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# First Amendment Harms

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David Rasheed Ali is an observant Muslim and a prison inmate who requested an exemption from the prison's restrictive policies that prohibited him from wearing a *kufi*, a knit skullcap, as required by his religious beliefs.<sup>1</sup> One might be tempted to conclude that wearing a *kufi* is both harmless and costless, making the decision to grant a religious exemption relatively straightforward. But even something as seemingly innocuous as religious head coverings contains a number of hidden potential costs and harms: hundreds of thousands of dollars in estimated redistributed staff time and resources to implement a new policy;<sup>2</sup> fewer resources for other inmates for better healthcare, activities, facilities, or food;<sup>3</sup> heightened physical risk for prison guards who must enter an inmate's "strike zone" to search personal items;<sup>4</sup> and increased risk of deadly contraband being secreted in a headgear hiding spot.<sup>5</sup>

On the other hand, failing to grant an exemption causes spiritual and dignitary harm to Ali, who must violate his conscience. Additionally, numerous studies suggest that providing religious protections for inmates decreases prison violence and results in significant rehabilitative positive externalities, not just for other inmates and securities but for society at large.<sup>6</sup> In light of these competing and varied externalities, how should we think about Ali's religious exemption request?

ILLUSTRATIONS BY JAMES STEINBERG



### THIRD-PARTY HARM THEORY

These sorts of questions about harm related to religious exemptions are particularly weighty at this specific moment in history, when religious exemptions have perhaps never been more controversial or hotly debated in legal scholarship. Especially in light of Supreme Court cases like *Hobby Lobby* and *Masterpiece Cakeshop*, some scholars have advanced new theories that would place strict limits on government’s ability to grant religious exemptions that result in harm to third parties who do not benefit from that religious practice.<sup>7</sup> These theories have inspired recent legislation (including the 2019 Equality Act and the 2018 Do No Harm Act)<sup>8</sup> and are gaining traction among some judges.<sup>9</sup> And just recently, four Justices on the Supreme Court signaled that they may want to revisit the Court’s jurisprudence for offering religious exemptions.<sup>10</sup>

Iterations of this theory, referred to in this article as the “third-party harm theory,” rely on both descriptive and normative claims. Descriptively, the theory asserts that Supreme Court cases are best understood as categorically prohibiting religious exemptions that result in cognizable harm to third parties. Normatively, other third-party theorists make the claim that it is “disturbing” to “forc[e] third parties to pay for the exercise of [religious] rights” of other parties.<sup>11</sup>

What has not received attention in the literature is a theoretical critique of the generic harm principle on which the theory relies. Specifically, proponents of the third-party harm theory echo longstanding views—articulated long ago by John Stuart Mill—that the ability of individuals to exercise their religious rights depends on whether such liberty does not cause “harm to others.”<sup>12</sup>

Third-party harm theorists take this harm principle a step further: Whereas Mill argued that harm was a necessary, though not always sufficient, condition justifying government interference with individual liberty, third-party harm theorists argue that the mere presence of harm is a sufficient condition *requiring* government restriction of religious rights. This significantly raises the stakes for determining what counts as cognizable harm under their theory.

### “HARM” AS A TERM OF ART

Reliance on a harm principle as justification for government interference has strong intuitive appeal. At least superficially, it seems to be a theoretical shortcut for avoiding other difficult moral questions about which causes a government should or should not advance—a question on which there is little consensus in a pluralistic society. Pointing instead to harm seems like a neutral method for bypassing such moral conundrums. If this were true, there is no question that this method would present a desirable means of making a great many normative decisions in society. Indeed, this sort of principle for decision-making has been attempted in numerous fields over numerous decades, from criminal law to environmental law.<sup>13</sup> But unfortunately, significant moral question begging is involved in determining what exactly we mean by “harm.”

If the harm principle is broadened to include more expansive notions, like dignitary harm, arguably “every action generates some harm cognizable under the expanded harm principle.”<sup>14</sup> Thus, any action would justify government restriction of rights. The most expansive notion of harm would include a subjective understanding, where any perceived negative impact on someone counted as harm. Unless we use this broad subjective standard, then “harm” must become a term of art that includes some sorts of interests and excludes others. But once a technical definition has been adopted, that definition must operate on top of a deep normative theory about which types of harm count and why.

