

## 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 (e.g., 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 (e.g., by using contraception). The understanding of complicity underpinning these challenges is vastly more expansive than what standard 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' complicity claim 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. In this way, the Court made elements of an employee's healthcare package the "boss's business" (to borrow from the title of the Democrats' proposed bill overturning the Hobby Lobby decision).

Much of the critical reaction to *Hobby Lobby* focuses on the issue of corporate rights of religious freedom. Yet the deeper concerns *Hobby Lobby* raises – about whether employers may now refuse, on religious grounds, to subsidize other forms of health coverage (e.g., blood transfusions or vaccinations) or to serve customers whose lifestyles they deplore (e.g., gays and lesbians) – do not turn on the organizational form the employer has adopted. Instead, the more significant issue goes to our understanding of complicity: When is it *reasonable* for an employer (for-profit or non-profit, 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 where 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 aim to argue here, the conception of complicity pervading the treatment of conscientious objection in the law is murky and misleading, and it often yields unjust results. This Article seeks to offer 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 RFRA cases more generally. It then seeks to disaggregate the elements in a complicity claim and to identify which of these deserve to be treated deferentially.

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Deference, however, is not decisive. The Article's second ambition is to expose an oversight in the law's treatment of conscientious objection – *viz.*, 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 where the accommodation would impose substantial burdens on third parties. I believe that they have an overly sanguine view of the protection 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.

## I. INTRODUCTION

In *Burwell v. Hobby Lobby*,<sup>1</sup> the Supreme Court faced a plea for an exemption from the Affordable Care Act that was based on an unusually broad conception of complicity: Hobby Lobby, a closely-held for-profit corporation, claimed that merely by subsidizing insurance through which its employees *might* access contraception that *might* operate by destroying embryos,<sup>2</sup> it would be participating in a wrong. The understanding of complicity underpinning this claim is vastly more expansive than what standard legal doctrine or moral theory contemplates.<sup>3</sup> As such, the Court could have rejected Hobby Lobby's claim, and so denied it an exemption from the so-called contraceptive mandate,<sup>4</sup> on the ground that Hobby Lobby's connection to the conduct it finds objectionable was too tenuous to be cognizable. Courts have proceeded in just this way in countless other cases where, say, taxpayers have lodged conscientious objections to subsidizing military spending,<sup>5</sup> or students have lodged conscientious objections to paying university fees that cover medical services providing abortion counseling.<sup>6</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

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<sup>1</sup> 573 U.S. \_\_\_\_ (2014).

<sup>2</sup> See, e.g., Aaron E. Carroll, *How Hobby Lobby Ruling Could Limit Access to Birth Control*, N.Y. TIMES: THE UPSHOT, Jun. 30, 2014, [http://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-](http://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-control.html?ref=us&module=Ribbon&version=context&region=Header&action=click&contentCollection=U.S.&pgtype=Multimedia&_r=1&abt=0002&abg=1)

[control.html?ref=us&module=Ribbon&version=context&region=Header&action=click&contentCollection=U.S.&pgtype=Multimedia&\\_r=1&abt=0002&abg=1](http://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-control.html?ref=us&module=Ribbon&version=context&region=Header&action=click&contentCollection=U.S.&pgtype=Multimedia&_r=1&abt=0002&abg=1) (describing medical consensus that the possibility that the challenged methods of contraception involved embryo destruction is highly speculative and improbable). Cf. George Annas, Theodore Ruger & Jennifer Prah Ruger, *Money, Sex, and Religion — The Supreme Court's ACA Sequel*, NEW ENGL. J MED., Jul. 16, 2014, at <http://www.nejm.org/doi/full/10.1056/NEJMhle1408081> (“in the opinion of medical experts, the four methods of contraception under scrutiny do not induce abortion; rather, they prevent abortion by preventing pregnancy.”).

<sup>3</sup> See *infra* \_\_\_\_.

<sup>4</sup> I join 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), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html>. See also Micah Schwartzman, Rich Shragger, and Nelson Tebbe, *Hobby Lobby and the Establishment Clause: Gedicks and the Government*, BALKINIZATION, (Jan. 21, 2014), <http://balkin.blogspot.com/2014/01/hobby-lobby-and-establishment-clause.html>. For the relevant portion of the Affordable Care Act, see Patient Protection and Affordable Care Act, Pub. L. No. 11-148, § 2713(a)(4), 124 Stat. 119, 131 (2010).

<sup>5</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (“there 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”); Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 972 (1999) (surveying cases and concluding that “[e]ach has held that ... RFRA ... does not require the income tax laws to accommodate religious beliefs, specifically those of conscientious objectors to war”); 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) (“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.”). See also notes \_\_\_\_ and accompanying text, *infra*, collecting cases where courts have rejected claims of conscientious objection to taxes aimed at funding initiatives the taxpayer opposes.

<sup>6</sup> *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir., 1996) (use of university registration fee to fund student health insurance plan that included abortion coverage did not substantially burden free exercise rights of students who objected to abortion on religious grounds because, in part, “plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services”), *overruled* on other grounds by *City of Boerne v. Flores*, 521 U.S. 507; *Erzinger v. Regents of Univ. of Cal.*, 137 Cal.App.3d 389, 187 Cal.Rptr. 164, *cert. denied*, 462 U.S. 1133 (1983).

exemption.<sup>7</sup> In a similar vein, the Court proceeded with grand deference in an order it issued just three days after rendering its *Hobby Lobby* decision. There, the Court acceded to Wheaton College's request for a preliminary injunction exempting it not from having to cover its employees' contraception costs – the government had already released Wheaton from the contraceptive mandate<sup>8</sup> – but from having to fill out the form that would formalize its exemption.<sup>9</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>10</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 the accommodation the religious adherent obtains. As Sandy Levinson puts it, “‘Because this is the way I feel’ seems to be a conclusive argument in the religio[us] realm.”<sup>11</sup> Invocations of religion, that is, threaten to function as trumps,<sup>12</sup> foreclosing legal intervention for everything from discrimination against gays and lesbians to refusals to cover life-saving care. *Hobby Lobby*, then, would have religion reign supreme.<sup>13</sup>

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<sup>7</sup> 573 U.S. \_\_\_\_\_. *Hobby Lobby* in fact consolidated two cases involving claims of conscientious objection on the part of three employers: In the first case, an appeal from the Tenth Circuit, two closely-held corporations owned by the Green family – Hobby Lobby, Inc., a chain of craft stores, and Mardel, Inc., a publisher of Christian texts – challenged the contraceptive mandate and won. *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10<sup>th</sup> 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. *Conestoga Wood v. Sebelius*, 724 F.3d 377 (3d Cir., 2013). For ease of exposition, I refer in the text only to Hobby Lobby, though everything I say about it applies to Mardel and Conestoga, unless otherwise indicated.

<sup>8</sup> See 45 C.F.R. § 147.131(b)(4) (dictating the procedure for receiving the accommodation – viz., completion of a form certifying that the organization is a religious non-profit that opposes contraception). The form itself, EBSA Form 700-Certification, can be viewed here: [www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf](http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf).

<sup>9</sup> *Wheaton College v. Burwell* 573 U.S. \_\_\_\_ (2014). In a Seventh Circuit case raising a similar challenge, Judge Posner emphasized the “novelty” of the claim at issue in this pithy way: The plaintiff asks “not for the exemption, which it has, but for the right to have it without having to ask for it.” *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7<sup>th</sup> Cir. 2014).

<sup>10</sup> In a subsequent case in which religious non-profits objected to the filing requirement, a three-judge panel on the D.C. Circuit unanimously rejected the non-profits' claim, stating that it is the ACA itself, and not the filing of the form, that triggers coverage for contraceptive use. *Priests for Life v. Dept. of Health and Human Svcs.*, No. 13-5368 (D.C. Cir., Nov. 14, 2014).

<sup>11</sup> Sandy Levinson, *Justice Ginsburg's Inexplicable First Two Pages*, BALKINIZATION, (Jun. 30, 2014), <http://balkin.blogspot.com/2014/06/justice-ginsburgs-inexplicable-first-two.html>.

<sup>12</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) (“Individual rights are political trumps held by individuals.”); Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984). For 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 (1996); Charles Taylor, *Alternative Futures--Legitimacy, Identity, and Alienation in Late Twentieth Century Canada*, in *CONSTITUTIONALISM, CITIZENSHIP, AND SOCIETY IN CANADA* 183, 209 (A. Cairns & C. Williams eds. 1985) (describing 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); and Robin West, *Rights, Harms, and Duties: A Response to Justice for Hedgehogs*, 90 *B.U. L. Rev.* 819, 819 (2010).

<sup>13</sup> I focus largely here on religiously based claims of conscientious objection because *Hobby Lobby* was decided under a statute protecting religious freedom. See *infra* note 17 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, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 65-71 (1996); BRIAN LEITER, *WHY TOLERATE RELIGION?* 54-67

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 Democrats have proposed to overturn *Hobby Lobby* bears the short title "Not My Boss's Business Act."<sup>14</sup> The central question in *Hobby Lobby*'s undoubted progeny should be, "When is a decision about healthcare coverage an employer's business?" or, more perspicuously, "When does an employer have a strong enough reason to think itself complicit in its employees' healthcare choices that it should enjoy an exemption from having to subsidize those choices?" And because the *Hobby Lobby* decision has implications not just for healthcare coverage but also for anti-discrimination laws – as where a business seeks to deny service or employment to gays and lesbians<sup>15</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 he opposes on religious grounds?"<sup>16</sup> Unfortunately, both the *Hobby Lobby* decision as well as the larger doctrine of free exercise 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 (RFRA),<sup>17</sup> which allows a religious adherent to claim an exemption from a neutral law of general application where 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>18</sup>

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(2012); CHRISTOPHER L. EISGRUBER AND LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51-77 (2007). For arguments on the other side, see, for example, Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QUINNIAC L. REV. 257, 301 (2008); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000). Cf. *United States v. Seeger*, 380 U.S. 165 (1965) (accommodating non-religious pacifistic objections to the draft because these played the 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 under-inclusive 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 (2009) (*hereinafter Conscience*).

<sup>14</sup> See, e.g., Jake Lefferman, *Dems Strike Back on Hobby Lobby Case With "Not My Boss's Business Act,"* ABC NEWS, (Jul 9, 2014, 1:44 PM), <http://abcnews.go.com/Politics/dems-strike-back-on-hobby-lobby-case-with-not-my-bosss-business-act/blogEntry?id=24488168&ref=https%3A%2F%2Fwww.google.com%2F>.

<sup>15</sup> See, e.g., Michael Paulson and Fenrnada Santos, *Religious Right in Arizona Cheers Bill Allowing Businesses to Refuse to Serve Gays*, N.Y. TIMES, Feb. 22, 2014, at A1.

<sup>16</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 B.C. L. REV. 1417, 1426-29 (2012).

<sup>17</sup> Religious Freedom Restoration Act of 1993, 42 U.S. C. § 2000bb-1 (1993).

<sup>18</sup> The precise text of the relevant part of the statute is as follows: The government may "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 of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* 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 & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 211 (1994). As such, this "super-statute," Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995), can constrain the operation of any federal legislation that fails RFRA's test.

The legal requirement at issue in *Hobby Lobby* follows from the Patient Protection and Affordable Care Act,<sup>19</sup> which imposes an employer mandate.<sup>20</sup> Businesses employing fifty or more full-time workers must provide health insurance,<sup>21</sup> and this health insurance must include preventive care for women.<sup>22</sup> Federal rules promulgated in light of the PPACA, and developed in consultation with the Institute of Medicine, identify just which kinds of preventive care employer healthcare packages must offer. Among these is the so-called contraceptive mandate: the rules dictate that all twenty methods of FDA-approved contraception must be made available through the health plans offered by large employers.<sup>23</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>24</sup> The Court, in *Hobby Lobby*, ruled for the first time that for-profit corporations could 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>25</sup>

Much has been made of the corporate law implications of the decision.<sup>26</sup> These are important questions in their own right, but *Hobby Lobby*’s deeper significance, and the “parade of horrors” it threatens,<sup>27</sup> do not in fact turn on the employer’s organizational form.<sup>28</sup> This is

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<sup>19</sup> 42 U.S.C. §§ 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2012).

<sup>20</sup> See, e.g., Sandhya Somashekhar, *As Health-Care Law’s Employer Mandate Nears, Firms Cut Worker Hours, Struggle with Logistics*, WASH. POST, Jun. 23, 2014.

<sup>21</sup> See, e.g., Health insurance for businesses with more than 50 employees, HEALTH CARE, <https://www.healthcare.gov/what-do-large-business-owners-need-to-know/> (last visited Aug. 31, 2014).

<sup>22</sup> Pub. L. No. 111-148, §1001, 124 Stat. 119, 131 (codified at 42 U.S.C. § 300gg-13 (2012)).

<sup>23</sup> See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621-01 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).

<sup>24</sup> The Becket Fund maintains a list of the contraceptive mandate challenges. See HHS Mandate Information Central, THE BECKET FUND, <http://www.becketfund.org/hhsinformationcentral/>. To date, there have been 102 cases filed, with “victories” (mostly preliminary injunctions) for plaintiffs in 71 of them.

<sup>25</sup> 573 U.S. \_\_\_\_.

<sup>26</sup> I address these 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. \_\_\_\_ (forthcoming Spring 2015). See also Mark Rienzi, *God and the Profits: Is there Religious Liberty for Money-Makers?* 21 GEO. M. L. REV. 15 (2014); Stephen M. Bainbridge, *A Critique of the Corporate Law Professors’ Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE, (Feb. 21, 2014),

[http://www.virginialawreview.org/sites/virginialawreview.org/files/Bainbridge\\_Final.pdf](http://www.virginialawreview.org/sites/virginialawreview.org/files/Bainbridge_Final.pdf); Eric Orts, *The Legal and Social Ontology of the Firm*, CONGLOMERATE (Aug. 5, 2014),

[http://www.theconglomerate.org/corporate\\_governance/](http://www.theconglomerate.org/corporate_governance/); Micah Schwartzman, Richard Schragger and Nelson Tebbe, *The New Law of Religion*, SLATE, (Jul. 30, 2014, 11:54 AM),

[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/07/after\\_hobby\\_lobby\\_there\\_is\\_only\\_rfra\\_and\\_that\\_s\\_all\\_you\\_need.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html).

