TPA of its objection. See note 10. The new procedure requires no more of the religious objector than that it notify HHS of its objection; it is then HHS's responsibility to notify the TPA. 79 Fed Reg at 51094–95 (cited in note 10). So, relative to the policy contemplated by the Supreme Court in *Wheaton College*, the new procedure contains one more layer of bureaucracy, and so one more layer of insulation, between the nonprofit and the party subsidizing contraception.

With that said, there are at least two reasons to have sympathy for the nonprofits' contention that the new procedure does not alleviate their complicity concerns. First, the premise underlying the new procedure is itself suspect: The thought seems to be that by having HHS serve as an intermediary between the nonprofit and the TPA, the connection between the nonprofit and contraceptive coverage is made more tenuous and so the magnitude of culpability that the nonprofit bears should be diminished. But the presumed connection between proximity and culpability is wrongheaded, for reasons I articulate in Part III.B–C.

Second, the argument about triggering fails to take seriously the felt experience of contributing to conduct that one deems gravely wrong. Imagine the following hypothetical: Suppose that the government has decided that it is permissible to kill young babies for sport so long as one has a license to do so. Suppose further that the government has determined that a key way for individuals to obtain such licenses is through their employers. The government recognizes that some employers object to infanticide, so it develops a policy whereby objecting employers can register their objections with the government, which will then let a third-party provider know that it should issue the licenses to the employees of the objecting organization in the organization's stead. If the objecting organization does not register its objection, the government will find a way of letting the third-party provider know of its obligations. Specifically, the government will have to do more work to determine the identity of the provider and the names of the eligible employees. But at the end of the day, the outcome will be the same. That is, the same number of licenses will be issued whether or not the employer issues them, whether or not the employer formally registers its objection with the government, or whether the employer refuses to participate and the government has to gather the relevant information on its own. Suppose, finally, that the objecting employer knows all of this: it knows that, no matter what it does, the same number of babies will be killed. Would it then be unreasonable for the employer to refuse to register its objection?

I think not. For someone with objections to infanticide, issuing the killing licenses should of course be out of the question. But seeking an accommodation is not without its moral costs, too. Filing an objection would signal that one's worry lies with one's own participation, rather than with the practice itself; it would ratify the accommodation scheme and so imply that one saw infanticide as a practice about which reasonable minds could differ. But one who genuinely thought that infanticide was wrong would not want to have anything to do with it at all. He should refuse to take part in any aspect of the practice that would normalize it. This includes acceding to the government's accommodation procedure. So the objector need not think that registering his objection "triggers" the issuance of licenses for him to think that he has a valid reason to object; he can instead see his refusal to register as a meaningful way for him to protest a scheme that allows anyone to do something that he deems deplorable.

To be clear, this hypothetical is not intended to suggest that killing babies is the moral equivalent of using contraception. The point is instead that, for someone who sees some act as a grave moral wrong, doing anything other than refusing to have any part in

More generally, the flaw in the Quaker analogy and the decisions denying that the accommodation procedure imposes a substantial burden is that they acknowledge complicity only for those acts in which one participates directly, ignoring the possible responsibility one comes to bear through a surrogate, or by facilitating someone else's commission of a wrong, or perhaps even just by legitimating the overarching scheme through which others are permitted to commit wrongs.<sup>92</sup> We shall see that this narrow understanding of complicity permeates much of the legal and moral treatment of conscientious objection, and that much of this understanding is problematically chary.<sup>93</sup> Before turning to a more general survey and critique of the conceptions of complicity in the law and their moral underpinnings, however, we should assess the understanding of complicity in the majority opinion, for it is as troublingly broad as the dissent's is narrow.

### C. Complicity as Subjective Implication

The majority described what was at stake for the religious owners in *Hobby Lobby* in this way: “[The owners] believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.”<sup>94</sup> The majority insisted that “it [was] not for [the Court] to say that [the owners’] religious beliefs [were] mistaken or insubstantial.”<sup>95</sup> The owners believed that the mandate imposed a “substantial burden” on their religious exercise, and the Court took them at their word.<sup>96</sup>

In so doing, the majority accepted at face value the owners’ factual assertion that the four contraceptive measures to which

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the act will evoke reasonable concerns about complicity. Courts and commentators addressing challenges to the accommodation procedure fail to appreciate this fact, I believe, only because they illicitly allow their sense that contraceptive use is permissible to inform their judgments about whether objectors have reason to feel like the accommodation procedures are morally inculcating. After all, there can be no complicity if there is no wrong to start with. I have no objection to contraceptive use, but I do think that we need to take more seriously the perspective of those who do. The conceded dramatic reference to infanticide is meant to illustrate what taking the objectors’ perspective seriously might entail.

<sup>92</sup> For a hypothetical example of this last source of complicity, see note 91.

<sup>93</sup> See Parts II, III.

<sup>94</sup> *Hobby Lobby*, 134 S Ct at 2778.

<sup>95</sup> *Id.* at 2779.

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

they objected result in the “destruction of an embryo,”<sup>97</sup> even though the medical community does not believe that this is how these measures in fact work.<sup>98</sup> The majority deferred to the owners’ moral claim that it is wrong to destroy embryos. And the majority further accepted the owners’ relational claim that the contraceptive mandate would connect the owners to this (supposed) destruction in a way that would render them complicit in it. In short, the majority deferred completely to the owners’ factual, moral, and relational claims. The Court’s unhesitating deference stands in stark contrast to the dissent’s approach, which evidenced an equally unhesitating effort to review, and then reject, the owners’ belief that they would be complicit in embryo destruction were they to subsidize coverage of (alleged) abortifacients. Which approach should we prefer: one that does or does not seek to judge the factual, moral, and relational underpinnings of a complicity claim? It is now time to assess just which of these elements, if any, warrants deference.

#### D. Deference to Nonstandard Beliefs

In this Section, I treat each of the dimensions of the owners’ complicity claim—its moral, empirical, and relational elements—in turn. In so doing, I assume that the owners’ beliefs are sincerely held. Sincerity is an independent basis on which a court may inquire into the cogency of a bid for religious accommodation.<sup>99</sup> Some commentators have suggested that some of those who seek an exemption from the contraceptive mandate might be feigning objections to contraception on opportunistic grounds in order to lower their insurance costs or curry favor with their religious customer base.<sup>100</sup> These objectors are not the protagonists of my inquiry, however. I mean to focus only on the employers who genuinely believe that some or all contraceptive use (or blood transfusions or the like) are wrong, and that subsi-

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<sup>97</sup> Id at 2775.

<sup>98</sup> See notes 130–34 and accompanying text.

<sup>99</sup> See Ben Adams and Cynthia Barmore, *Questioning Sincerity: The Role of the Courts after Hobby Lobby*, 67 *Stan L Rev Online* 59, 59–60 (2014) (“[C]ourts historically have demonstrated that they are able to ferret out insincere religious claims. There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity.”).

<sup>100</sup> See, for example, Alan J. Meese and Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 *Harv L Rev F* 273, 293 (2014) (noting the risk of opportunism in both corporate and individual claims for accommodations under RFRA).

dizing a wrong renders them morally responsible for it. The doctrine already permits courts to inquire into the sincerity of the objector's professed religious beliefs, and I leave it to courts to ferret out the opportunists from the true believers.

Further, the objectors that I consider must operate with strong opposition to contributing to the conduct that they deem wrong. A mild preference to abstain will not do; instead, it must be the case that contributing would cause the objector to experience a deep rift in his self, so much so that he would be willing to incur some penalty to avoid betraying his convictions.<sup>101</sup> We should require this strength of conviction because the objector, like other citizens, bears a duty of political obedience,<sup>102</sup> and mere distaste for a legal requirement is not sufficient to overcome this duty. Instead, if he is to prevail in his bid for an exemption from a law that binds his compatriots, the objector must have reasons strong enough for his compatriots to think him justified—not on the merits necessarily but simply by virtue of the inner turmoil that obedience would cause. I will not try to identify precisely how strong these reasons should be or how we should determine their strength, but I assume that the typical sentiments voiced around claims of conscience—for example, “I couldn't live with myself if I were to . . .”<sup>103</sup> or “I would rather suffer punishment than obey . . .”<sup>104</sup>—would, if sincere, be sufficiently

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<sup>101</sup> See Plato, *Gorgias* 38 (Liberal Arts 1952) (W.C. Helmbold, trans) (“[Socrates:] And I, for my part, imagine that you and I and everyone else believe that to do wrong is worse than to be wronged and that not to be punished for wrongdoing is worse than to suffer punishment.”). See also Martin Luther King Jr., *Letter from a Birmingham Jail* [King, Jr.] (University of Pennsylvania), archived at <http://perma.cc/S3CT-HV98> (“I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”); *Girouard v United States*, 328 US 61, 68 (1946) (“Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.”).

<sup>102</sup> See, for example, Margaret Gilbert, *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* 91 (Clarendon 2006); H.L.A. Hart, *Are There Any Natural Rights?*, 64 *Philosophical Rev* 175, 185 (1955). See also generally Michael O. Hardimon, *Role Obligations*, 91 *J Phil* 333 (1994); John Horton, *Political Obligation* (Humanities 1992).

<sup>103</sup> See Paul Formosa, *Thinking, Conscience and Acting in Times of Crises*, in Andrew Schaap, Danielle Celermajer, and Vrasidas Karalis, eds, *Power, Judgment and Political Evil: In Conversation with Hannah Arendt* 89, 94 (Ashgate 2010) (describing Hannah Arendt's view of conscience as “advising on the pain of being unable to live with oneself that one ought *not* to perform certain actions”).

<sup>104</sup> See note 101. But see Jonathan Bennett, *The Conscience of Huckleberry Finn*, 49 *Phil* 123, 133 (1974) (arguing that conscience will typically track received moral or legal

strong. The idea might be cashed out in a norm of reciprocity: were others to feel as tormented as the objector does, they too would expect an exemption from the legal requirement (assuming that their exemption imposed no more costs on third parties or the legal regime, at any rate). So they should recognize the objector's desire to avoid this torment as a legitimate ground for an exemption. With that said, worries about sincerity might arise anew—here, with respect not to whether the objector holds the asserted conviction but instead to whether violating it will cause him as much pain as he claims. Again, though, courts are empowered to evaluate whether the objector really is as beset by inner turmoil as he contends. So much, then, for concerns about insincere or casual objectors.

But there is another set of mandate opponents whom I do not consider here. As some commentators have compellingly argued, some of the opposition to the mandate is intended not (or not merely) to avoid complicity in contraceptive use but instead (or in addition) to prevent that use altogether.<sup>105</sup> If these commentators are right, then what is at stake in some of the mandate cases is not an interest in being left alone, as it was in the traditional religious freedom cases.<sup>106</sup> Instead, we should see that some of the opponents of the mandate mean to undermine women's access to contraception—with potentially devastating effects for women's equality.<sup>107</sup> For example, Professors Douglas NeJaime and Reva Siegel detail the ways in which some bids for a conscientious exemption from the contraceptive mandate, or from antidiscrimination laws that would protect gays and lesbians, function as the next frontier in the culture wars. They marshal statements from advocates at the front lines who articulate an evangelical mission: the goal for these advocates is to urge and impose on others a “traditional morality” in which contra-

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precepts that guide conduct through reasoned argument, while sympathy or compassion, typically viscerally felt, can be a truer guide to morally right action).

<sup>105</sup> See, for example, NeJaime and Siegel, 124 *Yale L J* at 2520 (cited in note 28).

<sup>106</sup> See *id.* at 2524–56.

<sup>107</sup> See Marci A. Hamilton, *The Republican War against Women* (Justia, Oct 3, 2013), archived at <http://perma.cc/6LZC-F9HH> (“This is not simply a move to ensure that contraception isn’t paid for; it is an all-out war on women. This is the pushback to the feminist revolution, and it is being fostered by the religious organizations that believe that women should be subservient to men.”); Ruth Rosen, *The War against Contraception: “Women Must Be Liberated from Their Libidios”* (Huffington Post, Apr 21, 2014), archived at <http://perma.cc/B88D-H7S5> (quoting Ilyse Hogue, president of the National Abortion and Reproductive Rights Action League, who stated that “[t]he truth is that this is not about religious freedom, it’s about sexism, and a fear of women’s sexuality”).

ception (along with abortion and same-sex marriage) is verboten.<sup>108</sup> NeJaime and Siegel convincingly argue that the strategy of these religious advocates is an example of “preservation through transformation”:<sup>109</sup> “[W]hen an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may adopt new rules and reasons that preserve elements of the challenged regime.”<sup>110</sup> Put differently, religious opponents of women’s reproductive rights or same-sex marriage wield the banner of religious liberty in an effort to secure through courts the outcome denied to them in Congress (or state legislatures)—to wit, a culture that is inhospitable to the practices and lifestyles that they deplore on religious or ideological grounds.

The strategies and motives that NeJaime and Siegel describe should leave those of us committed to both equality and toleration deeply dismayed. Nonetheless, I do not consider the political and ideological use of complicity claims further. The inquiry here is intended to reach beyond the contraceptive mandate to cases in which there is a genuine conflict between a religious adherent who, with entirely benign motives, objects to some legal requirement and accommodating his objection imposes costs on others. I assume that at least some of those objecting to the employer mandate really do care only for the state of their own souls, and I mean to examine how the law should respond to them. This is already a vexing problem, and, as it arises in the contraceptive-mandate context (as well as in contexts involving refusals to cover the health-care costs of homosexual employees’ spouses, or to serve gay or lesbian customers), it already implicates concerns about equality. It will be worth clarifying the proper response to a straightforward, genuine conflict between conscience and third-party interests, including the interests of discrete, historically oppressed groups. I leave questions about bids for religious accommodations aimed at sabotaging a

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<sup>108</sup> NeJaime and Siegel, 124 Yale L J at 2542–54 (cited in note 28).

<sup>109</sup> Id at 2552–53 & n 151. For Siegel’s seminal articulations of her “preservation through transformation” paradigm, see Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 Yale L J 2117, 2119 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan L Rev 1111, 1113 (1997). For NeJaime’s extension of that work to the context of sexual orientation, see Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Perpetuation of Sexual Orientation Discrimination*, 100 Cal L Rev 1169, 1212–13 (2012).

<sup>110</sup> NeJaime and Siegel, 124 Yale L J at 2553 (cited in note 28).

legislative regime or expressing animus toward women or homosexuals for another day.<sup>111</sup>

### 1. Moral deference.

Deference to the moral claim at issue in a conscientious objection requires a court to take at face value the objector's claim that his religion finds some act or practice morally impermissible. This form of deference is not difficult to defend.

In moral and religious matters, we are often without a capacity for certitude that would allow us to discern truth and falsity.<sup>112</sup> Thus, some theorists defend moral deference on the part of the state on the basis of the skepticism and humility that we owe one another as compatriots in a pluralistic society.<sup>113</sup> Moral deference also protects against "the totalization of morality" on the part of the government.<sup>114</sup> And moral convictions can be deeply entwined with a person's sense of self and purpose. Given that we lack agreed-upon ways to adjudicate among moral convictions, and given the importance that these convictions can play in a person's life, the state should generally refrain from declaring these convictions true or false. In other words, moral deference is the appropriate stance for a polity rife with multiple and competing conceptions of the good.<sup>115</sup> Thus, the doctrine here is generally correct in finding that it is not for courts "to say that the line [of permissibility drawn by the religious adherent is] an unreasonable one."<sup>116</sup>

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<sup>111</sup> I aim to address some of these issues in Amy J. Sepinwall, *The Challenges of Conscience in a World of Compromise*, in Jack Knight, ed, *Nomos: Compromise* (forthcoming 2015) (on file with author).

<sup>112</sup> Professor Simon Căbulea May has implicitly embraced the view that we can and should adjudicate moral claims on the basis of their truth or falsity. See Simon Căbulea May, *Principled Compromise and the Abortion Controversy*, 33 *Phil & Pub Aff* 317, 336 (2005) ("Complicity in an activity is only really a moral problem if that activity really is unethical. Merely believing it to be immoral does not in itself ground a claim to special treatment.").

<sup>113</sup> See, for example, M.M. Moody-Adams, *Democratic Conflict and the Political Morality of Compromise* \*17 (unpublished manuscript, Jan 2014) (on file with author); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* 85 (Belknap 1996).

<sup>114</sup> Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 *U Ill L Rev* 1457, 1494.

<sup>115</sup> See John Rawls, *Political Liberalism* 133–34 (Columbia 1993) (noting the difficulties of maintaining stability and unity in a democratic society, given a citizenry deeply divided on religious, moral, and philosophical doctrines).

<sup>116</sup> *Thomas v Review Board of Indiana Employment Security Division*, 450 US 707, 715 (1981).

With that said, one might think that there are some moral beliefs so objectionable that they deserve no deference at all. Consider, for example, the belief that “homosexuality is wrong” (or, worse still, that “homosexuals are evil”). Shouldn’t there be limits on moral deference to ensure that courts—which are state actors par excellence<sup>117</sup>—are not compelled to treat animus on par with other moral beliefs?

Two responses are in order. First, according deference to a claim that denigrates another group is not the same as endorsing that claim. A court faced with such a claim should treat it with deference but also clearly articulate that the claim flies in the face of our most fundamental constitutional values. Courts, that is, must not only serve religious freedom but also speak in favor of the notion of equal respect that underpins our constitutional regime.<sup>118</sup> Second, deferring to this religious claim does not commit a court to issuing an exemption as a result. The court must still weigh the objector’s assertion against the government’s interest.<sup>119</sup> In some instances, the government will invoke its compelling interest in the eradication of, say, racism, and it will wield that interest to defeat the bid for an exemption. Thus, for example, in *Bob Jones University v United States*,<sup>120</sup> the Government withdrew the university’s tax-exempt status, on public policy grounds. Bob Jones had a policy of denying admission to students who had married outside their race and expelling students who dated or married interracially while enrolled.<sup>121</sup> The Government contended that nonprofit status should be held only by entities that advance a public purpose,<sup>122</sup> there is a public policy against racial discrimination, an entity that violates a public policy cannot be advancing a public

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<sup>117</sup> See, for example, *Shelley v Kramer*, 334 US 1, 15 (1948) (“[J]udicial action is to be regarded as action of the State.”); *Ex Parte Virginia*, 100 US (10 Otto) 339, 347 (1879) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.”).

