THE COGNITIVE DISSONANCE OF RELIGIOUS LIBERTY DISCOURSE: STATUTORY RIGHTS MASQUERADING AS CONSTITUTIONAL MANDATES

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There is a cognitive dissonance in current religious liberty discourse. On the one hand, there are vulnerable groups emerging as strong rights holders in the culture, including LGBTQ, women, and children. On the other hand, there are the religious believers who cannot or will not fit this new social order into their worldview and, therefore, assert rights against it. In fact, the religious liberty "rights" asserted are not constitutional, but rather statutory.[1] It is critically important that our public debate be built on this fact.

Rights for the vulnerable are under attack by some religious actors who have sought to turn religious liberty into a weapon of exclusion, control, and harm. "Cognitive dissonance" is the "psychological conflict resulting from incongruous beliefs and attitudes held simultaneously,"[2] and is often experienced as discomfort, which can lead the person to choose various routes away from the discomfort, such as denial or action.[3] As politically powerful religious actors experience unease in a culture they no longer control, there has been a multiplication of de-

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1. *See, e.g.*, Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

2. *Cognitive Dissonance*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/cognitive%20dissonance [http://perma.cc/3KGY-GCGF] (last visited Aug. 6, 2017).

3. *See* Eddie Harmon-Jones, David M. Amodio & Cindy Harmon-Jones, *Action-Based Model of Dissonance: A Review, Integration, and Expansion of Conceptions of Cognitive Conflict*, *in* 41 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 119, 120–21 (Mark P. Zanna ed., 2009).

mands for extreme religious liberty in the United States,[4] including by law professors as well as national advocacy organizations like the Becket Fund and the Alliance Defending Freedom,[5] who routinely trivialize the costs extreme religious liberty externalizes onto others as their discourse treats all religious liberty as constitutionally required. This is a time of religious triumphalism. The vulnerable are at risk from some religious who insist that their liberty does not end with their own practices but rather expands to include the culture around them. As a matter of public policy, it is necessary to choose between the rights of the vulnerable and the ever-increasing demands—not for liberty, but rather autonomy divorced from responsibility for harm. This is a threat to our peaceful coexistence. For that reason, the United States Commission on Civil Rights' report on religious liberty is correctly titled, "Peaceful Coexistence: Reconciling Nondiscrimination Principles and Civil Liberties."[6] The challenge is to draw the boundary line that squares civil rights for the vulnerable with religious liberty for conduct, and in my view the Report is the best analysis to date, albeit with inadequate attention to the plight of children at risk in religious communities of sex abuse, medical neglect, and educational neglect, as I discussed in my testimony before the Commission.[7]

The recent Supreme Court cases with impact on the religious liberty debate have centered on two of the vulnerable populations: LGBTQ and women. The former was empowered by the Court while the latter were not. According to the Supreme Court, LGBTQ have a right to live lives of love and devotion to

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4. *See, e.g.*, Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 858–92 (2004); J. Brett Walker, *Free Exercise of Religion: A Right, Not A Luxury*, 66 FLA. B.J. 22, 22–29 (1992).

5. *See* Press Release, Alliance Defending Freedom, ADF Comment on White House Summary of Religious Liberty Executive Order (May 3, 2017), https://www.adflegal.org/detailspages/press-release-details/adf-comment-on-white-house-summary-of-religious-liberty-executive-order [https://perma.cc/N827-K3CH]; Our Mission, BECKET FUND, http://www.becketlaw.org/about-us/mission/ [http://perma.cc/PX4K-RZZE] (last visited Aug. 6, 2017).

6. U. S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.pdf [https://perma.cc/GHK8-YFWZ].

7. *See* U.S. COMM'N ON CIVIL RIGHTS, BRIEFING: PEACEFUL COEXISTENCE? RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 76–81 (2013).

family on par with heterosexual couples.[8] The response from religious actors has been a doubling down on demands to exclude LGBTQ from any arena in which they are present including employment and the marketplace of goods and services.[9] Although they do not acknowledge the divided culture they seek, their approach is different in degree but not kind to the former religious liberty of South African apartheid,[10] which was an expression of the Dutch Reformed Church.

Some religious actors have long been fighting the rights of women to obtain contraception and abortion,[11] but the fight has progressed from tactics that are intended to deter abortions to those that empower an employer to deny health care coverage that includes reproductive healthcare based on the employer's religious beliefs, even in a for-profit setting.[12] Now, religious actors aggressively seek two ways to further erode women's rights to personal reproductive care through the institution of sweeping prerogatives on the part of employers, a right to refuse to provide care to women,[13] including in pharmacies,[14]

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8. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600–02 (2015).