<sup>27</sup> *Could the Hobby Lobby Ruling Unleash a ‘Parade of Horribles’?*, KNOWLEDGE@WHARTON (Jul. 02, 2014), <http://knowledge.wharton.upenn.edu/article/hobby-lobby-case/>. In September 2014, a U.S. 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. See Shadee Ashtari, *Judge Cites Hobby Lobby To Excuse Fundamentalist Mormon From Child Labor Testimony*, HUFF POST, Sept. 18, 2014, [http://www.huffingtonpost.com/2014/09/18/hobby-lobby-testimony-mormon-child-labor\\_n\\_5844696.html](http://www.huffingtonpost.com/2014/09/18/hobby-lobby-testimony-mormon-child-labor_n_5844696.html). Commenting on the case, 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 Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. \_\_\_\_, \*12 n. 58 (forthcoming 2015) (providing examples of the way in which gay rights opponents have wielded *Hobby Lobby* to shirk anti-discrimination measures aimed at protecting gays and lesbians. Cf. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989)

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 (LLC), partnership, or a sole proprietorship that was appealing for the accommodation.<sup>29</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 just so long as the religious adherent believes himself to be implicated in the conduct his religion opposes, and no matter the costs an exemption imposes on others.<sup>30</sup>

*Hobby Lobby* and its anticipated progeny fit into a larger debate about the place of religious freedom in public life,<sup>31</sup> a debate that “continues to divide and trouble the legal system.”<sup>32</sup> But the case, and its likely successors, also raise distinctive 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 application makes him complicit in conduct that his religious convictions deplore. While questions about the general bounds of religious freedom have received ample attention,<sup>33</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>34</sup>

This Article aims to make progress on these questions, engaging religious objections to legal requirements that compel the adherent to contribute to conduct by others that her religion opposes. To that end, the 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*. More specifically, 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 and chief dissent in *Hobby Lobby*,<sup>35</sup> in the doctrine pre-dating *Hobby Lobby*, and in the RFRA scholarship more

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(“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>28</sup> I offer a narrower argument to this effect in Amy J. Sepinwall, *Can a Corporation Have a Conscience?*, WASH. POST, Mar. 21, 2014, at B02 (“[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>29</sup> See, e.g., Complaint, *Wieland v. United States Department of Health and Human Services*, 4:13-cv-01577 (E.D. MI.2013) (filed on behalf of individual insurance subscribers who object to paying insurance premiums that partly subsidize contraception for other subscribers to the same insurance plan). For a survey of different kinds of business forms currently available, see, for example, ERIC W. ORTS, *BUSINESS PERSONS* 175-222 (2013).

<sup>30</sup> Cf. *Korte v. Sebelius*, 735 F.3d 654, 689 (7th Cir. 2013) *cert. denied*, 134 S. Ct. 2903 (U.S. 2014) (“The [Court of Appeals’] holding today [exempting 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.”).

<sup>31</sup> As Michael McConnell puts 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>32</sup> *Id.* [McConnell] at 1411.

<sup>33</sup> See, e.g., McConnell, *supra* note 31; Sullivan, *supra* note 13 ; Leiter, *supra* note 13; Koppelman, *Conscience*, *supra* note 13.

<sup>34</sup> Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 376 (2011).

<sup>35</sup> I focus principally on Justice Alito’s majority opinion and Justice Ginsburg’s dissent, although I make passing reference to Justice Kennedy’s concurrence.

generally. As we shall see, courts, as well as scholars, operate with understandings of complicity that are murky, under-theorized, and at times just plain wrong.<sup>36</sup>

The doctrine is afflicted by a second problem as well, as it does not take account of third-party interests except to the extent that these align with the government's interest in imposing the legal requirement. As such, women's interest in easy access to the full spectrum of the ACA-approved contraceptive methods gets factored into the doctrine's balancing test only if the government takes this interest to be compelling.<sup>37</sup> So too with gays' and lesbians' interest in equal treatment in the commercial sphere. The dissent is sensitive to this concern, as it faults the majority in large part because the majority accords 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>38</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>39</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>40</sup> who contend either that third parties suffer no cognizable harm from an exemption,<sup>41</sup> or else that the doctrine really does factor in third-party costs.<sup>42</sup>

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<sup>36</sup> See *infra* Parts IV.A and B.

<sup>37</sup> See *infra* Parts V.A and B.

<sup>38</sup> *Burwell v. Hobby Lobby* 573 U.S. \_\_\_\_ (2014) (Ginsburg, J., dissenting) (slip op., \*2). See also *id.* [dissent] at \*27 ("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>39</sup> I provide an example to this effect in Part V.B, *infra*.

<sup>40</sup> Cf. Frederick Mark Gedicks & 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 discussion surrounding the *Hobby Lobby* litigation is the total failure to acknowledge the women who would be harmed by RFRA exemptions from the Mandate."). Alan Garfield does not fault the doctrine for overlooking women's interests, but he does contend that the doctrine underdetermines the issues here. Given the indeterminacy, and given that women's interests are more important than are those of the religious objectors, Garfield concludes that the exemption should be denied. Alan E. Garfield, *The Contraception Mandate Debate: Achieving A Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 22-23 (2014) <http://columbialawreview.org/wp-content/uploads/2014/01/Garfield-114-Columbia-Law-Review-Sidebar-1.pdf>. But cf. Kara Loewentheil, *When Free Exercise Is A Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 470-74 (2014) (noting that the case law sometimes adverts to third-party effects but nonetheless concluding that, "generally speaking, the legal standards do not have a consistent way of taking account of these impacts," *id.* at 474).

<sup>41</sup> See, e.g., Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUSTICE: A BLOG DEDICATED TO THE DEVELOPMENT OF CATHOLIC LEGAL THEORY, (Dec. 5, 2013), <http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html>.

<sup>42</sup> See, e.g., Gedicks and Koppelman, *supra* note 40 ; Micah Schwartzman, Richard Schragger, and Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION, (Nov. 27, 2013), <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>; Micah Schwartzman and Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall*, SLATE, (Nov. 26, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/obamacare\\_birth\\_control\\_mandate\\_lawsuit\\_how\\_a\\_radical\\_argument\\_went\\_mainstream.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html) (*hereinafter* *Arguing off the Wall*); Frederick Mark Gedicks &

In short, the question of whether contraception (or other health interventions like 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 doesn’t 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, if unchecked, give rise.

More specifically, I shall 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 upon others. Thus I shall contend that the smaller the burden on third parties of a religious exemption, 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 religious objector’s request. I end the Article with a proposal for a revised balancing test that captures this interplay.

The Article begins, in Part II, with a critical assessment of the understandings of complicity in both the majority and dissenting opinions in *Hobby Lobby*. I shall argue that the majority is overly deferential to the religious believer’s assertions of complicity, while the dissent operates with a conception of complicity that is too stringent. Looming over both positions is a disagreement about the role courts may play in evaluating complicity claims. A subsidiary aim of Part II is to tease apart just what kinds of claims – empirical, moral or relational – courts must treat deferentially, as a matter of respecting religion.

In Parts III and IV, 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 claim, 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 it opposes to give its claim of complicity credence, as I aim to show in Part III.<sup>43</sup> But I also seek to argue, in Part IV, 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 they deem wrong. Proximity is given this prominence, I argue, 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. Proximity, in other words, 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 where the religious objector happens to *feel* complicit in a greater range of conduct than the

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Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

<sup>43</sup> Cf. Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL’Y & L. 303, 329-30 (2014) (*hereinafter* “*Contraception*”).

standard legal account contemplates. I conclude then that courts should, in general, take claims of complicity at face value, at least where they do not rest on factual errors.

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 V, I argue (*pace* Justice Ginsburg's dissent) that the doctrine does not currently mandate consideration of third-party costs, and that this oversight is deeply problematic. I then propose a revision to the test for a religious accommodation that aims to include third-party considerations. I conclude in Part VI 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 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>44</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 rights of free exercise of the corporation's individual members.<sup>45</sup>

## II. 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 application imposes a "substantial" burden on the

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<sup>44</sup> See Amy J. Sepinwall, *Corporate Piety and Impropriety*, *supra* note 26. I preview some of the arguments there in Amy J. Sepinwall, *Can a Corporation Have a Conscience?*, WASH. POST, Mar. 21, 2014, at B02, and Amy Sepinwall, *Corporate RFRA Rights and Complicity*, CONGLOMERATE, (Jul. 16, 2014), <http://www.theconglomerate.org/2014/07/corporate-rfra-rights-and-complicity.html>. Cf. Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 101 (2012) (arguing that corporations are not persons and so they 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) (*hereinafter* "Taking").

<sup>45</sup> 573 U.S. at \_\_\_\_ (slip op. \*19-25). I note that *Hobby Lobby* assumes, without argument, that the relevant members consist only of the closely-held corporation's owners. Others have contested this assumption, on the ground that the company's decisions about healthcare provision might contravene the deeply held convictions of its employees and they too have reason to care about what the company does. See, e.g., 573 U.S. at \_\_\_\_ (Ginsburg, J., dissenting) (slip op. \*16); *Korte v. Sebelius*, 735 F.3d 654, 722 (7th Cir. 2013) (Rovner, J., dissenting), *cert. denied*, 134 S. Ct. 2903 (U.S. 2014); Eric Orts, *The Legal and Social Ontology of the Firm*, CONGLOMERATE (Aug. 5, 2014), [http://www.theconglomerate.org/corporate\\_governance/](http://www.theconglomerate.org/corporate_governance/) ("Rights of employees may be equal to those of owners and managers in this context."); Sepper, *supra* note 43 at 319 ("In the case of disagreeing shareholders, whose beliefs matter? And what of employees who may not share the owners' beliefs?"). I do not seek to challenge this assumption here. Instead, I assume, first, 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 and, second, that these members are entitled to seek exemptions from legal requirements to which the corporation is otherwise subject in virtue of their own rights. I defend these assumptions in Sepinwall, *Corporate Piety*, *supra* note \_\_\_\_\_. I will refer to the members who are entitled, under this assumption, to seek exemptions as "owners" but I use that term provisionally. Those who think that there are 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 (e.g., employees, creditors, etc.). For accounts of ownership that reveal its complexity, see A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE: COLLABORATIVE WORK (1961), and ORTS, *supra* note 29 at 104-105.

religious believer,<sup>46</sup> and the question of when a burden becomes “substantial” is under-theorized and controversial.<sup>47</sup>

I begin, in Part II.A, with the Hobby Lobby owners’ claims, in an effort to get clear on what is at stake – morally, for them, and conceptually, for the courts assessing these claims. To that end, I seek to distinguish between 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 opinion. In Part II.B, I argue that the dissent accords too little deference to the owners’ beliefs. By contrast, the majority, as we shall see in Part II.C, is too solicitous, as it thinks challenging the owners on any ground is beyond the competence and prerogative of the Court. Part II.D returns to the three dimensions upon which conscientious objections might be evaluated, and it 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 twenty FDA-approved forms of contraception.<sup>48</sup> Hobby Lobby objected to four of these, on the ground that they posed a risk of functioning as “abortifacients” – i.e., drugs or devices that destroy embryos.<sup>49</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....<sup>50</sup> [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, that is, 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 – i.e., “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.

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<sup>46</sup> *Supra* notes 17-18 and accompanying text.

<sup>47</sup> See, e.g., Steven D. Smith & Caroline Mala Corbin, *Debate: The Contraceptive Mandate and Religious Freedom*, 161 U. PENN. L. REV. ONLINE (Apr. 24, 2013) (stating opposite positions on how courts should think about the term “substantial” in ascertaining whether the burden on the religious adherent is “substantial”).

<sup>48</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621-01 (Aug. 3, 2011) (codified at 45 C.F.R. pt. 147).

<sup>49</sup> See, e.g., Cathy Lynne Grossman, *What’s Abortifacient? Disputes over Birth Control Fuel Obamacare Fight*, WASH. POST, Jan. 28, 2014, available at [http://www.washingtonpost.com/national/religion/whats-abortifacient-disputes-over-birth-control-fuel-obamacare-fight/2014/01/28/61f080be-886a-11e3-a760-a86415d0944d\\_story.html](http://www.washingtonpost.com/national/religion/whats-abortifacient-disputes-over-birth-control-fuel-obamacare-fight/2014/01/28/61f080be-886a-11e3-a760-a86415d0944d_story.html).

<sup>50</sup> 573 U.S. at \_\_\_\_, slip op. \*2 (numbers in parentheses added to the block quote to ease the exposition that follows).

<sup>51</sup> *Id.* at \*36.

<sup>52</sup> *Id.* [slip op., \*36]

<sup>53</sup> This third claim in fact contains both a moral element and a relational one. I elaborate on this in Section D of this Part, *infra*.

Clearly, a good many people deny that abortion is wrong.<sup>54</sup> A greater percentage still think 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 to his employee's contraceptive choices, Hobby Lobby's claim 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 III.

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 empirical, moral or relational predicates of that contention? The dissent, as we shall now see, took issue with the latter two bases of Hobby Lobby's complicity claim; the majority, on the other hand, refused to engage 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 herself complicit in the conduct she 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 upon the word "substantial," and contend that this word requires "the court 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 Justice Ginsburg make good on her contention that judges enjoy a prerogative to assess the strength of complicity claims.<sup>61</sup> If anything, in many

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<sup>54</sup> See, e.g., Lydia Saad, *Americans Still Split Along "Pro-Choice," "Pro-Life" Lines*, GALLUP POLITICS, May 23, 2011, <http://www.gallup.com/poll/147734/americans-split-along-pro-choice-pro-life-lines.aspx> (reporting the results of a Gallup poll indicating that 51% of Americans think abortion is "morally wrong" while 39% think it "morally acceptable").

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

<sup>56</sup> See *infra* notes 100-102 and accompanying text.

<sup>57</sup> 573 U.S. at \_\_\_\_ (Ginsburg, J., dissenting) (slip op., \*21-23).

<sup>58</sup> See, e.g., *Wheaton College*, 573 U.S. \_\_\_\_, \*10 (Sotomayor, J., 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 F.3d 654, 708 (7th Cir. 2013) cert. denied, 134 S. Ct. 2903 (U.S. 2014) (Rovner, J., dissenting). In her rebuttal in *the Penn Law Review debate*, Caroline Mala Corbin presages Justice Ginsburg's contention that the term "substantial" entails that not just any burden should count under RFRA. See Smith & Corbin, *supra* note 47 at 279.

<sup>59</sup> *Korte v. Sebelius*, 735 F.3d 654, 708 (7th Cir. 2013) (Rovner, J., dissenting), cert. denied, 134 S. Ct. 2903 (U.S. 2014)

<sup>60</sup> *Id.* [Korte]

<sup>61</sup> Justice Ginsburg articulated a distinction between "'factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept as true, and the 'legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened,' an inquiry the court must undertake." 573 U.S. \_\_\_\_, at \*22 (Ginsburg, J., dissenting)

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 non-compliance with the challenged legal requirement, not the felt repercussions of compliance.

The dissent in *Hobby Lobby*, however, was unperturbed, and it sought to contest Hobby Lobby's claim of complicity on moral 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, she should not be taken to be responsible for that act. I take up each of these supposed requirements in turn.