<sup>118</sup> See Corey Brettschneider, *How Should Liberal Democracies Respond to Faith-Based Groups That Advocate Discrimination? State Funding and Nonprofit Status*, in Austin Sarat, ed., *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* 72, 74–75 (Cambridge 2012) (describing “democratic persuasion,” or the state’s responsibility to counter freedom of expression, with efforts to explain why discriminatory viewpoints “are inconsistent with a respect for free and equal citizenship”).

<sup>119</sup> See notes 19–20 and accompanying text.

<sup>120</sup> 461 US 574 (1983).

<sup>121</sup> *Id.* at 580–81.

<sup>122</sup> *Id.* at 588.



purpose, and so Bob Jones did not qualify for nonprofit status.<sup>123</sup> As I suggest below, this argument does not target racism as squarely as we might like.<sup>124</sup> But it does nonetheless stand as an instance in which the government recognizes the religious entity's genuine conviction but then defeats that conviction on the basis of its own compelling interests.

Moreover, as I argue below, courts must weigh the objectionable moral conviction against not only the government's interests but also the interests of third parties.<sup>125</sup> Third parties will presumably be able to marshal arguments that acceding to the believer's hateful claim inflicts a grave injury on them—one so grave that the court should find it dispositive. But even if third parties choose not to become too vexed about the believer's claim,<sup>126</sup> the state must, again in its capacity as a defender of our constitutional regime, add to its arguments about the compelling interests underpinning the challenged legal requirement a statement decrying the challenge because it deviates from our most cherished constitutional values.

In short, then, moral deference should be absolute, but it need not be enthusiastic, and it is but the first step in an inquiry anyway. We might expect that an interest against hate-based claims will be strong enough in most cases to defeat the request for an accommodation, even if courts must take the reasons for the request at face value.<sup>127</sup>

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<sup>123</sup> Id at 604.

<sup>124</sup> See note 241.

<sup>125</sup> See Part IV.

<sup>126</sup> This is just what Professor Andrew Koppelman urges in the context of opposition to gay marriage, on the convincing thought that rights to same-sex marriage are now so widely accepted that those who support them can afford to be magnanimous, at least assuming that a policy allowing for discrimination against gays is accompanied by features that would lessen the sting for individual gay couples. See generally Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S Cal L Rev 619 (2015).

<sup>127</sup> One might worry that the role I assign to the state in defending our constitutional values contravenes the neutral stance that a liberal state should occupy. The position that I am advocating does indeed deviate from a commitment to neutrality, but the deviation is in the service of other, even more foundational values, without which liberalism would collapse. For a stirring and persuasive defense of this "value democracy," see generally Brettschneider, *How Should Liberal Democracies Respond to Faith-Based Groups That Advocate Discrimination?* (cited in note 118); Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton 2012).

## 2. Empirical deference.

In contrast to moral claims, when it comes to factual assertions, we freely adjudicate truth and falsity based on indicia that receive broad support and that we think the government may count as authoritative—typically, observation (mediated by technology, if necessary).<sup>128</sup> It is thus surprising that both the majority and the dissent in *Hobby Lobby* announced that assessing the factual—in particular, the scientific—merits of Hobby Lobby’s claim was verboten.<sup>129</sup>

As we have seen, the owners refer to the four contested forms of contraception as “abortifacients”—that is, measures that have the effect of killing nascent human life. Yet medical authorities—such as the Institute of Medicine, which identified the forms of preventive care for women that the ACA should make available,<sup>130</sup> along with the American College of Obstetricians and Gynecologists and other medical experts—believe that the drugs do not act directly on the embryo.<sup>131</sup> According to the medical community, there is a very small possibility that the contested methods interfere with implantation and, without implantation, the embryo cannot develop.<sup>132</sup> But the general mechanism through which these methods work is by preventing sperm from fertilizing the egg in the first place,<sup>133</sup> in which case there is no embryo at all. In short, then, the owners’ objection relies on an understanding of facts with which the medical establishment disagrees.<sup>134</sup>

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<sup>128</sup> See Leiter, *Why Tolerate Religion?* at 34 (cited in note 34) (“Religious beliefs . . . are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science.”).

<sup>129</sup> *Hobby Lobby*, 134 S Ct at 2778; id at 2798 n 21 (Ginsburg dissenting).

<sup>130</sup> See generally Institute of Medicine of the National Academies, *Clinical Preventive Services for Women: Closing the Gaps* (National Academy of Sciences, July 2011), archived at <http://perma.cc/34G7-NBKS>.

<sup>131</sup> Carroll, *How Hobby Lobby Ruling Could Limit Access* (cited in note 3) (“Research does not support the idea that [the covered forms of contraception] prevent fertilized eggs to implant.”); Grossman, *What’s Abortifacient?* (cited in note 50).

<sup>132</sup> See Carroll, *How Hobby Lobby Ruling Could Limit Access* (cited in note 3) (“Because the doses of medication [in emergency contraception] are very short-term, they probably cannot affect the uterine lining in such a way as to affect implantation.”).

<sup>133</sup> See *Fill This Prescription* (Scientific American, Sept 24, 2005), archived at <http://perma.cc/AM4M-U2WN> (“By medical definition, the pills block rather than terminate pregnancy.”).

<sup>134</sup> See, for example, Anna Glasier, *Emergency Postcoital Contraception*, 337 *New Eng J Med* 1058, 1063 (1997) (“It cannot be stressed too strongly that if hormonal emergency contraception works largely by interfering with ovulation, then it cannot be regarded as an abortifacient.”).

No matter, the majority and dissent maintained, since courts are not permitted to gauge the “plausibility” of a religious claim.<sup>135</sup> But surely this position overstates the bounds of deference that are and should be required. Thoroughgoing empirical deference would commit courts to taking at face value a religious adherent’s objection to subsidizing blood transfusions because, say, he believes the donated blood to have come from the devil.<sup>136</sup> More generally, so long as the religious adherent’s belief is sincerely held and religiously based, it would establish a presumption in favor of an exemption. The government could rebut that presumption only in the face of a compelling interest that the challenged law provides the least restrictive means of serving.<sup>137</sup>

During oral argument in another contraceptive-mandate challenge, Judge Judith Rogers expressed incredulity in response to the claim that courts are hamstrung when it comes to weighing in on the factual merits of a religious claim.<sup>138</sup> And commentators contend not only that courts should be permitted

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With that said, the factual beliefs propelling the owners are not without any support. The evidence showing that the four contested methods do not cause embryo destruction is “not-yet-conclusive.” Jonathan H. Adler, *No, the Supreme Court’s Hobby Lobby Decision Is Not Based upon a Scientific Mistake* (Wash Post, July 6, 2014), archived at <http://perma.cc/MA48-HCDW>. Professor Robin Wilson offers an extended discussion of the state of scientific knowledge around the mode of operation of these so-called abortifacients. She concludes that the question whether these drugs can prevent implantation “is simply more complicated than [the American College of Obstetricians and Gynecologists’] blanket assertion suggests,” and she provides a wealth of citations to the writings of medical professionals to this effect. Wilson, 53 BC L Rev at 1455–59 & nn 140–57 (cited in note 18).

<sup>135</sup> *Hobby Lobby*, 134 S Ct at 2778; id at 2798 n 21 (Ginsburg dissenting).

<sup>136</sup> To be clear, this is not the ground on which Jehovah’s Witnesses rest their prohibition against blood transfusions. Instead, they rely on a verse from the Old Testament prohibiting the ingestion of blood. Leviticus 17:10 (New International Version) (“I will set my face against any Israelite or any foreigner residing among them who eats blood, and I will cut them off from the people.”).

<sup>137</sup> See notes 19–20 and accompanying text.

<sup>138</sup> For an audio recording of the oral argument for this case, *Priests for Life v United States Department of Health and Human Services*, 772 F3d 229 (DC Cir 2014), see *Oral Argument Recordings* (May 8, 2014), online at <http://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201405> (visited Nov 7, 2015) (Perma archive unavailable). See also Leslie C. Griffin, *A Tractor Is Not a Gun, Even If You Sincerely Believe It Is* (Hamilton and Griffin on Rights, May 18, 2014), archived at <http://perma.cc/X4DS-W5Z8>. Professor Leslie C. Griffin’s blog post reproduces the colloquy between Rogers and the attorney representing Priests for Life, who maintained that the court would have to accept a religious objector’s claim that he was being asked to produce sheet metal for munitions even if he were mistaken and the sheet metal was to be used only for farm equipment.

to assess the factual bases of claims of complicity<sup>139</sup> but also that they should not grant exemptions when these bases are false.<sup>140</sup> The American College of Obstetricians and Gynecologists, in particular, counsels against exemptions to providing emergency contraception when requests for exemptions are “based on unsupported beliefs about [emergency contraception’s] primary mechanism of action.”<sup>141</sup>

The willingness to weigh in on the empirical merits of a religious claim is not undue. Accepting all factual assertions as true no matter their plausibility would commit us to a life of irrationality. Practical reasoning depends on a grasp not only of our convictions and aspirations but also of the truth about our factual circumstances, so that we may successfully apply the former to the latter. As such, we need a coherent epistemology from which we can gather certain empirical facts. With that said, one might contend that factual claims are not so different from moral claims in this regard. We would surely consign ourselves to a life of irrationality or worse if we granted the truth of all moral claims—for example, claims like “it is permissible to kill humans for sport” or “one is morally required to oppress left-handed individuals.”

There is nonetheless a relevant ground of distinction between empirical and moral claims, which turns on the role of the state and state institutions in a liberal polity. The liberal state is committed to neutrality as among different “comprehensive doctrines.”<sup>142</sup> As such, the state may not weigh in on the truth or merits of citizens’ moral, religious, or other evaluative beliefs. On the other hand, states, like individuals, must act, and they can do so rationally only if they have an accurate grasp of what the world is like. This is especially true of courts, which function as finders and triers of fact. There must be some agreed-upon

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<sup>139</sup> See Griffin, *A Tractor Is Not a Gun* (cited in note 138) (“The idea that all the federal laws can be challenged by any irrational belief is unprecedented. And that’s a fact.”).

<sup>140</sup> See *id.*

<sup>141</sup> Committee on Ethics, *The Limits of Conscientious Refusal in Reproductive Medicine* \*4 (American College of Obstetricians and Gynecologists, Nov 2007), archived at <http://perma.cc/DH8Z-323X>.

<sup>142</sup> Rawls, *Political Liberalism* at 192–94 (cited in note 115). See also Bruce A. Ackerman, *Social Justice in the Liberal State* 10–12 (Yale 1980); Ronald Dworkin, *Why Liberals Should Care about Equality*, in Ronald Dworkin, ed., *A Matter of Principle* 205, 205–13 (Harvard 1985) (distinguishing between a liberalism of neutrality and a liberalism of equality and arguing in favor of the latter); Charles Larmore, *The Morals of Modernity* 125 (Cambridge 1996) (describing neutrality as political liberals understand it but then cautioning against the use of the term).

set of standards and methods that allows courts to determine what facts are true.

Our enlightenment ethos has anointed certain methodologies as truth conferring: observation, the scientific method, certain theoretical constructs, and so on have all been identified as reliable methods for capturing what the world is like. The state need not have a role in discovering and promoting moral truth, and by the lights of some versions of liberalism it should not have such a role. But it does need to have a role in policing empirical truth, at least in the areas in which it is permitted to regulate. For example, HHS could not decide what basic health care should consist of if it did not have a way of apprehending the way that healthy bodies work and identifying the medical interventions that are effective in restoring a sick body to health. Similarly, the Department of Education could not arrive at a “common core” that is genuinely informative unless it filtered truth from falsehood. In short, there is no state license for “epistemic abstinence” when it comes to taking cognizance of empirical facts about the world.<sup>143</sup>

Indeed, it is not even clear that there could exist a state that would be neutral between the claims that empirical evidence supports and the claims that empirical evidence denies. How could we ever be in dialogue, let alone cooperate, with individuals who were completely unmoored from empirical reality?<sup>144</sup> In this regard, it is notable that, even when some religious individuals embrace empirical claims that the scientific establishment denies, the religious adherents do not outright reject the truth-seeking methods of the scientific enterprise (which the liberal state adopts). Instead, claims contending that, for example, some methods of FDA-approved contraception function as abortifacients,<sup>145</sup> or claims denying global warming,<sup>146</sup> invoke science

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<sup>143</sup> I borrow the term “epistemic abstinence” from Professor Joseph Raz, who uses it in reference to a position that he attributes to Professors John Rawls and Thomas Nagel, according to which the state may not seek to justify the theory of justice with which it operates. See generally Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 *Phil & Pub Aff* 3 (1990).

<sup>144</sup> See Ackerman, *Social Justice in the Liberal State* 5–6 (cited in note 142) (identifying the capacity for dialogue as a necessary condition for equal rights).

<sup>145</sup> See, for example, Richard M. Doerflinger, *The HHS Mandate, Unborn Life, and the Professionals: A Cog in the Political Machine* (The Witherspoon Institute, June 25, 2014), archived at <http://perma.cc/S2RV-D63K>.

<sup>146</sup> See generally, for example, Roy W. Spencer, *Climate Confusion: How Global Warming Hysteria Leads to Bad Science, Pandering Politicians, and Misguided Policies That Hurt the Poor* (Encounter Books 2008).

for support. The person who would deny the legitimacy of empirical evidence must either adduce empirical evidence in support of his position, in which case his efforts would be self-defeating, or abandon hope of convincing others that he is right. As such, it is exceedingly difficult to see how such a person could prevail upon the state to accede to his view.<sup>147</sup>

For all these reasons, courts should accord no deference to empirical claims that are manifestly false. To do otherwise would be to consign to absurdity not just the parties before the court but also those whom deference affects. More generally, factual plausibility should indeed be a factor in determining how much deference a claim of complicity should enjoy. As such, if the scientific community were to have concluded that the four contested modes of contraception *never* interfered with implantation and instead always acted prefertilization, then the Court would have been justified in rejecting Hobby Lobby's claim of complicity, for the conduct to which Hobby Lobby objected ought not to have constituted a wrong even by the light of its own moral principle (that is, that destroying an embryo is wrong).<sup>148</sup> With that said, the questions of complicity that *Hobby Lobby* raised would not disappear if only we could conclusively establish that the Hobby Lobby owners got the facts wrong, because other employers challenging the contraceptive mandate object to all forms of contraception.<sup>149</sup> As such, their claims require that we address the broader question of when and why we should defer to the complicity claim of one of these employers.

### 3. Relational deference.

Hobby Lobby's objection to the four contested contraception methods turns not only on its understanding of the medical facts, however far-fetched that understanding may be, but also

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<sup>147</sup> To put the point another way, the challenge of the radical skeptic would, if taken seriously, jeopardize far more than just the account advanced here. Indeed, the swath of propositions that rest at least in part on empirical evidence for their truth or persuasiveness is immense. Most case law and legal scholarship would be debunked if we were to deem credible the radical skeptic's view. Given the great weight of agreement on the other side, the burden of proof lies with him. For these reasons, I set aside concerns about radical skepticism.

<sup>148</sup> I also note that, no matter the legitimacy of Hobby Lobby's objection to the four so-called abortifacients, the larger issue—whether employers may exempt themselves from the contraceptive mandate—would remain for those employers who object on religious grounds to all forms of contraception.

<sup>149</sup> See, for example, *Gilardi v Sebelius*, 926 F Supp 2d 273, 275 (DDC 2013); *Newland v Sebelius*, 542 Fed Appx 706, 707–08 (10th Cir 2013).

on its understanding of when the company or its owners become complicit in the conduct to which they object. More specifically, Hobby Lobby contended that its moral and religious convictions entail that it may not subsidize coverage of the contested contraceptive methods, because subsidization is a form of facilitation, and it may not facilitate or contribute to another's wrong or probable wrong no matter how small the probability of wrongdoing.<sup>150</sup> Its concerns about its own complicity, then, turned not so much on its assessment of the facts as on a particularly demanding conception of moral purity, as governed by a particularly expansive conception of responsibility. By Hobby Lobby's lights, mere facilitation of an act that has even a small potential to involve a wrong causes Hobby Lobby to be morally responsible for that wrong.<sup>151</sup> Nor is Hobby Lobby alone in subscribing to this expansive conception of complicity: all employers who object to the ACA because it provides for health coverage to which the owners object (for example, the full panoply of contraceptive devices, or vaccinations, blood transfusions, and so forth) worry that subsidization relates them to the medical treatment they deem wrong in a way that makes them morally responsible for that wrong. In general, then, those with conscientious objections to the contraceptive mandate believe that the threshold for complicity is lower than what law and morality generally take it to be; for these objectors, a relatively weak connection might be sufficient to implicate them.

What should we make of their unusually expansive sense of their own complicity? I have argued that courts should proceed with great deference when it comes to the moral elements of a conscientious objector's complicity claim, but no deference when the claim's empirical elements are manifestly false. Relational claims fall somewhere in between. In this regard, Justice Alito was right to contend that knowing when one "enabl[es] or facilitat[es] the commission of an immoral act by another" is a "difficult and important question."<sup>152</sup> Thus, some jurists and scholars contend that these claims should be treated no differently than moral ones, which is to say, with great deference.<sup>153</sup>

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<sup>150</sup> See Brief for Respondents, *Sebelius v Hobby Lobby Stores, Inc.*, Docket No 13-354, \*4-5 (US filed Oct 21, 2013) (available on Westlaw at 2013 WL 5720377).