9. *See* Jennifer Calfas, *Employment Discrimination: The Next Frontier for LBGT Community*, USA TODAY (July 31, 2015), http://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/ [http://perma.cc/7G48-Y6PZ]; Crosby Burns & Philip Ross, *Gay and Transgender Discrimination Outside the Workplace*, CTR. FOR AM. PROGRESS (July 19, 2011), http://www.americanprogress.org/issues/lgbt/reports/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/ [http://perma.cc/3D97-XA9M].

10. *See* Tamara Rice Lave, *A Nation at Prayer, a Nation in Hate: Apartheid in South Africa*, 30 STAN. J. INT'L L. 483, 496–510 (1994).

11. *See, e.g.*, Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016); *see also* Stephanie Russell-Kraft, *The Right to Abortion—and Religious Freedom*, ATLANTIC (Mar. 3, 2016), http://www.theatlantic.com/politics/archive/2016/03/abortion-rights-a-matter-of-religious-freedom/471891/ [http://perma.cc/V2GD-UQDR].

12. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014); *see also* Ian Millhiser, *Federal Court: Notre Dame Can't Cut Off Birth Control For Its Students*, THINKPROGRESS (May 20, 2015), http://thinkprogress.org/federal-court-notre-dame-cant-cut-off-birth-control-for-its-students-d8c0e1f421a9/ [http://perma.cc/98TK-VW3J].

13. *See Refusal Laws: Dangerous for Women's Health*, NARAL PRO-CHOICE AM., http://www.prochoiceamerica.org/wp-content/uploads/2017/01/1.-Refusal-Laws-Dangerous-for-Womens-Health.pdf [http://perma.cc/9L5G-ULW3] (last visited Aug. 15, 2017) (discussing the history of refusal laws and their impact on women's health).

14. *See, e.g.*, Catherine Pearson, *Pharmacist Allegedly Refused to Fill Teen's IUD-Related Prescription*, HUFFINGTON POST (June 5, 2017), http://www.huffingtonpost.com/entry/

and a right to discriminate against women by permitting an employer to impose a benefits plan that reflects his beliefs without regard to the female employee's health needs or her own faith.[15] These two fronts have preoccupied the religious triumphalists and the larger culture.

The Report does not adequately acknowledge the other vulnerable population to religious triumphalism: children. The seriatim sexual abuse of children within religious organizations has spanned the spectrum: ultra-Orthodox and Orthodox Jews,[16] the Roman Catholic Church,[17] the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS"),[18] the Children of God,[19] and Tony Alamo's cult,[20] to name a few.

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pharmacist-allegedly-refused-to-fill-teens-iud-related-prescription_us_59357d8ee4b0fa3f6ae63c3d [http://perma.cc/43SE-CZCW].

15. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

16. *See* Elija Wolfson, *Child Abuse Allegations Plague The Hasidic Community*, NEWSWEEK (Mar. 3, 2016), http://www.newsweek.com/2016/03/11/child-abuse-allegations-hasidic-ultraorthodox-jewish-community-brooklyn-432688.html [http://perma.cc/6EXW-7F4X]; *see also* Marci A. Hamilton, *The Plight of Jewish Children in Ultra-Orthodox Jewish Communities and the Failure of Government and Pandering Politicians to Protect Them*, VERDICT (Sept. 15, 2015), http://verdict.justia.com/2015/09/17/the-plight-of-children-at-risk-in-the-ultra-orthodox-jewish-communities-and-the-failure-of-government-and-pandering-politicians-to-protect-them [http://perma.cc/AV7V-9FRP] ("As with the FLDS, the ultra-Orthodox communities have put children at risk due to inadequate medical treatment, educational neglect, and mostly undeterred child sex abuse."); *Public Hearing Into Yeshivah Melbourne and Yeshivah Bondi to be Held*, ROYAL COMM'N INTO INSTITUTIONAL RESPONSES TO CHILD SEX ABUSE (Jan. 30, 2015), http://www.childabuseroyalcommission.gov.au/media-centre/media-releases/2015-01/public-hearing-into-yeshivah-melbourne-and-yeshiva [http://perma.cc/Y8A8-4H3G] (investigations into two religious institutions that are a part of the worldwide Hasidic Judaism sect Chabad, Yeshivah Melbourne and Yeshivah Bondi, uncovered that children had been the victims of abuse at the hand of at least three individuals who were involved in activities run by these institutions, such as martial arts classes, religious programs and overnight youth camps).

17. The most reliable archive on abuse within the Roman Catholic Church is www.bishopaccountability.org. *See also* ROYAL COMM'N INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, 1 INTERIM REPORT 187 (2014).

18. FLORA JESSOP & PAUL T. BROWN, CHURCH OF LIES 1–3 (2009); CAROLYN JESSOP & LAURA PALMER, ESCAPE 1–3 (2008); ELISSA WALL & LISA PULITZER, STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS 1–3 (2009).