## 1. Decision-Making and Complicity

The dissent, along with some commentators as well as some of the lower court opinions in the contraceptive mandate challenges,<sup>64</sup> maintains that the mandate does not make the employer complicit in its employee's use of contraception because the employer does not

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(quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (CA DC 2008).) But the two cases she cites 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 of whether the adherent's burden was substantial because, in both, the Court found that the asserted burden was not of the kind that courts need to recognize in the first place. Thus, in the first case Justice Ginsburg cites, *Bowen v. Roy*, 476 U.S. 693 (1986), the Court argued 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. 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. Commissioner*, 490 U.S. 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. 490 U.S. at 699. Put differently, we might see the issue here in terms similar to those in *Bowen*: 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 *Bowen*), "is this the kind of burden we have reason to accommodate"? Neither *Bowen* nor *Hernandez*, then, stands for the proposition that the substantial burden inquiry invites the Court to challenge a believer's assertion *that* she is complicit (although again it does permit the Court to determine whether to exempt her at the end of the day).

<sup>62</sup> Compare *Notre Dame v. Sebelius*, 743 F.3d 547, 556 (CA7 2014) ("Notre Dame may consider the process a substantial burden, but substantiality—like compelling governmental interest—is for the court to decide.") (citation omitted) and *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("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 v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) *cert. denied*, 134 S. Ct. 2903 (U.S. 2014) ("[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.") (quoting *Hobby Lobby*, 723 F.3d at 1137).

<sup>63</sup> By contrast, the dissent agreed with the majority that courts "must accept as true" the religious objectors' factual allegations. 573 U.S., at \_\_\_\_ (Ginsburg, J., dissenting) (slip op., \*22). I go on to argue that deference to the objectors' understanding of the facts is unwarranted.

<sup>64</sup> See 573 U.S., at \_\_\_\_ (Ginsburg, J., dissenting) (slip op., \*23); *Grote*, 708 F.3d at 865 (Rovner, J., dissenting). Cf. *Autocam*, 2012 WL 6845677, at \*7 ("[t]he 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.").

participate in the decision about whether to use contraception. As Justice Ginsburg states, “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 Rovner, dissenting in a Seventh Circuit mandate challenge, makes a similar argument, contending that “[a]lthough funds from the company health plan are being used to facilitate th[e employee’s contraceptive] choice, no objective observer would attribute that choice to the company, let alone its owner.”<sup>67</sup> And so, Justice Ginsburg and Judge Rovner each conclude, the employee’s decision cannot impose a substantial burden on the employer’s exercise of religion.<sup>68</sup>

The line of argument here is familiar from cases in which taxpayers have raised Establishment Clause objections to public funding for programs where the funding recipient elects to use the funds at a religious institution. Thus, for example, in *Zelman v. Simmons-Harris*, the Supreme Court rejected the idea that a school voucher program compelled taxpayers to subsidize religion.<sup>69</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>70</sup>

The general form of these arguments is as follows: The objector does not choose the conduct she deems objectionable, so she 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>71</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 the gun merchant who sells a weapon 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. There is here, as in the contraceptive mandate case, an “interruption” in the causal “linkage” between the merchant’s act and the killing – namely, the decision on the part of the buyer to commit the killing.<sup>72</sup> But the mere fact that the decision is not the merchant’s

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<sup>65</sup> *Burwell v. Hobby Lobby* 573 U.S. \_\_\_\_ (2014) (Ginsburg, J., dissenting) (slip op., \*23).

<sup>66</sup> *Id.* (quoting *Grote v. Sebelius*, 708 F. 3d 850, 865 (7<sup>th</sup> Cir. 2013) (Rovner, J., dissenting)).

<sup>67</sup> *Korte v. Sebelius*, 735 F.3d 654, 718 (7<sup>th</sup> Cir. 2013) (Rovner, J., dissenting) *cert. denied*, 134 S. Ct. 2903 (U.S. 2014).

<sup>68</sup> *Id.*

<sup>69</sup> 536 U.S. 639 (2002). *See also* *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986) (upholding against an Establishment Clause challenge use of state financial aid for tuition at a Christian college where recipient would be pursuing bible studies); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (rejecting Establishment Clause claim objecting to use of public funding for a sign language interpreter to student attending Catholic high school).

<sup>70</sup> 536 U.S. at 652.

<sup>71</sup> Compare H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 129 (2 ed. 1985) (articulating interventionist position supporting dissent) with MICHAEL MOORE, *CAUSATION AND RESPONSIBILITY* 233-53 (2009) (arguing that an accomplice’s responsibility does not evaporate simply because the perpetrator’s intention “intervenes” in the causal chain).

<sup>72</sup> The language here borrows from the terminology Judge Rovner uses in her dissenting opinion: “It is doubtful that Congress, when it specified that burdens must be ‘substantia[l],’ had in mind a linkage thus interrupted by

does not absolve her of moral responsibility for the resulting death. (Nor would she escape criminal liability under the law.)<sup>73</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>74</sup> Thus, on these accounts, a person can be complicit in another's wrong if she merely shares the wrongful attitudes that motivated the wrong (e.g., all racist individuals share responsibility for a racially motivated crime),<sup>75</sup> or if she and the perpetrator are participating in a joint project that the wrong furthers, even if she did not know and had no reason to know that the perpetrator would choose wrongful means to advance their shared end.<sup>76</sup> In short, conceptions of complicity may be far more expansive than the dissent recognizes.

With that said, it is certainly not the case that facilitation always makes the facilitator responsible for the act or choice she facilitates.<sup>77</sup> The point is instead that an account that denies 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

Justice Ginsburg's overly narrow view of complicity finds an echo in Justice Sotomayor's dissent in *Wheaton College*, which the two other female Justices joined. In that case, *Wheaton College*, "an explicitly Christian" institution,<sup>78</sup> contended that it would be complicit in contraceptive use as a result of its filling out a form registering its objection to the

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independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed." 735 F.3d 654, 718 (7th Cir. 2013) (Rovner, J., dissenting).

<sup>73</sup> Cf. *Blackun v United States*, 112 F.2d 635 (4<sup>th</sup> 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 James Stewart, *The Accomplice Liability of Arms Vendors* (manuscript on file with author).

<sup>74</sup> See, e.g., LARRY MAY, *SHARING RESPONSIBILITY* 42-52 AND 73-86 (1992) (one can bear responsibility for, e.g., a hate crime simply because one publicly endorsed the attitudes that the crime expresses); CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000) (grounding shared responsibility in shared ends, even where one party undertakes measures to achieve those ends that another party opposes); MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY* (2000) (grounding shared responsibility for a group act in the obligations members owe one another to form and sustain a "plural subject" of their joint activity).

<sup>75</sup> See May, *supra* note 74 at 42-52 and 73-86.

<sup>76</sup> See Kutz, *supra* note 74. The understanding of complicity here is embodied in the kind of conspiracy liability captured in the Pinkerton doctrine. See *United States v. Pinkerton*, 328 U.S. 640 (1946).

<sup>77</sup> For example, if one is innocently ignorant about 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 she was on track to do anyway. Cf. Benton Martin and Jeremiah Newhall, *Technology and the Guilty Mind: When Do Technology Providers Become Criminal Accomplices?*, J. CRIM. L. & CRIM'Y (forthcoming 2014), SSRN version available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2393484](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393484) (\*41-42) (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>78</sup> *About Wheaton*, WHEATON COLLEGE WEBSITE, <http://www.wheaton.edu/About-Wheaton> (last visited Aug. 31, 2014).

contraceptive mandate because filling out the form would “trigger[] the obligation for someone else to provide the services to which it objects.”<sup>79</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>80</sup> To buttress its argument, the dissent borrowed an analogy that Judge Posner invoked in another contraceptive mandate challenge.

Judge Posner described a scenario involving a Quaker who seeks an exemption from a wartime draft because he subscribes to his religion’s pacifism. The selective service officer grants the Quaker the exemption but then notes that someone else will be drafted in his place. 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>81</sup> But, Judge Posner continued, the Quaker is in fact responsible neither for the drafting of a replacement nor for any fighting in which the replacement participates. By “exempting him the government [has not] forced him to ‘trigger’ the drafting of a replacement who was not a conscientious objector.”<sup>82</sup> As such, Posner concluded, “the Religious Freedom Restoration Act [does not] require a draft exemption for both the Quaker and his non-Quaker replacement.”<sup>83</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 names 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? 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 in 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 Judge Posner and the *Wheaton* dissent were right that it is the draft itself that does the triggering, and not the 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 just) 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

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<sup>79</sup> *Wheaton College v. Burwell* 573 U.S. \_\_\_\_ (2014) (Sotomayor, J., dissenting) at 3. *See also* *Notre Dame v. Sebelius*, No. 13-3853 (7<sup>th</sup> Cir. 2014) (slip op., \*10).

<sup>80</sup> *Wheaton College*, 573 U.S. at \_\_\_\_ (Sotomayor, J., dissenting) (slip op., \*3).

<sup>81</sup> *Notre Dame v. Sebelius*, 743 F. 3d 547, 556 (CA7 2014).

<sup>82</sup> *Id.* This quote, as well as the one in the text accompanying the following note, have been altered such that rhetorical questions in the original are recast here as the assertions the rhetorical questions are meant to imply.

<sup>83</sup> *Id.*

the prohibited conduct.<sup>84</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, Judge Posner's (or the *Wheaton* dissent'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.

More generally, the flaw in the Quaker analogy is that it acknowledges complicity only for those acts in which one participates directly, ignoring the possible responsibility one comes to bear through a surrogate, or simply by facilitating someone else's commission of a wrong. 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>85</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>86</sup> The majority insisted that “it [was] not for [the Court] to say that [the owners'] religious beliefs are mistaken or insubstantial.”<sup>87</sup> The owners believed that the mandate imposed a “substantial burden” on their religious exercise and the Court took them at their word.

In so doing, the majority accepted at face value the owners' factual assertion that the four contraceptive measures to which they object result in the “destruction of an embryo,”<sup>88</sup> even though the medical community does not believe that this is how these measures in fact work.<sup>89</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

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<sup>84</sup> Cf. Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 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, *Personal Histories*, in *WAR TAX RESISTANCE: A GUIDE TO WITHHOLDING YOUR SUPPORT FROM THE MILITARY* 92 (Ruth Benn ed., 4th ed. 1992) (“‘It'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.’”) (quoting Richard Catlett).

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” – i.e., a non-Jew whom one asks to carry out some of the tasks prohibited on Shabbat on one's behalf. See Aryeh Citron, *The Myth of the “Shabbos Goy,”* CHABAD.ORG, [http://www.chabad.org/library/article\\_cdo/aid/1140867/jewish/The-Myth-of-the-Shabbos-Goy.htm](http://www.chabad.org/library/article_cdo/aid/1140867/jewish/The-Myth-of-the-Shabbos-Goy.htm) (last visited Aug. 25, 2014); *Shabbat Goy*, JEWISH ENCYCLOPEDIA, <http://www.jewishencyclopedia.com/articles/13467-shabbat-goy> (last visited Aug. 25, 2014).

<sup>85</sup> See *infra* Parts III and IV.

<sup>86</sup> *Burwell v. Hobby Lobby* 573 U.S. \_\_\_\_ (2014) at \*56.

<sup>87</sup> *Hobby Lobby*, 573 U.S. at \_\_\_\_, slip op. \*38.

<sup>88</sup> 573 U.S. at \_\_\_\_, slip op. \*2.

<sup>89</sup> See *infra* notes 119-123 and accompanying text.

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 Non-Standard 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 upon which a court may inquire into the cogency of a bid for religious accommodation.<sup>90</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>91</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, etc.) are wrong, and that subsidizing 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 I consider must operate with strong opposition to contributing to the conduct 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 her self, so much so that she would be willing to incur some penalty in order to avoid betraying her commitments.<sup>92</sup> We should require this strength of conviction because the objector, like other citizens, bears a duty of political obedience,<sup>93</sup> and mere distaste for a legal requirement is not sufficient to overcome this duty. Instead, if she is to prevail in her bid for an exemption from a law that binds

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<sup>90</sup> See generally Ben Adams and Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, Nov. 7, 2014,

<http://www.stanfordlawreview.org/online/questioning-sincerity> (“courts 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>91</sup> See, e.g., Alan J. Meese and Nathan Oman, *Hobby Lobby, Corporate Law and the Structure of the Firm*, 127 HARV. L. REV. F. 273 (2014) (noting the risk of opportunism in both corporate and individual claims for accommodation under RFRA).

<sup>92</sup> PLATO, GORGIAS 469C (“Socrates: ‘if it were necessary either to do wrong or to suffer it, I should choose to suffer rather than do it.’”). Cf. Martin Luther King, Jr., Letter from a Birmingham Jail, available at [http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (“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.”). Cf. *United States v. Nugent*, 346 U.S. 1, 12 (1953) (“throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State” and “the First Amendment is the product of that struggle”).

<sup>93</sup> See, e.g., MARGARET GILBERT, A THEORY OF POLITICAL OBLIGATION (2006); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955); Michael Hardimon, *Role Obligations*, 91 J. PHIL. 333 (1994); JOHN HORTON, POLITICAL OBLIGATION (1992).

her compatriots, the objector must have reasons strong enough for her compatriots to think her justified – not on the merits necessarily but simply in virtue of the inner turmoil 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 take it that the typical sentiments voiced around claims of conscience – e.g., “I couldn’t live with myself if I were to...”<sup>94</sup> or “I would rather suffer punishment than obey...”<sup>95</sup> -- would, if sincere, be sufficiently 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, not with respect to whether the objector holds the asserted conviction but instead whether violating it will cause her as much pain as she claims. Again, though, courts are empowered to evaluate whether the objector really is as beset by inner turmoil as she contends. So much then for concerns about insincere or casual objectors.

Suppose now that an individual comes forward with sincere and deeply felt objections to contributing or facilitating contraceptive use. Her claim is different from the garden variety case of conscientious objection, however, because it is aimed not (or not merely) to avoid complicity in contraceptive use but instead (or in addition) to prevent that use altogether. In this scenario, as other commentators have noted,<sup>96</sup> 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>97</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>98</sup> For example, Douglas NeJaime and Reva Siegel detail the ways in which some bids for a conscientious objection to the contraceptive mandate, or to anti-discrimination laws that would protect gays and lesbians, function as the next frontier in the culture wars. They marshal statements from advocates at the frontlines who articulate an evangelical mission: the goal for these advocates is to urge and impose upon others a “traditional morality” in which contraception (along with abortion and same-sex marriage) is verboten.<sup>99</sup> NeJaime and Siegel convincingly argue that the strategy of these religious advocates “is an example of ‘preservation through transformation’”<sup>100</sup>: “[W]hen

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<sup>94</sup> See, e.g., Paul Formosa, *Thinking, Conscience and Acting in Times of Crises*, in *POWER, JUDGMENT AND POLITICAL EVIL* 89, 94 (Andrew Schaap et al. eds., 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>95</sup> See *supra* note 97 [Socrates and King]. *But cf.* Jonathan Bennett, *The Conscience of Huckleberry Finn*, 49 *J. PHIL.* 123 (1974) (arguing that conscience will typically track received moral or legal precepts that guide conduct through reasoned argument while sympathy or compassion, typically viscerally felt, can be a truer guide to morally right action).

