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ON SAME-SEX MARRIAGE AND MATTERS OF CONSCIENCE

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INTRODUCTION

An increasing number of states offer some sort of legal status to same-sex couples and their families, whether through recognition of same-sex marriages, civil unions, domestic partnerships, reciprocal beneficiary status, or some other sort of familial relationship. However, some individuals refuse to recognize lesbian, gay, bisexual and transgender (LGBT) relationships as a matter of conscience, and various commentators have urged states to adopt legislation protecting such refusals.

Conscience exemption legislation is not new—states have already passed legislation protecting those who refuse to take part in the provision of abortion or other medical procedures deemed contrary to the dictates of conscience. Yet, commentators pointing to the healthcare exemption statutes as a model for relationship exemption legislation tend to discount some of the problems associated with the existing statutes and, further, tend to overlook important dissimilarities between these differing kinds of conscience clauses. While the creation of an exemption based on sincere belief might seem an ideal compromise whereby same-sex couples and their families can receive legal

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recognition and those with religious qualms will not be forced to violate their convictions, such a compromise loses its luster upon further consideration. By creating one exemption specifically for same-sex relationships rather than a more generalized exemption for those with religious reservations about facilitating or being associated with relationships contrary to their beliefs, the state would undermine its commitment to equality by implicitly suggesting that individuals might *rightly* object to this kind of union, but no other, on religious grounds. Such a message reinforces rather than reduces stigma and second-class citizenship, which is exactly what the state should not be doing. While all difficulties would *not* be resolved by creating a generalized exemption so that individuals would not be forced to recognize any relationships contrary to conscience, the kind of exemption at issue here is especially problematic. This article discusses recent attempts to craft a compromise whereby same-sex couples will be allowed to receive certain civil benefits, but individuals with religious objections to such relationships will be afforded by law the right to discriminate against these unions but no others. The article concludes that while religious beliefs must be taken seriously, this kind of compromise undermines both religion and same-sex relationships, and thus needs to be rethought.

I. EXEMPTIONS FOR THOSE OBJECTING TO PERFORMING WORK CONTRARY TO FAITH

Various states have passed legislation protecting those who refuse to participate in certain practices that violate their religions' dictates. A brief consideration of the case law in this area, however, reveals some of the difficulties associated with the creation of such exemptions and illustrates why they do not provide the obvious, virtually cost-free solution to the problems posed when individuals object as a matter of conscience to providing certain services.

A. The Limitations of Conscience

Employees have long asserted in a variety of contexts that they were precluded by conscience from performing certain tasks. For example, individuals have refused to participate in war because of their sincere objections to killing.[1] In *Welsh*, the Court examined the case of Elliot Welsh II, who refused to report to be drafted because he was "'conscientiously opposed to participation in war in any form.'"[2] He

1. *E.g.*, Welsh v. United States, 398 U.S. 333, 333 (1970) (seeking conscientious objector status from the Armed Forces).

2. *Id.* at 335 (quoting 62 Stat. 612).

was not claiming that his objections were based in religion, because "his beliefs . . . [were] formed 'by reading in the fields of history and sociology.'"[3] That said, however, he held these convictions with the same "strength" as might someone whose objection to war was religiously based.[4] The Court interpreted the statutory exemption to include individuals like Welsh whose heart-felt reservations about war were not directly based on religious beliefs.[5]

The conscientious objection at issue in *Welsh* might be contrasted with a different type of objection to promoting a war effort, where the objection is to participating in particular wars rather than participating in war as a general matter.[6] In *Gillette,* one of the plaintiffs was a devout Catholic who believed it "his duty as a faithful Catholic to discriminate between 'just' and 'unjust' wars, and to forswear participation in the latter."[7] Asked to decide whether the conscientious objector law included those who objected to particular wars on religious grounds,[8] the Court held that the objection to particular wars rather than to war as a general matter did not qualify under the relevant statute.[9] Yet, this meant that those with sincere religious beliefs that included an objection to all wars would qualify for an exemption, whereas someone with equally sincere religious beliefs that included an objection to only unjust wars would not qualify for such an exemption.[10]

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3. *Id.* at 341 (quoting Welsh's conscientious objector application).

4. *See id.* at 343 (holding that plaintiff maintained his beliefs with the force of more mainstream religious principles).

5. *See id.* at 343-44 (finding that the statute in question only required an individual have "deeply held moral, ethical, or religious beliefs [that] would give them no rest or peace . . ."); *see also* United States v. Seeger, 380 U.S. 163, 165-66 (1965).

> [T]he test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Id.

6. Gillette v. United States, 401 U.S. 437, 439 (1971).

7. *Id.* at 441.

8. *See id.* at 439 ("These cases present the question whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service.").

9. *See id.* at 447.

> [W]e hold that Congress intended to exempt persons who oppose participating in all war—"participation in war in any form"—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is "religious" in character.

Id.

10. *Id.* at 440 (noting that an objection to the Vietnam War and not *all* war disqualified petitioner from exemption).

Plaintiffs claimed that the refusal to grant an exemption to those who wished to differentiate among wars violated Establishment Clause guarantees.[11] In rejecting that assertion, the Court noted that the touchstone for determining whether the Clause was violated was "neutrality,"[12] emphasizing that the Establishment Clause prohibits the government from putting its "imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization."[13] However, the Court did not believe that Congress was attempting to favor some religions over others when affording an exemption to those opposing all war rather than only certain wars,[14] but merely attempting to affect a compromise that took account of conflicting interests.[15] On the one hand, Congress recognized the practical difficulties associated with trying to force a sincere conscientious objector to fight,[16] and wished to take into account a "concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience."[17] On the other hand, Congress also had a "need for manpower"[18] and, further, an important interest in employing a "fair system for determining"[19] who would be selected for inclusion in the armed services.[20] The Court was persuaded by the government's claim that the interest in fairness would be at risk if objections to particular wars were permitted,

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11. *Id.* at 437.

12. *Gillette*, 401 U.S. at 450.

13. *Id.* (citing Engel v. Vitale, 370 U.S. 421, 430-31 (1962) (citation omitted)).

14. *See id.* at 451-52.

> Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience.

Id.

15. *Id.* at 453 (citing United States v. Macintosh, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting)).

16. *Id.* (discussing "the hopelessness of converting a sincere conscientious objector into an effective fighting man") (citing Welsh v. United States, 398 U.S. 333, 369 (White, J., dissenting)).

17. *Id.* (citation omitted).

18. *Gillette*, 401 U.S. at 455.

19. *Id.*

20. *See id.* at 455 n.20 ("The Report of the National Advisory Commission on Selective Service (1967) is aptly entitled In Pursuit of Equity: Who Serves When Not All Serve?").

because there would be "a real danger of erratic or even discriminatory decisionmaking in administrative practice."[21]

This interpretation of the relevant statute was driven in part by public policy considerations. The Court foresaw the difficulty that would otherwise arise when trying to fashion a way to cabin the exemption—a whole host of individuals might claim to have an objection of conscience to a particular war, and it would be difficult if not impossible to determine which claims had merit in a fair or accurate way.[22] The potential for abuse must always be considered whenever exemptions are proposed or applied.

The Court has made clear that an individual who objects to one war in particular rather than to war as a general matter will not be protected by federal constitutional guarantees when refusing to serve in the military.[23] Yet, it should not be thought that the only cases involving religious objections to war have involved individuals seeking to avoid the draft. On the contrary, there have been other contexts in which individuals with religious qualms about aiding a war effort have argued that they should not be forced to perform certain jobs.[24] In *Thomas*, the plaintiff claimed that his religion prevented him from helping make war materials.[25] The Court in *Thomas* noted that "beliefs rooted in religion are protected by the Free Exercise Clause,"[26] although the Court recognized that determining "what is a 'religious' belief or practice is more often than not a difficult and delicate task."[27] In an effort to provide some guidance about how to determine whether a belief or practice is religious, the Court pointed out some criteria that should *not* be used, noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[28]

Thomas had been forced to choose between working on the one hand and maintaining his religious beliefs on the other.[29] He chose the latter, and the question before the Court was whether Indiana could deny him unemployment benefits—the state claimed that he had failed to establish that he had left work for good cause.[30] The

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21. *Id.* at 455.
22. *Id.* at 455-56.
23. *Id.* at 447, 462.
24. *E.g.*, Thomas v. Review Bd., 450 U.S. 707, 710 (1981).
25. *Id.* at 709.
26. *Id.* at 713.
27. *Id.* at 714 (citing Torcaso v. Watkins, 367 U.S. 488, 495 (1961)).
28. *Id.*
29. *Id.* at 717 (noting his "choice between fidelity to religious belief or cessation of work").
30. *See Thomas*, 450 U.S. at 717 ("Indiana requires applicants for unemployment compensation to show that they left work for 'good cause in connection with the work.'") (citation omitted).

Court held that the state could not deny him benefits based on his refusal to work for religious reasons.[31] Indeed, the Court offered a rather robust understanding of the free exercise jurisprudence:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[32]

Here, the Court followed the position offered in *Sherbert v. Verner*,[33] where the Court struck down South Carolina's refusal to accord unemployment benefits to an individual who refused to work on Saturday because of her religious beliefs.[34] The South Carolina Employment Security Commission had found that "appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered . . . .'"[35] Basically, the South Carolina Employment Commission decided that for purposes of the statute, a refusal to work on one's Sabbath did not qualify as a justification or excuse.[36]

The Court rejected the South Carolina Commission's position, reasoning that Sherbert was forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[37] The Court emphasized that "such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[38] After finding that the state requirement imposed a substantial burden on Sherbert, the Court sought to determine whether "some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's

31. *See id.* at 720 ("Thomas cannot be denied the benefits due him on the basis of the findings of the referee, the Review Board, and the Indiana Court of Appeals that he terminated his employment because of his religious convictions.").