<sup>151</sup> See *Gilardi*, 926 F Supp 2d at 281-83.

<sup>152</sup> *Hobby Lobby*, 134 S Ct at 2778.

<sup>153</sup> See, for example, *Notre Dame*, 743 F3d at 565 (Flaum dissenting) ("[B]y putting substantial pressure on Notre Dame to act in ways that (*as the university sees it*) involve the university in the provision of contraceptives, I believe that the accommodation [ ]

Others maintain that the extent of the implication determines the substantiality of the burden, and therefore that questions as to the extent of the connection fall squarely within a court's purview.<sup>154</sup> Which of these positions should we prefer?

To begin answering that question, note that some relational claims of complicity are clearly too far-fetched to tolerate. We would hardly grant an exemption from having to subsidize some medical treatment because the objector worried that the treatment would cause its recipient to grow horns and a tail. Nor should our solicitude extend this far. Although causal claims are metaphysical rather than empirical,<sup>155</sup> there are causal "facts"—claims of causal connection that, for the purposes of practical reasoning, we take to be no less true than empirical facts. Among these facts are what philosopher David Hume calls "constant conjunctions"—pairs of events in which the first always precedes the second (for example, you flip the switch and the light turns on).<sup>156</sup> However, the connection between administering the medical treatment in question and the patient's growing horns and a tail does not even count as a constant conjunction. Indeed, in no instance has anyone grown horns and a tail after receiving any medical treatment. A rough rule of thumb might then be the following: assertions of supposed causal connections that have never been documented and for which there is uniform contradictory evidence need not be accorded any deference.

Similarly, we should also reject those relational claims that amount to pleas that the objector should be *less* responsible than standard legal or moral theories would allow. For example, we should not permit someone who has intentionally facilitated a crime to evade conviction because he operates with an unusually

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runs afoul of RFRA.") (emphasis added); Mark L. Rienzi, *Unequal Treatment of Religious Exercises under RFRA: Explaining the Outliers in the HHS Mandate Cases*, 99 Va L Rev Online 10, 16 (2013) (arguing that the fact that a religious employer's effect on contraceptive use is attenuated—because employees decide whether they will use the method in question—should be irrelevant for a RFRA analysis, and instead that all that should be required is that the religious belief be sincerely held).

<sup>154</sup> See Part I.B.

<sup>155</sup> Notice that we arrive at causal claims on the basis of inductive reasoning: event B has always followed event A, nature is uniform, and so we should expect future occurrences of A to be followed by B. The constant regularity of "A then B" licenses our conclusion that A causes B. See David Hume, *An Enquiry concerning Human Understanding* 40–54 (Oxford 1999) (Tom L. Beauchamp, ed).

<sup>156</sup> *Id.* at 86. For the view that at least some causal claims are necessarily true, rather than simply inferred by induction, see generally Ted Honderich, 1 *Mind and Brain: A Theory of Determinism* (Oxford 1988).



narrow conception of complicity—say, one that requires that he function as a sufficient cause of the crime in order for him to be found guilty.<sup>157</sup> Even if this narrower conception is mandated by his religious convictions, our fidelity to the law counsels rejecting it. A person who repudiates the theories of responsibility on which legal liability turns poses a far greater challenge than the run-of-the-mill conscientious objector, whose opposition is directed to a discrete set of laws, typically encompassing just a small area of regulation. The challenge arises because the objection of the former targets modes of liability, and these cut across numerous legal domains—torts, criminal law, and regulatory violations (everything from traffic laws to environmental and financial regulations), among others. His is an anarchic challenge, as he effectively attempts to immunize himself from all legal censure and thereby seeks to be treated as “a law unto himself.”<sup>158</sup> At the same time, he is not completely without respect for the rule of law—after all, he is seeking an exemption through legal channels. (Were he to flout even these, there would be reason to think him unfit for political society.) His exemption should be denied, again because recognizing his conception of complicity would place him above the law altogether.<sup>159</sup>

But what of the paradigmatic cases of conscientious objection, in which the objector takes himself to be *more* responsible than the law would have it? This is just the nature of the claim at issue in the contraceptive-mandate challenges: there, the religious adherent believes that subsidizing insurance through which someone else can commit a wrong sufficiently connects the subsidizer to the wrong to make him complicit. In the next Part, we will see that that relationship is not one that the law or standard moral theories recognize as a ground of complicity. One might think that fidelity to the law should decide the issue here,

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<sup>157</sup> Such a view would, I presume, rule out accomplice liability altogether; the only “accomplices” on this view would be coperpetrators. Of course, the defendant who would seek to prevail on these grounds would have to contend not only that his religion construed complicity more narrowly but also that his religion mandated that he not permit himself to be subject to a more expansive conception—perhaps on the ground that any wider sense of responsibility would thwart the freedom that he requires to live out his individuality, as his religion conceives of it. Though not typically rooted in religion, we might think of libertarians’ or objectivists’ resistance to positive obligations as residing along something like these lines. See, for example, Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* 30–35 (Signet 1964).

<sup>158</sup> *Reynolds v United States*, 98 US (8 Otto) 145, 166–67 (1878).

<sup>159</sup> See *id.* at 167 (contending that “[g]overnment could exist only in name” if religious adherents were permitted to escape foundational legal tenets).

just as it does in the case of the person who operates with an unusually narrow conception of responsibility. But two considerations should give us pause. First, this objector does not pose a challenge to the rule of law; if anything, he holds himself to a more demanding standard than the law's. Second, and on the other hand, applying our law to him affirms the values underpinning our own conception of complicity—in particular, the value of individual freedom that functions to keep notions of complicity within bounds that are believed to be reasonable. And indeed, if these bounds were entirely reasonable, we would be right to think that they should prevail. But there is in fact reason to doubt the cogency of the legal conception of complicity—reason enough to put the religious adherent's conception on an equal footing with the law's. I turn now to surveying the legal conception, and then I offer a critique of that conception in Part III.

## II. COMPLICITY IN LAW AND ETHICS

In this Part, I argue that the conception of complicity in standard legal and moral accounts is far narrower than the conception that the mandate opponents wielded. Had the Court applied the law's conception of complicity in *Hobby Lobby*, it would have rejected the owners' claim. This argument turns on a comparison between paying taxes to fund measures some of which the taxpayer opposes and paying an insurance company to provide health-care coverage some of which the subsidizer opposes. I seek to establish here that these two practices are morally on par. Given that the law declines to recognize tax resistance, I conclude that, *as a matter of applying the law consistently*, it should also decline to recognize challenges to the employer mandate. Importantly, the claim at issue here is interpretive, not normative. In Part III, I provide reasons for thinking that courts should treat both tax resistance and insurance challenges more deferentially than they currently do. The ambition in this Part, however, is more modest: I aim to show that the legal conception of complicity and that of the conscientious objectors diverge. It is the idiosyncratic nature of the latter that requires that courts decide whether to defer to their conception or instead to insist on the one that the law embodies.

When it comes to conscientious objection, the law distinguishes between direct participation and remote facilitation, treating the former as compelling and the latter as negligible.

This can be clearly seen in the case of pacifistic objections to the military: the law tends to accord an exemption to the pacifist when he would be made to participate in the war effort,<sup>160</sup> but it denies an exemption to the pacifist who would withhold the portion of his taxes that would fund military expenditures.<sup>161</sup> By the lights of the law, participating in a war is recognizably unconscionable for the pacifistic conscript; funding a war is not.<sup>162</sup> In a similar vein, taxpayers are made to fund capital punishment and government-subsidized abortions no matter their moral or religious qualms about one or both of these practices.<sup>163</sup> And similar reasons undergird the rule that students may be compelled

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<sup>160</sup> The US military recognizes two classes of conscientious objectors: first, those who oppose only combat; and second, those who oppose all military service. In the event of a draft, the first class of conscientious objectors will have to serve in the armed forces, but they will be exempt from all training or duties involving the use of weapons. The second class will be exempt from all military activity, but they will have to pursue alternative service (for example, working with the very young or elderly). See generally *Fast Facts: Conscientious Objection and Alternative Service* (Selective Service System, Apr 30, 2002), archived at <http://perma.cc/8Q9M-FN2U>. It is worth noting that military service, while perhaps the most familiar locus for successful conscientious objection, is not the only area in which the law grants exemptions. Religious objectors may be excused from jury service (when they take seriously the Bible's prohibition on judging another). See *In re Jenison*, 125 NW2d 588, 590 (Minn 1963) (reversing the petitioner's contempt conviction for refusing to serve on a jury). Further, laws permitting controversial medical procedures exempt physicians who object to these procedures on moral or religious grounds. See, for example, 18 Vt Stat Ann § 5285(a) ("A physician, nurse, pharmacist, or other person shall not be under any duty, by law or contract, to participate in the provision of a lethal dose of medication to a patient.").

<sup>161</sup> See, for example, *Autenrieth v Cullen*, 418 F2d 586, 588 (9th Cir 1969) ("The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax."); *Lull v Commissioner of Internal Revenue*, 602 F2d 1166, 1167 (4th Cir 1979); *Graves v Commissioner of Internal Revenue*, 579 F2d 392, 393–94 (6th Cir 1978). See also *United States v Lee*, 455 US 252, 260 (1982) (rejecting a religiously based objection to social security taxes on the ground that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax"); Schwartzman, 97 Va L Rev at 354 (cited in note 35) (noting that "when [taxpayers'] protests are aimed at general taxation"—that is, all taxes, and not just those funding a particular initiative that some taxpayers oppose—then their "First Amendment interests are significantly attenuated, and the government's interest in promoting its policies will ordinarily be sufficient to overcome them") (emphasis omitted).

<sup>162</sup> But see Henry David Thoreau, *Civil Disobedience* (1849), excerpted in Scott J. Hammond, Kevin R. Hardwick, and Howard L. Lubert, eds, 1 *Classics of American Political and Constitutional Thought: Origins through the Civil War* 932, 935 (Hackett 2007):

I have heard some of my townsmen say, "I should like to have them order me out to help put down an insurrection of the slaves, or to march to Mexico;—see if I would go;" and yet these very men have each, directly by their allegiance, and so indirectly, at least, by their money, furnished a substitute.

<sup>163</sup> See Zach Carter, *Catholic Bishops' Contraception Coverage Argument Ridiculed by Pacifist Activists* (Huffington Post, Feb 13, 2012), archived at <http://perma.cc/UR9K-UV28>.

to pay fees that support university services that they oppose, like abortion provision or counseling—again, because the objecting students are considered too remotely connected to those services.<sup>164</sup>

Insurance subsidization is like the payment of taxes because it too relates the subsidizer to the party engaging in the objectionable conduct in an attenuated and mediated way. More specifically, the connection between Hobby Lobby's contribution to its employees' health insurance plans and its employees' use of one of the four contested contraceptive methods is not stronger in a meaningful sense than the connection between a taxpayer's contribution to, say, Medicaid and a Medicaid subscriber's use of one of these methods.<sup>165</sup> The components of the health-care package were chosen by the government, just as the expenditures that tax dollars fund are chosen by the government. Further, it is notable that courts have rejected religious objections to the ACA's *individual* mandate because they find the objector's connection to the health care that others in the insurance pool receive to be too attenuated to warrant an exemption.<sup>166</sup> To be sure, Hobby Lobby pays for a greater proportion of its employees' health care than any taxpayer pays for a Medicaid subscriber's health care (or for the health care of others in the same insurance pool). But brute dollar amounts cannot be said to make a relevant difference<sup>167</sup>—after all, we do not think that wealthy individuals who pay more taxes are for that reason more implicated by government conduct.

Courts fail to take seriously taxpayer complicity not because the amount any taxpayer pays to fund some initiative is vanishingly small, but because there are too many steps in the causal

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<sup>164</sup> See *Erzinger v Regents of University of California*, 187 Cal Rptr 164, 167–68 (Cal App 1982).

<sup>165</sup> See Sepper, 22 Am U J Gender, Soc Pol & L at 329–30 (cited in note 44) (“Doctrine dictates that contributions to insurance fall into a zone of limited responsibility and, therefore, do not significantly burden religious freedom.”).

<sup>166</sup> See, for example, *Mead v Holder*, 766 F Supp 2d 16, 42 (DDC 2011), *affd*, *Seven-Sky v Holder*, 661 F3d 1 (DC Cir 2011), *overruled by National Federation of Independent Business v Sebelius*, 132 S Ct 2566 (2012) (“Plaintiffs have failed to allege any facts demonstrating that this conflict is more than a *de minimis* burden on their Christian faith.”). This portion of the opinion was affirmed by the DC Circuit. *Seven-Sky*, 661 F3d at 5 & n 4. See also Sepper, 22 Am U J Gender, Soc Pol & L at 330 (cited in note 44) (“Until now, courts have consistently dismissed the burden imposed on religious objectors by insurance programs as both attenuated and justified by compelling government interests.”).

<sup>167</sup> But see *Kaemmerling v Lappin*, 553 F3d 669, 678 (DC Cir 2008) (“An inconsequential or *de minimis* burden on religious practice does not rise to th[e] level [of a substantial burden].”).

chain between the taxpayer's payment of taxes and the pursuit of the activity he deplors. For example, in some of the cases involving taxpayer resistance to military spending, the resisting taxpayer looks at the percentage of the federal budget devoted to military spending—say, 39 percent in some years<sup>168</sup>—and he deducts that amount from his total tax burden, sometimes offering to contribute that money to a charitable organization unrelated to war.<sup>169</sup> Thirty-nine percent of a person's tax burden is not an insignificant amount. And yet courts do not welcome those claims for a partial exemption from one's tax burden any more than they do other claims, when the amount of money the objector would contribute to the initiative he opposes is considerably less. Nor should it make a difference under the law that Hobby Lobby has an interest in its employees' spiritual standing (their souls) that is stronger than the taxpayer's interest in the spiritual standing of his fellow citizens, for this is not the kind of interest of which courts will take cognizance.<sup>170</sup>

In sum, given the considerations that the law takes to be relevant—considerations that turn largely on the proximity between the objector and the conduct to which he objects—there is no distinction between employer-subsidized health care and taxpayer-subsidized health care. If taxpayers are taken to be too remotely connected to the initiatives they fund to count as complicit, then so too employers should be taken to be too remotely connected to their employees' contraception use to count as complicit. On the basis of proximity considerations, then, the legal understanding of complicity would have compelled rejection of Hobby Lobby's objections.

Moreover, ethics and law align here. Thus, proximity considerations inform moral judgments as to whether someone is in fact complicit in conduct that he opposes. For example, in evaluating claims of complicity to participating in the sale of the morning-after pill, Professor Kent Greenawalt has considered

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<sup>168</sup> See Anup Shah, *World Military Spending* (Global Issues, June 30, 2013), archived at <http://perma.cc/Q9QZ-RNHN>.

<sup>169</sup> See, for example, Robert T. Pennock, *Death and Taxes: On the Justice of Conscientious War Tax Resistance*, 1 J Accounting, Ethics & Pub Pol 124, 127–28 (1998).

<sup>170</sup> See *Notre Dame*, 743 F3d at 552 (“[W]hile a religious institution has a broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution.”); *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 450–52 (1988); *Bowen v Roy*, 476 US 693, 699–700 (1986).

the relative strength of objections raised by the pharmacist, a drugstore clerk, and a cashier, and he has concluded that “[t]here comes a point at which an individual’s involvement is so remote, a right to refuse seems excessive.”<sup>171</sup> Other moral philosophers agree, both with respect to the pharmacist’s case<sup>172</sup> and with respect to claims of taxpayer complicity.<sup>173</sup>

Nor is it surprising that the prevailing conception of complicity among moral philosophers is narrow. Moral philosophical accounts of responsibility are predominantly individualistic.<sup>174</sup>

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<sup>171</sup> Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 Ave Maria L Rev 47, 57 (2010). See also id at 60:

I do not think everyone remotely connected to patients, including those who type their forms, make their beds, dish out their meals, and clean their rooms, should have a right of conscience to refuse based on the procedure the patient undergoes. The tie to the objectionable practice is too remote.

<sup>172</sup> See, for example, Eva LaFollette and Hugh LaFollette, *Private Conscience, Public Acts*, 33 J Med Ethics 249, 253 (2007); Robert F. Card, *Conscientious Objection and Emergency Contraception*, 7 Am J Bioethics 8, 11 (2007) (“[I]t is simply unreasonable to withhold medication because of the mere possibility that [assisting patients] may contribute to an immoral result.”).

<sup>173</sup> See, for example, Dan W. Brock, *Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated to Do What, and Why?*, 29 Theoretical Med & Bioethics 187, 197 (2008):

Suppose, as I and many others believe, that thousands of innocent Iraqis have died unjustly in the Iraq war. Donald Rumsfeld’s complicity in those deaths is great; senators who voted to authorize President Bush to initiate the war have complicity that is significant though lesser; ordinary citizens whose tax dollars help pay for the war have complicity that is minimal at most.

