

# Conscience Wars in the Americas\*

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## Abstract

Across the globe, public and private actors are now invoking conscience as a ground for objecting to laws or judicial decisions that confer on citizens reproductive and LGBT rights. Conscience claims in culture-war conflicts over reproduction and sexuality differ from paradigmatic religious accommodation claims, where an individual from a minority faith seeks to engage in ritual observance or religiously-motivated dress that runs afoul of generally applicable laws. Accommodation of culture-war conscience claims may inflict significant harms on other citizens and impose older, traditional views on citizens whose rights the law only recently has come to protect.

Our intervention is practical and critical. We offer guidance on accommodation, showing how government might promote pluralism by accommodating objectors while protecting citizens who may be affected. We suggest that when government accommodates conscience in a framework that does not preserve the other citizens' rights, government may be employing accommodation to create a *de facto* public order favoring objectors' beliefs.

## Keywords

Conscience, Conscientious Objection, Religious Accommodation, Reproductive Rights, LGBT, SOGIE

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## Guerras de conciencia en las Américas

### Resumen

Alrededor del mundo, sujetos y entidades pertenecientes a los sectores públicos y privados están invocando la conciencia como base para objetar leyes o decisiones judiciales que confieren derechos reproductivos y LGBT a otras/os ciudadanas/os. Las objeciones de conciencia que se dan en el contexto de las “guerras culturales” respecto de derechos reproductivos y LGBT, difieren de las situaciones paradigmáticas en las que se conceden excepciones al cumplimiento de la ley donde alguien de una religión minoritaria busca observar un ritual religioso o vestirse conforme a su religión, en violación a leyes generalmente aplicables. En cambio, el otorgamiento de objeciones de conciencia que se da en el contexto de las “guerras culturales” puede causar daños significativos a terceros e imponer visiones tradicionales a ciudadanos/as, cuyos derechos han sido recientemente protegidos por la ley.

La contribución de este trabajo es práctica y crítica. Por un lado, ofrecemos una guía para mostrar cómo el gobierno puede promover el pluralismo a través de proveer excepciones a la ley para objetores y al mismo tiempo protege a ciudadanos/as que pueden verse afectados/as. Por otro lado, consideramos que cuando el gobierno protege la conciencia en un marco que no preserva los derechos de otros/as ciudadanos/as, podría estar utilizando la objeción de conciencia para crear un orden jurídico de facto en favor de las creencias de los objetores.

### Palabras clave:

Conciencia, Objeción de conciencia, excepciones a la ley por razones religiosas, derechos reproductivos, LGBT, SOGIE

Claims seeking the accommodation of religious conscience recur in constitutional orders around the world. In the paradigmatic scene of religious accommodation, an individual from a minority faith seeks to engage in ritual observance or religiously-motivated dress or grooming that runs afoul of generally applicable laws.<sup>1</sup> For instance, in the U.S., members of the Native American Church who engaged in the ritual use of peyote challenged the application of criminal drug laws to their religious practice.<sup>2</sup> Ordinarily, the democratic body that designed the generally applicable law simply had not anticipated or appreciated the law’s impact on the practices of religious minorities.

Liberals and progressives in constitutional democracies worldwide long have supported the claimants in these paradigm cases, and therefore supported accommodations that allow religious minorities to engage in religiously-motivated conduct. Providing minority religious claimants exemptions from laws of general application allows the majority to pursue legitimate

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1 See, e.g., *Multani v. Comm’n Scolaire Marguerite-Bourgeoys*, Sup. Ct. Canada [2006] 1 S.C.R. 256 (accommodating Sikh student who sought to wear traditional kirpan to school). Cf. *Director del Servicio de Salud Metropolitano Sur c/ Mirla Isasmendi Cartagena-Javier Fuentealba Reinoso*, Court of Appeals of San Miguel, May 22, 2004, case no. 123-2004 (ruling in favor of Jehovah’s Witness who refused blood transfusions based on religious beliefs).

2 *Employment Division v. Smith*, 494 U.S. 872 (1990).

secular ends and allows minorities free exercise of conscience. In this respect, religious accommodation promotes pluralism. The accommodation of conscience in these circumstances permits multiple and minority forms of belief in the community to flourish.

More recently, a new type of religious conscience claim is appearing across the globe—in conflicts over sexuality, gender, reproduction, and the family, or what are often described as the “culture wars.” In the United States, many European countries, and parts of Latin America, conscience has emerged as an important framework for objecting to recently enacted laws or case law that confer on citizens reproductive rights and, increasingly, LGBT (or SOGIE) rights.<sup>3</sup> Religious conscience claims in this setting can be asserted sincerely and with a theological basis *and* yet also serve as a way to limit the newly recognized rights of other citizens. In contrast to the paradigmatic scene of religious accommodation, conscience claims in the culture wars are asserted in defense of norms that the majority recently has shared and may in fact continue to share.

In contrast to the paradigmatic case, where an individual from a minority faith seeks to engage in ritual observance or religiously-motivated dress or grooming that runs afoul of generally applicable laws, accommodation of conscience claims in culture-war conflicts may inflict significant harms on other citizens. Accommodation may impose older, traditional views on citizens whose rights the law only recently has come to protect. For example, after the Colombian Constitutional Court recognized a limited right to abortion, conscience objections by both public and private actors threatened women’s exercise of this newly recognized right.<sup>4</sup> In Uruguay, after the legislature expanded access to abortion, widespread objection dramatically limited women’s access to the procedure.<sup>5</sup>

Our intervention in this essay is both practical and critical. We consider culture-war conscience claims across the Americas involving reproductive rights and LGBT equality and show how these more recent conscience claims resemble, and differ from, paradigmatic conscience claims involving ritual observance and dress. Surveying law across borders, we then offer guidance on accommodating these conscience claims. We suggest a variety of approaches that would promote, rather than undermine, pluralism. It is often possible for the government to accommodate conscientious objectors’ claims while still protecting the rights of citizens who may be affected.

Appreciating the multiple pathways for accommodation helps clarify the logic of the government’s choices. In this essay, we show that when the government accommodates conscience

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3 In this essay, we use the term LGBT (lesbian, gay, bisexual, and transgender), which remains the dominant terminology in the U.S., but our usage is meant to be consistent with SOGIE (sexual orientation, gender identity and expression), even though we recognize that LGBT refers specifically to sexual and gender minorities while SOGIE refers universally to the identity categories. While our analysis focuses on discrimination against same-sex couples in the context of marriage and commerce, conscience objections of the kind we explore also arise with respect to transgender, non-binary, and gender-nonconforming individuals. See, e.g., *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, 884 F.3d 560 (6th Cir. 2018), cert. granted, 203 L.Ed.2d 754 (U.S. 2019) (employer sought exemption, based on the Religious Freedom Restoration Act, from any obligation under Title VII of the Civil Rights Act of 1964 not to discriminate based on gender identity); Miss. H.B. No. 1523, § 2 (2016) (authorizing discriminatory conduct based on “religious beliefs or moral convictions ... that ... [m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth”).

4 See *infra* notes 82-83.

5 See *infra* notes 102-105.

in a framework that does not preserve the legally enshrined rights of other citizens, it may be employing the law of accommodation to create a *de facto* public order favoring the beliefs of the objectors.

## INTRODUCTION

We begin with struggles over abortion in the U.S. to show how claims of conscience can emerge in response to newly recognized rights. In the wake of *Roe v. Wade*, the Supreme Court decision that protected abortion as a constitutional right, Congress enacted the Church Amendment, which protects physicians and nurses who refuse “to perform or assist in the performance of any sterilization procedure or abortion ... [based on] religious beliefs or moral convictions.”<sup>6</sup> In more recent years, law enforcing conscience protections has extended beyond the doctors and nurses directly involved in the procedure, to others who might consider themselves to be complicit in sanctioning abortion. Beginning in the 1990s, federal and state lawmakers began to accommodate a wider range of healthcare professionals and employees, as well as institutions, with objections to referring patients or providing them information about abortion. Even this indirect involvement, these objectors assert, would make them complicit in conduct they deem sinful.