32. *Id.* at 717-18.

33. 374 U.S. 398 (1963).

34. *Id.* at 399 ("Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith.").

35. *Id.* at 401.

36. *Id.*

37. *Id.* at 404.

38. *Id.*

First Amendment right."[39] No such interest was present.[40] The Court was careful to note that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."[41] Yet, one of the ways that exemptions for people refusing to perform same-sex marriages differs from other kinds of exemptions is that marriage rights for members of the LGBT community may be of religious as well as civil import and thus the *denial* of those rights may implicate matters of faith.[42]

When explaining that the Constitution does not require individuals to forsake the precepts of their religion merely because legitimate state interests might thereby be promoted,[43] the Court was not implying that those precepts had to be in accord with the tenets of an established religion. On the contrary, as was demonstrated in *Frazee v. Illinois Department of Employment Security*,[44] precepts need not be found in the formal dogma of an established religious denomination in order to be given constitutional weight.[45]

At issue in *Frazee* was the plaintiff's sincere religious belief that he should not work on Sunday.[46] However, Frazee was not a member of an established religious group or sect, and his beliefs about work on Sunday did not spring from the teachings of a particular religious group or body.[47] The Court explained that the lack of connection between Frazee (or his beliefs) and an organized religion was not fatal, rejecting "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[48] Because his religious belief was sincere,[49] it was entitled to protection.[50]

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39. *Sherbert*, 374 U.S. at 406.

40. *Id.* at 409; *see also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139 (1987) ("[T]he Appeals Commission's disqualification of appellant from receipt of benefits violates the Free Exercise Clause of the First Amendment.").

41. *Sherbert*, 374 U.S. at 409.

42. *See infra* note 62 and accompanying text.

43. *Sherbert*, 374 U.S. at 406.

44. 489 U.S. 829 (1989).

45. *Id.* at 834.

46. *Id.* at 830 ("William Frazee refused a temporary retail position offered him by Kelly Services because the job would have required him to work on Sunday. Frazee told Kelly that, as a Christian, he could not work on 'the Lord's day.'").

47. *See id.* at 831 ("Frazee was not a member of an established religious sect or church, nor did he claim that his refusal to work resulted from a 'tenet, belief or teaching of an established religious body.'") (citing Frazee v. Ill. Dept. of Emp't Sec., 512 N.E.2d, 789, 791 (Ill. App. Ct. 1987)).

48. *Id.* at 834.

49. *Id.* ("Frazee's refusal was based on a sincerely held religious belief.").

50. *Frazee*, 489 U.S. at 834.

It is simply unclear whether the kinds of protections recognized in *Sherbert*, *Thomas*, and *Frazee* are still recognized today. In the meantime, the Court has decided *Employment Division of the Department of Human Resources of Oregon v. Smith*,[51] in which Oregon's statute prohibiting the use of controlled substances was challenged as a violation of the Free Exercise Clause.[52] While "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display,"[53] there was no evidence that Oregon was targeting religious practice.[54] The Court explained that the Free Exercise Clause does not "require exemptions from a generally applicable criminal law . . . ,"[55] and seemed tempted to limit the strength of the Clause's protections in the unemployment benefit context.[56]

According to the Court in *Smith*, the Free Exercise guarantees afforded by the Constitution are not particularly robust.[57] For example, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[58] However, the Court offered a possible loophole whereby the otherwise tepid protections afforded by the Free Exercise Clause might be stronger, namely, those situations implicating both Free Exercise and other protected interests.[59] It is not at all clear, however, that this hybrid loophole

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51. 494 U.S. 872 (1990).

52. *Id.* at 874 ("This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug . . . .").

53. *Id.* at 877 (alteration in original).

54. *Id.* at 882 ("There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.").

55. *Id.* at 884.

56. *See id.* at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied . . . .") (citing United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971)).

57. *See* N. Coast Women's Care Med. Grp., Inc. v. Super. Ct., 189 P.3d 959, 966 (Cal. 2008) ("[U]nder the United States Supreme Court's most recent holdings, a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs.") (emphasis in original).

58. *Smith*, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

59. *See id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have

would be of much help to those seeking an exemption from recognizing LGBT families, since the hybrid loophole would seem more likely to be invoked to require the recognition of same-sex marriages than it would be to justify individual refusals to assist in the celebration of such marriages.[60]

As constitutional matters stand currently, Free Exercise protections are tepid at best.[61] While the United States Constitution would preclude clergy members from being forced to perform a same-sex ceremony contrary to their faith,[62] it would be highly unlikely that the Court would find similar constitutional protections for a justice of the peace. The more controversial issue involves the conditions, if any, under which a civil servant should be afforded a statutory exemption from performing his civil duty when fulfilling that duty would contravene his religious beliefs.

B. Contexts in which Claimed Exemptions Might Occur

As should be unsurprising, individuals have claimed that they were precluded by their convictions from performing certain kinds of work in a variety of settings. For example, Grace Pierce refused to work on a particular project because she believed that doing so would violate the Hippocratic oath.[63] Basically, she feared that the drug she was working on posed too great a risk of harm to justify using it in trials involving human subjects.[64] The New Jersey Supreme Court affirmed that an individual has a right to refuse to continue working on a project when doing so would violate her convictions,[65] but it

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involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .").

60. *See, e.g.*, Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59, 102-06 (2008) (arguing that in some cases same-sex marriage would be an example of such a hybrid).

61. *See* Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. REV. 935, 949 (2005) ("One of many problems with a neutrality approach to religious freedom is that it translates into very weak protection of Free Exercise Clause rights."); *see also* John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 260 (2007) (noting that "the Free Exercise Clause (both independently and in hybrid contexts) is so weak").

62. *Cf.* Marc D. Stern, *Same-Sex Marriage and the Churches, in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 1 (Douglas Laycock et al. eds., 2008) ("No one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them.") (citation omitted).

63. Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 507 (N.J. 1980) ("She felt that by continuing to work on loperamide she would violate her interpretation of the Hippocratic oath.").

64. *Id.* at 507 ("[Dr. Pierce] concluded that the risk that saccharin might be harmful should preclude testing the formula on children or elderly persons, especially when an alternative formulation might soon be available.").

65. *Id.* at 514 ("[N]othing in this opinion should be construed to restrict the right of an employee at will to refuse to work on a project that he or she believes is unethical.").

denied that an individual could maintain an action for wrongful discharge unless the practice at issue clearly violated public policy.[66]

Corrine Warthen refused "to dialyze a terminally ill . . . patient because of her 'moral, medical and philosophical objections' to performing the procedure."[67] When notified that her continued refusal to perform the dialysis would result in her being fired, she still refused and was then discharged.[68] Rejecting the plaintiff's wrongful discharge claim,[69] the court concluded that "by refusing to perform the procedure she may have eased her own conscience, but she neither benefited the society-at-large, the patient, nor the patient's family."[70]

Frances Free claimed to have been wrongfully discharged[71] when she refused to evict a bedridden patient from the hospital where she worked.[72] However, the court concluded that her objections were not religiously based,[73] holding that her refusal to violate professional ethical standards did not fall within the protections offered for those who refuse to engage in medical practices that violate the dictates of religious conscience.[74] Perhaps Free simply committed a strategic error. Rather than suggest that evicting a bedridden patient violated her religious beliefs about how the weak and vulnerable should be treated,[75] Free instead suggested that doing so violated her professional obligations.[76] Apparently, she might have been more successful

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66. *See id.* ("[A]n employer may discharge an employee who refuses to work unless the refusal is based on a clear mandate of public policy."); *see also id.* at 512 ("We hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy.").

67. Warthen v. Toms River Cmty. Mem'l Hosp., 488 A.2d 229, 230 (N.J. Super. Ct. App. Div. 1985).

68. *Id.* ("[P]laintiff continued to refuse to dialyze the patient, and the head nurse informed her that if she did not agree to perform the treatment, the Hospital would dismiss her. Plaintiff refused to change her mind, and the Hospital terminated her.").

69. *Id.* at 234 ("[W]e conclude as a matter of law that even under the circumstances of this case the ethical considerations cited by plaintiff do not rise to the level of a public policy mandate permitting a registered nursing professional to refuse to provide medical treatment to a terminally ill patient . . . .").

70. *Id.*

71. Free v. Holy Cross Hosp., 505 N.E.2d 1188, 1188 (Ill. App. Ct. 1987) ("The plaintiff, Frances Free, brought this action against the defendant, Holy Cross Hospital, for wrongful termination of her employment as a nurse.").

72. *Id.* at 1190 ("Free alleges in her complaint that the hospital discharged her for insubordination because, as an act of conscience, she refused to provide a medical service ordered by the hospital; *i.e.*, she refused to evict a bedridden patient from the hospital.").

73. *Id.* ("Nowhere in Free's complaint is it alleged that a refusal to follow the hospital's orders would conflict with her moral convictions arising from what are traditionally characterized as religious beliefs.").

74. *Id.* at 1189. "Based upon the language of the Act, the public policy mandated is that hospital personnel will not be discriminated against for refusing to perform medical services as they relate to their religious beliefs. This contemplates morally controversial issues such as euthanasia, sterilization or abortion." *Id.* at 1190.

75. *See supra* note 64 and accompanying text.

76. *Free*, 505 N.E.2d at 1190 ("Free's allegations relate to her ethical duty as a

had she asserted both theories.[77] In any event, many of those asserting ethical objections to performing particular tasks have been quite explicit that their objections were religiously based, and the courts have offered very different analyses of the conditions under which conscientious refusals would be protected.

