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Look Who's Talking: Conscience, Complicity, and Compelled Speech

B. JESSIE HILL[*]

Compelled speech claims, which arise under the Free Speech Clause, and complicity claims, which usually arise under the Religious Freedom Restoration Act (RFRA), are structurally similar. In each case, an individual claims that the government is forcing her to participate in a particular act that violates her religious or moral beliefs and imperatives, sending a false and undesired message to others and causing a form of spiritual or dignitary harm. It is therefore no surprise that compelled speech claims are often raised together with complicity claims in cases where religious individuals challenge the application of generally applicable laws to themselves.

In analyzing compelled speech claims, courts and commentators have often considered whether the purportedly compelled message is likely to be perceived as the speech of the objecting individual. In the complicity context, by contrast, courts and commentators generally have not considered whether the problematic act can reasonably be attributed to the individual claimant. Nor do they generally consider whether the individual claimant can take steps to disassociate from the act. This Article argues that the concepts of attribution and disassociation, if applied in the compelled speech context, should also be applied in the complicity context. It also attempts to demonstrate how an analysis of these concepts might proceed in complicity cases. Alternatively, if these concepts fit poorly in the complicity context, they should be rejected in the compelled speech context for the same reasons.

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INTRODUCTION

Compelled speech claims, which arise under the Free Speech Clause,[1] and complicity claims, which usually arise under the Federal Religious Freedom Restoration Act (RFRA) or its state-law analogs,[2] are structurally similar. Compelled speech doctrine prevents the government from forcing a speaker to espouse the government's message, whereas complicity doctrine protects religious individuals from having to participate in or promote the conduct of another that the religious individual deems sinful. Thus, both compelled speech claimants and complicity claimants argue that, by virtue of the challenged law or its implementation, they are forced into guilt by association. In each case, an individual claims that the government is forcing her to participate in a particular act that violates her religious or moral beliefs and imperatives, sending a false and undesired message to others and causing a form of spiritual or dignitary harm. It is therefore no surprise that compelled speech claims are often raised together with complicity claims in cases where religious individuals challenge the application of generally applicable laws to themselves.[3]

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1. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . .").

2. 42 U.S.C. § 2000bb. Twenty-one states currently have a state-law equivalent of RFRA. *State Religious Freedom Restoration Acts,* NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/45KZ-QK5F]; *see also* Bradley J. Lingo & Michael G. Schietzelt, *Fulton and the Future of Free Exercise*, 33 REGENT U. L. REV. 5, 19 (2020) (noting that 21 states have passed RFRAs since 1990). For a helpful overview and analysis of state-law RFRAs and their interpretation by courts, see Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

3. *See, e.g.*, Fulton v. City of Philadelphia, 922 F.3d 140, 160–65 (3d Cir. 2019), *rev'd* 140 S. Ct. 1104 (2020); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1178, 1202–03 (10th Cir. 2015) (challenge to contraceptive coverage mandate under the Affordable Care Act), *vacated and remanded sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); New Doe Child #1 v. Cong. of U.S., 891 F.3d 578, 583 (6th Cir. 2018) (challenge to federal statutes requiring inscription of the words "In God We Trust" on U.S. currency); *cf.*

In analyzing compelled speech claims, courts and commentators have often considered whether the purportedly compelled message is likely to be perceived as the speech of the objecting individual. For example, in *Craig v. Masterpiece Cakeshop, Inc.*, the Colorado Court of Appeals rejected the compelled speech claim of a baker who sought to avoid, on religious grounds, application of a state law that would require him to create and sell a wedding cake to a same-sex couple.[4] The court found that a reasonable observer would not assume the message being conveyed by the wedding cake was attributable to the baker, as opposed to being attributable to the couple.[5] Moreover, the court noted that the baker could take steps to disassociate himself from the cake's message.[6]

In the complicity context, by contrast, courts and commentators generally have not considered whether the problematic act can reasonably be attributed to the individual claimant. Nor do they generally consider whether the individual claimant can take steps to disassociate from the act. For instance, in *Burwell v. Hobby Lobby Stores, Inc.*, a challenge to the Affordable Care Act's contraceptive coverage mandate as applied to a for-profit corporation claiming a religious identity, the Supreme Court accepted at face value the corporation's argument that its religious exercise was substantially burdened by the legal requirement to subsidize, and thereby facilitate, its employees' use of contraception.[7] While the Government argued that the relationship between the employer's insurance premium payment and the sinful act—the employee's use of contraception—was too attenuated, the Court declined to question the company's complicity theory, stating that the corporation's religious "belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[8] It thus deferred to the religious claimant's understanding of complicity and declined to find the connection to be too remote between the employer's government-mandated action and the independent decision of the employee to use contraception. The Court did not question whether the decision to use contraceptives or even to provide the contraception coverage could reasonably be attributed to the corporation, nor did it suggest that the corporation might find ways to disassociate itself from the assertedly sinful act.

This Article argues that the concepts of attribution and disassociation, if applied in the compelled speech context, should also be applied in the complicity context. It also attempts to demonstrate how an analysis of these concepts might proceed in complicity cases. Alternatively, it argues that if these concepts fit poorly in the

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W.B. by & through Baker v. Crossroads Acad.-Cent. St., No. 4:19-CV-00682-HFS, 2019 WL 6257963, at *3 (W.D. Mo. Nov. 22, 2019) (combining complicity and compelled-speech claims).

4. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015), *rev'd sub nom. on other grounds* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

5. *Id.* at 286.

6. *Id.* at 288.

7. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014).

8. *Id.*

complicity context, they should be rejected in the compelled speech context for the same reasons.

Part I of this Article describes compelled speech and complicity claims and further demonstrates how courts have applied the concepts of attribution and disassociation in the compelled speech context but not in the religious complicity context. Part II then explains how compelled speech and complicity claims are similar, both in terms of their doctrinal frameworks and in terms of the underlying harms they address. Finally, Part III considers how the concepts of attribution and disassociation might be applied to religious complicity claims.