19. *See* Lynne Wallace, *Violent sexual abuse, brainwashing and neglect: What it's like to grow up in a religious sect,* INDEPENDENT (Sep. 1, 2007), http://www.independent.

Specifically, the FLDS forces girls into prophet-mandated polygamous marriages with much older men and abandons the boys who do not fully conform to the group, a move necessary in part to keep the numbers favorable to the men seeking multiple wives.[21] These organizations typically revert to theology and church autonomy rationales to excuse and explain the widespread sexual abuse and trivialization of children.[22] In addition, numerous religious organizations have medically neglected and even let children die or be permanently disabled for religious reasons, including Christian Scientists, the Followers of Christ, and many others.[23]

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co.uk/news/uk/this-britain/violent-sexual-abuse-brainwashing-and-neglect-what-its-like-to-grow-up-in-a-religious-sect-401035.html [http://perma.cc/74EQ-PKHF].

20. *See* Associated Press, *32 Children Seized From Tony Alamo Christian Ministries, Over Alleged Beatings, Sexual Abuse*, FOX NEWS (Dec. 4, 2008), http://www.foxnews.com/story/2008/12/04/32-children-seized-from-tony-alamo-christian-ministries-over-alleged-beatings.html [http://perma.cc/NVX3-65VL].

21. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 73–74 (2d ed. 2014); BRENT JEFFS, LOST BOY 1–3, 201–04 (2009).

22. *See* Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953, 961–68 (2010); Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 MD. L. REV. 115, 118–21 (2009); *see also* Ramani v. Chabad of S. Nev., Inc., 373 P.3d 953 (Nev. 2011); Sharon Otterman & Ray Rivera, *Ultra-Orthodox Shun Their Own for Reporting Child Sexual Abuse*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html?pagewanted=all&_r=0 [http://perma.cc/4SUC-LK44] (highlighting that members of ultra-Orthodox community were shunned after reporting child molestation by religious leaders, on the basis that there was an ancient prohibition against *mesirah*, the turning in of a Jew to non-Jewish authorities, and that publicly airing allegations against fellow Jews is *chillul Hashem*, a desecration of God's name).

23. *See* HAMILTON, *supra* note 21, at 63–73; PAUL OFFIT, BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE, at ix–xv, 1–18 (2015); *see also* Lundman v. McKown, 530 N.W.2d 807, 813–15 (Minn. Ct. App. 1995), *review denied*, (Minn. May 31, 1995), *cert. denied sub nom.* Lundman v. First Church of Christ, Scientist, 516 U.S. 1092 (1996) (discussing death of child due to untreated diabetes by Christian Scientist); State v. Neumann, 832 N.W.2d 560, 569–72 (Wis. 2013) (highlighting death of child due to untreated diabetes through online faith-healing); Vince Lattanzio, *Faith Healing Churches Linked to 2 Dozen Child Deaths*, NBC PHILA. (May 23, 2013), http://www.nbcphiladelphia.com/news/local/Faith-Healing-Churches-Linked-to-Two-Dozen-Child-Deaths-208745201.html [http://perma.cc/7DPG-T6BG] (discussing deaths of juvenile members of Faith Tabernacle and First Century Gospel Church in Philadelphia); Holly McKay, *Woman who blames parents for health woes looks to shut down faith healers*, FOX NEWS (Apr. 21, 2016), http://www.foxnews.com/us/2016/04/21/idaho-woman-blames-parents-for-health-woes-seeks-change-in-law-protecting-faith-healers.html [http://

Twenty years ago, Professor Douglas Laycock and I squared off at the Supreme Court over the constitutionality of the Religious Freedom Restoration Act, or RFRA,[24] the statute passed by Congress to augment the First Amendment. The Court held that RFRA was unconstitutional as applied to the states,[25] but it also made clear that RFRA is only a statutory standard, not one that is constitutionally mandated.[26] This is the north star for religious liberty debates. Religious liberty advocates frequently like to slip in an insinuation that their "right" to overcome another person's rights is constitutionally compelled.[27] That is illegitimate. The "rights" of the owners of Hobby Lobby were only in a statute, RFRA, and they overcame in effect the Title VII statutory rights of female employees to not be discriminated against based on gender or faith. Those who insist on a "sacred right" not to do business with gay couples, not to include contraception in their healthcare plans, and not to be subject to the employment nondiscrimination laws need statutes to achieve their goals, because the First Amendment does not allow believers to impose their beliefs on others. They have nothing but a statute in their hands. That statute, unlike the Consti-

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perma.cc/N7Q4-CAQW] (discussing story of a young woman and her struggle with a debilitating heart condition due to lack of medical treatment from LDS parents); Cameron Rasmusson, *Idaho's 'Faith' Healing Dilemma,* BOISE WEEKLY (March 16, 2016), http://www.boiseweekly.com/boise/idahos-faith-healing-dilemma/Content?oid=3739400 [http://perma.cc/YM97-L8HV] (highlighting deaths of children in Idaho); Sarah Jane Tribble, *Measles Outbreak In Ohio Leads Amish To Reconsider Vaccines*, NPR (June 24, 2014), http://www.npr.org/sections/health-shots/2014/06/24/323702892/measles-outbreak-in-ohio-leads-amish-to-reconsider-vaccines [http://perma.cc/4YP9-XSDF] (noting that failure of Amish to immunize has led to outbreaks of previously eradicated childhood diseases like measles).