The normative appeal of the harm principle stems from its superficial simplicity. But once “harm” becomes a term of art, the normative justification for the theory becomes quite complex.<sup>15</sup> The plausibility of the harm principle is built on the assumption that there will be a consensus about what constitutes harm. But there is no such consensus, only a plurality of views of what harm is.<sup>16</sup>

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## LACK OF A TRUE DEFINITION

Indeed, the lack of consensus on harm is highlighted by the fact that three different groups of third-party harm theorists understand harm as a term of art to mean three very different things: (1) a materiality standard, meaning a burden that is relevant to decision-making;<sup>17</sup> (2) an undue hardship standard for subsets of the population;<sup>18</sup> and (3) “targeted material or dignitary harms” on those who “do not share the [religious] claimant’s belief.”<sup>19</sup> None of these scholars provide clear normative justifications on why certain types of harm count under their definition and others do not.

In addition, recently proposed legislation inspired by iterations of these third-party harm theories relies on an entirely different definition of harm, specifically the Do No Harm Act. This act defines harm as including a specific laundry list of events, such as any exemption from anti-discrimination laws, provisions of health-care services, and government contracting requirements.<sup>20</sup> Given this utter lack of consensus on what should count as harm, it is not surprising that scholars in other fields have observed the way a heavy reliance on a generic harm principle almost always collapses in upon itself.<sup>21</sup>

The normative and doctrinal shortcomings with this undertheorized reliance on generic harm are highlighted by measuring the purported aims of this theory against its over- and underinclusive results. Specifically, it is overinclusive because if applied in an even-handed way, the theory would actually remove religious exemptions for groups like religious minorities that third-party harm theorists generally acknowledge should receive protection.<sup>22</sup> These groups include Muslim prison inmates, Sikhs in the workplace, and Amish communities.<sup>23</sup> The theory is normatively underinclusive because it fails to provide any explanation whatsoever for why some competing third-party harms are simply ignored in the calculus. Moreover, special prohibitions on religious harm, including things like dignitary harm, cannot be normatively justified by the argument that such harms are unique. A comparison of the types of harm we permit in the speech context demonstrates that religious harm is quite similar in all meaningful respects.

## THREE TYPES OF HARM

Given the normative and descriptive shortcomings of the third-party harm theory, it is not surprising that courts are not, in fact, treating the presence of generic harm alone as categorically requiring the government to restrict religious rights. Instead, at times courts recognize and allow significant amounts of harm to third parties in order to protect every type of First Amendment right—not just religious rights. While the presence of harm may be a necessary condition to justify the government’s restriction of First Amendment rights, the harm must also have certain characteristics.

In light of Supreme Court cases like *Hobby Lobby* and *Masterpiece Cakeshop*, some scholars have advanced new theories that would place strict limits on government’s ability to grant religious exemptions that result in harm to third parties who do not benefit from that religious practice.

Based on these characteristics, courts weigh a variety of competing harms, classifying them in three specific categories: (1) prohibited harms (which are categorically impermissible); (2) probative harms (which can be balanced against one another); and (3) inadmissible harms (which are given no weight, regardless of how severely or disproportionately the third parties experience them). A careful review of religious exemption case laws reveals that courts are not treating any harm to third parties as categorically prohibited. And competing harms always arise in the context of the protection of First Amendment rights.

### THREE NORMATIVE QUESTIONS ABOUT HARM

This descriptive framework has important normative implications. A clear understanding of the role that harm

plays in courts' treatment of various First Amendment rights highlights the fact that the protection of any right inherently concerns harms competing from either side of the ledger. The real question with which courts are often grappling is what the proper balance of "harm" ought to be. This framework does not treat the presence of any harm as a sufficient condition for restricting any right. Rather, it treats harm as part of an equation: however we are defining harm, it must be weighed in a consistent way for the government to determine the most socially beneficial outcome.