I. Compulsion and Complicity in the Case Law

Of late, the First Amendment has proven an extraordinarily effective tool for challenging a variety of state laws that restrict individual freedom in some manner.[9] The Roberts Court, in particular, has proven fiercely protective of both free speech and free exercise rights.[10] The doctrine applicable to both kinds of claims is thus fairly well-developed. This Part endeavors to describe and distinguish two specific sub-categories of claims—first, compelled-speech claims, which generally arise under the Free Speech Clause, and second, complicity claims, which arise under RFRA, a sort of "super-statute"[11] designed to protect religious free exercise rights.

A. Compelled Speech

The Supreme Court first recognized the right against compelled speech in *West Virginia State Board of Education v. Barnette*.[12] In that case, the Court held that children belonging to the Jehovah's Witness religion could not be punished for

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9. *See* Raymond Shih Ray Ku, *Free Speech and Abortion: The First Amendment Case Against Compelled Motherhood*, 43 CARDOZO L. REV. (forthcoming 2022) (manuscript at 29–38) (arguing that the decision whether to carry a pregnancy to term implicates significant expressive and associational values and therefore that abortion restrictions may be unconstitutional under the First Amendment). *See generally* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617 (2015) (describing the "outward pressure on the First Amendment's boundaries of applicability"); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015).

10. Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 105 (2016); *cf.* Linda Greenhouse, *Chief Justice Roberts in His Own Voice: The Chief Justice's Self-Assignment of Majority Opinions*, 97 JUDICATURE 90, 97 (2013) (arguing that "a narrow but determined majority is reshaping First Amendment law by embracing the free speech rights of corporations as a powerful tool of deregulation" and that "[f]ree speech and free exercise both are clearly subjects that engage [Chief Justice Roberts] and on which he wants to leave a mark").

11. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."); Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 166 & n.84 (2014) (citing William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230 (2001)).

12. 319 U.S. 624, 642 (1943).

refusing to salute the American flag and recite the Pledge of Allegiance, which would contravene their religious beliefs.[13] *Barnette* is now understood primarily as a compelled speech case, although it combined both free speech and free exercise elements.[14] The Court in *Barnette* rejected the notion "that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind," and instead found that the First Amendment protects both the right to speak and the right not to speak.[15]

In recent years, the Supreme Court has applied the prohibition on government-compelled speech to strike down a state-law requirement to pay union agency fees,[16] to hold that a law requiring certain factual disclosures by crisis pregnancy centers was likely invalid,[17] and to invalidate a federal requirement that recipients of U.S. funds under certain programs affirm their opposition to prostitution.[18] In all of these cases, the Court understood a legal requirement to unconstitutionally compel a private individual's or entity's speech (although in some cases—such as *Janus*, involving the payment of union fees—the speech was in the form of a compelled financial subsidy for the speech of another).

The Court has carefully safeguarded the right against governmentally compelled speech, particularly when the compelled message is ideological in nature. The prohibition on compelling ideological speech is so strong that in some instances the Court does not bother to apply any test or level of scrutiny at all, instead appearing to assume that the law is automatically and categorically unconstitutional.[19] In other cases, the Court assumes that some form of heightened scrutiny—possibly strict scrutiny—would apply to laws compelling ideological speech, which are treated like content- or viewpoint-based speech restrictions.[20]

Nonetheless, not all laws that appear to compel speech—even ideological speech—will be presumptively unconstitutional. Instead, courts have often applied limiting principles, referred to here as "attribution" and "disassociation." If the

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13. *Id.*

14. *See* TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 130 (2018).

15. *Barnette*, 319 U.S. at 634; *see also id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

16. Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2486 (2018).

17. Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA), 138 S. Ct. 2361, 2376, 2378 (2018).

18. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013).

19. *See, e.g.*, *id.* at 218–21; *Barnette*, 319 U.S. at 642 ("If there are any circumstances which permit an exception, they do not now occur to us."). For a more detailed examination of such apparently categorical prohibitions, see B. Jessie Hill, *The Deliberative Privacy Principle: Abortion, Free Speech, and Religious Freedom*, 28 WM. & MARY BILL RTS. J. 407, 411–12, 418–24 (2019).

20. *Janus*, 138 S. Ct. at 2465 (suggesting, without deciding, that strict scrutiny should apply to a compelled-speech claim); *NIFLA*, 138 S. Ct. at 2374–75 (treating a compelled-speech claim like a content-based restriction on speech and assuming strict scrutiny should apply).

compelled speech is not fairly attributable to the claimant, or if the claimant can take steps to disclaim or disassociate from the speech, then the free speech claim may be found to be simply nonexistent.

With respect to attribution, courts ask whether the reasonable observer would consider the compelled message to be that of the speaker or of someone else. If it is likely that the average observer or listener would assume that the speech is that of the government rather than the private individual, for example, then the speaker's interest in avoiding association with that message is mitigated, and courts often find no First Amendment violation.[21] Indeed, compelled-speech claims often fail on the ground that the challenged speech constitutes "government speech," rather than compelled private speech.[22] For example, in *Johanns v. Livestock Marketing Association*, beef producers who were forced to provide financial support for a government beef marketing program brought suit under the First Amendment (among other grounds) to enjoin the compelled subsidy because they disagreed with the marketing campaign's message.[23] The claim failed in large part because the Court

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21. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 286–87 (Colo. App. 2015), *rev'd sub nom. on other grounds* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018); State v. Hill, No. 2020-KA-03232020, WL 6145294, at *11 (La. Oct. 1, 2020) (stating, in a compelled speech challenge, that "the issue was whether the government's message is 'readily associated' with the private person compelled to propound it"), *cert. denied*, 142 S. Ct. 311 (2021); *cf.* Cressman v. Thompson, No. CIV-11-1290-HE, 2014 WL 131715, at *5 n.15 (W.D. Okla. Jan. 14, 2014), *aff'd*, 798 F.3d 938 (10th Cir. 2015); Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1119 (D. Minn. 2017), *aff'd in part, rev'd in part and remanded sub nom.* Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019). *But see Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part) ("The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it."); McClendon v. Long, 22 F.4th 1330, 1337 (11th Cir. 2022) (holding that forcing a private individual to host unwanted government speech violates the First Amendment regardless of whether that speech is likely to be attributed to the individual and that this violation was not mitigated by the individual's ability to post a second sign disassociating himself from the government message).

22. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) ("In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself."); New Doe Child #1 v. Cong. of United States, 891 F.3d 578, 594 (6th Cir. 2018) (rejecting a compelled-speech challenge to the National Motto printed on currency because "[p]laintiffs do not allege that the Motto is attributed to them and because the Supreme Court has reasoned that currency is not 'readily associated with' its temporary carrier"); Caruso v. Yamhill Cnty. ex rel. Cnty. Com'r, 422 F.3d 848, 858 (9th Cir. 2005) (holding that a law requiring a notice to be printed on ballots along with ballot initiatives did not constitute compelled speech because it "[did] not require that owners use their private property to transmit the state's message" and "instead provide[d] for the State's message to be transmitted through ballots, documents prepared, printed, and distributed by—and therefore attributed to—State and local governments").

23. *Johanns*, 544 U.S. at 555–56. The beef producers objected to the marketing campaign because it "promote[d] beef as a generic commodity, which, they contended, impedes their efforts to promote the superiority of, *inter alia,* American beef, grain-fed beef, or

found that the marketing message would not be attributed to the complaining producers.[24] While acknowledging that there might be a viable "as-applied challenge . . . if it were established . . . that individual beef advertisements were attributed to respondents," the Court noted that there was no evidence of such attribution and therefore rejected the compelled speech claim out of hand.[25]

Courts have also rejected compelled-speech claims where the speaker was able to disassociate or distance herself from the controversial message, such as by conveying disagreement with it or adding a disclaimer explicitly attributing the message to the government. In *PruneYard Shopping Center v. Robins*,[26] for example, the Court held that the First Amendment was not violated by a California law requiring a shopping center owner to permit private individuals to hand out flyers and solicit signatures for a petition on the shopping center property. One of the Court's rationales was that the owner could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."[27] Similarly, combining caveats about both attribution and disassociation in one sentence, the Supreme Court stated in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)* that the federal government did not compel law schools' speech by requiring them to permit military recruiters to speak to students on their campuses: "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the [challenged law] restricts what the law schools may say about the military's policies."[28] Thus, the schools could presumably indicate their disagreement with the military's policies, to which they objected, by posting disclaimers stating that they were hosting the recruiters under protest, or that they disagreed with the military's policies about gays and lesbians. In a case involving a law requiring doctors to perform and describe an ultrasound before performing an abortion, the Sixth Circuit Court of Appeals noted that, "to the extent that it matters to the First Amendment analysis," a doctor's ability to distance herself from the message compelled by a mandatory ultrasound law weighed against finding a free-speech violation.[29]

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certified Angus or Hereford beef." *Id.* at 556.

24. *Id.* at 564–65.

25. *Id.* at 565–66.

26. 447 U.S. 74 (1980).

27. *Id.* at 87.

28. 547 U.S. 47, 65 (2006); *cf.* Planned Parenthood Minn., N.D., S.D v. Rounds, 530 F.3d 724, 737 (8th Cir. 2008) (suggesting without deciding that a physician's ability to disassociate from providing a required message to abortion patients may be relevant to the requirement's constitutionality).

29. EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 439 (6th Cir. 2019) ("[N]othing prevents the doctor from informing the patient that the factual disclosures of H.B.2 are required by the Commonwealth rather than made by the doctor's choice."), *cert. denied sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Meier, 140 S. Ct. 655 (2019); *see also* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 86 F. Supp. 2d 624, 633 (W.D. Tex. 2000), *rev'd and remanded*, 270 F.3d 180 (5th Cir. 2001), *cert. granted, judgment vacated on other grounds sub nom.* Phillips v. Wash. Legal Found., 538 U.S. 942 (2003); Caruso v. Yamhill Cnty. *ex rel*. Cnty. Com'r, 422 F.3d 848, 858 (9th Cir. 2005) (noting that the

Admittedly, the principles of attribution and disassociation have not been applied in every compelled-speech case, or with complete doctrinal consistency. However, as discussed below, those concepts are almost uniformly rejected by courts in complicity cases.

B. Complicity

By "complicity" claims, this Article is referring to religious freedom claims—generally brought under RFRA or a similar state law—in which the claimant asserts that a particular regulation substantially burdens her religious exercise by forcing her to facilitate *another person's* sinful act.[30] RFRA is a federal law that prohibits the federal government from substantially burdening a person's religious exercise unless it can justify that burden by showing that it is the least restrictive means of advancing a compelling government interest.[31] Originally, such complicity claims arose under the Free Exercise Clause of the First Amendment. In *Thomas v. Review Board*, Thomas, a Jehovah's Witness, challenged his exclusion from his state's unemployment compensation program after he refused a job transfer by his employer to a position assisting in the manufacture of military tank turrets.[32] Thomas claimed that his religious convictions prohibited him from "producing or directly aiding in the manufacture of items used in warfare."[33] Although the Court did not say so explicitly, it seems that Thomas objected to facilitating the manufacture of weapons because that would make him complicit in killing people—that is, the manufacturing violated Thomas's religious convictions, but only because the weapons were used by someone else later for killing.[34] In *Thomas*, the Supreme Court held that Thomas

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challenged law did not require the plaintiff "to affirm the government's statement; rather, he remained free to publicly disassociate himself from it"); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (rejecting a florist's claim that requiring it to provide flowers for same-sex couples violated its right against compelled speech, in part because businesses "retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.").

