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First Amendment "Harms"

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What role should harm to third parties play in the government's ability to protect religious rights? The intuitively appealing "harm" principle has animated new theories advanced by scholars who argue that religious exemptions are indefensible whenever they result in cognizable harm to third parties. This third-party harm theory is gaining traction in some circles, particularly in light of the Supreme Court's pending cases in Little Sisters of the Poor *and* Fulton v. City of Philadelphia*. While focusing on harm appears at first to provide an appealing, simple, and neutral principle for avoiding other difficult moral questions, the definition of harm itself operates on top of a deep moral theory about what counts as harm and why. Consequently, multiple scholars advancing iterations of these theories use "harm" as a term of art to mean very different things. This in turn results in scholars talking past each other and trading on a superficially simple idea that turns out to be incredibly complex. For this reason, the harm principle has proven unworkable in other contexts, including criminal and environmental law. This Article highlights the flaws of this approach in the religious context by measuring the theory against its own ends, including the theory's failure to account for harms this approach would cause for religious minorities and other vulnerable groups.*

Refuting the unhelpful fixation on the mere presence of generic harm, this Article makes two important contributions, one descriptive and one normative. First, this Article carefully describes the nuanced ways that courts classify and weigh different types of harm, and it identifies three categories: (1) prohibited harms (meaning harms that are categorically impermissible); (2) probative harms (meaning relevant harms that can be balanced against other harms); and (3) inadmissible harms (meaning harms that are given no weight regardless of how severely or disproportionately they are experienced by third parties). This Article demonstrates how these categories of harm are not limited to religious exemptions but are in fact common to all First Amendment rights. Further, this descriptive framework highlights the competing harms that always arise when First Amendment rights are protected. Second, this Article argues that moving beyond a false dichotomy of harm versus no harm allows one to ask much more fruitful normative questions, including whether there is a justifiable tradeoff between the specific harm and the social goods it provides, whether institutions can be modified to mitigate avoidable harm, and whether disproportionate harms can be distributed in more just ways. This Article

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offers examples of how these necessary normative questions are already woven into the legal framework that governs many sorts of religious exemptions.

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INTRODUCTION

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.[1] 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

1. Ali v. Stephens, 822 F.3d 776, 781 (5th Cir. 2016).

potential costs and harms, including allegations of hundreds of thousands of dollars in estimated redistributed staff time and resources to implement a new policy;[2] less resources for other inmates for better healthcare, activities, facilities, or food;[3] heightened physical risk for prison guards who must enter an inmate's "strike zone" to search personal items; and increased risk of deadly contraband being secreted in a headwear hiding spot.[4] On the other hand, failing to grant an exemption causes spiritual and dignitary harm to Ali, who must violate his conscience. And 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 security guards, but for society at large.[5] In light of these competing and varied externalities, how should we think about Ali's religious exemption request?

These sorts of questions about harm related to religious exemptions are particularly weighty at this moment in American history, when religious exemptions have perhaps never been more controversial or hotly debated in legal scholarship.[6] Particularly in light of the Supreme Court's previous cases like *Hobby Lobby*[7] and *Masterpiece Cakeshop*,[8] as well as its upcoming case regarding exemptions for the Little Sisters of the Poor and Catholic adoption agencies,[9] some scholars have

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2. *Id.* at 796 (discussing the prison's estimate of $702,500 in annual costs across the prison to implement a new policy allowing inmate use of headgear and implementing necessary safety precautions).

3. *See, e.g.*, Appellants' Initial Brief at 36, 38, United States v. Sec'y, Fla. Dept. of Corr., 828 F.3d 1341 (11th Cir. 2016) (No. 15-14117) (arguing that costs related to providing a kosher dietary accommodation would result in less funding for "roofs for prisons, mental health and medical care for inmates, and salaries for security staff," and that less resources could even compromise the "security and safety of the institutions").

4. *Ali*, 822 F.3d at 788, 794; Cox v. Stephens, No. 2:13-CV-151, 2015 WL 1417033, at *7, *9 (S.D. Tex. Mar. 27, 2015) (discussing the strike zone).

5. *See* Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. OFFENDER REHABILITATION 125, 147–152 (2002); Byron R. Johnson, David B. Larson & Timothy C. Pitts, *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 148, 160–63 (1997) (internal citations omitted) [hereinafter Johnson et al., *Religious Programs*]; Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHABILITATION 11, 27–30 (2002); *see also* Todd R. Clear & Marina Myhre, *A Study of Religion in Prison*, 6 INT'L ASS'N RESIDENTIAL & COMMUNITY ALTERNATIVES J. ON COMMUNITY CORRECTIONS 20, 24–25 (1995); Byron R. Johnson, *Religiosity and Institutional Deviance: The Impact of Religious Variables upon Inmate Adjustment*, 12 CRIM. JUST. REV. 21, 24–25 (1987); Byron R. Johnson, Spencer De Li, David B. Larson & Michael McCullough, *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. CONTEMP. CRIM. JUST. 32 41–46 (2000). [hereinafter Johnson et al., *Systematic Review*].

6. *See* Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 167–72 (2014) (discussing the heightened polarization regarding religious exemption debates).

7. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

8. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

9. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/little-sisters-of-the-poor-saints-peter-and-paul

advanced new theories that would place strict limits on the government's ability to grant religious exemptions that result in harm to third parties who do not benefit from that religious practice.[10] These theories have inspired recent legislation, including the 2018 Do No Harm Act,[11] and are gaining traction among some judges.[12]

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, third-party theorists such as Professors Schwartzman, Tebbe, and Schragger make the claim that it is "disturbing" to "forc[e] third parties to pay for the exercise of . . . [religious] rights" of other parties.[13]

-home-v-pennsylvania/ [https://perma.cc/J7H8-6K8D] (Supreme Court granted cert on January 17, 2020); Fulton v. City of Philadelphia, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ [https://perma.cc/2GRX-49UD] (Supreme Court granted cert on February 24, 2020).

10. *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) [hereinafter Gedicks & Van Tassell, *Of Burdens and Baselines*]; IRA C. LUPU & 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 & 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 187, 190 (Susanna Mancini & Michel Rosenfeld eds., 2018) [hereinafter NeJaime & Siegel, *Conscience Wars*]; Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 215–29 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) [hereinafter Tebbe et al., *How Much May Accommodations Burden Others*]; NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 49–70 (2017); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328, 328–46 (Susanna Mancini & Michel Rosenfeld eds., 2018) [hereinafter Tebbe et al., *When Do Accommodations Burden Others*]; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 343 (2014) [hereinafter Gedicks & Van Tassell, *RFRA Exemptions*]; Andrew Koppelman & Frederick M. Gedicks, *Is Hobby Lobby Worse for Religious Liberty than Smith?*, 9 U. ST. THOMAS J.L. & PUB. POL'Y 223 (2015); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J.F. 201, 204–05 (2018) [hereinafter NeJaime & Siegel, *Religious Exemptions*]; Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 881 (2018).

11. Do No Harm Act, S. 2918, 115th Cong. (2018); *see also Do No Harm Act*, HRC, https://www.hrc.org/resources/do-no-harm-act [https://perma.cc/V4SH-3RZB]; Hailey Lobb, *The Do No Harm Act Will Make Sure Doctors and Businesses Do Just That*, NAT'L WOMEN'S L. CTR. (May 24, 2018), https://nwlc.org/blog/the-do-no-harm-act-will-make-sure-doctors-and-businesses-do-just-that/ [https://perma.cc/X7RW-N8N8].

12. *See*, *e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

13. Schwartzman et al., *supra* note 10, at 912.

Many thoughtful scholars have critiqued various aspects of the third-party harm theory, including its constitutional grounding,[14] historical foundations,[15] baseline assumptions,[16] and its impact on other accommodations.[17] But what has not received attention in the literature is a theoretical critique of the generic harm principle on which the theory relies—particularly when harm is used as a sufficient, rather than just a necessary, condition justifying government restriction of religious rights. 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."[18] 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

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14. *See, e.g.*, Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015) [hereinafter Berg, *Accommodation*]; Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 FEDERALIST SOC'Y REV. 50 (2016); Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 132–34 (2016); Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?* 59 J. CHURCH & ST. 357 (2016); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 45 (2014).

15. *See* Berg, *Accommodation*, *supra* note 14, at 144–45; Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the False Analogy to Church Taxes*, 106 KY. L.J. 679 (2017); Mark Storslee, *Religious Accommodations, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871 (2019).

16. *See, e.g.*, Garnett, *supra* note 14, at 46–47 ("The argument that an exemption for Hobby Lobby and other employers would violate the Establishment Clause takes as the relevant starting point, or baseline, the requirement that employers provide employees with no-cost-sharing contraception coverage and employees' entitlement to that coverage. . . . The argument is also strange because it allows the regulation that imposes the unnecessary and therefore unlawful burden on religious exercise to create entitlements or interests that then block the ability of a court to lift that unlawful burden through an exemption."); Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUST. (Dec. 5, 2013), https://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html [https://perma.cc/59SV-6369]; Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?* THE VOLOKH CONSPIRACY (Dec. 4, 2013, 5:11 PM) http://volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/ [https://perma.cc/5DJV-Z56G]; Kevin C. Walsh, *A Baseline Problem for the "Burden on Employees" Argument Against RFRA-Based Exemptions from the Contraceptives Mandate*, MIRROR OF JUST. (Jan. 17, 2014), https://mirrorofjustice.blogs.com/mirrorofjustice/2014/01/a-baseline-problem-for-the-burden-on-employees-argument-against-rfra-based-exemptions-from-the-contr.html [https://perma.cc/DF4R-USSP].

17. Marc DeGirolami, Holt v. Hobbs *and the Third-Party-Harm Establishment Clause Theory*, MIRROR OF JUST. (Oct. 7, 2014), https://mirrorofjustice.blogs.com/mirrorofjustice/2014/10/where-has-the-establishment-clause-third-party-harm-argument-gone.html [https://perma.cc/FX8Q-7NH5]; *see also* Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1383–84 (2016).

18. JOHN STUART MILL, *On Liberty*, *in* ESSENTIAL WORKS OF JOHN STUART MILL 253, 263–66 (Max Lerner ed., 1961).

argue that the mere presence of harm is a sufficient condition *requiring* government intervention with religious rights.[19] This significantly raises the stakes for determining what counts as cognizable "harm" under their theory.

Reliance on a harm principle as a 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 would be no question that this would present a desirable means of making a great many normative decisions in society. Indeed, relying on some sort of harm principle for decision-making has been attempted in numerous fields over numerous decades, from criminal law to environmental law.[20] But unfortunately, significant moral question begging is involved in determining what exactly we mean by "harm."

Unless we use a purely subjective idea of harm that allows anything to count as harm that subjectively and negatively impacts someone's interest, "harm" must become a term of art only including some sorts of interests and excluding others. At that point, any technical definition of harm must operate on top of a deep normative theory about which types of harm count and why. If the harm principle is broadened to include more expansive notions like dignitary harm or any impact on the

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19. *See infra* Section II.A.

20. 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, 139–55, 172–76 (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 & Cassia Spohn, *A Defense of Retributivism Against Criticisms of the Harm-for-Harm Principle*, 43 CRIM. LAW BULL., Winter 2007, at 6 ("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 A. 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. *See* EPSTEIN, *supra*, at 113–15 (discussing progressive arguments).

environment, arguably "every action generates some harm cognizable under the expanded harm principle."[21]

The normative appeal of the harm principle thus depends on its superficial simplicity. But once "harm" becomes a term of art, the normative justification for the theory becomes quite complex.[22] And the plausibility of the harm principle trades on the assumption that there will be consensus about what constitutes harm. But there is no such consensus; only a plurality of views of what harm is.[23]

Indeed, the lack of consensus on harm is highlighted by the fact that three different groups of third-party harm theorists define harm as a term of art to mean three very different things: a materiality standard meaning a burden that is relevant to decision-making,[24] an undue hardship standard for subsets of the population,[25] and "targeted material or dignitary harms" on those who "do not share the [religious] claimant's belief."[26] None of these scholars provide clear normative justifications why certain types of harms 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 defines harm to include a specific laundry list of events, including things like any exemption from antidiscrimination laws, provisions of healthcare services, or government contracting requirements.[27] 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 the harm principle almost always collapses in upon itself.[28]

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 evenhanded way, the theory would actually remove religious exemptions for groups like religious minorities that third-party harm theorists generally acknowledge should receive protection.[29] These groups include Muslim

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21. EPSTEIN, *supra* note 20, at 102.

22. *See* STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 70–106 (2010) (critiquing the harm principle on this basis in other contexts).

23. *See* EPSTEIN, *supra* note 20, 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.").

24. Professor Gedicks and Ms. 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 & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 366.

25. Professors Tebbe, Schwartzman, and Schragger argue that the proper inquiry is whether an accommodation imposes an "undue hardship" on others, by which they mean a burden that is "more than . . . de minimis." TEBBE, *supra* note 10, at 63; *see also* Tebbe et al., *How Much May Accommodations Burden Others*, *supra* note 10.

26. Professors NeJame and Siegel argue that cognizable harm only arises if "granting the religious exemption can inflict material and dignitary harms on those who do not share the claimant's belief." NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 190.

27. *See* Do No Harm Act, S. 2918, 115th Cong. (2018).

28. *See, e.g.*, SMITH, *supra* note 22, at 70–106; Harcourt, *supra* note 20, at 139–40.

29. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 193 ("We commonly understand religious exemptions as protecting members of minority faith traditions not

prison inmates, Sikhs in the workplace, and Amish communities.[30] And 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.[31] Nor can special prohibitions on religious harm, including things like dignitary harm, be normatively justified by the argument that such harms are unique. A comparison of the types of harms we permit in the speech context demonstrates that religious harm is quite similar in all meaningful respects.[32]

Given the normative and descriptive shortcomings with the third-party harm theory, it is not surprising that courts are not, in fact, treating the presence of generic harm alone as a sufficient condition that bars government from offering religious protections. Instead, this Article argues that the sufficiency of the harm turns on other characteristics that accompany the harm, as well as the competing harm on the other side of the ledger. What is therefore needed is a careful analysis of which specific types of harm matter, when, and in what ways. This Article carefully describes the much more nuanced ways in which courts classify and weigh a variety of competing harms, and it identifies three categories of harm that arise not just with respect to religious exemptions, but across all First Amendment rights: (1) prohibited harms (meaning harms that are categorically impermissible); (2) probative harms (meaning relevant harms that can be balanced against other harms); and (3) inadmissible harms (meaning harms that are given no weight regardless of how severely or disproportionately they are experienced by third parties).[33]

It is beyond the scope of this Article to assess whether the current doctrinal framework used by courts is normatively justified in every respect. However, this descriptive framework has important normative implications. A clear understanding of the role harm plays in courts' treatment of various First Amendment rights highlights how it is ubiquitous in the law that protection of any such rights inherently involves competing harms on both sides of the ledger. Moving beyond a false dichotomy of harm versus no harm thus allows one to ask much more fruitful, normative questions about harm, including whether there is a justifiable trade-off between the specific harm and the social goods it provides, whether institutions can be modified to mitigate avoidable harm, and whether disproportionate harms can be distributed in more just ways. This Article also provides examples of how these necessary normative inquiries are already woven into the legal framework that governs many sorts of religious exemptions.

This Article proceeds in four parts. Part I provides an overview of the sources and categories of religious exemptions, as well as the development of current third-party

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considered by lawmakers passing laws of general application that burden religious exercise."); Schwartzman et al., *supra* note 9, at 886–87, 899 ("[Third parties] 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. . . . Religious accommodations like these promote inclusiveness and equality . . . .").

30. 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, 946–48 (2004).

31. *See infra* Section II.A.

32. *See infra* Section II.B.

33. *See infra* Part III.

harm theories relying on versions of the harm principle. Part II provides a critique of the third-party harm theory, including a deconstruction of overreliance on an undefined and pluralistic concept of harm as a sufficient condition for government interference with religious rights. Part III provides a new descriptive framework for categorizing harm not just under the Establishment Clause but under parallel First Amendment rights of free speech and religious exercise as well. This Part also discusses how this framework sheds light on how the Court may revise some of its muddied *Lemon* jurisprudence in the near future. Part IV discusses the normative questions we should be asking with respect to harm. This Part also explores potential ways in which parties on both sides of the religious exemption debate may be able to find common ground through modifying institutions to mitigate avoidable conflicts that exacerbate harms and seek alternatives that are aimed at dispersing disproportionate harms.

I. RELIGIOUS EXEMPTIONS AND THIRD-PARTY HARM THEORIES

A. A Brief Overview of Religious Exemptions

A "religious exemption" is often described as something that occurs when the government removes a legal requirement that would apply to individuals if it were not for some relevant religious exercise or observance. Religious exemptions can be promulgated in statutes by legislatures, implemented in policies by administrative bodies, or carved out of laws essentially as "as-applied challenges" by the judiciary.[34] But the essential feature of religious exemptions is that they "lift[]" a government action "that burdens the exercise of religion."[35] This is why some critics have described religious exemptions as "a free pass to ignore laws that bind everyone else,"[36] or as a "get-out-of-the-law-free-card."[37]

Religious exemptions take a range of forms, but Professor Kent Greenawalt has provided two helpful categories for considering exemptions.[38] First, an exemption might take a "specific" form, in which it is a targeted exemption for a certain type of religious practice from specific laws.[39] For example, a law allowing Native Americans to use peyote in religious practices is a specific exemption because this specific practice is allowed even though it would otherwise be prohibited for nonreligious purposes.[40] Second, religious exemptions might take a broad and "general" form that creates a rebuttable presumption that the government generally

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34. For a discussion of how religious exemptions are essentially just a form of as-applied challenges, see Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

35. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338, 329 n.1 (1987).