In this vein, this article proposes three normative questions we *should* be asking to the extent that we are treating harm as a relevant moral consideration in the First Amendment context.

#### 1 Are costs justified by the social goods they provide?

When we are not fixated on asking whether a particular right is harmful or not (acknowledging that it always will be at some level), we can ask the much more fruitful normative question of whether inevitable costs are justified by providing important social goods.<sup>24</sup> Sometimes localized externalities are arguably balanced by a more diffuse social benefit. For example, one might consider the localized externalities resulting from state or local taxes related to the support of education in such a way.<sup>25</sup> Even families who do not have school-age children benefit from having a more educated citizenry and even higher property values in their neighborhoods when schools are high quality.<sup>26</sup> If we view externalities in this cost/benefit context, perhaps the most important normative question to ask is whether the cost of a right is a "good deal" for society. Where the social goods that society receives in exchange for harm are significant, then protection of the right might be deemed a social bargain, notwithstanding significant harm.<sup>27</sup>

The costs and benefits of free speech provide a particularly salient example of this sort of trade-off. Free expression has been justifiably described as a very costly right,<sup>28</sup> but free expression has also been described as one of America's "most precious" rights because its protection provides enormous social goods generally enjoyed by society.<sup>29</sup> These goods make it more likely that violations of other rights will be reported, operate as a precondition for democratic self-government, ensure political accountability, decrease government corruption and abuses of power, improve the quality of policy-making, and facilitate a host of other artistic, psychological, economic, moral, and even religious functions.<sup>30</sup> In less-developed countries, freedom of speech has even helped prevent famines.<sup>31</sup>

As Professor Joseph Raz has remarked:

*If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.<sup>32</sup>*

In other words, individuals in a society without freedom of expression suffer more from the loss of social goods that such a society will inevitably experience than the individual would suffer from lacking such freedoms herself and yet living in a society that generally protects

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them. Protection of rights can thus secure goods for individuals far beyond those who actually enjoy the rights, which arguably justifies the high cost of protecting such rights.

Freedom of religion has similarly been described as a right that provides a significant social bargain to society, notwithstanding its costs.<sup>33</sup> This was something a number of the American founders believed. In his farewell address in 1796, President George Washington stated:

*Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. The mere politician, equally with the pious man, ought to respect and cherish them.*<sup>34</sup>

This argument has contemporary force as well. As Professor Rick Garnett has observed, religious accommodation provides a number of social goods, even for those who do not practice a religion at all.<sup>35</sup> One empirical study by Brian and Melissa Grim indicates that “[r]eligion annually contributes nearly \$1.2 trillion of socio-economic value to the U.S. economy.”<sup>36</sup> These include things like “130,000 alcohol recovery programs,” or “120,000 programs to help the unemployed,” or about 26,000 “active ministr[ies] to help people living with HIV-AIDS.”<sup>37</sup> Similarly, Professors Stephen Holmes and Cass Sunstein have argued that one of the most important contributions of religious liberty is “peaceable social coexistence,” as this right “permit[s] us to be autonomous in our deepest convictions” while still allowing “our religiously heterogeneous society to operate passably well.”<sup>38</sup> Professor Douglas Laycock has likewise recently observed that protecting religious liberty “reduces social conflict” and “reduces human suffering.”<sup>39</sup> Thus, Americans are willing to bear significant costs associated with rights imposed upon them in part because a whole range of precious public goods result from such protection of rights.

The social benefits that flow from both free speech and religious rights suggest that thick protections of these rights are warranted, even if at times costly for society and for third parties. These sorts of thick protections are illustrated by constitutional or statutory frameworks that require the government to satisfy strict scrutiny and demonstrate that it has a “compelling” justification for disregarding free speech or religious rights. Indeed, this is the standard required under the Religious Freedom Restoration Act (or RFRA). But once the government can demonstrate a compelling interest, for purposes such as preventing otherwise unavoidable significant harm to third parties, then the normative explanation is that at this point the cost is too great. Protecting that right is no longer a social bargain, and thus other harms outweigh that religious harm. This is the sort of normative question—woven into current legal frameworks—that we ought to be asking.