30. *See generally* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897 (2015). Religious complicity claims could also be brought under the Free Exercise Clause of the First Amendment, but since the U.S. Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Free Exercise Clause has not been understood to protect religious claimants from burdens on religious exercise that are caused by generally applicable laws. The Supreme Court may be moving toward overruling that doctrine, however, and has certainly narrowed it in the recent "shadow docket" case of *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam). *See* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 NYU J.L. & LIBERTY (forthcoming 2022), (manuscript at 29–34) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3987461 [https://perma.cc/M4QX-JTSD]).

31. 42 U.S.C § 2000bb–1(b).

32. 450 U.S. 707, 709 (1981).

33. *Id.* at 711.

34. *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 381 N.E.2d 888, 890 (Ind. Ct. App. 1978) ("Claimant's religious beliefs specifically exempts (sic) claimant from producing or

should have been extended unemployment benefits because the denial of benefits constituted a substantial burden on Thomas's religious exercise, and there was no sufficiently compelling government interest to outweigh that burden.[35] It thus upheld Thomas's claim on a complicity theory, though the Court did not describe the claim as such.

In ruling on complicity claims, courts are generally highly deferential to religious claimants' insistence both that particular conduct by a third party violates their religious beliefs and that the challenged regulation burdens their religious exercise by forcing them to participate in that conduct, however indirectly. In *Burwell v. Hobby Lobby*, for example, the Supreme Court accepted at face value a closely-held corporation's claim that its religious exercise was substantially burdened by having to pay, under the Affordable Care Act, for its employees' insurance coverage of contraceptives because it would implicate the corporation and its owners in the sinful act of the employees (i.e., using contraception).[36] But the Court did not consider whether the decision to facilitate the employees' use of contraceptives is one that could reasonably be attributed to the employer, when it was performed under legal compulsion. Indeed, the Tenth Circuit (which was affirmed by the Supreme Court) had explicitly rejected application of the attribution principle, stating that "the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."[37]

Similarly, in *New Doe Child #1 v. United States*, in which the plaintiffs raised both RFRA and compelled-speech claims with respect to the National Motto on U.S. currency, the Sixth Circuit explicitly considered the question of attribution only in relation to the plaintiffs' compelled-speech claim—noting the plaintiffs did not "allege that anyone has ever attributed the Motto to them"—but did not consider this issue in relation to their RFRA claim.[38] In fact, the court explicitly rejected the plaintiffs' attempt to analogize their compelled-speech claim to a religious complicity claim and thereby forced the court to defer to their own assessment of whether the offending message would be attributable to them. "Plaintiffs seek to avoid the attribution analysis by arguing that, just as courts should accept plaintiffs' determinations of what violates their religion, courts should defer to plaintiffs' determinations about what conduct constitutes support of government speech," the court noted.[39] Citing *Hobby Lobby*, the court continued: "But while the Supreme Court has stated that it is not courts' role to question the reasonableness of a

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aiding in the manufacture of items used in the advancement of war."), *superseded*, 391 N.E.2d 1127 (Ind. 1979), *rev'd*, 450 U.S. 707 (1981). Jehovah's Witnesses have often objected to being forced to participate in war. *See, e.g.*, Sicurella v. United States, 348 U.S. 385, 386 (1955); J.B. Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 S. CAL. L. REV. 123, 123 (1955) (stating that Jehovah's Witnesses were responsible for the overwhelming majority of conscientious objection litigation).

35. *Thomas*, 450 U.S. at 717–19.

36. 573 U.S. 682 (2014).

37. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1142 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

38. 891 F.3d 578, 589–90, 593 (6th Cir. 2018).

39. *Id.* at 594 (internal citations omitted).

plaintiff's religious beliefs, its caselaw indicates that courts may properly evaluate attribution" in the compelled-speech context.[40] The court thus drew a distinction between making a determination of whether a particular *message* is attributable to the plaintiff and making a determination of whether particular *conduct* should be attributed to them—finding the former to be permissible and the latter to be impermissible.

Courts also do not consider whether religious individuals can take active steps to disassociate themselves from the sinful act of another and thereby avoid complicity in their sinful acts. Instead, courts generally treat the question of whether an individual's religious belief is substantially burdened by a legal requirement as being largely beyond the competency of the courts to decide; they therefore simply defer to the claimant's assessment of spiritual harm and thus, necessarily, whether that harm can be avoided. For example, in *Burwell v. Hobby Lobby*, one of the groups of plaintiffs challenging the Affordable Care Act's ("ACA") contraceptive insurance coverage mandate explained that they believed that "human life begins at conception" and that some contraceptives—specifically those that could work to prevent a fertilized egg from implanting in the uterus—were therefore immoral.[41] Taking their religious objection a step further, they then asserted that it was "immoral and sinful for [them] to intentionally *participate in, pay for, facilitate, or otherwise support* these drugs," and therefore that they had to exclude them from their employee group health insurance plans.[42] As Justice Ginsburg's dissent pointed out, the majority opinion in *Hobby Lobby* simply took for granted the plaintiffs' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage," without considering whether the plaintiffs could take steps to disassociate themselves from the coverage or their employees' sinful acts.[43] Thus, if the school in *FAIR*, discussed above, had been a religious school—such as a Quaker institution whose tenets oppose military involvement—the Supreme Court presumably would not have considered whether the school could distance itself from the military recruiters' speech and actions on its campus.[44]

By contrast, when the D.C. Circuit Court of Appeals considered a challenge to the ACA's contraceptive mandate before the Supreme Court's *Hobby Lobby* decision, Judge Edwards's concurrence rejected the notion that the religious employers' free exercise of religion was substantially burdened by the mandate, because, *inter alia*, the employers remained free to disassociate themselves from the employees' contraceptives use.[45] As Judge Edwards explained, the essence of the complicity

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40. *Id.*

41. 573 U.S. 682, 701 (2014).