C. Objections to Abortion or Sterilization in Particular

Several cases have involved individuals who were religiously opposed to assisting others seeking to accomplish certain reproductive ends. Marjorie Swanson, a Certified Registered Nurse-Anesthetist, refused to administer anesthesia to a patient who was to undergo a tubal ligation.[78] Basically, Swanson invoked her rights under Montana law to refuse to participate in such a procedure.[79] The Montana statute did not qualify this exemption by suggesting that an individual would not be able to assert such a privilege if doing so would impose a hardship on a particular facility, and the Montana Supreme Court refused to read such a qualification into the statute.[80] Thus, it did not matter that the hospital might have to schedule procedures in light of the fact that someone would have to be brought in from fifty or ninety miles away to assist in the relevant procedure,[81] because the statutory right was "unqualified."[82]

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registered nurse not to engage in dishonorable, unethical or unprofessional conduct of a character likely to harm the public as mandated by the Illinois Nursing Act.").

77. *Cf. id.* ("We do not believe that the Act contemplates the protection of ethical concerns as opposed to sincerely held moral convictions arising from religious beliefs.").

78. Swanson v. St. John's Lutheran Hosp., 597 P.2d 702, 705 (Mont. 1979).

79. *See id.* at 704 ("All persons shall have the right to refuse to advise concerning, perform, assist, or participate in sterilization because of religious beliefs or moral convictions.") (quoting REV. CODE MONT. § 69-5223(2) (1947) (current version at MONT. CODE ANN. § 50-5-503(2) (1999))).

80. *See id.* at 710 ("[S]ection 69-5223 admits of no such limitation or qualification, nor may the statutory rights of Marjorie Swanson be so weighed because to do so would emasculate her statutory rights.").

81. *See id.* at 709.

> The District Court bases this conclusion upon its findings that substitute nurse-anesthetists available to replace Swanson must be procured from Bonners Ferry, Idaho, a 55 mile distance or Kalispell, Montana, a 90 mile distance; that such substitutes are employed at other hospitals and available only when their schedules do not conflict; that continual arrangements for substitutes are unacceptable to the hospital because of traveling and scheduling difficulties; that uncertainty results in the hospital as to when a sterilization procedure might be accomplished, that are detrimental to patients; and that the cost of substitutes is greater, and is an additional burden to the hospital and to the hospital patients.

Id.

82. *See id.* at 710 (noting that the "unqualified" status made the district court's limitations unlawful).

Several states have enacted legislation affording individuals exemptions based on conscience,[83] although many of the exemptions are not as robust as was provided in the Montana legislation. There are at least two different respects in which exemption legislation might be more or less robust: (1) the breadth of activities that would be subject to the exemption; and (2) the burdens on the employer that would have to be met to overcome the protection afforded by the exemption.

1. The Breadth of Activities Subject to Exclusion

California has limited the breadth of activities subject to the exemption.[84] For example, when construing a state statute that prohibited "denying admission or discriminating against any applicant for study because of the applicant's reluctance to 'assist or in any way participate in the performance of abortions or sterilizations,'"[85] a California appellate court explained that "the proscription applies only when the applicant must participate in acts related to the actual performance of abortions or sterilizations."[86] While an individual would be protected if she chose not to perform an abortion, similar protection would not be afforded for those asserting the exemption with respect to "[i]ndirect or remote connections with abortions or sterilizations . . . ."[87]

At issue in *Erzinger* was whether students could be forced to pay mandatory student fees for student health services where some of those fees would be used to support abortion or pregnancy-related counseling.[88] The California appellate court made clear that "the fact plaintiffs may object on religious grounds to some of the services the University provides is not a basis upon which plaintiffs can claim a constitutional right not to pay a part of the fees,"[89] since it could not be shown that by requiring the payment of these fees the University was unreasonably interfering with the practice of the plaintiffs' religion.[90]

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83. *See, e.g.*, Meredith Edwards Eckstut, *Assisted Reproductive Technologies*, 9 GEO. J. GENDER & L. 1153, 1171 (citing forty-two state statutes and one federal law that allow health care professionals to refuse from participating in certain procedures on moral or religious grounds).

84. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123420 (West 2006) (noting that the statutory right to refuse from participating in abortion procedures is subject to qualifications).

85. Erzinger v. Regents of Univ. of Cal., 137 Cal. App. 3d 389, 394 (Cal. Ct. App. 1982) (quoting 42 U.S.C. § 300a-7(d) (2000)).

86. *Id.*

87. *Id.*

88. *Id.* at 391.

89. *Id.* at 393.

90. *See id.* at 392-93 ("[T]o prevail on their First Amendment claim, the plaintiffs must allege and prove the University coerced their religious beliefs or unreasonably interfered

The interpretive tack adopted by the California court might be contrasted with that adopted by a federal district court in Indiana. That court had to interpret the Indiana Conscience Statute, which read:

> No physician, and no employee or member of the staff of a hospital or other facility in which an abortion may be performed, shall be required to perform any abortion or to assist or participate in the medical procedures resulting in or intended to result in an abortion, if such person objects to such procedures on ethical, moral or religious grounds, nor shall any person as a condition of training, employment, pay, promotion, or privileges, be required to agree to perform or participate in the performing of abortions, nor shall any hospital, person, firm, corporation or association discriminate against or discipline any person on account of his or her moral beliefs concerning abortion.[91]

Elaine Tramm was an aide whose job description included "cleaning surgical instruments."[92] She objected on religious grounds to cleaning any instruments that would be used in abortion procedures.[93] Tramm was told that she would be fired unless she performed her job duties, including cleaning instruments that might be used in such procedures.[94] She refused and was fired.[95]

In this case, the hospital made no effort to accommodate Tramm's beliefs.[96] Indeed, co-workers volunteered to substitute for her when abortion instruments needed to be cleaned, but the hospital rejected that arrangement.[97] What was at issue was not the sincerity of her belief,[98] but whether the Indiana statute was intended to include people like Tramm within its protections.[99]

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with their practice of religion.") (citing School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222-23 (1963)).

91. Tramm v. Porter Mem'l Hosp., Civil No. H 87-355, 1989 U.S. Dist. LEXIS 16391, at *1, *28 (N.D. Ind. Dec. 22, 1989) (citing IND. CODE § 16-10-3-2).

92. *Id.* at *1.

93. *Id.* at *1-2.

94. *Id.* at *3.

95. *Id.*

96. *Id.* at *12 (noting that "PMH made no effort whatsoever to accommodate Tramm's religious beliefs").

97. *Tramm*, 1989 U.S. Dist. LEXIS 16391, at *12 ("Although Tramm's co-workers testified in their depositions that they were willing to clean abortion instruments for Tramm, PMH rejected this alternative.").

98. *Id.* at *15-16 ("Here there would be a direct, substantial burden on the practice of Tramm's religion if she is forced to clean abortion instruments. Tramm's testimony indicates that her anti-abortion stance is a principle tenet of her Catholicism and that any involvement with abortion procedures would be a substantial violation of her religious and moral beliefs.").

99. *Id.* at *29 (noting the hospital's argument that only doctors and employees who "assist" or "participate in" abortion procedures are protected by the conscience statute).

The court in *Tramm* examined the language of the statute, which "protects physicians and other hospital employees and staff from being required to participate directly in abortion procedures that violate their beliefs . . . [and] protects employees from being forced to participate in the performance of an abortion as a condition for employment, pay, promotion or privileges."[100] The court reasoned that the statute was designed to protect people who might be forced to perform abortion procedures, and that the plaintiff's duties did not fall within that protected classification.[101]

The surprising part of the court's analysis was in how it interpreted the third provision: "nor shall any hospital, person, firm, corporation, or association *discriminate or discipline any person on account of his or her moral beliefs concerning abortion . . . .*"[102] At the very least, this section means that regardless of one's job duties one will not be terminated because of one's religious beliefs.[103] The question at hand, however, is in determining how this section should be applied.[104] The court concluded that since the administrators "admitted to knowing of Tramm's beliefs and terminating her for refusing to perform duties that would violate those beliefs, the termination violated her rights under the Indiana Conscience Clause."[105]

Yet, there was no evidence that the hospital would have allowed Tramm to continue if her refusal to clean instruments had not been because of her religious beliefs.[106] Nor was there any evidence that she would have been fired because of her religious beliefs had she been willing to clean the instruments.[107] Rather, the hospital was unwilling to make an exception for her because her refusal was based on her religious beliefs.[108]

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100. *Id.* at *31.

101. *Id.* at *30 ("In this case, the undisputed facts are that an aide's duties include preparing and cleaning instruments used in surgical procedures and securing specimen container lids before they are transported to the laboratory for analysis. (Plaintiff's Exhibit 15). Under the plain meaning of the statute, those duties do not encompass the 'performance' of procedures resulting or intended to result in an abortion.").

102. *Id.* at *31 (emphasis in original) (quoting IND. CODE § 16-10-3-2).

103. *Tramm*, 1989 U.S. Dist. LEXIS 16391, at *31 ("Under the third provision, all hospital personnel are within the class of persons who may not be terminated because of their religious beliefs.").

104. *See id.* at *29-30 (recognizing that this court had to try and predict how the Indiana Supreme Court would interpret the conscience statute, because no Indiana court had previously construed the scope of the Indiana conscience statute).

105. *Id.* at *32.

106. *Id.*

107. *Id.*

108. *Id.* at *13-14 ("[I]t is clear that PMH refused to make *any* accommodation for Tramm and then terminated her because she refused to perform certain tasks which she felt violated her religious beliefs.").

Perhaps the hospital should have acted differently as a matter of respect. Others volunteered to substitute for Tramm when she could not clean the instruments as a matter of conscience,[109] and it should not have mattered to the hospital who sterilized the instruments as long as the sterilization was performed. In the hospital's defense, however, the co-workers' willingness to perform this substitution might not have continued indefinitely.[110] The hospital might have reasoned that it should address the issue early, because the issue would have to be addressed eventually anyway. Perhaps the hospital should have adopted a wait-and-see attitude or explored whether it could have done something else to avoid the problem, e.g., transfer her to another job,[111] although those measures would not themselves have been without cost. In any event, the difficulty pointed to here is not that a blameless hospital was punished, but that the Indiana court offered an interpretation of the law that simply was not plausible.