Conscience objections also have spread to contraception. Healthcare providers, pharmacists, and organizations object to being made complicit in what they believe to be the sinful conduct of others. In 2014, the U.S. Supreme Court considered the claims of for-profit employers challenging a federal health insurance requirement that they cover contraception in health insurance benefits offered to employees. In *Burwell v. Hobby Lobby Stores*, the Court credited the claim that providing such insurance benefits would make the employers complicit in their employees’ use of drugs that the employers believe cause abortion and accordingly ordered that the government accommodate the employers.<sup>7</sup> After *Hobby Lobby*, the Court considered the claims of religiously affiliated nonprofit organizations with objections to the government’s framework for accommodating employers religiously opposed to providing employees with contraceptive insurance. These organizations rejected the government’s accommodation mechanism because they claimed that applying for an accommodation (for instance, by completing a form to notify the government) would make them complicit in arrangements that provide their employees with alternative coverage for contraception.<sup>8</sup>

Many of the same actors pressing conscience objections to abortion and contraception also assert conscience objections to LGBT equality. They object to recognizing same-sex marriage and to including sexual orientation and gender identity in antidiscrimination law. In the wake of the U.S. Supreme Court’s 2015 decision recognizing same-sex couples’ right to marry,<sup>9</sup> Kim Davis, a government clerk in Kentucky, refused to issue marriage licenses to same-sex couples

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6 42 U.S.C. § 300a-7(b)(1) (2012).

7 134 S. Ct. 2751 (2014). On efforts to stigmatize contraception as “the new abortion,” see Douglas NeJaime and Reva B. Siegel, “Conscience Wars: Conscience Claims in Religion and Politics,” *Yale Law Journal*, n° 124(7), (2015): 2582, <https://www.yalelawjournal.org/feature/complicity-based-conscience-claims>

8 See *Zubik v. Burwell*, 136 S.Ct. 1557 (2016).

9 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

or to allow others in her office to do so, asserting that her religious beliefs prevented her from carrying out her official duties.<sup>10</sup> Businesses, too, seek exemptions from antidiscrimination laws prohibiting sexual orientation discrimination in commerce, claiming that serving same-sex couples would make them complicit in relationships they deem sinful. In its 2018 decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>11</sup> the U.S. Supreme Court considered the claim of bakery owner Jack Phillips, who refused to provide wedding cakes for same-sex couples.

Claims of this kind are not limited to the U.S. In Europe, some healthcare workers object not only to performing abortion but also to engaging in actions they believe render them complicit in abortion. For example, healthcare professionals and employees have objected to laws that require them to offer post-procedure care to patients,<sup>12</sup> to refer patients for abortion,<sup>13</sup> or to sell emergency contraception.<sup>14</sup>

Conscience objections to LGBT equality also have begun to arise in some European jurisdictions, and feature objections to both direct performance and complicity.<sup>15</sup> Consider two cases from the U.K. In *Eweida and Others v. United Kingdom*, a government official objected to conducting same-sex civil partnerships.<sup>16</sup> In *Bull v. Hall*, innkeepers sought an exemption from an antidiscrimination law that included sexual orientation after refusing to rent a double-bed room to a same-sex couple based on their objection “to facilitat[ing] what they regard as sin.”<sup>17</sup>

Conscience has become a dominant form of objection to reproductive rights in Latin America as well. For example, in the wake of Mexico City’s legalization of abortion, a leading conservative politician opposed to abortion drew attention to conscientious objection, urging “medical personnel who oppose ... abortion” to invoke “their right not to perform abortions.”<sup>18</sup> As in the U.S. and Europe, conscience protections in the context of reproductive healthcare have not been limited to those directly involved in the procedure but also have reached those with complicity-based objections. In 2017, Chile’s Congress legalized abortion and also authorized conscience exemptions for physicians who objected to performing the procedure.<sup>19</sup> But soon the Constitutional Tribunal, in response to a challenge posed by conservative politicians

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10 See Appellant Kim Davis’s Emergency Motion for Immediate Consideration and Motion for Injunction Pending Appeal at 7–8, *Miller v. Davis*, No. 15–5961 (6th Cir. Sept. 7, 2015).

11 138 S. Ct. 1719, 1732 (2018) (holding, without resolving the question of whether exemptions from antidiscrimination law are constitutionally required, that the state civil rights commission violated Phillips’s Free Exercise rights by failing to consider his claim in a neutral and respectful way).

12 See *Greater Glasgow & Clyde Health Board v. Doogan*, [2014] UKSC 68, [33], [37].

13 See European Parliamentary Association, “Women’s Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection,” Doc. No. 12347 (July 20, 2010): 11 (discussing the need for requirements that objecting providers timely refer patients).

14 See *Sentencia Tribunal Constitucional (S.T.C.)*, July 7, 2015 (S.T.C., No. 52) (Spain).

15 See: *Eweida and Others v. United Kingdom*, Nos. 48420/10, 59842/10, 51671/10, 46516/10, para. 26, p. 8, para. 34, p. 11 (Eur. Ct. H. R. 2013); *Lee v. McArthur & Others*, [2016] NICA 39.

16 Nos. 48420/10, 59842/10, 51671/10, 46516/10, ¶ 26, 34 (Eur. Ct. H.R. 2013).

17 *Bull v. Hall*, [2013] UKSC 73, [34].

18 See “Promueve PAN-DF objeción de conciencia entre médicos de Xoco”, *El Universal*, May 9, 2007, <https://archivo.eluniversal.com.mx/notas/423910.html>

19 Congreso Nacional de Chile. *Ley No. 21.030 (August 2017)*.

who had long opposed abortion, ruled that the Congress's limits on conscientious objection were unconstitutional.<sup>20</sup> The tribunal expanded conscience exemptions from medical professionals performing the procedure to non-professionals who "also object, in conscience, to the procedures in which they must intervene," and to institutions.<sup>21</sup>

In Latin America, there is also evidence of the extension of conscience objections to the LGBT domain. After Argentina became the first country in the region to authorize same-sex marriage,<sup>22</sup> public officials in several provinces refused to perform such marriages based on conscience.<sup>23</sup> At this point, it is unclear the extent to which complicity-based objections will also emerge in the LGBT context. Here, too, objections are not limited to direct participation but also include complicity-based claims. In 2015, a printing company in Chile was found to have violated consumer protection laws<sup>24</sup> after it refused to print invitations for same-sex couples' civil union celebrations,<sup>25</sup> objecting "to participat[ing] in an act that they consider immoral."<sup>26</sup>

In what follows, we first offer a political diagnosis of the transnational spread of conscience claims in the contexts of reproductive rights and LGBT rights. We then offer a principled legal response and, in doing so, identify various ways in which persons committed to sexual and reproductive freedom can respectfully accommodate conscience in a fashion consistent with the rights of others in a pluralistic society.

## 1. THE POLITICS OF CONSCIENCE

For several years now, we have been writing about conscience claims, in the U.S. as well as in Europe, arising in the domains of reproductive healthcare and LGBT equality. We have offered an account of the spread of these claims in so-called "culture war" conflicts and have supplied a principled response rooted in existing law.<sup>27</sup> In this section, we explain why conscience claims have proliferated in conflicts over reproductive and sexual rights.

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20 See Constitutional Tribunal, Decision no. 3729 (3751)–17–CPT, Aug 28, 2017, Paragraph 135,

21 Constitutional Tribunal, Decision no. 3729, Paragraph 135

22 Congreso de la Nación Argentina. *Ley 26,618* (2010).

23 "Matrimonio gay: impulsan proyectos a favor de la objeción de conciencia en algunas provincias", *La Nación*, August 3, 2010, <https://www.lanacion.com.ar/sociedad/matrimonio-gay-impulsan-proyectos-a-favor-de-la-objecion-de-conciencia-en-algunas-provincias-nid1290869>

24 Pamela Gutiérrez, "Invitaciones A Un AUC Homosexual Enfrentan A Imprenta Y Al Sernac", *El Mercurio*, April 21, 2017, page C8.