<sup>96</sup> See, e.g., NeJaime and Siegel, *supra* note 27; Robin West, [add cite].

<sup>97</sup> See, e.g., *id.* at \*6-7 [NeJaime and Siegel].

<sup>98</sup> See, e.g., Jessica Valenti, *Birth Control Coverage: It’s the Misogyny, Stupid*, *THE NATION*, Nov. 26, 2013, <http://www.thenation.com/blog/177380/birth-control-coverage-its-misogyny-stupid> (quoting Ilyse Hogue, president of NARAL, who stated that “‘The truth is that this is not about religious freedom, it’s about sexism, and a fear of women’s sexuality.’”); Marci A. Hamilton, *The Republican War Against Women*, *JUSTIA*, Oct.3, 2013 (“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*, Feb. 19, 2014.

<sup>99</sup> NeJaime and Siegel, *supra* note 27 at \*26-36.

<sup>100</sup> *Id.* at \*26 (quoting Siegel’s seminal articulations of her “preservation through transformation” paradigm in Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119 (1996); Reva

an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may act to preserve elements of the challenged regime through new rules and reasons.” 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 practices and lifestyles that they deplore on religious or ideological grounds.

The strategies and motives 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 upon 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 contexts involving refusals to cover the healthcare costs of homosexual employees’ spouses, or to serve gay or lesbian customers), it already implicates concerns about equality. It will be worth getting clear on 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 accommodation aimed at sabotaging a legislative regime or expressing animus toward women or homosexuals for another day.<sup>101</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>102</sup> Thus, some theorists defend moral deference on the part of the state on the basis of the skepticism and humility we owe one another as compatriots in a pluralistic society.<sup>103</sup> Moral deference also protects against “the totalization of morality” on the part of the government.<sup>104</sup> And moral convictions, unlike empirical or relational ones, can be deeply entwined with a person’s sense of self and purpose. Given that we lack agreed upon ways to adjudicate between moral convictions, and given the importance these convictions can play in a person’s life, the state should in general refrain from declaring them true or false. In other

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Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997), as well as NeJaime’s extension of that work to the context of sexual orientation in Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Perpetuation of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1212-13 (2012).

<sup>101</sup> I aim to address some of these issues in Amy J. Sepinwall, “The Challenges of Conscience in a World of Compromise,” in *NOMOS: COMPROMISE* (Jack Knight, ed., forthcoming 2015).

<sup>102</sup> *But cf.* Simon C. May, *Principled Compromise and the Abortion Controversy*, 33 PHIL. & PUB. AFF. 317, 336 (2003) (implicitly embracing the view that we can and should adjudicate between moral claims on the basis of their truth or falsity: “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>103</sup> *See, e.g.*, Michele Moody Adams, *Democratic Conflict and the Political Morality of Compromise* (manuscript on file with author); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 85 (1996).

<sup>104</sup> Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 14594 (2013).

words, moral deference is the appropriate stance for a polity rife with multiple and competing conceptions of the good.<sup>105</sup> Thus the doctrine here is in general correct to find that it is not for courts “to say that the line [of permissibility the religious adherent draws is] an unreasonable one.”<sup>106</sup>

With that said, one might think that there are some moral beliefs so noxious that they deserve no deference at all. Consider, for example, the belief that “homosexuality is wrong” (or, worse still, “homosexuals are evil”). Shouldn’t there be limits on moral deference to ensure that courts – which are state actors *par excellence*<sup>107</sup> – are not compelled to treat animus as on a 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>108</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>109</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. Consider, for example, the government’s response to Bob Jones University.<sup>110</sup> 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. The government contended that non-profit status should be held only by entities that advance a public purpose,<sup>111</sup> there was a public policy against racial discrimination, an entity that violated a public policy could not be advancing a public purpose, and so Bob Jones did not qualify for non-profit status.<sup>112</sup> As a result, the government withdrew the university’s tax-exempt status, on public policy grounds. The university challenged the government’s action, arguing that its religious convictions should render it exempt from the government’s commitment to racial equality. The Supreme Court sustained the withdrawal, finding that the government’s interest in eradicating racism was compelling enough to warrant denying Bob Jones the benefit of the tax exemption.<sup>113</sup> As I suggest below, this argument does not target racism as squarely as we might like.<sup>114</sup> But it does nonetheless stand as an instance in which the Court recognized a religious entity’s genuine conviction but then defeated that conviction on the basis of the government’s own compelling interests.

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<sup>105</sup> Cf. JOHN RAWLS, *POLITICAL LIBERALISM* (1995).

<sup>106</sup> *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 715 (1981).

<sup>107</sup> See, e.g., *Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.”); *Shelley v. Kramer*, 334 U.S. 1, 15 (1948) (“judicial action is to be regarded as action of the State”).

<sup>108</sup> See Corey Brettschneider, *How Should Liberal Democracies Respond to Faith-Based Groups That Advocate Discrimination? State Funding and Non-Profit Status*, in *LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS* 72, 74-75 (Austin Sarat ed., 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>109</sup> See *supra* notes and accompanying text [RFRA provisions].

<sup>110</sup> See 461 U.S. 574 (1983).

<sup>111</sup> 461 U.S. at 588.

<sup>112</sup> 461 U.S. at 604.

<sup>113</sup> *Id.*

<sup>114</sup> See *infra* note 227.

Moreover, as I go on to argue below, courts must weigh the noxious moral conviction not only against the government's interests but against the interest of third parties too.<sup>115</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 get too vexed about the believer's claim,<sup>116</sup> the state must, again in its capacity as 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>117</sup>

## 2. Empirical deference

The facts at issue here are empirical ones, subject to assessment in light of observation (mediated by technology, if necessary). 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 government may count as authoritative.<sup>118</sup> It is thus surprising that both the majority and the dissent announced that assessing the factual -- and, in particular, the scientific -- merits of Hobby Lobby's claim was verboten.<sup>119</sup>

As we have seen, the owners refer to the four contested forms of contraception as "abortifacients" -- i.e., measures that have the effect of killing nascent human life. Yet medical authorities -- the Institute of Medicine, which identified the forms of preventive care for women that the Affordable Care Act should make available,<sup>120</sup> along with the American College of Obstetricians and Gynecologists, as well as other medical experts -- believe that the drugs do not act directly on the embryo at all.<sup>121</sup> According to the medical community, there is a very small

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<sup>115</sup> See *infra* Part V.

<sup>116</sup> This is just what 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. Andrew Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law," in *Southern California Law Review* (forthcoming 2015) (*hereinafter* "Gay Rights").

<sup>117</sup> One might worry that the role I assign the state in defending our constitutional values contravenes the neutral stance that a liberal state should occupy. The position 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 Brettschneider, *supra* note 108 along with his book, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* (2012).

<sup>118</sup> Cf. BRIAN LEITER, *WHY TOLERATE RELIGION* 34 ("religions involve beliefs that are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science").

<sup>119</sup> See 573 U.S. at \_\_\_\_, \*37 and *id.* at \_\_\_\_, 21 n. 21 (Ginsburg, J., dissenting).

<sup>120</sup> See Institute of Medicine of the National Academies of Science, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011), available at [http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief\\_updated2.pdf](http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf).

<sup>121</sup> Aaron E. Carroll, *How Hobby Lobby Ruling Could Limit Access to Birth Control*, N.Y. TIMES, (June 30, 2014), <http://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth->

possibility that the contested methods interfere with implantation and, without implantation, the embryo could not develop.<sup>122</sup> But the general mechanism through which these methods work is by preventing sperm from fertilizing the egg in the first place,<sup>123</sup> in which case there is no embryo at all. In short, then, the owners' objection relies on an understanding of the facts with which the medical establishment disagrees.<sup>124</sup>

No matter, the Court and dissent maintained, since courts are not permitted to gauge the "plausibility" of a religious claim.<sup>125</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>126</sup> More generally, so long as the religious adherent's belief was 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 provided the least restrictive means of serving.<sup>127</sup>

Judge Rogers, during oral argument in another contraceptive mandate challenge, 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>128</sup> And commentators contend not only that courts should be permitted to assess the factual bases of a claim of complicity,<sup>129</sup> but also

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("Research does not support the idea that they prevent fertilized eggs to implant.").

<sup>122</sup> See, e.g., Aaron E. Carroll, *How Hobby Lobby Ruling Could Limit Access to Birth Control*, N.Y. TIMES, (Jun. 30, 2014), [://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-control.html?rref=us&module=Ribbon&version=context&region=Header&action=click&contentCollection=U.S.&p&gtype=Multimedia](http://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-control.html?rref=us&module=Ribbon&version=context&region=Header&action=click&contentCollection=U.S.&p&gtype=Multimedia) ("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>123</sup> See, e.g., Editors, *Fill This Prescription*, SCIENTIFIC AMERICAN (Sept. 26, 2005), available at <http://www.sciam.com>, ("By medical definition, the pills block rather than terminate pregnancy.").

<sup>124</sup> See, e.g., Anna Glasier, *Emergency Postcoital Contraception*, 337 NEW ENGLAND JOURNAL OF MEDICINE 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").

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 conclusive." Jonathan H. Adler, *No, the Supreme Court's Hobby Lobby Decision is Not Based upon a Scientific Mistake*, THE VOLOKH CONSPIRACY, July 6, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/06/no-the-supreme-courts-hobby-lobby-decision-is-not-based-upon-a-scientific-mistake/>. Robin Fretwell Wilson offers an extended discussion of the state of scientific knowledge around the mode of operation of these so-called abortifacients. She concludes that question of whether these drugs can prevent implantation "is simply more complicated than ACOG's blanket assertion suggests," and she provides a wealth of citations to the writings of medical professionals to this effect. Wilson, *supra* note 16 at 1455-59 & n. 140-57.

<sup>125</sup> 573 U.S. at \_\_\_\_, slip op. \*37; *id.* at \_\_\_\_, 21 n. 21 (Ginsburg, J., dissenting).

<sup>126</sup> To be clear, this is not the ground upon 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.

<sup>127</sup> See *supra* notes 17 and 18 and accompanying text.

<sup>128</sup> See Leslie C. Griffin, *A Tractor Is Not a Gun, Even If You Sincerely Believe It Is*, HAMILTON AND GRIFFIN ON RIGHTS, <http://hamilton-griffin.com/a-tractor-is-not-a-gun-even-if-you-sincerely-believe-it-is/> (last visited Aug. 31, 2014). The post reproduces the colloquy between Judge Rodgers 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 just mistaken, and the sheet metal would be used only for farm equipment.

<sup>129</sup> Cf. *id.* [Griffin] ("The idea that all the federal laws can be challenged by any irrational belief is unprecedented. And that's a fact.").

that they should not grant an exemption where these bases are false.<sup>130</sup> The American College of Obstetricians and Gynecologists in particular counsels against exemptions to providing emergency contraception when these are based on “unsupported beliefs about its primary mechanism of action.”<sup>131</sup>

The willingness to weigh in on the empirical merits of a religious claim is not undue. Unlike moral convictions, empirical beliefs about non-moral matters rarely structure a person’s sense of who she is. To be sure, some factual truths devastate when they come to light – secrets and lies would be far less ubiquitous if the truth were always anodyne. But there is much wider agreement both on the bases for assessing factual claims relative to moral ones, and on the value of undertaking this assessment. Thus, for example, we prize robust protections for speech not because we think ourselves unable to judge which assertions are true or false and so may not discriminate among them but because we think that only a free exchange of ideas allows the truth to emerge.<sup>132</sup> And we see ourselves in a collective quest for more and greater truths, as we aspire to know about life long ago, what the future holds, how our minds work, and so on.<sup>133</sup>

The marked difference in our attitudes toward moral claims and empirical claims – largely deferential, when it comes to the former, and aggressively probing, when it comes to the latter – is not arbitrary. Accepting all factual assertions as true no matter their plausibility would commit us to a life of irrationality. Practical reasoning depends for its success on a grasp not only of our convictions and aspirations but also of the truth about our factual circumstances, so that we may apply the former to the latter successfully. For these reasons, courts should accord no deference to empirical claims that are manifestly false. To do otherwise would be to consign not just the parties before the court, but also those whom deference affects, to absurdity. 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 worked pre-fertilization, then the Court would have been within its rights to reject 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 (i.e., that destroying an embryo is wrong).<sup>134</sup> With that said, the questions of complicity *Hobby Lobby* raises would not disappear if only we could conclusively establish that the Hobby Lobby owners got the facts wrong. For other employers challenging the contraceptive mandate object to all contraception.<sup>135</sup> As such, their claims require that we address the broader question of when, and why, we should defer to a complicity claim of one of these employers.

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<sup>130</sup> *See id.*

<sup>131</sup> Am. Coll. Obstetricians & Gynecologists, *Committee Op. No. 385: The Limits of Conscientious Refusal in Reproductive Medicine* 4 (2007), available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co385.pdf?dmc=1&ts=20120728T1211090439>.

<sup>132</sup> This is the basis of our constitutional commitment to a “marketplace of ideas.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>133</sup> For more of these big questions, see Hayley Birch, Colin Stuart & Mun Keat Looi, *The 20 Big Questions in Science*, OBSERVER, Aug. 21, 2013, available at <http://www.theguardian.com/science/2013/sep/01/20-big-questions-in-science>.

<sup>134</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>135</sup> See, e.g., *Gilardi*, 2013 WL 781150; *Newland v. Sebelius*, No. 12-1380, (10<sup>th</sup> Cir., Oct. 3, 2013).

### 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 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.<sup>136</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>137</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 (e.g., the full panoply of contraceptive devices, or vaccinations, blood transfusions, etc.) worry that subsidization relates them to the medical treatment they deem wrong in a way that makes them morally responsible for that wrong.