<sup>174</sup> See, for example, Joel Feinberg, *Collective Responsibility*, 65 J Phil 674, 674 (1968) (“[I]n the standard case of responsibility for harm, there can be no liability without contributory fault.”); Kutz, *Complicity* at 3–7 (cited in note 75) (describing the paradigmatic principle of responsibility in Anglo-American law and ethics as the “individual difference principle,” which holds that “I am only accountable for a harm if something I did made a difference to its occurrence,” and arguing, convincingly, that this principle is gravely in need of supplementation); H.D. Lewis, *The Non-moral Notion of Collective Responsibility*, in Peter A. French, ed, *Individual and Collective Responsibility: Massacre at My Lai* 119, 121 (Cambridge 1972) (“[N]o one can be responsible, in the properly ethical sense, for the conduct of another.”). Legal accounts also embrace an individualistic conception. See, for example, Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 Am J Comp L 455, 468 (2001) (anointing as sacrosanct “the principle that conviction and sentence for a morally disqualifying crime should be related to the actor’s own conduct and culpability”); Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offense of the Superior?*, 5 J Intl Crim Just 619, 633 (2007) (“[N]o one, in fact, can be punished for a wrongful act unless the act is attributable to him.”); Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1, 1–3 (1988) (noting this feature of American jurisprudence and arguing that it reflects only men’s existential experiences). See also Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J L & Polit 183, 189 (2006):

Individuals bear responsibility on these accounts only for what they do, and only to the extent that what they do causes harm.<sup>175</sup> This narrow understanding of responsibility is taken to be a necessary corollary of liberalism's commitment to individual freedom: more-expansive conceptions of responsibility, especially when these would license blame or sanction, threaten to limit too much action and therefore to be too restrictive. So it is that there is a general inclination in the Western philosophical canon to overlook or even deny claims that an upstream agent can bear moral responsibility for a downstream event, particularly when other agents intervene in—and thereby rupture—the causal chain by interposing their own intentions or decisions.<sup>176</sup> Thus, on these accounts, a gun seller is not responsible for a gun buyer's murder of the latter's nemesis, because the buyer's decision to kill functions as an intervening event breaking the causal chain between the gun sale and the murder. And as we have seen, commentators and jurists adduce a similar line of argument in the contraceptive-mandate challenges, contending that an employee's *decision* to buy the morning-after pill (or another form of contraception) eclipses her employer's responsibility for her use of contraceptives.<sup>177</sup>

Given the role that proximity plays in these cases, it seems clear that Hobby Lobby's objection to the contraceptive mandate fails as a matter of the standard moral and legal understandings of complicity.<sup>178</sup> Morally, the fact that it is employees who decide to use contraception would be taken to absolve Hobby Lobby (and, a fortiori, its owners) of responsibility for that contraceptive use. And legally, the principled rationale for prohibiting taxpayer resistance<sup>179</sup> would seem to apply with equal force to

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[The individualist] conception of responsibility [is one] that American law has made familiar to us. On this conception, responsibility is limited to the individual's contribution, and liability may be imposed on an individual only for her actions, and only to the extent that these wrongfully caused the injury to be redressed.

<sup>175</sup> See Kutz, *Complicity* at 3 (cited in note 75).

<sup>176</sup> See Hart and Honoré, *Causation in the Law* at 82–83 (cited in note 72).

<sup>177</sup> See, for example, Smith and Corbin, Debate, 161 U Pa L Rev Online at 271 (cited in note 48); *Hobby Lobby*, 134 S Ct at 2799 (Ginsburg dissenting).

<sup>178</sup> See Jay Michaelson, *Why Hobby Lobby Will Be Bad for Conservatives* (The Daily Beast, June 30, 2014), archived at <http://perma.cc/EM2H-PP99> (“[The owners’] causal nexus is so thin as to be basically nonexistent. [They] can be responsible for anything.”).

<sup>179</sup> There is, of course, an administrative rationale for prohibiting tax resistance: the tax system as a whole would falter if taxpayers could opt out of paying taxes for any initiative that they opposed. But that rationale is not decisive. Courts routinely invoke

pleas for religiously based exemptions from mandatory insurance subsidization.

Before moving on, it is worth underscoring that the claim in this Part has been conditional in two respects. First, the deliberations here have been aimed at showing how *Hobby Lobby* would have come out *if* the Court had applied the understanding of complicity contained in the law (which itself follows the understanding in standard moral accounts), rather than the more capacious understanding of complicity that the owners advanced. We have seen that, under the legal understanding of complicity, Hobby Lobby's connection to the asserted wrong would be too tenuous to render it complicit in "embryo destruction" simply on the basis of providing health insurance that included so-called abortifacients. Nor would the result have been different had Hobby Lobby instead opposed all methods of contraception, or different medical interventions altogether (for example, blood transfusions, treatments derived from embryonic stem cells, and so forth). The relevant considerations contemplate not how much health care the objecting subsidizer funds but how strong the connection is between the objecting subsidizer and the conduct that he opposes. Again, given the law's fixation on proximity, the connection created by the employer mandate would not be deemed strong enough.

The claim that I defend is conditional in a second sense, as well: *if* proximity is relevant to determining when courts should grant exemptions, then the mandate cases should be decided no differently from the tax-resistance cases. In the next Part, I take issue with the role that proximity plays in law and ethics and thereby seek to show that the antecedent in this second conditional is problematic.

### III. THE TROUBLING ROLE OF PROXIMITY IN COMPLICITY DETERMINATIONS

Our standard thinking about complicity, in both law and ethics, relies to a significant extent on considerations of proximity for purposes of distinguishing among different complicity claims on the basis of their strength. In this Part, I aim to establish that proximity does indeed play this role and to argue that it is a misleading guide when it comes to conscientious objection.

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concerns about attenuation in justifying their decisions to deny tax relief on conscientious grounds. See notes 160–61 and accompanying text.



Part III.A contains the argument for the claim that proximity does a good deal of work in the adjudication of complicity claims in both ethics and the law. In Part III.B, I ascertain what is really at stake for the conscientious objector: Why is participation in an act that he opposes so difficult for him? I contend that the fact of our agency does make a difference to us; we do not want to be connected to an act we deem wrong, even if our connection is compelled by law and even if the outcome will be the same whether or not we participate. Yet concerns for our own implication can be—reasonably—insensitive to degree: even when there may, in some cases, be good reasons to see oneself as more or less implicated in an act given the strength of one’s causal connection to it, there may, in other cases, be good reasons to overlook proximity considerations, as I argue in Part III.C. In Part III.D, I apply the insights of the previous sections to the employer-mandate case and I argue that, given the amount of deference that complicity claims deserve, considerations of proximity underdetermine the proper response to requests for exemptions. We shall see that we are without the resources to arrive at fine and firm distinctions among different claims of complicity. I conclude that if we are to decide which of these claims the law should recognize, we will have to look beyond the merits of a given complicity claim and instead to the effects of an exemption on others.

#### A. Proximity as the Prevailing Criterion for Conscientious Objection

We have seen that courts generally reject claims of conscientious objection to particular tax expenditures.<sup>180</sup> The rationale for denying citizens a right to opt out of paying the portion of their taxes funding initiatives to which they object is, in part, avowedly administrative—the whole tax system would falter if the government were made to carve out exceptions to the myriad governmental expenditures that some individual or another opposes on moral or religious grounds.<sup>181</sup> As the Court has noted,

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<sup>180</sup> The exception here arises in cases in which the contested government expenditure would constitute an Establishment Clause violation. See *Flast v Cohen*, 392 US 83, 104 (1968) (noting that the “Establishment Clause . . . operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power”).

<sup>181</sup> See *United States v Lee*, 455 US 252, 260 (1982) (contending that the “tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief”); *Autenrieth v*

“the proper and efficient exercise of [the tax function] may sometimes entail the possibility of encroachment upon individual freedom.”<sup>182</sup> The Court has also expressed separation of powers concerns, rejecting the objecting taxpayers’ claims not on the merits but rather on standing grounds.<sup>183</sup> And scholars adduce another principled rationale for denying taxpayers a right to withhold taxes that would fund initiatives that they find objectionable: these expenditures, like all government expenditures, result from established democratic means.<sup>184</sup> Today’s tax levies do not involve “taxation without representation”;<sup>185</sup> instead, it is “our own duly elected governmental officials who imposed these taxes.”<sup>186</sup> Put differently, what it means to live in a democracy is to recognize that one’s policy preferences will not always prevail, and that one is under an obligation to obey the law even if one’s preferences have not prevailed.<sup>187</sup>

Yet while all these considerations provide a partial explanation for the law’s refusal to countenance conscientious taxpayer resistance, they do not—either alone or in combination—fully account for that refusal. The law already permits taxpayers to

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*Cullen*, 418 F2d 586, 588–89 (9th Cir 1969) (“If every citizen could refuse to pay all or part of his taxes because he disapproved of the government’s use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed.”).

<sup>182</sup> *Bates v City of Little Rock*, 361 US 516, 524–25 (1960). See also Kornhauser, 1999 Wis L Rev at 972 (cited in note 6).

<sup>183</sup> See, for example, *Flast*, 392 US at 114 (Stewart concurring) (“[A] taxpayer may not ‘employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.’”); *United States v Richardson*, 418 US 166, 177 (1974); *Ex parte Levitt*, 302 US 633, 633–34 (1937); *Massachusetts v Mellon*, 262 US 447, 487 (1923).

<sup>184</sup> See *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 890 (1990):

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

<sup>185</sup> Pennock, 1 J Accounting, Ethics & Pub Pol at 132 (cited in note 169) (raising this argument as a hypothetical objection to his own position, which is that conscientious objection to war taxes should be permissible). See also generally Moody-Adams, *Democratic Conflict* (cited in note 113).

<sup>186</sup> Pennock, 1 J Accounting, Ethics & Pub Pol at 132 (cited in note 169).

<sup>187</sup> See Sullivan, 59 U Chi L Rev at 222 (cited in note 15) (“[W]hile financial support is withdrawn from religion, religionists may still be required to give financial support to the state, for all religions gain from the truce and the common goods of the civil public order it established.”).

contest government expenditures that violate constitutional constraints on government activity, most notably in the Establishment Clause context.<sup>188</sup> If the tax system can withstand these challenges, then it can presumably withstand at least some others, too.<sup>189</sup> Similarly, if courts are equipped to weigh the merits of tax objections in the Establishment Clause context, then surely they can weigh the merits of at least some other tax objections, too—especially those that are based on conscience and thus are not “generalized grievances”<sup>190</sup> or injuries that are “indefinite [and held] in common with people generally.”<sup>191</sup> Finally, the fact that the contested government expenditures were chosen through legitimate democratic means fails as a justification for similar reasons, because exemptions are granted for other government measures whose democratic pedigrees are no less venerable. For example, the pacifist who seeks an exemption from the draft lodges an objection to a war effort that Congress authorized.

The consideration that tips the scale against most cases of taxpayer resistance, then, must lie elsewhere—namely, in considerations of the proximity between the objector’s conduct and the result or activity to which he objects. Thus, as we have seen, the connection between taxpayers and the government initiatives they oppose has been deemed too remote or attenuated to warrant an exemption.<sup>192</sup> And remoteness here is not simply a factor bearing on the justiciability of the complaint.<sup>193</sup> It is instead a finding on the merits that the burden on the taxpayer is too negligible or too far removed from an activity that is important to the adherent’s religious scheme.<sup>194</sup>

Moreover, considerations of proximity underpin not only the differential treatment accorded to pacifistic military conscripts and tax resisters but other complicity determinations as well.

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<sup>188</sup> See *Flast*, 392 US at 102–03 (establishing a two-part test whereby a plaintiff can establish standing to sue the government for an unconstitutional use of taxpayer funds).

<sup>189</sup> To soften the blow, the government could mandate that the objecting taxpayers direct the portion of their taxes that would have gone to the objectionable activity to some other initiative, like the Peace Corps or Head Start. See Pennock, 1 J Accounting, Ethics & Pub Pol at 141 & n 34 (cited in note 169).

<sup>190</sup> *Flast*, 392 US at 106.

<sup>191</sup> *Mellon*, 262 US at 488.

<sup>192</sup> See note 161 and accompanying text.

<sup>193</sup> See *Mellon*, 262 US at 487 (“[A]ny payment out of the funds [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”).

<sup>194</sup> See *Kaemmerling v Lappin*, 553 F3d 669, 678 (DC Cir 2008) (denying a claim on the ground that the burden on the objector was “de minimis”).

Thus, proximity explains law and morality's greater tolerance for physicians who assist suicide (legal in some states) relative to those who engage in euthanasia (illegal in all states), as well as the greater protection afforded to pharmacists who refuse to fill prescriptions for the morning-after pill but not to pharmacy clerks who refuse to ring up the bill for customers waiting to pick up their morning-after pill prescriptions.<sup>195</sup> Yet it is not clear that considerations of proximity are relevant to the objector, nor that they should be, as I now endeavor to show.

## B. The Grounds of Conscientious Objection

I begin with a relatively uncontroversial case of conscientious objection—that of the physician who refuses to perform abortions on moral or religious grounds. Doctors who object to abortion on moral or religious grounds may, without penalty, refuse to perform abortions. This is a well-established right of physicians,<sup>196</sup> and it is met with virtually no objection on the part of the public. Yet notwithstanding the widespread acceptance of conscientious objection in the case of abortion provision,<sup>197</sup> it is surprisingly difficult to identify or articulate the rationale for accommodating the physician's objection. Especially if we know that the outcome will be the same no matter whether the objecting physician participates (if he will not, the patient can find another provider who will) and especially given that doctors bear a fiduciary duty to act in the best interests of their

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<sup>195</sup> See Wilson, 53 BC L Rev at 1465–66 (cited in note 18):

In the health care context, an Iowa Attorney General Opinion concluded that the state's abortion conscience clause extended by its terms only to those who "recommend[ ], perform[ ], or assist[ ] in an abortion procedure." Consequently, nurses who provide comfort to a patient and pharmacists who prepare the saline solution used in abortions could not use the conscience clause to refrain from doing their jobs.

<sup>196</sup> See Sepper, 98 Va L Rev at 1503 (cited in note 45); Thaddeus Mason Pope, *Legal Briefing: Conscience Clauses and Conscientious Refusal*, 21 J Clinical Ethics 163, 165 & n 38 (2010) (collecting laws from states that permit doctors to refuse to perform abortions on moral or religious grounds); *State Policies in Brief: Refusing to Provide Health Services* \*3 (Guttmacher Institute, Nov 1, 2015), archived at <http://perma.cc/T5C5-SYEL> (same).

<sup>197</sup> I assume that the situation is not one in which the woman faces an imminent threat to her health or life such that she would not have time to find another doctor if the first one refused. See Committee on Ethics, *The Limits of Conscientious Refusal* at \*1 (cited in note 141) ("In an emergency in which referral is not possible or might negatively have an impact on a patient's physical or mental health, providers have an obligation to provide medically indicated and requested care.").

patients,<sup>198</sup> why permit the physician to refuse? Why not just think the objecting physician's concern precious and, worse still, violative of the commitment to his patient's welfare that forms the backbone of his profession?<sup>199</sup>

The answer, it turns out, depends on the special value that each of us attaches to our own agency. In general, it is a moral commonplace that no one should be made to participate in an act that he deems immoral. We safeguard people from such participation because we recognize that, from the perspective of the actor, it makes a difference that the wrong occurs through *his* hands, even if he knows that the wrong will occur whether or not it is he who brings it about.

The interest at stake for an individual in keeping his own hands clean can be understood in several ways. On a narrative account, the idea might be that one has an interest in having a life story that does not include an episode in which one acted against one's convictions.<sup>200</sup> The notion of moral integrity and its role in constituting one's identity might also capture what is at stake.<sup>201</sup> Thus, Professor Dan Brock writes:

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<sup>198</sup> In general, a fiduciary must "promote the interests of [the] beneficiar[y] rather than [the fiduciary's] own interests." Sharona Hoffman and Jessica Wilen Berg, *The Suitability of IRB Liability*, 67 U Pitt L Rev 365, 393 (2005). The doctor is a fiduciary to his patients. See Thomas L. Hafemeister and Richard M. Gulbrandsen Jr, *The Fiduciary Obligation of Physicians to "Just Say No" If an "Informed" Patient Demands Services That Are Not Medically Indicated*, 39 Seton Hall L Rev 335, 369 & nn 171–72 (2009) (collecting cases in which courts have noted that the physician bears a fiduciary relationship to his patients).

<sup>199</sup> See Lois Snyder, *American College of Physicians Ethics Manual: Sixth Edition*, 156 Annals Internal Med 73, 75 (2012) ("The physician's primary commitment must always be to the patient's welfare and best interests.").

<sup>200</sup> This idea is given a powerful evocation in a hypothetical that might seem far afield of the example here—namely, one in which a lorry driver hits and kills a child through no fault of the driver's. See Bernard Williams, *Moral Luck* 27–30 (Cambridge 1981). Given that the driver is not responsible for the accident, one might expect his reaction to the child's death to be no different from that of an onlooker who witnesses the scene. Not so, however, Professor Bernard Williams explains: the driver's agency has been implicated in the death in a way that the bystander's has not. *Id.* at 30. The driver's biography has been punctuated by this tragic event—it figures in the narrative of his life in a way different from the way that it will figure in the life of a mere bystander to the event. For this reason, in addition to caring about the child's fate, the driver has reason to care that it was *he* who brought about this fate. See Susan Wolf, *The Moral of Moral Luck*, 31 Philosophic Exchange 4, 9 (2001) ("What is problematic is [the lorry driver's] failure . . . to take the consequences of his faultiness to have consequences for him, to be a significant part of his personal history, in a way in which witnessing, much less reading about an accident would not be.").