25 "Pareja Homosexual Se Querelló Contra Imprenta Por Negarse A Hacer Invitaciones Para Su Unión Civil", *Cooperativa*, September 25, 2015, <https://www.cooperativa.cl/noticias/sociedad/minorias-sexuales/pareja-homosexual-se-querello-contrainprenta-por-negarse-a-hacer/2015-09-25/151405.html>

26 "Otra Del Ministro Varela: Mineduc Contrata Como Jefe Jurídico A Fundador De ONG Anti LGTB", *El Mostrador*, April 30, 2018, <https://www.elmostrador.cl/noticias/pais/2018/04/30/otra-del-ministro-varela-mineduc-contrata-como-jefe-juridico-a-fundador-de-ong-anti-lgtb/>

27 See NeJaime & Siegel, "Conscience Wars", 2516; Reva Siegel & Douglas NeJaime. "Conscience and the Culture Wars," *American Prospect*, n° 26(2) (2015): 70-73, <http://prospect.org/article/conscience-and-culturewars>; Reva Siegel & Douglas NeJaime. "Conscience Wars in Transnational Perspective: Religious Liberty,



We first distinguish between paradigm cases of conscientious objection and religious liberty and more recent conscience claims in the context of reproductive healthcare and LGBT equality. We then provide an example of the expansion of conscience objections to reproductive healthcare in the U.S., and show how LGBT equality is subject to a similar expansion. Once we have offered an explanation for these developments, we consider the possibility of similar dynamics outside the U.S.

### 1.1. Distinguishing Conscience Claims

Faith-based claims merit special protections in many liberal constitutional orders. In the paradigm case, religious conscience claims involve ritual observance—such as a Muslim woman wearing a hijab or a Seventh-Day Adventist observing a Saturday Sabbath. For example, in the 2015 U.S. case of *Holt v. Hobbs*, a Muslim prisoner sought, and the Court granted, an exemption from a prison rule that prevented him from wearing a beard in accordance with the dictates of his faith.<sup>28</sup> In cases of this kind, members of minority faith traditions seek accommodations for unconventional beliefs or practices generally not considered by lawmakers when they adopted the challenged laws. As Justice Ruth Bader Ginsburg observed in her concurring opinion in *Holt*, “accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.”<sup>29</sup>

Conscience claims have come to play a new and special role in culture-war debates over the decriminalization and constitutionalization of contraception, abortion, and same-sex relationships. The claimants invoke old, familiar terms of conscientious objection and religious liberty, but the claims and their consequences are new and distinctive. In the paradigmatic case of accommodation, a minority religious claimant seeking to engage in ritual observance or dress requests an exemption from a generally applicable law in a case where the law has never reflected the claimant’s faith tradition. In the culture-war setting in which conscience claims are being asserted, the claimant objects to a recent shift in generally applicable law—away from a law that embodied the norms of the claimant’s religion and toward a law that instead vindicates the rights of a particular group, long condemned by traditional religious and moral views. A second critical difference concerns the impact of accommodating the claim. In the paradigmatic case, the impact of accommodation is minimal and widely shared. In the culture-war setting we examine, accommodation involves significant impacts on those whose rights have been recently protected and may even obstruct the exercise of a newly recognized right.

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Third-Party Harm, and Pluralism”, in *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, edited by Susana Mancini & Michel Rosenfeld (New York: Cambridge University Press, 2018), 187; Douglas NeJaime & Reva Siegel. “Religious Exemptions and Antidiscrimination Law in *Masterpiece Cakeshop*”, *Yale Law Journal Forum*, n.º 128, (2018), 201, [https://www.yalelawjournal.org/pdf/NeJaimeSiegel\\_t7ffwsct.pdf](https://www.yalelawjournal.org/pdf/NeJaimeSiegel_t7ffwsct.pdf); Douglas NeJaime & Reva B. Siegel. “Religious Accommodation, and Its Limits, in a Pluralist Society”, in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, edited by William N. Eskridge Jr. & Robin fretwell Wilson (New York: Cambridge University Press, 2018), 69.

28 *Holt v. Hobbs*, 135 S. Ct. 853, 856–57 (2015).

29 *Ibid.* at 867 (Ginsburg, J., concurring).

We assume that conscientious objections to abortion, contraception, and same-sex marriage are asserted in religious good faith. Even the more far-reaching complicity-based claims can find a theological basis in Catholic doctrine on “cooperation” and “scandal.”<sup>30</sup> (We observe that adherents may not always consistently apply these doctrines, which have internal limit principles that allow the faithful to engage in many forms of practical action, including law enforcement, consistent with religious obligations).<sup>31</sup> But even as conscientious objectors act in religious sincerity, they may be politically engaged in trying to undo the law, either the court decision or democratic action, that recently protected the rights at issue. According to Sherif Girgis, a proponent of broad exemptions in the contexts of reproductive healthcare and LGBT equality in the U.S., “political potency and moral stigma are *part of the point*.”<sup>32</sup> Exemptions can simultaneously protect conscience and religious liberty and restrict and stigmatize contraception, abortion, and same-sex marriage.

## 1.2. The Spread of Conscience in the U.S.

The relationship between religion and politics is visible in the U.S. case, where legislators have authorized expanding conscience objections to reproductive healthcare over time. The Supreme Court struck down laws criminalizing abortion in its 1973 *Roe v. Wade* decision. In *Roe*’s wake, federal and state legislators authorized doctors and nurses with religious or moral objections to refuse to perform abortions or sterilizations.<sup>33</sup> But federal and state legislators have dramatically expanded coverage of healthcare refusal laws in recent decades. Opponents of abortion have worked to overturn *Roe* and to deter the exercise of abortion rights as long as *Roe* remains law. They have enacted far-reaching conscience protections that protect objectors, and, at the same time, function to limit and stigmatize abortion. More recent conscience laws use concepts of complicity to authorize conscience objections, not only by the doctors and nurses directly involved in the objected-to procedure, but also by others indirectly and remotely involved.

The American state of Mississippi illustrates how a government hostile to abortion can employ laws authorizing refusals by healthcare workers directly and remotely involved to restrict women’s access to abortion—accomplishing indirectly what the government may not do directly under the U.S. Constitution. A 2004 law authorizes conscience objections not only by doctors and nurses refusing to perform abortions but also by a wide array of other workers who

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30 See Bernard Häring, *The Law of Christ: Moral Theology for Priests and Laity*, Vol. 2, “Special Moral Theology” (Cork: Mercier Press, 1963): 494–517. See also Anthony Fisher, *Catholic Bioethics for a New Millennium* (New York: Cambridge University Press, 2011) 69–98; Germain Grisez, *The Way of the Lord Jesus*, Vol. 3, “Difficult Moral Questions” (St. Paul’s/Alba House 1997): 871–97.

31 For Catholic scholars analyzing limits on principles of cooperation and scandal, see Michael R. Panicola & Ronald P. Hamel, “Conscience, Cooperation, and Full Disclosure: Can Catholic Health Care Providers Disclose “Prohibited Options” to Patients Following Genetic Testing?”, *Health Progress*, n° 87(1)(2006), 52; Cathleen Kaveny, *Law’s Virtues: Fostering Autonomy and Solidarity in American Society* (Georgetown University Press, 2012) 245–51.

32 Sherif Girgis, “NervousVictors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel”, *Yale Law Journal Forum*, n° 125, (2016), 399, 407 <http://www.yalelawjournal.org/forum/nervous-victors-illiberal-measures>.