It bears noting that this relational claim – i.e., that subsidization makes one complicit in a (supposed) wrong – contains both moral and metaphysical components. We can disaggregate these components in this way: Suppose that W is the wrong in question, A is the agent whose complicity is at issue, and S is the strength of the connection between A and W that would make A complicit in W. The claim that A is complicit in W rests on the prior claims that (1) connections between agents and wrongs that are at least S\* strong suffice to make an agent so connected complicit in W and (2) the agent here bears a connection to W that is at least S\* strong. The first of these claims is a moral claim: to be complicit is to be worthy of blame in light of one's relationship to a wrong. The domain consisting of the acts or relations that render one blameworthy is the domain of morality. Thus, the determination that S\* suffices for complicity is a moral determination. The second claim – the assertion about the strength of the connection at issue – is a metaphysical claim,<sup>138</sup> and metaphysical claims cannot be judged true or false empirically.<sup>139</sup>

The difference between those who oppose the contraceptive mandate on religious grounds and those who would deny the objectors an exemption can then be cashed out in terms of a difference regarding how large S\* must be for A to be complicit. More specifically, if strength of connection resides on a spectrum with S\* marking the threshold between non-complicity and complicity – i.e., only those connections of strength S\* or greater render one complicit – then we can say that Hobby Lobby (and the other objectors) would have S\* reside lower down on the spectrum than would Justice Ginsburg, Judge Rovner and those theorists who deny that the contraceptive mandate imposes a “substantial” burden on an employer.<sup>140</sup> In other

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<sup>136</sup> *Sebelius v. Hobby Lobby*, Brief for Respondents, No. 13-354 (2013), at 3.

<sup>137</sup> See also *Gilardi*, 2013 WL 781150, at \*4.

<sup>138</sup> See, e.g. Robert Northcott, *Defining Causal Strength*, in *Causality: Metaphysics and Methods* (Julian Reiss ed., 2003), available at [http://www.lse.ac.uk/CPNSS/pdf/DP\\_withCover\\_Causality/CTR14-03-C.pdf](http://www.lse.ac.uk/CPNSS/pdf/DP_withCover_Causality/CTR14-03-C.pdf).

<sup>139</sup> See, e.g., IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSIC Bk I at 7 (transl. Jonathan Bennett, 1783) at [www.earlymoderntexts.com](http://www.earlymoderntexts.com) (“basic principles [of metaphysics] can never be taken from experience, nor can its basic concepts; for it is not to be physical but metaphysical knowledge, so it must be beyond experience.”).

<sup>140</sup> See, e.g., Corbin, *supra* note 47.

words, Hobby Lobby allows that S\* might arise through connections to the wrong that are weaker than those that the exemption opponents require.<sup>141</sup> What should we make of their disagreement?

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 it comes to assessing the claim's empirical elements. 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>142</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>143</sup> Others maintain that the extent of implication determines the substantiality of the burden, and so questions of the extent of the connection fall squarely within a court's purview.<sup>144</sup> Which of these positions do we have reason to 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>145</sup> there are causal "facts" – claims of causal connection that, for purposes of practical reasoning, we take to be no less true than empirical facts. Among these facts are what David Hume calls "constant conjunctions" – pairs of events where the first always

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<sup>141</sup> I have been construing the relevant relationships to a wrong as differing in terms of degree – contending in particular that a relationship must connect an agent sufficiently *strongly* to a wrong to make the agent complicit in that wrong. It may be that the consideration in question is better cashed out as a difference in kind, however. As such, we would note that there are different kinds of ways in which one can be related to a wrong – e.g., by participating in it, by helping it along, by knowing about it and failing to prevent it, etc. – and then see that not all of these relationships connect one to the wrong in the way they would need to for one to be complicit in that wrong. I adopt the construction that has the relevant relations vary in strength, rather than degree, because I think the former better tracks the way the law thinks about causation. For an extended argument to that effect, see MICHAEL MOORE, CAUSATION AND RESPONSIBILITY 122-23 (2009). *See generally* CHIARA LEPORA AND ROBERT E. GOODIN, ON COMPLICITY & COMPROMISE 59-70 (2013) (providing a detailed account for grading complicity that turns in significant part on the strength of the putative accomplice's causal connection to another's wrong). One can find further support for the idea that relationships grounding complicity can vary in kind, and not just degree, in the work of those theorists who maintain that one need not be causally connected to a wrong to bear responsibility for that wrong. *See, e.g.*, Karl Jaspers, *The Question of German Guilt*, E.B. Ashton, transl. 99 (New York: Fordham University Press, 2001) (describing metaphysical guilt, or the guilt one experiences not because one could have prevented some wrong but instead precisely because one could not have done so); LARRY MAY, SHARING RESPONSIBILITY 152-53 (1996) (referring to the moral taint one comes to incur not because one culpably caused a wrong but simply because one is a member of a group that did so, and one identifies with the other members); CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE (2000) (describing non-causal guilt).

<sup>142</sup> 573 U.S. at \_\_\_\_, \*36.

<sup>143</sup> *See, e.g.*, Notre Dame, 743 F.3d at \_\_\_\_, \*37 (Flaum, J., dissenting) ("by 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... runs afoul of RFRA.") (emphasis added); Mark Rienzi, *Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases*, 99 VA. L. REV. ONLINE 10 (2013) (arguing that the fact that religious believer's effect on contraceptive use is attenuated – because employees decide whether they will take drug in question – should be irrelevant for RFRA analysis. All that is required is that belief be sincerely held.).

<sup>144</sup> *See supra* Part II.A.

<sup>145</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 concluding that A causes B. *See generally* David Hume, *An Enquiry concerning Human Understanding* (Tom L. Beauchamp ed., 1999).

precedes the second (assuming there is no intervening event between the two) (e.g., you flip the switch and the light turns on).<sup>146</sup> 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, however. 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 taken to 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 narrow conception of complicity – say, one that requires that the perpetrator function as a sufficient cause of the crime in order for him to be found guilty.<sup>147</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 upon 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, regulatory violations (everything from traffic laws to environmental and financial regulations, etc.). 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>148</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, we would have 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>149</sup>

But what of the paradigmatic cases of conscientious objection, where 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 connects the subsidizer sufficiently 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 law should decide the issue here 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

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<sup>146</sup> *Id.* at 7.2.29. For the view that at least some causal claims are necessarily true, rather than simply inferred by induction, see, for example, TED HONDERICH, *MIND AND BRAIN: A THEORY OF DETERMINISM*, VOL. 1 (1990).

<sup>147</sup> Such a view would, I presume, rule out accomplice liability altogether; the only “accomplices” on this view would be co-perpetrators.

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, e.g., AYN RAND, *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* (1964).)

<sup>148</sup> *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

<sup>149</sup> *Cf. id.* [*Reynolds*] at 167 (contending that “[g]overnment could exist only in name” if religious adherents were permitted to escape foundational legal tenets).

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, values of individual freedom that function 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 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 offer a critique of that conception in Part IV.

### III. Complicity in Law and Ethics

In this Part, I seek to argue that the conception of complicity in standard legal and moral accounts is far narrower than the conception that the mandate opponents wield. Had the Court applied the law's conception of complicity in *Hobby Lobby*, then, it would have rejected the owners' claim. The argument turns on a comparison between paying taxes to fund measures some of which the taxpayer opposes and paying an insurance company to provide healthcare coverage some of which the subsidizer opposes. I seek to establish here that these two practices are morally on a 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 IV, I provide reason for thinking that courts should treat both tax resistance and insurance challenges more deferentially than they 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.

#### A. Subsidization and Tax Resistance

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 seen clearly in the case of pacifistic objections to the military: The law tends to accord an exemption to the pacifist where he would be made to participate in the war effort,<sup>150</sup> but it denies an exemption to the pacifist who would withhold the portion of his taxes that would fund military expenditures.<sup>151</sup> By the lights of the law, participating in a war is

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<sup>150</sup> The U.S. 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 will have to pursue alternative service (e.g., working with the very young or elderly). See generally *Fast Facts: Conscientious Objection and Alternative Service*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/FSconsobj.htm> (last visited Aug. 31, 2014). It is worth noting that military service, while perhaps the most familiar locus for successful conscientious objection, is not the only area where the law grants an exemption. For example, religious objectors may be excused from jury service (where they take seriously the Bible's prohibition on judging another), see, e.g., *In re Jenison*, 267 Minn. 136 (1963) (reversing petitioner's contempt conviction for refusing to serve on jury under *Sherbert* test). Further, laws permitting controversial medical procedures exempt physicians who object to these procedures on moral or religious grounds, see, e.g., 18 V.S.A. § 5285(a).

<sup>151</sup> See, e.g., *Autenrieth v. Cullen*, 418 F.2d 586, 588 (1969), cert. den. 397 U.S. 1036 (“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

recognizably unconscionable for the pacifistic conscript; funding a war is not.<sup>152</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>153</sup> And similar reasons undergird the rule that students may be compelled to pay fees that support university services they oppose, like abortion provision or counseling – again, because the objecting students are taken to be too remotely connected to those services.<sup>154</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 and its employees' use of one of the four contested contraceptive methods is not stronger in a meaningful sense than that between a taxpayer's contribution to, say, Medicaid, and a Medicaid subscriber's use of one of these methods.<sup>155</sup> The components of the healthcare package were decided upon by the government, just as the expenditures that tax dollars fund are decided upon by the government. Further, it is notable that courts have rejected religious objections to the PPACA's *individual* mandate because they find the objector's connection to the healthcare others in the insurance pool receive too attenuated to warrant an exemption.<sup>156</sup> To be sure, Hobby Lobby pays for a greater proportion of its employees' healthcare than any taxpayer pays for a Medicaid subscriber's healthcare (or that of others in the same insurance pool). But brute dollar amounts cannot be said to make a relevant difference<sup>157</sup> – after all, we do not think wealthy individuals who pay more taxes are for that reason more implicated in government

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claim a constitutional right not to pay a part of the tax.”); *Lull v. Commissioner*, 602 F.2d 1166 (4th Cir., 1979), *cert. denied*, 444 U.S. 1014 (1980); *Graves v. Commissioner*, 579 F.2d 392, 393-94 (6th Cir., 1978), *cert. denied*, 440 U.S. 946 (1979). *Cf.* *United States v. Lee*, 455 U.S. 252, 260 (1982) (rejecting 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”); Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 354 (2011) (noting that, “when [taxpayers’] protests are aimed at general taxation [i.e., all taxes, and not just those funding a particular initiative some taxpayers oppose], their First Amendment interests are significantly attenuated, and the government’s interest in promoting its policies will ordinarily be sufficient to overcome them.”).

<sup>152</sup> But see Henry David Thoreau, *Civil Disobedience*, in *CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS THROUGH THE CIVIL WAR*, 932, 935, ( Scott J. Hammond ed., 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>153</sup> See, e.g., Zach Carter, *Catholic Bishops' Contraception Coverage Argument Ridiculed By Pacifist Activists*, HUFF. POST,(Feb. 13, 2012, 6:08 PM EST), [http://www.huffingtonpost.com/2012/02/13/contraception-coverage-catholic-bishops-birth-control-pacifists\\_n\\_1274392.html](http://www.huffingtonpost.com/2012/02/13/contraception-coverage-catholic-bishops-birth-control-pacifists_n_1274392.html).

<sup>154</sup> See, e.g., *Erzinger v. Regents of Univ. of California*, 137 Cal. App. 3d 389, 394-95, 187 Cal. Rptr. 164, 167-68 (Ct. App. 1982).

<sup>155</sup> *Cf.* Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL’Y & L. 303, 329-30 (2014) (“Doctrine dictates that contributions to insurance fall into a zone of limited responsibility and, therefore, do not significantly burden religious freedom.”)

<sup>156</sup> See, e.g., *Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) *aff’d sub nom.* *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) *abrogated by* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (U.S. 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 D.C. Court of Appeals. *Seven-Sky v. Holder*, 661 F.3d 1 & n. 4 (D.C. Cir. 2011). See generally Sepper, *Contraception*, *supra* note 43 at 330 (“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>157</sup> *But cf.* *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (“An inconsequential or *de minimis* burden on religious practice does not rise to th[e] level [of a substantial burden].....”).

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 chain between the taxpayer's payment of taxes and pursuit of the activity she 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% in some years<sup>158</sup> -- and she deducts that amount from her total tax burden, sometimes offering to contribute that money to a charitable organization unrelated to war.<sup>159</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, where 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, say) that is stronger than the taxpayer's interest in the spiritual standing of her fellow citizens, for this is not the kind of interest of which courts will take cognizance.<sup>160</sup>

In sum, given the considerations the law takes to be relevant – considerations that largely turn on the proximity between the objector and the conduct to which he objects – there is no distinction between employer-subsidized healthcare and taxpayer-subsidized healthcare. 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 objection.

Moreover, ethics and the law align here. Thus, proximity considerations inform moral judgments as to whether someone is in fact complicit in conduct he opposes. For example, in evaluating claims of complicity to participating in the sale of the morning after pill, Kent Greenawalt considers the relative strength of objections raised by the pharmacist, a drugstore clerk, and a cashier, and he concludes that “[t]here comes a point at which an individual's involvement is so remote, a right to refuse seems excessive.”<sup>161</sup> And other moral philosophers

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<sup>158</sup> <http://www.globalissues.org/article/75/world-military-spending>.

<sup>159</sup> See, e.g., Robert T. Pennock, *Death and Taxes: On the Justice of Conscientious War Tax Resistance*, 1 J. ACCOUNTING, ETHICS & PUB. POL'Y 1 (1998).

<sup>160</sup> See, e.g., *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 552 (7th Cir. 2014) (“while 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 Ass'n*, 485 U.S. 439, 450–51 (1988); *Bowen v. Roy*, 476 U.S. 693, 699–700, (1986).

<sup>161</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.”).

agree, both with respect to the pharmacist case,<sup>162</sup> and with respect to claims of taxpayer complicity too.<sup>163</sup>

Nor is it surprising that the prevailing conception of complicity among moral philosophers is a narrow one. Moral philosophical accounts of responsibility are predominantly individualistic.<sup>164</sup> Individuals bear responsibility on these accounts only for what they do, and only to the extent that what they do causes harm.<sup>165</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 where these would license blame or sanction, threaten to limit too much action and so 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 where other agents intervene in, and thereby rupture, the causal chain, by interposing their own intentions or decisions.<sup>166</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 cause 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 the employee's *decision* to buy the morning-after pill (or other forms of contraception) eclipses her employer's responsibility for her use of contraceptives.<sup>167</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 understanding of complicity.<sup>168</sup> Morally, the fact that it is employees who decide to use

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<sup>162</sup> See, e.g., Eve LaFollette & Hugh LaFollette, *Private Conscience, Public Acts*, 33 J. MED. ETHICS 249 (2007). Cf. Robert F. Card, *Conscientious Objection and Emergency Contraception*, 7 Amer. J. Bioethics 8, 11 (2007) (arguing that if the chances that a harm will result from some act one undertakes are very low, then one is not morally responsible for that harm; as such, conscientious refusal ought not to be permitted in these speculative cases: "it is simply unreasonable to withhold medication because of the *mere possibility* that this may contribute to an immoral result.").

<sup>163</sup> See Dan. W. Brock, *Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated To Do What, and Why?*, 29 THEOR. MED. & BIOETHICS 187, 197 (1998) ("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>164</sup> See, e.g., 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."); CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 3* (2000) (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." Kutz goes on to argue, convincingly, that this principle is gravely in need of supplementation); H.D. Lewis, *The Non-Moral Notion of Collective Responsibility*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI* 119, 121 (Peter A. French ed., 1972) ("no one can be responsible, in the properly ethical sense, for the conduct of another."). Cf. 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 generally Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183, 189 (2006) (arguing that 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.") (footnotes omitted).