24. The Religious Freedom Restoration Act of 1993 (RFRA provides that the government may not place a substantial burden on one's exercise of religion unless it proves that is in the furtherance of a compelling interest and that it is the least restrictive means of furthering this interest. *See* Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

25. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.").

26. *See id.* at 532–36.

27. This happened during the question and answer period at the National Student Symposium when a question was posed as though the statutory standard is constitutionally required.

tution, does not trump the civil rights asserted by the vulnerable groups in harm's way. Therefore, it is essential to distinguish the First Amendment's constitutional mandate from the religious liberty statutes' rules.

I. RFRA VS. THE FIRST AMENDMENT

Since 1990, some religious entities and their defenders have demanded near-absolute rights of accommodation, for example, the right never to do business with a same-sex couple based on religious belief[28] or the right to raise children without interference from the state even when the child's life is at stake.[29] The advocates' internal premise is that religiously motivated conduct is virtually unassailable. When the First Amendment did not deliver the strong rights they sought, they pursued statutes like RFRA at the federal and state levels under the assumption that religion can do no harm.

When President William Jefferson Clinton signed RFRA, there was a rosy patina of unity between religious and civil rights groups, who supported supposedly old-fashioned religious liberty. In his signing remarks, President Clinton said:

> We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom. Usually the signing of legislation by a President is a ministerial act, often a quiet ending to a turbulent legislative process. Today this event assumes a more majestic quality because of our ability together to affirm the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished.[30]

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28. *See, e.g.*, Mississippi Religious Freedom Restoration Act, MISS. CODE. ANN. § 11-61-1 (West 2017), *discussed in* Marci A. Hamilton, *The Lessons of the New Mississippi RFRA That Shed Light on the* Hobby Lobby *and* Conestoga Wood *Cases Pending at the Supreme Court*, VERDICT (May 15, 2014), http://verdict.justia.com/2014/05/15/lessons-new-mississippi-rfra-shed-light-hobby-lobby-conestoga-wood-cases-pending-supreme-court [http://perma.cc/YPB9-NNKH].

29. *See* Rasmusson, *supra* note 23.

30. President William J. Clinton, *Remarks on Signing the Religious Freedom Act of 1993, November 16, 1993*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=46124 [http://perma.cc/5DSR-RKUS] (last visited Aug. 8, 2017).

These same groups had lobbied for the bill as though it was a benign addition to the law and a simple return to prior constitutional case law.[31] There was a predominant presumption, though not entirely unchallenged,[32] that religious believers don't harm others.[33] The religious lobbyists' public relations combined with this false sense of safety led members of Congress to believe that there would be no major change in religious liberty protections if RFRA were passed.[34]

In fact, RFRA is a contortion of prior case law, not a return to prior cases. After it was declared unconstitutional, and Congress took up the issue again, there was a new hidden agenda: a drive by conservative Christians to secure a right to discriminate against unmarried couples, single mothers, and eventually same-sex couples in the housing context.[35] Because of its broad and blind scope, RFRA appeared desirable on its surface but in fact put at risk many vulnerable individuals.

According to a majority of the Supreme Court, before RFRA the "vast majority" of the Supreme Court's First Amendment free exercise cases recognized an absolute right to believe what one chooses but an obligation to abide by neutral, generally applicable laws.[36] But laws targeted negatively at a particular religious entity were to be subjected to more searching judicial scrutiny.[37] In other words, in the United States, faith has not justified avoiding laws that apply to every other person taking

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31. *See* HAMILTON, *supra* note 21, at 18–24.

32. *The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 372–74 (1992) (statement of Professor Ira C. Lupu).

33. *See* HAMILTON, *supra* note 21, at 31–37.

34. *See id.* at 7–8, 346 (outlining the expanding list of religious liberty tests).

35. *See id.* at 232–36.

36. Emp't Div. v. Smith, 494 U.S. 872, 879–80 (1990) ("[T]he 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).'"). While I am persuaded that the Court correctly summarized its jurisprudence, as I discuss in *inter alia,* Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2011), pre-*Smith* cases also reflect this reading of the Free Exercise Clause. *See, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); United States v. Lee, 455 U.S. 252 (1982); Cantwell v. Connecticut, 310 U.S. 296 (1940).

37. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–41 (1993).

the same action. For example, if someone is driving to a religious service and violates the speed limit, there is no religious liberty defense to avoid the speeding ticket even if the process of the police writing the ticket means the driver misses the service altogether. The same analysis applies to a church building that does not have legally-mandated fire prevention measures. In both cases, the neutral, generally applicable law applies to the believer regardless of the involvement of worship.

The First Amendment's doctrine, however, has not only contributed to the neutral rule of law in a religiously diverse society, but also has paved the way for permissive legislative accommodations. When the Court rejected a First Amendment-mandated exemption for the use of an illegal drug, peyote, in 1990, it also pointed to the long tradition of legislative accommodation for specific religious practices.[38] The result was that peyote use was then permitted for religious uses in many states and at the federal level.[39] Religious lobbyists also have not been shy in demanding exemptions to laws that are intended to protect children from harm, for example, faith-healing exemptions to medical neglect laws, exemptions from mandated reporting of child sex abuse (and neglect), and confessional exceptions to a duty to protect a child when the information arrives via a confession.[40]

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38. *Smith*, 494 U.S. at 877–78, 890.

39. *See* Marcia A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1672, 1690 (2011).

40. *See generally Research*, CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1–3 (2015), https://www.childwelfare.gov/pubPDFs/clergymandated.pdf [https://perma.cc/E3CP-EQC3]; Julie Love Taylor, Parents of Minor Child v. Charlet*: A Threat to the Sanctity of Catholic Confession?*, LA L. REV. (Oct. 22, 2014), https://lawreview.law.lsu.edu/2014/10/22/parents-of-minor-child-v-charlet-a-threat-to-the-sanctity-of-catholic-confession/ [https://perma.cc/4R83-TLM4; CHILD USA, http://www.childusa.org/research/ [https://perma.cc/35JX-LWXG] (last visited July 16, 2017); Marci A. Hamilton, *The Universal Need for the Mandatory Reporting of Child Sex Abuse*, JUSTIA: VERDICT (Nov. 17, 2011), https://verdict.justia.com/2011/11/17/the-universal-need-for-the-mandatory-reporting-of-child-sexual-abuse [https://perma.cc/U96V-EH78]; Jack Jenkins, *Unholy secrets: The legal loophole that allows clergy to hide sexual abuse*, THINK PROGRESS (Aug. 8, 2016), https://thinkprogress.org/unholy-secrets-the-legal-loophole-that-allows-clergy-to-hide-child-sexual-abuse-9a6899029eb5 [https://perma.cc/S4V5-SLN8]; Aleksandra Sandstrom, *Most states allow religious exemptions from child abuse and neglect laws*,

Since the early 1960s, some religious litigants have worked assiduously to avoid the application of laws that are neutral and generally applicable in a wide array of contexts, including social security taxes,[41] child labor laws,[42] and military dress requirements,[43] among others. They sought a doctrine that would presume believers are exempt from any law in conflict with a believer's faith. The Supreme Court routinely interpreted the First Amendment to reject such claims.[44] Then, in 1990, the Court definitively rejected their demands for extreme religious liberty in a case involving the use of an illegal drug during religious services,[45] and the religious entities, who at that time were joined by civil rights organizations, pivoted from the Supreme Court to Congress to provide the hyper-protection for religious liberty against all laws that they had been unable to obtain from the Court.[46] Congress acquiesced, and RFRA was imposed on the United States after President Clinton signed the bill into law.[47]

RFRA layered a statutory, extreme free exercise right onto the First Amendment and the large network of legislative accommodations, and thereby created a presumption that the religious entity should be accommodated in *all* contexts.[48] RFRA imposes an extremely heavy burden on the government to justify all laws, even neutral and generally applicable laws. The result was that religious entities became empowered to harm

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PEW RES. CTR. (Aug. 12, 2016), http://www.pewresearch.org/fact-tank/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws/ [https://perma.cc/VK42-G7DC].

41. United States v. Lee, 455 U.S. 252 (1982) (no First Amendment free exercise right to avoid social security taxes).

42. Prince v. Massachusetts, 321 U.S. 158 (1944) (no First Amendment free exercise right to avoid child labor laws).

43. Goldman v. Weinberger, 475 U.S. 503 (1986) (no First Amendment free exercise right for active military to wear religious headgear).

44. *See Smith*, 494 U.S. at 878–82 (discussing the history of the Supreme Court's Free Exercise Clause jurisprudence).

45. *Id.* at 874, 890.

46. *See* Linda Greenhouse, *High Court Voids a Law Expanding Religious Rights*, N.Y. TIMES (June 26, 1997), http://www.nytimes.com/1997/06/26/us/high-court-voids-a-law-expanding-religious-rights.html [https://perma.cc/32Z3-EUCY].

47. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html [https://perma.cc/Y7XE-5FS3].

48. 42 U.S.C. § 2000bb-1 (2012).

others in ways never before contemplated by the First Amendment cases.[49] All the while, there has been persistent verbal slippage that portrays RFRA as though it is a constitutional mandate rather than the sui generis statute that it is.

The issue that finally slowed blind trust in RFRA implicated not children but adults—LGBTQ adults and women in need of reproductive health care. When the RFRA formula revealed itself as a means of discriminating against LGBTQ adults,[50] only then did powerful forces at odds with religious entities on these issues step up to fight new state RFRAs and to amend the federal and state RFRAs to prevent harm to adults. LGBTQ advocates, civil rights organizations, and a significant portion of the business community mobilized to their defense. The Arizona and Georgia RFRAs were vetoed,[51] the Indiana RFRA was scaled back,[52] and the West Virginia RFRA failed.[53] Had the

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49. The history of free exercise in the United States is more fully explained in my book, *God vs. the Gavel: The Perils of Extreme Religious Liberty*. *See generally* HAMILTON, *supra* note 21, at 239–77 (discussing the history of the Supreme Court's jurisprudence regarding free exercise of religion).

50. Marci Hamilton, *Indiana Leads the Way With an Outrageous RFRA Proposal*, JUSTIA: VERDICT (Jan. 21, 2016), https://verdict.justia.com/2016/01/21/indiana-leads-the-way-with-an-outrageous-rfra-proposal-again [https://perma.cc/S4UE-E2AH]; Marci Hamilton, *The Insatiable Demand for Extreme Religious Liberty Under the RFRAs, Part II*, JUSTIA: VERDICT (Mar. 20, 2014), https://verdict.justia.com/2014/03/20/insatiable-demand-extreme-religious-liberty-rfras-part-ii [https://perma.cc/9VKZ-ANU3].

51. The Arizona RFRA, Arizona SB 1062 (amending A.R.S. § 41-1493.01), was vetoed by Governor Jan Brewer who described it as a "'broadly worded' bill that 'could result in unintended negative consequences.'" Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jane Brewer vetoes controversial anti-gay bill, SB 1062*, CNN (Feb. 26, 2014), http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/ [https://perma.cc/GWV8-XZL3]. The Georgia RFRA, HB 757, was a "[bill] to be entitled an Act to protect religious freedoms . . . so as to provide that religious officials shall not be required to perform marriage ceremonies in violatoin of their legal right to free exercise of religion." *See 2015-2016 Regular Session - HB 757*, GA. GEN. ASSEMBLY, http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/757 [https://perma.cc/A5N9-HSKD] (last visited July 19, 2017). It was vetoed by Governor Nathan Deal who stated that it did not "reflect Georgia's welcoming image as a state of 'warm, friendly, and loving people.'" Greg Bluestein, *Nathan Deal vetoes Georgia's 'religious liberty' bill*, AJC.COM (Apr. 9, 2016), http://politics.blog.ajc.com/2016/03/28/breaking-nathan-deal-will-veto-georgias-religious-liberty-bill/ [https://perma.cc/XHY6-DE3Q].

52. Indiana's initial religious liberty bill, Indiana S.B. 101, was revised in order to ensure that sexual orientation and gender identity would be protected. Tony Cook et al., *Indiana governor signs amended 'religious freedom' law*, USA TODAY (Apr. 2, 2015), http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-

state RFRAs been constitutionally mandated, the push back and vetoes would have been problematic, but they are just statutes.

In the same era this version of "religious liberty" began to look problematic when the for-profit corporation, Hobby Lobby, demanded under RFRA a right to curtail female employee's reproductive health coverage based on the owners' religious rights. Civil rights organizations from the ACLU to Americans United for Separation of Church and State publicly denounced this use of RFRA and began to lobby against the state RFRAs and their application in certain scenarios.[54] In Congress, the Do No Harm Act was introduced to carve out specific elements of RFRA.[55] (It is my view that wholesale repeal of RFRA that

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freedom-law-deal-gay-discrimination/70819106/ [https://perma.cc/7GXX-RWDM]. The law:

> [P]rohibits a governmental entity from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the governmental entity can demonstrate that the burden: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering means of furtherance the compelling governmental interest.

Senate Bill 101, IND. GEN. ASSEMBLY, https://iga.in.gov/legislative/2015/bills/senate/101 [https://perma.cc/3VSL-WSNS] (last visited July 27, 2017).

53. Erin Beck, *WV Senate kills 'religious freedom' bill*, CHARLESTON GAZETTE-MAIL (Mar. 2, 2016), http://www.wvgazettemail.com/news/20160302/wv-senate-kills-religious-freedom-bill [https://perma.cc/3JYZ-48DR].