33 Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b)-(c), 87 Stat. 91, 95; MINN. STAT. ANN. § 145.414 (1974); OHIO REV. CODE ANN. § 4731.91 (1974).



have only attenuated connections to an objected-to procedure. Specifically, the law allows healthcare providers to assert conscience objections to providing “any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or healthcare institutions.”<sup>34</sup> The law expansively defines “health care provider” to include “any individual who may be asked to participate in any way in a health care service, including, but not limited to: a physician, physician’s assistant, nurse, nurses’ aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty, student or employee, counselor, social worker or any professional, paraprofessional, or any other person who furnishes, or assists in the furnishing of, a health care procedure.”<sup>35</sup>

The law imposes no explicit obligation on the objecting provider to ensure that patients turned away receive care. In fact, the law explicitly allows the provider to refuse, on conscience grounds, to furnish counseling or referrals that would lead patients to obtain the services they seek.<sup>36</sup> A healthcare refusal law like Mississippi’s functions to restrict access to abortion and contraception. The law, perhaps unsurprisingly, is based on a model statute produced by the anti-abortion group Americans United for Life (AUL).<sup>37</sup>

When a state permits or requires these expansive exemptions, it severely restricts the sphere for the exercise of a judicially recognized right. The Republican-controlled Mississippi legislature is both enacting restrictions on abortion and enacting expansive healthcare refusal laws. Those pushing expansive conscience laws routinely act in coordination with a political party that shares their aims. Republican lawmakers in Mississippi have not only passed the nation’s most expansive healthcare refusal law; they have passed so many restrictions on abortion that the state only has one remaining clinic and is now seeking to challenge *Roe* with a ban on abortion at six weeks of pregnancy.<sup>38</sup> AUL recently celebrated Mississippi as “an excellent example of the effectiveness of an incremental, legal strategy to combat the evil of abortion,” explaining that “[o]ver the past 15 years, Mississippi has adopted 15 pro-life laws. As a result, abortions in the state have decreased by nearly 60% and six out of seven abortion clinics have closed—leaving only one embattled abortion clinic in the entire state.”<sup>39</sup>

Conscience has also become a primary mode of objection to LGBT rights in the U.S. In fact, for opponents of same-sex marriage and LGBT nondiscrimination, conscience exemptions in the reproductive rights context have offered a model for restricting LGBT rights.<sup>40</sup> As

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34 Miss. Code Ann. § 41-107-3(a) (West 2016).

35 *Ibid.*, § 41-107-3(b).

36 *Ibid.*, § 41-107-3(a).

37 See Americans United for Life, *Mississippi 2014 Report Card* (Americans United for Life, w.d). For the model act on which the Mississippi law is based, see Americans United for Life *Healthcare Freedom of Conscience Act: Model Legislation and Policy Guide for the 2014 Legislative Year*, (Americans United for Life, 2013).

38 See Associated Press. “Mississippi’s New ‘Heartbeat’ Law Bans Most Abortions at 6 Weeks”, *NBC News*, March 21, 2019, <https://www.nbcnews.com/news/us-news/mississippi-s-new-heartbeat-law-bans-most-abortions-6-weeks-n986021>

39 See “Mission,” *Americans United for Life*, April 7, 2019, <https://aul.org/about/>

40 See Matthew Kacsmayk, “The Inequality Act: Weaponizing Same-Sex Marriage,” *Public Discourse*, September 4, 2015, [www.thepublicdiscourse.com/2015/09/15612/](http://www.thepublicdiscourse.com/2015/09/15612/).

arguments against same-sex marriage lost their persuasive force and courts and legislatures opened marriage to same-sex couples, opponents began to argue for expansive conscience exemptions. Characterizing themselves as vulnerable minorities who find their deeply held beliefs denigrated by mainstream society, they appeal to conscience and nondiscrimination in seeking exemptions to allow public and private actors to refuse to serve same-sex couples or to treat their marriages as valid.<sup>41</sup>

After the U.S. Supreme Court recognized same-sex couples' constitutional right to marry, the Republican-controlled Mississippi legislature passed expansive conscience legislation that allowed a wide range of public and private actors to refuse to serve LGBT people based on "religious beliefs or moral convictions ... that ... [m]arriage is or should be recognized as the union of one man and one woman."<sup>42</sup> The Mississippi state government had opposed marriage equality, and the state only opened marriage to same-sex couples as the result of court order. The Mississippi conscience law not only exempts judges "from performing or solemnizing lawful [same-sex] marriages,"<sup>43</sup> but also authorizes businesses and individuals to refuse to provide "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage."<sup>44</sup> The provision authorizing refusals is curious because there is no statewide Mississippi law that protects LGBT people from discrimination in public accommodations. By expressly authorizing complicity-based objections to LGBT equality in the absence of legal obligations to serve LGBT people on an equal basis, the law appears more concerned with giving state sanction to LGBT inequality than with protecting conscience.

As with Mississippi's earlier healthcare refusal law, this new law evinces little concern for the interests of LGBT people. While it requires the government to take "necessary steps to ensure" that same-sex couples can marry when a government official refuses (a requirement likely included because of constitutional concerns), it does nothing to ensure that same-sex couples have access to goods and services in the commercial sphere or are shielded from the humiliation of refusals.<sup>45</sup> Perhaps unsurprisingly, leading anti-LGBT group Alliance Defending Freedom (ADF) encouraged and shaped Mississippi's law. ADF opposes same-sex marriage and sexual orientation and gender identity antidiscrimination laws, and it supports expansive conscience exemptions from laws protecting same-sex marriage and prohibiting LGBT discrimination.<sup>46</sup>

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41 See Ryan T. Anderson, "Marriage: Where Do We Go From Here?," *National Review*, May 22, 2014, [www.nationalreview.com/article/378538/marriage-where-do-we-go-here-ryan-t-anderson](http://www.nationalreview.com/article/378538/marriage-where-do-we-go-here-ryan-t-anderson); Miss. H.B. No. 1523 (2016) ("The Protecting Freedom of Conscience from Government Discrimination Act").

42 Miss. H.B. No. 1523, § 2 (2016). The law also permits refusals to serve based on "religious beliefs or moral convictions ... that ... [m]ale (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." *Idem*.

43 *Ibid.*, at § 8.

44 *Ibid.*, § 5.

45 *Ibid.*, § 8.

46 See Douglas NeJaime & Reva Siegel, "What Masterpiece Cakeshop is Really About", *Take Care (blog)*, December 6, 2017), <https://takecareblog.com/blog/what-masterpiece-cakeshop-is-really-about>.

### 1.3. Preservation Through Transformation

What might explain this forceful turn to conscience by those opposed to reproductive rights and LGBT rights? When opponents of liberalization lose in the conflict over decriminalization and constitutionalization, they increasingly turn to conscience claims to resist newly protected rights. They look for new rules and reasons to attain similar ends—a dynamic we term “preservation through transformation.”<sup>47</sup> Unable to enforce traditional values through laws of general application (such as criminal bans on abortion or civil restrictions on same-sex marriage), opponents seek expansive exemptions from laws departing from traditional morality. Without change in numbers or belief,<sup>48</sup> they shift from *speaking as a majority* to *speaking as a minority*.

In asserting a claim to conscience against a court decision or a newly enacted law conferring reproductive or LGBT rights, the aggrieved Christian group speaks as a minority even though the group may still be asserting the faith tenets of the majority or a recent majority. Consider the important ways in which its position differs from the minority faith claimant in the paradigmatic case of ritual observance—members of the aggrieved Christian group are not systematically excluded or marginalized. But the group may well be acting from a genuine experience of status decline. The fact that the members of the group can no longer control generally applicable laws establishing society-wide norms for gender and sexuality may contribute to the experience of status affront that fuels their experience of injury as minorities.

Asserting conscience objections to laws recognizing nontraditional practices offers a way to oppose an emergent legal order and limit the newly recognized rights of those the order protects. Importantly, opponents of liberalization can advance traditional norms by appealing to liberal values.<sup>49</sup> By invoking conscience, religious liberty, pluralism, and nondiscrimination, opponents of reproductive rights and LGBT equality offer more persuasive justifications for their positions and partly disable liberals from objecting.

Because conscience objections are asserted against laws protecting reproductive rights and LGBT equality, accommodation has the capacity to harm the laws’ beneficiaries. That is, unlike with the paradigmatic claims of ritual observance, exemptions in this context can inflict significant material and dignitary harms on women and LGBT people. As we will discuss, it is possible to accommodate conscience in ways that protect objectors without restricting the rights of other citizens—here, women seeking reproductive healthcare and same-sex couples seeking goods and services. But conscience provisions of the kind we address here—like the ones adopted in Mississippi—take a different form. These laws furnish expansive exemptions to a wide range of actors without ensuring access for women and LGBT people. On this model, conscience can contribute to a legal order that restricts reproductive rights and LGBT rights—thus indirectly enforcing limits on access that, for constitutional or political reasons, cannot be enforced directly.