<sup>165</sup> See, e.g., KUTZ, *supra* note 74.

<sup>166</sup> See Hart and Honore, *supra* note 71.

<sup>167</sup> See, e.g., Corbin, *supra* note 47; *Hobby Lobby*, *supra* note \_\_\_\_ at (Ginsburg, J., dissenting), slip op. \* 23.

<sup>168</sup> See, e.g., Jay Michaelson, *Why Hobby Lobby Will Be Bad for Conservatives*,

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>169</sup> would seem to apply with equal force to pleas for a religiously-based exemption from mandatory insurance subsidization.

Before moving on, it is worth underscoring that the claim in this Section 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 accept. We have seen that, under the legal understanding of complicity, Hobby Lobby's connection to the asserted wrong would be too tenuous to render Hobby Lobby complicit in "embryo destruction" simply on the basis of its providing health insurance that included the so-called abortifacients. Nor would the result have been different had Hobby Lobby instead opposed all methods of contraception, or different medical interventions altogether (e.g., blood transfusions, treatments derived from embryonic stem cells, etc.) The relevant considerations contemplate not how much healthcare the objecting subsidizer funds but how strong the connection is between the objecting subsidizer and the conduct she opposes. Again, given the law's fixation on proximity, the connection created by the employer mandate would not be deemed strong enough.

Further, the claim that I have sought to 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.

#### **IV. 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 between 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. Part IV.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 IV.B, I seek to ascertain what is really at stake for the conscientious objector – why is participation in an act she opposes so difficult for her? 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 no matter whether or not we participate. Yet concerns for our own implication can be – reasonably – insensitive to degree: Even where 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 seek to argue in Part IV.C. In Part

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<http://www.thedailybeast.com/articles/2014/06/30/the-hobby-lobby-decision-is-bad-for-conservatives-and-religious-liberty.html> (“[the owners’] causal nexus is so thin as to be basically nonexistent. I can be responsible for anything.”).

<sup>169</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 they oppose. But that rationale is not decisive. Courts routinely invoke concerns about attenuation in justifying their decisions to deny tax relief on conscientious grounds. *See infra* notes 148-49 and accompanying text.

IV.D, I apply the insights of the previous sections to the employer mandate case, and I argue that, given the amount of deference complicity claims deserve, considerations of proximity under-determine the proper response to requests for an exemption. We shall see that we are without the resources to arrive at anything like fine and firm distinctions between 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 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>170</sup> The rationale for denying citizens a right to opt out of paying that portion of their taxes that would go to fund 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 other opposes on moral or religious grounds.<sup>171</sup> As the Court has noted, “the proper and efficient exercise of [the tax function] may sometimes entail the possibility of encroachment upon individual freedom.”<sup>172</sup> The Court also expresses separation of powers concerns, rejecting the objecting taxpayers’ claims not on the merits but on standing grounds.<sup>173</sup> And scholars adduce another, principled rationale for denying taxpayers a right to withhold taxes that would fund initiatives they find objectionable: These expenditures, like all government expenditures, result from established democratic means.<sup>174</sup> Today’s tax levies do not involve “taxation without representation;”<sup>175</sup> instead, it is “our own duly elected governmental officials who imposed these taxes.”<sup>176</sup> Put differently, what it is 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

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<sup>170</sup> The exception here arises in cases where the contested government expenditure would constitute an Establishment Clause violation. *See* *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>171</sup> *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 260 (1982) (contending that the social security “tax system could not function if denominations were allowed to challenge the tax system because tax payments [are] spent in a manner that violates their religious belief.”); *Autenrieth v. Cullen*, 418 F.2d 586, 588 (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>172</sup> *Bates v. City of Little Rock*, 361 U.S. 516, 524-25 (1960). *See generally* Marjorie Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 972 (1999).

<sup>173</sup> *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (“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.’”); *U. S. v. Richardson*, 418 U.S. 166, 177 (1974);

*Ex parte Levitt*, 302 U.S. 633, 636 (1937); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923).

<sup>174</sup> *Cf. Emp’t Div. v. Smith*, 494 U.S. 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>175</sup> *Pennock*, *supra* note 158 at 10 (raising this argument as a hypothetical objection to his own position, which argues that conscientious objection to war taxes should be permissible). *See also* Michele Moody Adams, *Democratic Conflict and the Political Morality of Compromise* (2014) (manuscript on file with author).

<sup>176</sup> *Pennock*, *supra* note 158 at 10.

not prevailed.<sup>177</sup>

Yet while all of these considerations provide a partial explanation for the law's refusal to countenance conscientious taxpayer resistance, they do not – either singly or in combination – fully account for that refusal. The law already permits taxpayers to contest government expenditures that violate constitutional constraints on government activity, most notably in the Establishment Clause context.<sup>178</sup> If the tax system can withstand these challenges then it can presumably withstand at least some others too.<sup>179</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 so not “generalized grievances”<sup>180</sup> or injuries that are “indefinite [and held] in common with people generally.”<sup>181</sup> Finally, the fact that the contested government expenditures were decided upon through legitimate democratic means fails as a justification for similar reasons, because exemptions are granted for other government measures whose democratic pedigree is 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 – viz., 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 government initiatives they oppose has been deemed too remote or attenuated to warrant an exemption.<sup>182</sup> And remoteness here is not simply a factor bearing on the justiciability of the complaint.<sup>183</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 important to the adherent's religious scheme.<sup>184</sup>

Moreover, considerations of proximity underpin not only the differential treatment accorded to pacifistic military conscripts and pacifistic tax resisters but other complicity determinations as well. 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 pharmacists who refuse to fill prescriptions for the morning-after pill but not pharmacy clerks who refuse to ring up the bill for customers waiting to pick up their morning-after pill subscriptions.<sup>185</sup> Yet it is not clear that

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<sup>177</sup> Cf. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992) (“while 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.”).

<sup>178</sup> *Flast v. Cohen*, 398 U.S. at 102-03, articulates the relevant test.

<sup>179</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 Headstart. See Pennock *supra* note 158 at 20 & n. 32.

<sup>180</sup> *Flast*, 392 U.S. at 114.

<sup>181</sup> *Frothingham v. Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078 (1923).

<sup>182</sup> See *supra* note 150 and accompanying text.

<sup>183</sup> See *Frothingham*, 262 U.S. at 487 (“any 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>184</sup> See, e.g., *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (denying claim on the ground that burden on objector was “de minimis”).

<sup>185</sup> See, e.g., Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1465-66 (2012) (describing an Iowa Attorney General Opinion that 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.”) (quoting 41 Iowa Op. Att'y Gen. 474, 478 (1976)).

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>186</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>187</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 will find another provider who will) and especially given that doctors bear a fiduciary duty to act in the best interests of their patients,<sup>188</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>189</sup>

The answer, it turns out, depends on the special value 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 she 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 occur through *her* hands, even if she knows that the wrong will occur whether or not it is she who brings it about.

The interest at stake for an individual in keeping her 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>190</sup> The

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<sup>186</sup> See, e.g., Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1503; Thaddeus Mason Pope, *Legal Briefing: Conscience Clauses and Conscientious Refusal*, 21(2) JOURNAL OF CLINICAL ETHICS 163-180, (2010), <http://clinicaethics.com/> (collecting laws from across those states that permit doctors to refuse to perform abortions on moral or religious grounds); *State Policies In Brief*, GUTTMACHER INSTITUTE, (Aug. 1, 2014), [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (same).

<sup>187</sup> I assume that the situation is not one in which the woman faces an immanent threat to her health or life, such that she would not have time to find another doctor if the first one refuses. Cf. Committee on Ethics, *The Limits of Conscientious Refusal in Reproductive Medicine*, 385 ACOG COMMITTEE OPINION, (November 2007), <https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine> (“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.”).

<sup>188</sup> In general, a fiduciary must “promote the interests of [the] beneficiar[y] rather than [the fiduciary’s] own interests.” Sharon Hoffman & Jessica Wilen Berg, *The Suitability of IRB Liability*, 67 U. PITT. L. REV. 365, 393 (2005). The doctor is a fiduciary to her patients. See, e.g., Thomas L. Hafemeister & 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 & n. 171-72 (collecting cases where courts have noted that the physician bears a fiduciary relationship to her patients).

<sup>189</sup> See, e.g., American College of Physicians, *ACP Ethics Manual Sixth Edition*, 156 ANN INTERN MED. 73 (2012) (“The physician’s primary commitment must always be to the patient’s welfare and best interests...”).

<sup>190</sup> The idea here is given a powerful evocation in a hypothetical that might seem far afield of the example here – viz, where a “lorry” driver hits and kills a child through no fault of the driver’s. BERNARD WILLIAMS, *MORAL LUCK* 27-30 (1981). Given that the driver is not responsible for the accident, one might have expected his reaction to the child’s death to be no different from that of an onlooker who witnesses the scene. Not so, however, 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

notion of moral integrity and its role in constituting one's identity might also capture what is at stake.<sup>191</sup> Thus Dan Brock writes,

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>192</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>193</sup> At bottom, all of these understandings are about meaning – how we construct meaning for ourselves, about ourselves, in light of what we do in the world.<sup>194</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 how complicit a person feels, and even has reason to feel. Or so I shall now argue, by examining cases where responsibility for some conduct is taken to be greater

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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 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 also Susan Wolf, *The Moral of Moral Luck*, 31 PHIL. EXCHANGE 1, 9 (2001) (explaining why it would be untoward for the lorry driver to feel no differently from the spectator in this way: "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>191</sup> See generally Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1529 (2012) ("a number of scholars have argued [that] an individual's moral integrity offers the most compelling moral basis for respecting her conscience."); Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1494 (2013) ("as 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, LIFE OF THE MIND 181 (1978) (explaining Socrates's civil disobedience in this way: "it was better ... 'to be in disagreement with multitudes than I, *being one*, should be out of harmony with me and contradict myself") (quoting Socrates in GORGIAS 482) (italics in original); HARPER LEE, TO KILL A MOCKINGBIRD 120 (1995) (as Atticus Finch says, "before I can live with other folks I've got to *live with myself*."). Cf. JOHN RAWLS, POLITICAL LIBERALISM 312-13 (2005) (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 NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 19 (2008) (referring to conscience as the "faculty in human beings with which they search for life's ultimate meaning.").

<sup>192</sup> Dan. W. Brock, *Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated To Do What, and Why?*, 29 THEOR. MED. & BIOETHICS 187 (1998). Cf. J. David Bleich, *The Physician as Conscientious Objector*, 30 FORDHAM URB. L. J. 245, 245 (2002) ("to 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>193</sup> See JEAN PAUL SARTRE, EXISTENTIALISM IS A HUMANISM (Carol Macomber transl., 2007).

<sup>194</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. 573 U.S. at \_\_\_\_, \*1-2 (Kennedy, J., 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.").

than others on proximity grounds, but where the asserted disparity falters on closer analysis.

### C. Proximity Versus First-Person Perceptions of Complicity

Law and morality agree that it is worse for a doctor to kill a patient than 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>195</sup> It is for this reason that PAS is legal in some states whereas euthanasia is illegal everywhere.<sup>196</sup> On what do these judgments rest?

According to some commentators, proximity makes the relevant difference.<sup>197</sup> Yet much of the greater concern 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>198</sup> If he self-administers the lethal drugs, we have greater reason to think that he was committed to the end of ending his life.<sup>199</sup> The question for our purposes, 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>200</sup> Suppose one could be confident that the patient in the euthanasia scenario is as committed to ending his life as is 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>201</sup> But that way of describing the two practices is tendentious. The

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<sup>195</sup> Cf. *Washington v. Glucksberg*, 521 U.S. 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>196</sup> See, e.g., Oregon's Death with Dignity Act, O.R.S. 127.800-127.809 (2013).

<sup>197</sup> See, e.g., Timothy E. Quill et al., *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*, HASTINGS CENTER REPORT 52 (March/April 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>198</sup> See, e.g., Willem A. Landman, *A Proposal for Legalizing Assisted Suicide*, in PHYSICIAN-ASSISTED SUICIDE: WHAT ARE THE ISSUES? 211 (Loretta M. Kopelman & Kenneth A. DeVille eds., 2001). Cf. *Washington v. Glucksberg*, 521 U.S. 702, 730-31 (1999) (describing ways in which our certitude about the patient's commitment to ending her life might be undermined, because she has not been adequately treated for pain, or because she is in a vulnerable position).

<sup>199</sup> But cf. Susan M. Wolf, *Gender, Feminism and Death: Physician-Assisted Suicide and Euthanasia*, in FEMINISM AND BIOETHICS: BEYOND REPRODUCTION 282-317 (Susan M. Wolf ed., 1996) (arguing that, given social and cultural norms celebrating, or mandating, self-sacrifice on the part of women, we have reason to doubt the conviction of the gravely ill woman who professes to want to end her life, whether through euthanasia or PAS).

<sup>200</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 EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES 225 (John Keown ed., 1995) (finding no difference between euthanasia and PAS on practical grounds) and John Deigh, *Physician Assisted Suicide and Voluntary Euthanasia: Some Relevant Differences*, 88 J. CRIM. L. & CRIMINOLOGY 1155, 1164-65 (1998) (concluding that "utilitarian methods advise treating the two practices separately").

<sup>201</sup> Cf. *Vacco v. Quill*, 521 U.S. 793, 802 (1997) ("in some cases, painkilling drugs may hasten a patient's death, but

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, however. To see this, consider a stylized version of the way 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 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, the patient fills the prescription, and then typically ingests the pills at home.)<sup>202</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>203</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 (i.e., drug-induced) abortions where, in the case of a medical abortion, the patient ingested the pills in the doctor's office with the doctor at her side.)

Yet if there is no reason to distinguish morally between the euthanasia and PAS cases in the stylized versions just describe, why think that a distinction exists between euthanasia and PAS as the two typically occur – i.e., with the former taking place in the doctor's office and the latter occurring some time after the doctor prescribes the lethal medications, and in the doctor's absence? The decision to end one's 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 where 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 further remove does not entail a diminution in the physician's moral responsibility – and for the foregoing reasons, I believe it does not – then it must be that what matters in our thinking about any moral differences between PAS and euthanasia is not the extent of the doctor's intervention in the patient's death so much as other concerns for which causal proximity might function as a proxy (for example, concerns about whether the patient persists in his intent to die, or whether he has been pressured).<sup>204</sup>

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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.'" (quoting congressional testimony of Dr. Leon Kass). For an extended discussion of the difficulty in distinguishing, on moral grounds, an intention to omit treatment from acts of hastening death, see for example, Sepper, *Taking, supra* note 44 at 1536-38.

