

Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel

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INTRODUCTION

Douglas NeJaime and Reva Siegel have offered an elaborately reasoned argument against claims of conscience with respect to healthcare and marriage, claims that they call “complicity-based conscience claims.”¹ I appreciate that they have avoided some of the exaggerations of more strident opponents of exemptions in these contexts. I even agree with some of what they say.

But their reasonable tone cannot conceal their remarkable conclusion. They appear to say that religious conservatives should forfeit their right to conscientious objection on these issues because too many of them also engage in political speech on these issues. This claim that dissenters must choose which of their rights to exercise, or that their rights subsist only so long as they are not exercised too vigorously, is at odds with both freedom of speech and freedom of religion.

After briefly summarizing NeJaime and Siegel’s argument, I will consider their asserted government interests in descending order of generality and then their concept of complicity claims. Neither the political meaning of conscientious objection, nor the dignitary harm of receiving a civilly communicated refusal to assist behavior that a conscientious objector views as immoral, creates a compelling government interest that overrides the right to conscientious objection. And while preventing significant material harm generally is a compelling interest, and one that is sometimes present in these cases, it cannot be presumed just because conservative Christians are numerous. Finally, “complicity claim” is a fuzzy category with no legal significance. It is irrelevant to NeJaime and Siegel’s claims.

1. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

I. THEIR ARGUMENT

By “complicity claims,” NeJaime and Siegel principally mean conscience-based refusals to provide goods and services that the conscientious objector views as immoral.² They argue that these claims differ from the less controversial claims that motivated the Religious Freedom Restoration Act.³

NeJaime and Siegel argue that allowing conscientious objectors to refuse to provide goods or services they view as immoral may harm the customers turned away,⁴ and that such harms are more likely when conscientious objectors are more numerous.⁵ They specify these harms as the material harm of perhaps having to do without the goods or services,⁶ and the dignitary harm of being refused.⁷ Their concept of dignitary harm also has a broad social and political dimension, quite independent of any harm to a would-be customer.

NeJaime and Siegel observe that those who conscientiously object to assisting with abortions or same-sex weddings generally object to permitting abortions or same-sex marriages at all, and that these religious-liberty claims are thus linked to the underlying dispute over social policy.⁸ They say that defenders of traditional sexual morality, who used to be a political majority, now argue for their individual rights as if they were a political minority – which of course they now are. NeJaime and Siegel italicize this,⁹ and keep coming back to it,¹⁰ as though it were an especially telling point. It is not clear they understand that the sexual revolution has swept away the former religious majority on sexual matters. Religious conservatives make the individual-rights arguments of a minority group because they are a minority group. And even where they still have local majorities, they are constitutionally disabled from enforcing their views on disputed issues of sexual morality.

In this context of deep moral disagreement, NeJaime and Siegel say that conscientious refusals to assist with morally controversial acts create a harmful *social* meaning.¹¹ Refusing to assist communicates moral disapproval. And then comes the subtly stated conclusion: If exempting conscientious objectors “would produce effects and *meanings* that undermine the government’s society-

2. *Id.* at 2518-19.

3. *Id.* at 2524-29.

4. *Id.* at 2529-33.

5. *Id.* at 2557-58, 2566-67, 2574.

6. *Id.* at 2566-74.

7. *Id.* at 2574-78.

8. *Id.* at 2552-65.

9. *Id.* at 2553.

10. *Id.* at 2556, 2559, 2561.

11. *Id.* at 2578.

wide objectives, this impact is evidence that unimpaired enforcement of the law is the least restrictive means of furthering the government's interest."¹² "If granting a religious accommodation would harm those protected by the antidiscrimination law *or* undermine societal values and goals the statute promotes, then unencumbered enforcement of the statute is the least restrictive means of achieving the government's compelling ends."¹³ No one need actually be harmed; in the alternative—"or"—it is enough that religious exemptions might help sustain a political argument over government policy. Conscientious objection creates "meanings" and supports "values" that government rejects. Preventing such "meanings" and "values" is a compelling government interest; government can refuse religious exemptions when the communicative impact of the exemption undermines the communicative goals of the law. Religious liberty cannot be allowed to support political dissent.

It seems obvious why they did not say all this without euphemism. But this is the unmistakable import of their lengthy section on "Religion in Politics" and their conclusion that stamping out "social meanings" can be a compelling interest.¹⁴ "Religious accommodation claims of this kind may continue democratic conflict in new forms,"¹⁵ and preventing such democratic conflict is, in their view, a compelling government interest.

II. SOCIAL MEANINGS

NeJaime and Siegel say that these exemption claims are part of a continuing political fight on the underlying issue; conscientious objectors who do not want to assist with abortions or same-sex weddings often do not want to permit abortions or same-sex marriages in the first place. And therefore, it is more important than it otherwise would be to reject the claim to exemption. *Because* these conscientious objectors engage in a political argument, they lose their right to conscientious objection.