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47 Reva B. Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy,” *Yale Law Journal*, nº 105 (1996): 2117-2207, at 2119; Reva Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action,” *Stanford Law Review*, nº 49 (1997): 1111-48, at 1113.

48 NeJaime and Siegel, “Conscience Wars,” 2553.

49 *Idem.*, 2553, 2589.

While we have focused on this dynamic in the U.S., events in Latin America are suggestive of a similar sequencing of conflicts in which struggles over decriminalization of abortion are followed by struggles over conscientious objection. The turn to conscientious objection after legalization of abortion is not merely an effort to accommodate religious objectors but is also an effort to continue the struggle over the legitimacy of the abortion right. After lawmakers legalized abortion in Mexico City in 2007, leaders of the conservative National Action Party (PAN), which opposes abortion, launched a campaign calling on hospital staff to assert rights of conscientious objection. Mariana Gomez del Campo, a PAN senator, distributed flyers at a public health facility declaring: “Nobody can force you to perform an abortion... . [W]e will ... defend [your] right not to perform abortions. The law contemplates conscientious objection for all the medical personnel who oppose ... abortion.”<sup>50</sup> Professor Gustavo Ortiz Millán describes this shift to conscience in terms that resonate with the preservation-through-transformation dynamic we observed in the U.S. “While conservatives in Mexico City lost the battle over the decriminalization of first-trimester abortion in both the Legislature and the Supreme Court,” he explains, “they still hoped to win a battle through CO: even if the right to abortion was guaranteed by law, they wanted to ensure that, in practice, there would be neither doctors nor healthcare personnel willing to guarantee this right.”<sup>51</sup>

In Mexico, the role of conscientious objection in conflicts over abortion has expanded, as conservative lawmakers have pressed a number of bills to amend the federal health law.<sup>52</sup> Most recently, in 2018, the Senate passed a conscience law pushed by Norma Edith Martínez Guzmán,<sup>53</sup> a lawmaker from the conservative *Partido Encuentro Social* (PES) and a long-time opponent of abortion rights.<sup>54</sup> The law, which has been challenged in court, does not refer

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50 See “Promueve PAN-DF objeción de conciencia entre médicos de Xoco”

51 Gustavo Ortiz-Millán, “Abortion and conscientious objection: rethinking conflicting rights in the Mexican context”, *Global Bioethics*, n° 29(1), (2017), 2. Doi: 10.1080/11287462.2017.1411224 (For a Spanish-language version of the argument, see Gustavo Ortiz Millán, “Aborto y Objeción de Conciencia”, in *Bioética laica. Vida, Muerte, Género, Reproducción y Familia*, edited by Pauline Capdevielle & María de Jesús Medina Arellano. (México: Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas, 2018).)

52 *Idem*.

53 See “Reforman diputados Ley General de Salud, para Establecer la Objeción de Conciencia de Personal Médico y Enfermeras del Sistema Nacional de Salud, Nota n° 8015”, *Cámara de Diputados H. Congreso de Unión*, (2017), <http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Agencia-de-Noticias/2017/10-October/10/8015-Reforman-diputados-Ley-General-de-Salud-para-establecer-la-objecion-de-conciencia-de-personal-medico-y-enfermeras-del-Sistema-Nacional-de-Salud> (press release from the Chamber of Deputies stating Martínez Guzmán presented the initiative).

54 Before becoming an elected official, Martínez was president of Jalisco’s pro-life and “pro-family” NGO coalition, *Mexicanos por la Vida de Todos* (roughly translated to “Mexicans for everyone’s life”). See “Perfil del legislador: Martínez Guzmán, Norma Edith por la LXIII Legislatura”, *Sistema de Información Legislativa*, [http://sil.gobernacion.gob.mx/Librerias/pp\\_PerfilLegislador.php?Referencia=9219776](http://sil.gobernacion.gob.mx/Librerias/pp_PerfilLegislador.php?Referencia=9219776). (In Spanish). As described by Catholic news outlet *Acción Católica*, the goal of *Mexicanos por la Vida de Todos* is to “prevent the adoption of ... legislation such as ... decriminalization of abortion, homosexual unions, [legislation that] promotes sexual permissiveness outside the guardianship of the parents and the distribution and consumption of the “day after” pill [emergency contraception]... .” *Acción Católica Mexicana*. “Circular: 2011-9 Asunto: Mexicanos por la vida de todos”, *Accion Catolica Queretaro*, May 17, 2011, <https://accioncatolicaqueretaro.wordpress.com/2011/05/17/circular-2011-9-asunto-mexicanos-por-la-vida-de-todos/>.

to reproductive healthcare and was justified as a labor protection for healthcare providers.<sup>55</sup> Nonetheless, both those who oppose and those who support abortion rights have understood the law as specifically targeting reproductive healthcare.<sup>56</sup> As ADF International explained, it allows providers to “to opt out of providing abortions and related services.”<sup>57</sup> The issue of reproductive healthcare also reaches LGBT rights. As Professor Ortiz Millán observes, the federal conscience legislation was “also intended to cover healthcare personnel who refused to participate in other procedures such as assisted reproduction (particularly for same-sex couples or single women).”<sup>58</sup>

#### 1.4. Transnational Mobilization

Conservative activists pressing conscience claims in the U.S. are also active in other regions, and their efforts are coordinated.<sup>59</sup> ADF, for example, has a significant presence outside the U.S. It opposes abortion and same-sex marriage, and at the same time, according to a lawyer in the Brussels office, “ADF International protects religious minorities from being persecuted.”<sup>60</sup> In places where arguments for criminalization retain persuasive force, ADF expressly backs criminalization—for example, with respect to recent conflict over sodomy in India.<sup>61</sup> Yet in places where criminalization is no longer realistic and same-sex relationships have attained legal recognition, ADF presses for conscience exemptions.<sup>62</sup>

ADF has reached extensively into Latin America, having established an ADF International office in Mexico City in 2013. According to its website, ADF International “is strategically

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55 Ley General de Salud, Article 10 Bis. See “Diputada Norma Edith Martínez Guzmán. PES. Iniciativa que adiciona el artículo 10-bis a la Ley General de Salud” *Canal del Congreso. El Canal de la Unión*, November 4, 2015, [https://www.canaldelcongreso.gob.mx/vod/reproducir/0\\_pko3maov/Diputada\\_Norma\\_Edith\\_Martinez\\_Guzman\\_PES](https://www.canaldelcongreso.gob.mx/vod/reproducir/0_pko3maov/Diputada_Norma_Edith_Martinez_Guzman_PES) (video of session of Congress where Martínez Guzmán presented the bill, arguing that the measure should be adopted to protect the labor rights of doctors).

56 See ADF International, *Universal Periodic Review – Third Cycle, Submission to the 30th session of the Human Rights Council’s Universal Periodic Review Working Group May 2018, Geneva, Switzerland* (Mexico), p. 4; Elías Camhaji, “El Congreso allana el terreno para la objeción de conciencia en México”, *El País*, March 23, 2018, [https://elpais.com/internacional/2018/03/23/mexico/1521833903\\_084196.html](https://elpais.com/internacional/2018/03/23/mexico/1521833903_084196.html); César Palacios González “Un conciencioso regalo para los conservadores”, *Animal Político (blog)*, March 29, 2018, <https://www.animalpolitico.com/blogueros-blog-invitado/2018/03/29/un-conciencioso-regalo-para-los-conservadores/>; Gire. “Objeción de conciencia, no para todo”, *Animal Político (blog)*, March 26, 2018, <https://www.animalpolitico.com/blogueros-punto-gire/2018/03/26/objecion-de-conciencia-no-para-todo/>.