<sup>202</sup> See, e.g., Daniel Engber, *How Does Assisted Suicide Work?*, SLATE Oct. 6, 2005, 6:20, [http://www.slate.com/articles/news\\_and\\_politics/explainer/2005/10/how\\_does\\_assisted\\_suicide\\_work.html](http://www.slate.com/articles/news_and_politics/explainer/2005/10/how_does_assisted_suicide_work.html).

<sup>203</sup> Cf. JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGALISATION 33 (2002) ("[w]hat, 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?").

<sup>204</sup> But cf. Dan Brock, *Voluntary Active Euthanasia*, 22 HASTINGS CENTER REP. 10, 10 (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.").

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 conceived of as a team. The doctor is not some mere commercial purveyor while the patient plays the role of consumer. Instead, doctor and patient decide together, in consultation, what the best course of action for the patient will be.<sup>205</sup> As such, the doctor is aligned with the patient's treatment choices in a way that a pharmacist is not.<sup>206</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>207</sup> PAS is like the gun merchant who is asked to sell a gun to someone who intends to kill herself with it and who – let us imagine, for purposes 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 her 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 her 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, as we have seen, a matter for both normative and metaphysical judgment.<sup>208</sup> But the physician has a reason over and above the extent of her causal role to feel implicated – 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 herself to be 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 the patient up. Assume all three of them 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 his attention on providing the patient with the drugs that will arm her with the means to take her life. And the pharmacist may feel more implicated in light of his professional training too: “Today I used my expertise to give someone drugs that she will use to kill herself,” is a plausible thought for him to have. For these reasons, it would be understandable if he were to see himself as more bound up in the patient's suicide than either the clerk or cashier would be. But the fact that his own role would seem to him more salient than the clerk's or cashier's role would seem to either of them does not mean that the pharmacist is in fact more complicit than these other two drugstore employees. From a disinterested standpoint, the pharmacist is just doing his job, just as the clerk and cashier are

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<sup>205</sup> See, e.g., Timothy E. Quill & Howard Brody, *Physician Recommendations and Patient Autonomy: Finding a Balance Between Physician Power and Patient Choice*, 125 ANN. INTERN MED. 763 (1996) (advocating “enhanced autonomy,” a decision-making model in which physicians share their expertise and patients and physicians deliberate together about the best course of treatment).

<sup>206</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 physician assisted suicide. See, respectively, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>207</sup> See, e.g., Engber, *supra* note 201 (describing process for having physicians authorize PAS).

<sup>208</sup> See *supra* notes 137-140 and accompanying text; cf. Moore, *supra* note 71 (contending that the law's conception of causation is stylized and based largely on the ends the law seeks to serve, rather than any genuine metaphysical truths).

doing their jobs.<sup>209</sup> The fact that the pharmacist cannot ignore his contribution as readily as the clerk or cashier can does not make him more responsible; it just makes him feel more responsible.

Drilling down on these scenarios and the roles 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>210</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. But 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 where 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, and our 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>211</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 speaking, good if we feel implicated in acts to which our connection is remote. A person who places a premium on her moral purity will feel responsible for her contributions to wrongs or harms that most of us ignore. As such, she will constrain her conduct at the expense of freedoms the rest of us claim as our right, restricting her purchases, carbon footprint, food choices, practices at work, relationships with others, etc., in the service of dissociating herself from conduct she deems wrongful. The effect is, in general, to lessen harm in the world. To be sure, the tendency she exhibits is not always morally desirable – extreme versions of this posture can reflect narcissism or neuroticism or moral 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-personal perspective. Thus a person's sense of her own complicity may be greater or less than we would judge it to be.<sup>212</sup> More specifically, her own sense may depend on factors that

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<sup>209</sup> There is a well-known case in continental 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, e.g., Luis E. Chiesa, *The Evil Waiter Case* (manuscript on file with author). The waiter is not responsible for the presence of the poison and, according to continental 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 because she did what her job commanded. Many of us would find the continental stance overly permissive – surely the waiter bears *some* responsibility for the death, and the law ought to track that responsibility. But the pharmacist case is distinguishable at any rate, because the patient knows (and indeed intends) that the drugs he is giving her will cause her demise.

<sup>210</sup> See *supra* notes 189-93 and accompanying text.

<sup>211</sup> Cf. Schwartzman, *Conscience*, *supra* note 34 at 376-77.

<sup>212</sup> In the text that follows, I contemplate the way we should treat first-personal assessments of responsibility only where the person judges herself more harshly than an impartial observer would. The case where someone judges herself less harshly can give rise to two points of divergence in practice: First, this more lax judge may decide that

are – again, from an impartial perspective – morally irrelevant but – from the perspective of the person whose contributions they are – not so readily dismissed. If her contribution claims more of her attention, or strikes more acutely at her sense of self, she will feel herself to be more responsible than we, impartial observers, would judge her to be. Sometimes, we should respond to this divergence by seeking to bring her around to our way of seeing the matter. But sometimes we should not: As I have said, her heightened moral sensitivity is sometimes salutary, and oftentimes laudable for its own sake. And, in any event, because her assessment is connected to her self-conception, we should be wary of trying to dissuade her, on the worry that doing so will interfere with her sense of self. For example, the pharmacist’s sense of what it is to be a pharmacist, or his conception of the kind of pharmacist he wants to be, might include a prohibition on using his skills to dispense medications whose aim is to end human life. Even if we would not judge him responsible in any measure were he to fill a prescription for PAS, he might think his own contribution abominable. And his thought here isn’t wrong, even if 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 where those boundaries are stricter than what 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 her own complicity: Being made to contribute to conduct one opposes is painful, because it entails a dislocation from the self. So too being told that one has overly grand ideas about her professional identity, or her 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-personal assessments of complicity with solicitude – at least presumptively. That is, *all else equal*, we should deem a complicity claim compelling just 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 just on whether the objector believes 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 between

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she is not sufficiently implicated in the conduct she deems wrong to seek an exemption. As such, questions of whether to grant her conscientious objector status do not arise. Second, this more lax judge may recognize that she bears no more responsibility than we would ascribe to her but she might nonetheless think that even the (relatively little) responsibility she bears is more than her personal morality can handle. Thus she might seek an exemption even though she would think the magnitude of her responsibility less than we would think it. I don’t see that there is any difference between this case and the one where the person judges herself to be more responsible because she thinks she is meaningfully connected to some harm, even though we think her contribution negligible. At the end of the day, both find their connection to the wrong intolerable – one because she sees her causal role as greater than we see it, and the other because she sees the magnitude of her causal role accurately but she posits the threshold for complicity lower on the spectrum than we do. In both cases, then, deference is in order for the reasons I adduce in the text above.

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 herself as complicit from the conduct to which she objects in every instance when 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 may 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.

## V. 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>213</sup> – there, the “thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.”<sup>214</sup> Justice Ginsburg cites 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>215</sup> As I argue in Part V.A, however, these cases contemplate third-party interests only tangentially, if at all. Nor, as I argue in Part V.B, can one find support for that proposition elsewhere in the doctrine around religion. The doctrine's failure adequately to 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>216</sup> to refrain from contributing will then 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>217</sup> complicity claims warrant great deference on the merits, as I argued above, then it becomes all the more important to examine their extrinsic effects of an

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<sup>213</sup> 573 U.S. at \_\_\_\_ (Ginsburg, J., dissenting) (slip. op., \*2) (“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 disfavors 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, whereas they deserve to be at its core. *Supra* note 40 at 467. 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 consider third parties right from the outset. Instead, the inquiry 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>214</sup> *Id.*

<sup>215</sup> *Id.* at \*7.

<sup>216</sup> See NeJaime and Siegel, *supra* note 27 at \*36 (“Complicity-based conscience claims assert a relationship to third parties, whose conduct the claimants view as sinful. In this sense, the third-party effects of accommodation are bound up in the form of the claim itself.”).

<sup>217</sup> See *supra* text accompanying notes 90-95 (stressing that complicity claims must be sincere and deeply felt).

accommodation and, in particular, to consider whether the accommodation will impose undue costs on third parties. Part V.C paves the way for doing so, by describing a balancing test through which courts can weigh the amount of deference a complicity claim warrants against the magnitude of the burdens, if any, an accommodation would impose upon third parties. Part V.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>218</sup> I think the doctrinal bases for their understanding 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 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 how much they figure in.<sup>219</sup> Thus, as I argue here, it is possible that the 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 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>220</sup> In short, as this Part aims to show, there is no plausible reading of the doctrine according to which it adequately protects third parties.<sup>221</sup>

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

Justice Ginsburg is right to note that the Court should have considered the costs of an accommodation on third parties, but she is wrong to think that the Court betrayed the RFRA doctrine in neglecting to do so. While she cites four cases for her contention that the doctrine

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<sup>218</sup> For a strong statement of this position, see Schwartzman and Tebbe, *Arguing Off the Wall*, supra note 42 (“in 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 Tassell, supra note 42 at 349 (“by 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 Kara Loewentheil, *When Free Exercise Is A Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 438 (2014) (“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 healthcare refusal laws, which allow medical providers to refuse to participate or assist in procedures they oppose on religious grounds, also fail to address third-party harm, as NeJaime and Siegel, supra note 27 at \*13-14, point out

<sup>219</sup> Cf. Loewentheil, supra note 40 at 474 (“we 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>220</sup> See infra Part V.B.

<sup>221</sup> Cf. Loewentheil, supra note 40 at 438 (“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).

requires courts to factor in third-party costs, I now argue that these cases do not provide the requisite support.

In rejecting religious adherents' requests for accommodation, 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>222</sup> the first case Justice Ginsburg cites, the Court faced a religious challenge to a law requiring students to attend school through the age of 16. The challengers were Amish parents with high-school aged children who maintained that their faith prohibited their sending their children to secular school past the eighth grade, for fear of the corrupting influence of a secular education and in order to protect the youths' time to assume the farming obligations they incurred in later adolescence.<sup>223</sup> In upholding the Amish parents' religious objection, the Court was careful to note that religion would not always function as a trump. It thus referenced cases where 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>224</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.

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 Justice Ginsburg cites, *Cutter v. Wilkinson*.<sup>225</sup> There, facing inmates' requests for religious accommodation under RLUIPA,<sup>226</sup> the Court recognized the Bureau of Prison's "need to maintain order and safety"<sup>227</sup> (although, again, the Court concluded that safety could be maintained consistent with the accommodations). But again, order and safety are concerns of the *government*, not concerns of third parties – i.e., 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>228</sup> Describing the relevant interests as the government's makes clear that the Court is concerned not with protecting the targets of racism but instead with providing for a safe and orderly prison.<sup>229</sup>

The third case that Justice Ginsburg cites involved an Establishment Clause claim. *Estate of Thornton v. Caldor* addressed a Connecticut statute that required businesses to grant Sabbath

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<sup>222</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>223</sup> 406 U.S. at 209-213.

<sup>224</sup> 406 U.S. at 230 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

<sup>225</sup> 544 U.S. 709 (2005).

<sup>226</sup> RLUIPA, or the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 804, [42 U.S.C. § 2000cc—1\(a\)\(1\)–\(2\)](#), effectively extends RFRA to those "residing in or confined to" a government-run institution.

<sup>227</sup> 544 U.S. at 722.

<sup>228</sup> *Id.* at 723 (emphasis added).

<sup>229</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, upon 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, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (defending the IRS'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") (italics added).

leave to any employee who requested it on religious grounds, no matter the day of the Sabbath observed.<sup>230</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 but instead to establish that an exemption would violate the Establishment Clause by privileging one set of interests (e.g., those of religious employees who observe a Saturday Sabbath) over another (e.g., those of employees who do not 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<sup>231</sup> – its "unyielding weighting in favor of Sabbath observers"<sup>232</sup> -- elevated the interests of religious employees over non-religious ones, and it then said: "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."<sup>233</sup> We can see, then, that third-party interests do not function here as they would need to in order to conclude that *they* are what matters in the Court's determination. The Court references the effect on third parties as premises in an argument whose conclusion is that the law violates 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 day off. There would have been no need for the Court to justify its refusal to grant the exemption on a concern about the evils of government support of religion in its own right.<sup>234</sup>

Justice Ginsburg's final case was a California Supreme Court decision involving a non-profit seeking an exemption from a contraceptive mandate contained in California's healthcare law.<sup>235</sup> This case has the most direct, seemingly supportive statement of Justice 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>236</sup> and it cited *Yoder* and *United States v. Lee* as evidence. But *Yoder*, we have seen, did not involve third-party rights.<sup>237</sup> And *Lee*, a case

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<sup>230</sup> 472 U. S. 703 (1985).

<sup>231</sup> 472 U.S. at 709.

<sup>232</sup> 472 U.S. at 709.

<sup>233</sup> 472 U.S. at 710 (citations omitted).

<sup>234</sup> Similar considerations allow us to dispose of the suggestion that *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977), turned on third-party interests, as some commentators have suggested, *see, e.g.*, Fretwell Wilson, *supra* note 16 at 1465 n. 183. In *TWA*, the Court addressed a religious adherent's claim that TWA violated his rights to religious accommodation under Title VII by failing to give him a day off on the day of his Sabbath. 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." Title VII could not support this kind of discrimination and so the Court denied the accommodation. 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 demonstrates that the religious adherent is indeed seeking a privilege that the company does not bestow upon others. Acceding to the religious adherent's request, then, would have the Court favor religion impermissibly and it is this favoring, and not the effect on third parties, that sustains the Court's decision.

<sup>235</sup> *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 ( Cal. 2004).

<sup>236</sup> 85 P.3d at 93.

<sup>237</sup> *See supra* notes 223-25 and accompanying text. The California Supreme Court also appears to read *Yoder* incorrectly. It states that, in *Yoder*, in evaluating whether to grant an "exemption from a general law requiring their older children to attend public school, the [Supreme C]ourt *emphasized that its conclusion depended on the assumption that no Amish child wished to attend.*" 85 P.3d at 93 (emphasis added). But the United States Supreme

rejecting an Amish employer's plea for an exemption from social security taxes, does not turn on the interests of third parties either.<sup>238</sup> Instead, *Lee* turns on the adverse consequences to the system *as a whole* if courts begin granting exemptions to tax burdens on an ad hoc basis.<sup>239</sup> And the more general review of the caselaw undertaken here demonstrates that it is entirely reasonable that the California Supreme Court would not have been aware of Supreme Court cases where the Court squarely recognized third-party costs and yet granted the exemption anyway.<sup>240</sup> These cases do not exist because *the Court never squarely factors third-party costs into its determinations about whether to grant a religious exemption in the first place.*<sup>241</sup>

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Court said exactly the opposite: "our holding today *in no degree* depends on the assertion of the religious interest of the child as contrasted with that of the parents." 406 U.S. at 230 (emphasis added). And Chief Justice Burger, writing for the Court, went on to say that "it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent." 406 U.S. 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 reading of *Yoder* and the text of *Yoder* itself hardly inspires confidence in the former's ability to proceed as a faithful reader of constitutional doctrine.