<sup>201</sup> See Sepper, 98 Va L Rev at 1529 (cited in note 45) ("[A] number of scholars have argued [that] an individual's moral integrity offers the most compelling moral basis for respecting her conscience."); Chapman, 2013 U Ill L Rev at 1494 (cited in note 114) ("[A]s

Deeply held and important moral judgments of conscience constitute the central bases of individuals' moral integrity; they define who, at least morally speaking, the individual is, what she stands for, what is the central moral core of her character. Maintaining her moral integrity then requires that she not violate her moral commitments and gives others reason to respect her doing so . . . because the maintenance of moral integrity is an important value, central to one's status as a moral person.<sup>202</sup>

Or, again, in a more existentialist vein, one might say that one is what one does, and one's actions instantiate one's values in the world and so stand as beacons for others in discerning right from wrong.<sup>203</sup> At bottom, all these understandings are about meaning—how we construct meaning for and about ourselves in light of what we do in the world.<sup>204</sup>

Notice, though, that once we locate the reason to grant an accommodation to others in a quest for meaning, it becomes difficult to judge some assertions of complicity to be more or less legitimate than others. From a first person perspective, other factors may occlude proximity considerations in determining

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many theorists have noted, protecting conscience promotes obedience to conscience, which in turn promotes personal integrity.”). For statements of conscience that speak to personal integrity, see Hannah Arendt, 1 *The Life of the Mind: Thinking* 181 (Harcourt Brace 1978) (quoting Socrates's explanation for his civil disobedience: “It would be better . . . that multitudes of men should disagree with me rather than that I, *being one*, should be out of harmony with myself and contradict me”); Harper Lee, *To Kill a Mockingbird* 105 (Warner Books 1960) (quoting Atticus Finch as saying, “before I can live with other folks I've got to *live with myself*”) (emphasis added). See also Rawls, *Political Liberalism* at 312–13 (cited in note 115) (defending “liberty of conscience” in light of its relationship to our conception of the good, which includes a sense of self-awareness—we come to know “*why* . . . our ends [are] good and suitable for us”); Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 19 (Basic Books 2008) (referring to conscience as the “faculty in human beings with which they search for life's ultimate meaning”).

<sup>202</sup> Brock, 29 *Theoretical Med & Bioethics* at 189 (cited in note 173). See also J. David Bleich, *The Physician as a Conscientious Objector*, 30 *Fordham Urban L J* 245, 245 (2002) (“[T]o demand of a physician that she act in a manner she deems to be morally unpalatable not only compromises the physician's ethical integrity, but is also likely to have a corrosive effect upon the dedication and zeal with which she ministers to patients.”).

<sup>203</sup> See Jean-Paul Sartre, *Existentialism Is a Humanism* 20–23 (Yale 2007) (John Kulka, ed) (Carol Macomber, trans).

<sup>204</sup> Justice Kennedy's concurrence in *Hobby Lobby* supports the relationship between conscience and meaning, although his comments are restricted to religious freedom rather than freedom of conscience more generally. *Hobby Lobby*, 134 S Ct at 2785 (Kennedy concurring) (“For [religious adherents], free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.”).

how complicit a person feels or even has reason to feel. Or so I shall now argue, by examining cases in which proximity is a poor guide for discerning the magnitude of one's responsibility for someone else's conduct to which one contributes.

### C. Proximity versus First Person Perceptions of Complicity

Law and morality agree that it is worse for a doctor to kill a patient than for a doctor to give the patient the means to kill himself (typically, with a lethal dose of medicine that the patient self-administers). That is, euthanasia is taken to be worse than physician-assisted suicide (PAS).<sup>205</sup> It is for this reason that PAS is legal in some states whereas euthanasia is illegal everywhere.<sup>206</sup> On what do these judgments rest?

According to some commentators, proximity makes the relevant difference.<sup>207</sup> Yet much of the greater concern that euthanasia invites results from considerations that bear only a contingent connection to proximity. Instead, these are better cashed out as concerns for patient autonomy, and proximity is but a rough proxy for them. For example, we have reason to prefer PAS to euthanasia because it elides the worry that perhaps the patient was coerced, or that he had a change of heart that he was unable to communicate in time.<sup>208</sup> If he self-administers the lethal drugs, we have greater reason to think that he was committed to ending his life.<sup>209</sup> The question for our purposes,

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<sup>205</sup> See *Washington v Glucksberg*, 521 US 702, 732–33 (1997) (noting that one of the reasons for prohibiting PAS is that legalized PAS could open the door to legalized euthanasia).

<sup>206</sup> See, for example, The Oregon Death with Dignity Act, Or Rev Stat § 127.800 et seq.

<sup>207</sup> See, for example, Timothy E. Quill, Christine K. Cassel, and Diane E. Meier, *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 *New Eng J Med* 1380, 1381 (1992); Daniel Callahan, *When Self-Determination Runs Amok*, 22 *Hastings Center Rep* 52, 52 (Mar–Apr 1992) (arguing that euthanasia, unlike suicide, cannot be seen as an exercise of self-determination since euthanasia has someone else do the killing, and contending further that no one else can have the right to kill another, even with the other's consent).

<sup>208</sup> See Willem A. Landman, *A Proposal for Legalizing Assisted Suicide and Euthanasia in South Africa*, in Loretta M. Kopelman and Kenneth A. De Ville, eds, *Physician-Assisted Suicide: What Are the Issues?* 203, 211 (Kluwer Academic 2001). See also *Glucksberg*, 521 US at 730–31 (describing the ways in which our certitude about the patient's commitment to ending his life might be undermined—for example, because he has not been adequately treated for pain or because he is in a vulnerable position).

<sup>209</sup> But see generally Susan M. Wolf, *Gender, Feminism, and Death: Physician-Assisted Suicide and Euthanasia*, in Susan M. Wolf, ed, *Feminism & Bioethics: Beyond Reproduction* 282 (Oxford 1996) (arguing that, given the social and cultural norms celebrating or mandating self-sacrifice on the part of women, we have reason to doubt the

however, is whether there is an *intrinsic* moral difference between the two practices, not whether one is more likely to raise concerns in practice.<sup>210</sup> Suppose that one could be confident that the patient in the euthanasia scenario is as committed to ending his life as the patient in the PAS scenario. Does the fact that euthanasia has the physician administer the lethal medicine whereas PAS has the patient do so give the physician more reason to feel complicit in the former than the latter?

One might think that a distinction between the two exists because, with euthanasia, the physician intends her patient's death whereas in PAS the physician need intend only to facilitate her patient's choice to die.<sup>211</sup> But that way of describing the two practices is tendentious. The physician who offers euthanasia may intend only to facilitate her patient's choice to die, too, and the physician who prescribes lethal medication that the patient will self-administer may intend by so doing to participate in bringing about her patient's death. Given that the intention underlying euthanasia and PAS may be the same, the difference between the two may then simply be one of means.

This difference in means cannot sustain a moral distinction between the two practices. To see this, consider a stylized version of the ways that euthanasia and PAS occur. Suppose that death in both occurs as a result of a lethal combination of medicines that is administered through injection (euthanasia) or orally (PAS). Whichever route the patient chooses, his death will occur in the doctor's office—either the doctor will administer the

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conviction of a gravely ill woman who professes to want to end her life, whether through euthanasia or PAS).

<sup>210</sup> Those who consider the question from a utilitarian perspective will not recognize a difference between a practice's practical consequences and its intrinsic moral status. Compare Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in John Keown, ed., *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* 225, 228–33 (Cambridge 1995) (suggesting that there is no difference between euthanasia and PAS on practical grounds), with John Deigh, *Physician-Assisted Suicide and Voluntary Euthanasia: Some Relevant Differences*, 88 J Crim L & Crimin 1155, 1164–65 (1998) (concluding that “utilitarian methods advise treating the two practices separately”).

<sup>211</sup> See *Vacco v Quill*, 521 US 793, 802 (1997), quoting *Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong., 2d Sess 367 (1996) (testimony of Dr. Leon R. Kass) (“[I]n some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, ‘must, necessarily and indubitably, intend primarily that the patient be made dead.’”). For an extended discussion of the difficulty in distinguishing, on moral grounds, an intention to omit treatment from acts of hastening death, see Sepper, 98 Va L Rev at 1536–38 (cited in note 45).



injection in her office or she will hand the patient the pills and he will take them in her office. (The example is stylized because, with PAS, the physician provides the patient with a prescription for the lethal drugs, and the patient fills the prescription and then typically ingests the pills at home.)<sup>212</sup> Arguably, at least, the injection has the physician participate more directly in the patient's death than does the provision of the pills. But surely there can be no moral difference that turns on the difference in the method by which the lethal drugs enter the patient's body.<sup>213</sup> The physician is not more morally implicated in the death when she administers a lethal injection that kills her patient than when she hands over the lethal pills and simply watches as the patient kills himself. (The same would hold true if what were at stake were a distinction between surgical and medical (that is, drug-induced) abortions in which either procedure took place in the doctor's office with the doctor at the patient's side.)

Yet if there is no reason to distinguish morally between the euthanasia and PAS cases in the stylized versions just described, why should we think that a distinction exists between euthanasia and PAS as the two typically occur—that is, with the former taking place in the doctor's office, and the latter occurring sometime after the doctor prescribes the lethal medications and in the doctor's absence? The decision to end his life is no more the patient's when it is effectuated in his home than when it is effectuated in the doctor's office. Yet in the case in which the patient ingests the lethal drugs at home, the doctor is undoubtedly more removed—in space and time—from the patient's death than she is in the euthanasia case. If the fact of greater distance in space and time does not entail a diminution in the physician's moral responsibility—and for the foregoing reasons, I believe that it does not—then it must be that what matters in our thinking about any moral differences between euthanasia and PAS is not the extent of the doctor's intervention in the patient's death so much as it is the other concerns for which causal proximity might function as a proxy (for example, concerns

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<sup>212</sup> See Daniel Engber, *How Does Assisted Suicide Work?* (Slate, Oct 6, 2005), archived at <http://perma.cc/D9MN-3XP5>.

<sup>213</sup> See John Keown, *Euthanasia, Ethics, and Public Policy: An Argument against Legalisation* 33 (Cambridge 2002) ("What, for example, is the supposed difference between a doctor handing a lethal pill to a patient; placing the pill on the patient's tongue; and dropping it down the patient's throat?").

about whether the patient persists in his intent to die or whether he has been pressured).<sup>214</sup>

What, then, of the pharmacist who objects to filling a prescription for PAS? The pharmacist is situated differently from the physician: Doctor and patient share responsibility for the patient's treatment choices, as physician and patient are appropriately regarded as a team. The doctor is not some mere commercial purveyor and the patient does not merely play the role of consumer. Instead, doctor and patient decide together, in consultation, on the best course of action for the patient.<sup>215</sup> As such, the doctor is aligned with the patient's treatment choices in a way that the pharmacist is not.<sup>216</sup> Instead, the pharmacist who is handed a prescription for a lethal dose of medicine because the patient has elected, and has been certified for,<sup>217</sup> PAS is like the gun merchant who is asked to sell a gun to someone who intends to kill himself with it and who—let us imagine, for the purpose of more closely aligning the pharmacist and gun-

merchant cases—is also terminally ill and has also been certified for PAS. (Imagine further that the terminally ill gun buyer who intends to end his life prefers the drama of a gunshot to lethal sedation.) Both the pharmacist and gun merchant in these scenarios provide their customers with instruments that they know the customer intends to use to end his life. And as a brute causal matter, it may well be that the physician prescribing the lethal medication for PAS is not so differently situated from either the pharmacist or the gun merchant. Determining the strength of a causal connection for legal purposes is a matter for both

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<sup>214</sup> But see Dan W. Brock, *Voluntary Active Euthanasia*, 22 *Hastings Center Rep* 10, 10 (Mar–Apr 1992) (“If there is no significant, intrinsic moral difference between the two, it is also difficult to see why public or legal policy should permit one but not the other; worries about abuse or about giving anyone dominion over the lives of others apply equally to either.”).

<sup>215</sup> See Timothy E. Quill and Howard Brody, *Physician Recommendations and Patient Autonomy: Finding a Balance between Physician Power and Patient Choice*, 125 *Annals Internal Med* 763, 765 (1996) (advocating “enhanced autonomy,” a decisionmaking model in which physicians share their expertise and patients and physicians deliberate together about the best course of treatment).

<sup>216</sup> This alignment explains why physicians and terminally ill patients together brought suit challenging the constitutionality of Washington's and New York's statutes prohibiting PAS. See generally *Glucksberg*, 521 US 702 (challenging Washington's statute); *Quill*, 521 US 793 (challenging New York's statute).

<sup>217</sup> See Engber, *How Does Assisted Suicide Work?* (cited in note 212) (describing the process for having physicians authorize PAS).

normative and metaphysical judgment.<sup>218</sup> But the physician has reason to feel implicated over and above the extent of her causal role—again, as part of the team that decided on the course of treatment, the doctor is aligned with the patient’s ends in a way that the pharmacist is not. The physician is a participant in the patient’s care whereas the pharmacist is a detached facilitator of it. For that reason, the physician has reason to feel more implicated in PAS than the pharmacist does.

Now compare the pharmacist to the pharmacy clerk who hands the vial to the patient, or the cashier who rings up the patient. Assume that all three employees know the contents of the vial. On the basis of the features typically salient to us, the pharmacist is more directly involved than the other two—the pharmacist acts with greater specificity toward the patient’s end. The clerk and cashier can proceed mindlessly, but the pharmacist must focus her attention on providing the patient with the drugs that will arm him with the means to take his life. And the pharmacist may feel more implicated in light of her professional training, too: “Today I used my expertise to give someone drugs that he will use to kill himself” is a plausible thought for her to have. For these reasons, it would be understandable if she were to see herself as more bound up in the patient’s suicide than either the clerk or cashier would. But the fact that her own role would seem more salient to her than the clerk’s or cashier’s roles would seem to either of them does not mean that the pharmacist is in fact more complicit than these other two drug-store employees. From a disinterested standpoint, the pharmacist is just doing her job, just as the clerk and cashier are doing their jobs.<sup>219</sup> The fact that the pharmacist cannot ignore her

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<sup>218</sup> See Moore, *Causation and Responsibility* at 278–79 (cited in note 72) (contending that the law’s conception of causation is stylized and based largely on the ends that the law seeks to serve rather than on any genuine metaphysical truths).

<sup>219</sup> There is a well-known case in European criminal law theory involving a waiter who serves a dish that she knows to be poisonous to a customer without alerting the customer to the lethal danger he now faces. See Luis E. Chiesa, *The Evil Waiter Case*, 69 U Miami L Rev 161, 162–63 (2014). The waiter is not responsible for the presence of the poison, and, according to European systems, she will not be held responsible for the customer’s death notwithstanding her failure to warn. The waiter’s job was to deliver the dish, and she is relieved of responsibility for the death because she did what her job commanded. Many of us would find the European stance overly permissive—surely the waiter bears *some* responsibility for the death, and the law ought to track that responsibility. But the pharmacist’s case is distinguishable, at any rate, because the patient knows (and indeed intends) that the drugs she is giving the patient will cause his demise.

contribution as readily as the clerk or cashier can does not make her more responsible; it just makes her feel more responsible.

Drilling down on these scenarios and the roles that various individuals play in them reveals the following insight: many assertions of complicity appear far more compelling from a first person, rather than third person, perspective. This is unsurprising given the relationship between conscience and identity.<sup>220</sup> *I* have more reason to care about some state of affairs when it is *I* who has brought it about. And proximity can function as a proxy for other considerations that are relevant, too. For example, the person who purposely contributes to A will often want to ensure A's successful completion, and so may involve himself more. It is not, then, his proximity that does the work of rendering him more responsible, but instead his greater commitment or sense of purpose.

It is good that we feel more implicated in acts in which we have played a greater causal role. We have more power to ensure that these acts do not happen or that they happen in a better way than they might have otherwise, and feeling more implicated may well provide us with greater motivation to prevent these acts or to modify them for the better. But the point here is that this stronger feeling of implication need not reflect, and indeed may well exceed, the genuine extent of one's complicity.<sup>221</sup> In other words, one might feel more morally responsible for conduct to which one bears a closer causal connection even though it would be unreasonable for anyone else to judge one more morally responsible solely on that basis.

On the other hand, it is also generally good if we feel implicated in acts to which our connections are remote. A person who places a premium on his moral purity will feel responsible for his contributions to wrongs or harms that most of us ignore. As such, he will constrain his conduct at the expense of freedoms that the rest of us claim as our right, restricting his purchases, carbon footprint, food choices, practices at work, relationships with others, and so forth, in the service of dissociating himself from conduct that he deems wrongful. The effect is, in general, to lessen harm in the world. To be sure, the tendency that he exhibits is not always morally desirable—extreme versions of this posture can reflect narcissism or neuroticism or moral

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<sup>220</sup> See notes 200–04 and accompanying text.

<sup>221</sup> See Schwartzman, 97 Va L Rev at 376–77 (cited in note 35).

fetishism. But, in general, holding oneself to an unusually high moral standard is rightly taken to be a mark of virtue, not psychological pathology.

All of this suggests that the factors that determine the magnitude of an individual's responsibility when judged by an impartial observer need not coincide with those that are salient from a first person perspective. Thus, a person's sense of his own complicity may be greater or less than we would judge it to be.<sup>222</sup> More specifically, his own sense may depend on factors that are, again, from an impartial perspective, morally irrelevant but—from the perspective of the person making the contributions—not so readily dismissed. If his contribution claims more of his attention or strikes more acutely at his sense of self, he will feel himself to be more responsible than we, impartial observers, would judge him to be. Sometimes, we should respond to this divergence by seeking to bring him around to our way of seeing the matter. But sometimes we should not: as I have said, his heightened moral sensitivity is sometimes salutary and often-times laudable for its own sake. And, in any event, because his assessment is connected to his self-conception, we should be wary of trying to dissuade him, on the worry that doing so will interfere with his sense of self. For example, the pharmacist's sense of what it is to be a pharmacist, or her conception of the kind of pharmacist she wants to be, might include a prohibition on using her skills to dispense medications that aim to end human life. Even if we would not judge her responsible in any measure were she to fill a prescription for PAS, she might think

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<sup>222</sup> In the text that follows, I contemplate the way that we should treat first person assessments of responsibility only when the person judges himself more harshly than an impartial observer would. The case in which someone judges himself less harshly can give rise to two points of divergence in practice: First, this more lax judge may decide that he is not sufficiently implicated in the conduct that he deems wrong to seek an exemption. As such, questions whether to grant him conscientious objector status do not arise. Second, this more lax judge may recognize that he bears no more responsibility than we would ascribe to him, but he might nonetheless think that even the (relatively little) responsibility he bears is more than his personal morality can handle. Thus, he might seek an exemption even though he would think the magnitude of his responsibility less than we would think it. I do not see that there is any difference between this case and the one in which the objector judges himself to be more responsible because he thinks that he is meaningfully connected to some harm, even though we think that his contribution is negligible. At the end of the day, both objectors find their connections to the wrong intolerable—one because he sees his causal role as greater than we see it, and the other because he sees the magnitude of his causal role accurately but positions the threshold for complicity lower on the spectrum than we do. In both cases, then, deference is in order for the reasons that I adduce in the text above.

her own contribution abominable. And her thought here is not wrong, even if it is different from our own. In matters of professional or personal identity, individuals should be given some latitude to forge meaning and set boundaries for themselves (at least when those boundaries are stricter than those that professional, moral, or legal norms require).