42. *Id.* at 701–02 (emphasis added).

43. *Burwell*, 573 U.S. at 758 (Ginsburg, J., dissenting). Indeed, it is arguably a stretch to think that the employer is in any way responsible for the sinful conduct of employees on their own time, outside of the employment relationship.

44. *See supra* text accompanying note 28. Thanks to Chris Lund for suggesting this analogy.

45. Gilardi v. U.S. Dep't of Health & Hum. Servs., 733 F.3d 1208, 1237–39 (D.C. Cir. 2013) (Edwards, J., concurring), *cert. granted*, *judgment vacated* 573 U.S. 956 (2014). Judge Edwards explained:

claim under RFRA was that the plaintiffs were "being pressed to effectively endorse the use of contraception."[46] Explicitly drawing on the Supreme Court's compelled speech case law, he noted that the plaintiffs "remain[ed] free to 'disassociate' themselves from any message that might suggest that they endorse contraception," such as by "denounc[ing] publicly the use of contraception, . . . by issuing a statement to [their] employees expressing their disapproval of the Mandate and contraception; . . . or authorizing [the company] to display slogans on company delivery trucks expressing their views about the sanctity of human life."[47] Indeed, he added, "[t]here are countless ways the [plaintiffs] can make clear that their involuntary compliance with federal law does not signify that they endorse the use of contraception."[48] Although this view did not command the support of the court's majority, it demonstrates that—partly for reasons explored in Part II—complicity claims, like compelled speech claims, lend themselves to considerations of attribution and disassociation.

II. HOW COMPELLED SPEECH AND COMPLICITY CLAIMS ARE SIMILAR

It is not surprising that compelled-speech claims under the First Amendment and RFRA claims asserting a substantial burden arising from complicity in sin are often joined together in a single lawsuit—and indeed that the exact same government conduct is asserted to violate the plaintiff's rights under both theories.[49] Both claims

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> First, the Mandate does not require the Gilardis to use or purchase contraception themselves. Second, the Mandate does not require the Gilardis to encourage Freshway's employees to use contraceptives any more directly than they do by authorizing Freshway to pay wages. Finally, the Gilardis remain free to express publicly their disapproval of contraceptive products.

Id. at 1237.

46. *Id.* at 1238.

47. *Id.* at 1239.

48. *Id.* (citing Grp. Health Plans & Health Ins. Issuers Relating to Coverage of Preventive Servs. Under the Patient Prot. and Affordable Care Act, 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012) ("Nothing in these final regulations precludes employers or others from expressing their opposition, if any, to the use of contraceptives, requires anyone to use contraceptives, or requires health care providers to prescribe contraceptives if doing so is against their religious beliefs."); *see also* Transcript of Oral Argument at 10–12, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19–123) (U.S. Nov. 3, 2020) (suggesting to Catholic foster care agency that it could take steps to disassociate from the City of Philadelphia's endorsement of same-sex marriage in placing foster children with same-sex couples).

49. *See, e.g.*, Fulton v. City of Phila., 922 F.3d 140, 160–65 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020), *rev'd and remanded*, 141 S. Ct. 1868 (2021) (arguing that the City of Philadelphia's requirement that private foster care agencies work with same-sex couples as prospective foster parents both compelled speech in violation of the Free Speech Clause and required Catholic agencies to endorse same-sex marriage in violation of the state RFRA law); Cath. Charities of Diocese of Albany v. Serio, 850 N.E.2d 459, 464 (N.Y. 2006) (arguing that a state contraceptive mandate violated a religious employer's "hybrid right" to free exercise of religion and free speech by compelling it to endorse employees' contraceptive use); Cath. Charities of Sacramento, Inc. v. Superior Ct., 85 P.3d 67, 87 (Cal. 2004) (articulating the same "hybrid right" argument).

partake of a similar structure: they claim that the government is, in essence, commandeering the individual to serve as an instrument of the state in endorsing a message or an action with which the individual disagrees. In both cases, the claimant argues that she will suffer because the act of another person is attributable to the claimant to some degree: the employer will suffer eternal damnation because of her role in the contraceptive use of the employee; the abortion provider violates her ethical obligations by misinforming the patient with words coming from her own mouth. Compelled-speech claims and complicity claims thus share structural similarities. In addition, as discussed below, they address similar kinds of harm. For this reason, it makes eminent sense to "borrow" concepts of attribution and distancing from the compelled-speech context and apply them in the complicity context. Indeed, the practice of constitutional borrowing is one that is both recognized and legitimate, particularly where the lender and borrower fields share a number of similarities.[50] Alternatively, if applying concepts of attribution and disassociation is inappropriate in the complicity context, then perhaps it is also inappropriate in the compelled-speech context.

A. Structural Similarities

Compelled speech and complicity claims are structurally similar in that they both consist in the claimant being forced to support or facilitate something another person (or the government) is doing, with which the claimant disagrees. Both claims thus suggest a sort of guilt by association—accepting the notion that dignitary, spiritual, or societal harm results when individuals are forced to foster beliefs or conduct that offends that individual's conscience.[51] Moreover, given the expansive reach of the Free Speech Clause under the First Amendment, which applies to expressive conduct as well as pure speech,[52] both complicity and compelled speech claims will often be available to a religious claimant.

Thus, the two claims are particularly likely to be raised in tandem when the activity that the plaintiff resists can reasonably be considered expressive in nature. If the plaintiff is being forced to "speak" with her actions, then she can likely raise both

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50. *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (describing the types of, and justifications for, borrowing of doctrinal concepts and tests between constitutional doctrines); ZICK, *supra* note 14, at 130 (advocating for a careful analysis of "the distinctions and connections between and sometimes among" the Free Exercise and Free Speech Clauses).