36. Frederick Mark Gedicks, *Is Religion an Excuse for Breaking the Law?*, NEWSWEEK (Mar. 12, 2016, 10:51 AM), http://www.newsweek.com/are-religious-beliefs-excuse-breaking-law-435664 [https://perma.cc/8WKN-CV6E].

37. Barclay & Rienzi, *supra* note 34, at 1604–05 (collecting sources).

38. KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 9 (2016).

39. *Id.*

40. *See, e.g.*, 42 U.S.C. § 1996a (2012) (protecting ceremonial use of peyote).

cannot burden an individual's religious practice.[41] To rebut this presumption, the government must demonstrate that it has a very strong justification for its action and that it cannot accomplish its goal some other way.[42]

Specific religious exemptions in the United States are created legislatively or administratively. Specific exemptions date back to the American Revolution and even to some of the American colonies.[43] Some classic examples include "exemptions from military service for pacifist denominations, exemptions for Jews from certain incest rules (specifically the ban on uncle-niece marriages), and religious exemptions from requirements that hats be removed in court."[44] In the nineteenth century, other exemptions were created, including a privilege to refuse to testify about the contents of confessions, exemptions in some states for Sabbatarians from Sunday closing laws, and exemptions for sacramental wine from state-level prohibition statutes (which were echoed in the 1919 federal prohibition statute).[45]

On the other hand, rules requiring a general religious exemption regime have historically originated both in the Free Exercise Clause of the Constitution as well as in statutes such as the federal Religious Freedom Restoration Act (RFRA) or state versions of it.[46] Constitutional regimes result in "mandatory" exemptions, whereas statutory regimes create "permissive" exemptions.[47] One example of a mandatory constitutional exemption arose in the 1972 case of *Wisconsin v. Yoder*.[48] There, the Supreme Court exempted the Amish from public school attendance laws on religious exercise grounds.[49] The Supreme Court arrived at this result after determining that the government did not have a very strong justification for refusing the exemption.[50] Some scholars have described *Yoder* as the "high water mark" of the Court's constitutional religious exemption standard, but others question how consistently this

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41. GREENAWALT, *supra* note 38, at 9.

42. *See, e.g.*, 42 U.S.C. §§ 2000bb to -4.

43. Eugene Volokh, *A Brief Political History of Religious Exemptions*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 21, 2015, 8:39 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/21/a-brief-political-history-of-religious-exemptions/?noredirect=on [https://perma.cc/8ATW-FVDP].

44. *Id.*; *see also* Horwitz, *supra* note 6, at 167 ("Accommodation of religion is an aboriginal feature of American public law."); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1837 (2006) ("From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions. James Ryan, using a Lexis search and sampling techniques, estimated that there were 2000 religious exemptions on state and federal statute books in 1992.").

45. Volokh, *supra* note 43.

46. 42 U.S.C. §§ 2000bb to -4. An earlier version of this statute was invalidated in part by City of Boerne v. Flores, 521 U.S. 507 (1997). For a helpful overview of state RFRAs, see Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAS*, 55 S.D. L. REV. 466 (2010).

47. *See, e.g.*, Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 356–57 (discussing the difference between "mandatory" and "permissive" religious accommodations).

48. 406 U.S. 205 (1972).

49. *Id.* at 234–36.

50. *Id.* at 236.

constitutional standard was applied by the courts.[51] Nearly two decades later, in *Employment Division v. Smith*, the Court rejected the notion that the Free Exercise Clause requires mandatory religious exemptions from generally applicable and neutral laws.[52] This significantly constrained the prospect of a general exemption regime under the Free Exercise Clause.

However, the Court also noted that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[53] Thus, the Court noted that permissive religious exemptions could still be provided consistent with the First Amendment through the "political process."[54]

Legislatures at federal, state, and local levels responded to *Smith* by enacting precisely those sorts of permissive religious exemption statutes through their political processes. At the federal level, Congress passed the RFRA in an effort (in part) to restore the more protective general exemption framework.[55] After RFRA was limited by the Supreme Court to only apply to the federal government, twenty-one different states also passed their own legislation similar to RFRA. Additional states have interpreted their constitutions to provide a more protective general exemption standard for protecting religious practices.[56] And Congress later passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) to apply the RFRA exemption standard to state and local government actions in the context of land use zoning decisions and prison administration.[57]

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51. *See, e.g.*, Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 222 (1995) (arguing that on the eve of *Smith*, religious exercise protections were much thinner than they were at the "high-water mark" period when *Yoder* was decided).

52. 494 U.S. 872, 886 (1990).

53. *Id.* at 890.

54. *Id.*

55. 42 U.S.C. §§ 2000bb to -4 (2012); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210, 243–44 (1994); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 588 (1998) (noting that "RFRA is federal law, supported by a near unanimous House and Senate and an enthusiastic President").

56. Eugene Volokh, *Religious Exemptions – A Guide for the Confused,* WASH. POST: THE VOLOKH CONSPIRACY (Mar. 24, 2014, 6:32 AM), https://www.washingtonpost.com/news /volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused/ [https://perma.cc/L9TV-5ZVY].

57. 42 U.S.C. § 2000cc to -5. When Congress drafted this statute, two of RLUIPA's Senate sponsors expressed concern that "prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 CONG. REC. 16698, 16699 (2000) (joint statement of Senators Hatch and Kennedy); *see also* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA'S Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 510 (2005) ("After numerous hearings and two draft bills, the new law was eventually narrowed to address 'those areas of law where the congressional record of religious discrimination and discretionary burden was the strongest:' laws governing institutionalized persons (*i.e.*, prisoners and persons in mental institutions) and land use laws.").

Regardless of whether the source of the general religious exemption is constitutional or statutory, such general exemptions can only be made effective in practice by the judiciary.[58] To judicially grant an exemption, a court must determine that the government has either failed to sufficiently justify its action or failed to prove that it cannot accomplish its goals some other way. At the federal level, as explained by President Bill Clinton during the RFRA signing ceremony, "What [RFRA] basically says is that the government should be held to a very high level of proof before it interferes with someone's free exercise of religion. . . . We believe strongly that we can never . . . be too vigilant in this work."[59]

Aside from religious exemptions from government requirements, the government also sometimes creates laws that require private accommodation of religious practices.[60] Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against a current or prospective employee on the basis of religion.[61] Title VII defines prohibited religious discrimination to include an employer's failure to make "reasonabl[e] accommod[ations]" of an employee's religious practices unless accommodation would pose "undue hardship."[62] But this requirement under Title VII does not result in a "religious exemption," since the religious individual is not being exempted from a government legal requirement. On the other hand, Title VII does include a separate specific religious exemption for religious employers.[63] In this exemption, Title VII removes employment

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58. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 434 (2006) ("RFRA, however, plainly contemplates that courts would recognize exceptions—that is how the law works.") (emphasis omitted).

59. Remarks on Signing the Religious Freedom Restoration Act of 1993, 1993 PUB. PAPERS 2000, 2001 (Nov. 16, 1993).

60. "Religious accommodations" are often discussed in the context of "religious exemptions," but for purposes of this Article, I refer to religious exemptions as a subcategory of the broader religious accommodations category. This Article refers to "religious accommodations" to mean the removal or amelioration of any sort of burden on a religious individual, including a private party's alleviation of a burden caused by things like private employment policies. Such accommodating activity might be voluntary, or it might be mandated by other government policies.

61. Section 2000e-2(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012), makes it an unlawful employment practice for an employer to discriminate against an employee or a prospective employee on the basis of his or her religion. At the time of the events involved here, a guideline of the Equal Employment Opportunity Commission (EEOC), 29 C.F.R. § 1605.1(b) (1968), required, as the Act itself now does, 42 U.S.C. § 2000e(j), that an employer, short of "undue hardship," make "reasonable accommodations" to the religious needs of its employees.

62. 42 U.S.C. § 2000e(j).

63. Section 2000e-1(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. The relevant text reads as follows:

> This subchapter [i.e., Title VII of the Civil Rights Act of 1964] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

For a case interpreting this religious exemption, see Corp. of Presiding Bishop of Church of

requirements that the government would impose on the private employer but for the religious nature of the employer. This allows a religious employer to hire and staff consistent with the religious practices of the organization.[64] This distinction between private religious accommodations and government religious exemptions is important for reasons that will be discussed below in Section III.B.

B. New Theories Advocating Limits on Religious Exemptions that Result in Harm to Third-Parties

In the wake of the Supreme Court's hotly debated decisions in *Hobby Lobby*[65] and *Masterpiece Cakeshop*,[66] some scholars have argued that cost shifting resulting from religious exemptions is impermissible, both as a descriptive doctrinal matter under the Establishment Clause and as a normative matter.[67] Since that time, other scholars including Professors Micah Schwartzman, Nelson Tebbe, Richard Schragger, and Andrew Koppelman have contributed their own thoughtful defense of this theory.[68]

At its core, this Establishment Clause third-party harm theory asserts that "'[r]eligious liberty' does not and cannot include the right to impose the costs of observing one's religion on someone else."[69] Put another way, the theory argues that "shifting the cost of accommodating the [religious individual]'s religious beliefs onto" parties who do not derive any benefit from that accommodation and "who may

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Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 329 (1987).

64. 42 U.S.C. § 2000e.

65. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); *see also* Horwitz, *supra* note 6, at 154.

66. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

67. *See* Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 361.

68. *See* TEBBE, *supra* note 10, at 49–70; Koppelman & Gedicks, *supra* note 10, at 246–47; Schwartzman et al., *supra* note 10, at 884; Tebbe et al., *How Much May Accommodations Burden Others, supra* note 10, at 215–29; Tebbe et al., *When Do Accommodations Burden Others*, *supra* note 10, at 328–46; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), https://balkin.blogspot.com/2013/11/the-establishment-clause-and.html [https://perma.cc/A57N-LDRS]; Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BALKINIZATION (Dec. 4, 2013), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html [https://perma.cc/S9XV-2QZM]; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html [https://perma.cc/NY7Q-GZJX]; Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Reply to McConnell on Hobby Lobby and the Establishment Clause*, BALKINIZATION (Mar. 30, 2014), https://balkin.blogspot.com/2014/03/reply-to-mcconnell-on-hobby-lobby-and.html [https://perma.cc/MUK3-8TF6]; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Holt v. Hobbes and Third Party Harms*, BALKINIZATION (Jan. 22, 2015), https://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html [https://perma.cc/EQ3Q-DDUS].

69. Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 51 (2014).

not share those beliefs" is constitutionally prohibited.[70] However, different scholars have different definitions for what they say counts as "harm" under their theory. For ease of discussion, this Article will refer to operative harm as "cognizable harm." Professor Gedicks and Ms. Van Tassell argue that cognizable harm means a "material" burden on others, meaning a burden that is "relevant to . . . decisions about how to act in some relevant way."[71] Alternatively, Professors Tebbe, Schwartzman, and Schragger argue that the proper inquiry is whether an accommodation imposes an "undue hardship" on a subset of the population, borrowing from Title VII's religious accommodation standard. This standard looks at whether a burden is "more than . . . de minimis."[72] These theorists rely on the Burger Court case of *Estate of Thornton v. Caldor* as the leading precedent for this Establishment Clause principle.[73]

Other scholars advocated against allowing religious exemptions that cause harm to others, though they have not based such prohibitions regarding harm on the Establishment Clause. Professors Douglas NeJaime and Reva Siegel, for example, have argued that "US law on religious liberty . . . restricts religious accommodation where accommodation would harm others."[74] They define cognizable harm a third way, to include harm from a religious exemption to include one that "inflict[s] targeted material or dignitary harms on other citizens" who do not "share the claimant's belief."[75]

For ease of reference, this Article will at times refer to scholars who advance a theory placing limits on religious exemptions based on harm to others as "third-party

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70. Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J. L. & GENDER 153, 173 (2015) (the theory is not concerned with "social costs" that are "fully distributed throughout society," but instead concerns itself with "costs [that] are focused on a relatively small group of identifiable persons"); Nelson Tebbe, *How to Think About Religious Freedom in an Egalitarian Age*, 93 U. DET. MERCY L. REV. 353, 354–56 (2016).

71. Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 366.

72. TEBBE, *supra* note 10, at 63; *see also* Tebbe et al., *How Much May Accommodations Burden Others*, *supra* note 10, at 217. Professors Tebbe, Schwartzman, and Schragger acknowledge that there is not a single, neutral baseline principle for measuring harm, but they do argue that "a promising model can be found in employment discrimination law" under "Title VII" because the "undue burden" standard would prevent a third party from being harmed "too much" and thus offer "an attractive and workable standard for limiting harms to third parties." *Id.*; *see also* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 62–67 (2017) (discussing the "sensible" metric of the undue burden standard). But this still then relies on the undue burden standard as the measure of cognizable harm for purposes of Establishment Clause analysis, and a normative moral justification (rather than just a practical justification) is lacking for why *that* standard counts as the operative definition of cognizable harm as opposed to other standards, like "materiality."

73. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

74. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 191.

75. *Id.* at 190, 200; *see also* NeJaime & Siegel, *Religious Exemptions*, *supra* note 10, at 204–05 ("Going forward, the Court's concern about restraining religious exemptions so that they do not inflict material and dignitary harm on those who do not share the objector's beliefs should guide not only adjudication, but also the drafting of legislation concerning LGBT equality and reproductive healthcare.").

harm theorists." I count many of these scholars as friends and colleagues, and I appreciate the meaningful contributions they have made in drawing attention to important questions about harm.

II. A FLAWED PERSPECTIVE OF HARM

This Section examines some of the claims made by third-party harm theorists. Part A examines whether the presence of generic harm provides (or should provide) a sufficient condition for allowing government interference with religious liberty in the form of denying a religious exemption. And Part B examines whether religious externalities cause unique harms involving conscience, providing additional normative justification for government interference with religious rights. While third-party harm theorists' claims are worthy of careful consideration, this Article argues that they prove to be theoretically unsound.

A. The Unresolved Pluralism of "Harm"

The theoretical approach of attempting to divide relevant acts into those that cause cognizable harm and those that do not has a long intellectual pedigree. One of the earliest articulations of the "harm principle" comes from John Stuart Mill, who famously argued that the "only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[76] "As soon as any part of a person's conduct affects prejudicially the interests of others," Mill explained, "society has jurisdiction over it."[77]

Reliance on a harm principle as a justification for government interference with individual rights 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 principle that allows us to bypass such moral conundrums. Indeed, that is why many scholars since John Stuart Mill have attempted to rely on some sort of harm principle in a variety of fields, from criminal law to the environmental context.[78] But here we face what Professor Steven Smith describes as the "central dilemma" of any harm principle: we must determine what we mean by harm.[79]

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76. MILL, *supra* note 18, at 263.

77. *Id.* at 322. Some countries also historically adopted this mode of thinking with regard to protecting individual liberty. For example, Article IV of the Declaration of the Rights of the Man and of the Citizen of 1789, set by France's National Constituent Assembly after the French Revolution, states, "Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights." *Liberty in the French Declaration of the Rights of Man and of the Citizen (1789)*, ONLINE LIBR. LIBERTY, https://oll.libertyfund.org/quotes/488 [https://perma.cc/WX2X-XH4D]; *see also* EPSTEIN, *supra* note 20, at 98–99 (describing the use of the harm principle in ancient Rome).

78. *See supra* notes 67–72.

79. SMITH, *supra* note 22, at 77.

Of course, harm could be referred to in the subjective sense, meaning any time someone sincerely believes that their interests have been adversely impacted by some occurrence, we agree that they have been.[80] This version of harm preserves the principle's attractive feature of a commonsensical and simplistic rule, which at least superficially lends to its normative force.[81] However, proponents of any harm principle, from current third-party harm theorists back to John Stuart Mill, have been reluctant to concede that harm can subjectively mean anything.[82] And for good reason. Once that concession is made, the principle provides government justification to regulate everything and anything, and thus becomes useless as a tool of demarcation for government intervention.

Thus, what proponents of a harm principle quickly do is to use "harm" in a narrower, technical sense—essentially as a term of art that recognizes detrimental impacts on only some sorts of interests, but not others.[83] But once proponents of a harm principle take this step, the theory often becomes enmeshed in significant moral question begging. When any technical definition of harm is adopted, that definition operates on top of a deep normative theory about which types of harm count and why. As Professor Joseph Raz has observed:

> Since "causing harm" entails by its very meaning that the action is prima facie wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded. Without such a connection to a moral theory, the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions.[84]

It is thus unsurprising that different groups throughout history and of varying political persuasions have relied on a harm principle to advance very different conceptions of harm and to justify very different sorts of government intervention. Returning to the criminal context, progressives began arguing in the 1960s and 1970s that government should not prosecute "victimless crimes" like marijuana use.[85] These arguments were countered by a campaign in the 1970s and 1980s against drug use that emphasized harms drugs caused to society.[86] Subsequently, some

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80. *Id.* at 78.

81. *Id.* at 81.

82. *Id.* at 87.

83. *Id*.

84. JOSEPH RAZ, THE MORALITY OF FREEDOM 414 (1986); *see also* Eric Blumenson, *Economic Rights as Group Rights*, 15 U. PA. J.L. & SOC. CHANGE 87, 90 (2011) ("The problem is that the 'harm principle' depends crucially on what counts as harm to others. Some claim, with Mill, that it violates the harm principle to prosecute 'victimless crimes,' among which they would include laws criminalizing intoxication, possession of pornography, and failing to use seatbelts. But that conclusion depends on a definition of 'harm to others' that excludes indirect and unintended effects.") (citations omitted); Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 724 (1995) ("Moral judgment is needed to determine what count as relevant harms . . . ."); Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2621 (1994) (book review) (discussing "the inherent subjectivity of 'harm'").