The very same factors that favor conscientious objection in cases of direct participation (as in the draft) also favor deference when it comes to a person's heightened sense of his own complicity: Being made to contribute to conduct that one opposes is painful because it entails a dislocation from the self. So too being told that one has overly grand ideas about his professional identity or his personal agency can be painful, because these ideas constitute one's sense of self in important ways. Given the pain of betraying one's sense of self, then, we should treat first person assessments of complicity with solicitude—at least presumptively. That is, *all else equal*, we should deem a complicity claim compelling if the objector deems it so, and independent of the kind of contribution to the asserted wrong that it entails. Whether facilitation through insurance subsidization is morally troubling enough to count as complicity should then turn on only whether the objector believes that it is.

#### D. Morally Mandated Indifference to Proximity

This leaves us with a problem: On an account that grounds a conscientious exemption in the objector's interest in not having his agency implicated in what he perceives as a wrong, there is no reason not to take the objector's concerns at face value. It is *his* sense of meaning that is at stake and so we should defer to *his* understanding of the circumstances that make him complicit. Who are we to say that he is being overly sensitive or stringent when it comes to his own moral purity? On this way of proceeding, we are without the resources to distinguish among assertions of complicity on the basis of their strength. In particular, if we must accept assertions of complicity at face value, then we may not accord them more or less weight on the ground that complicity itself is, in Anglo-American law, a scalar concept whose magnitude turns at least in part on the actor's causal proximity to the act in which he is (or takes himself to be) morally implicated.

And yet as a practical matter, we cannot defer to every sincere claim of complicity and exempt the person who would see himself as complicit from the conduct to which he objects in every

instance in which a complicity claim is raised. Two considerations, which I explore in the next Part, provide counterweights against a claim of complicity. First, we must consider whether the grant of an exemption would impose costs on third parties and, if so, the magnitude of these costs. Second, we must bring to bear the insights culled from the three kinds of deference we discussed earlier and use them to evaluate how compelling different claims of complicity are.

#### IV. MISSING THIRD PARTIES: A TROUBLING OVERSIGHT

In her *Hobby Lobby* dissent, Justice Ginsburg rails against the majority's position in significant part because, according to her, the Court impermissibly overlooks the costs of an accommodation to third parties<sup>223</sup>—there, the “thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.”<sup>224</sup> Ginsburg cited a handful of cases for the proposition that “[a]ccommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties.”<sup>225</sup> As I argue in Part IV.A, however, these cases contemplate third-party interests only tangentially, if at all. Nor, as I argue in Part IV.B, can one find support for that proposition elsewhere in the doctrine. The law's failure to adequately consider third-party costs is deeply troubling for two reasons. First, third-party effects are an ineluctable feature of complicity claims, for complicity arises only in light of one's contribution to someone else's conduct;<sup>226</sup> to refrain from contributing will then

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<sup>223</sup> See *Hobby Lobby*, 134 S Ct at 2787 (Ginsburg dissenting) (“In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith.”). Kara Loewentheil disfavours the term “third party” in this context, as she worries that casting the individuals whom an exemption affects as “third parties” implies that they are somehow incidental to the inquiry about whether to grant an exemption; rather, they deserve to be at its core. Loewentheil, 62 Drake L Rev at 47 (cited in note 41). I am sympathetic to the strength of her concern for the rights and interests of these individuals, but I do not agree that, as a matter of logic and procedure, we need to consider third parties right from the outset. Instead, the inquiry that I propose begins with the religious adherent, who must first establish that he has a claim worthy of deference before we even need consider third-party effects. As such, there is a way in which third-party interests are not at the core of the inquiry, and so I do not see the need to shift terminology. For all that, however, I do not mean to suggest that third parties' interests are less important than Loewentheil's account would have it.

<sup>224</sup> *Hobby Lobby*, 134 S Ct at 2787 (Ginsburg dissenting).

<sup>225</sup> *Id* at 2790 (Ginsburg dissenting).

<sup>226</sup> See NeJaime and Siegel, 124 Yale L J at 2566 (cited in note 28) (“Complicity-based conscience claims assert a relationship to third parties whose conduct the claimants

leave the third party without a contribution that she may have been expecting (and, in the contraceptive-mandate cases, believes is her statutory right). Second, if I am right that (sincere and apolitical<sup>227</sup>) complicity claims warrant great deference on the merits, as I argued above, then it becomes all the more important to examine the extrinsic effects of an accommodation and, in particular, to consider whether it will impose undue costs on third parties. Part IV.C paves the way for such an examination by describing a balancing test through which courts can weigh the amount of deference that a complicity claim warrants against the magnitude of the burdens, if any, an accommodation would impose on third parties. Part IV.D applies this balancing test to *Hobby Lobby* and its possible progeny.

I note at the outset that a good number of scholars believe that the doctrine, as it stands, already contemplates third-party interests.<sup>228</sup> I think that the doctrinal bases for their understanding are perilously thin, for the reasons I articulate below. The idea is not that there is no plausible interpretation of case law that supports their position; it is that their interpretation does not rest on binding precedent, and it would be all too easy for the Court to eschew it. To the extent that one can distill a line of argument that seems to protect third-party interests, then, that line might be evanescent. Moreover, even if these scholars are right that the doctrine does currently contemplate third parties, we would still have reason to be concerned, for the doctrine says little—too little—about the way in which third-party interests figure in, as well as about how much they figure

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view as sinful. In this sense, the third-party effects of accommodation are bound up in the form of the claim itself.”).

<sup>227</sup> See text accompanying notes 99–104 (stressing that complicity claims must be sincere and deeply felt).

<sup>228</sup> For a strong statement of this position, see Schwartzman and Tebbe, *Arguing off the Wall* (cited in note 43) (“[I]n an important line of cases that has not received the attention it deserves, the Supreme Court has insisted that the Establishment Clause prohibits religious accommodations that impose burdens on third parties.”). See also Gedicks and Van Tassel, 49 *Harv CR–CL L Rev* at 349 (cited in note 43) (“[B]y shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not, RFRA exemptions from the Mandate violate an Establishment Clause constraint on permissive accommodation.”). But see Loewentheil, 62 *Drake L Rev* at 438 (cited in note 41) (“Our religious accommodation jurisprudence has no principled or systematic framework for taking the interests of third parties affected by religious accommodations into account.”). It is notable that health-care-refusal laws, which allow medical providers to refuse to participate or assist in procedures that they oppose on religious grounds, also fail to address third-party harms. See NeJaime and Siegel, 124 *Yale L J* at 2542 (cited in note 28).



in.<sup>229</sup> Thus, as I argue here, it is possible that doctrine requires courts to do no more than acknowledge that an accommodation will impose a burden on third parties (assuming *arguendo* that courts must heed third parties at all). More to the point, nothing in the doctrine, even on an interpretation that is most congenial to third-party interests, explicitly requires courts to deny accommodations that would impose costs on third parties, or even to weigh third-party interests against those of the religious objectors in an effort to determine whether to grant an accommodation.<sup>230</sup> In short, as this Part aims to show, there is no plausible reading of doctrine according to which it adequately protects third parties.<sup>231</sup>

#### A. The *Hobby Lobby* Dissent's Strained Efforts to Find Third-Party Considerations in the Doctrine

Ginsburg was right to note that the Court should have considered the costs of an accommodation on third parties, but she was wrong to think that the Court betrayed the RFRA doctrine in neglecting to do so. While she cited four cases for her contention that the doctrine requires courts to factor in third-party costs,<sup>232</sup> I now argue that these cases do not provide the requisite support.

In rejecting religious adherents' requests for accommodations, two of these cases do make reference to the interests of third parties, but only in an extremely tangential way. In *Wisconsin v Yoder*,<sup>233</sup> the first case that Ginsburg cited, the

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<sup>229</sup> See Loewentheil, 62 Drake L Rev at 474 (cited in note 41) (“[W]e can see that the pre-*Smith* constitutional framework—now applicable through the RFRA—is not completely insensitive to [concerns for third parties]. Nevertheless, generally speaking, the legal standards do not have a consistent way of taking account of these impacts.”).

<sup>230</sup> See Part IV.B.

<sup>231</sup> See Loewentheil, 62 Drake L Rev at 438 (cited in note 41):

Courts and scholars have occasionally noticed that such conflicts may exist, and with the advent of lawsuits regarding the contraceptive coverage requirement, they have been forced to confront them more directly. But neither has suggested any systematic way of thinking about or resolving them that transcends the ill-fitting constraints of the current doctrine while remaining within the context of free exercise law.

(citations omitted).

<sup>232</sup> *Hobby Lobby*, 134 S Ct at 2790 & n 8 (Ginsburg dissenting), citing *Wisconsin v Yoder*, 406 US 205, 230 (1972), *Estate of Thornton v Caldor, Inc*, 472 US 703 (1985), *Cutter v Wilkinson*, 544 US 709, 720 (2005), and *Catholic Charities of Sacramento, Inc v Superior Court*, 85 P3d 67, 93 (Cal 2004).

<sup>233</sup> 406 US 205 (1972).

Court faced a religious challenge to a law requiring students to attend school through the age of sixteen. The challengers were Amish parents with high school-aged children who maintained that their faith prohibited sending their children to secular school past the eighth grade, both for fear of the corrupting influence of a secular education and to preserve the youths' time to assume the farming obligations that they incurred in later adolescence.<sup>234</sup> In upholding the Amish parents' religious objections, the Court was careful to note that religion would not always function as a trump. It thus referenced cases in which religious beliefs have been made to yield to secular laws because the religious conduct sought to be protected posed a "substantial threat to public safety, peace or order."<sup>235</sup> The Court then noted that the conduct at issue in *Yoder* posed no such threat and so those cases did not determine the outcome for the case at hand.<sup>236</sup>

There is, to be sure, a sense in which threats to public safety, peace, and order affect third parties. But the Court can weigh these threats in its determination to grant an exemption without referencing third parties at all. The *government's* interest in maintaining public safety, peace, and order suffices. And indeed, that is the most plausible way to read the other related case that Ginsburg cited, *Cutter v Wilkinson*.<sup>237</sup> There, facing inmates' requests for religious accommodations under the Religious Land Use and Institutionalized Persons Act of 2000<sup>238</sup> (RLUIPA), the Court recognized the Bureau of Prisons' "need to maintain order and safety"<sup>239</sup> (although, again, the Court concluded that safety could be maintained consistent with the accommodations). But order and safety are concerns of the *government*, not concerns of third parties—that is, other inmates—who might be harmed if hell were to break loose. The Court expressed as much when it noted, in the context of discussing relevant prior decisions, that "[c]ourts [ ] may be expected to recognize the *government's* [ ] compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order."<sup>240</sup> Describing

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<sup>234</sup> Id at 209–13.

<sup>235</sup> Id at 230, quoting *Sherbert v Verner*, 374 US 398, 402 (1963).

<sup>236</sup> *Yoder*, 406 US at 230.

<sup>237</sup> 544 US 709 (2005).

<sup>238</sup> Pub L No 106-274, 114 Stat 803, codified at 42 USC § 2000cc et seq. RLUIPA effectively extends RFRA to those "residing in or confined to" a government-run institution. 42 USC § 2000cc-1(a).

<sup>239</sup> *Cutter*, 544 US at 722.

<sup>240</sup> Id at 723 n 11 (emphasis added).

the relevant interests as the government's makes clear that the Court was concerned not with protecting the targets of racism but instead with providing for a safe and orderly prison.<sup>241</sup>

The next case that Ginsburg cited involved an Establishment Clause claim. *Estate of Thornton v Caldor, Inc*<sup>242</sup> addressed a Connecticut statute that required businesses to grant Sabbath leave to any employee who requested it on religious grounds, no matter the day that the Sabbath was observed.<sup>243</sup> The Court did refer to third parties there, but not to claim that they have interests that the Court must consider in their own right. Instead, the Court did so to establish that an exemption would violate the Establishment Clause by privileging one set of interests (for example, those of religious employees who observe a Saturday Sabbath) over another (for example, those of employees who do not observe Sabbath but who might nonetheless have good reasons to want Saturday as their day off). Thus, the Court reviewed all of the ways in which the statute's "absolute" requirement—its "unyielding weighting in favor of Sabbath observers"—elevated the interests of religious employees over nonreligious ones, and it therefore concluded that "the statute [went] beyond having an incidental or remote effect of advancing religion. The statute ha[d] a primary effect that impermissibly advance[d] a particular religious practice."<sup>244</sup> We can see, then, that third-party interests did not function in that case as they would need to in order to conclude that *they* are what mattered in the Court's determination. The Court referenced the effects on third parties as a premise in an argument whose conclusion was that the law violated the Establishment Clause. If the Court cared about third-party interests for their own sake, it would have been enough that the law imposed burdens on third parties by making it harder for them to have their preferred days off. There would have been no need for the Court to justify its refusal

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<sup>241</sup> The same can be said for other cases in which the Court denies religious entities special treatment on grounds that superficially suggest an interest in protecting racial minorities from animus but, on closer examination, speak to the *government's* or the *public's* interest in living in a society free of racism, and not to the particular interests that members of the targeted minorities might have in not suffering from that discrimination. See, for example, *Bob Jones*, 461 US at 604 (defending the Internal Revenue Service's decision to withdraw tax-exempt status from a university that prohibited interracial dating or marriage on the ground that "the *Government* has a fundamental, overriding interest in eradicating racial discrimination in education") (emphasis added).

<sup>242</sup> 472 US 703 (1985).

<sup>243</sup> *Id* at 705–06.

<sup>244</sup> *Id* at 710 (citations omitted).

to grant the exemption based on a concern about the evils of government support of religion in their own right.<sup>245</sup>

Ginsburg's final case was a California Supreme Court decision involving a nonprofit seeking an exemption from a contraceptive mandate contained in California's health-care law.<sup>246</sup> This case has the most direct, seemingly supportive statement of Ginsburg's position. There, the court stated: "We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties,"<sup>247</sup> and it cited *Yoder* and *United States v Lee*<sup>248</sup> as evidence.<sup>249</sup> But *Yoder*, we have seen, did not involve third-party rights.<sup>250</sup> And *Lee*, a case rejecting an Amish employer's plea for

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<sup>245</sup> Similar considerations allow us to dispose of the suggestion that *Trans World Airlines, Inc v Hardison*, 432 US 63 (1977) ("TWA"), turned on third-party interests, as some commentators have suggested. See, for example, Wilson, 53 BC L Rev at 1464 n 183 (cited in note 18). In *TWA*, the Court addressed a religious adherent's claim that TWA violated his rights to religious accommodation under Title VII of the Civil Rights Act of 1964 by failing to give him a day off on the day of his Sabbath. *TWA*, 432 US at 67–70. In response, the Court noted that it would be costly to TWA to grant the requested day off, and it held that "to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." *Id.* at 84. Title VII could not support this kind of discrimination and so the Court denied the accommodation. *Id.* Here, as in *Thornton*, the Court invoked third parties, but it did not do so because third-party interests were themselves at issue. Instead, and again as in *Thornton*, the treatment of third parties was relevant only as an evidentiary matter—that treatment demonstrated that the religious adherent was indeed seeking a privilege that the company did not bestow on others. *Id.* at 92. Acceding to the religious adherent's request, then, would have the Court favor religion impermissibly; it is this favoring, not the effect on third parties, that sustains the Court's decision.

<sup>246</sup> See *Catholic Charities*, 85 P3d at 74–76.

<sup>247</sup> *Id.* at 93.

<sup>248</sup> 455 US 252 (1982).

<sup>249</sup> *Catholic Charities*, 85 P3d at 93.

<sup>250</sup> See text accompanying notes 233–36. The California Supreme Court also appears to have read *Yoder* incorrectly. It stated that, in *Yoder*, in evaluating whether to grant an "exemption from a general law requiring [] older children to attend public school, the [United States Supreme C]ourt emphasized that its conclusion depended on the assumption that no Amish child wished to attend." *Catholic Charities*, 85 P3d at 93 (emphasis added). But the United States Supreme Court said exactly the opposite: "[O]ur holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents." *Yoder*, 406 US at 230 (emphasis added). And Chief Justice Warren Burger, writing for the Court, went on to say that "it is [the parents'] right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent." *Id.* at 230–31. In this way, the Court considered *only* the parents' interests, and not the interests of their children, who were third parties to the litigation. The discrepancy between the California Supreme Court's

an exemption from social security taxes, does not turn on the interests of third parties either.<sup>251</sup> Instead, *Lee* turns on the adverse consequences to the system *as a whole* if courts were to begin granting exemptions to tax burdens on an ad hoc basis.<sup>252</sup> And the more general review of the case law undertaken here demonstrates that it is entirely reasonable that the California Supreme Court would not have been aware of United States Supreme Court cases in which the Court squarely recognized third-party costs and yet granted the exemption anyway.<sup>253</sup>

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reading of *Yoder* and the text of *Yoder* itself casts doubt on the former's ability to proceed as a faithful reader of constitutional doctrine.