51. It is perhaps worth noting that corporations and organizations, not just individuals, may raise compelled-speech and complicity claims. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2370–71 (2018) (considering a compelled speech claim by an organization of crisis pregnancy centers and individual centers); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014) (recognizing that a closely held corporation is a "person" exercising religion under RFRA and therefore may proceed with its complicity claim).

52. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968); *cf.* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1036 (2015) (discussing cases in which courts found conduct antecedent to the production of speech to be protected by the First Amendment).

free speech and religious freedom claims. For example, colorable compelled-speech and religious-freedom claims by religious individuals opposed to same-sex relationships were raised in cases involving such quasi-expressive acts as designing a wedding cake for a same-sex couple,[53] engaging in videography for a same-sex commitment ceremony,[54] and providing floral arrangements for a same-sex wedding.[55] Such conduct can be cast either as "speech" that is compelled by the government or as facilitation of assertedly sinful conduct (same-sex marriage). As Professor Timothy Zick has observed, the free speech and free exercise rights are "cognate" rights, and in the context of laws requiring religious businesses to offer services to same-sex couples, as in the context of a compelled flag salute, "the compulsion of *belief* connects the two clauses."[56]

In addition, the two kinds of claims tend to intersect in cases involving the payment of taxes or paying into social welfare programs.[57] Because financial subsidies of expressive conduct are treated by the Supreme Court as tantamount to speech,[58] laws requiring private financial support for government programs can be framed as akin to compelled private speech.[59] At the same time, financial support can be framed as facilitation of the third-party conduct being supported.[60] Thus, there is a natural overlap in the two types of claims, particularly where the government requires religious individuals or entities to subsidize arguably expressive acts.

Finally, both kinds of claims have a tendency toward expansion, and limiting principles are therefore necessary to make the doctrine coherent. With respect to compelled speech, as some commentators have pointed out, "speech" is itself an expansive concept, and numerous aspects of criminal and regulatory law would be profoundly undermined if individuals had a general right not to speak messages they

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53. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *rev'd on other grounds sub nom.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

54. *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 58 (N.M. 2013).

55. *See* Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 550 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018).

56. ZICK, *supra* note 14, at 126, 134.

57. On this point, see generally Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 360, 372–82 (2011).

58. While Schwartzman's article notes that the Court has not generally treated compelled speech and compelled subsidies for speech identically from a doctrinal perspective, the Supreme Court's more recent decision in *Janus* suggests that compelled subsidies are to be subjected to a very demanding level of scrutiny, albeit perhaps not "strict scrutiny" like compelled speech. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464–65 (2018).

59. For criticism of the view that compelled subsidies for speech violate the Free Speech Clause, see William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 182–94 (2018).

60. Holder v. Humanitarian L. Project, 561 U.S. 1, 29–31 (2010) (identifying financial contribution as a possible form of "material support" for terrorist organizations); *see generally* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1477 (2015) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 729 n. 37 (2014) (describing free-exercise claims that treat such payments as redistributive, forcing challengers "to confer benefits on third parties").

did not choose, even if that right could be overridden in some cases by a compelling government interest. There cannot simply be a "generalized right not to speak."[61] Similarly, complicity claims have a noted tendency to expand. After the plaintiffs in *Hobby Lobby* succeeded in convincing the Supreme Court that it would violate the RFRA to force them to be complicit in the use of certain contraceptives that they considered to be immoral, they next objected even to being required to *opt out* of the program under which they were required to cover these drugs.[62] It is difficult to see where the logic of complicity ends, if not with religious believers controlling the entire regulatory regime that affects them so as to ensure they cannot be forced to support, however indirectly, any conduct that offends their beliefs.

B. Similar Harms

Scholarly commentators have debated the nature of the harms arising from both compelled speech and complicity in sin. While the interests supporting complicity claims and compelled speech claims are in some ways distinct, they largely center on the psychic harm that results from being forced to participate in or support the conduct or message of another to which one is opposed. The harms may be inward-facing or outward-facing. "Inward-facing" harm refers to the impact that the compelled speech or action has on the individual being forced to speak or participate in sin; "outward-facing" harm refers to the impact that the coerced speech or action has on others.

1. Outward-Facing Harm

Some have argued that compelled speech is unconstitutional at least in part because of its impact on listeners rather than speakers. For example, one interest protected by compelled speech doctrine is in avoiding "misattribution"—that is, the danger of "mislead[ing] a reasonable person into thinking [a speaker is] endorsing" a message with which the speaker disagrees.[63] This harm seems primarily outward-facing, as it focuses on the mistaken understanding of others who hear the compelled message. In this vein, Professor Laurent Sacharoff argues that the interests protected by compelled-speech doctrine center primarily on listeners rather than speakers.[64] According to Sacharoff, in compelling speech, the government "amplifies its own message through the mouths of unwilling citizens, giving listeners a mix of information skewed to the government viewpoint."[65] Presumably because of this concern, as noted above, courts are more skeptical of compelled speech claims in which the speech is clearly attributable to someone other than the speaker.[66]

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61. Steven H. Shiffrin, *What Is Wrong with Compelled Speech?*, 29 J.L. & POL. 499, 504–05 (2014) (quoting New Mexico v. Dawson, 983 P.2d 421, 425 (N.M. Ct. App. 1999)).

62. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016).

63. Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1491 (2018).

64. Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 332 (2008).

65. *Id.* at 333; *see also id.* at 367–68.

66. *See supra* text accompanying notes 21–26; *see also* Johanns v. Livestock Mktg.