## 2 Can institutions be modified to mitigate avoidable harms?

Professor Joel Feinberg argues in his classic work *Harm to Others* that some sorts of harm arise from “bad social institutions,” meaning institutions that cause conflicts that could be avoided, or at least mitigated, if the institution were modified.<sup>40</sup> In other words, perhaps much criticism regarding harm lies within a policy or institution that puts religious believers and other rights on a predictable and easily avoidable clash of harms.

For example, one of the high-profile contests of harms between religious liberty and third-party rights recently arose in the controversial case of Kim Davis, a former county clerk in Kentucky. After the Supreme Court legalized gay marriage, Ms. Davis was unwilling to issue marriage licenses to same-sex couples. Ms. Davis was also unwilling to have any marriage licenses for same-sex couples issued in her name. These religious objections resulted in preventing any same-sex couple in the county from obtaining a marriage license to which they were lawfully entitled. The denial of government services for these same-sex couples was a significant harm. On the other hand, Ms. Davis was ultimately sent to jail for five days and held in contempt of court because she was unwilling to violate her conscience.

Other states handled similar conflicts of conscience in a very different way: by modifying their institutions to mitigate harm to both parties. Utah, for example, passed a law that would

allow clerks to opt out of performing marriages for conscience-based reasons, so long as the office ensured that a willing clerk was on duty and available to perform marriages for any couple who requested it.<sup>41</sup> One need not agree with the policy or even the legality of such a compromise to acknowledge that this sort of institutional modification mitigated harms on both sides of the ledger.

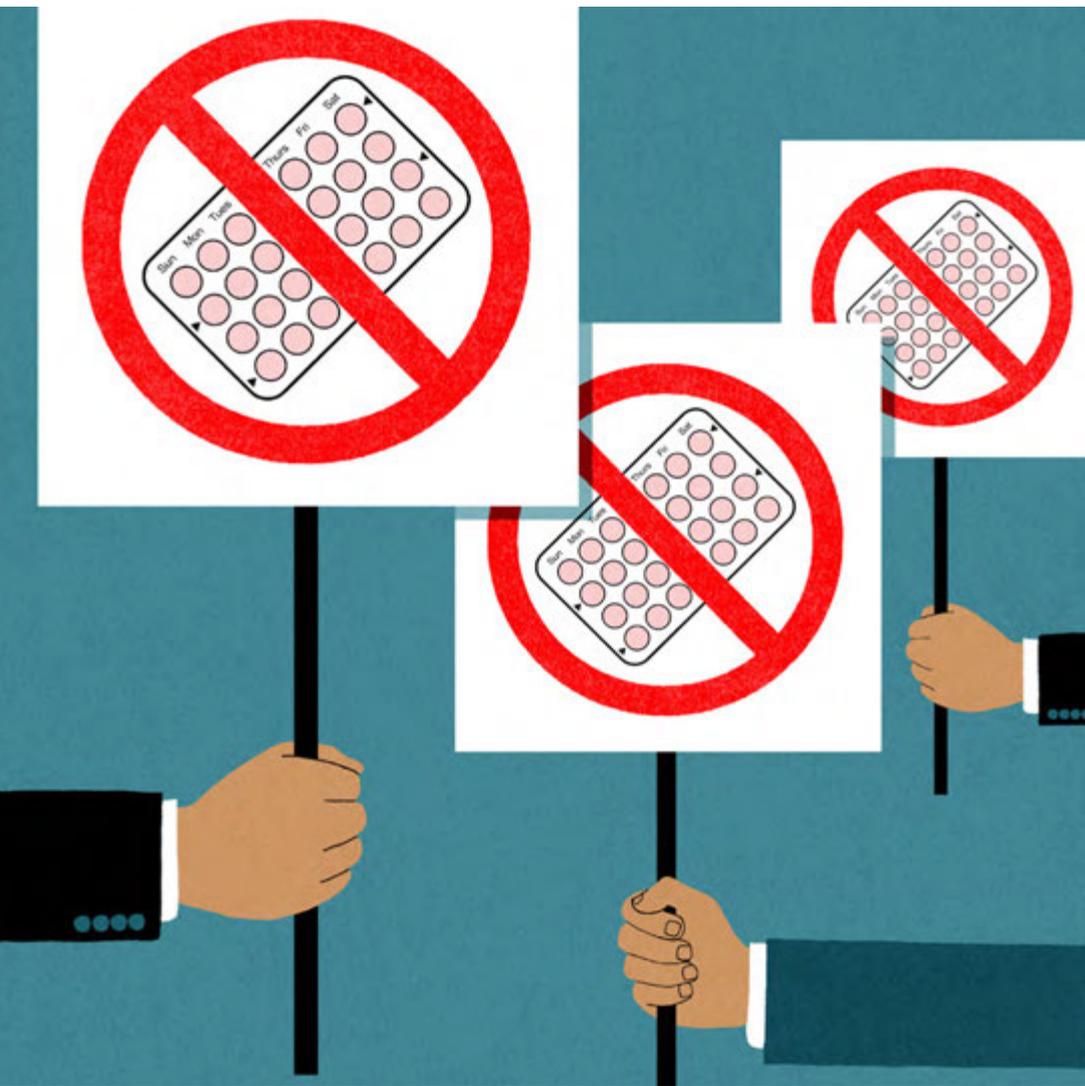
③ *Can the harm be distributed more justly?*