<sup>238</sup> *United States v. Lee*, 455 U.S. 252 (1982). The Court does 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." 455 U.S. at 261. But this is dictum. The Court's reason for refusing the exemption is, as I go on to 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 social security benefits. *See also id.* at 263 (Stevens, J., 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>239</sup> "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." 455 U.S. at 260 (citations omitted).

This argument appears to be in tension with a provision that already existed at the time of *Lee*, which the petitioner in *Lee* cited – viz., an exemption for self-employed individuals whose religion opposed social security benefits and whose sect provided care for their own elderly, *see* 26 U.S.C. 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, Justice Ginsburg, in her *Hobby Lobby* dissent, seizes on language from *Lee* that suggests that the infirmity there lay in the fact that "[g]ranting an exemption from social security taxes to an employer [would] operate[] to impose the employer's religious faith on the employees." 455 U.S. at 261; *see* 573 U.S. \_\_\_\_, at \*32 (Ginsburg, J., dissenting). *See also* Bob Egelko, Supreme Court unmoved by religious employer's coverage objections — for the Amish, SFGate Blog, Aug. 4, 2014, 4:44 PM, <http://blog.sfgate.com/stew/2014/08/04/supreme-court-unmoved-by-religious-employers-coverage-objections-for-the-amish/> (quoting UVA law 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 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. At any rate, the quote from *Lee* merely states the fact that granting *Lee* 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 *Lee'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>240</sup> *See* 85 P.3d at 93.

<sup>241</sup> The California Supreme Court cites two other cases in passing for the proposition that courts will not grant religious exemptions where the exemptions would adversely affect third parties. In the first case, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 304 (1985), the Supreme Court rejected a plea for exemption from the Fair Labor Standards minimum wage and reporting requirements. The Court did so because it found that the FLSA imposed no burden whatsoever on the objector. 471 U.S. at 303-306. As such, the Court did not need to undertake an inquiry into the interests that the legal requirement was intended to serve, and it did not undertake that

## 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 look, at least superficially, to address third-party interests and argue that none is ultimately up to the task.

### 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>242</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 where the two diverge, the government need not press both its own interest as well as the third party's.<sup>243</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 repeal of Don't Ask Don't Tell, he would find it too offensive to his values to serve alongside individuals who are openly gay. The legal requirement he challenges – i.e., 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, may not include the interests of third parties. Accordingly, a test that does not look to third-party costs over and above considering the government's interest is likely to leave third parties out in the cold.

### 2. The Establishment Clause

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inquiry. In the second case, also involving an as-applied challenge to the FLSA, the Fourth Circuit Court of Appeals also found that the burden on religion, if any, was "limited." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (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. 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. 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* – viz., 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." 899 F.2d at 1398. 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.

<sup>242</sup> RFRA, *supra* note 17.

<sup>243</sup> Justice Kennedy, in his *Hobby Lobby* concurrence, seems to recognize that third-party interests count when, but only when, they are the interests 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." 573 U.S. \_\_\_\_ at \*4 (Kennedy, J., concurring). Not all third-party interests warrant protection, then; only those "the law deems compelling."

Some commentators look to the Establishment Clause to protect third parties from a religious exemption that would otherwise burden them. Thus, for example, Frederick Gedicks and 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 accommodated practice.”<sup>244</sup> Even assuming that their contention is correct,<sup>245</sup> it does not fully capture the concern here – that the doctrine does

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<sup>244</sup> Supra note 42 at 349. See also Gedicks and Koppelman, *supra* note 40 at 54 (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*, 573 U.S. at \_\_\_\_ (Ginsburg, J., dissenting) (slip op., \*28 n. 25).

<sup>245</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 “‘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,’” 472 U.S. at 710 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (CA2 1953)) and they read in this statement the Court’s recognition that the government may not protect religion when doing so would impinge upon others’ rights. See, e.g., Schwartzman and Tebbe, *Arguing off the Wall*, *supra* note 44; Gedicks and van Tassell, *supra* note 42 at 358. Cf. *Hobby Lobby*, 573 U.S. at \_\_\_\_, \*8 (Ginsburg, J., dissenting) (“with 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.”) (quoting Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

In response, it is worth looking at the Learned Hand quote in the context in which *Thornton* invokes it. The full quote 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.”

*Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (CA2 1953). As such, the statute goes beyond having an incidental or remote effect of advancing religion. See, e.g., *Roemer v. Maryland Bd. of Public Works*, [426 U.S. 736](#), 747 (1976); *Board of Education v. Allen*, [392 U.S. 236](#) (1968). The statute has a primary effect that impermissibly advances a particular religious practice.

472 U.S. at 710. The meaning of the Learned Hand quote 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.” 205 F.2d at 61 (italics added; internal citation omitted). The point there was that one cannot claim First Amendment protections against non-state 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 get a court to compel others to alter their conduct because it placed demands upon the plaintiff with which he could not comply, as a result of his religious convictions. The plaintiff’s request, Judge 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.* Judge Hand’s position then contemplates not cases where someone seeks a religious accommodation and third parties are affected *incidentally*; instead it applies to cases where controlling third parties’ conduct 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 quote appears. There, Justice Burger cites 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 non-sectarian purposes, *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 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

not adequately consider burdens third parties may 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 worry is not restricted, then, to the women who will be denied contraception as a result of the exemption. Second, there may be cases where 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 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 – viz., exposure to diverse peers – is different from the interests Wisconsin proffered in support of the law requiring schooling through age 16 – viz., ensuring a reasonably educated electorate;<sup>246</sup> and the teens’ interest is not rooted in a complaint about the state’s undue support of religion. The teens have no principled opposition to governmental measures that advance religion. If the government were to decide that the Amish should be favored in some way consistent with their religious beliefs, that decision, in and of itself, would not cause these teens any concern. Put differently, what the teens care about in this *Yoder* variant is that they are not getting to continue their secular schooling, not that the state is supporting their parents’ practice of the Amish 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 would have nothing to do with an Establishment Clause violation.<sup>247</sup> In this way, the Establishment Clause can protect the rights of third parties in only a subset of the cases where 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

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students attending both public and private (including parochial) schools. Again, the books themselves were not religious in nature and the financial relief they provided benefitted the students’ parents, not the schools themselves.

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 Justice 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 U.S. at 710. On the logic of that case, 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>246</sup> Wisconsin had argued that education was necessary for participation in democratic life, and for cultivating self-sufficiency. 406 U.S. at 222.

<sup>247</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 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 they would incur from their parents’ religious exemption. *Cf.* Loewentheil, *supra* note 40 at 475 (“the 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.”).

government's interest in prison security. The Court 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's having weighed 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" upon 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>248</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>249</sup> One might then conclude that the settled view of the Court is that third-party costs matter.<sup>250</sup>

Yet even if the Court has adopted the view that it must "take adequate account" of third-party costs, this would hardly establish that the Court is committed to protecting third parties. For 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 in order 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, where 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 answer to these questions because the Court found that "nonbeneficiaries" would not be harmed by the requested accommodation.<sup>251</sup> And 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>252</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 effect of an accommodation only on the government's interests, and not those of third parties. Third parties should not have to rely on so precarious a statement of what the law requires.

#### 4. Third-Party Intervention

Suppose now that one agrees that neither RFRA nor the Establishment Clause straightforwardly contemplate third-party interests. One might nonetheless think that the concern about overlooking third parties is mitigated by the possibility that they will seek to intervene in

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<sup>248</sup> 544 U.S. at 720.

<sup>249</sup> 573 U.S. \_\_\_\_, \*42 n. 37.

<sup>250</sup> I am grateful to Andrew Koppelman and Micah Schwartzman, each of whom urged this language upon me.

<sup>251</sup> 544 U.S. 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 \_\_\_\_\_. 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>252</sup> 573 U.S. \_\_\_\_, \*42 n. 37.

the case, and get their interests before the court in that way.<sup>253</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 in order to be heard, and the court has discretion to grant or deny the intervention.<sup>254</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. Where 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 anymore than anyone else is. So the mechanism of third-party intervention cannot supply the protection that the doctrine, as I have argued, fails to afford.

## 5. Summary

I argued above that a court should proceed with great deference when facing a claim for religious exemption – it 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 do not unduly or disproportionately interfere with the interests of discrete others. I turn now to some concrete suggestions for operationalizing this careful balancing act.

### 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 upon third parties. In this Section, I seek to put these two pieces together, reviewing first the kinds of claims warranting deference on the merits, and then bringing to bear the extrinsic consideration of third-party costs.<sup>255</sup>

#### 1. Assessing the Strength of Complicity Claims

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<sup>253</sup> In *Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), the Seventh Circuit Court of Appeals granted leave to three Notre Dame students who claimed an interest in the contraceptive coverage they would receive were Notre Dame not to be granted an exemption.

<sup>254</sup> See Fed. R. Civ. Pro. 24(b). There are cases where third parties are accorded intervention as of right. See Fed. R. Civ. Pro. 24(a). But it isn't 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 743 F.3d 558 (“We need to say something about the three Notre Dame students whom *we have allowed* to intervene.”) (emphasis added).

<sup>255</sup> Micah Schwartzman also advocates a balancing approach in cases where, for example, taxpayers are made to support government activity 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. Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317 (2011).

As I argued above in the discussion about the three kinds of deference,<sup>256</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, and this is so even if an exemption would impose no third-party costs.

Matters are more complicated when it comes to complicity claims that turn on non-standard 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 some act A (e.g., use of contraception, receiving a blood transfusion, etc.) is wrong. With that said, courts are not without the resources to address hate-based claims, such as those declaring homosexuality immoral, as I argued above.<sup>257</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 far-fetched.<sup>258</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 non-neutral considerations with which to dispute the metaphysics underpinning the more expansive notions of complicity in conscientious objectors' claims.<sup>259</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 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 where 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 – viz., considerations tracking the interests of third parties.<sup>260</sup>

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<sup>256</sup> See *supra* Part II.D.

<sup>257</sup> See *supra* note 108 and accompanying text.

<sup>258</sup> See *supra* note 144 and accompanying text.

<sup>259</sup> Cf. Rawls, *supra* note 105 (describing an overlapping consensus).

<sup>260</sup> Eric Orts has argued that it is tendentious to speak of third parties' *interests* rather than their *rights* – e.g., rights to contraceptive coverage under the ACA. See Eric Orts, “Undertheorizing the Corporation Continued: Hobby Lobby and Employees' Rights,” *The Conglomerate* (July 31, 2014), *available at* <http://www.theconglomerate.org/2014/07/undertheorizing-the-corporation-continued-hobby-lobby-and-employees-rights.html>. 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 I describe to apply to all complicity claims, and some of these threaten to impose costs upon third parties even where 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 DHHS rules, rather than the statute itself, that mandated cost-

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 to be untenable and so exemptions denied where 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>261</sup> Several ancillary considerations warrant mention, however. First, the government should seek to minimize occasions for conflict between religious belief and third-party interests. (I note, for example, that a national healthcare plan (whatever its other demerits) would have obviated employers' conscientious objections to the ACA.)<sup>262</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 for-profit entities, and so provided universal access to contraception outside of the employer-subsidized insurance delivery system. Second, where third-party interests would be implicated were an exemption to be granted, courts and the government must work to ensure that these interests are raised and adequately defended.

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free access to contraception. And even if the government chose to grant women these rights, it did not need to impose the corresponding duty upon their employers.

<sup>261</sup> Kara Loewentheil, *supra* note 40 at 477, contends that equality-implicating third-party costs should defeat a bid for an exemption just so long as they are "substantial," which she understands to mean neither "de minimis" nor "exceedingly rare." She arrives at this contention because she thinks equality-implicating rights are just as important as rights of religious freedom, and the latter ground claims for accommodation just so long as the challenged legal requirement "substantially" burdens religious exercise. *See 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.") (footnote omitted); *id.* at 452-56.

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 supra* Part \_\_\_\_ (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). *Cf.* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 11 (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); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1517 (1990) (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."). 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 a par with equality-implicating interests (though I personally find the asserted equivalence compelling).

<sup>262</sup> I elaborate on this suggestion in a *Washington Post* op-ed. *See supra* note 44.

### 3. Getting 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. Where 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 (e.g., NARAL, in the case of the contraceptive mandate),<sup>263</sup> 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 exemption 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 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>264</sup>

#### 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 were it to have 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 non-profits. 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 that Hobby Lobby’s claim deserved deference (it turned on moral and relational premises that courts may not challenge),<sup>265</sup> and that granting the claim would not ultimately impose burdens on third parties,

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<sup>263</sup> 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 healthcare coverage they will enjoy. *Hobby Lobby* has precedential value for pending contraceptive challenges, and 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 Schwartzman and Tebbe compellingly argued with respect to Hobby Lobby, “employees [were] (understandably) reluctant to come forward against their employers, even though their constitutional claim [was] strong and even though they [would] have a lot to lose if the case goes the wrong way.” *Arguing off the Wall*, *supra* note 42. Their concerns would obtain in any employer mandate challenge.

<sup>264</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 offer as much to those plaintiffs who can show financial hardship. If conscience is worth protecting then we might not want ability to pay to stand as a barrier to those with legitimate claims.

<sup>265</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 supra* notes 119-23 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 has not done so, allowing instead that there is at least a theoretical possibility that the

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 ready to 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 it 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 (e.g., 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 anti-discrimination laws would typically fail as well. The third parties whose interests are implicated in these cases are not just the ones 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 so undermines the sense of security and respect that a decent state should confer on all its citizens.<sup>266</sup>

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.

## VI. 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>267</sup> Conscience is central to that endeavor, and the law should then protect each of us from having to act against conscience, at least where 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

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contraceptive methods in question work in just the way that Hobby Lobby fears. *See supra* notes 120-23. 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>266</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 gay or lesbian weddings. Thus Douglas Laycock would allow wedding vendors to deny service to gays and lesbians, just so long as the wedding vendors were made to publicize their policy in advance. Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 198-99 (Douglas Laycock et al. eds., 2008). Given the way in which the dignitary harm of a state-authorized denial of service can ramify to 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 where the gay couple is turned away (an implication 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, supra* note 115 at \*21.

<sup>267</sup> *See, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFF.* 204, 215-22 (1972); 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 (1982).

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 freedom, 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>268</sup> And other pieces of my writing evince a deep skepticism about corporate constitutional rights.<sup>269</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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<sup>268</sup> Amy J. Sepinwall, *Defense of Others and Defenseless "Others"*, 17 YALE J.L. & FEMINISM 327 (2005).

<sup>269</sup> See, e.g., Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575 (2012).