The outward-facing harms arising from forced complicity similarly focus on the effect on reasonable observers of the complicit conduct. As Professor Amy Sepinwall suggested, complicity doctrine recognizes the religious individual's outwardly facing desire to "instantiate one's values in the world and so stand as beacons for others in discerning right from wrong."[67] This concern suggests that complicity harms observers by implying that the sinful conduct is morally acceptable, thus potentially making it easier or less stigmatizing for others to engage in that same conduct.[68] If the religious nonprofit organization Catholic Charities is paying for contraception, the average Catholic observer might then think it cannot be an entirely immoral or sinful act.

This outward-facing concern maps closely onto the concept of "scandal" in Catholic doctrine.[69] "Scandal" is defined as "an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor's tempter."[70] The risk of scandal is a reason why believers should avoid being complicit in evil or immoral acts.[71]

2. Inward-Facing Harm

A number of scholars have argued that compelled-speech doctrine additionally or even exclusively addresses inward-facing harms such as violation of individual autonomy, undermining bodily integrity, and causing psychological distress. For example, Professor Abner Greene suggests two inward-facing harms arising from compelled speech. First, he argues that compelled speech violates the individual's right to bodily integrity and autonomy: "In *Barnette*," he points out, "the state was forcing the schoolchildren to say something—to use their bodies against (possibly) their will."[72] Greene also draws on Professor Seana Shiffrin's work to suggest yet another interest served by prohibiting government-compelled speech: that being forced to repeat an idea with which one disagrees may lead either to altering one's own way of thinking—eventually, the speaker starts to believe it—or, if not, it causes a sort of psychic disconnect between the speaker's beliefs and her words and contributes to a "culture and/or habit of insincerity."[73]

Ass'n, 544 U.S. 550, 565 n.8 (2005) (noting, in the context of compelled subsidies for government speech, that "there might be a valid objection if 'those singled out to pay the tax are closely linked with the expression' in a way that makes them appear to endorse the government message" but that a compelled subsidy "does not violate autonomy simply because individual taxpayers feel 'singled out' or find the exaction 'galling'").

67. Sepinwall, *supra* note 30, at 1950.

68. Indeed, framed in this way, the complicity claim sounds quite similar to the compelled speech claim: it is fundamentally a concern about the message one's conduct sends to others.

69. *See Respect for the Dignity of Persons*, CATECHISM OF THE CATHOLIC CHURCH ¶ 2284, https://www.vatican.va/archive/ENG0015/__P80.HTM [https://perma.cc/3RGD-W2VR].

70. *Id.*

71. *See* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 325 n.79 (1998).

72. Greene, *supra* note 63, at 1492.

73. *Id.* (citing Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 854 (2005)); *see also* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 94–97 (2014).

Along similar lines, Professor C. Edwin Baker has argued that the individual autonomy interest is central to free speech rights, and in particular to the right against compelled speech.[74] Referring to *Barnette* as the "poster child of autonomy theory,"[75] Baker contends that the purpose of the free speech right is to protect each "person's authority (or right) to make decisions about herself—her own meaningful actions and usually her use of her resources—as long as her actions do not block others' similar authority or rights."[76] Thus, compelled speech doctrine protects primarily personal and dignitary interests of the speaker, rather than listeners' interests in accurate information.

Complicity claims can be understood as addressing similar inward-facing harms. As Professor Sepinwall argues, "[i]n general, it is a moral commonplace that no one should be made to participate in an act that he deems immoral," because, although the individual may realize that the immoral act may occur with or without his participation, he has an interest in "keeping his own hands clean."[77] Although this interest may derive from an outward-facing concern, discussed above, about the impact on observers of the conduct, it may also arise from the more inward-facing concept of moral integrity—protecting the individual's interest in maintaining a narrative about himself that is consistent with his values.[78] Of course, it also seems obvious that some psychological or spiritual harm may result directly from being forced to commit an act that is held to be wrongful or sinful according to one's religious beliefs. And some religions—most prominently, Roman Catholicism—consider "cooperation" in evil acts to be a sin in itself.[79]

Yet, it is important to identify some limiting principles for complicity claims. As Professor Edward Lyons argues, "[f]rom a commonsense point of view, no sound ethical theory could hold persons morally responsible for every act that may, in some way or another, facilitate or causally contribute to others' wrongdoing."[80] Thus, legal, ethical, and religious theories have been developed to distinguish between facilitation of sinful acts that should count as morally blameworthy and facilitation that is morally innocent. One factor often considered in this calculus is the proximity to the wrongful conduct—the closer one is to the conduct, and the more direct the relationship between one's own conduct and the sinful conduct, the more reasonable it is to hold the individual responsible for supporting the sinful conduct.[81] Indeed, John Garvey, currently the president of Catholic University, and now-Justice Amy Coney Barrett (then Amy Coney) wrote in an article regarding the participation of

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74. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011)

75. *Id.* at 270.

76. *Id.* at 254.

77. Sepinwall, *supra* note 30, at 1949.

78. *Id.* (citing Dan W. Brock, *Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated to Do What, and Why?*, 29 THEORETICAL MED. & BIOETHICS 187, 189 (2008)).

79. *See, e.g.*, Brief of 28 Catholic Theologians and Ethicists and Amici Curiae Supporting Plaintiffs-Appellants and Urging Reversal of the Dist. Ct., Gilardi v. U.S. Dep't of Health & Hum. Servs., 733 F.3d 1208 (D.C. Cir. 2013) (No. 13-5069), 2013 WL 1900572, at 10–11 (explaining the Roman Catholic doctrine of cooperation).

80. Edward C. Lyons, *Causation and Complicity: The HHS Contraceptive Mandate and Asymmetrical Burdens on Free Exercise*, 55 S. TEX. L. REV. 229, 289 (2013).

81. *See* Sepinwall, *supra* note 30, at 1938–44.