A final important question is whether the distribution of harm is just with respect to how benefits flowing from harm are distributed when compared to how the corresponding harm is being distributed throughout society. As third-party harm theorists have rightly observed, a just society should work to defray costs that are disproportionately borne by a subset of the population. Relying on the work of Professor Frederick Schauer, third-party harm theorists state, “It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries.”<sup>44</sup> In many cases, government-funded alternatives to more evenly disperse externalities may provide precisely the sort of uncoupling of harm that Professor Schauer advocates for. And potential government-funded programs are relevant under the religious exemption framework of RFRA. Indeed, this was an important concern for the Supreme Court in its *Hobby Lobby* decision under RFRA’s “less restrictive alternative analysis.”

In *Hobby Lobby* the Court noted that the “most straightforward way” of ensuring that harms would not be disproportionately born by third parties “would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.”<sup>45</sup> The Court flirted with the idea that RFRA may, at times, require the creation of “a new, government-funded program” in order to both accommodate religious exercise and avoid disproportionate harms to third parties.<sup>46</sup> Some third-party harm theorists have criticized this approach as “not politically viable,” which is certainly a reasonable practical concern.<sup>47</sup>

However, on June 1, 2018, the Department of Health and Human Services proposed a new regulation that would expand the definition of “low-income family” under Title X to include “women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers’ religious beliefs or moral convictions.”<sup>48</sup> This proposed rule would have ensured that if someone actually loses employer-sponsored contraceptive coverage as a result of religious exemptions, she will still have access to “free or low-cost family planning services,” including contraceptives.<sup>49</sup> While only a proposed rule, this sort of expanded government program provides a good example of institutions or policies that can be revised so as to distribute harm more justly and decrease the magnitude of harm on both sides of the ledger. This line of inquiry may be a constructive area where both those who seek to avoid third-party harm and those who defend religious exemptions could find common-ground solutions aimed at dispersing any costs that society must incur to reap important social goods through the protection of conscience rights. cm