57 See ADF International, *Universal Periodic Review*, 4.

58 Ortiz-Millán, “Abortion and conscientious objection”, 2.

59 See Claire Provost & Mary Fitzgerald, “Revealed: Trump-Linked US Christian ‘Fundamentalists’ Pour Millions of ‘Dark Money’ into Europe, Boosting the Far Right”, *Open Democracy*, March 27, 2019, <https://www.opendemocracy.net/en/5050/revealed-trump-linked-us-christian-fundamentalists-pour-millions-of-dark-money-into-europe-boosting-the-far-right/2>.

60 Claudia Ciobanu, “How the ‘Natural Family’ Movement Brought Its War of Values to the Balkans”, *The Nation*, November 21, 2018, <https://www.thenation.com/article/gender-ideology-right-wing-balkans/> (quoting Romanian lawyer Adina Portaru).

61 See NeJaime & Siegel, “What Masterpiece Cakeshop is Really About”.

62 See *Idem*.



positioned to effectively engage with the OAS [Organization of American States], which consists of Member States from Latin America, the Caribbean, the US, and Canada. Our network of allied lawyers allows us to conduct our legal advocacy work throughout the Latin American region.”<sup>63</sup>

ADF advocates against abortion rights in Latin American countries,<sup>64</sup> including on the basis of international human rights principles.<sup>65</sup> It also urges domestic and international authorities to maintain same-sex couples’ exclusion from marriage and to permit other forms of LGBT discrimination. For instance, ADF has worked in domestic and international courts to prohibit marriage and adoption by same-sex couples in Colombia.<sup>66</sup>

More recently, ADF representatives in Latin America have begun to emphasize the importance of conscience and religious liberty. In a 2016 interview with a Catholic news outlet in Chile, ADF International Senior Counsel, Neydy Casillas, explained that “the next challenge will be to safeguard the right to think differently, to have conscience objection and not to be forced to act.”<sup>67</sup> The next year, ADF International Legal Counsel for the UN and Latin America, Sofia Martínez Agraz, warned that “religious freedom has been undermined by the activism that proposes to create a religious intolerance in which any religious statement could be classified as an insult or discrimination based on sexual orientation and gender identity, leaving religious freedom completely unprotected.”<sup>68</sup>

Domestic NGOs are also active in Latin American struggles over abortion, contraception, and same-sex relationships, and some may be supported by U.S.-based organizations like ADF.<sup>69</sup> NGOs in Latin America translate religious views about sexuality and the family into

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63 “The Americas”, *ADF International*, <https://adfinternational.org/regions/the-americas/>

64 See, e.g., Amicus available at: “Mexico Supreme Court upholds pro-life amendments”, *Alliance Defending Freedom. For faith. For Justice*, May 3, 2013, <http://www.adflegal.org/detailspages/press-release-details/mexico-supreme-court-upholds-pro-life-amendments>. (in Spanish).

65 ADF argues that the International Covenant on Civil and Political Rights (ICCPR) should be “understood as recognizing the unborn child’s distinct identity from the mother and protecting the unborn child’s right to life.” ADF International, *Universal Periodic Review - Third Cycle, Submission to the 32nd session of the Human Rights Council’s Universal Periodic Review Working Group, January 2019, Geneva, Switzerland* (Dominican Republic) 3.

66 See “Alberto Duque v. Colombia”, *ADF International*, February 26, 2016, <https://adfinternational.org/legal/alberto-duque-v-colombia/>; “Constitutional Challenge against Colombia’s Laws on Same-Sex Couple Adoption”, *ADF International*, February 18, 2015, <https://adfinternational.org/legal/constitutional-challenge-against-colombias-laws-on-same-sex-couple-adoption/> (adoption).

67 “Hay mucho dinero y presión en Latinoamérica para imponer el aborto”, *Portaluz.org*, January 1, 2016, <https://www.portaluz.org/articulo.asp?idarticulo=1533> (in Spanish) (translation by Mariana Velasco Rivera).

68 EWTN español. “Cara A Cara: “Derechos” gay y Libertad Religiosa - Lic. Sofia Martinez Agraz”, *YouTube*, November 22, 2017, [min. 6], <https://www.youtube.com/watch?v=khQZaGjzly8> (in Spanish) (translation by Mariana Velasco Rivera).

69 For example, *Comunidad y Justicia* has acknowledged that it routinely receives an intern from ADF to help with research and legislative advocacy. See Pedro Ramirez, “El desconocido rol estelar de J.A. Kast en la “guerra santa” contra la OEA”, *CIPER* (June 25, 2019), <https://ciperchile.cl/2019/06/25/el-desconocido-rol-estelar-de-j-a-kast-en-la-guerra-santa-contra-la-oea/>. Leaders at *Comunidad y Justicia* also have participated in ADF’s fellowship programs, such as the Blackstone Fellowship. *Comunidad y Justicia*, Equipo Ejecutivo, <https://comunidadyjusticia.cl/equipo/> (last visited July 10, 2020); *Comunidad y Justicia*, Directorio, <https://comunidadyjusticia.cl/directorio/> (last visited July 10, 2020). According to ADF, the Blackstone Fellowship trains “exceptional Christian law students... in 21 different



arguments in law and policy debates over sexual and reproductive rights.<sup>70</sup> Religious institutions may also intervene in these debates, particularly given the position of the Catholic Church in many Latin American countries.<sup>71</sup> Some religious leaders urge adherents to assert conscience objections in the context of abortion and same-sex marriage.

In this setting, acts of faith spill over into advocacy against sexual and reproductive rights; it is difficult to disaggregate them. As Professor Juan Marco Vaggione explains in his treatment of the Catholic Church's formal invocation of conscience in the context of reproductive rights and LGBT rights, "[m]ore than seeking to open up a legitimate space so that the citizenry can articulate its beliefs in the face of majority laws, [conscientious objection] has as its main purpose to prove the injustice of sexual and reproductive rights."<sup>72</sup> Indeed, the Church's Letter to Health Care Workers declares, "the CO of the Health Care worker ... has the greater significance of a social denunciation of an illegal injustice perpetrated against innocent and defenseless life."<sup>73</sup>

Traditionally, liberals and progressives have defended conscientious objection. Today, across the globe, conservative opponents of reproductive rights and LGBT equality are appealing to conscience in ways that obstruct access to abortion, contraception, and same-sex marriage. How should liberals and progressives respond?

## 2. THIRD-PARTY HARM AND LIMITS ON ACCOMMODATION

We support attempts to accommodate conscience, but not in circumstances that prevent the government from vindicating weighty governmental objectives or that impose significant harm on other citizens who do not share the objector's beliefs, in particular by burdening or obstructing the exercise of rights. In this section, we first elaborate our position. We then find authority for our position in domestic and international sources. Finally, we suggest ways that decision makers can design conscience exemptions to protect conscientious objectors while also allowing the government to achieve important ends and shield other citizens from material and dignitary harm. If accommodations are not designed in ways that limit their impact on third parties, it may be an indication, as the Colombian Constitutional Court acknowledged, that those opposed to the rights of third parties assert "conscientious objections ... to project their private convictions in the public sphere."<sup>74</sup>

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70 Juan Marco Vaggione, "Sexuality, Religion and Politics in Latin America", in *Sexuality and Politics: Regional Dialogues from the Global South, Vol. 1*, edited by Sonia Corrêa, Rafael de la Dehesa & Richard Parker. (Brazil: Sexuality Policy Watch), 136, 145-46.

71 *Idem.* at 142.

72 Juan Marco Vaggione, "The Politics of Camouflage: Conscientious Objection as a Strategy of the Catholic Church, *States of Devotion*", *Hemispheric Institute*, April 26, 2014, <https://hemisphericinstitute.org/en/emisferica-13-1-states-of-devotion/13-1-dossier/the-politics-of-camouflage-conscientious-objection-as-a-strategy-of-the-catholic-church.html>

73 *Idem.* (quoting Pontifical Council for the Pastoral Care of Health Care Workers, 1995).