As interpreted by the Indiana court, the third provision swallows up the other two. If no employee can receive punishment for refusing to perform any job because of her religious beliefs concerning abortion, then it is of course true that no medical professional can receive punishment for refusing to participate directly in the provision of an abortion.[112] So, too, a refusal to hire or promote someone because of her beliefs about abortion would presumably be viewed as discriminatory, making the second provision superfluous. At least one of the difficulties suggested by the *Tramm* decision is that conscience exceptions might be construed in utterly implausible ways that are much more robust than anyone intended.[113]

Suppose that Tramm was hired to help raise money for the hospital. At least one question raised by the decision is whether she would be immunized from trying to steer unrestricted monies away from the hospital for fear that they might be used in a way that might improve facilities where abortions or abortion counseling were offered.[114] Or, suppose that Tramm was hired by the hospital to provide information to the public, for example, where particular offices or clinics within

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109. *See supra* note 97 and accompanying text.

110. *See infra* note 135 and accompanying text (stating that while individuals initially willing to cover a nurse so she might avoid doing something that she found religiously objectionable could eventually refuse to do so).

111. *See Tramm*, 1989 U.S. Dist. LEXIS 16391, at *2 (noting that Tramm asked that she be transferred to another job).

112. *See id.* at *31 (noting that, based on the third provision, no hospital personnel can be terminated due to their religious beliefs).

113. *See id.* at *17 (stating that when there is substantial pressure to modify beliefs, a burden on religion exists, violating free exercise).

114. *See id.* at *12, *18 (noting that an employer need offer only reasonable accommodation to one's belief).

the hospital might be found. One wonders if she would be permitted to refuse to direct families or patients to particular parts of the hospital because she feared that she might otherwise be helping them to attain abortions or to comfort those who had obtained them.

A related issue arose in a California case, *Brownfield v. Daniel Freeman Marina Hospital*,[115] which involved a hospital's refusal to provide "'pregnancy prevention treatment'"[116] information to a rape victim after such information was requested.[117] The hospital also failed to inform the individual that a particular treatment was time-sensitive and would be most effective within seventy-two hours.[118] Brownfield was not informed about the importance of acting quickly and did not see her family doctor until more than three days passed.[119] There was no contention that the rape resulted in pregnancy,[120] and the hospital had advised her to see her doctor within two days without specifying why.[121]

One of the contested issues was whether use of a morning-after pill should be thought of as "'post-coital contraception'" or, instead, as abortion.[122] The rape victim asserted the former and the hospital the latter view.[123] The California court concluded that for purposes of the statute offering protection for those refusing to perform abortions, the former rather than the latter view was correct.[124] The abortion protection statute was thus interpreted to confer no immunity on the hospital, so that its refusal to provide the relevant information might make it liable under appropriate circumstances.[125]

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115. 256 Cal. Rptr. 240 (Cal. Ct. App. 1989).
116. *Id.* at 242.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Brownfield*, 256 Cal. Rptr. at 243.
122. *Id.* at 244.
123. *Id.*
124. *See id.* at 245.

> Appellant alleged, and respondent by its demurrer admitted, that the morning-after pill was a "pregnancy prevention" treatment, the proper name of which was estrogen pregnancy prophylaxis. The conclusion that the treatment constitutes "prevention," i.e., birth control, rather than "termination," i.e., abortion, is consistent with the above-cited law. We therefore conclude that Health and Safety Code section 25955, subdivision (c), does not immunize respondent from liability for failure or refusal to provide information about estrogen pregnancy prophylaxis to rape victims.

Id.

125. *Id.* at 245.

> [W]hen a rape victim can allege: that a skilled practitioner of good standing would have provided her with information concerning and access to estrogen pregnancy prophylaxis under similar circumstances; that if such information had been provided to her she would have elected such treatment; and that

The *Tramm* court would likely have offered a much different interpretation of the statute, which stated:

> [N]o nonprofit hospital or clinic which is organized or operated by a religious corporation or other religious organization or its administrative officers, employees, agents, or members of its governing board shall be liable, individually or collectively, for failure or refusal to perform or to permit the performance of an abortion in such facility or clinic or to provide abortion services.[126]

The court might well have suggested that supplying any of the relevant information would be to assist in the provision of abortion services broadly construed, and neither the hospital nor any of its employees could be liable for the failure to afford the rape victim the information that she would need to maximize her chances of averting pregnancy after being raped.

Consider a related scenario. A patient has a prescription for a morning-after pill,[127] but the pharmacist refuses to fill the prescription. In some states, the pharmacist not only would be immune from liability for refusing to dispense the particular drug, but also for refusing to refer the patient elsewhere.[128] Further, there might be no exception for those who had been raped.[129] Thus, while some states *may* tailor their exemptions narrowly, other states may offer very broad exemptions,[130] notwithstanding the kinds of harms that might thereby be caused to those who are refused service or even a referral.

2. Exceptions for Significant Burdens on Businesses

Some statutes with conscience exemptions include a limitation so that a business will not be forced to incur significant burdens by

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> damages have proximately resulted from the failure to provide her with information concerning this treatment option, said rape victim can state a cause of action for damages for medical malpractice.

Id.

126. *Id.* at 244.

127. Scott Burris et al., *Stopping an Invisible Epidemic: Legal Issues in the Provision of Naloxone to Prevent Opioid Overdose*, 1 DREXEL L. REV. 273, 326 n.242 (2009) ("Because the 'morning after pill' (also called Plan B or RU-486) is now an OTC medication for women over eighteen, a prescription is now required only for minors.").

128. *See* Catherine Grealis, Note, *Religion in the Pharmacy: A Balanced Approach to Pharmacists' Right to Refuse to Provide Plan B*, 97 GEO. L.J. 1715, 1723 (2009) (noting that the conscience clauses of Arkansas, Georgia, Mississippi, and South Dakota do not impose a duty on pharmacists to give advanced notice of their refusal or a referral).

129. *See id.* ("[N]one provide an exception for women who are raped.").

130. *See id.* (noting that four states have adopted laws protecting pharmacists while other states have enacted laws to protect patient access to both emergency contraception and prescription medication).

employing someone who refuses for religious reasons to perform particular procedures, Florida is an example. Consider the Florida conscience statute:

> Nothing in this section shall require any hospital or any person to participate in the termination of a pregnancy, nor shall any hospital or any person be liable for such refusal. No person who is a member of, or associated with, the staff of a hospital nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds, shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.[131]

While the statute does not expressly include any consideration of the possible burdens that might be placed on a business by virtue of a conscience exemption, a Florida appellate court interpreted the statute to incorporate such a limitation, "an employer must reasonably accommodate an employee's religious practices unless he establishes that he would suffer undue hardship."[132]

Margaret Kenny alleged that she was demoted because of her refusal to assist in abortions and other reproduction-related matters.[133] Her employer attempted to accommodate her refusal by asking other nurses to exchange duties with her.[134] However, after a while, the other nurses refused to substitute for her,[135] and Kenny's employer did not take the further step of arranging Kenny's schedule so she would never be assigned to assist in providing abortions.[136] The court in *Kenny* reasoned that "[a]lthough appellees would incur some hardship, the record does not support a finding that *undue* hardship would result."[137]

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131. Kenny v. Ambulatory Ctr. of Miami, Fla., Inc., 400 So. 2d 1262, 1264 (Fla. Dist. Ct. App. 1981) (internal quotation marks omitted) (citing FLA. STAT. § 458.22(5) (1977)).

132. *Id.* at 1266.

133. *Id.* at 1267 (Hendry, J., dissenting) ("[T]his action filed by the Plaintiff is founded on employment discrimination from her employment as a nurse and her duties in termination of pregnancy procedures and other related birth control and sterilization operations contrary to her religious beliefs.").

134. *Id.* at 1263, 1266.

135. *Id.* at 1266 ("Some efforts toward accommodation were made by fellow employees seeking to assist appellant. When other nurses ceased cooperating, however, the employer made no further effort to accommodate appellant.").

136. *Id.* at 1266-67 ("There is no showing that schedules could not have been arranged to accommodate appellant's religious beliefs.").

137. *Kenny*, 400 So. 2d at 1267 (emphasis in original).

Yet, there is reason to think the appellate court underestimated the burden that was thereby imposed. The trial court found that to accommodate the plaintiff's desires, the employer would have to hire someone else[138] at a time when doing so would not be fiscally prudent.[139] The appellate court neither explained why being forced to hire another person to accommodate Kenny was not an undue burden as a matter of law,[140] nor what would have constituted an undue burden. If forcing an employer to hire additional workers does not qualify, then burdens might be quite significant without crossing the relevant threshold.

The Seventh Circuit has explored the contours of the existing undue burden jurisprudence in a series of cases. In one, an FBI employee refused to investigate pacifist groups accused of destroying government property.[141] John Ryan was a Catholic who believed that the United States Bishops' Pastoral Letter on War and Peace "show[ed] the impropriety of conducting investigations into groups that destroy governmental property to express their opposition to violence."[142] He informed his superior that this letter might make it impossible for him to perform particular duties.[143] However, he did not ask to be reassigned or to have different duties as a general matter,[144] and rejected a fellow employee's offer to take over the particular investigation that Ryan could not perform in good conscience.[145] While Ryan had been willing in the past to trade assignments so he would not have to investigate the alleged criminal acts of non-violent groups,[146] he was unwilling to make a similar compromise this time.[147]

Ryan's sincerity was not in question.[148] The Seventh Circuit raised but did not decide whether it would be an undue burden to require the FBI to offer transfers to those agents who had religious

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138. *See id.* at 1268 (Hendry, J., dissenting) (noting that the district court found that "the lack of employee cooperation would have resulted in the employer paying additional wage salaries contrary to sound business and fiscal management").