This is indefensible. Religious conservatives are constitutionally entitled to argue for their views on the regulation of sex, however mistaken some of those views may be. And their exercise of that right is not a ground for forfeiting other rights they may have, including their right to religious exemptions.

The exercise of one right cannot be conditioned on forfeiture of another. The right to hold or run for public office cannot be conditioned on

12. *Id.* at 2580 (emphasis added).

13. *Id.* at 2581 (emphasis added).

14. *Id.* at 2542-65.

15. *Id.* at 2521.

surrendering the right to be a minister,¹⁶ the right not to believe in God,¹⁷ the right to criticize a war,¹⁸ the right not to swear a loyalty oath,¹⁹ the right to be free of unreasonable searches,²⁰ or the privilege against self-incrimination.²¹ The same principle applies to statutory rights—even ordinary statutory rights not enacted in aid of a closely related constitutional right. So the right to a statutory tax exemption cannot be conditioned on surrendering the right not to swear a loyalty oath.²²

This is just an application of the broader principal of unconstitutional conditions. “[G]overnment may not deny a benefit to a person because he exercises a constitutional right”²³—and a fortiori it may not do so if that benefit is itself a legally protected right. “[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.”²⁴ The rule against unconstitutional conditions has a well-established core, however murky its boundaries and exceptions may be.

Conditioning the right to political speech on surrender of the right to conscientious objection—or vice versa—is well within the core. Religious conservatives do not forfeit their right to conscientious objection by making political arguments about the laws they object to, and they do not forfeit their right to make political arguments by invoking their right to conscientious objection. Religious conscience is widely protected in American law, and political speech is protected everywhere in American law.

Employment Division v. Smith somewhat muddied the waters with respect to protection for conscientious objection, holding that the Free Exercise Clause protects the right to practice one’s religion only against laws that are not neutral or not generally applicable.²⁵ But that case was fundamentally about whether exemptions should be crafted by federal courts under the Constitution or left to legislatures and state law.²⁶ Congress and thirty-two states have

16. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion); *see also id.* at 633-35 (Brennan, J., concurring).

17. *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

18. *Bond v. Floyd*, 385 U.S. 116, 132-37 (1966).

19. *Communist Party v. Whitcomb*, 414 U.S. 441, 449-50 (1974).

20. *Chandler v. Miller*, 520 U.S. 305, 317-22 (1997).

21. *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977).

22. *Speiser v. Randall*, 357 U.S. 513 (1958).

23. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983)).

24. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that defendant did not forfeit privilege against self-incrimination by testifying on motion to suppress fruits of allegedly unconstitutional search).

25. 494 U.S. 872, 878-85 (1990).

26. *Id.* at 890.

protected religious practice from neutral and generally applicable laws under some form of heightened scrutiny, most commonly the compelling-interest test.²⁷ Only four states have judicially adopted the *Smith* rule and failed to enact their own Religious Freedom Restoration Act.²⁸ Nearly every state has enacted more specific conscience protections with respect to abortion,²⁹ and every state with gay-rights laws has enacted exemptions for religious non-profits.³⁰ Religious conservatives do not forfeit these protections when they also argue for their positions politically or seek to exercise a politically tinged right.

And if these acts of conscience are in themselves a form of political speech, as NeJaime and Siegel argue, then the acts of conscience are doubly protected. Two sources of legal protection do not somehow cancel each other out and leave no legal protection.

The Court has already closed the door on “social meaning” as a compelling government interest. The government cannot justify restrictions on discriminatory expressive conduct with the goal of “produc[ing] a society free of the corresponding biases.”³¹ That would be “a decidedly fatal objective;”³² “[t]he Speech Clause has no more certain antithesis.”³³ At least in the noncommercial context in that case (a parade), the Court was unanimous on this point.

Claims to conscientious objection will of course be litigated under the laws protecting religiously motivated conduct—state constitutions, state RFRA, specific religious exemptions in state gay-rights laws or state and federal healthcare-conscience laws, or federal RFRA or federal exemptions if we ever get a federal gay-rights law. The protection for religious conduct comes not from the Free Speech Clause, but from these provisions that explicitly protect religious conduct. I do not claim that civil-rights laws generally violate the Free

27. See, e.g., ARK. CODE ANN. §§ 16-123-401 to 16-123-407 (West 2015); IND. CODE §§ 34-13-9-0.7 to 34-13-9-11 (2015); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 844 n.22, 845 n.26 (collecting citations).

28. See Laycock, *supra* note 27, at 844 n.23. Idaho has enacted a state RFRA, although note 23 fails to say so. *Id.* at 845 n.26.

29. See Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 77 app. (Douglas Laycock et al. eds., 2008) (collecting statutes in an appendix).

30. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies: State Nondiscrimination Policies Fill the Void but Federal Protections Are Still Needed*, CTR. FOR AM. PROGRESS ACTION FUND 3-4 tbl. (June 2012), http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf [<http://perma.cc/CR9Z-Z733>] (listing employment-discrimination statutes and religious exemptions).

31. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 578 (1995).

32. *Id.* at 579.

33. *Id.*

Speech Clause, as Robert Post seems to think.³⁴ It is NeJaime and Siegel, not me, who say that these claims of conscientious objection are a form of political speech in support of the conservative religious position on the underlying issues.

What I say is that religiously motivated conscientious objectors have a claim to exemption under these other sources of law. Parades are protected by the Speech Clause; conscientious objectors are protected by laws on conscientious objection, most of them state laws. The reason the Speech Clause is relevant (apart from NeJaime and Siegel's argument that exercise of one right forfeits the other) is that the speech cases identify some things that cannot be compelling government interests. There cannot be a compelling government interest in suppressing the conservative religious side of the political argument or stamping out the social meanings that conscientious objection may create.

In the abstract, one might conceive of NeJaime and Siegel's argument as giving rise to a free-speech claim: the forfeiture of conscientious-objection rights under a state or federal RFRA, on the ground that religious conservatives also spoke out against abortion or marriage equality, would be a penalty on the exercise of free speech. But the cases would never be litigated that way, for multiple reasons: because the claim is too abstract; because the conscientious objectors have to state their claim before the state asserts its compelling interest, which may not track NeJaime and Siegel; because NeJaime and Siegel's argument is based on the political speech of an entire movement in which particular plaintiffs may or may not have actively participated; and because the claim under specific protections for religious conduct is so much simpler and more straightforward.

NeJaime and Siegel say that religious conservatives could still advocate for their position; they would lose only the "special advantage" of conscientious objection.³⁵ But this "special advantage" has been part of the American experience of religious liberty since the seventeenth century.³⁶ And as already explained, it is protected in federal law and widely protected in state law.

NeJaime and Siegel say that when it enacted the Religious Freedom Restoration Act in 1993,³⁷ Congress contemplated protecting the unusual practices of numerically small religious minorities, whereas the religious

34. See Robert Post, *RFRA and First Amendment Freedom of Expression*, 125 YALE L.J. F. 387 (2016).

35. NeJaime & Siegel, *supra* note 1, at 2584.

36. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Meaning of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1803-08 (2006) (collecting early examples); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466-73 (1990) (same).

37. Religious Freedom Restoration Act, as amended, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

minority on these sexual issues is large. There is a bit of truth to this; RFRA's sponsors and supporters naturally emphasized the most sympathetic cases, often involving small religious minorities. And same-sex marriage was not yet a live political issue. But because the principal opposition to RFRA came from the Catholic bishops and pro-life organizations,³⁸ supporters also emphasized that those groups in particular needed RFRA. I testified, for example, that "[c]ulturally conservative churches . . . are under constant attack on issues related to abortion, homosexuality, ordination of women, and moral standards for sexual behavior."³⁹ The president and legislative counsel of the ACLU testified that RFRA was needed to permit "religiously sponsored hospitals to decline to provide abortion or contraception services" and to protect "a church's refusal to ordain women or homosexuals."⁴⁰

To the extent that attention has shifted from small religious minorities to more numerous Catholics and evangelicals, the innovation did not spontaneously spring from the Catholics and evangelicals. The innovation came from government, which seeks to outlaw well-known practices of our largest religions. Requiring conservative believers to assist with same-sex weddings, or distribute what they believe to be abortifacients, or requiring Catholics to distribute contraception, has almost no precedent in American history. The only arguable exception is the nineteenth-century Protestant-Catholic conflict, which was more about Protestant establishment than Catholic free exercise, and not an example anyone should wish to follow.⁴¹

It is fundamentally mistaken to suppose that religious liberty is only for small religious minorities. Efforts to suppress the practices of large religious minorities create more social conflict than similar efforts to suppress small religious minorities. In a less tolerant age, government efforts to suppress large religious minorities led to the wars of religion. One important purpose of religious liberty is to mediate such conflicts and avoid such wars. No law that protects religious liberty draws any distinction between large religions and small religions, and any such distinction would almost certainly be unconstitutional. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."⁴²

38. See Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 236-38 (1994) (reviewing the argument that RFRA would create a right to religiously motivated abortions).

39. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 72 (1992) (statement of Douglas Laycock).

40. *Id.* at 192 (statement of Nadine Strossen and Robert S. Peck).

41. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297-305 (2001) (describing the Protestant establishment).

42. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

NeJaime and Siegel fear that the large and culturally conservative religious minority might win politically – that it might regain sufficient political strength to “undermine the government’s society-wide objectives.”⁴³ I think the sexual revolution will be hard to reverse. But however that may be, this risk that the other side might win is democracy in action. If defenders of liberty and equality in sexual and reproductive matters cannot persuade either the courts or the legislatures to protect their rights, our system of government provides that those rights will be lost. There cannot be a compelling interest in stopping the democratic process or in suppressing the means of persuasion that either side brings to bear.