85. Harcourt, *supra* note 20, at 172.

86. *Id.*

conservative groups began using the harm principle to "justify laws against prostitution, pornography, public drinking, drugs, and loitering," and in some instances, "regulation of homosexual and heterosexual conduct."[87] Criminal law scholar Professor Bernard Harcourt has argued that "the harm principle experienced an ideological shift from its progressive origins: today, the debate over drug use pits conservative harm arguments against new progressive arguments about 'harm reduction.'"[88] Harcourt thus argued that "[t]he proliferation of harm arguments in the debate over the legal enforcement of morality has effectively collapsed the harm principle."[89]

In the environmental context, conservative and other scholars have argued that regulation of private land use is not justified unless the landowner actually causes a physical intrusion, or "nuisance," harming her neighbor's property.[90] But some progressives have argued that any action creating negative externalities on the environment, including things like increased CO_2 emissions that are uniformly distributed in the atmosphere, constitutes cognizable harm justifying government intervention.[91] Professor Epstein has argued that this broader conception of environmental harm, treating any "harm to the environment" as cognizable, "guts the ability of the harm principle to place limits on government action."[92]

Even looking back to some of the harm principle's earliest discussion, Mill focused on tangible harms against individuals involving the use of force or fraud, and he did not treat losses resulting from competitive markets or discrimination as cognizable harm.[93] Nor did Mill recognize lack of government entitlements as a form of cognizable harm, focusing instead on harm to negative rights. But some courts, employing the harm principle, have treated competitive losses in the marketplace as

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87. *Id.* at 139; *see also* Calabresi, *supra* note 20, at 956 ("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."); Cederblom & Spohn, *supra* note 20, at 6 ("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.").

88. Harcourt, *supra* note 20, at 172; *see also* Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 301 (2013) ("The expansive reading of the harm principle, however, has resulted in turning an ostensibly liberal idea into a conservative concept, which is too readily able to generate harm arguments to justify expansive prohibitions that previously had only moralism rationales.").

89. Harcourt, *supra* note 20, at 182.

90. EPSTEIN, *supra* note 20, at 98; *see also* Kochan, *supra* note 20, at 322–23 ("[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.").

91. EPSTEIN, *supra* note 20, at 98–99.

92. *Id.* at 99.

93. *Id.* at 77, 79, 93 (describing Mill's theory).

cognizable, including losses to airlines, broadcasters, farmers, and other groups.[94] Many modern scholars view discrimination, and its attendant "dignitary harm," as a particularly salient form of cognizable harm. For example, Professor David Strauss has equated the harmful social loss from "racial antipathy" to the tort of battery.[95] And modern scholars have advocated that loss of entitlements should absolutely be counted as a form of harm.[96]

Perhaps it is the case that each generation is tempted to use the seductively simple theoretical shortcut of a harm principle as a means of bypassing thorny moral questions in various legal fields. But these drastically different conceptions of harm discussed above illustrate the way in which the harm principle often breaks down and reveals itself as merely providing a backdoor, obfuscated entrance to the same moral debate it was seeking to avoid.[97] This is likely why scholars in other fields have argued that "[t]he idea of harm is too vague, too dependent on baseline assessments of private rights, too open to long chains of causal speculation, and too catastrophic in its categorical judgments to give liberty much practical protection."[98]

The normative appeal of the harm principle thus trades on its superficial simplicity. But once "harm" becomes a term of art, the normative justification for the theory becomes quite complex.[99] And the plausibility of the harm principle trades on the assumption that there will be consensus about what constitutes harm. But in fact, there is no such consensus, only a plurality of views of what harm is.[100] Harm cannot provide a neutral methodology for solving ultimate dilemmas of pluralism because the conception of harm itself is compromised by the very pluralism it attempts to resolve. This lack of consensus on harm is highlighted by the fact all three different groups of third-party harm theorists define harm as a term of art to mean very different concepts: a materiality standard meaning a burden that is relevant to decision-making,[101] the Title VII undue burden standard for subsets of the

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94. *Id.* at 91–93.

95. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1625 (1991).

96. RAZ, *supra* note 84, at 414 ("Roughly speaking, one harms another when one action makes the other person worse off than he was, or is entitled to be, in a way which affects his future well-being.").

97. *See* Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 445 (2000) ("Because the harm principle provides the least controversial basis for regulation, and because some kind of harm can always be attributed to a particular behavior, many invoke the harm principle to 'explain' regulations that would be more appropriately justified on pure paternalistic grounds.").

98. Donald A. Dripps, *The Liberal Critique of the Harm Principle*, CRIM. JUST. ETHICS, SUMMER/FALL 1998, at 3, 3 (1998).

99. *See* SMITH, *supra* note 22, at 70–106 (critiquing the harm principle on this basis in other contexts).

100. EPSTEIN, *supra* note 20, 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.").

101. Professor Gedicks and Ms. 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 & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 366.

population,[102] and "targeted material or dignitary harms" on those who "do not share the [religious] claimant's belief."[103] And none of these scholars provide clear normative justifications why their conception of harm is superior to any of the other concepts. Moreover, the recently proposed Do No Harm Act defines "harm" to include a specific laundry list of items, including things like any exemption from antidiscrimination laws, provisions of healthcare services, and government contracting requirements.[104] 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 the harm principle almost always collapses in upon itself.[105]

Issues surrounding the plurality of harm can perhaps be mitigated, to some extent, if two things occur. First, a harm principle must be transparent about the underlying moral calculus justifying the proposed technical definition of harm that recognizes some interests but not others. Some proponents of a version of a harm principle, such as Professors Epstein and Raz, have worked to provide precisely this sort of transparent exposition of their underlying moral theory to advance their version of a workable harm principle.[106] Second, the stakes of a definition of harm are lowered when a moral theory treats harm as necessary but not sufficient for government intervention. In other words, less rides on justifying the definition of harm when the lack of harm acts as a *limitation* on government intervention, but other factors than the simple presence of harm must arise to provide a *justification* for government intervention. Along these lines, both Professors Epstein and Raz argue that the presence of harm alone is not a sufficient condition for government intervention; rather, the sufficiency depends on the type of harm at issue and how that type

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102. Professors Tebbe, Schwartzman, and Schragger argue that the proper inquiry is whether an accommodation imposes an "undue hardship" on others, by which they mean a burden that is "more than . . . de minimis." TEBBE, *supra* note 10, at 63; *see also* Tebbe et al., *How Much May Accommodations Burden Others, supra* note 10.

103. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 190, 200. 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." *Id.*

104. *See* Do No Harm Act, S. 2918, 115th Cong. (2018).

105. *See, e.g.*, Harcourt, *supra* note 20, at 139–40; SMITH, *supra* note 22, at 70–106.

106. EPSTEIN, *supra* note 20, at 76 ("[T]he key to applying the harm principle lies in our ability to lay bare the utilitarian judgments that underlie even the simplest cases of its application."); RAZ, *supra* note 84, at 414 ("[The harm] principle is derivable from a morality which regards personal autonomy as an essential ingredient of the good life, and regards the principle of autonomy, which imposes duties on people to secure for all the conditions of autonomy, as one of the most important moral principles."); *see also* Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006) (arguing that our notions of harm really appeal to a larger "sovereignty principle"); *id.* at 245 ("[T]he sovereignty principle gives defenders of the harm principle the thing that they want most, protection of individual freedom from interference by the state. The harm principle is often held out as a bulwark against paternalism, but the sovereignty principle offers a better account of why it is objectionable."). Of course, one could argue that it would be better to just rely directly on these utilitarian principles or autonomy principles rather than relying on a harm principle which does not, on its own, capture the nuance of these normative principles.

interacts with their underlying moral theory giving rise to their definition of harm.[107] This argument tracks with Mill's conception of harm as a necessary but not sufficient condition.[108] Similarly, Professor Harcourt has argued that the harm principle was "never intended to be a sufficient condition. It does not address the comparative importance of harms."[109]

In contrast, none of the third-party harm theorists offer a nuanced normative justification for why some interests count and others do not under their technical definition of harm. And worse yet, the stakes of the presence of harm are at their zenith under the third-party harm theory, as most of the theorists treat the mere presence of cognizable harm as a sufficient condition not just justifying but *requiring* government restriction of the religious individual's rights. Put another way, third-party harm theorists argue that exemptions (or the ability of the individual to exercise her religion free of government interference) are categorically prohibited if cognizable harm would result.

The shortcomings with this theoretical approach are highlighted by measuring the purported aims of the third-party harm theory against its over- and underinclusive results. Specifically, its results are overinclusive because, as discussed below under Section II.A.1, the theory would actually remove religious exemptions for groups like religious minorities that third-party harm theorists generally acknowledge should receive protection. And as discussed in Section II.A.2, the theory is underinclusive because it fails to provide any normative explanation whatsoever for why some competing third-party harms to vulnerable groups are simply ignored in the calculus.

1. The Third-Party Harm Theory's Likely Impact on Religious Minorities

At the heart of the third-party harm theory lies this foundational premise: that there is a meaningful category of religious exemptions which do *not* result in cognizable harm to third parties.[110] Professors Schwartzman, Tebbe, and Schragger argued that "many accommodations are harmless, in the sense that they, quite literally, do not harm other people," citing to examples of accommodations for Jews in the military or a Muslim prisoner.[111] Similarly, Professors NeJaime and Siegel state that "[m]any religious liberty claims do not ask one group of citizens to bear the costs of another's religious exercise."[112] These third-party harm theorists similarly argue that religious exemptions to religious minorities like Muslim prison

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107. *See* EPSTEIN, *supra* note 20, at 77, 79, 91–93, 98–99; RAZ, *supra* note 84, at 414.

108. EPSTEIN, *supra* note 20, at 77, 79, 93; MILL, *supra* note 18, at 253, 263–66.

109. Harcourt, *supra* note 20, at 182 (emphasis omitted).

110. Schwartzman, *supra* note 10, at 798. Along similar lines, Kent Greenawalt has asserted that some religious exemptions "do not cause direct harm" to others. Greenawalt, *supra* note 84. As examples of this category of exemptions, Professor Greenawalt points to permitting Native Americans to use peyote in their religious services, giving tax exemptions, granting prisoners' rights to wear longer beards than generally allowed, and excusing pacifists from military service. KENT GREENWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED 9, 66, 137 (2016).

111. *Id.*

112. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 200.

inmates, Sikhs in the workplace, and the Amish generally fall within this "harmless" category, and thus ought to be provided.[113] Professors NeJaime and Siegel argue that the "most significant constitutional free exercise cases in the United States involve claims," where "religious minorities sought exemptions" and the "costs of accommodating their claims were minimal and widely shared."[114]

But all of the examples that third-party harm theorists point to as permissible, essentially harmless religious exemptions do in fact involve allegations of significant cognizable harm to third parties. Thus, these minority groups likely would not have received any religious exemption if the third-party harm theory were taken to its logical conclusions and applied in an evenhanded way.

For example, one case Professors NeJaime and Siegel cite to as involving a harmless religious exemption is *Wisconsin v. Yoder*.[115] Yet one of the most prominent themes in the case was whether harm to identifiable Amish children in the form of a denial of public education should trump the religious exercise rights of the Amish parents.[116] This argument that children would be harmed by a denial of education carried the day in the first two litigation proceedings before the trial and then the state appeals court.[117] For example, the trial court expressed concern about potentially damaging implications for an "appreciable number of Amish-reared youth [who] may decide to subsequently adopt a different faith, join a different church, or leave the Amish community to become a part of a different culture."[118] The trial court noted that children who desire later to venture outside the close-knit Amish community would be at a distinct disadvantage because they had not been allowed to obtain a traditional education and they may lack critical skills to help them succeed.[119] The appellate court similarly noted that the trial had established many people who were born into the Amish families eventually left the church, and these people might be woefully unprepared for life outside the Amish community if they were "deprived of a reasonable degree of education" in their youth.[120]

The Wisconsin Supreme Court and U.S. Supreme Court ultimately ruled the other way, but these rulings faced dissents that were also focused on harm to children. Specifically, Justice Heffernan on the Wisconsin Supreme Court stated that the harm the government was trying to avoid was loss of education for "each and every child

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113. *Id.* at 193 ("We commonly understand religious exemptions as protecting members of minority faith traditions not considered by lawmakers passing laws of general application that burden religious exercise."); Schwartzman et al., *supra* note 9, at 886–87, 899 ("[Third parties] 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. . . . Religious accommodations like these promote inclusiveness and equality . . . .").

114. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 201.

115. *Id.* at 201 n.63 (citing Wisconsin v. Yoder, 406 U.S. 205, 209 (1972)).

116. *E.g.*, *Yoder*, 406 U.S. at 212.

117. State v. Yoder, 182 N.W.2d 539, 542 (Wis. 1971).

118. SHAWN FRANCIS PETERS, THE *YODER* CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS 99 (2003) (alteration in original).

119. *Id.*

120. *Id.* at 103 (quoting county circuit court opinion).

in the state" and that this "problem *cannot be dismissed as de minimis*."[121] He also noted that large numbers of Amish individuals leave the Amish community each year and are forced to make their way in the world without an education that equips them for modern life.[122] Similarly, in his dissent from the U.S. Supreme Court's ruling, Justice Douglas stated that "[i]t is the future of the student . . . that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school," then those children might be "forever barred" from certain opportunities and even "stunted" in their development.[123] In other words, the lack of comprehensive educational opportunities was more than de minimis, and it befell an identifiable subset of the population—Amish children in specified communities.[124]

Under the third-party harm theory, these cognizable harms should have prohibited the religious exemption and ended the analysis. But that is not how the Supreme Court analyzed the case. Instead, the Court assessed this potential harm alongside a range of other factors, including the devastating harm that might befall the Amish community and the way in which Amish vocational education still allowed children to be productive members of the community.[125] One might argue that these vocational opportunities for Amish children meant they did not really face harm. But that involves a recharacterization of the harm the government was seeking to avoid: equipping Amish children with the skills they would need to succeed in a world *outside* the Amish community in case they chose that course. Along these same lines, Professors NeJaime and Siegel would describe the harm in this case as falling outside their technical definition of harm because the Court's decision assumes that the children share the religious beliefs of their Amish parents. But the concern about harm for the lower courts and dissenting Justices was precisely the possibility that some children did not, or at least one day *may not*, share those beliefs and would be at that time ill-equipped to transition out of a community with beliefs they no longer shared. Thus, the result in this case was one in which the Supreme Court provided a religious exemption even over objections about cognizable harm to third parties.

Another exemption Professors NeJaime and Siegel point to as "not detrimentally affect[ing] others" is the one at issue in *Holt v. Hobbs*, a 2015 case where the Supreme Court ruled in favor of a prisoner who sought a religious exemption from the prison's no-beard policy.[126] However, in that case the state government alleged that providing an exemption for a beard could result in "deadly" consequences for both prison guards and other prisoners.[127] This included providing inmates with an

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121. *Yoder*, 182 N.W at 549 (Heffernan, J., dissenting) (emphasis added).

122. *Id.*

123. Wisconsin v. Yoder, 406 U.S. 205, 245–46 (1972) (Douglas, J., dissenting).

124. Some third-party harm theorists argue that *Yoder* is distinguishable because the majority decision downplayed any real harm to children. But the broader point is that there is no way to deny the harm in *Yoder* when measuring harm by the same metric third-party harm theorists advocate under their various theories. So *Yoder* was either wrongly decided, or third-party harm theories are inconsistent with this precedent. But both cannot be correct.

125. *Yoder*, 406 U.S. at 222–24. As Justice White also noted, the government had simply failed to fully develop this concern on the trial court record. *Id.* at 240 (White, J., concurring).

126. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 200, 200 n.62 (citing Holt v. Hobbs, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring)).

127. Brief for Respondent at 46, *Holt*, 135 S. Ct. 853 (No. 13-6827), 2014 WL 3704560.

"important hiding place for contraband," including "needles, homemade darts, pieces of broken razors, drugs, . . . SIM cards[,] . . . pieces of fence wire, staples, and paperclips" that could be used to harm "inmates and staff alike."[128]

In its unanimous ruling, the Supreme Court did not ultimately hold that the religious exemption in *Holt* posed no threat of harm to third parties—it certainly said nothing about de minimis harm. While it raised skepticism about some of the government's claims, the Court ultimately determined under strict scrutiny review that the government could not deny a religious exemption based on the same type of harm it allowed for other secular reasons. Specifically, in *Holt* the government was willing to assume potential harm related to quarter-inch beards for medical reasons, but not half-inch beards for religious reasons. The Court explained, "[t]he Department suggests that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard. But that is no less true for searches of hair, clothing, and ¼–inch beards."[129] Thus, because the prison was not seeking to prevent harm in an even-handed way, the Court prohibited the prison from attempting to prevent harm exclusively for religious reasons.