54. Each of these organizations, which fully supported RFRA at its inception, have now embraced a mission to criticize the state RFRAs and to lobby against religious liberty claims against same-sex couples and LGBTQ individuals. The ACLU has protested the use of religion to discriminate against LGBTQ people, stating that "everyone is entitled to their own religious beliefs, but when you operate a business or run a publicly funded social service agency open to the public, those beliefs do not give you a right to discriminate." *See End the Use of Religion to Discriminate,* ACLU, https://www.aclu.org/feature/using-religion-discriminate [https://perma.cc/7JNG-53FY] (last visited July 19, 2017). The Americans United for the Separation of Church and State launched the "Protect Thy Neighbor" campaign to "prevent the use of religion to discriminate against and otherwise cause harm to individuals including religious objection to marriages and religious-based restrictions on women's healthcare." *See Marriage & Reproductive Rights*, AMS. UNITED, https://www.au.org/issues/marriage-reproductive-justice-other-privacy-issues [https://perma.cc/337N-2M94] (last visited July 27, 2017).

55. The Supreme Court ruled in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014), that the protection of RFRA extended to religious business owners and that therefore, such owners were exempted from providing contraceptives and abortifacients coverage to their employees. The Do No Harm Act, H.R. 5272, was introduced in order to "clarify that no one can seek religious ex-

would leave the First Amendment unfettered is the most humane policy choice, but that option has not yet been politically feasible in the United States, largely due to the pandering of elected officials to politically powerful—and even some not so powerful—religious entities). The push for the Do No Harm Act was almost exclusively for the benefit of the adult issues mentioned above. Child protection was never a priority and had to be brought into the discussion; it was not initially embraced by those at the table.[56] Eventually, in large part due to LGBTQ concerns about the conversion therapy movement, child protection provisions were included.[57] The Do No Harm Act never would have been introduced solely for the protection of children, once again showing how child protection in the religious context is often a second-order concern. It is also unlikely to be passed in a Republican-controlled White House, House, and Senate. After the election of President Donald Trump, right-wing Christians pursued child-endangering extreme religious liberty with a vengeance, introducing bills that permit state-paid believers, whether individuals or organizations, to refuse to provide social services to same-sex couples and gay children.[58]

The alteration of free exercise doctrine by adding on statutory rights but then treating them in the public square as constitutionally required was made possible in part by a retreat from specifics (the lives of children, women, LGBTQ, and other minorities) to banal generalities about constitutional doctrine. Many defended "accommodations" of religion that protected institutions run by adults over their child members, even in

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emption from laws guaranteeing fundamental civil and legal rights." *See* Lauretta Brown, *'Do No Harm Act' Would Forbid Religious Objection to 'Any Healthcare' Service*, CNSNEWS.COM (May 23, 2016), https://www.cnsnews.com/news/article/lauretta-brown/do-no-harm-act-would-amend-rfra-prevent-discrimination-forbid-religious [https://perma.cc/2DBS-XUWC].

56. I was involved in the behind-the-scene discussions and advocated for the Do No Harm Act to include provisions that would protect children against abuse and neglect from religious actors. This principle of child protection caused some consternation because it was a distraction from the leading adult issues.

57. Eventually, the child protection provisions remained in the bill, and finally children had a seat at the table to push back against those who would harm them based on faith.

58. Marci A. Hamilton, *The Children Be Damned . . .*, JUSTIA: VERDICT (Mar. 30, 2017), https://verdict.justia.com/2017/03/30/children-damned [https://perma.cc/LM4L-46J7].

situations involving serious violations of children's human rights.[59] In effect, even some have sided with the perpetrators of trauma against children in the name of religion by supporting a doctrine that they thought protected religion but instead protected religion past the no-harm line.[60] They could not or

59. *See, e.g.*, Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 835–36 (2012) ("Taken together, the establishment and free exercise holdings of *Hosanna-Tabor* suggest a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions. Although the Court never confined the protections of the Religion Clauses to natural persons, opinions gave the impression that, to the Court, religion is essentially a matter between individuals and their God (however conceived). Free exercise cases emphasized individual sincerity and rejected the idea that religious exercise must be rooted in the teachings of a faith community. In some of the parochial school cases, members of the Court gave the impression they regarded the 'inculcat[ion]' of church 'dogma' as a threat to the freedom of individuals to form their own beliefs. Now, however, as interpreted in *Smith* and *Hosanna-Tabor*, the Free Exercise Clause provides far greater protection to the 'faith and mission' of religious institutions than to individual acts of religious exercise, and the Establishment Clause bars the government from interfering in 'ecclesiastical' decisionmaking. Perhaps it is a coincidence, but this shift in emphasis corresponds very roughly to the old divide between individualistic Protestantism and institutional Catholicism and might be the first evident fruit of the new Catholic majority on the Court. The 'freedom of the church' was the first kind of religious freedom to appear in the western world, but got short shrift from the Court for decades. Thanks to *Hosanna-Tabor*, it has again taken center stage." (footnotes omitted)).