III. INDIVIDUAL DIGNITARY HARMS

NeJaime and Siegel argue that when potential customers are turned away because of conscientious objection, they suffer the dignitary harm of being rejected and of knowing that the conscientious objector thinks their proposed conduct is immoral.⁴⁴ This harm is real, although it is often exaggerated. The present situation is nothing like that in the segregated South, when African-Americans were routinely turned away by a dominant majority that controlled political and economic power and public opinion. In that situation, both dignitary and material harms were enormous. It is rather different to be turned away by a member of a shrinking minority whose views are regarded by dominant opinion as profoundly wrongheaded. Anger and counter-rejection would seem to be more sensible reactions than humiliation and emotional distress. But however great or small the effects, I agree that there is a dignitary harm in being refused service because of perceived immorality.

Preventing these harms cannot be a compelling interest that justifies suppressing someone else’s individual rights. These are expressive harms, based on the “communicative impact” of the religious practice – a justification that is generally fatal to regulation of expressive conduct.⁴⁵ That justification must be equally fatal when offered to override protections for religious conduct. That your religion offends me is not a sufficient reason to suppress it.

Mutual moral disapproval is inherent in a morally pluralistic society. Religious conservatives think that same-sex couples, and women seeking abortions, are engaged in deeply immoral conduct. Much of the gay-rights and pro-choice movements think that religious conservatives are hate-filled bigots

43. NeJaime & Siegel, *supra* note 1, at 2580.

44. *Id.* at 2574-78.

45. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-12, 411 n.7 (1989); see also *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (requiring the government interest to be “unrelated to the suppression of free expression”).

and extremist zealots. Both sides are well aware of the other's disapproval, as NeJaime and Siegel recognize with respect to customers who understand moral disapproval that is left unstated.⁴⁶ Mutual moral disapproval is widespread, and neither side can be protected from encountering it on occasion.

The argument from dignitary harm to individuals is, at bottom, an argument that these religious practices must be suppressed because they offend the customer turned away. That argument is at odds with the whole First Amendment tradition. It is settled that offensiveness is not a sufficient reason for suppressing speech.⁴⁷ Disagreement about the morality of same-sex sexual relations has provided an unfortunate number of occasions for the Supreme Court to apply this principle,⁴⁸ both to pure speech (*Snyder v. Phelps*⁴⁹) and to discriminatory but expressive conduct (*Hurley*⁵⁰ and *Boy Scouts v. Dale*⁵¹). The rule has not been controversial at the Court. *Hurley*, protecting exclusion of a gay-rights group from a parade, was unanimous; *Snyder*, protecting religious hate speech, was 8-1, with the lone dissenter being a Catholic conservative.

Dale, protecting the Boy Scouts' right to exclude gay leaders, was 5-4. But the dissenters did not suggest that Dale's dignitary harm would justify restricting the Boy Scouts' speech or expressive association. Rather, they argued at length that the Boy Scouts were not engaged in speech or expressive association on sexual issues at all.⁵² Dale had been an active and engaged scout for twelve years; the dignitary harm of being excluded from scouting at that point must have been vastly greater than the typical dignitary harm of being refused a one-time arms-length transaction. But no Justice found a compelling interest in preventing the latter harm. And the harm in all these cases is insignificant compared to the emotional harm inflicted by the funeral picketing in *Snyder*.

NeJaime and Siegel say that religious-exemption cases differ from speech cases, because conscientious objectors invoke protection for conduct.⁵³ But

46. NeJaime & Siegel, *supra* note 1, 2576-77.

47. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2531-32 (2014) (abortion counseling); *Johnson*, 491 U.S. at 414 (flag burning); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-57 (1988) (intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15, 18-26 (1971) (profanity).

48. I mean both that the continued frequency of such speech is unfortunate and that the continued attempts to suppress it are unfortunate. I do not defend the views of conservative religious believers; I defend only their rights.

49. 562 U.S. 443, 458 (2011).

50. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 572-81 (1995).

51. 530 U.S. 640, 647-61 (2000).

52. See, e.g., *id.* at 684 (Stevens, J., dissenting) ("Boy Scouts of America is simply silent on homosexuality.").

53. NeJaime & Siegel, *supra* note 1, at 2575 n.243.

these cases arise in a context where conduct is legally protected, usually under a compelling-interest test, by state RFRAs and state constitutions. NeJaime and Siegel are relying on offensiveness to demonstrate a compelling interest in overriding that protection. The speech cases say that preventing such harm is not a compelling interest. It is no more compelling when invoked in response to a state or federal RFRA. Here too the protection comes not from the Speech Clause, but from these sources of state law. The speech cases merely inform the meaning of compelling government interest.