There is little reason to believe that *Holt* would have turned out the same way if the Court were merely assessing whether or not alleged harm to third parties was more than de minimis, and there is significant reason to believe that the case would have gone the other way under the third-party harm theory. One case illustrating this contrast is *Tagore v. United States* in the Fifth Circuit.[130] There, a Sikh employee brought an action against the IRS for refusing to allow her to wear her kirpan, a dull blade that is one of five articles of faith that Sikh adherents are required to wear. Because the case involved the federal government acting as an employer, both RFRA's strict scrutiny and Title VII's de minimis standards applied. Under the undue burden, or de minimis standard, the court simply accepted the IRS's word that requiring security officials to ensure that the employee's blade was dull enough was more than a "de minimis" harm to the employer.[131] But under RFRA's rigorous strict scrutiny review, the analysis was much different. The same court noted that the government had been inconsistent in its enforcement of its policy. For instance, it let other weapons in the building for lawful purposes, and it had let Sikh individuals wear their kirpans in buildings like the White House.[132] Thus, the court determined that RFRA's "fact-sensitive inquiry" required reversal of the lower court and remand for further inquiry into less restrictive alternatives to accommodate this employee's religious beliefs.[133]

Some third-party harm theorists try to avoid acknowledging the harm at issue in cases like *Holt* and *Tagore* by further limiting the technical sense in which they use the word harm, arguing that it should include only direct, concrete harm and not increased *risk* of harm or unsubstantiated allegations of harm.[134] But this argument

128. *Id.* at 45–46.
129. *Holt*, 135 S. Ct. at 864 (majority opinion).
130. 735 F.3d 324 (5th Cir. 2013).
131. *Id.* at 330.
132. *Id.* at 331.
133. *Id.* at 331–32.
134. *See, e.g.*, Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 363–64

has both doctrinal and normative problems. As a normative matter, third-party harm theorists fail to justify why increased risks of physical harm or indirect harms to certain groups, as in *Holt*, do not count as cognizable harm in their calculus.[135] Indeed, the normative question of how tight a causal connection should be has caused disagreement among scholars relying on harm principles in other fields. Professor Raz argues that "an action harms a particular person only if it affects him directly and significantly by itself. It does not count as harming him if its undesirable consequences are indirect and depend on the intervention of other actions."[136] On the other hand, Professor Blumenson has noted that excluding "indirect and unintended effects" of harm renders this principle "inadequate" for addressing "damaging downstream consequences for others."[137] A cost that some refer to as "invisible externalities" provides a good example of potentially deadly unintended or indirect harm. As Professors Lisa Grow Sun and Brigham Daniels have observed, "[c]ertain kinds of externalities are both difficult to see and difficult to measure, usually because they involve increased risk rather than an immediately discernible, concrete effect."[138] Similarly, Professors Holmes and Sunstein have drawn attention to child welfare tragedies such as Joshua DeShaney, a child who was beaten into a state of severe mental disability when knowing government workers failed to intervene.[139] Professors Holmes and Sunstein argue that perhaps if we had provided more resources to enforcing Joshua's legal interests, rather than distributing those resources to other interests, the outcome for Joshua would have been different.[140]

("[E]xemption from the draft for religious pacifists increases the mathematical likelihood that nonpacifists and secular pacifists will be drafted in their place . . . The risk of being drafted already exists and is already substantial; . . . The additional burden imposed by accommodating religious pacifists . . . is barely measurable; those accommodated are so few compared to the entire population subjected to the law that it is not reasonable to understand the exemption as a meaningful third-party burden.") (footnotes omitted); Schwartzman et al., *supra* note 10, at 904 ("Because the risk of harm is small and diffuse, it does not trigger the third-party harm doctrine."); *see also* Gedicks & Koppelman, supra note 69, at 57 ("Like the incremental tax increase in *Walz*, the religious pacifist exemption barely increased an already-existing burden that was substantial in its own right and thus did not impose significant additional costs on others in violation of the Establishment Clause. Although whoever was drafted in place of the objectors faced the consequence of going to war, the pre-existing probability of those persons' being drafted was not significantly increased by the exemption.") (emphasis omitted).

135. Nor is it clear why, doctrinally, increased risk of harm would be irrelevant to a "materiality" standard. And it is simply not clear at all what "targeted" and "material" harm mean, as that is not a standard that has been applied elsewhere in the law. Gedicks and Van Tassell, *supra* note 10, at 366; NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 190, 200.

136. RAZ, *supra* note 84, at 416.

137. Blumenson, *supra* note 84, at 90–91.

138. Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 160 (2014); *see also* Charles R. Beitz, *Justice and International Relations*, 4 PHIL. & PUB. AFF. 360, 383–85 (1975) (describing circumstances in which invisible externalities come home to roost).

139. STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 87–89 (2013).

140. *Id.* at 19, 87–89.

Normative questions that must be addressed in this context include things like how much increased risk is too much? Do the third party's subjective concerns about the risk matter? Shouldn't the gravity of the harm matter? Increased gravity of harm in the tort context operates to decrease the probability of risk required.[141] So where the harm at issue is very grave, such as potential death or "fatal" injury of prison security guards who have to perform additional searches in *Holt*, should we really require a very high probability of that harm occurring to normatively recognize the harm as cognizable? If so, why? These are all normative questions left unanswered under current third-party harm theories.

And perhaps more importantly as a doctrinal matter, the *Tagore* case above and other Title VII cases illustrate that courts recognize increased risk of harm and even unsubstantiated claims of harm as cognizable under Title VII's undue burden standard. Indeed, the Fifth Circuit has specifically stated, "The *mere possibility* of an adverse impact . . . is sufficient to constitute an undue hardship."[142] The Title VII undue burden standard often recognizes unsubstantiated employer allegations of harm as sufficient to constitute more than a de minimis burden. In a First Circuit case, for example, an employer made very hypothetical claims about how a religious accommodation from a dress code would cause an undue burden without providing any corroborating evidence or even cost-benefit analysis.[143] But the court said that was enough to constitute an undue burden.[144] The *Tagore* case similarly illustrates how the current strict scrutiny standard under RFRA operates to flesh out baseless and exaggerated claims of harm, but the undue burden standard under Title VII does not.[145] Thus, third-party harm theorists who advocate this Title VII standard cannot distinguish away these risk-related, indirect, or unsubstantiated claims of harm; those claims would likely be dispositive in removing religious exemptions for religious minorities who need them most if the undue burden standard actually supplanted strict scrutiny.[146]

To provide a final illustration of a religious exemption that third-party harm theorists inaccurately describe as harmless, Professors Tebbe, Schwartzman, and Schragger point to a kosher diet being offered to Jewish inmates.[147] They assert that such an exemption is "normatively unproblematic" if the government taxes the public to provide kosher meals, but it would not be "normatively permissible" for the government to "tax . . . nonreligious inmates" to provide kosher meals to Jewish

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141. *See* Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 LA. L. REV. 323, 324–25 (1991) (discussing the Learned Hand formula).

142. Weber v. Roadway Express, Inc., 199 F.3d 270, 274 (5th Cir. 2000) (emphasis added).

143. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 135 (1st Cir. 2004).

144. *Id.* at 137.

145. Tagore v. United States, 735 F.3d 324, 330–31 (5th Cir. 2013).

146. The claim that Title VII's standard would provide sufficient protection for religious minorities is a bit puzzling because the third-party harm theory would give courts fewer tools—not more—to weed out meritless claims about externalities from religious minorities' religious practices. After all, Title VII only requires the government to point to a harm more than de minimis, a quite different standard than the demanding showing of a compelling government interest currently required under strict scrutiny.

147. Schwartzman et al., *supra* note 10, at 886.

inmates.[148] This argument has some intuitive appeal, but upon closer inspection this line-drawing breaks down, leaving no real meaningful difference between the categories. As it turns out, the government not infrequently (and not unreasonably) argues that providing a kosher or halal diet to prisoners would result in significant costs to other prisoners and prison officials, operating as an effective tax on these individuals.

For example, in one Eleventh Circuit case where an inmate in Florida requested a kosher dietary exception, the Florida Department of Corrections responded that costs related to providing such an accommodation would result in less funding for "roofs for prisons, mental health and medical care for inmates, and salaries for security staff," and that less resources could even compromise the "security and safety of the institutions."[149] The Department also argued that the increased costs of the diet would result in a "hiring freeze," as well as a situation where the Department "would have to eliminate 246 staff positions in its already minimally staffed facilities."[150] All of these harms, if true, would likely constitute more than de minimis negative externalities for identifiable third parties.[151] Prison officials similarly successfully argued in the Fifth Circuit that the prison could not provide a kosher diet because the prison's "ability to provide a nutritionally appropriate meal to other offenders would be jeopardized (since the payments for kosher meals would come out of the general food budget for all inmates)."[152] While the government was likely exaggerating the consequences from increased costs to some extent in both of these cases, the officials were correct in noting that more funding spent on kosher meals operates as an effective tax on other inmates by resulting in less resources for the needs of these inmates.

This issue of effective taxes on other inmates arises even for religious exemption requests that don't involve items a prison must pay for directly.[153] As discussed above, in a case where Muslim inmates requested to wear a kufi, a religious head covering, the prison estimated that this would cost $702,500 annually across the prison system in redistributed staff time and resources.[154] In addition, one prison has estimated that the cost in just one state of allowing prisoners to wear beards slightly longer than the ones at issue in *Holt* would cost over $1.1 million annually when accounting for additional staff time to search beards.[155] While some courts have

148. *Id.*

149. Appellants' Initial Brief at 36, 38, United States v. Sec'y, Fla. Dept. of Corr., 828 F.3d 1341 (11th Cir. 2016) (No. 15-14117).

150. *Id.* at 36–37.

151. The court in this case ultimately agreed that there would be "increased costs" drawing from limited resources for inmates to accommodate the kosher diet, though the court disagreed that "operations of the prison" would come screeching to a halt as a result of increased cost. *Fla. Dep't of Corr.*, 828 F.3d at 1347 (quoting Garner v. Kennedy, 713 F.3d 237, 246 (5th Cir. 2013)).

152. Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007).

153. *See, e.g.*, Ali v. Stephens, 822 F.3d 776, 796 (5th Cir. 2016) (discussing the cost of additional search time by staff).

154. *Id.*

155. *Id.* at 792.

found these sorts of costs to be acceptable compared to larger prison expenditures,[156] the costs nonetheless arguably operate to redistribute resources away from other inmates for things like better buildings, healthcare, activities, and food. At the very least, an "effective tax" argument would be something government officials could plausibly argue to defeat virtually any religious exemption in prison if that were actually the standard. Religious minorities would likely be especially impacted by such a rule, as one empirical study found that "[o]ver half" of all cases dealing with religious exemption requests from prisoners "involved non-Christian religious minorities" and the "most frequently appearing were Muslims, Jews, and Native Americans."[157]

One could argue that the prison context is unique, because prison budgets are constrained and prisoners are dependent on government officials to exercise their rights. No doubt religious exemptions in the prison context raise special challenges. But in another sense, the prison context offers a helpful microcosm to study the ways in which protecting any rights impact third parties when such protections must expend scarce resources that could be used elsewhere.

At the most basic level, redistribution results from the sober reality that resources devoted to enforcing some rights will draw resources away from other important rights or legal interests, and those third parties who do not receive those resources thus experience harm.[158] As Professors Stephen Holmes and Cass Sunstein note in their recent book, *The Cost of Rights: Why Liberty Depends on Taxes*, "conflicts among rights stem from a common dependency of all rights on limited budgetary outlays. Financial limits alone exclude the possibility of all basic rights being enforced maximally at the same time."[159] Professors Holmes and Sunstein challenge

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156. *Id.* at 797 ("The record below indicates that TDCJ's budget for staff salary and wages was $1.045 billion in 2014, which is roughly one-third of its total operating budget of $3.1 billion. TDCJ has not shown it has a compelling interest in saving less than .004% of its budget that is dedicated to CO compensation. [Moussazadeh v. Tex. Dep't. of Criminal Justice, 703 F.3d 781, 795 (5th Cir. 2012)] (expressing doubt that TDCJ had a compelling interest in saving $88,000 in food-related expenses where that cost amounted to 'less than .05% of the food budget.')").

157. Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 375–77 (2018). Proponents assert that the third-party harms theory preserves the ability of courts to weed out "weak" government official objections based on costs to third parties.

158. HOLMES & SUNSTEIN, *supra* note 139, at 125, 223–24 ("Legal rights have 'opportunity costs'; when rights are enforced, other valuable goods, including rights themselves, have to be forgone (because the resources consumed in enforcing rights are scarce). The question is always, might not public resources be deployed more sensibly in some other way?"). On a more abstract level, as Professor Wesley Hohfeld recognized long ago, any positive legal interest legally recognized for one individual results in a negative interest for another. Rights correlate with duties, privileges correlate with a "no-right," powers correlate with liabilities, and immunities correlate with disabilities. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

159. HOLMES & SUNSTEIN, *supra* note 139, at 101. Similarly, Professor Wesley Hohfeld long ago observed that any time society chooses to give legal protection to the interest of one individual, it must do so by placing some sort of legal burden on other individual. According to Hohfeld, if the law provides one individual with a right, privilege, power, or immunity, then

the "widespread but obviously mistaken premise that our most fundamental rights are essentially costless."[160] Legal rights (as opposed to moral rights)[161] "remain a hollow promise" absent political authority that is willing and able to intervene to enforce remedies for those rights; a "legal right exists, in reality, only when and if it has budgetary costs."[162] Since "legal rights are subsidized by taxes levied on the community at large, not by fees paid by the individuals who happen to be exercising them at the moment[,] . . . redistribution in the field of rights protection seems to be inevitable."[163] A societal protection of any right, including constitutional rights, "presuppose[s] political decisions (which could have been different) about how to channel scarce resources most effectively given the shifting problems and opportunities at hand."[164]

For some third parties, those redistributive costs can be experienced in acute, disproportionately harmful, and even deadly ways. Indeed, costs borne by society in exchange for certain social goods are likely never distributed perfectly evenly across the populous. If a religious exemption could be defeated any time government could argue that the exemption operated to effectively tax some segment of the population in a disproportionate way, few if any religious exemptions could survive. And as illustrated above, all of the exemptions for religious minorities that third-party harm theorists view as normatively desirable involved cognizable harm and thus likely could not have survived an evenhanded application of the theory.

2. Overlooked Competing Harms for Other Vulnerable Third Parties

The third-party harm theory relies on the normative premise that religious exemptions are not morally justified when they impose externalities on third parties. Professor Gedicks and Ms. Van Tassell describe religious harms as "externalities" because they can result in "a cost that one person, firm, or group imposes on others without their consent."[165]

However, the perception of externalities flowing in just one direction has long been challenged by economists.[166] For example, R.H. Coase stated, "The question is

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the law must place on other individuals the "jural correlative" of a duty, no-right, liability, or disability. These legal interests may be exercised against others on what Hohfeld calls the "paucital" level—meaning against identifiable individuals, or by a compound aggregate of these individuals with what he calls "multital" rights. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 716–17 (1917); Thomas A. Alspaugh, *Hohfeld's Jural Relations*, PROJECT SCIENTIST (May 11, 2019, 10:36 AM), https://thomasalspaugh.org/pub/fnd/hohfeld.html [https://perma.cc/A3LM-S4GN].

160. HOLMES & SUNSTEIN, *supra* note 139, at 25.

161. Legal rights refer to legally enforceable rights. Moral rights encompass a different, though often overlapping category, of rights thought to be aspirational and natural.

162. HOLMES & SUNSTEIN, *supra* note 139, at 19.

163. *Id.* at 111.

164. *Id.* at 222.

165. Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 358 (quoting Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 46 (1989)); *see also* Schwartzman et al., *supra* note 10, at 912.

166. For a discussion of this, see Sun & Daniels, *supra* note 138, at 137 (citing R.H. Coase,

commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A."[167] According to what scholars now refer to as the Coase theorem, "[t]he real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."[168] To provide an illustration, a quintessential example of externalities involves damage that engine sparks from a passing train causes to a farmer's crops.[169] The intuitive approach would be to view the train company as the party imposing harm on the farmer. But Coase argues that we might just as easily view the externality as being imposed on the train company by the farmer preventing the train from making sparks to raise crops that will not benefit the train company.[170] As Professors Lisa Sun and Brigham Daniels have explained, situations where one individual's harm is another individual's gain, and vice versa, are known as "reciprocal bilateral externalities."[171]

The presence of such reciprocal bilateral externalities is particularly relevant in the religious exemption context. Take, for example, an incident where government officials unanimously denied a permit for a Sikh gurudwara, or temple, after "citing neighbors' complaints regarding increased noise and traffic."[172] Noises caused by a Sikh temple are an externality imposed on the neighbors who would prefer a quiet neighborhood. But the insistence on a quiet neighborhood results in an externality imposed on the Sikh group, as it prevents them from peacefully exercising their religion on their own property.

Some may argue that negative externalities imposed on the religious adherent seeking an exemption are less deserving of consideration because such an individual is attempting to impose the cost of their religious practice (from which they benefit)

The Problem of Social Cost, 3 J.L. & ECON. 1, 2–5 (1960)).

167. Coase, *supra* note 166, at 2.

168. *Id.*; *see also* JOEL FEINBERG, HARM TO OTHERS 218 (1984) ("The world is full of situations which are such that the interests of one party can be advanced only at the expense of the interests of others, and vice versa, or—even more unhappily—such that the interests of one party can avoid being defeated or thwarted only if that party acts in a way that will set back the interests of another party and vice versa.").

169. Gedicks &Van Tassell, *RFRA Exemptions*, *supra* note 10, at 358 n.58 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.10, at 71 (6th ed. 2003)).

170. *See* Francesco Parisi, *Coase Theorem*, *in* NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., Palgrave Macmillan 2008); RICCARDO REBONATO, TAKING LIBERTIES: A CRITICAL EXAMINATION OF LIBERTARIAN PATERNALISM 111 n.44 (2012) (discussing reciprocal externalities); HOLLEY H. ULBRICH, PUBLIC FINANCE IN THEORY AND PRACTICE 111 (Routledge 2011) (2003); Herbert Hovenkamp, *The Coase Theorem and Arthur Cecil Pigou*, 51 ARIZ. L. REV. 633 (2009); Alan Randall, *Coasian Externality Theory in a Policy Context,* 14 NAT. RESOURCES J. 35, 36–46 (1974); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 233 (1979); Lawrence B. Solum, *Legal Theory Lexicon 002: The Coase Theorem*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon /2003/09/legal_theory_le_1.html [https://perma.cc/RE4T-DTZJ].