139. *See id.* at 1267 (noting the district court's finding that "there is justifiable and compelling financial basis for Defendant's decision" and that the decision was "made in good faith based on fiscal necessity").

140. *Id.* ("We therefore hold that appellees failed to sustain their burden of establishing undue hardship, and we reverse the trial court's decision.").

141. Ryan v. U.S. Dep't of Justice, 950 F.2d 458, 459 (7th Cir. 1991).

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.* at 459 ("Agent James Swinford volunteered to swap assignments with Ryan. He declined. An agent had taken off Ryan's hands an earlier order to investigate a group of peace activists including nuns and priests; this time Ryan chose confrontation.").

146. *Id.*

147. *Ryan*, 950 F.2d at 459.

148. *See id.* at 460 ("Ryan's sincerity is unquestioned.").

objections to the performance of particular tasks.[149] Because Ryan had refused the reasonable accommodation of swapping assignments, the difficult determination of what would constitute an undue burden could be left for another day.[150]

The Seventh Circuit had another opportunity to discuss undue burdens in *Wright v. Runyon*.[151] Gordon Wright, a Seventh Day Adventist, had a position with the United States Postal Service that did not require him to work on his Sabbath,[152] but that position was abolished.[153] He could have gotten a different position that did not require his working between sundown on Friday and sundown on Saturday, but he did not seek it.[154] He became an "unassigned regular," which meant that he could be assigned to any open position, and was eventually assigned to a position requiring him to work on Friday evening.[155]

The court in *Wright* suggested that he was responsible for his own Hobson's choice between quitting his job or working on the Sabbath, because he did not avail himself of the opportunity to take a comparable position that did not require him to work on the Sabbath.[156] Because the position that he could have had would not have involved

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149. *Id.* at 461.

> Whether tolerating Ryan's disobedience and that of other agents with sincere religious claims would contribute to a breakdown in discipline, and whether transferring such an agent to an assignment where nonviolent protests are not a potential issue would hinder the efficient operation of the FBI, are subjects about which reasonable persons can and do differ.

Id.

150. *See id.*

> Reallocation of work between agents is the most obvious accommodation, one that Ryan's fellow agents had arranged for him before. Because Ryan refused Swinford's offer to arrange for a swap this time, we need not decide whether a series of swaps—potentially calling for training a different agent in the techniques of domestic security investigations—would create "undue hardship" for the FBI.

Id.

151. 2 F.3d 214 (7th Cir. 1993).

152. *Id.* at 215.

153. *Id.*

154. *See id.* at 216 ("[F]our positions were let for bid in the ordinary process that did not require work during Wright's Sabbath. Wright would have received at least two of these positions, as the senior bidder, had he bid for them.").

155. *Id.*

156. *Id.* at 217.

> The bidding system enabled Wright to obtain a job the requirements of which did not interfere with his religious practices. Indeed, it allowed Wright to *select* such a position. This strikes us as a paradigm of "reasonable accommodation." Wright, in refusing to bid on two "flat sorter machine operator" jobs that would not have required work during his Sabbath, chose not to take full advantage of the bidding system. Wright, not the Postmaster General, is therefore responsible for the consequences.

Id. (emphasis in original).

a reduction in pay or transferring from a skilled to an unskilled position, the Postal Service was held to have offered him a reasonable alternative.[157]

Individuals might request their employers to modify work schedules or assignments for a variety of reasons. Angelo Rodriguez worked for the Chicago Police Department and claimed that he was discriminated against because of his religious beliefs[158] when he was assigned to protect an abortion clinic.[159] Rodriguez could have avoided this problem without losing pay or benefits by being transferred to a district that did not contain an abortion clinic,[160] but he liked being in the district where he was currently assigned.[161] The Seventh Circuit suggested that the Police Department had met its burden by affording the opportunity to work elsewhere for similar pay and benefits.[162]

Judge Posner made clear in his concurrence that he would have gone further—he suggested that "police officers and firefighters have no right under Title VII of the Civil Rights Act of 1964 to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."[163] He worried about the effect on the public confidence were such a right of recusal recognized,[164] explaining:

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157. *Wright*, 2 F.3d at 217 ("The USPS here has taken adequate steps to accommodate Wright's religious practices.").

158. Rodriguez v. City of Chicago, 156 F.3d 771, 774 (7th Cir. 1998). "As a life-long Roman Catholic, Officer Rodriguez accepts the teachings of the Roman Catholic Church that an elective abortion is the wrongful taking of innocent human life and that individuals have a general moral obligation to avoid participating in, or facilitating, an elective abortion." *Id.* at 773.

159. *Id.* at 772.

> On September 20, 1995, Angelo Rodriguez, a patrol officer in the Chicago Police Department ("CPD"), filed a four-count complaint against the City of Chicago. In that complaint, Officer Rodriguez alleged that the City discriminated against him on the basis of his religion by refusing to exempt him from an assignment to stand guard outside an abortion clinic on November 19, 1994.

Id.

160. *Id.* at 774 ("Officer Rodriguez could have requested transfer to six alternative districts on the north side comparable to the 14th District that did not have facilities where abortions were performed. Due to his seniority, Rodriguez would have been able to make the change with no reduction in his level of pay or benefits.").

161. *Id.* at 776 ("[T]he fact that Officer Rodriguez may prefer an accommodation that allows him to remain in the 14th District does not render a transfer 'unreasonable.'").

162. *Id.* at 775 ("The district court concluded that the City had satisfied its duty to accommodate Officer Rodriguez by providing him the opportunity . . . to transfer to a district that did not have an abortion clinic with no reduction in his level of pay or benefits. We agree.").

163. *Id.* at 779 (Posner, C.J., concurring).

164. *Rodriguez*, 156 F.3d at 779 ("The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty . . . .").

> When the business of the employer is to protect the public safety, the maintenance of public confidence in the neutrality of the protectors is central to effective performance, and the erosion of that confidence by recognition of a right of recusal by public-safety officers would so undermine the agency's effective performance as to constitute an undue hardship within the meaning of the statute.[165]

Judge Posner's point is well-taken. If individuals must be exempted from performing public safety functions whenever those individuals have religious objections to anything associated with their assignment, logistics might become quite burdensome.[166] The Eleventh Circuit worried that forcing a police department to modify training schedules to accommodate religious beliefs[167] would itself impose too great a burden on the department.[168]

Judge Posner's concerns about the loss of public confidence and the potential health and safety risks that might be created by recusals[169] should not be thought limited to contexts in which members of police and fire departments might be called to duty. Consider a hospital where a nurse refuses to participate in an emergency procedure that would result in a pregnancy termination.[170] The procedure might

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165. *Id.* at 779-80.

166. *Cf.* Jones v. City of Gary, 57 F.3d 1435, 1442 (7th Cir. 1995) ("If the fire chief is unable to find a last minute replacement, the post may go unstaffed and public safety may be at risk.").

167. Beadle v. City of Tampa, 42 F.3d 633, 634 (11th Cir. 1995) ("At all times relevant to this lawsuit, Beadle was a practicing member of the Seventh Day Adventist Church. One of the tenets of this faith is the prohibition of secular labor on its Sabbath—from sundown Friday until sundown Saturday.").

168. *Id.* at 637

> The Department chose to implement a rotating shift schedule, randomly assign recruits to shifts, and expose its recruits to a variety of training officers. In order to accommodate Beadle's religious practices, the Department would have been forced to assign him to another training squad and to not reassign him during the third phase of training.") "[T]he magistrate court did not err when it found that requiring the Department to grant shift exceptions would result in a greater than *de minimis* cost and that the City had met its obligation under Title VII.

Id. at 638.

169. *Rodriguez*, 156 F.3d at 779 ("The objection to recusal in all of these cases is not the inconvenience to the police department, the armed forces, or the fire department . . . . The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect.").

170. Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 222-23 (3d Cir. 2000).

> In 1994, Shelton refused to treat a patient. According to the Hospital, the patient was pregnant and suffering from a ruptured membrane (which the Hospital describes as a life-threatening condition). Shelton learned the Hospital planned to induce labor by giving the patient oxytocin. Shelton refused to assist or participate.

Id.

have to be delayed until another nurse could be located, which might increase risks for the patient.[171]

Several issues must not be conflated. One issue involves what conditions satisfy the requirement that a reasonable accommodation be made. For example, offering an employee a different position where the conflict would not arise would be a reasonable accommodation as long as the salary and benefits were similar and the position involved a similar skill set.[172]

A different issue involves the conditions under which an employer must offer such an alternative. That would depend upon the language of the relevant statute,[173] and whether it would be considered an undue burden for an employer to have to hire an additional person so that the objected-to procedures could still be performed.[174] As to whether an employer would be required to modify schedules to accommodate beliefs, this might depend upon how easily such a modification could be made and at what costs to morale or the program as a whole.[175]

An entirely different issue is whether an exemption should be created. This might depend upon a number of factors including how widespread the exemption would be, and what kinds of obvious and non-obvious costs would be incurred by affording this exemption. Some commentators advocate that an exemption be created so that individuals objecting to LGBT relationships would not have to serve

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171. *See id.* at 223.

> In November 1995, Shelton refused to treat another emergency patient. This patient—who was "standing in a pool of blood"—was diagnosed with placenta previa. The attending Labor and Delivery section physician determined the situation was life-threatening and ordered an emergency cesarean-section delivery. When Shelton arrived for her shift, she was told to "scrub in" on the procedure. Because the procedure would terminate the pregnancy, Shelton refused to assist or participate. Eventually, another nurse took her place. The Hospital claims Shelton's refusal to assist delayed the emergency procedure for thirty minutes.