Moreover, NeJaime and Siegel never acknowledge the dignitary harm on the religious side. Those seeking exemption believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates. Some believe that assisting with an abortion or a same-sex wedding would destroy that relationship forever. They believe that they are being asked to do serious wrong that will torment their conscience for a long time after, perhaps forever. These are among the harms religious liberty is intended to prevent, and an expressive harm on the other side cannot justify inflicting such harms. The compelling-interest test of state and federal RFRAs is ultimately a balancing test with a substantial thumb on the scale in favor of religious liberty.⁵⁴ Viewed in purely secular terms, we have intangible emotional harms on both sides of the balance. The emotional harm to potential customers or patients cannot compellingly outweigh the emotional harm to believers.⁵⁵

IV. MATERIAL HARMS

NeJaime and Siegel also rely on the material harm to customers who must do without desired goods or services.⁵⁶ Unlike many of *Hobby Lobby's* more overwrought critics, they recognize that that decision rested on the fact that employees would still get free contraception.⁵⁷ Cases in which customers must do without present a different question.

I agree that conscientious objectors are generally not entitled to exemptions that would inflict significant material harm on others. "Significant" and

54. See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(5) (2012) (describing the compelling-interest test as "a workable test for striking sensible balances"); Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 151-52, 152 n.47 (2009) (collecting cases).

55. I am not here discussing race discrimination, which differs from the wedding and healthcare cases in many ways. See Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 231, 252-53 (Micah Schwartzman et al. eds., 2016) (summarizing some of those ways).

56. NeJaime & Siegel, *supra* note 1, at 2566-74.

57. *Id.* at 2530-31.

“material” are important modifiers. Most exercises of constitutional rights inflict costs on others;⁵⁸ there is no reason to require that religious liberty alone be entirely cost free. And not everyone who feels harmed is harmed in a legally cognizable way. Ever since John Stuart Mill argued that preventing harm to others is the only legitimate basis for regulation, people have learned to claim that whatever they do not like is harmful.⁵⁹ NeJaime and Siegel’s arguments about social meanings and offensiveness are examples. But material harms are cognizable and more likely to be significant. “Significant” is inevitably a matter of degree; so is “compelling.” But I agree that having to do without goods or services is generally a significant material harm.

In a market economy, refusals of service rarely result in anyone having to do without. Other purveyors of the same goods and services are generally eager for the business. The country is deeply divided on these moral issues; many business owners support reproductive rights and marriage equality. Many more are indifferent or simply more interested in profit than in making moral statements. And some adherents of the objecting faiths interpret their obligations more loosely, deciding, for example, that they have no right or ability to control their customers’ immorality. Even among those with serious moral objections, few are willing to endure the risk of litigation, boycotts, defamatory reviews, and vandalism that can follow in the wake of refusing service on conscientious grounds.⁶⁰

NeJaime and Siegel invoke the example of pharmacists who refuse to sell emergency contraception.⁶¹ But after detailed fact finding in the leading case on the issue, the court found no example of any woman unable to promptly get emergency contraception when she asked for it—despite several years of investigating and test shopping.⁶² The state stipulated that exemptions did “not pose a threat to timely access.”⁶³ We have only a handful of wedding cases, and a year after *Hobby Lobby*, the government knew of only eighty-seven for-profit employers conscientiously refusing to provide contraception or

58. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

59. See Douglas Laycock, *God vs. the Gavel: A Brief Rejoinder*, 105 MICH. L. REV. 1545, 1546-47 (2007) (briefly elaborating this point).

60. See Laycock, *supra* note 55, at 253-54 (documenting examples).

61. NeJaime & Siegel, *supra* note 1, at 2557-58.

62. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 946-51 (W.D. Wash. 2012), *rev’d on other grounds sub nom. Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *petition for cert. filed*, (U.S. Jan. 4, 2016) (No. 15-862).

63. *Id.* at 989 (emphasis omitted).

emergency contraception.⁶⁴ Not every refusal gets litigated or publicized, and more people would refuse to actively participate in abortions, where the moral objection runs deepest. But these are remarkably small numbers in a nation with nearly 150 million self-identified Catholics and evangelicals⁶⁵ (plus of course many smaller faiths with similar conservative moral views).

When a moral objection is widely held, the risk that some customers will face refusal goes up. If a local monopolist or a large fraction of the sellers in a market are refusing service, so that people have difficulty buying things they want or need, the government's interest in requiring compliance generally becomes compelling. But whether commerce has actually been so restricted is an empirical question. I have seen no evidence that we are close to this situation for marriage equality or gay rights in any city, even in the South. There may be small rural communities with only one florist or bridal shop, and some of these communities may have a same-sex couple planning a wedding. We can deal with such cases if they ever arise, but my position has always been that if the next available provider is seriously inconvenient, there is a compelling interest in requiring local monopolists to serve all comers. One who insists on living by his own values cannot be allowed to occupy a blocking position that prevents others from doing the same.