171. Sun & Daniels, *supra* note 138, at 137 (citing Coase*, supra* note 166, at 2–5).

172. Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter, 456 F.3d 978, 989 (9th Cir. 2006).

onto individuals in society who do not benefit from such a practice. Thus, harm should be relevant only if it is befalling non-benefitting third parties. Such an argument is dubious because it again ignores bilateral reciprocal externalities and fails to provide a normative justification for such an omission. But even if we take as true the assumption that cognizable harm only involves externalities flowing to parties not directly involved in the religious practice, what about reciprocal bilateral externalities involving other third parties? Specifically, what about third parties who rely heavily on or benefit significantly from religious individuals or organizations that operate as a result of religious exemptions and who would experience significant harm as a consequence of the denial of a religious exemption?

For example, hundreds of thousands of third parties are currently served by religious homeless shelters that only operate because of a specific religious exemption under the Fair Housing Act.[173] Countless foster children and families are served by religious adoption agencies which can only operate because of specific religious exemptions under state law.[174] One foster mother in the Supreme Court's

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173. *See, e.g.*, Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 657 F.3d 988, 995 (9th Cir. 2011).Although § 3604(a) and (b) of the [Fair Housing Act] prohibit religious discrimination generally, in 42 U.S.C. § 3607(a) Congress provided an exemption for religious organizations that want to limit access to their charitable services to people who practice the same religion. Specifically, § 3607(a) provides in relevant part:

> (a) Nothing in [the FHA] shall prohibit a religious organization . . . from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

The Ninth Circuit upheld this religious exemption for a homeless shelter even where doing so resulted on more than de minimis negative externalities on third parties. *Id.*; *see also* Rebecca Boone, *Court Rules in Favor of Boise Rescue Mission*, LEWISTON TRIB. (Sept. 20, 2011), https://lmtribune.com/northwest/court-rules-in-favor-of-boise-rescue-mission/article_7c8b2c32-9722-5e40-9e12-e1cc72a42595.html [https://perma.cc/L3TH-P49Z]. For some examples of positive externalities that resulted from this religious charity, see *Case Summary*: Intermountain Fair Housing Council v. Boise Rescue Mission Ministries, BECKET LAW, https://www.becketlaw.org/case/intermountain-fair-housing-council-v-boise-rescue-mission-ministries/ [https://perma.cc/94Y4-FULN] ("From 2012 to 2013 alone, [Boise Rescue Mission] welcomed nearly 5,000 new guests, served about 700,000 meals, and provided 250,000 beds. Hundreds have graduated from its recovery program . . . .").

174. *See, e.g.*, Melissa Buck, *Catholic Adoption Agencies: A Private-Public Adoption System that Works,* HILL (Mar. 6, 2018, 2:00 PM), https://thehill.com/opinion/civil-rights/376984-catholic-adoption-agencies-a-private-public-adoption-system-that-works [https://perma.cc/4B4V-3VJG]; Shamber Flore, *Column: My Adoption Agency Saved Me*, DET. NEWS (Mar. 7, 2018, 10:48 PM), https://www.detroitnews.com/story/opinion/2018/03/07/religious-adoption-agencies-aclu/32717127/?platform=hootsuite [https://perma.cc/FZ8N-CGG2]; Sharonell Fulton, Opinion, *My Faith Led Me to Foster More than 40 Kids*; *Philly Is Wrong to Cut Ties with Catholic Foster Agencies*, PHILA. INQUIRER (May 24, 2018, 2:25 PM), https://www.inquirer.com/philly/opinion/commentary/catholic-social-services-philadelphia-lawsuit-lgbtq-gay-foster-parents-adoption-sharonell-fulton-20180524.html [https://perma.cc/L8A5-VRAW]; Kathryn Jean Lopez, *Foster Children in Philadelphia Deserve Better than Unnecessary Limbo as Religious-Liberty Dispute Lingers*, NAT'L REV.

pending *Fulton* case spoke about the deep pain and dignitary harm she felt watching the government publicly deride religious beliefs she shared by condemning the religious beliefs of a foster agency she had worked with for years.[175] And if one considers positive externalities from accommodated religious groups, studies suggest that by accommodating religious practices of inmates, prisons are able to reduce infraction rates and inmate violence and increase rehabilitation, which benefits both religious inmates and nonreligious inmates alike.[176] Under the third-party harm

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(June 12, 2018, 6:50 PM), https://www.nationalreview.com/corner/foster-children-in-philadelphia-deserve-better-than-unnecessary-limbo-as-religious-liberty-dispute-lingers/ [https://perma.cc/C8QR-H6JC]; Kathleen Parker, Opinion, *Philadelphia's Unnecessary War on Catholics*, WASH. POST (May 22, 2018, 7:56 PM), https://www.washingtonpost.com/opinions/philadelphias-unnecessary-war-on-catholics/2018/05/22/0b6b1bd6-5e0e-11e8-9ee3-49d6d4814c4c_story.html?noredirect=on [https://perma.cc/3JAF-7B8B]; Bre Payton, *This Woman's Autistic Foster Son Was Ripped from Her Arms Because She Works with Catholics*, FEDERALIST (June 14, 2018), https://thefederalist.com/2018/06/14/womans-autistic-foster-son-ripped-arms-works-catholics/ [https://perma.cc/99PU-GCVP]; The Editorial Board, *Suffer the Little Children*, WALL ST. J. (May 22, 2018, 6:59 PM), https://www.wsj.com/articles/suffer-the-little-children-1527029941 [https://perma.cc/FTS2-BK37]. The potential harm to foster children is highlighted by the national crisis our country already faces to find enough foster homes. Emily Birnbaum & Maya Lora, *Opioid Crisis Sending Thousands of Children into Foster Care*, HILL (June 20, 2018, 6:00 AM), https://thehill.com/policy/healthcare/393129-opioid-crisis-sending-thousands-of-children-into-foster-care [https://perma.cc/JSP3-L8JB]; John DeGarmo, *The Foster Care Crisis: The Shortage of Foster Parents in America*, HUFFINGTON POST, (May 1, 2017, 8:54 AM), https://www.huffpost.com/entry/the-foster-care-crisis-the-shortage-of-foster-parents_b_59072dcfe4b05279d4edbdd9?platform=hootsuite [https://perma.cc/8B4F-L9F6]; Julia Terruso, *Philly Puts Out 'Urgent' Call – 300 Families Needed for Fostering*, PHILA. INQUIRER (Mar. 8, 2018), https://www.inquirer.com/philly/news/foster-parents-dhs-philly-child-welfare-adoptions-20180308.html [https://perma.cc/D4XJ-7U3L]. In jurisdictions where religious adoption agencies did not receive religious exemptions, some agencies have pulled out of the adoption industry. *See* Manya A. Brachear, *3 Dioceses Drop Foster Care Lawsuit*, CHI. TRIB. (Nov. 15, 2011), https://www.chicagotribune.com/news/ct-xpm-2011-11-15-ct-met-catholic-charities-foster-care-20111115-story.html [https://perma.cc/Q2N7-PAWD]; *Catholic Charities Pulls Out of Adoptions*, WASH. TIMES (Mar. 14, 2006), https://www.washingtontimes.com/news/2006/mar/14/20060314-010603-3657r/ [https://perma.cc/H9R2-P6T3]; Cicero A. Estrella, *San Francisco/Catholic Charities Scaling Back Its Role in Adoption Services*, SF GATE (Aug. 3, 2006, 4:00 AM), https://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Catholic-Charities-scaling-back-2515267.php [https://perma.cc/29KF-UUMT].

175. Fulton, *supra* note 174 ("As a single mom and woman of color, I've known a thing or two about discrimination over the years. But I have never known vindictive religious discrimination like this, and I feel the fresh sting of bias watching my faith publicly derided by Philadelphia's politicians. . . . To see the city condemn the foster agency that has made possible my life's work fills me with pain. To know that the City of Philadelphia may soon take from me the work that brings me the greatest joy frightens me. And to think that the city would rather score political points than to offer true hope and a future to our city's most vulnerable children makes me angry.").

176. *See* Clear & Sumter, *supra* note 5, at 147–52; Johnson et al., *Religious Programs*, *supra* note 5, at 148–49; O'Connor & Perreyclear, *supra* note 5; *see also* Clear & Myhre, *supra* note 5; Johnson, *supra* note 5; Johnson et al., *Systematic Review*, *supra* note 5.

theory as currently articulated, these sorts of externalities are not given any weight at all in the normative analysis. Indeed, the third-party harm theory is simply not equipped to compare or weigh competing claims of harm. This is why some scholars have noted that a harm principle was "never intended to be a sufficient condition" for government coercion.[177]

B. Are Religious Externalities Uniquely Harmful?

Even if reliance on generic harm in other legal contexts proves normatively unsatisfying, third-party harm theorists have argued that harms flowing from religious protections are uniquely problematic. Three variations of this argument have been offered: (1) religious externalities involve competing claims of conscience "on both sides" of a debate,[178] (2) religious exemptions can result in unique "dignitary harm" by describing some third-party conduct as sinful,[179] and (3) religious exemptions can significantly "obstruct the achievement of major social goals" by making claims "fraught with . . . powerful social meaning" that is harmful to groups that "the law has only recently come to protect."[180] This Section addresses each argument in turn and argues that each proves descriptively inaccurate when compared to the types of harms we regularly allow in the context of free speech rights.

1. Competing Conscience Rights

Professors Tebbe, Schwartzman, and Schragger argue that "even if some rights impose harms on third parties, rights involving claims of conscience are distinctive" because "[w]hen third parties complain, their objection is that the state is requiring them to subsidize another's commitments of conscience."[181] Thus, they argue that "when religious exemptions generate harms to third parties, there is liberty of conscience *on both sides*."[182]

However, it is not clear that this argument is descriptively accurate in many, if not most, cases where third-party harms arise. In *Hobby Lobby*, there was not a group of employees arguing that a religious exemption for Hobby Lobby would violate their own conscience.[183] Such employees could have sought representation and moved to intervene in the dispute to make this argument. Instead, the government was simply arguing it should be able to require Hobby Lobby to provide contraception to its employees to aid the government's interest—for nonreligious reasons—in expanding contraceptive access.[184] Yet proponents of the third-party harm theory still argued that such a religious exemption inappropriately burdened these third parties.[185] To

177. Harcourt, *supra* note 20, at 182 (emphasis omitted).
178. *See* Schwartzman et al., *supra* note 10.
179. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 201.
180. *Id*. at 200–01.
181. Schwartzman et al., *supra* note 10, at 909.
182. *Id.* (emphasis in original).
183. *See* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).
184. *Id.* at 2781.
185. *See supra* Section I.B.

provide another example, in the kosher context, non-Jewish inmates are not generally complaining about religious accommodations because they do not want to subsidize conscience (at least not in typical documents before the courts in those cases). Rather, the prison is arguing that a kosher accommodation would take more resources away from other inmates.[186] No case law requires courts to paternalistically presume that any burdened third party has an unspoken conscientious objection to religious externalities. If that were the case, it would likely open a Pandora's Box of claims unlike anything we recognize elsewhere in the law.

Further, it is also not accurate that countervailing conscience concerns are only relevant in the religious-accommodations context. Third-party harm theorists state that the "challenge for critics of the third-party harm doctrine is to identify cases in which there are rights that conflict and in which those cases are relatively easily resolved in favor of those imposing on the rights of others."[187] The Supreme Court's decision in *Snyder v. Phelps* is one example of just such a case.[188] There, defendant picketers carried hateful signs to protest the funeral of a fallen marine, and they defended their actions on free speech grounds, though the plaintiffs' behavior also constituted a religious exercise.[189] The plaintiffs, the family of this service member, argued that the picketers should not receive First Amendment protection because their "conduct interfered with the Snyders' right to bury their son, a religious ceremony entitled to constitutional protection through the First Amendment's Free Exercise Clause."[190] The plaintiff also argued that "wholesale promotion of the free speech rights of one party without accounting for the free exercise and peaceful assembly rights of another has no support in the Constitution."[191] Thus, the plaintiffs clearly articulated their competing-conscience rights—even religious-conscience rights—that had been harmed as a result of protecting the defendants' free speech rights. Nevertheless, the Supreme Court upheld the free speech rights of the picketers and set aside the jury verdict in an 8-1 decision.[192]

The normative justification for this decision stems back to the "firmly established" principle that "the Constitution applies only to governmental conduct," and "offers no shield against 'private conduct, "however discriminatory or wrongful."'"[193] Thus, while there may be countervailing conscience interests in these First Amendment conflicts, only one side of that conflict can lay claim normatively

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186. *See supra* note 151 and accompanying text.

187. Schwartzman et al., *supra* note 10, at 910.

188. 562 U.S. 443, 448 (2011).

189. *Id.*

190. Brief for Petitioner at 56, Snyder v. Phelps, 562 U.S. 443 (2010) (No. 09-751).

191. *Id.* at 55; *see also* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 310 (citing Chelsea Brown, Note, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 233 (2009) ("[T]he evaluation of the WBC's conduct in a civil action proceeding and the rejection of the Free Exercise Clause defense in this case serves to protect the Snyders' own choice of worship . . . .")).

192. *Snyder*, 562 U.S. at 443.

193. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507, 509 (1985) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974)).

to the particular harm that arises when it is the *government* infringing on that conscience right.

2. Dignitary Harm

Professors NeJaime and Siegel argue that religious exemptions can result in unique "dignitary harm" by describing some conduct as "sinful."[194] They note that these "dignitary harms" can be particularly hurtful where "one citizen seeks an exemption from a legal duty to serve another on the ground that she believes her fellow citizen is sinning."[195]

But as Professor Mark Rienzi and I have written elsewhere, society regularly countenances nearly identical dignitary harms to protect freedom of speech.[196] For example, speech protections have been used to protect incredibly hurtful statements like signs saying "God Hates You" at the funeral of a marine killed in action. Indeed, in terms of condemning someone as "sinful," the picketers in *Snyder* actually explicitly stated "You're Going to Hell" on their signs.[197] Similarly, in *Boy Scouts of America v. Dale*, the Supreme Court allowed an organization to exclude a scout master who was a self-professed gay man because the Boy Scouts did not view allowing him as a leader as being consistent with their emphasis on being "morally straight."[198] It surely inflicted great dignitary harm for this man to be expelled from the Boy Scouts. Indeed, unlike in *Masterpiece Cakeshop*,[199] which involved a onetime and brief interaction between a store owner and a same-sex couple and only implied condemnation of sinful behavior, *Dale* was expelled from a program that had been a major part of his life (for likely as long as he could remember) and involved explicit condemnation of his behavior as not "morally straight."[200] Yet the Court held that these dignitary harms were insufficient to trump the expressive association rights of a private group.

3. Fraught with Social Meaning

Professors NeJaime and Siegel also argue that religious exemptions can significantly "obstruct the achievement of major social goals" by making claims "fraught with . . . powerful social meaning" that are harmful to groups that "the law

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194. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 199–200.

195. *Id.* at 201; *see also* NeJaime & Siegel, *Religious Exemptions*, *supra* note 9, at 204–05 ("Going forward, the Court's concern about restraining religious exemptions so that they do not inflict material and dignitary harm on those who do not share the objector's beliefs should guide not only adjudication, but also the drafting of legislation concerning LGBT equality and reproductive healthcare.").

196. *See* Barclay & Rienzi, *supra* note 34, at 1623–24 (citing *Snyder*, 562 U.S. at 448).

197. *Snyder*, 562 U.S. at 454.

198. 530 U.S. 640, 650 (2000).

199. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,138 S. Ct. 1719 (2018).

200. *Boy Scouts*, 530 U.S. at 650; *see also* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 557, 574 (1995) (holding that the exclusion of the LGBT group from a private parade was "hurtful," but still protected).

has only recently come to protect."[201] They note that claims concerning "sexual norms in long-running political contest" are "fraught with legible and powerful social meaning," including "stigmatizing social meaning" similar to "a dynamic classically illustrated by regimes of racial segregation."[202]

But the First Amendment protects speech that makes claims fraught with powerful social meaning for groups who have been oppressed in recent history. One example comes from *National Socialist Party of America v. Village of Skokie*,[203] where the Supreme Court allowed a group of demonstrators wearing Nazi uniforms or displaying swastikas to march in Skokie, Illinois—a community with "an unusually high percentage of Holocaust survivors."[204] At the time, The New York Times reported on how this march "revived the worst agony of our time," and how no one could "underestimate[] the anguish which Nazi uniforms and insignia must cause to those who lost families at Dachau and Buchenwald."[205] The harm third parties pointed to included emotional harm and anguish caused by the speech. Despite this significant harm being inflicted on a subset of the population by the actions of private parties and despite the speech being about important social issues aimed at individuals who had faced unspeakable wrongs under the Nazi regime, the Court upheld the First Amendment rights of the protesters.[206]

Similarly, in *R.A.V. v. City of St. Paul*, the Supreme Court struck down a law under which a teenager who had burned a cross on the lawn of an African-American family had been convicted.[207] The law in question prohibited "a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[208] Despite the fraught social meaning the government was trying to avoid, particularly with the history of racial segregation and despicable threats against racial minorities, the Court held that freedom of speech interests prohibited this sort of content-based regulation.[209]

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This Section does not argue that dignity interests or competing-conscience interests are always legally irrelevant; rather, this Section's aim is to demonstrate that such interests are not unique to the context of religious harm when compared

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201. NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 200–01.

202. *Id.* at 201.

203. 432 U.S. 43 (1977) (per curiam).