Id.; additionally, "[t]he Hospital believed Shelton's refusals to assist risked patients' safety." *Id.*

172. *Id.* at 226 ("Shelton has not established she would face a religious conflict in the Newborn ICU. The Hospital's offer of a lateral transfer to that unit thus constituted a reasonable accommodation.").

173. *See* Grealis, *supra* note 128, at 1725-26 (discussing the Washington and California statutory exemptions for pharmacists).

174. *Cf. Shelton*, 223 F.3d at 224 ("Title VII of the 1964 Civil Rights Act requires employers to make reasonable accommodations for their employees' religious beliefs and practices, unless doing so would result in 'undue hardship' to the employer.").

175. *See, e.g.*, Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir. 1995) ("The Supreme Court has described 'undue hardship' as any act requiring an employer to bear more than a '*de minimis* cost' in accommodating an employee's religious beliefs. . . . The Court has also recognized that the phrase '*de minimis* cost' entails not only monetary concerns, but also the employer's burden in conducting its business.").

or associate with members of the LGBT community.[176] However, it seems clear that many of those proponents have not given adequate consideration to all the costs that would have to be borne by recognizing such an exemption.[177]

II. CONSCIENCE EXEMPTIONS AND THE LGBT COMMUNITY

When trying to figure out whether to create an exemption so that those objecting to LGBT families would not have to support such families, a number of factors might be taken into account.[178] For example, the importance of the implicated interests and the rationale for making the particular exemption at issue.[179] A less obvious consideration might involve the implications, if any, of providing an exemption with respect to this group but no others. Contrary to what commentators might believe, creation of an exemption for conscience with respect to the treatment of members of the LGBT community will not be virtually cost-free.[180] On the contrary, creating such an exemption so that individuals in the workplace would be free to refuse to perform their normal duties for those in "religiously objectionable" relationships would create a whole host of difficulties that would inure to the detriment not only of those immediately affected but to society as a whole.[181]

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176. *See, e.g.*, Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, 77, 101-02 (Douglas Laycock, Anthony R. Picarello & Robin Fretwell Wilson eds., 2008) (noting some religious objectors to same-sex marriage will not favor the author's proposal that while there should be an exemption to facilitating such relationships, such a refusal is would be unavailable where significant burdens to the same-sex couple would occur).

177. *Id.* at 94 ("Legislatures that enact conscience clauses are, by definition, valuing more heavily the moral and religious convictions of the objectors; and legislatures that refuse to enact conscience clauses are valuing more heavily the dignitary interests of same-sex couples—not to be embarrassed, not to be inconvenienced, not to have their choice questioned.").

178. *See, e.g.,* Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 494-95 (2008) (discussing some factors to be taken into account when deciding whether to create an exemption in the context of adoption).

179. *See id.* (asking "What impact would a legislative exemption have on same-sex couples seeking to adopt?" or "What percentage of adoption agencies are likely to object to serving them?" or "Will other adoption agencies fill their needs?").

180. *Cf.* Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life after Prop 8*, 14 NEXUS 101, 109 (2009) ("In rare instances, it is possible that permitting a religiously based refusal may create a hardship for the person seeking an abortion—or in this context, for the couple seeking a marriage license").

181. *See id.* at 100-01 ("[I]t is much easier to imagine hardships resulting from the denial of benefits that other married couples enjoy, such as hospital visitation. Even where hardships do not result, being turned away can inflict damage which should not be lightly dismissed—the harm to one's dignity."); *see also id.* at 101 ("Indeed, marriage is the touchstone for receiving a host of government-provided or government-mandated benefits that

A. Creating an Exemption for Those with Religious Objections to Same-Sex Marriage

Some commentators suggest that states should enact statutes affording exemptions so that those with religious objections to LGBT relationships would not have to promote those relationships, just as states already afford exemptions to those who have religious objections to performing abortions.[182] While these commentators are correct that the experience with abortion exemptions should be examined, they are incorrect that our experience with such legislation suggests that we have an easy compromise within reach.[183]

Suppose that a state enacted a statute to protect those who did not want to officiate at a same-sex marriage. First, it should be noted, such a provision would not be necessary to protect clergy refusing to celebrate marriages contrary to their faith, because they could not be forced to celebrate such marriages even without such a statutory exemption.[184] However, such a provision might be necessary for public officials, for example, town clerks or justices of the peace, seeking to avoid helping same-sex couples who wished to marry.[185] Under such a statute, two individuals of the same sex presenting themselves before a justice of the peace might be told that although the state permitted same-sex marriages, the couple would have to find someone who did not have religious objections to the union to perform the ceremony.

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married couples simply take for granted: receipt of family medical leave from certain large employers; benefits for spouses of civil service employees . . . .").

182. *See, e.g.*, *id.* at 80 ("This chapter argues further that legislatures should deflect this litigation with legislative accommodations as they ultimately did with fractious healthcare services. Indeed, legislative accommodations in medicine offer a number of approaches for resolving the clash between those who want a service and those who have moral objections to performing it.").

183. *Id.* at 101 ("Perhaps the best we can hope for is to create statutorily a live-and-let-live solution, one that provides the ability to refuse based on religious or moral objections, but limits that refusal to instances where a significant hardship to the requesting parties will not occur.").

184. *See id.* at 97 ("As to churches and members of the clergy, the state cannot easily affect the choices to perform, or to refrain from performing, same-sex unions because of constitutional doctrines limiting their control of religious functions . . . .").

185. *Cf.* Wilson, *supra* note 180, at 103.

> Closer to home, the chief legal counsel for Massachusetts' governor, on the heels of *Goodridge v. Department of Public Health*, told the state's justices of the peace that they must "follow the law, whether you agree with it or not." Anyone who turned away same-sex couples could be held personally liable under the state's antidiscrimination statute, which provides for penalties up to $50,000.

Id. (citing Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. TIMES, Apr. 26, 2004, at A15).

It might seem that affording such an exemption would not impose any burden on the LGBT community. There are many individuals who can perform same-sex unions, so permitting particular individuals to refuse as a matter of conscience to help such couples need not create an insurmountable stumbling block for those couples wishing to marry.[186] Further, the state might require that a conscientious objector refer a couple to someone willing to perform the ceremony or, perhaps, might require that a sign be posted outside an office directing the couple to the appropriate place.[187] Professor Wilson comments:

> Clerks' offices likewise can take steps to avert collisions over same-sex marriage with good information and good practices. These offices should ask existing and prospective employees whether they would anticipate a moral or religious objection and keep appropriate lists. Same-sex couples who present could then be directed to a willing clerk with little inconvenience.[188]

Yet, numerous difficulties are suggested by the practice modeled by Professor Wilson. Imagine the signs that might be posted—"Different-sex couples here" and "All couples here" or, perhaps, "All couples, including same-sex couples, here." In such a scenario, the same office *might* be able to handle all couples who met the local marriage requirements, although there is something disquieting about the image of several couples standing in one line while no one stands in the other.

Exemption proponents might suggest that such an image should not be disquieting. After all, when one goes to the airport to get tickets, there might be two lines, one for preferred customers and the other for non-preferred customers. While the state offering a frequent flyer analogue with regard to marriage would have its own problems,[189] there are separate problems with the state saying that it prefers certain legal marriages over others. Suppose, for example, that a couple were to come to a town clerk's office and see two signs:

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186. *See* Wilson, *supra* note 176, at 98 ("It does not necessarily follow that permitting conscientious refusals will bar access to marriage. This is so because so many different parties in any given state can marry a couple.").

187. *See id.* ("Information-forcing rules—that is, rules that require refusing parties to direct couples to others who will perform the service—allow protection for matters of conscience without sacrificing access or humiliating same-sex couples. . . . For example, Illinois requires pharmacies that do not carry emergency contraceptives to post a sign directing patients to other pharmacies that do.").

188. *Id.*

189. *Cf.* Lynn D. Wardle, *The Fall of Marital Family Stability and the Rise of Juvenile Delinquency*, 10 J.L. & FAM. STUD. 83, 94-97 (2007) (arguing that society bears heavy costs when there is an increasing divorce rate).

"Single-race couples here," and "All couples, including mixed-race couples, here." The difficulties associated with such signs would not suddenly disappear were there an accompanying explanation that one of the clerks had religious objections to facilitating mixed-race marriages.[190]

The above scenario assumes that the same-sex couple might have to wait in a different line, but would ultimately be served by the same office. Yet, that need not be true—a particular office might be staffed by individuals only willing to help different-sex couples who wished to marry. If so, a sign might be posted indicating that same-sex couples would have to go to a different office, city, or county to marry. Professor Wilson believes that there would be relatively few cases where same-sex couples would have to go too far out of their way.[191] She offers an example to communicate her sense of what would be too great a burden to impose on same-sex couples wishing to marry:

> Imagine, for example, that a same-sex couple resides in the state of Montana, a million miles from anywhere else, and that there is only one town clerk that can help the couple complete their application for a marriage license. By refusing to assist the same-sex couple, that clerk is effectively barring them from the institution of marriage, to which state law has said they are entitled. In this instance, *because a real and palpable hardship would occur*, I would argue that the religious liberty of the objector must yield . . . .[192]

Professor Wilson should be commended for recognizing that there are conditions under which the religious liberty of the objector must yield.[193] However, her example does not inspire much confidence that there would be many instances in which same-sex couples' needs would be accommodated. One must wonder, for example, how many hundreds of miles one could be forced to travel before the burden would be viewed as too great.

Some commentators imply that being forced to go to another town or county or, perhaps, waiting additional days because one

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190. *See infra* notes 225-28 and accompanying text (discussing some of the couples whose marriages might be viewed as religiously objectionable).

191. Wilson, *supra* note 180, at 110 ("[O]utside this rare case of a hardship, where there are other clerks who would gladly serve the couple, and no one would otherwise lose by honoring the religious convictions of the objector, then I believe those convictions should be honored. . . . In part I am less willing to trample on religious beliefs [in the wedding planning context] because I believe that hardships are likely to be fewer—there are simply more vendors in the marketplace.").