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NOTES

- 1 Ali v. Stephens, 822 F.3d 776, 781 (5th Cir. 2016).
- 2 Id. at 796 (estimating \$702,500 across the prison annually to implement a new policy allowing inmate use of headgear and implementing necessary safety precautions).
- 3 See, e.g., Appellants’ Initial Brief, United States v. Sec’y, Fla. Dep’t of Corr., 828 F.3d 1341 (11th Cir. 2016) (No. 15-14117), 2015 WL 9412274.
- 4 Cox v. Stephens, No. 2:13-CV-151, 2015 WL 1417033, at \*9 (S.D. Tex. Mar. 27, 2015) (discussing the strike zone).
- 5 Ali, 822 F.3d at 785, 794.
- 6 See Todd R. Clear and Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. OFFENDER REHAB. 127, 154 (2002); Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 148 (1997) [hereinafter Johnson et al., *Religious Programs*] (internal citations omitted); Thomas P. O’Connor and Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHAB. 11 (2002); see also Todd R. Clear and Marina Myhre, *A Study of Religion in Prison*, 6 INT’L ASS’N RES. & CMTY. ALT. J. ON CMTY. CORR. 20 (1995); Byron R. Johnson, *Religiosity and Institutional Deviance: The Impact of Religious Variables upon Inmate Adjustment*, 12 CRIM. JUST. REV. 21 (1987); Byron R. Johnson et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. CONTEMP. CRIM. JUST. 32 (2000) [hereinafter Johnson, *Systematic Review*].
- 7 Frederick Mark Gedicks and Rebecca G. Van Tassel, *Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 323 (Micah Schwartzman, et al. eds., 2016); IRA C. LUPU AND ROBERT W. TUTTLE, *SECULAR GOVERNMENT RELIGIOUS PEOPLE* 236 (2014) (discussing the “Establishment Clause