Reproductive healthcare is different. The principal obstacle to abortion access is not conscience protection, but hostile regulation of willing abortion providers. And the religious objection to participating in abortion is so grave that we should not compel medical providers to assist merely to avoid inconvenience to patients. But we do have a serious problem with a small minority of urgent cases. Some Catholic hospitals have local monopolies in smaller cities. A Catholic hospital may be the only hospital in a woman's insurance network or the only hospital where her doctor has admitting privileges. At least some of these cases are genuine emergencies, where treatment is urgently needed and the best or standard treatment is to terminate the pregnancy.

The gravity of the moral objection makes these reproductive-care cases difficult, but there are some things that religious liberty cannot protect. A religiously motivated hospital has no right to deceive or mislead a patient, telling her that no treatment is available when it knows that other providers would offer treatment. At least if time is short, it has no right to withhold

64. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,332 (July 14, 2015).

65. In the most recent large-scale survey, self-identified Catholics were 20.8 percent of the population, and evangelicals were 25.4 percent. PEW RES. CTR., *America's Changing Religious Landscape* 3-4 (May 12, 2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf> [<http://perma.cc/UY59-Z23X>]. The population is approaching 323 million. U.S. CENSUS BUREAU, *Population Clock*, <http://www.census.gov> [<http://perma.cc/ES2C-9ZD8>] (last visited Jan. 15, 2016). Combining the two groups, 46.2% of 323 million is 149.2 million.

information about those other providers. And if there is no time to refer the patient elsewhere, or if no other source of treatment is accessible, it has no right to endanger a patient by withholding urgently needed treatment. These medical harms are material and significant, and the hospital is, at least for the moment, effectively a monopolist. The government has a compelling interest in preventing such harms. I do not know how often these things happen in Catholic hospitals, but the literature describes such cases⁶⁶ and lawsuits allege them.⁶⁷

There are also nonemergency cases. The example I hear about most often is a woman hospitalized for a caesarian section who wants a tubal ligation at the same time. Doing this sterilization elsewhere at a later time involves a second operation and a second general anesthetic, with additional expense, discomfort, and time off work or away from the new baby, and at least some additional risk.

NeJaime and Siegel are right that healthcare-conscience legislation often fails to address these problems.⁶⁸ A few state conscience laws have explicit emergency exceptions;⁶⁹ most do not. But federal law requires hospitals to treat or stabilize patients in emergencies,⁷⁰ and that federal mandate overrides all contrary state law. Courts have not decided whether the federal emergency-treatment law controls over the federal conscience laws or vice versa, but the answer should be that in cases of conflict, the emergency-treatment law is confined to true emergencies in which there is no time to transfer the patient, and, so confined, the obligation to respond to emergencies controls.

Because the most difficult cases arise in short-lived medical emergencies, these issues are hard to litigate. Political deadlock prevents legislative solutions. So the problem has lingered. NeJaime and Siegel have no better mechanism than I do for forcing a resolution.

But if we care about the rights of all Americans, religious and secular, left and right, then it is reasonably clear what the resolution should be. Conscientious objection to reproductive healthcare should be respected as far as possible—up to the point at which it would inflict significant harm on patients. Hospitals in emergencies must treat or refer, and if there is no time to refer, they must treat, including terminating pregnancy where necessary. Catholic hospitals will of course resist. But if such a duty were clearly

66. See, e.g., Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1502, 1518-25, 1552 (2012) (discussing examples involving abortion, end-of-life care, and other issues).

67. See *Means v. U.S. Conference of Catholic Bishops*, No. 1:15-cv-353, 2015 WL 3970046 (W.D. Mich. June 30, 2015), *appeal docketed*, No. 15-1779 (6th Cir. July 1, 2015); *ACLU v. Trinity Health Corp.*, No. 2:15-cv-12611 (E.D. Mich. filed July 23, 2015).

68. NeJaime & Siegel, *supra* note 1, at 2542.

69. See Sepper, *supra* note 66, at 1510 n.26.

70. 42 U.S.C. §§ 1395dd(b), (c) (2012).

established, Catholic hospitals would become more cooperative in delegating reproductive healthcare to nearby community clinics or other non-Catholic facilities. Catholic hospitals do not want to either treat or refer, but if forced to choose, they would most likely refer. In cities too small to sustain such alternative providers, Catholic hospitals must treat in emergencies or sell their hospitals, entirely or in part, to someone who will.

V. COMPLICITY CLAIMS

The idea of “complicity claims” is rhetorically central to NeJaime and Siegel. “Complicity claims,” or “complicity-based conscience claims,” appears seventy-two times, including in their title. But the idea has no clear meaning and is irrelevant to their larger points about preventing harm to would-be customers.