192. *Id.* at 109-10 (emphasis added).

193. *Id.* ("In this instance, because a real and palpable hardship would occur, I would argue that the religious liberty of the objector must yield . . . .").

does not wish to make a match approved by the town clerk[194] is simply one of the prices that same-sex couples have to pay to live in a country that respects religious freedom.[195] Yet, there are at least two reasons to think that this is a misleading characterization of the debate. First, respect for religious freedom militates in favor of the recognition of same-sex marriage, because same-sex couples, like different-sex couples, may marry for religious reasons among others.[196] Ironically, some of the commentators trumpeting the importance of religious liberty when arguing for a conscience exemption[197] argue against rather than for same-sex marriage,[198] notwithstanding the religious liberty interests implicated in the latter.[199] Whether or not the recognition of same-sex marriage is constitutionally required,[200] one might expect that those proclaiming the importance of religious liberty would be less selective with respect to the times that they would proclaim its importance.

Those championing religious liberty often do not seem to appreciate that the arguments offered to justify providing an exemption with respect to assisting individuals in same-sex relationships would also support providing a more generalized exemption.[201] Religious liberty might also justify a broad exemption allowing individuals not to be associated with other relationships of which they disapproved, for example, interracial, interreligious or intergenerational unions.[202]

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194. *See* Wilson, *supra* note 176, at 99 ("The possibility of slight delay while locating a willing clerk can be addressed with a modified timing rule. States could simply have a different timing rule for same-sex couples than they do for other couples . . . .").

195. *See* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 845-46 (2007) ("A bit more respect, flexibility, and humility on all sides in the clash between religious groups and advocates for rights for gays, lesbians, and transgendered people could open possibilities for resolutions that accommodate civil rights norms and religious principles.").

196. *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997) ("Plaintiff Robin Joy Shahar is a woman who has 'married' another woman in a ceremony performed by a rabbi within the Reconstructionist Movement of Judaism.").

197. *E.g.*, Lynn D. Wardle, *Protecting The Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 181 (1993).

198. *E.g.*, Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1369 (2007).

199. Strasser, *supra* note 60, at 103 ("[T]here is no reason to believe that same-sex unions do not play an important role in the spiritual lives of individuals seeking to marry a same-sex partner.") (citing Jamal Greene, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1995 (2005)).

200. *See id.* at 64-65 (discussing whether same-sex marriage implicates free exercise concerns).

201. *See* Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 311-12 (discussing how recognition of same-sex marriage will have other ramifications in the religious liberty context).

202. *See infra* notes 225-28 and accompanying text (discussing couples whose marriages might be viewed as religiously objectionable).

B. The Expansion of Exemptions

Those who recommend using healthcare exemptions as a model for other kinds of exemptions tend not to emphasize that legislation affording exemptions for those who wish to be excused as a matter of conscience from performing abortions have not been limited to those seeking exemption from performing that particular procedure.[203] Rather, there has been a tendency to expand those exemptions to sterilization or, perhaps, to any medical procedure.[204]

That there has been this expansion should not be surprising. The rationale supporting an exemption for abortion—individuals should not be forced to violate their religious convictions in order to keep a job[205]—might seem equally compelling whether one is discussing abortion, sterilization, or other medical procedures.[206] But this suggests that exemptions for those not wishing to promote same-sex marriage might well expand into other areas.

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203. *See* Grealis, *supra* note 128, at 1719 (discussing the recent expansion class of healthcare providers who can also refuse to give out birth control or counsel on other forms of family planning).

204. *Id.*

> State legislatures have been even more willing than the federal government to expand conscience clause protection beyond abortion services. Today, thirteen states permit some healthcare providers to refuse contraceptive services, and seventeen states allow healthcare providers to refuse sterilization services. In addition, given the recent advancements in medical technology mentioned above, some states now provide conscience clause protection for medical procedures and practices such as family and referral services, assisted reproduction, fetal experimentation, human cloning, and euthanasia.

Id. (citations omitted); *see also* Georgia Chudoba, Comment, *Conscience in America: The Slippery Slope of Mixing Morality with Medicine*, 36 SW. U. L. REV. 85, 86 (2007).

> Conscience clauses in this country are becoming dangerously broad and over-inclusive. What was once a protection for physicians who objected to performing abortions is now a tool for religious activists to obstruct a patient's right to contraceptives, sterilization, and any other medical procedure that they feel is "morally" wrong.

Id.

205. *Cf.* Wilson, *supra* note 178, at 477 ("For individuals the cost of vindicating one's conscience frequently comes at the expense of one's livelihood.").

206. *Cf.* Wardle, *supra* note 197, at 181.

> There is no rational justification for protecting rights of conscience in the context of just one of these morally controversial medical procedures (for example, abortion) but not others. Such restrictive protection is fundamentally inconsistent with the basic principles underlying the extension of any such protection—respect for constraints of individual conscience, care for the conscience rights of minorities, and commitment to the value (and belief in the feasibility) of accommodation. Limiting protection for rights of conscience to just one or two specific procedures that are politically significant (for example, those that bother a majority or influential minority of voters) could manifest cultural or religious oppression.

Id.

To see how such an expansion might occur, it would be useful to consider a broad healthcare exemption. Illinois law prohibits discrimination against any individual "on account of the applicant's refusal to receive, obtain, accept, perform, counsel, suggest, recommend, refer, assist or participate in any way in any forms of health care services contrary to his or her conscience."[207] Illinois law further limits the liability of those who refuse to perform particular health services as a matter of conscience.[208]

Suppose that the words "forms of health care" were deleted from the statute. After all, individuals who did not want to promote same-sex marriages might also object to providing other services that would promote same-sex relationships or assist members of the LGBT community in pursuing a religiously objectionable lifestyle.[209] For example, a Washington district court noted that "[i]t is certainly plausible that some pharmacist in the State of Washington could . . . deny distribution of needed HIV-medicine because of personal disdain for a homosexual lifestyle."[210] Or, consider someone who did not want to offer relationship counseling because she did not approve of same-sex relationships and thus did not want to play a role in helping such relationships flourish.[211] By the same token, someone else might refuse to let an apartment or sell a home to someone in a same-sex relationship.[212]

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207. 745 ILL. COMP. STAT. ANN. 70/7 (West 1993).

208. *See id.* § 4.

> No physician or health care personnel shall be civilly or criminally liable to any person, estate, public or private entity or public official by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel.

Id.

209. *See* Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 500 (5th Cir. 2001)

> Bruff testified that when she initially applied to be an EAP counselor she assumed she would have to counsel homosexuals, but she also assumed she could refer such individuals when they sought counseling on their relationships. Nothing in the record reflects that she raised this issue with her interviewer, or explored how any such conflicts with her religious beliefs could, in fact, be accommodated. Instead, she apparently assumed she would only have to perform those aspects of the position she found acceptable.

Id.

210. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1261 (W.D. Wash. 2007), *vacated*, 586 F.3d 1109 (9th Cir. 2009).

211. *See supra* note 209 and accompanying text (noting that those who object to same-sex marriages may object to providing any service that relates to the LGBT lifestyle).

212. *Cf.* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska 1994) (per curiam) ("Swanner, d/b/a Whitehall Properties, appealed the superior court's decision which affirmed the Anchorage Equal Rights Commission's (AERC) order that Swanner's policy against renting to unmarried couples constituted unlawful discrimination based on marital status.").

It is clear that Professor Wilson does not envision the conscience exemption as being restricted to town clerks or justices of the peace—she believes that bakers, photographers, and wedding planners should be protected insofar as they do not wish to provide services for same-sex couples.[213] She also believes that just as there should be exemptions for those who object to same-sex marriage, there should be an exemption for those who object to adoption by same-sex couples.[214] Yet, it seems underappreciated how easily such an exemption could cover most areas of one's social existence. Presumably, individuals who morally disapproved of LGBT families might refuse to serve such families in stores, banks, and restaurants. Indeed, it is not clear how this exemption would be cabined.

Creating such an open-ended exemption permitting individuals to be excused from providing services to LGBT families in particular would be a public policy disaster and might implicate constitutional protections as well. Affording this exemption to those objecting to LGBT families but no others would seem to have "the peculiar property of imposing a broad and undifferentiated disability on a single named group . . ."[215] which might make it seem "inexplicable by anything but animus toward the class it affects . . . ."[216] But Colorado's imposition of a broad disability solely on members of the LGBT community was struck down by the Court in *Romer*,[217] which suggests that the kind of exemption envisioned here might also be constitutionally suspect.

One of the important respects in which healthcare exemptions should be differentiated from the kind of exemptions at issue here is that the former involves a kind of procedure which would not be performed as a general matter,[218] whereas the latter involves members of a particular group who are subject to something which other similarly situated individuals are not.[219] The justice of the peace could

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213. *Cf.* Wilson, *supra* note 180, at 110 ("I have a harder time requiring every baker, photographer, and wedding advisor to serve every person who presents . . . .").

214. Wilson, *supra* note 178, at 492 ("The parallels between the clashes over abortion and same-sex adoption are so striking that policymakers would be remiss not to draw on the abortion experience in deciding how to approach same-sex adoption.").

215. Romer v. Evans, 517 U.S. 620, 632 (1996).

216. *Id.*

217. *Id.* at 635 ("Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.").

218. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: ABORTIONS BY SELECTED CHARACTERISTICS: 1990-2005 (2010), *available at* http://www.census.gov/compendia/statab/2010/tables/10s0100.pdf (showing that only 19.4 women out of every 1,000 had an abortion in 2005).