204. J. Anthony Lukas, *The A.C.L.U. Against Itself*, N.Y. TIMES (July 9, 1978), https://www.nytimes.com/1978/07/09/archives/the-aclu-against-itself-aclu-aclu.html [https://perma.cc/DS4H-5UHH]; *see also* Rob Warden, *Nazi's March in Skokie, Ill., Stirs Emotion*, WASH. POST (June 30, 1977), https://www.washingtonpost.com/archive/politics/1977/06/30/nazis-march-in-skokie-ill-stirs-emotion/018e1bee-2ca1-4b56-90b8-3b2ed4471491/ [https://perma.cc/37TA-L9P9].

205. Lukas, *supra* note 204.

206. *Nat'l Socialist Party*, 432 U.S. at 44.

207. 505 U.S. 377, 377 (1992).

208. *Id.* at 380.

209. *Id.* at 377.

with harms we permit when protecting speech.[210] To be sure, sometimes cases involving clashes between First Amendment rights and antidiscrimination laws may also raise issues beyond expression fraught with social meaning, including access to important goods or services. But as Professor Rienzi and I have written elsewhere, the Court has provided a framework for dealing with precisely this sort of issue regarding access to goods and market failures in the speech context.[211] The same framework provides a method for dealing with those questions in the religious context.

III. A DESCRIPTIVE FRAMEWORK IDENTIFYING FOUR FIRST AMENDMENT CATEGORIES OF HARM

Given the normative and descriptive shortcomings of the various third-party harm theories, it is not surprising that courts are not, in fact, treating the presence of generic harm alone as a condition categorically requiring restriction of 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 for justifying government restriction of First Amendment rights, other characteristics are also required. What is therefore needed is a careful descriptive analysis of which specific types of harm matter to courts, when, and in what ways.

This Section offers this analysis not just in the context of religious exemptions, but more broadly in the First Amendment context, including with respect to freedom of speech and the Establishment Clause. This Section also addresses both harms caused by private parties, as well as harms caused directly by the government. As Professors Holmes and Sunstein explain, the First Amendment prohibits "citizens in a multidenominational America" from "acting through the shared instrumentalities of their government" to cause harm against other fellow citizens.[212] For example, protections such as the Establishment Clause were enacted in part to prevent "private religious sects" from "employ[ing] the instrumentalities of government to enforce their sectarian beliefs on unwilling fellow citizens."[213] Consequently, "[t]o protect religious liberty from 'government interference' . . . is actually a roundabout way of protecting religious liberty from infringement by private parties."[214]

By drawing parallels across different sorts of legal interests and different sorts of harms, this Section highlights important repeating patterns critical to understanding the nuanced ways that courts classify and weigh different types of harm. Based on additional characteristics discussed below that are associated with harm, this Section identifies three important categories of harm that arise in the First Amendment context: (1) prohibited harm, (2) inadmissible harm, and (3) probative harm.

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210. Discussing the ways in which these interests become relevant is an important question beyond the scope of this Article.

211. Barclay & Rienzi, *supra* note 34, at 1629–31.

212. HOLMES & SUNSTEIN, *supra* note 139, at 184.

213. *Id.*

214. *Id*. Indeed, the "church tax" example that some third-party harm theorists rely on is a perfect example of such a phenomenon.

The first two categories include harms that courts assess in a more categorical manner, whereas the third involves competing harms assessed by courts in an explicit balancing framework. Prohibited and inadmissible harms are addressed together in Section III.A, as they often operate as mirror images of each other in a categorical clash of harms. Prohibited harms include those that the government is not permitted to inflict (or allow) regardless of whether the harms are experienced by a discrete group or are more broadly dispersed, or whether they are merely de minimis or substantial. Conversely, there are some sorts of harms that are inadmissible in the First Amendment analysis. It is not that the harms are insufficiently weighty, they are simply not relevant to the calculus when considering the weight of harms.

One way of thinking about inadmissible harms is that such harms are inherent to the redistribution of legal interests that was critical to the formation of such a legal right to begin with. But some harms are merely *incidentally* inadmissible by virtue of being the bilateral reciprocal externality of a per se prohibited harm. The same is true for prohibited harms, in that they can be per se or incidentally impermissible. This Section will highlight examples of these categorical harms that exist in free speech and free exercise contexts and then address how the same sort of framework operates in the Establishment Clause context as well. For example, under the Establishment Clause, courts have determined that government interference with ecclesiastic decisions regarding internal church governance and leadership is a per se prohibited harm.[215] Conversely, the reciprocal harm a third party faces by being excluded from a certain position becomes incidentally inadmissible, meaning given no weight at all in this particular First Amendment calculus. As another example, in the free speech context, harm that third parties may face by being offended by speech is generally considered a form of per se inadmissible harm.[216] Thus, if the government can point to no other justification for prohibiting the speech, then the reciprocal harms to the speaker of having speech suppressed will become incidentally prohibited harms. This Section addressing the prohibited category of harms will also discuss *Estate of Thornton v. Caldor*, a case on which a number of third-party harm theorists rely.

Probative harms are discussed in Part III.B, as these involve competing harms being explicitly balanced against each other, typically in a rebuttable presumption framework.[217] Within the category of probative harms, it is helpful to think of two different types of harms that are given different types of weight in the balancing. Some classes of probative harms are automatically given a heavy weight, such that they give rise to presumptions of impermissibility. This presumption is not, however, absolute. Such a presumption can be overcome by the existence of sufficiently countervailing probative harms. For example, in the speech or free exercise context, courts treat certain defined classes of harm as presumptively impermissible, triggering the familiar rebuttable presumption framework of heightened constitutional (or statutory) scrutiny. But even where such a presumption arises,

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215. *See infra* Section III.A.3.

216. *See infra* Section III.A.1.

217. Of course, courts are engaging in a weighing and balancing of harms to some extent for categorical harms too, but they appear to be doing so at the level of deciding which harms are categorically weighty enough to constitute prohibited harms and which are simply not the type of harms our legal system recognizes.

competing relevant harms may, in some instances, rebut presumptively probative harms. However, the weight of these relevant harms is context specific and depends entirely on the type and magnitude of the harm at issue. And, perhaps notably for these sorts of harms, they end up not receiving much weight at all if the government has alternatives to avoid these relevant harms without imposing the presumptively prohibited harm.

It is beyond the scope of this Article to assess whether the current doctrinal framework used by courts is normatively justified in every respect. However, this descriptive framework has important normative implications. A clear understanding of the role harm plays in courts' treatment of various First Amendment rights highlights how it is ubiquitous in the law that protection of any such rights inherently involves competing harms on both sides of the ledger. Moving beyond a false dichotomy of harm versus no harm and more clearly viewing the reciprocal harms always at play allows one to ask much more fruitful normative questions about harm, discussed below in Part IV.

A. Prohibited and Inadmissible Harms

1. Free Speech

In the free speech context, harm that third parties experience in the form of mere offense to speech is per se inadmissible. The Supreme Court has repeatedly affirmed this principle, explaining that "offensiveness was 'classically not [a] justification[n] validating the suppression of expression protected by the First Amendment.'"[218]Any other result would "effectively empower a majority to silence dissidents simply as a matter of personal predilections."[219] In other words, courts treat the harm of offense as inadmissible when determining whether to protect speech, because otherwise speech protections would fail to exist in any meaningful sense.

Thus, if the government can point to no other justification for prohibiting the speech than the inadmissible harm of offense, then the reciprocal harms to the speaker of having speech suppressed will become incidentally prohibited harms. The Supreme Court has stated, "time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'"[220] The government may be able to engage in that same burden to speech

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218. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 (1983) (alteration in original); *see also* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (citing Street v. New York, 394 U.S. 576, 592 (1969)); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); Texas v. Johnson, 491 U.S. 397, 414 (1989) (listing cases where courts have not allowed government to prohibit expression "simply because society finds the idea itself offensive or disagreeable").

219. Cohen v. California, 403 U.S. 15, 21 (1971).

220. Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (quoting Street v. New York, 394 U.S.

for other justifications, but so long as that harm is merely the bilateral reciprocal externality of avoiding offense to third parties, it becomes incidentally prohibited.

The Supreme Court has recognized other sorts of per se inadmissible harms in the free speech context as well. Specifically, the harm a speaker experiences from their speech being burdened is inadmissible when the expression at issue falls within certain "well-defined and narrowly limited classes of speech."[221] These classes include things like incitement to illegal action, true threats of violence, obscenity, and child pornography.[222] The justification for treating the harm to the speaker as inadmissible in these contexts is that the countervailing harm of the speech to third parties is too great to entitle the speech to special First Amendment protection. These classes of speech operate as categorical exceptions to the rule that would otherwise consider such harm to the speaker to be quite weighty—indeed, a presumptive harm, as discussed below.

2. Religious Exercise

Where private parties have claimed that religious expression harms them because the practice is insulting or disturbing to their religion, the Supreme Court has treated this sort of harm as per se inadmissible. In other words, if the government can point to no other justification for prohibiting the religious conduct than the inadmissible harm of religious insult, then the reciprocal harms to the religious observer will become incidentally prohibited harms.[223] For example, in *Cantwell v. State of*

576, 592 (1969)) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (quoting *Johnson*, 491 U.S. at 414)); *see also Hustler Magazine*, 485 U.S. at 55–56 (1988); Coates v. Cincinnati, 402 U.S. 611, 615 (1971); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509–14 (1969); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963); Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); Schneider v. State, 308 U.S. 147, 161 (1939); De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

221. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

222. *See, e.g.*, J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson ed., 1962) (discussing speech acts); L.W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION (2004) (discussing obscenity); DWIGHT L. TEETER & BILL LOVING, LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA 121 (12th ed., Thomson Reuters/Foundation Press 2008) (discussing fighting words); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1143 (2005) (noting that "threats or false statements of fact" have "so little First Amendment value that [they are] constitutionally unprotected").

223. *See* Kunz v. New York, 340 U.S. 290, 292 (1951) (invalidating a permit scheme which had been used to revoke a preacher's permit "based on evidence that he had ridiculed and denounced other religious beliefs in his meetings"); *Cantwell*, 310 U.S. at 303 (1940); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497 (1952) (striking down a statute in New York that permitted "the banning of motion picture films on the ground that they are 'sacrilegious'"); Volokh, *supra* note 191, at 310 ("If the tendency of speech to emotionally disturb a plaintiff for religious reasons, and affect the spiritual or emotional value that a plaintiff gets from a religious service, suffices to justify restricting speech, then half-century-

Connecticut, Newton Cantwell, a Jehovah's Witness, stopped two other men on the street and asked and received permission to play a record for them, which went on to criticize the Catholic Church.[224] The two men were themselves Catholic, and they became "incensed by the contents of the record."[225] As a result, charges were brought against Cantwell, and he was convicted for inciting a breach of the peace, among other convictions.[226] The Court unanimously held that this conviction "must be set aside" because "a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."[227] Thus, the harm the government caused for religious observers was prohibited, and the harm the Catholic men claimed experiencing, undesirable religious activity, was per se inadmissible.

Similarly, in 1952 the Supreme Court struck down a statute in New York that permitted "the banning of motion picture films on the ground that they are 'sacrilegious.'"[228] The highest court in New York upheld the statute, reasoning that the government could act to avoid harm to third parties that included their religion being "treated with contempt, mockery, scorn and ridicule."[229] The Supreme Court unanimously reversed, holding that this standard "is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."[230] The Court went on to explain that "the state has *no legitimate interest* in protecting any or all religions from views distasteful to them . . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine . . . ."[231]

Lest one think that such inadmissible and prohibited harms are obvious in the free exercise context, it is valuable to consider a very different approach that Europe's highest human rights court has taken. In a recent ruling, the European Court of Human Rights held that disparagement of religious doctrines, such as insulting the Prophet Muhammad, is a harm that *can* justify prosecution by the government.[232] In this particular Austrian case, a woman had been convicted under a law that prohibited

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old precedents protecting blasphemous and otherwise religiously offensive speech . . . would have to be overturned. And religious ideologies would acquire striking, and improper, new protection from criticism and ridicule.").

224. 310 U.S. at 303.

225. *Id.*

226. *Id.* at 300.

227. *Id.* at 307–08.

228. *Joseph Burstyn*, 343 U.S. at 497.

229. *Id*. at 504 (quoting Joseph Burstyn, Inc. v. Wilson, 101 N.E.2d 665, 672 (N.Y. 1951)).

230. *Id*. at 504–505.

231. *Id.* at 505 (emphasis added). The Court here discussed concerns regarding this policy under the religion clauses of the First Amendment, but it ultimately determined it only needed to decide the case under the Free Speech Clause. *Id.* at 502. However, the Supreme Court later affirmed this reasoning, quoting from this passage, in the context of religious protections under the First Amendment. Epperson v. Arkansas, 393 U.S. 97, 106─07 (1968).

232. Bojan Pancevski, *Europe Court Upholds Ruling Against Woman Who Insulted Islam*, WALL ST. J. (Oct. 26, 2018, 2:57 PM), https://www.wsj.com/articles/europe-court-upholds-ruling-against-women-who-insulted-islam-1540580231?mod=hp_lead_pos9 [https://perma.cc/VA5A-HXY6].

religious disparagement after she called the Prophet Muhammad a pedophile.[233] The European Court of Human Rights held that Austrian courts "carefully balanced her right to freedom of expression with the right of others to have their religious feelings protected, and served the legitimate aim of preserving religious peace in Austria."[234] Other countries have engaged in even more extreme prosecution of harm caused by religious disparagement with blasphemy laws. These approaches used in other countries highlight the distinctive way in which U.S. courts have chosen to treat disparagement harms as inadmissible, rather than a relevant factor to be balanced.[235]

3. Establishment Clause

This subsection discusses two harms courts have treated as categorically prohibited under the Establishment Clause: coerced conformance with religious tenets and government interference with internal church governance and leadership, along with some of the inadmissible harms in those cases.

a. Coerced Conformance with Religious Tenets

One per se inadmissible harm in the Establishment Clause context includes the claim by religious individuals that the government's failure to coerce conformance with religious practices would allow private behavior that "contradicts accepted social, moral or religious ideas."[236] If the government can point to no other justification for its policy other than that inadmissible harm, then any harms flowing from giving the force of law to coerce certain religious doctrines or teachings become incidentally prohibited harm.[237]

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233. *Id.*

234. *Id.*

235. For a discussion of the differences between categoricalism and balancing, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

236. *Epperson*, 393 U.S. at 107 n.15 (quoting Robert A. Leflar, *Legal Liability for the Exercise of Free Speech*, 10 ARK. L. REV. 155, 158 (1956)) (addressing a challenge to a law prohibiting teachers from instructing students about the theory of evolution).

237. Third-party harm theorists have observed that there is "broad consensus that, whatever else it was originally understood to accomplish, the Establishment Clause was meant to prohibit the federal government from setting up any 'establishment of religion' that resembled the eighteenth-century Church of England." Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 10, at 362 (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32 (1998); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 82 (2013); STEVEN D. SMITH, FOREORDAINED FAILURE 23 (1995); JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 89 (3d ed. 2011); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 388–89 (2002); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 488, 491 (2006)). Prior to American Independence, "the Church of England was formally established by law in the five [American] colonies . . . ." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110 (2003). The remaining colonies did not have established churches, and they were relatively religiously

For example, in a Kansas court of appeals case called *Sharma v. Sharma*, a husband had brought a divorce action which the wife objected to on the grounds that the couple were Hindus and their religion "does not recognize divorce."[238] She argued that an "order dissolving her marriage violates her constitutionally guaranteed right of free exercise of religion."[239] The court disagreed and noted that compelling the husband to remain married would be to coerce him to comply with his wife's religious belief rather than his own.[240] This sort of harm the husband would experience "is prohibited by the Establishment Clause of the First Amendment."[241] The court recognized potential harm the wife could experience because the husband contravened religious vows he had made, but it also noted that such harm was per se inadmissible under the Establishment Clause. "Any transgression by her husband of their ecclesiastical vows, is, in this instance, *outside the jurisdiction* of the court."[242]

The Supreme Court engaged in similar reasoning in the education context. In *Epperson v. Arkansas*, the State passed a law that prevented its teachers from teaching the theory of evolution "because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man."[243] The Court observed that the State's actions resulted in harm for teachers and students by "requir[ing] that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[244] The Court ruled that coercing a teacher to tailor her teaching to a certain "sect or dogma" constituted prohibited harm.[245] This was because the harm that the State alleged citizens would experience if teachers could teach theories that contradict "accepted social, moral or religious ideas" was simply a form of per se inadmissible harm.[246] The Court explained that "the state has *no legitimate interest* in protecting any or all religions from views distasteful to them."[247] Since the State could point to no other harm than this inadmissible one to justify its policy, the reciprocal coercive harm was prohibited.

Another case, *Caldor*, deserves mention here given third-party harm theorists reliance on it.[248] The Burger Court's reasoning in *Caldor* is not a model of clarity.

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tolerant and pluralistic. *Id.* at 2110–11 ("The remaining colonies—Pennsylvania, Delaware, New Jersey, Rhode Island, and non-metropolitan New York—had no official establishment of religion. Rhode Island, Pennsylvania, and Maryland were explicitly founded as havens for dissenters, though Maryland lost that status at the end of the 1600s. Although the laws of these colonies would not pass full muster under modern notions of the separation of church and state—they all had religious tests for office, blasphemy laws, and the like—they were, by the standards of the day, religiously tolerant and pluralistic.").

238. 667 P.2d 395, 395 (Kan. Ct. App. 1983).

239. *Id.*

240. *Id.* at 396.

241. *Id.*

242. *Id.* (emphasis added) (quoting Williams v. Williams, 543 P.2d 1401, 1403 (Okla. 1975)).

243. 393 U.S. 97, 107–09 (1968).

244. *Id.* at 106.

245. *Id.* (emphasizing that "[t]his prohibition is absolute").