60. *See* Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411, 486 (2000) (discussing how state religious freedom laws should be drafted to avoid being declared unconstitutional like RFRA); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 496–97 (2010) (arguing for the continued drafting and passing of state religious freedom laws); Jennifer A. Marshall, Burwell v. Hobby Lobby*: Protecting Religious Freedom in A Diverse Society*, 10 NYU J.L. & LIBERTY 327, 344–45 (2016) (discussing the importance of RFRA for protecting religious liberty after the Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)); John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 435, 450 (2016) (discussing the history and importance of protecting religious liberty in the United States); *see also* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1115–16 (explaining the concept of the "No-Harm Doctrine" in relation to RFRA and free exercise of religion); Marci A. Hamilton, *North Dakota's Religious Freedom Restoration Act (RFRA) Signals Religious Lobbyists' New and Disturbing Approach to Statute-based Free Exercise Rights*, JUSTIA: VERDICT (May 3, 2012), https://verdict.justia.com/2012/05/03/north-dakotas-religious-freedom-restoration-act-rfra-signals-religious-lobbyists-new-and-disturbing-approach-to-statute-based-free-exercise-rights [https://perma.cc/2FRG-65BN] (explaining the "dark underside" and harm caused by RFRA, specifically against children).

did not see that by protecting accommodations for religion they were protecting adult institutional leaders to the detriment of vulnerable children.

The one-size-fits-all-cases rhetoric introduced in the last twenty years through the introduction of religious liberty statutes like RFRA and state counterparts[61] has treated all religious actors as rights-deserving, and all contexts as equally legitimate for consideration of accommodation—regardless of the harm they may impose. Why? In no small part because the constitutional undertone of the statute-based discourse treats religious believers as ascendant and all others as second order citizens.

There has been lip service paid to concerns about harm to third parties in some cases,[62] but in others the harm to others has been ignored or trivialized.[63] That has meant that the religious actor is treated as rights-deserving without consideration of the effect on others, even if harm occurs. The discourse that accompanies such reasoning treats religious liberty as a constitutionally-required right in all iterations, whether the claim is based on a constitutional or a statutory base.

This expression in constitutional terms about statutory rights creates cognitive dissonance in public discourse. The cure for the cognitive dissonance of religious liberty dialogue is to call a right what it is: constitutional or statutory. A constitutional right overcomes conflicting statutes, persists, and requires a constitutional amendment to overturn it. In contrast, a statuto-

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61. HAMILTON, *supra* note 21, at 19–20, 340–42; *see also* Marci A. Hamilton, *Indiana Leads the Way With an Outrageous RFRA Proposal Again*, JUSTIA: VERDICT (Jan. 21, 2016), https://verdict.justia.com/2016/01/21/indiana-leads-the-way-with-an-outrageous-rfra-proposal-again [https://perma.cc/P8M4-NTKT]; Marci A. Hamilton, *RFRA, Zubik v. Burwell, and the Do No Harm Act*, JUSTIA: VERDICT (May 19, 2016), https://verdict.justia.com/2016/05/19/rfra-zubik-v-burwell-no-harm-act [https://perma.cc/EX8F-KZR4].

62. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurring) ("Requiring standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act. And requiring that women affirmatively opt into such coverage would 'impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate.'" (citation omitted)).

63. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Ginsburg, J., dissenting) ("No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect").

ry right is capable of being shaved back, amended, and repealed when harm becomes apparent. Therefore, there is a great deal at stake in accurately categorizing religious liberty rights.

II. CONCLUSION

The First Amendment's contours have been clouded by overreaching for religious liberty that it does not protect. That is unfortunate, because the Free Exercise Clause provides the clearest signal that the correct default position is that religious actors are accountable to the law and that accommodation should only occur legislatively after there is deliberate weighing of an accommodation and potential harm. Moreover, the Establishment Clause establishes that there are intended limits on religion and its believers. Taken together, the Religion Clauses are the foundation for a society rich in religious liberty, fairness, and diversity.

The statutory cloud of religious liberty with its sly insinuation that religious liberty rights are really constitutionally required is intended to mislead and to increase the power of religious actors—without bound. That power in turn has been used to undermine the fairness principle of the First Amendment and to moot the power of the Establishment Clause. The end result is elevation of the religious rights holder above all others.

The better discussion begins just as the Commission's Report did: with a frank concession that the religious liberty rights to discriminate are not constitutional mandates, combined with a refusal to treat a claim simply because it is religiously motivated as superior. That is the formula that brings the vulnerable back into focus and treats them as equal human beings, and not as second-class citizens.