219. *Cf.* MARK STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW 108 (2002) ("Some commentators deny that the issue is who should be allowed to

refuse to perform this marriage about which she had a religious objection but not another marriage about which she might also have objections. Consider, for example, the Mississippi conscience exemption, which states, "[a] health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience."[220] However, the Mississippi subsection makes quite clear that a health care provider is not thereby permitted to refuse "to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation."[221] Mississippi seems to recognize one of the potential difficulties of exemptions, namely, that they can be used to target specific groups.[222]

C. The Expansion of the Classes against Whom the Exemption Might Be Employed

States might well have some difficulty in justifying selectively respecting the religious liberty of their justices of the peace and town clerks by affording them an exemption with respect to same-sex relationships, but not other "religiously offensive" relationships.[223] Further, were the state to expand the exemption, it seems likely that public officials would take advantage of that expansion and refuse to help other religiously objectionable couples who wished to formalize their relationships.[224] It was not so long ago that individuals would assert religious objections to interracial marriage,[225] and it would be unsurprising were such claims to be asserted again if such protections were incorporated into law.[226] Other types of unions might also

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marry, claiming that lesbians and gays, like everyone else, can marry; they simply cannot marry someone of their sex.").

220. MISS. CODE ANN. § 41-107-5 (1) (West 2009).

221. *Id.*

222. *See supra* note 217 and accompanying text (noting the Court's rejection of discrimination against interracial couples).

223. *See* Minow, *supra* note 195, at 828 (discussing the possibility of granting exemptions based on conscience and not spiritual beliefs).

224. *Id.* ("[E]ach additional exemption curtails the application of the overarching norm—and civil rights as a result can be too easily and thoroughly undermined.").

225. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 581 (1983) (discussing that a school would not allow students to matriculate if they were dating or married to someone of another race).

226. *Cf. Newscast: Louisiana justice of the peace refuses to apologize for not marrying interracial couple*, SUNDAY TODAY, Oct. 18, 2009, *available at* 2009 WLNR 20611994.

> [T]he Louisiana justice of the peace who refused to marry an interracial couple says he will not apologize and says he did nothing wrong. Beth Humphrey and Terence McKay says the justice of the peace, Keith Bardwell, told them he does not marry interracial couples because he's worried about their

be subject to similar treatment if, for example, they were thought to be non-procreative.[227] Or, individuals might have objections to facilitating those who wished to enter into religious intermarriages.[228] In short, were there an open-ended exemption so that individuals could refuse to perform marriages contrary to conscience, many kinds of couples might have their hopes of marriage initially thwarted.

That there might be a whole host of marriages subject to this exemption would not alone establish that such an exemption should not be created. Nonetheless, it might give one pause for both practical and theoretical reasons. Presumably, very few if any of the commentators would wish to return to the day in which burdens could be placed on an individual seeking to marry someone of another race.

Some commentators suggest that it may not be helpful to compare a refusal to perform a same-sex marriage with a refusal to perform an interracial marriage. Professor Koppelman notes that, "[n]ot all antigay views, however, deny the personhood and equal citizenship of gay people."[229] Yet, his point is at best unhelpful for two reasons. First, the exemption from performing same-sex marriage may well be part of a broader exemption so that individuals would be free to refuse any service to members of the LGBT community.[230] Were that so, the exemption might well deny personhood and equal citizenship, especially if this exemption were targeted so that only those in the LGBT community would be adversely affected.[231] Second, it is important to consider the right that is being burdened—at issue is the right to marry. The Court in *Zablocki* noted that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships,"[232] explaining that "it would make little sense to recognize a right of

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> children's future. Well, the couple finally did get married. Bardwell says he has no plans to step down.

Id.

227. *Cf.* Rutledge, *supra* note 201, at 301 (2008) ("God's design for human sexuality . . . is first and foremost for procreation.").

228. *See* Gustav Niebuhr, *Marriage Issue Splits Jews, Poll Finds*, N.Y. TIMES, Oct. 31, 2000, http://www.nytimes.com/2000/10/31/us/marriage-issue-splits-jews-poll-finds.html (discussing the varying opinions on Jews and non-Jews being able to marry).

229. *See* Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 145 (2006) (citing ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 53-68 (2002)).

230. *See* Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 500 (5th Cir. 2001) (discussing how an employee assumed she only was required to perform services she found morally acceptable).

231. *See supra* note 217 and accompanying text (discussing the specific effect Amendment 2 would have on the gay community in particular).

232. Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[233] But given the centrality of marriage, permitting that right to be burdened might well speak to dignity and equality even if other sorts of limitations would not.

States have a compelling interest in eradicating discrimination on a variety of bases, including race,[234] religion,[235] gender,[236] and orientation.[237] This interest must be taken into account when deciding whether the religious liberty of the objecting public official should win the day. Indeed, if we look to the healthcare exemption caselaw, we see that exemptions must sometimes give way when historically discriminated-against groups would be disadvantaged by the exemption.[238]

Some commentators make clear that they believe an exemption permitting individuals not to support same-sex marriage is appropriate, at least in part, because of the (alleged) wrongness of same-sex marriage.[239] But this is exactly the wrong approach—the state should not be in the position of deciding whether to grant an exemption based on the theological correctness of the objector's position. That would be precisely the kind of judgment that the Establishment Clause would prevent the state from making.[240]

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233. *Id.*

234. *See* Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868, 886 (Wis. 2009) (discussing the "state's compelling interest in prohibiting racial discrimination").

235. *See* Mill River Club, Inc. v. N.Y. Div. of Human Rights, 873 N.Y.S.2d 167, 173 (App. Div. 2009) (discussing the "compelling state interest in preventing discrimination on the basis of religion") (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

236. *See* Lahmann v. Grand Aerie of Fraternal Order of Eagles, 121 P.3d 671, 685 (Or. Ct. App. 2005) (discussing "the state's compelling interest in eliminating gender discrimination").

237. Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 5 (D.C. 1987) (discussing "the District of Columbia's compelling interest in the eradication of sexual orientation discrimination").

238. *See, e.g.*, Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 93-94 (Cal. 2004) ("Nor are any less restrictive (or more narrowly tailored) means readily available for achieving the state's interest in eliminating gender discrimination. Any broader exemption increases the number of women affected by discrimination in the provision of health care benefits."); *see also* N. Coast Women's Care Med. Grp., Inc. v. Super. Ct., 189 P.3d 959, 968 (Cal. 2008) ("The Act furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal.").

239. *See, e.g.*, Robert John Araujo, *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L.J. 571, 618 (2007) (discussing those objecting to same-sex unions "in good conscience, based not on 'feeling' but on sound and reasoned views of rightness and wrongness").

240. Kaitlin DeCrescio, Casenote, *An Education in Evolution: Silencing Scientific Inquiry in* Selman v. Cobb County School District, 25 TEMP. ENVTL. L. & TECH. J. 285, 301-02 (2006) ("Under the Establishment Clause, the government is prohibited from taking

The difficulty pointed to here will not be solved by expanding exemptions so that individuals will be immune from civil rights laws as long as they have religious or *non-religious* qualms about interacting with the people in question.[241] Such an expansion would impose too great of a cost on society as a general matter—anyone who had any sort of qualms about dealing with anyone else could thereby be excused and society could become increasingly balkanized.[242] Respect and tolerance for the religious and non-religious alike is more likely to be undermined than promoted if these kinds of exemptions for religious and non-religious conscience are enacted.[243]

CONCLUSION

Commentators suggest that legislatures should afford an exemption to those who for religious reasons do not wish to serve members of the LGBT community, likening such exemptions to those already provided in the context of healthcare. Yet, the existing jurisprudence on healthcare exemptions suggests that such an exemption, once offered, might be difficult to cabin both with respect to the kinds of services subject to the exemption and to the groups of "objectionable" people who need not be served. All too often, commentators fail to note the important difference between the compared exemptions—healthcare exemptions permit those with religious qualms about performing particular services to refrain from providing them, but

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'sides' regarding questions of religion.") (citing Selman v. Cobb Cnty Sch. Dist., 390 F. Supp. 2d 1286, 1307 (N.D. Ga. 2005)); *cf.* Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 CARDOZO L. REV. 2369, 2373 (2009) ("The more multireligious a society, the more important it is that the state remain neutral in religious matters. A state that would take sides in religious matters would lose its capability to guarantee liberty for all religious faiths.").

241. *See* James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 241 (2007) ("[A]lthough such laws make reference to 'conscience,' most define that term in a virtually boundless fashion to include 'religious, moral or ethical principles.'"); *cf.* Minow, *supra* note 195, at 827-28 ("A third option . . . is to grant exemptions not only to religious groups, but to other groups that make comparable accommodation requests based on conscience rather than spiritual tenets.") (citation omitted).

242. *See* Minow, *supra* note 195, at 828 (discussing how an expansion would further undercut the laws of civil rights).

243. Dean Minow does not seem to appreciate this possibility. *Cf. id.* at 845-46 ("A bit more respect, flexibility, and humility on all sides in the clash between religious groups and advocates for rights for gays, lesbians, and transgendered people could open possibilities for resolutions that accommodate civil rights norms and religious principles."). Certainly, we would not expect commentators to advocate flexibility about, say, racial discrimination or exclusion. *Cf.* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 120 (2006) ("Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect LGBT people.").

they do not permit individuals to discriminate against a particular class of persons by providing certain services for some groups of individuals but not others.

Religious views should be taken seriously but the suggestion that those with sincere qualms should be permitted to refuse to serve members of the LGBT community must be rethought. Such a policy if enacted into law will either create or reinforce second-class citizenship for members of the LGBT community or, if generalized, increase the balkanization and intolerance that is already undergoing a resurgence in this country. Creation of the proposed exemption will lead to less tolerance and respect for everyone, a result that furthers the interests of neither the religious nor the non-religious. While sincere religious views should not be dismissed, they also should not be allowed to bring about such harm to minorities in particular or to society as a whole.