246. *Id.* at 107 n. 115 (quoting Leflar, *supra* note 237, at 158).

247. *Id.* at 107 (emphasis added) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952)).

248. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985).

The language of the opinion, as well as subsequent cases discussing *Caldor*, suggest that it was decided under the Court's *Lemon* precedent[249]—precedent that at least six justices recently indicated they no longer view as good law.[250] As discussed in more detail below in Section III.B.2, this legal standard is thus dubious precedent under the Establishment Clause. Nevertheless, to the extent that it remains good law, one reading of *Caldor* is that it fits within this categorical class of Establishment Clause cases regarding government coercion and religious tenants. In *Caldor*, the Court struck down a broad, generally applicable Connecticut law that required employers to allow an employee to not work on his chosen Sabbath day.[251] *Caldor* involves coercion in the sense that the law at issue in that case is (1) a government requirement or prohibition that (2) falls on a private party and (3) compels that private party to change their behavior so that *other* third parties can engage in their desired religious practices more easily.

One way to think of *Caldor* is that the government action is quasi-coercive because it does not directly require the private actor to engage in a religious practice. But it does require, through the force of law, that private individuals change their behavior so that *someone else* may engage in a religious practice. Indeed, the Court observed with concern that this law at issue in *Caldor* created an "absolute duty to conform [the private] business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates."[252] This, the Court held, contravened a requirement of the Establishment

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249. In *Caldor*, the law required employers to accommodate employees' Sabbath observance, but it did not require employers to accommodate a host of other sorts of religious practices. The majority stated that its holding "relied on . . . Lemon" for "guidance," noting the need for a law to avoid the "primary effect" of "advanc[ing] or inhibit[ing] religion." *Id.* Similarly, in her concurrence, Justice O'Connor stated, "The Court applies the test enunciated in *Lemon v. Kurtzman*, and concludes that [the law] has a primary effect that impermissibly advances religion. . . . [T]he Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance." *Id.* at 711 (O'Connor, J., concurring) (citations omitted). The Supreme Court has subsequently affirmed that this issue of impermissible purpose under *Lemon* was the basis for its holding in *Caldor*. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 145 n.11 (1987) ("In *Thornton*, we held that a Connecticut statute that provided employees with an absolute right not to work on their Sabbath violated the Establishment Clause. The Court determined that the State's 'unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly advance[d] a particular religious practice.'") (alterations in original). Professor Eugene Volokh has described *Caldor* as falling under the "impermissible primary effects" prong of the *Lemon* test. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 727 (6th ed. 2016).

250. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019). Justice Alito (joined by Chief Justice Roberts and Justice Breyer) criticized *Lemon* in the context of symbol cases. *Id.* at 2085. Justice Gorsuch suggested that *Lemon* is effectively "shelved." *Id.* at 2098 (Gorsuch, J., concurring). Justice Kavanaugh stated that "[*American Legion*] again makes clear that the *Lemon* test does not apply to Establishment Clause cases." *Id.* at 2092 (Kavanaugh, J., concurring). And Justice Thomas went as far to say that the Court should "overrule the *Lemon* test in *all* contexts." *Id.* at 2095 (Thomas, J., concurring).

251. *Caldor*, 472 U.S. at 708.

252. *Id.* at 709.

Clause that "government . . . must take pains not to compel people to act in the name of any religion."[253]

Because of this quasi-coercive element, as opposed to a fully coercive element (requiring the individual himself to conform behavior with a religious tenet), it seemed to matter to the Court whether there were strict limits on the level of government coercion. And in *Caldor*, the law failed to place any reasonable limit on the externalities that would result from the government coercion, which was why the Supreme Court noted with concern the "absolute and unqualified" religious accommodation requirement resulted in an "absolute duty to conform . . . business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates."[254] In contrast to those in *Caldor*, other sorts of quasi-coercive government action likely do not fall within this prohibited category of harm where limits are placed on the government coercion. Title VII's religious discrimination prohibition is a good example of a quasi-coercive government action that likely satisfies Establishment Clause concerns.[255] The statute does require employers to change their behavior to accommodate employees' religious beliefs. But it limits the level of religious-benefitting coercion that can be exercised against an employer by capping any accommodations that would rise to the level of creating "undue hardship" on the conduct of the employer's business.[256] Thus, under Title VII, private parties are spared from experiencing limitless coercion in order to benefit private parties' religious practices.

Notably, as other scholars have observed,[257] true religious exemptions from government requirements never involve this quasi-coercive problem, where the government imposes a requirement or prohibition directly on a private party in order to benefit religious individuals. Instead, a religious exemption involves (1) a government requirement or prohibition that (2) applies to a range of groups and

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253. *Id.* at 708.

254. *Id.* at 709.

255. 42 U.S.C. § 2000e-2 (2012).

256. *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring).

257. *See generally* Esbeck, *supra* note 14. As these scholars have recognized, the Supreme Court's decision in *Amos* regarding the statutory exemption in Title VII also illustrates how such exemptions do not result in quasi-coercive government action. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 327–28 (1987). Employees who had been fired from their jobs with a religious organization brought suit, arguing that the statutory religious exemption violated the Establishment Clause because it "singles out religious entities for a benefit." *Id.* at 333. Notably, these employees constitute a discrete and identifiable group of third parties who experienced more than a de minimis harm from the religious exemption. Yet the Supreme Court unanimously rejected their argument. The Court concluded that the "government acts with [a] proper purpose" when it "lift[s] a regulation that burdens the exercise of religion," even if the exemption does not "come packaged with benefits to secular entities." *Id.* at 338. The Court also observed the difference between a burden imposed on a private party directly by the government and one imposed incidentally by virtue of private actors who received a religious exemption stating, "Undoubtedly, [the employee's] freedom of choice in religious matters was impinged upon, but it was the Church (through the [church policies]), and not the Government, who put him to the choice of changing his religious practices or losing his job." *Id.* at 337–38, 338 n.15.

individuals but (3), for free exercise reasons, is not being applied against particular religious individuals. Such exemptions will have incidental impacts on third parties (as does the protection of any legal right or interest), but there is no direct government coercion operating through the force of law against nonbenefiting private parties in order to benefit religious individuals.[258] In *Hobby Lobby* (citing *Cutter*),[259] the Supreme Court did discuss the interplay between Establishment Clause concerns under *Caldor* and heightened scrutiny analysis in the context of religious exemptions; this interplay is discussed in the context of relevant harms below in Section III.B.

b. Government Interference with Internal Church Governance and Leadership

Another sort of per se prohibited harm in the Establishment Clause context occurs when the government interferes with ecclesiastic decisions regarding internal church governance and leadership.[260] On the other side of the ledger in such conflicts, a private party experiences the harm of being excluded from a group or employment position. Such a harm is not categorically inadmissible; indeed, courts have ruled in favor of preventing such harm elsewhere.[261] But it becomes incidentally inadmissible when the competing harm is categorically prohibited: government interference with church leadership.

The leading case addressing this conflict is *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, where the Supreme Court unanimously rejected the discrimination claim of a former teacher challenging her church's decision to fire her.[262] The Court also acknowledged that there were countervailing harms on each side of the scale, including the "important" interest of society "in the enforcement of employment discrimination statutes," to protect third parties like the teacher on the one hand, and "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" on the other side.[263] But instead

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258. To provide an example, for *Hobby Lobby* to have truly involved a quasi-coercive government action and mirrored *Caldor*, it would have needed to involve a scenario similar to the following: an employee who worked for a company objected on religious grounds to being offered company insurance with contraception in it and demanded under a religious accommodation law that the employer exclude contraception coverage from its plan, even if that went against the preferences or needs of the employer and other employees. Of course, the Supreme Court's actual decision in *Hobby Lobby* looked nothing like that. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). Instead, when the Supreme Court exempted Hobby Lobby from the contraception mandate, it did not place any government-imposed requirement, penalty, or barrier with respect to contraception on any private parties. It simply removed a government requirement that had previously applied to Hobby Lobby. *Id.*

259. *Id.* at 2761 (citing Cutter v. Wilkinson, 544 U.S. 709, 715–16 (2005)).

260. For a thoughtful discussion about when religious autonomy causes cognizable harm, see Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1856, 1856 n. 266, 1858 (discussing sex abuse cases).

261. *See* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (ruling in favor of women who were excluded from associating with the Jaycees).

262. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 190 (2012).

263. *Id.* at 196.

of engaging in any sort of comparative balancing of these harms, the Court stated that "the First Amendment has struck the balance for us."[264] That balance categorically required a ruling avoiding the prohibited harm to the church, and treating the bilateral reciprocal externality befalling the teacher as incidentally inadmissible.

B. Probative Harms

1. Free Speech and Religious Exercise

The framework for assessing competing probative harms is relatively straightforward and similar in both the free speech and the statutory religious exemption contexts.[265] In both contexts, a presumptively impermissible harm arises when government action burdens either protected speech or religious exercise rights, respectively. The tests vary for determining which harms qualify for this classification as a presumptive harm. But once the relevant harm has occurred, that government action is impermissible unless that presumption is rebutted by the presence of sufficient countervailing and unavoidable harms. The weight of the presumption varies somewhat, depending on whether the doctrinal context of the right triggers intermediate scrutiny or strict scrutiny. The important point is that unlike with truly prohibited harms, here the government may rebut such a presumption based on other relevant factors. One such rebutting factor involves other relevant probative harm to third parties that will result unless the government is allowed to engage in the presumptive harm to the speech or religious interest. However, these competing harms will not be given much weight at all if the government has alternatives to avoid these relevant harms without imposing the presumptively prohibited harm.

One of many examples of this analysis in the speech context comes from *Bartnicki v. Vopper*, where the Court dealt with the question of whether a federal wiretap law could be used to punish the publication of an illegally intercepted cellular telephone call.[266] The Court there noted that the government interception resulted in harm to the speaker's rights to be able to publicize information. This harm was presumptively impermissible. The government argued that it had an interest in punishing the publication of the communication to "minimiz[e] the harm to persons whose conversations have been illegally intercepted."[267] This countervailing harm was

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264. *Id.* Note that the Supreme Court's decision in *Hosanna-Tabor* was under both the Free Exercise Clause and the Establishment Clause. *Id.* at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

265. Note that for the religious exercise context, I will be pointing to cases decided both constitutionally and statutorily under RFRA, as RFRA operates as a quasi-constitutional statute that was meant in part to restore the constitutional heightened scrutiny that existed prior to *Employment Division v. Smith*. I have argued elsewhere why *Smith* is an inappropriate constitutional standard for religious exemptions and will thus not attempt to fit *Smith* into a coherent harm framework here. *See generally* Barclay & Rienzi, *supra* note 34.

266. Bartnicki v. Vopper, 532 U.S. 514, 517 (2001).

267. *Id.* at 529.

relevant. Despite the government's asserted interest in reducing substantial harm to identifiable third parties, the Court held that this argument was insufficient to rebut the presumption of impermissibility.[268] The government had other ways to protect third parties, including by punishing parties more directly tied to the interception of the communication.[269] A contrasting case is *Holder v. Humanitarian Law Project*, where the Court acknowledged that the government had engaged in serious presumptive harm by passing a statute that allowed even political speech to be prohibited by the government in order to avoid providing support to terrorist organizations.[270] However, the relevant harm in that case, including injury to third parties from terrorist organizations, was sufficient to rebut the presumption of impermissibility.[271] The Court left open the possibility, however, that such relevant harms to third parties from terrorist activity would not be sufficient to rebut the presumption in other contexts.[272]

This same sort of analysis applies in the context of general exemption statutes for religious rights.[273] For example, in *Hobby Lobby*, the Supreme Court found that RFRA gave rise to presumptively impermissible harm where the government substantially burdened Hobby Lobby's religious exercise with respect to contraception, thus creating a rebuttable presumption.[274] On the other side of the ledger, the Court assessed harm that would befall third parties—employees of Hobby Lobby—if the Court offered a religious exemption and these employees did not receive seamless contraception access. Ultimately, the Court determined that this relevant harm was insufficient to rebut the presumption of impermissible government burdening of religious exercise rights.[275] The Court's conclusion was driven by its determination that the government had other alternatives to avoid harm to Hobby Lobby's employees while also avoiding the presumptive harm of burdening religious exercise rights.[276]

In the free exercise context, *United States v. Lee* is a case where the Court held that the harms to third parties were such that the government was able to satisfy strict scrutiny and thus overcome the presumptive harm that befell an Amish employer theologically opposed to paying Social Security tax.[277]

A brief word about the Establishment Clause limits on religious exemptions is relevant here, though other Establishment Clause harms will be discussed in more detail below. Some scholars argue that the harm Hobby Lobby's employees would

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268. *Id.* at 535.
269. *Id.* at 529.
270. 561 U.S. 1, at 25 (2010).
271. *Id.* at 30.
272. *Id.* at 40 (the Court made clear that its holding only applied to "the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations").
273. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006) (noting that the rebuttable presumption in this case "is placed squarely on the Government by RFRA rather than the First Amendment, but the consequences are the same") (citation omitted).
274. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014).
275. *Id.* at 2780–82
276. *Id.* at 2782.
277. 455 U.S. 252, 259–60 (1982).

experience as a result of the religious exemption should operate as essentially a form of prohibited harm under the Establishment Clause.[278] The Court rejected this approach, and instead noted that this third-party harm was a relevant harm, entitled to probative weight under the Establishment Clause no greater than the normal probative weight it would be given under the rebuttable presumption framework of heightened scrutiny.[279] Specially, the Court cited some Establishment Clause cases and noted that "[i]t is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"[280] But the Court stated that such "consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest" under strict scrutiny.[281] Thus, whatever consideration must be given to relevant harms caused to nonbeneficiaries by statutory general religious exemptions, that analysis is likely automatically baked into the strict scrutiny analysis of general accommodation statutes like RFRA and RLUIPA. Such relevant harm does not appear to receive additional weight based on Establishment Clause considerations.

2. Establishment Clause

In some Establishment Clause contexts, such as with regard to government discrimination between religious congregations, courts have explicitly followed a rebuttable presumption framework of competing harms similar to the speech and religious exercise context.[282] On the other hand, the Supreme Court's infamous *Lemon* test sometimes has seemed to just be looking at a series of relevant harms with no clear guidance as to how to balance the harms against one another or what respective weights various harms should receive. The *Lemon* test looks at whether the statute has a secular purpose, whether its primary effect is to "endorse" religion, and whether it fosters excessive entanglement.[283] The Court, however, recently rejected and heavily criticized the application of *Lemon* in its *American Legion* ruling.[284]

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278. *See supra* Section I.B.

279. *Hobby Lobby*, 134 S. Ct. at 2781, 2781 n.37.

280. *Id.* at 2801 (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

281. *Id.* at 2781.

282. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982). Commentators such as Professor Fallon have noted a deep incongruence between the Court's jurisprudence regarding standing and other constitutional doctrines and have argued for Establishment Clause jurisprudence to be brought more in line with other First Amendment jurisprudence. *See* Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 59 (2017) ("When compared with other constitutional doctrines, Establishment Clause doctrine is confused and anomalous, both substantively and with regard to standing.").

283. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (describing *Lemon* test); Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring) (articulating the "no endorsement" test).

284. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) ("If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. . . . This pattern is a testament to the *Lemon*

Careful review of some of the Court's previous cases ostensibly applying *Lemon* suggests that these cases may be actually following something closer to the rebuttable presumption framework used elsewhere in the First Amendment. Some harms are treated as presumptively invalid under the Establishment Clause when they resemble a historic hallmark of establishment, such as those identified by Professor Michael McConnell,[285] and when the government is engaging in some sort of preferential treatment with regard to religion.[286] As discussed below, these sorts of harms include preferential public funding to religious groups and preferential partnerships with religious organizations for the performance of state civil functions. Viewing courts' treatment of harm under the Establishment Clause in this light can lend more predictability and coherence to the analysis in which courts are engaging.

The public financial support of religious groups is one Establishment Clause area where the rebuttable presumption framework is also consistent with historical concerns regarding an established religion. As Professor McConnell has recognized, public financial support is one of the hallmarks of a historic establishment of religion.[287] Historically, public financial support does not appear to have been viewed as a categorically prohibited harm, as many forms of financial support appear to have received wide acceptance in early American history.[288] To take one particularly relevant example, our country has a long history of providing tax exemptions for religious groups,[289] which necessarily results in cost-shifting for religious practices to nonbelievers. There are no meaningful differences between a church tax or a church tax exemption in terms of pure cost shifting and externalities for third parties—the issue at the heart of the third-party harm theory. As Professor Wolfman has explained, a "tax expenditure" can "appropriate money to a particular person or group" where there is "a special, narrowly directed tax deduction or exclusion."[290] But where public support was provided to religious organizations in preferential ways, such as the Virginia church tax that Mark Storslee has recently analyzed, then such costs were viewed with much greater historical concern.[291]

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test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them.").

285. *See* McConnell, *supra* note 237, at 2110.

286. *See* Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistic Analysis*, 61 ARIZ. L. REV. 505 (2019) (providing data on how frequently historic terms discussing an established religion referred to these different hallmarks of an establishment).

287. McConnell, *supra* note 237, at 2146.

288. *Id.* at 2147–48. For a discussion of additional characteristics of public funding that raised concerns about an establishment of religion during the founding period, see Barclay et al., *supra* note 285.

289. Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970).

290. Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491, 491–492 (1985) (book review).

291. Storslee, *supra* note 15, at 887; *see also* Barclay et al., *supra* note 285 (explaining how historic sources in the corpus linguistic analysis never treated public funding, alone, as equating with an established religion; rather, each surveyed source involved preferential treatment of at least one religious group with respect to the funding).