They begin with the category of conscientious refusal to provide goods or services to another. This category has a real but variable relationship to the idea of complicity; conscientious objectors who refuse to provide goods or services they view as immoral *sometimes* believe that they would be complicit in the immorality of their customers. But even when that is true, complicity is not doing any analytic work. NeJaime and Siegel are concerned with dignitary and material harm to potential customers, whatever the nature of the religious practice causing that harm, and without regard to whether the objector says that “I would be complicit in your sin,” or “I would be sinning myself.”

Their central argument—about exemptions reinforcing political dissent—depends on a very different category: religious teachings with large numbers of adherents. But complicity is irrelevant to the number of adherents. Consider a Jewish complicity claim. Details do not really matter, but suppose an Orthodox Jew with a wholesale grocery business refuses to stock or sell nonkosher items, even if prepackaged and sealed to prevent contamination of his other inventory. And suppose he says the reason is that he does not want to tempt or assist any other Jew to consume the nonkosher items. And suppose that some part of this practice somehow runs afoul of an obscure government regulation.⁷¹ This is a complicity claim in NeJaime and Siegel’s terms. But there is no national political battle over nonkosher food, and NeJaime and Siegel would presumably not worry about the social meanings created by the small religious minority that the shopkeeper represents. If some customers are harmed or inconvenienced, complicity does not capture the source of that harm, which results from the unavailability of nonkosher items, not from the wholesaler’s motives. Complicity is irrelevant to NeJaime and Siegel’s

71. I am grateful to Michael Helfand for advice with respect to this hypothetical.

argument—unless they mean for readers to assume that complicity claims are a lesser kind of claim, less deserving of protection.

Complicity also fails to capture the full extent of the religious claim. The category of complicity claims is fuzzy, and it does not indicate lack of weight or moral gravity in the religious objection. NeJaime and Siegel seem to acknowledge that refusing to perform or assist an abortion is not a complicity claim; it is a claim that the conscientious objector’s own conduct would be religiously prohibited.⁷² But even with what we might all agree are complicity claims, the conscientious objector still believes that his own conduct would be religiously prohibited. Whether it is directly or in itself prohibited, or prohibited only because of complicity in the wrongdoing of another, is hard to say, irrelevant to their arguments about harm to customers and patients, and certainly not worth litigating.

The owners of Hobby Lobby, the Greens, said they would be complicit in the possible abortions caused by the drugs and devices the law required them to provide.⁷³ But they also said that their “religious beliefs will not allow them to do precisely what the contraceptive-coverage mandate demands.”⁷⁴ They were required to contract for, and pay for, drugs and devices that could not be used in any way without creating a risk, beyond anyone’s power to control, of causing what the Greens understood to be the killing of an innocent human being. These drugs and devices were not just items on a list of insurance choices: Employees could freely choose these drugs and devices, without cost and without reducing other benefits available under the insurance policy, because the Affordable Care Act abolished coverage limits except for specific nonessential services.⁷⁵ In the Greens’ view, they were required to provide prepaid abortifacients.

It is always useful to test our intuitions by changing the political valence of these questions. If the Greens provided a prepaid heroin benefit to their employees, or a prepaid prostitution benefit, would they be doing wrong just by offering it, tempting their employees to use it? Or would they merely be complicit in the wrongdoing of those employees who chose to take advantage of the benefit? It is not a line worth drawing, and characterizing it one way or the other does not change the moral stakes.

To their credit, NeJaime and Siegel do not question the Greens’ sincerity, and they recognize the “richly elaborated” theological discussion of complicity

72. See NeJaime & Siegel, *supra* note 1, at 2537 (describing such objectors as “directly involved” in the procedure).

73. Brief for Respondents at 9, 35, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

74. *Id.* at 10; *accord id.* at 34-35.

75. 42 U.S.C. § 300gg-11 (2012).

issues.⁷⁶ But like many others on the anti-exemption side of these issues, NeJaime and Siegel have trouble taking the conscientious objectors' claims seriously. They do not appear to genuinely comprehend that the Greens believed they were required to pay to kill people. Revealingly, NeJaime and Siegel repeatedly italicize the fact that some people object to referring for abortion; they seem to think this claim is so extreme as to be more-or-less self-refuting.⁷⁷ I have already said that in some cases, conscientiously objecting medical providers have a duty to refer for abortion, or even to perform an abortion. But that is an extraordinary thing to demand, justified only by a compelling interest in preventing significant medical harm to a patient in immediate danger.

We cannot properly balance the religious-liberty claims in these cases unless we take the religious claims seriously. Fully crediting the pro-life claim goes to whether it is “merely” a complicity claim; it also goes to balancing interests and to the magnitude of harm on the religious side. If you really believe abortion is an unjustified killing, you will be horrified at either performing it or referring for it. If I asked any reader of this Response to kill someone for me, she would refuse, and if she thought I was serious, call the police. If I asked the reader not to do it herself, but only to refer me to a good hit man, she would refuse with similar depth of feeling. And if I demanded that she pay the hit man in advance, to be available to kill for me whenever needed, and threatened her with huge penalties if she refused, she would be in approximately the position that the Greens believed themselves to be in.