74 Corte Constitucional. Sentencia T-388 del 2009, May 28, 2009.[C.C.] [Constitutional Court]. See also Alba Ruibal, "Movement and Counter-Movement: A History of Abortion Law Reform and the Backlash in Colombia 2006-2014," *Reproductive Health Matters*, n° 22(44), (2014): 42-51, at 45-6., [https://doi.org/10.1016/s0968-8080\(14\)44803-1](https://doi.org/10.1016/s0968-8080(14)44803-1)

## 2.1. Conscientious Objection, Governmental Interests, and Third-Party Harm

In the paradigmatic case of conscience exemptions, accommodation serves important goals of pluralism, providing limited exceptions from laws of general application that allow persons of heterogeneous faiths and moral convictions to flourish. But it is not always clear that more recent conscience exemptions from laws protecting reproductive healthcare and LGBT equality serve this same pluralism-promoting end.

We support accommodation in the paradigmatic case in a variety of factual settings, and we are prepared to support accommodation of conscience objections in the more recent cases on the condition that accommodation not (1) obstruct the government's achievement of major social goals or (2) inflict targeted material or dignitary harms on other citizens. Achieving these conditions requires accommodation in a form that permits the government to pursue its constitutional or statutory ends and shields other citizens from the significant impacts of accommodation. In particular, we are concerned about granting accommodations that obstruct or materially burden or impair the exercise of protected rights. Only where government endeavors to shield affected third parties from the impact of exemptions are we persuaded that accommodation would promote pluralism. In cases where that is not possible, the accommodation of conscience objections may not be appropriate.

As we suggested above, we recognize that objections to abortion, contraception, and same-sex relationships can be asserted in good faith and with theological support. In responding to claims in this context, we focus not on the claims' sincerity or religious significance, but instead on the claims' potential to undermine the government's objectives and harm others. Conscientious objection can obstruct access to goods and services to which citizens are legally entitled. Refusals based on conscience can also inflict dignitary harm, as the objector refuses to comply with a legal duty to serve another citizen on the ground that she believes that fellow citizen is sinning. In most cases, the objector communicates his or her refusal to serve to the citizen whose conduct is condemned.

In our view, conscientious objection by those acting in professional roles should be accommodated only when the institution in which the objector is located mitigates the material and dignitary effects on other citizens. In some settings, it may not be possible to shield third parties from the material or dignitary harms of refusals. In such settings, we are deeply skeptical of accommodation.

Our concerns with third-party harm lead us to be especially cautious in endorsing accommodations for complicity-based objections. In fact, we worry specifically that the logic of complicity undermines our very efforts to accommodate conscience and provide for the rights of third parties. Complicity furnishes a basis on which to object to efforts to mitigate the impact of conscience objections on third parties. Consider a doctor with moral or religious objections to performing sterilization. The legal system could accommodate the doctor and also require her to refer patients to alternate providers. But if the doctor objects that referrals would make her complicit in the patient's eventual sterilization, she will refuse to provide the information necessary to ensure the patient's access to services. Accordingly, even as we recognize the sincerity of complicity-based conscience claims, we are concerned that their logic will preclude protections for affected third parties—as illustrated by the Mississippi example in Section I.

There is substantial U.S. precedent for limiting religious liberty claims when accommodation would inflict targeted harm on third parties or prevent the government from pursuing

important objectives.<sup>75</sup> Domestic law in some European jurisdictions also views third-party harm as a potential limit on religious accommodation.<sup>76</sup> International human rights principles also provide a basis on which to limit conscientious objection in order to protect the rights of others.<sup>77</sup> So too have some Latin American jurisdictions attempted to constrain conscientious objection when it would limit the rights of other citizens.

Consider a 2009 Colombian Constitutional Court decision, in which it articulated limits on conscientious objection to abortion with attention to the potential impact on third parties. “The problem,” the Court explained, “arises when an individual’s moral convictions are externalized with the purpose of evading a legal duty and, as a consequence, interferes with the rights of other individuals.”<sup>78</sup> Conscientious objection in the case before it implicated “women’s fundamental constitutional rights to health, personal integrity and life in conditions of quality and dignity,” as well as “their sexual and reproductive rights.”<sup>79</sup> Accordingly, the Court limited accommodation in order to protect the rights of women, reflecting the common-sense understanding that the government can respect conscience but only to the point that it does not make another citizen bear significant costs.

United States civil rights law recognizes the government’s important interest in enforcing antidiscrimination law and limits religious exemptions to allow the government to achieve that interest. In *Masterpiece Cakeshop*, the Supreme Court credited the government’s interest in enforcing civil rights laws and in securing equal opportunity for its citizens, and extended these principles to LGBT equality. The Court closed its opinion with the instruction that “these disputes must be resolved ... without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”<sup>80</sup> The government, in other words, sought to pursue an important interest in equal opportunity, and pursuit of that interest required that LGBT citizens not be subjected to religious refusals in the marketplace.<sup>81</sup>

The government also has an important interest in enforcing a statutory scheme that provides for women’s reproductive healthcare, including the health insurance benefits that U.S. employers must provide their employees under the Affordable Care Act. When an employer advanced a religious objection to providing its employees insurance benefits for contraception in *Hobby Lobby*, for example, the government responded that uniform enforcement of the law would promote “public health” and “gender equality.”<sup>82</sup> The government’s interest in ensuring that employees have access to contraception “includes not only core concerns of the community in promoting public health and facilitating women’s integration in the workplace,” but

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75 See NeJaime & Siegel, “Conscience Wars”, at 2528-29.

76 See NeJaime & Siegel, “Conscience Wars in Transnational Perspective”, at 210-12.

77 See *Idem.* at 212-15.

78 Corte Constitucional. Sentencia T-388 del 2009

79 *Ibid.*

80 138 S. Ct. at 1732.

81 See NeJaime & Siegel, “Religious Exemptions and Antidiscrimination Law”.

82 134 S. Ct. at 2779-80.

also “crucial concerns of the employees who are the intended beneficiaries of federal law’s contraceptive coverage requirement—interests that sound in bodily integrity, personal autonomy, and equal citizenship.”<sup>83</sup>

When a religious objector seeks an exemption from a law designed to protect other citizens, the government’s interest in enforcement of the law will converge with the other citizens’ interest in being protected from third-party harms of the objection.

Concerns with material and dignitary harm are especially significant when complicity claims are entangled in society-wide conflicts, such as the conflict over reproductive rights in *Hobby Lobby* and LGBT rights in *Masterpiece Cakeshop*. Complicity claims expand the universe of potential objectors, from those directly involved to those who consider themselves indirectly involved. This is especially concerning in regions where majorities still oppose conduct that has only recently been legalized, often by court decision. As the number of objectors grows, access shrinks. Concerns with dignitary harm are also heightened in this setting. Because the claims concern sexual norms subject to culture-war conflict, the meaning of conscientious objection is plainly legible to the citizen being denied. The refusals may create stigmatizing social meaning as they reiterate traditional and familiar judgments about the conduct in question.

These concerns have not escaped courts and legislatures. In considering the relationship between abortion rights and conscientious objection, the Constitutional Court of Colombia acknowledged the relevance of the political context in which conscience exemptions were sought. In 2006, the Court had ruled that both the Colombian Constitution and international human rights instruments gave women a right to make decisions about abortion under limited circumstances.<sup>84</sup> Subsequently, when a woman sought to act on her newly recognized right, the physician demanded a court order before performing an abortion. The woman then brought a *tutela* action before a judge who recused himself due to his conscientious objection to abortion. Once the judge’s superior court remanded the case and ordered him to decide, he denied the woman’s request on the basis of his objection. The woman won the case on appeal and was allowed to end her pregnancy. The Colombian Constitutional Court took the case to clarify the bounds of conscientious objection in the medical and judicial contexts. The Court imposed limits on conscientious objection with attention to the ways in which religious accommodation could impair the rights of groups historically subject to discrimination. It explained that conscientious objection must be restricted when it would result in a “disproportionate restriction on fundamental constitutional rights.” The Court expressed particular concern in situations where the fundamental constitutional “rights developed out of struggles led by sectors of the society that have historically been discriminated against and whose successes have generally not been well-received by many sectors of society that, shielded by their conscientious objections, try to project their private convictions in the public sphere.”<sup>85</sup>

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83 Reva B. Siegel & Neil S. Siegel, “Compelling Interests and Contraception”, *Connecticut Law Review*, n° 47(4), (2015), 1025, 1028.