- problem under Caldor of absolutely preferring religious interests to competing secular interests, and doing so at the expense of private third parties”); Douglas NeJaime and Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 200* (Susanna Mancini and Michel Rosenfeld eds., 2018); NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 49–70* (2017); Nelson Tebbe, Micah Schwartzman and Richard Schragger, *How Much May Religious Accommodations Burden Others?*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215–39* (Holly Fernandez Lynch, et al. eds., 2017); Nelson Tebbe, Micah Schwartzman and Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* (Susanna Mancini and Michel Rosenfeld eds., 2018); Frederick Mark Gedicks and Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 *HARV. C.R.-C.L. L. REV.* 343 (2014); Andrew Koppelman and Frederick Mark Gedicks, *Is Hobby Lobby Worse for Religious Liberty Than Smith?*, 9 *ST. THOMAS J. L. & PUB. POL’Y* 223 (2015); Douglas NeJaime and Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *YALE L. J.* F. 201, 204–05 (2018); Micah Schwartzman et al., *The Costs of Conscience*, 106 *KY. L. J.* 781, 786 (2018).
- 8 Equality Act, H.R. 5, 116th Cong. (2019), *available at* [www.congress.gov/bill/116th-congress/house-bill/5/text](http://www.congress.gov/bill/116th-congress/house-bill/5/text); Do No Harm Act, S. 2918, 115th Cong. (2018), *available at* [www.harris.senate.gov/imo/media/doc/Do%20No%20Harm%20Act.pdf](http://www.harris.senate.gov/imo/media/doc/Do%20No%20Harm%20Act.pdf); *see also* Hailey Lobb, *The Do No Harm Act Will Make Sure Doctors and Businesses Do Just That*, NATIONAL WOMEN’S LAW CENTER: THE LATEST (May 24, 2018), [nwlc.org/blog/the-do-no-harm-act-will-make-sure-doctors-and-businesses-do-just-that](http://nwlc.org/blog/the-do-no-harm-act-will-make-sure-doctors-and-businesses-do-just-that); *Do No Harm Act*, HUMAN RIGHTS CAMPAIGN (Dec. 21, 2018), [www.hrc.org/resources/do-no-harm-act](http://www.hrc.org/resources/do-no-harm-act).
- 9 *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).
- 10 *See Kennedy v. Bremerton Sch. Dist.*, No. 18–12, 2019 WL 272131, at \*3 (U.S. Jan. 22, 2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (discussing the possibility of revisiting *Employment Division v. Smith*).
- 11 Schwartzman et al., *supra* note 7, at 810, 812.
- 12 John Stuart Mill, *On Liberty*, in *THE ESSENTIAL WORKS OF JOHN STUART MILL* 253, 263–66 (Max Lerner ed., 1961).
- 13 In the criminal context, progressives have argued that “victimless crimes” should not be prosecuted, such as drug use or prostitution. In response, conservatives have responded by pointing to harm related to such crimes and have also at times relied on a harm principle to justify banning things like pornography. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 *J. CRIM. L. & CRIMINOLOGY* 109, 139 (1999); *see also* Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein’s The Classical Liberal Constitution*, 8 *N.Y.U. J. L. & LIBERTY* 839, 956 (2014) (“Drug use, like suicide, is not a victimless crime. The victims of drug abuse include not only the abuser but also his family and his friends.”); Jerry Cederblom and Cassia Spohn, *A Defense of Retributivism Against Criticisms of the Harm-for-Harm Principle*, 43 *NO. 6 CRIM. LAW BULLETIN* Art. 4 (2007) (“We maintain that most crimes that are called ‘victimless’ do indeed have victims, that in these cases the harm-for-harm principle can be applied, and that in the remaining cases decriminalization and treatment are probably appropriate. Although drug use often is portrayed as a victimless crime, potential victims include children (if drugs are used while caring for children), motorists (if drugs are used while driving), and neighbors (if drug use results in neighborhood deterioration). Similarly, the practice of prostitution has both direct and indirect victims. Prostitutes themselves are often victims of their pimps.”). Conversely, in the environmental context some libertarians have argued that only when a landowner causes environmental harm to a neighbor should that justify government interference with the landowner. RICHARD EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY* 98–99 (1998); *see also* Donald J. Kochan, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 4 *MICH. J. ENVTL. & ADMIN. L.* 303, 322–23 (2015) (“[J]udicial land use controls—particularly nuisance—are designed to enforce the prohibition against harming others. Put differently, they prevent one from imposing impermissible negative externalities on others.”). But progressives have argued for a broader conception of harm that would include things like greenhouse gas emissions and other downstream externalities to the environment. EPSTEIN, *supra* (discussing progressive arguments).
- 14 EPSTEIN, *supra* note 13, at 102.
- 15 *See* STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE 70–106* (2010) (critiquing the harm principle on this basis in other contexts).
- 16 EPSTEIN, *supra* note 13, at 76 (“Should the application of the [harm] principle be limited to physical harm? What about competitive harms? Blocking of views? Personal offense? False or insulting words? No shortcut answers all the variations on the common theme.”).
- 17 Professor Gedicks and Van Tassell argue that harm means a “material” burden on others, meaning a burden that is “relevant . . . to decisions about how to act in some relevant way.” Gedicks and Van Tassell, *RFRA Exemptions*, *supra* note 7, at 365–66.
- 18 Professors Tebbe, Schwartzman, and Schragger argue that the proper inquiry is whether an accommodation imposes an “undue hardship” on others, which they described as a burden that is more than “de minimis.” Schwartzman et al., *supra* note 7, at 799 n. 86; *see also* TEBBE, *supra* note 7, at 63; Tebbe et al., *How Much May Accommodations Burden Others*, *supra* note 7.
- 19 Professors NeJaime and Siegel argue that cognizable harm only arises if “granting the religious exemption can inflict . . . targeted material or dignitary harms” on “those who do not share the claimant’s belief.” NeJaime and Siegel, *Conscience Wars*, *supra* note 7, at 200.
- 20 *See* Do No Harm Act, S. 2918, 115th Cong. (2018), *available at* [www.harris.senate.gov/imo/media/doc/Do%20No%20Harm%20Act.pdf](http://www.harris.senate.gov/imo/media/doc/Do%20No%20Harm%20Act.pdf).
- 21 *See, e.g.*, Harcourt, *supra* note 13, at 139–140; SMITH, *supra* note 16, at 70–106.
- 22 Schwartzman et al., *supra* note 7, at 786–87 (“Taxpayers have no reason to complain if the government uses their funds to lift burdens on a religious minority, provided the government is not advancing religion but protecting religious freedom, which is a secular good.”).
- 23 For a thoughtful discussion about why protection of minority religious groups is so important, *see* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 *WASH. U. L. Q.* 919, 945 (2004).
- 24 STEPHEN HOLMES AND CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 117* (2013).
- 25 Thanks to Professor Frederick Gedicks for this example.
- 26 *See* Gladriel Shobe, *Economic Segregation, Tax Reform, and the Local Tax* (draft on file with the author).
- 27 HOLMES AND SUNSTEIN, *supra* note 24, at 177.