I do not share the Greens' view of these matters, and neither, obviously, do NeJaime and Siegel. But the Greens' view is perfectly logical within its premises: A new and unique genetic identity is created at the moment of fertilization, not later, and the FDA-approved labels say that emergency contraception may sometimes work by preventing the fertilized egg from implanting in the uterus.⁷⁸

The same-sex wedding cases are less dramatic, but similar with respect to complicity. The wedding vendors do not believe that only the couple is sinning. The vendors believe that they themselves sin by assisting and promoting what they understand to be an inherently religious ceremony that, in their view, makes a mockery of that ceremony and of the inherently religious relationship of marriage. This claim is clearest when the services are most creative—when the wedding planner is asked to make the wedding the best it can be, or the photographer is asked to show it in the best possible light. But all wedding services are creative to some degree, and all are designed to make the

76. NeJaime & Siegel, *supra* note 1, at 2522-23.

77. *Id.* at 2538-41.

78. See Laycock, *supra* note 27, at 852-53 & nn.77-81 (collecting sources on the debate over the FDA labels).

wedding better and more memorable. Wedding vendors are thus asked to improve and promote what some of them understand to be a religious ceremony that God prohibits. When they say they cannot do that, it is about far more immediate issues than complicity in the acts of the couple.

Here we have actual cases to test our competing intuitions. A conservative Christian baker has been ordered to make cakes for same-sex weddings; another baker, in the same jurisdiction, has been protected in his refusal to make cakes decorated with words and images opposing same-sex marriage. In the Christian baker's case, the court denied that there is any implicit message in a wedding cake,⁷⁹ and found discrimination on the basis of the customers' sexual orientation.⁸⁰ In the other case, an administrative law judge said that the more liberal baker could refuse to create an explicit message – that is, the words and images in frosting on top of the cake – and that refusal based on the message did not discriminate on the basis of the customer's religion.⁸¹

For reasons already explained, I believe that this distinction between explicit messages and alleged implicit messages is mistaken: Both cakes send important messages, and both bakers should be protected in refusing to express the message to which they object. More to the point here, NeJaime and Siegel cannot adopt this distinction. Their claim is precisely that the conservative Christian baker's refusal sends a message and creates a "social meaning." And if that is so, then baking the cake must send a different message and create a different social meaning. The court's reason for denying the conservative Christian baker's claim is that he sends no message. But NeJaime and Siegel's reason is that they claim a compelling interest in suppressing the social meaning that his refusal communicates. And they would presumably protect the liberal baker because they approve the social meaning that his refusal communicates.

Would they also deny protection to the printer who refused to print T-shirts with an explicit message promoting a gay pride festival? This case is doctrinally like that of the liberal baker: The printer objected to the explicit message and not to any personal characteristic of his customers.⁸² But this printer's refusal contributes to the social meaning that NeJaime and Siegel wish to eliminate. Should this printer's refusal be treated as discrimination, so

79. *Craig v. Masterpiece Cakeshop Inc.*, No. 14CA1351, 2015 WL 4760453, at *10-13 (Colo. App. Aug. 13, 2015).

80. *Id.* at *8.

81. *Jack v. Azucar Bakery*, No. P20140069X, at 4 (Colo. Civil Rights Div. Mar. 24, 2015), http://media.thedenverchannel.com/document/2015/04/23/Jack_Williams_V_Azucar_Bakery_17228465_ver1.o.pdf [<http://perma.cc/B5WS-3T8E>].

82. *Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, at 7-13 (Ky. Cir. Ct. Fayette Cnty. Apr. 27, 2015) (No. 14-CI-04474), <http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf> [<http://perma.cc/L9YJ-PG2W>], *appeal docketed*, No. 2015-CA-000745 (Ky. Ct. App. May 15, 2015).

that his resistance can be stamped out? Once they commit to viewpoint discrimination as compelling interest, it is hard to find a stopping point. In each of these cases, I infer NeJaime and Siegel's likely view directly from their premise that stamping out disapproved social meanings is a compelling government interest.

A merchant who refuses service to a customer for reasons of conscience risks litigation, boycotts, and more. Those who take these risks, on either side of the various issues, believe that they themselves would be doing serious wrong by complying with their customers' requests. It mischaracterizes their claim to say that they are concerned only with complicity in the wrongdoing of another. And the complicity label tells us nothing about the seriousness of the claim.

CONCLUSION

Religious liberty is most needed for the religions with which we deeply disagree. NeJaime and Siegel have let the political argument over the underlying issues distort their analysis of the legal argument over liberty. When distinguished scholars persuade themselves that religious conservatives forfeit explicit compelling-interest protections for religious liberty by making related political arguments on disputed public issues, their argument has gone seriously awry.

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