84 Corte Constitucional, Sentencia C-355 del 2006, May 10, 2006.

85 Corte Constitucional Sentencia T-388 del 2009.

## 2.2. Limits on Conscientious Objection

Many jurisdictions recognize conscientious objection but subject it to principled limits. In some cases, individuals can exercise conscientious objection without undermining the government's important interests or harming other citizens. In other cases, it is not possible to accommodate the objector *and* protect the rights of third parties or ensure the government's ability to effectively pursue its important ends. We observe ways to accommodate objections while ensuring that the government can effectively pursue important ends and that other citizens are not subjected to significant material or dignitary harm. A legal system that provides expansive conscience exemptions without adopting any of the limits we identify will align the public order with the belief system of the objector and against the rights to which the objector objects.

### 2.2.1. Protecting Patients

Laws can endeavor to protect conscience while providing for the patient's welfare by, first and foremost, prioritizing the health and safety of the individual seeking services.<sup>86</sup> Accommodation regimes can be designed in ways that require institutions to anticipate problems and ensure patient access. Some laws require objectors to identify themselves to their employers or to the government in advance.<sup>87</sup> The government or employer must ensure that willing providers are available and that the patient does not endure a stigmatizing encounter with an objecting provider.<sup>88</sup>

### 2.2.2. Limiting Accommodation of Complicity Objections

Laws can also differentiate between those directly involved in the objected-to service and those who object on the basis of indirect involvement. Many jurisdictions limit accommodation for complicity objections, and thus limit objections that are likely to inflict material or dignitary harm on third parties and undermine the government's important interests. Complicity claims can be constrained by limiting the range of actors who can claim conscience exemptions,<sup>89</sup> as well as the range of acts subject to conscience exemptions.<sup>90</sup>

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86 Legge 22 maggio 1974, n. 194, G.U. May 22, 1975, n.140 (It.); Health Code, article 119 ter, paragraph three (Chile).

87 Resolution N° 843 (Santa Fe 2010) (Argentina); Resolution N° 933 (Mendoza 2011) (Argentina); Health Code, article 119 ter, paragraph one (Chile).

88 *Abortloven* 13 juni 1975 nr. 50, ch. II, § 20; ch. III, § 18; *F.A.L. s/ Medida Autosatisfactiva*, Judicial Consideration N° 29 (March 13, 2012).

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90 *Greater Glasgow & Clyde Health Board v. Doogan*, [2014] UKSC 68.

### 2.2.3. Ensuring Alternative Access

Legal systems may be able to afford affected individuals with an alternate source of goods and services by requiring objectors to provide information and to refer patients to willing providers. This type of scheme allows providers with religious or moral objections to exercise conscientious objection while also ensuring that the individual receives the services to which she is entitled.<sup>91</sup> Law in some jurisdictions requires a refusing professional to provide alternative access as part of an accommodation regime—protecting patients’ health needs and shielding them from the dignitary harms of a refusal.<sup>92</sup>

While justifications for conscientious objection assume a paradigm of an individual resisting the state, it is not uncommon for conscience objections to become entangled in society-wide conflict over changes in the law.<sup>93</sup> In some regions, accommodation can result in widespread restrictions on access to the objected-to services.<sup>94</sup> If healthcare providers claim conscientious objection in large numbers, protecting the rights of patients may require the denial of exemptions.<sup>95</sup>

### 2.2.4. Limiting Conscientious Objection to Individuals

Institutions, including hospitals and other religiously affiliated organizations, assert rights of conscientious objection—raising conceptual questions given that conscientious objection is premised on an individual ethical imperative.<sup>96</sup> Institutional objections also raise immense practical questions—especially when the institution is endowed with the system-wide power and significance of the Catholic Church, or a national hospital system.<sup>97</sup> (In the U.S., one in six patients is treated by a Catholic affiliated hospital).<sup>98</sup> Many jurisdictions have limited conscientious objection to individuals.<sup>99</sup>

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91 See Committee on the Elimination of Discrimination against Women, *General Recommendation 24, para 11, Women and Health (Twentieth session, 1999)*, U.N. Doc. A/54/38 at 5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 271 (2003).

92 *Christian Medical & Dental Soc of Canada v. College of Physicians and Surgeons of Ontario* [2019], 2019 ONCA 393, ¶ 2, ¶ 116 (Can. Ont. C.A.).

93 See NeJaime & Siegel, *Conscience Wars*, at 2548-51.

94 Lilián Abracinskas (coord.) *Asegurar y Avanzar Sobre lo Logrado: estado de situación de la salud y los derechos sexuales y reproductivos en Uruguay (monitoreo 2010-2014)*, Uruguay: MYSU, 2014); “¿Por qué la objeción de conciencia es un retroceso en materia de aborto?”, *Chilango*, March 24, 2018, <http://www.chilango.com/ciudad/aborto-legal-cdmx/>.

95 See *Int’l Planned Parenthood Fed’n – Eur. Network v. Italy* (ECSR 2013).

96 See Vaggione, “Sexuality, Religion and Politics in Latin America”; Marcelo Alegre, “Conscious Oppression: Conscientious Objection in the Sphere of Sexual and Reproductive Health”, in *Controversies in Latin American Bioethics*, edited by Eduardo Rivera-López & Martin Hevia. (Cham: Springer, 2019).

97 See NeJaime & Siegel, *Conscience Wars*, at 2556. See *Ethical and Religious Directives for Catholic Health Care Services: Fifth Edition*, U.S. Conf. Cath. Bishops (Nov. 17, 2009).

98 See *Catholic Health Care in the United States*, Cath. Health Ass’n U.S. (Jan. 2014).

99 See, e.g., *Corte Constitucional. Sentencia C-355 del 2006*; *Sundhedsloven, LBK nr. 546 af 25/6/2005* [Danish Health Act, Law No. 546 of June 25, 2005].



## CONCLUSION

Individuals assert conscience claims for a number of reasons. They may have a sincere experience of spiritual or ethical constraint. They may have a political aim to extend conflict, reworking what had been a battle in litigation or democratic lawmaking to prevent recognition of new rights. Both of these instincts can exist at once. For others, conscientious objection may offer the easiest way to avoid becoming entangled in conflict; that is, those without a moral drive against abortion or a direct political end to restrict it may simply find it easier to opt out of abortion services than face the community's judgment for providing such services.

A legal system should anticipate problems of access that may result from accommodating conscience and should respond accordingly. If legislatures, courts, or implicated systems (such as healthcare institutions) are not reacting by providing for access to services, they may be engaged, whether implicitly or explicitly, in obstruction or indirect negation of the rights in question.

Consider recent developments in the U.S. In February 2019, the Trump Administration issued regulations governing organizations that receive federal family planning funding aimed at serving low-income women. The regulations not only eliminate the longstanding requirement that healthcare providers counsel and refer patients with respect to abortion; they actually prohibit providers from referring for abortion services. The Administration justified the regulations in the language of conscience, declaring that healthcare providers will no longer be "required to choose between participating in the program and violating their own consciences by providing abortion counseling and referral."<sup>100</sup> The Administration pointed to decades-old "federal conscience protections" to support its position—even though those laws had not been interpreted to preclude referrals or counseling.<sup>101</sup> Indeed, the Administration cited the 1973 Church Amendment, which protects doctors and nurses with objections to performing abortions and says nothing about referrals and counseling.

There are an ever-increasing number of faith claims that government may accommodate. But a government that repeatedly accommodates religious objectors without using the mechanisms we have identified to offset the impact on other citizens is plainly doing more than accommodating religion. It is taking a position in the underlying controversy, providing the objector the sanction of law and aligning itself with the religious claimant over and against the parties notionally protected by the law. In doing so, the state is employing the language of accommodation to create a new public order establishing and sanctioning religion—and depriving citizens of the protection of rights constitutionally recognized or legislatively enacted.

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