The social benefits that flow from both free speech and religious rights suggest that thick protections of these rights are warranted, even if at times costly for society and for third parties.

- 28 Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321–22 (1992) (“The capacity of speech to cause injury in diverse ways contends with the goal of strong free speech (and free press) protection, and it is commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm it may cause. Given that existing First Amendment doctrine protects those who negligently and erroneously charge public officials and public figures with criminal behavior, immunizes from tort liability publications causing bodily injury or death, and shields from prosecution those who successfully abet violent criminal acts, it can scarcely be denied that a major consequence of a highly protective approach to freedom of speech and freedom of the press is to shelter from legal reach a set of behaviors that could otherwise be punished and a set of harms that could otherwise be compensated.”); *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 281 (1964) (“[O]ccasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.”).
- 29 HOLMES AND SUNSTEIN, *supra* note 24, at 107.
- 30 *Id.* at 107–08.
- 31 *Id.* at 108 (citing JEAN DREZE AND AMARTYA SEN, *INDIA* (Oxford: Oxford University Press, 1996)).
- 32 JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 39 (Oxford: Clarendon, 1995).
- 33 For an interesting discussion of the various contexts in which religious organizations provide social services, *see* Thomas C. Berg, *Partially Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341 (2016).
- 34 George Washington Farewell Address 1796; *see also* Arlin M. Adams and Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989).
- 35 Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 49 (2014) (“We all have a stake in efficient and transparent markets, functioning courts, and clean air. Similarly, we all benefit, whatever our religious tradition and whether or not we embrace or practice a religious faith at all, from practices and commitments—like the accommodation of religion—that place limits on the state, on its demands, and on its authority.”); Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, in JOHN WITTE JR. AND FRANK S. ALEXANDER, *CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* (2010).
- 36 Brian J. Grim and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. RES. ON RELIGION 1556 (2016); National Press Club, *\$1.2 Trillion Religious Economy in U.S.*, RELIGIOUS FREEDOM & BUS. FOUND. (Sept. 13, 2016), [religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us](http://religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us).
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- 38 HOLMES AND SUNSTEIN, *supra* note 24, at 182.
- 39 Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, *BYU L. REV.* (forthcoming 2019).
- 40 JOEL FEINBERG, *HARM TO OTHERS* 220 (1984) (“A form of competition is illegitimate if it is avoidable” (internal quotation marks omitted)).
- 41 S.B. 297, 2015 Leg., Gen. Sess. (Utah 2015); Dennis Romboy, *New law helps Utah avoid marriage license conflict playing out in Kentucky*, DESERET NEWS (Sept. 3, 2015), [www.deseretnews.com/article/865636031/New-law-helps-Utah-avoid-marriage-license-conflict-playing-out-in-Kentucky.html](http://www.deseretnews.com/article/865636031/New-law-helps-Utah-avoid-marriage-license-conflict-playing-out-in-Kentucky.html); Dennis Romboy, *US can learn from Utah on gay marriage license issue, professor says*, KSL (Sept. 4, 2015), [www.ksl.com/article/36356546](http://www.ksl.com/article/36356546); Ben Winslow, *Governor signs bill letting clerks opt out of same-sex marriages on religious grounds*, FOX 13 (Mar. 21, 2015), [fox13now.com/2015/03/20/governor-signs-bill-letting-clerks-opt-out-of-same-sex-marriages-on-religious-grounds](http://fox13now.com/2015/03/20/governor-signs-bill-letting-clerks-opt-out-of-same-sex-marriages-on-religious-grounds).
- 42 *Zubik v. Burwell*, No. 14-1418, 2016 WL 1203818 (U.S. Mar. 29, 2016).
- 43 *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016).
- 44 Schwartzman et al., *supra* note 7, at 810 (quoting Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992)).
- 45 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014).
- 46 *Id.*
- 47 Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J. L. & GENDER 153, 161 (2015).
- 48 83 Fed. Reg. 25,502, 25,514 (June 1, 2018) (to be codified at 42 C.F.R. pt. 59).
- 49 *Id.*