<sup>251</sup> See generally *Lee*, 455 US 252. The Court did say in passing that “[g]ranting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.” *Id.* at 261. But this is dictum. The Court’s reason for refusing the exemption is, as I argue in the text following this note, a concern about the workability of the social security system *as a whole*, not a concern about depriving the business’s non-Amish workers of social security benefits. See *id.* at 263 (Stevens concurring) (“I agree with the Court’s conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim.”).

<sup>252</sup> See *id.* at 260:

The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. . . . Because 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.

This argument appears to be in tension with a provision that already existed at the time of *Lee*, which the petitioner in *Lee* cited—namely, an exemption for self-employed individuals whose religion opposed social security benefits and whose sect provided care for their own elderly. See 26 USC § 1402(g). One might then think that the problem in *Lee* went not to a concern for the tax system as a whole but instead to a concern for third parties: *Lee* threatened to deny non-Amish employees social security benefits, whereas the existing exemption for self-employed individuals concerned only the Amish person himself. Indeed, Ginsburg, in her *Hobby Lobby* dissent, stated that “the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would ‘operat[e] to impose the employer’s religious faith on the employees.’” *Hobby Lobby*, 134 S Ct at 2804 (Ginsburg dissenting), quoting *Lee*, 455 US at 261. See also Bob Egelko, *Supreme Court Unmoved by Religious Employer’s Coverage Objections — for the Amish* (SFGate, Aug 4, 2014), archived at <http://perma.cc/TB4X-NLLH> (quoting Professor Micah Schwartzman, who “contrasted the court’s concern for the Amish farmer’s workers [in *Lee*] in 1982 with its brush-off of Hobby Lobby’s employees”).

The language from *Lee* referencing the burdens that third parties might incur appears in the very last paragraph of the decision and likely constitutes mere rhetorical flourish rather than a premise necessary to the holding. See *Lee*, 455 US at 261. At any rate, the quotation from *Lee* merely states the fact that granting the employer an exemption would impose costs on those of his employees who do not share his faith. It does not say that the exemption would therefore be unconstitutional, or even that courts would have to weigh these costs against the employer’s rights of religious freedom. As such, the quoted language leaves the question of how third-party costs matter—and in particular whether they would affect the outcome at all—totally unclear.

<sup>253</sup> See *Catholic Charities*, 85 P3d at 93.

These cases do not exist, because *the Court never squarely factors third-party costs into its determinations about whether to grant religious exemptions in the first place.*<sup>254</sup>

## B. The Troubling Omission of Third-Party Costs

One might think that current doctrine already allows for the consideration of third-party interests, even if their interests have been given short shrift in practice. Here I address three doctrines that appear, at least superficially, to address third-party interests, and I argue that none is ultimately up to the task.

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<sup>254</sup> The California Supreme Court cited two other cases in passing for the proposition that courts will not grant religious exemptions when the exemptions would adversely affect third parties. In the first case, *Tony and Susan Alamo Foundation v Secretary of Labor*, 471 US 290 (1985), the United States Supreme Court rejected a plea for an exemption from the minimum wage and reporting requirements of the Fair Labor Standards Act (FLSA). *Id.* at 304–05. The relevant provisions of the FLSA were 29 USC §§ 206(b), 207(a), 211(c), 215(a)(2), and 215(a)(5). The Court rejected the plea because it found that the FLSA imposed no burden whatsoever on the objectors. *Tony and Susan Alamo Foundation*, 471 US at 303–06. As such, the Court did not need to undertake an inquiry into the interests that the legal requirements were intended to serve, and it did not undertake that inquiry. In the second case, also involving an as-applied challenge to the FLSA, the Fourth Circuit also found that the burden on religion, if any, was “limited.” *Dole v Shenandoah Baptist Church*, 899 F2d 1389, 1397–98 (4th Cir 1990). It nonetheless went on to assess the interest intended to be served by the FLSA, which it identified as an interest in protecting women from employment discrimination by ensuring equal pay for both sexes. *Id.* at 1398. This looks to be an interest in protecting third parties, but it is an interest that “counts” only because it is the asserted interest of the government in imposing the FLSA in the first place. *Id.* In this way, the interest in women’s equality is like the interest of the *Cutter* inmates in security—they are interests that receive judicial notice only because the government has chosen to adopt these interests as its own. I elaborate on the distinction between addressing third-party interests squarely versus tangentially in the text following this note. In any event, the court in *Shenandoah Baptist Church* upheld the FLSA requirements not so much because of anyone’s interests in equal pay as because of reasons similar to those underpinning *Lee*—namely, interests in maintaining Congress’s objectives by ensuring the universal application of the law. As the court said:

There is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls. This would undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools.

*Id.* Only a very strained reading of the case, then, would allow one to infer that it sought to protect the interests of those whom an exemption would directly affect.

1. The compelling-interest prong of RFRA.

In defending a legal requirement against a claim that the requirement substantially burdens an objector's exercise of religion, the government is asked to adduce the compelling interest that the challenged requirement is designed to serve.<sup>255</sup> Sometimes, the government's interest coincides with that of third parties. Yet there is no reason to think that this will always be true, and when the two diverge, the government need not press both its own interest as well as the third parties' interest.<sup>256</sup> Thus, for example, consider a religious adherent who objects to a military draft because he believes homosexuality is evil and, in the wake of the Don't Ask, Don't Tell Repeal Act of 2010,<sup>257</sup> he would find it too offensive to his values to serve alongside individuals who are openly gay. The legal requirement he challenges—that is, his conscription—is motivated by concerns for national security. These may be compelling enough in their own right to deny the objector an exemption, but even if they are, they do not at all track what is at stake for the gays and lesbians whom this objector's claim denigrates. The government's compelling interest, then, might not include the interests of third parties. Accordingly, a test that does not look to third-party costs over and above the government's interest is likely to leave third parties out in the cold.

2. The Establishment Clause.

Some commentators look to the Establishment Clause to protect third parties from a religious exemption that would otherwise burden them. Thus, for example, Professor Frederick Gedicks and his coauthor Rebecca Van Tassell contend that “the Court condemns permissive accommodations on Establishment Clause grounds when the accommodations impose significant burdens on third parties who do not believe or participate in the

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<sup>255</sup> See 42 USC § 2000bb-1.

<sup>256</sup> Justice Kennedy, in his *Hobby Lobby* concurrence, seems to recognize that third-party interests count when, but only when, they are the interests that the government sought to advance through the legal requirement in question. According to him, religious exercise may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.” *Hobby Lobby*, 134 S Ct at 2787 (Kennedy concurring). Not all interests warrant protection, then—only those that “the law deems compelling.” *Id* (Kennedy concurring).

<sup>257</sup> Pub L No 111-321, 124 Stat 3515.

accommodated practice.”<sup>258</sup> Even assuming that their contention is correct,<sup>259</sup> it does not fully capture the concern here—that the

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<sup>258</sup> Gedicks and Van Tassell, 49 Harv CR–CL L Rev at 349 (cited in note 43). See also Gedicks and Koppelman, 67 Vand L Rev En Banc at 54 (cited in note 41) (arguing that an exemption from the contraceptive mandate violates the Establishment Clause, which “prohibit[s] RFRA’s application when . . . a particular exemption would shift the costs of the accommodated religious practice to identifiable and discrete third parties”); *Hobby Lobby*, 134 S Ct at 2802 n 25 (Ginsburg dissenting).

<sup>259</sup> I have my doubts, though I will restrict myself here to taking issue with just one strand of argument that those with a more capacious understanding of the Establishment Clause have marshaled. Some theorists point out that *Thornton*, discussed above, favorably quotes Judge Learned Hand’s contention that “[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.” *Thornton*, 472 US at 710, quoting *Otten v Baltimore & O. R. Co.*, 205 F2d 58, 61 (2d Cir 1953). These theorists read in this statement the Court’s recognition that the government may not protect religion when doing so would impinge on others’ rights. See, for example, Schwartzman and Tebbe, *Arguing off the Wall* (cited in note 43); Gedicks and Van Tassell, 49 Harv CR–CL L Rev at 358 (cited in note 43). See also *Hobby Lobby*, 134 S Ct at 2791 (Ginsburg dissenting), quoting Zechariah Chafee Jr, *Freedom of Speech in War Time*, 32 Harv L Rev 932, 957 (1919) (“[W]ith respect to free exercise claims no less than free speech claims, ‘[y]our right to swing your arms ends just where the other man’s nose begins.’”) (quotation marks omitted).

In response, it is worth looking at the Learned Hand quotation in the context in which *Thornton* invokes it. The full quotation from *Thornton* is as follows:

This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand:

“The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”

As such, the statute goes beyond having an incidental or remote effect of advancing religion. . . . The statute has a primary effect that impermissibly advances a particular religious practice.

*Thornton*, 472 US at 710. The meaning of the Learned Hand quotation itself can be further gleaned if it is read along with its surrounding language: “The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities.” *Otten*, 205 F2d at 61 (emphasis added) (citation omitted). The point there was that one cannot claim First Amendment protections against nonstate actors—there, union employees who pressured the employer (a private railway company) to discharge the plaintiff because the plaintiff refused to join the union. The issue in *Otten*, then, was whether the plaintiff could convince a court to compel others to alter their conduct—in that case, by giving up the bargaining power that the union members would enjoy only if that place of employment were a “union shop”—because union membership contravened the employee’s religious convictions. *Id.* at 59–60. The plaintiff’s request, Learned Hand argued, was no different from that of a “man [who] might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed.” *Id.* at 61. Learned Hand’s position then contemplates not cases in which someone seeks a religious accommodation and third parties are affected *incidentally*; instead, it applies to cases in which controlling third parties’ conduct



doctrine does not adequately consider the burdens that third parties might incur in light of an exemption. For one thing, all of Hobby Lobby's employees who do not share its religious views have reason to feel affronted by its religious exercise. The Establishment Clause concern is not restricted, then, to the women who will be denied contraception as a result of the exemption. Second, there may be cases in which a religious exemption does not result in an Establishment Clause violation, and yet third parties do have genuine cause to feel that their interests have been sacrificed. Suppose that the Amish teens in *Yoder*, for example, had wanted to continue with their secular schooling because they found their interactions with secular peers enriching. Their interest in continued schooling—namely, exposure to diverse peers—would be different from the interests Wisconsin proffered in support of the law requiring schooling through age sixteen—namely, ensuring a reasonably educated electorate;<sup>260</sup> the teens' interests would not be rooted in a complaint about the state's undue support of religion. If the Court were then to grant the teens' parents the requested exemption, the teens would have reason to feel aggrieved and their grievance

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is *the precise and only purpose* of the sought-after accommodation. This is a decisive distinction.

Return now to the portion of *Thornton* in which the Learned Hand quotation appears. There, Burger cited two cases for the proposition that government action that only incidentally advances religion does not violate the Establishment Clause. In one of those cases, the Court upheld a Maryland statute providing grants to private colleges—both secular and religious—so long as the grants were used for nonsectarian purposes. *Roemer v Board of Public Works of Maryland*, 426 US 736, 747 (1976). In the other, the Court upheld, against an Establishment Clause challenge, a New York statute authorizing the state to buy and then lend secular textbooks to high school students attending both public and private (including parochial) schools. *Board of Education of Central School District No 1 v Allen*, 392 US 236, 248–49 (1968). Again, the books themselves were not religious in nature, and the financial relief that they provided benefited the students' parents, not the schools themselves. *Id.* at 243–45. The contrast between *Thornton* and these two cases is relevant here, because it underscores that what mattered to the Court in *Thornton* was *government support for religion* and not government accommodations that shift burdens to third parties. Put differently, the Connecticut law challenged in *Thornton* would have been found defective even if it prevented no secular employee from having his preferred day off. The defect lay in the formal favoring of religious interests and not in any setback to secular interests. It is for this reason that Burger ended his discussion with the conclusion that, unlike the Maryland and New York statutes, the Connecticut statute “*has a primary effect that impermissibly advances a particular religious practice.*” *Thornton*, 472 US at 710 (emphasis added). On the logic of that case, the government may not advance religion, full stop. Third-party effects are neither necessary nor sufficient for the Court to find an Establishment Clause violation.

<sup>260</sup> Wisconsin had argued that education was necessary for participation in democratic life and for cultivating self-sufficiency. *Yoder*, 406 US at 221.

would have nothing to do with an Establishment Clause violation.<sup>261</sup> In this way, the Establishment Clause can protect the rights of third parties in only a subset of the cases in which their interests are threatened.

3. The “shoals” causing claims for religious accommodation to founder.

I argued above that *Cutter* weighed the burden of a legal requirement against the *government’s* interest in prison security; it held that a religious accommodation would not in fact undermine that interest, and so it granted the exemption. As such, the case cannot fairly be read as an example of the Court weighing a bid for religious accommodation against the interests of discrete third parties. With that said, it is worth noting that *Cutter* contains what is perhaps the most succinct statement to the effect that third-party harms matter. Listing the “shoals” on which prior bids for religious accommodation have “founder[ed],” the Court stated, “Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”<sup>262</sup> This is powerful language, all the more so because Justice Alito quotes it in a footnote in the *Hobby Lobby* majority opinion, in a discussion about whether courts may deny religious exemptions from programs aimed at providing benefits to third parties.<sup>263</sup> One might then think

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<sup>261</sup> One who holds that the Establishment Clause prohibits religious accommodations that would harm third parties will object to my treatment of the hypothetical *Yoder* variant that I describe. The objection would proceed as follows: If the Amish teens want to continue their secular education, and a court affords their parents a religious exemption that prevents the teens from doing so, the teens will have reason to think that the court has impermissibly supported religion at their expense. In other words, the exemption would, contrary to my argument, violate the Establishment Clause. In response, it is worth noting that whether the Establishment Clause contemplates third-party costs in this way is precisely the issue. Reviewing the case law, I have sought to argue that we cannot accurately read Establishment Clause case law in this way. As such, the teens could not wield the Establishment Clause to contest the costs that they would incur from their parents’ religious exemption. See Loewentheil, 62 Drake L Rev at 475 (cited in note 41):

[T]he problem is not so much protecting third parties from being forced to participate indirectly in someone else’s religious practices or suffer for them, but is rather—or additionally—that [third parties] sometimes have independently existing interests, both practical and expressive, which are subordinated to religious interests when accommodations are granted.

<sup>262</sup> *Cutter*, 544 US at 720.

<sup>263</sup> See *Hobby Lobby*, 134 S Ct at 2781 n 37.

that the settled view of the Court is that third-party costs matter.<sup>264</sup>

Yet even if the Court has adopted the view that it must “take adequate account” of third-party costs,<sup>265</sup> this would hardly establish that the Court is committed to protecting third parties. The meaning and implications of the *Cutter* language are radically unclear. What will count as having taken “adequate account” of third-party interests? How much weight must these interests be given for a court’s accounting to have been “adequate”? And what does giving them their due weight entail? Is it enough for a court merely to note that the exemption will impose burdens on third parties? Or does the statement mean that, when courts do recognize that third parties will be burdened, they should seek to arrive at an alternative accommodation? Or should they deny the accommodation altogether? *Cutter* itself provides no answers to these questions, because the Court found that “nonbeneficiaries” would not be harmed by the requested accommodation.<sup>266</sup> The *Hobby Lobby* majority arrived at the same conclusion with respect to the third parties there, given the availability of alternative arrangements for providing contraception.<sup>267</sup>

At any rate, the foregoing analysis of the relevant case law suggests that the claim that courts must take “adequate account” of the interests of “nonbeneficiaries” fails to find support in prior cases. It would be all too easy for a court to dismiss this part of *Cutter* on the ground that *Cutter* incorrectly interpreted its precedents and the case itself looked to the effects of an accommodation only on the government’s interests, not on the interests of third parties. Third parties should not have to rely on so precarious a statement of what the law requires.

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<sup>264</sup> I am grateful to Professors Koppelman and Schwartzman, each of whom urged this language upon me.

<sup>265</sup> *Hobby Lobby*, 134 S Ct at 2781 n 37.

<sup>266</sup> See *Cutter*, 544 US at 720. One might seek further support for the claim that third-party costs matter in their own right in the following *Cutter* language: “Should inmate requests for religious accommodations . . . impose unjustified burdens on other institutionalized persons . . . the facility would be free to resist the imposition.” Id at 726. But again, the language is unhelpfully vague because we are not told what counts as a burden, let alone an unjustified burden, and the Court did not have occasion to decide the matter in *Cutter* itself because it found no burden there.

<sup>267</sup> *Hobby Lobby*, 134 S Ct at 2781 n 37.

#### 4. Third-party intervention.

Even if one agrees that neither RFRA nor the Establishment Clause straightforwardly contemplates third-party interests, one might think that the concern about overlooking third parties is mitigated by the possibility that they will seek to intervene in the case and bring their interests before the court in that way.<sup>268</sup> But it would be foolhardy to rely on this mechanism alone. For one thing, possibly affected third parties must seek a court's permission to be heard, and the court has discretion to grant or deny the intervention.<sup>269</sup> For another, while the contraceptive-mandate cases received a lot of publicity—and so readily put third parties on notice that their rights were subject to abrogation—many other cases seeking religious exemptions may not be so prominent. When they are not, third parties cannot be counted on to know of their own accord that their interests are at stake. Finally, it is unfair for third parties to incur litigation costs to protect their interests when they are not impinging on the objectors' rights of free exercise any more than anyone else is.