The rebuttable presumption framework provides the most coherent account of courts' decisions in the public funding context as well. Where public funding is being offered to religious groups on neutral terms available to other religious and secular groups alike, no presumptive harm arises. But when public aid is being offered in a more preferential manner, a rebuttable presumption of impermissibility arises that can be rebutted based on a showing of a need to avoid the competing harm of government entanglement with religious affairs.

For example, in the context of taxes, Professor Zelinsky has astutely observed that "taxing [churches] does not separate church and state but, rather, enmeshes them. . . . The relationship between the tax collector and the taxpayer is among the most enmeshing legal relationships in our society."[292] Professor Zelinsky describes "enforcement entanglement" as the entanglement that occurs when government taxes churches and is therefore required to value church property, place liens on church property, and (in some cases) foreclose on church property.[293] In *Walz v. Commissioner*, for instance, the Supreme Court rejected an Establishment Clause challenge to New York's property tax exemption for church property.[294] In an opinion joined by six Justices, Chief Justice Burger wrote that the tax exemption was a permissible means of "avoid[ing] excessive entanglement" and "prevent[ing] the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."[295] Given the "autonomy and freedom of religious bodies," it was reasonable for the state to conclude that such organizations "should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes."[296]

While the entanglement concern constituted the core of Justice Burger's opinion, he also touched on the subtheme of government evenhandedness. He noted that New York's exemption for religious organizations was part of a broad tax scheme that included other exemptions for "a broad class of property" including for groups like "hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[297] New York's policy thus did not just exempt "churches as such," but instead had a policy recognizing many "groups as beneficial and stabilizing influences in community life."[298] Professor Zelinsky has suggested that these comments reflect "greater judicial acceptance of tax exemptions for churches and other religious institutions when exemption simultaneously extends as well to secular philanthropic activities and entities."[299] Another way to think about this presumptively impermissible harm of preferential tax treatment in favor of some

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292. EDWARD A. ZELINSKY, TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION 234–35 (2017).

293. Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633, 1640 (2012).

294. *Walz*, 397 U.S. at 680.

295. *Id*. at 670.

296. *Id.* at 672.

297. *Id.* at 673.

298. *Id.*

299. ZELINSKY, *supra* note 292, at 6.

religious organizations may be rebutted in some instances where entanglement concerns would arise without such a tax exemption. But some preferential tax treatment of religious organizations, such as in *Texas Monthly, Inc. v. Bullock*, actually creates heightened entanglement concerns and thus fails to rebut the presumption of impermissibility.[300]

The flip side of this Establishment Clause analysis illustrates a mirror rebuttable presumption framework that takes place under the Free Exercise Clause with regard to denials of public support singling out religious organizations. Specifically, when government denies public support in a targeted, discriminatory way toward religious groups, a presumption of impermissibility arises.[301] Such a presumption may be rebutted where the funding at issue would be directed to a religious activity and where there has been a "history" of government entanglement.[302] But absent this specific history of entanglement, the presumptively impermissible discriminatory denial will not be rebutted. For example, in *Trinity Lutheran*, the Supreme Court recently struck down a state grant program that excluded religious organizations.[303] The Court indicated that the State might have been able to rebut the presumption of impermissibility for its exclusion of religious groups from public funding if such an exclusion had arisen in one of the "few areas" where the state has an "antiestablishment interest" in preventing funding for "essentially religious endeavors"—an interest which is at the "historic core of the Religious Clauses."[304] But absent that sort of core interest, the State would be unable to rebut a presumption of impermissibility for its discriminatory actions.

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300. 489 U.S. 1 (1989). Professor Zelinsky labels the entanglement issue in this case as "borderline entanglement," referring to the entanglement that occurs when government must police the boundaries of who qualifies for an exemption and assessment of specific religious activities. ZELINSKY, *supra* note 292, at xv ("I propose the label 'borderline entanglement' for the church-state tussles which occur when churches and other sectarian actors are tax exempt. When churches (and other religious entities and actors) are tax exempt, they must claim exemption while tax collectors must police the boundaries of exemption and sometimes reject those claims. The upshot is church-state entanglement over the borders of exemption."). The State in *Texas Monthly* had a sales tax which applied to all secular publications, but it exempted "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." *Texas Monthly*, 489 U.S. at 5 (quoting TEX. TAX CODE ANN. § 151.312 (West 1982)). In Justice Brennan's opinion, joined by Justices Marshall and Stevens, he noted the borderline entanglement problem inherent in such an exemption, as it "requires that public officials determine whether some message or activity is consistent with 'the teaching of the faith.'" *Id.* at 20. Thus, while Justice Brennan noted that taxing churches would also "enmesh the operations of church and state to some degree," enforcing this type of subsidy which is "targeted at writings that promulgate the teachings of religious faiths," "appears, on its face, to produce greater state entanglement with religion than the denial of an exemption." *Id.* at 15, 20–21 (emphasis omitted).

301. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) ("Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.").

302. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 725 (2004).

303. *Trinity Lutheran*, 137 S. Ct. at 2012.

304. *Id.* at 2023 (citations omitted).

IV. THE NORMATIVE QUESTIONS WE SHOULD BE ASKING ABOUT HARM

As discussed in Part III, careful review of religious exemption caselaw reveals that courts are not treating any harm to third parties as categorically prohibited. Rather, 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. And competing harms always arise in the context of the protection of such rights. A clear recognition of the ubiquitous nature of reciprocal harm inherent in the protection of these rights requires more nuanced normative consideration beyond a simple conclusion that harm is bad and ought to be avoided. As discussed above, it is beyond the scope of this Article to assess whether the current doctrinal framework (discussed in Part III) is normatively justified in every respect. But to the extent harm is a useful normative criterion in the First Amendment context, this Article proposes three normative questions we *should* be asking. This Article also provides examples of how these necessary normative inquiries are already woven into the legal framework that governs many sorts of religious exemptions.

A. Are Costs Justified by the Social Goods They Provide?

Professors Schwartzman, Tebbe, and Schragger have argued that it is normatively "disturbing" to "forc[e] third parties to pay for the exercise of others' constitutional rights."[305] But this assertion loses its force if someone will always experience a cost or harm when government acts to protect, or not protect, any constitutional right. Instead, we must broaden our lens to observe harms on both sides of the scale. At that point, we can ask the more important normative question related to harm: whether net costs are justified by providing a net gain for society.[306]

Sometimes localized externalities are arguably balanced by a more diffuse social benefit. One might consider the localized externalities resulting from state or local taxes related to the support of education in such a way.[307] 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.[308] Viewing 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 society receives in exchange for the harm are significant, then protection of the right might be deemed a social bargain, notwithstanding significant harm.[309]

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,[310] but free expression has also been described as one of America's "most

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305. Schwartzman et al., *supra* note 10, at 912.

306. *See* HOLMES & SUNSTEIN, *supra* note 139, at 117.

307. Thanks to Professor Frederick Gedicks for this example.

308. *See* Gladriel Shobe, *Economic Segregation, Tax Reform, and the Local Tax* (unpublished manuscript) (draft on file with the author).

309. HOLMES & SUNSTEIN, *supra* note 139, at 177.

310. 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

precious" rights because its protection provides enormous social goods enjoyed by society generally.[311] These goods include making it more likely that violations of other rights will be reported; operating as a precondition for democratic self-government; ensuring political accountability; decreasing government corruption and abuses of power; improving the quality of policy-making; and facilitating a host of other artistic, psychological, economic, moral and even religious functions.[312] In less developed countries, freedom of speech has even helped prevent famines.[313] As Professor 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.[314]

In other words, individuals in a society without freedom of expression suffer more from the loss of social goods 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 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 which provides a significant social bargain to society, notwithstanding its costs.[315] This was something a number of the American Founders believed. In his Farewell Address in 1796, President 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 to cherish them."[316] This

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strong free speech (and free press) protection, and it is a 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.") (quoting Coleman v. MacLennan, 98 P. 281, 286 (Kan.1908)).

311. HOLMES & SUNSTEIN, *supra* note 139, at 107.

312. *Id.* at 107–08.

313. *Id.* at 108 (citing JEAN DRÈZE & AMARTYA SEN, INDIA: ECONOMIC DEVELOPMENT AND SOCIAL OPPORTUNITY (1995)).

314. JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 54 (1994).

315. For an interesting discussion of the various contexts in which religious organizations provide social services, see Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341 (2016).

316. President George Washington, Farewell Address (Feb. 22, 1796); *see also* Arlin M.

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.[317] 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."[318] This value can be seen in programs like "130,000 alcohol recovery programs," "120,000 programs to help the unemployed," and about 26,000 "active ministr[ies] to help people living with HIV-AIDS."[319] Similarly, Professors Holmes and 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."[320] Professor Douglas Laycock has similarly recently observed that protecting religious liberty "reduces social conflict" and "reduces human suffering."[321] Thus, Americans are willing to bear not insignificant costs associated with rights imposed upon them in part because a whole range of precious public goods result from the protection of such rights.

The social benefits that flow from both 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 speech or religious rights. Indeed, this is the standard required under 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. Yet this is not a question that is relevant under current third-party harm theories.

It is worth noting that definitional issues related to harm under the third-party harm theory need not arise in this context, or certainly not with the same acuteness,

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Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989).

317. Garnett, *supra* note 14, at 49 ("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. & FRANK S. ALEXANDER, CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 267 (2010).

318. National Press Club, *$1.2 Trillion Religious Economy in U.S.*, RELIGIOUS FREEDOM & BUS. FOUND. (Sept. 13, 2016), https://religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us [https://perma.cc/VE9N-V4WH]; Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISCIPLINARY J. RES. ON RELIGION, art. 3, 2016, at 1.

319. National Press Club, supra note 319; Grim & Grim, *supra* note 318.

320. HOLMES & SUNSTEIN, *supra* note 139, at 182.

321. Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. Rev. 167, 200 (2019).

because whatever definition one chooses to employ for harm affecting third parties, one must grapple with how an action will result in that same type of reciprocal harm for groups on the other side of the ledger. Further, this normative account does not treat the presence of any harm as a condition requiring restriction of any rights. Rather, it treats harm as part of an equation that must be weighed in a consistent way for government to determine the most socially beneficial intervention.

B. Can Institutions Be Modified to Mitigate Avoidable Harms?

Professor Feinberg argues in his classic work, *Harm to Others*, that some sorts of harms arise from "bad social institutions," meaning institutions that cause conflicts that could be avoided, or at least mitigated, if the institutions were modified.[322] In other words, perhaps much criticism regarding harm lies with a policy or institution that puts the rights of religious believers and other third party 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, the former county clerk in Kentucky.[323] 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 issued in her name.[324] Her religious objections led her to prevent any same-sex couples in the county from obtaining a marriage license to which they were lawfully entitled.[325] 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 and held in contempt of court because she was unwilling to violate her conscience.[326]

Other states handled very 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

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322. FEINBERG, *supra* note 168, at 220 (quoting JOHN STUART MILL, ON LIBERTY 93 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978)) ("A form of competition is illegitimate if it is avoidable" (internal quotation marks omitted)).

323. Richard Samuelson, *Kim Davis and the Rule of Law*, FEDERALIST (Sept. 10, 2015), https://thefederalist.com/2015/09/10/kim-davis-and-the-rule-of-law/ [https://perma.cc/2TUR-8RZ7].

324. *See id.*

325. Amy Held, *Kim Davis Once Denied Him a Marriage License. Now Kentucky Man Seeks Her Job*, NPR (Dec. 6, 2017, 6:12 PM), https://www.npr.org/sections/thetwo-way/2017/12/06/568881497/kim-davis-once-denied-him-a-marriage-license-now-kentucky-man-seeks-her-job [https://perma.cc/3EK9-4TL5].

326. David Weigel, Abby Phillip & Sarah Larimer, *Kim Davis Released from Jail, Ordered Not to Interfere with Same-Sex Marriage Licenses*, WASH. POST (Sept. 8, 2015, 4:48 PM), https://www.washingtonpost.com/news/post-nation/wp/2015/09/08/judge-orders-kentucky-clerk-kim-davis-released-from-jail/ [https://perma.cc/RP46-QZ8C]; *see also* William McGurn, *Why Must Kim Davis Be Jailed*, WALL ST. J. (Sept. 7, 2015, 6:58 PM), https://www.wsj.com/articles/why-must-kim-davis-be-jailed-1441666727 [https://perma.cc/GZV8-Y92Z].

duty and available to perform marriages for any couple who requested one.[327] One need not agree with the policy, or even legality, of such a compromise to acknowledge that this sort of institutional modification operated to mitigate harms on both sides of the ledger.

In the context of religious exemptions offered under RFRA, this normative question is relevant to the "less restrictive alternatives" portion of the strict scrutiny test. Specifically, that prong of the analysis requires courts to look at whether the government could still accomplish its interest (which often involves things like avoiding harms to third parties) while still avoiding harm to the religious claimant. In other words, are there ways to modify institutions or programs so that neither party is harmed? This was a particularly salient issue in the *Zubik*[328] litigation, where the Supreme Court requested supplemental briefing precisely to require the parties to address the question of whether modifications to the religious accommodation under the contraception mandate could remove an avoidable harm to both parties.[329] Ultimately, because the government acknowledged that some changes to the program were possible, and because the religious claimants indicated that such changes could be satisfactory to their interests, the Supreme Court remanded the case to be resolved between the parties.[330] This is precisely the sort of inquiry that mitigates harm in the aggregate and that thus leads to more normatively justifiable results.

C. 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 just a subset of the population. Relying on the work of Professor Frederick Schauer, Professors Schwartzman, Tebbe, and Schragger argue, "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."[331] In many cases, a government-funded alternative to more evenly disperse externalities may provide precisely the sort of uncoupling of harm that Professor Schauer advocates

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327. UTAH CODE ANN. § 63G-20-101 to -303 (LexisNexis 2016); Dennis Romboy, *New Law Helps Utah Avoid Marriage License Conflict Playing Out in Kentucky*, DESERET NEWS (Sept. 3, 2015, 5:30 PM), https://www.deseretnews.com/article/865636031/New-law-helps-Utah-avoid-marriage-license-conflict-playing-out-in-Kentucky.html [https://perma.cc/KF78-8DRS]; Dennis Romboy, *US Can Learn from Utah on Gay Marriage License Issue, Professor Says*, KSL (Sept. 4, 2015, 8:38 AM), https://www.ksl.com/?sid=36356546&nid=148&title=us-can-learn-from-utah-on-gay-marriage-license-issue-professor-says [https://perma.cc/KPD8-5DA8]; Ben Winslow, *Governor Signs Bill Letting Clerks Opt Out of Same-Sex Marriages on Religious Grounds*, FOX 13 (Mar. 21, 2015, 4:26 PM), https://fox13now.com/2015/03/20/governor-signs-bill-letting-clerks-opt-out-of-same-sex-marriages-on-religious-grounds/ [https://perma.cc/YR89-8XQ7].

328. Zubik v. Burwell, 136 S. Ct. 1557 (2016).

329. Order, No. 14–1418, 2016 WL 1203818 (U.S. Mar. 29, 2016).

330. *Zubik*, 136 S. Ct. at 1560–61 (2016).

331. Schwartzman et al., *supra* note 10, at 910 (quoting Schauer, *supra* note 310, at 1322).

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 portion of the test.[332]

The Court in *Hobby Lobby* noted that the "most straightforward way" of ensuring that harms would not be disproportionately borne 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."[333] 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.[334] Some third-party harm theorists have criticized this approach as "not politically viable," which is certainly a reasonable practical concern.[335]

However, on June 1, 2018, the federal government 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."[336] This proposed rule would ensure that if someone actually loses employer-sponsored contraceptive coverage as a result of religious exemptions, she will nevertheless have access to "free or low-cost family planning services," including contraceptives.[337] This sort of expanded government program provides a good example where institutions or policies 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.

CONCLUSION

While focusing on harm appears at first to provide an appealing simple and neutral principle for avoiding other difficult moral questions, the definition of harm itself operates on top of a deep moral theory about what counts as harm and why. Consequently, multiple scholars advancing iterations of these theories use "harm" as a term of art to mean very different things. This in turn results in scholars talking past each other and trading on a superficially simple idea that turns out to be incredibly complex. For this reason, the harm principle has proven unworkable in other contexts, including criminal and environmental law. This Article highlights the flaws of this approach in the religious context by measuring the theory against its own ends,

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332. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014).

333. *Id.*

334. *Id.* at 2781–82.

335. Koppelman & Gedicks, *supra* note 10, at 237 ("Funding for either a substantially larger exchange-tax credit or direct government funding for contraception is not politically viable, and it is disingenuous to suggest otherwise.").

336. 83 Fed. Reg. 25,502, 25,514 (June 1, 2018) (codified at 42 C.F.R. § 59.2 (2019)).

337. *Id.*

including the theory's failure to account for harms this approach would cause for religious minorities and other vulnerable groups.

Refuting the unhelpful fixation on the mere presence of generic harm, this Article instead describes the nuanced ways in which courts actually classify and weigh different types of harm. The categories of harm identified in this Article illustrate how courts are always weighing competing harms, which economists refer to as bilateral reciprocal externalities. This Article demonstrates how these categories of harm are not limited to religious exemptions but are in fact common to all First Amendment rights. Further, this descriptive framework sheds light on which sorts of harms matter and when, and it highlights the competing harms that always arise when any rights are protected. Significantly, by moving beyond a false dichotomy of harm versus no harm, we are able to ask much more fruitful normative questions. Such questions include whether there is a justifiable trade-off between the specific harm and the social goods it provides, whether institutions can be modified to mitigate avoidable harm, and whether disproportionate harms can be distributed in more just ways. This Article offers examples of how these necessary normative questions are already woven into the legal framework that governs many sorts of religious exemptions.