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I argued above that a court should proceed with great deference when facing a claim for religious exemption. The court should, in particular, judge the claim on the merits only to the extent that the claim rests on suspect empirical facts. But if there are few intrinsic limits on claims of complicity, then there is an even greater need to attend to extrinsic concerns—specifically, the effect an accommodation might have on third parties. Pluralism demands respect for religious differences, but that respect goes both ways: it entails that we must be open to many claims of conscience, but we must also ensure that these claims do not unduly or disproportionately interfere with the interests of discrete third parties. I turn now to some concrete suggestions for operationalizing this careful balancing act.

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<sup>268</sup> See, for example, *Notre Dame*, 743 F3d at 558–59 (granting leave to intervene to three Notre Dame students who claimed an interest in the contraceptive coverage they would receive were Notre Dame not granted an exemption).

<sup>269</sup> See FRCP 24(b). There are cases in which third parties are accorded intervention as of right. See FRCP 24(a). But it is not at all clear that the religious-exemption cases are of this kind. Indeed, the Seventh Circuit treated the Notre Dame students' intervention as one requiring the court's permission. See *Notre Dame*, 743 F3d at 558 (“We need to say something about the three Notre Dame students whom *we have allowed* to intervene.”) (emphasis added).

### C. Balancing Concerns for Complicity against Third-Party Costs

We have seen that claims of complicity have moral, empirical, and relational dimensions, and that each of these may require a different level of deference. At the same time, whatever the level of deference accorded to a complicity claim, it must still be balanced against the burdens, if any, that an accommodation would impose on third parties. In this Section, I seek to put these two pieces together, first reviewing the kinds of claims that warrant deference on the merits and then bringing to bear the extrinsic consideration of third-party costs.<sup>270</sup>

#### 1. Assessing the strength of complicity claims.

As I argued above in the discussion about the three kinds of deference,<sup>271</sup> the government need not defer to complicity claims that are premised on mistakes of empirical fact. As such, the government may deny an exemption based on a claim of complicity that turns on factual errors, even if an exemption would impose no third-party costs.

Matters are more complicated when it comes to complicity claims that turn on nonstandard moral or relational premises, however. Given that courts may not assess the cogency of an objector's moral claims, the moral elements of a conscientious objection must be treated with absolute deference for the reasons stated above. Courts must then take at face value an objector's claim that a certain act (for example, the use of contraception, receipt of a blood transfusion, and so forth) is wrong. With that said, courts are not without the resources to address hate-based claims—such as those declaring homosexuality evil—as I argued above.<sup>272</sup>

It is more difficult to grant a categorical right of deference to relational claims, especially given the possibility that someone might claim a causal connection that is extravagantly

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<sup>270</sup> Schwartzman also advocates a balancing approach in cases in which, for example, taxpayers are made to support government activities that their convictions oppose. But Schwartzman's balancing approach remains faithful to the RFRA doctrine insofar as it restricts its focus to the interests of the objector, on the one hand, and the government, on the other. As with the RFRA test, then, Schwartzman's test does not attend to the interests of third parties who might come to be burdened were the religious objector granted an accommodation. See Schwartzman, 97 Va L Rev at 346–54 (cited in note 35).

<sup>271</sup> See Part I.D.

<sup>272</sup> See text accompanying note 118.

far-fetched.<sup>273</sup> Nonetheless, deference should be the default here, given that concerns about complicity can strike at the heart of the believer's conscience and given that, unlike with empirical claims, we lack nonneutral considerations with which to dispute the metaphysics underpinning the more expansive notions of complicity in conscientious objectors' claims.<sup>274</sup> Courts may abandon the default only when the claim is interwoven with empirical assertions that are themselves clearly mistaken. Thus, for example, consider an employer who seeks to exclude coverage for ultrasounds during pregnancy from his health insurance plan on the belief that ultrasounds are a sufficient cause of left-handedness in the resulting child and that left-handedness is evil. It would be easy to defeat this claim on the factual merits (most women have ultrasounds during pregnancy and most children are not left-handed). Less far-fetched metaphysical claims, at least when they entail more responsibility rather than less, must be treated with deference.

## 2. Balancing deference against third-party interests.

The fact that all moral and many relational claims must be treated with deference does not automatically entail an exemption; it merely shifts the burden of the inquiry. The government then needs to defend the challenged legal requirement, as RFRA requires. But a separate, additional set of considerations must be brought to bear—namely, considerations tracking the interests of third parties.<sup>275</sup>

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<sup>273</sup> See note 155 and accompanying text.

<sup>274</sup> See Rawls, *Political Liberalism* at 144–50 (cited in note 115) (describing an overlapping consensus and maintaining that we can reach decisions on the basic political structure of society—notwithstanding differences in individuals' metaphysical commitments—so long as these different commitments nonetheless support the same policy outcomes).

<sup>275</sup> Professor Eric Orts has argued that it is tendentious to speak of third parties' interests rather than their rights—for example, rights to contraceptive coverage under the ACA. See Eric Orts, *Undertheorizing the Corporation Continued: Hobby Lobby and Employees' Rights* (The Conglomerate, July 16, 2014), archived at <http://perma.cc/4GW P-24BE>. He compellingly contends that framing the conflict as one between religious rights and third-party interests already tips the balance in favor of the employers, because rights trump interests. As a general matter, I agree, but I nonetheless describe what is at stake for third parties in terms of their interests, rather than their rights, because I mean for the test that I describe to apply to all complicity claims, and some of these threaten to impose costs on third parties even when they do not threaten to infringe any third parties' rights. I am also not convinced that referring to the employees' "rights" under the ACA is any less tendentious. The rights employees have are not necessarily rights against their employers: It was the HHS rules, rather than the statute

Deference is a binary term in this context—a claim of complicity either does or does not get deference. There is no middle ground when it comes to moral or relational claims because there is no legitimate scale according to which one could measure the magnitude of the claim’s plausibility. Instead, plausibility weightings are off the table.

Third-party costs, by contrast, are scalar. The greater the cost to third parties of an exemption, the more weight third-party interests should carry. The process of weighing something with an absolute value against something with a scalar value requires that we posit a threshold on the scalar side of the equation: costs exceeding some threshold amount should be found untenable and so exemptions should be denied when these excessive costs would otherwise result.

Specifying the location of the threshold on a cost spectrum is a matter for democratic deliberation. There is no a priori, context-independent answer to the question of how much of a burden it is fair to impose on third parties for the sake of respecting religious observance.<sup>276</sup> Several ancillary considerations

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itself, that mandated cost-free access to contraception. And even if the government chose to grant women these rights, it did not need to impose the corresponding duty on their employers.

<sup>276</sup> Loewentheil contends that equality-implicating third-party costs should defeat a bid for an exemption so long as they are “substantial,” which she understands to mean neither “de minimis” nor “exceedingly rare.” Loewentheil, 62 Drake L Rev at 477 (cited in note 41). She arrives at this contention because she thinks equality-implicating rights are just as important as rights of religious freedom and that the latter ground claims for accommodation so long as the challenged legal requirement “substantially” burdens religious exercise. Id at 483 (“If the core of free exercise doctrine is the desire to protect religious exercise from discrimination that would render believers unequal to other citizens, its protections should only extend so far as they do not undermine the equality of nonbelievers on the other side.”) (citation omitted).

In contrast to Loewentheil, I have argued that the purpose of rights of conscience is not (or not merely) to prevent discrimination against those with deeply held convictions that conflict with the law but (also) to promote lives of integrity. On my way of thinking, living according to conscience is an important human good, one that the government should protect, all else equal. See Part III.B (describing the place of conscience in one’s sense of self and meaning and, as a result, the deep pain that attends violations of conscience). See also Andrew Koppelman, *Defending American Religious Neutrality* 11 (Harvard 2013) (arguing that the First Amendment reasonably “treats religion as a distinctive human good” and concluding that it is therefore “not unfair” to give religion special treatment); McConnell, 103 Harv L Rev at 1517 (cited in note 32):

To [those who saw in America a refuge for religious exercise], the freedom to follow religious dogma was one of this nation’s foremost blessings, and the willingness of the nation to respect the claims of a higher authority than “those whose business it is to make laws” was one of the surest signs of its liberality.

warrant mention, however. First, the government should seek to minimize occasions for conflict between religious beliefs and third-party interests. (I note, for example, that a national health-care plan—whatever its other demerits—would have obviated employers’ conscientious objections to the ACA.)<sup>277</sup> The government did so when it excluded churches from the contraceptive mandate at the outset. It might have foreseen objections to the contraceptive mandate from religious institutions and even from for-profit entities, and so provided universal access to contraception outside of the employer-subsidized insurance delivery system. Second, when third-party interests would be implicated were an exemption granted, courts and the government must work to ensure that these interests are raised and adequately defended.

### 3. Bringing third-party interests before a court.

This brings us to the final piece of doctrinal revision, which provides a means for third parties to have their interests represented in court. The government bears an obligation to assess whether a requested exemption would impose costs on third parties. When the government determines that it would, the government must make a good faith effort to alert the relevant third parties to the proceedings. For example, the government might contact a representative advocacy group (for example, the National Abortion and Reproductive Rights Action League, in the case of the contraceptive mandate), or take out ads in national news sources (paper and electronic).

Further, the government—which is to say, taxpayers—should fund the third parties’ legal representation. As a society, we should be willing to incur some costs in exchange for conferring religious freedom. But those costs should be shared equally among us. We would impermissibly chill requests for religious exemptions were we to require the objectors to pay for third parties’ legal representation. And requiring third parties to fully fund their efforts to protect themselves would expose them to a

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I thus view living conscientiously as deeply important, though just how important it is and how its importance should be weighed against other interests are matters that we citizens must together decide. Given the role I contemplate for democratic deliberation in this area, I resist Loewentheil’s a priori idea that rights of conscience are on par with equality-implicating interests.

<sup>277</sup> I elaborate on this suggestion in a *Washington Post* op-ed. See Sepinwall, *Can a Corporation Have a Conscience?* (cited in note 29).



disproportionate burden, even if they were to prevail. Accordingly, the government should have to subsidize third parties' legal costs, on behalf of us all.<sup>278</sup>

Finally, it would not be sufficient to contact only the third parties most immediately affected by the case—for example, Hobby Lobby's employees, given that the exemption affects the health-care coverage that they will enjoy. *Hobby Lobby* has precedential value for pending contraceptive challenges and for any other challenges that will be filed in its wake. Thus, it stands to affect the interests of many women of reproductive age, and it is for this reason that notice should extend beyond the Hobby Lobby employees themselves. And there is a separate reason to notify an advocacy organization, rather than the potentially affected employees themselves: As Professors Micah Schwartzman and Nelson Tebbe compellingly argued with respect to Hobby Lobby, "employees are (understandably) reluctant to come forward against their employers, even though their constitutional claim is strong and even though they have a lot to lose if the case goes the wrong way."<sup>279</sup> Their concerns would obtain in any employer-mandate challenge.

#### D. Assessing *Hobby Lobby* and Its Progeny in Light of the Proposed Balancing Test

The proposed revisions to the doctrine articulated here would likely not have altered the outcome in *Hobby Lobby*. To be sure, women of childbearing age ought to have been entitled to express the nature and meaning of the consequences an accommodation would yield for them. But the Court should have ruled in favor of Hobby Lobby's requested exemption even had it attended to third-party costs. This is because an exemption for Hobby Lobby would not in fact have imposed any costs on third parties: the government had already established a work-around for the contraceptive mandate for religious nonprofits. With that alternative arrangement in place, the Court was in a position to offer Hobby Lobby an exemption at virtually no cost to Hobby Lobby's employees or their dependents. As such, given the fact

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<sup>278</sup> For that matter, we might decide that parties who succeed in securing a conscientious exemption should have their legal fees reimbursed, too, or at least that we should offer as much to those plaintiffs who can show financial hardship. If conscience is worth protecting, then we might not want the ability to pay to stand as a barrier to those with legitimate claims.

<sup>279</sup> Schwartzman and Tebbe, *Arguing off the Wall* (cited in note 43).

that Hobby Lobby's claim deserved deference (it turned on moral and relational premises that courts may not challenge)<sup>280</sup> and that granting the claim would not ultimately impose burdens on third parties, the Court was right to uphold Hobby Lobby's exemption.

But *Hobby Lobby* was unusual. We should expect that other cases will not involve a work-around that is so readily at hand. In these other cases, courts will have to do the serious work of weighing the religious adherent's claim of complicity against the costs that an accommodation would impose on third parties. Again, just how much of a burden would be legitimate to impose on third parties is a matter for democratic deliberation. We can nonetheless anticipate the proper outcomes in a few discrete examples.

Claims seeking religious exemptions from coverage for life-saving measures (for example, blood transfusions) should be denied, given the magnitude of the interests at stake for third parties (here, life or death) unless the government can arrive at an alternative funding arrangement that leaves third parties no worse off. We should expect that claims seeking religious exemptions from antidiscrimination laws would typically fail as well. The third parties whose interests are implicated in these cases are not only those who are immediately denied service or employment by the religious objector. All members of the group facing discrimination can claim an expressive injury from the discrimination. And other historically oppressed groups can claim that an exemption threatens them with an injury, too: the state that would grant a request to discriminate fails to take seriously the great evil of discrimination and thus undermines the sense of security and respect that a decent state should confer on all its citizens.<sup>281</sup>

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<sup>280</sup> I have noted that Hobby Lobby's claim rested on the dubious empirical assumption that the four contested methods of contraception were "abortifacients." See notes 130–34 and accompanying text. If the medical community were certain that the four contraceptive methods *never* operated by destroying embryos, then the Court could have disposed of Hobby Lobby's claim on empirical grounds, finding that it did not deserve any deference. But the medical community instead allows that there is at least a theoretical possibility that the contraceptive methods in question work in just the way that Hobby Lobby fears. See notes 131–34. And because Hobby Lobby contends that it will feel itself to be complicit just so long as it contributes to conduct that has even a remote chance of leading to embryo destruction, the Court was right to treat its claim deferentially, for the reasons advanced here.

<sup>281</sup> Others who support gay rights have nonetheless been more hospitable to the idea that opponents of same-sex marriage should be permitted to abstain from contributing to

There will of course be cases far harder than these. But we should feel more confident in the ability of courts to appropriately assess claims of complicity once we appreciate the reasons for which these claims can be inherently compelling and once we expand the test for an accommodation so that it factors in the costs that an exemption would impose on third parties.

#### CONCLUSION AND A PERSONAL APOLOGIA

The freedom that we cherish and that our constitutional regime enshrines is the freedom to create for ourselves lives of meaning and value.<sup>282</sup> Conscience is central to that endeavor, and the law should then protect each of us from having to act against our consciences, at least when the protection can be had without imposing undue costs on others. Moreover, conscience is not an after-work or off-hours indulgence; indeed, only a cruel and unyielding conception of work would require that we turn our selves off during the time we spend on the job. It is for this reason that courts should treat requests for religious exemptions from specific provisions of the employer mandate with substantial deference.

With that said, I confess that the prospect that women's sexual or reproductive choices might be anyone else's business—let alone a business's business—is one that I find deeply discomfiting. I deplore efforts to limit women's reproductive freedoms and construe many of these as reflections of a deep-seated sexism that no decent government should harbor or support. I have thus written in defense of women's rights, including their reproductive rights.<sup>283</sup> And other pieces of my writing evince a deep

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gay or lesbian weddings. Thus, Professor Douglas Laycock would allow wedding vendors to deny service to gays and lesbians, just so long as the wedding vendors publicized their policies in advance. See Douglas Laycock, *Afterword*, in Douglas Laycock, Anthony R. Picarello Jr, and Robin Fretwell Wilson, eds, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 189, 198–99 (Rowman & Littlefield 2008). Given the way in which the dignitary harm of a state-authorized denial of service can have ramifications for members of all historically oppressed groups, I am skeptical that we should allow these refusals. Their expressive implications arise not just in the face-to-face encounter in which the gay couple is turned away (an implication that Laycock's account avoids in light of its publicity condition) but in the mere enjoyment of the state-sanctioned right to discriminate. See Koppelman, *Gay Rights* at 645–47 (cited in note 126).

<sup>282</sup> See Martin H. Redish, *The Value of Free Speech*, 130 U Pa L Rev 591, 593–94, 619–25 (1982); Rogers M. Smith, *The Constitution and Autonomy*, 60 Tex L Rev 175, 176–81 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil & Pub Aff 204, 215–22 (1972).

<sup>283</sup> See, for example, Amy J. Sepinwall, *Defense of Others and Defenseless "Others"*, 17 Yale J L & Feminism 327, 328 (2005) (arguing against the Unborn Victims of Violence

skepticism about corporate constitutional rights.<sup>284</sup> My scholarly commitments are, then, such as to propel me toward the anti-*Hobby Lobby* camp. More than that, as a woman of childbearing age who is perfectly happy with the family she has, challenges to the contraceptive mandate strike especially close to home. *Hobby Lobby* vexes me personally as much as it occupies me professionally and politically.

I offer these statements, unusual though they are in a law review publication, to shed some light on the internal struggle involved in advancing the thoughts contained here. *Hobby Lobby*, I have contended, was rightly decided, both as a matter of the doctrine as it stands and as a matter of the doctrine as it should be. More generally, as I have argued, claims of conscientious objection warrant great (though not absolute) deference, even when they do not track the understanding of complicity in our standard legal and moral theories (as challenges to insurance subsidization do not). I arrive at these claims in spite of my personal, ideological, and political orientation but, for all that, with no less conviction about their truth. If I do not relish the company of my bedfellows on these matters, I hope at least to take refuge in the fidelity to conscience that has compelled the reflections here.

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Act of 2004 and other legislative efforts aimed at fetal protection on the ground that they subordinate women).

<sup>284</sup> See, for example, Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 *Conn L Rev* 575, 581 (2012) (asserting that corporations are not “normative citizens” and, as such, do not deserve the robust speech protections recently bestowed on them by *Citizens United v Federal Election Commission*, 558 US 310 (2010)).