Catholic judges in death penalty cases that a sort of "moral balancing test" should be used to determine when cooperating in evil acts is immoral—weighing not just the proximity of the actor to the act, but also "the importance of doing the act against the gravity of the evil, the certainty that one's act will contribute to it, and the danger of scandal to others."[82] Under this framework, Garvey and Coney reached the conclusion that Catholic judges should recuse themselves from death penalty cases in which their participation could require sentencing a defendant to death, enforcing a jury recommendation of capital punishment, or affirming a death sentence.[83] Catholic judges may be permitted to participate in determinations of a defendant's guilt and collateral review, however.[84] Similarly, Professor Steven Shiffrin has pointed out that there is no right against compelled speech per se; rather, only certain kinds of compelled speech threaten the interests protected by the First Amendment and are therefore inherently suspect.[85] Thus, even on an understanding of the complicity and compelled speech doctrines that focuses on internal harms, the prohibitions are not categorical; rather, internal harms may be mitigated in certain circumstances.

C. Borrowing Limitations on Complicity from Compelled Speech Doctrine

Given that there is a voluminous literature on compelled speech and, to a lesser extent, complicity, the above accounts of the harms wrought by government compelled speech and complicity are necessarily somewhat over-simplified. In addition, some commentators treat only one type of concern as central to the doctrine, whereas others claim that multiple purposes underlie the case law.[86] For purposes of this Article, this issue need not be resolved; the essential point is simply that the compelled-speech and complicity doctrines are sufficiently similar in structure and in purpose that it seems to be a reasonable choice to apply principles derived from compelled-speech doctrine to complicity claims. If compelled speech and complicity claims share similar structures and address similar types of harm, then logically, they should be subject to similar limiting principles. On the other hand, if attribution and disassociation would not be sufficient to mitigate the harms of complicity, then they should also be considered insufficient to mitigate the harms of compelled speech.

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82. Garvey & Coney, *supra* note 71, at 319.
83. *Id.* at 305–06.
84. *Id.*
85. Shiffrin, *supra* note 61, at 504–05.
86. For example, Professor Steven Shiffrin identifies both inward-facing and outward-facing harms with compelled speech, see Steven Shiffrin, *supra* note 61, at 515 ("[S]ometimes compelled speech may cause a reasonable observer to wrongly attribute views to speakers that they do not hold. So too, forcing speakers to mouth words may distort deliberative processes."). Whereas Professor C. Edwin Baker insists that autonomy interests alone can explain free-speech doctrine, *but see* Baker, *supra* note 74, at 251 ("Despite the plethora of values served by speech, the need for [respect for autonomy], I claim, provides the proper basis for giving free speech constitutional status."); *cf.* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 148 (2006) (arguing that "[t]he harm in compelled speech remains elusive").

For example, outward-facing concerns can likely be addressed by allowing speakers to disassociate themselves from particular ideas, so that neither they nor their listeners come to perceive them as the speaker's own.[87] The principles of attribution and disassociation are aimed directly at disabusing listeners who otherwise might mistake the compelled speech for the speaker's own. Likewise, the outward-facing harms of complicity—such as the concern about scandal—seem particularly well-suited to amelioration by allowing the purportedly complicit individual to act in ways that distance the believer from the sinful act by using clear signals about attribution and disassociation. The distancing mechanisms can reduce the proximity to the sinful act by breaking the line of intention and causality between the purportedly complicit actor and the sinful act.

Two respected Catholic scholars, using the example of Catholic judges' involvement in capital punishment, have suggested that various factors may increase or reduce the culpability of individuals for facilitating the acts of others. Proximity to the action is often cited as one significant indicator of moral culpability.[88] Thus, while an appellate judge affirming a death sentence will "probably look[] to most people like an endorsement of the sentence,"[89] participation in early phases of the defendant's trial might not, because overseeing a trial is a step removed from the act of sentencing.[90] The act of sentencing the defendant to death would not likely be attributed to a judge who presides over the guilt phase but recuses herself before the sentencing phase.[91]

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87. Greene, *supra* note 63, at 1493–94. Greene suggests as yet another interest an "anti-fostering concern," by which he means an interest in not being forced to physically "host" or associate with another's message. He argues that this concern holds even if no one mistakenly attributes the speech to the speaker:

> Compelling me to speak or host another's speech compels me to associate with—or perhaps be associated with—such speech. This is so even if no one is mistaking the message as mine. The speech is still being made, in part, in my name. I might want no speech made in my name, or speech only of my choosing. Connecting or associating me with unwanted messages is a harm to my ability to construct myself in part through my expressive acts. It affects both how the world sees me and how I see myself.

Id. at 1494. Yet, it is not clear that the anti-fostering interest—framed here as an associational interest—is harmed if one can effectively disassociate oneself from the stated belief.

88. Garvey & Coney, *supra* note 71, at 325; Sepinwall, *supra* note 30, at 1951–52.

89. Garvey & Coney, *supra* note 71, at 328; *see also* Marty Lederman, *Judge Barrett's Views on What a Faithful Catholic Judge Should Do When She Has Conflicting Religious and Judicial Obligations*, BALKINIZATION (Oct. 12, 2020), https://balkin.blogspot.com/2020/10/judge-barretts-views-on-what-faithful.html [https://perma.cc/6ALG-7WY3] ("[A] reasonable observer—and, more importantly, most of the public—*would* understand the Court to be approving the legitimacy of the death penalty in most cases where it turns aside constitutional challenges. Therefore, such a decision would at a minimum implicate the doctrine of 'scandal.'").

90. Garvey & Coney, *supra* note 71, at 325.

91. *Id.*

The inward-facing harms are less obviously addressed by allowing speakers to distance themselves from the challenged message. To some extent, perhaps, the psychic harm of (literally) embodying another's message can be mitigated by recognizing and signaling to the world that the embodiment is only under duress, and that it does not reflect one's own values and beliefs. It is not entirely clear that this approach will remedy the interior spiritual sense of moral wrong, however. Similarly, the inward-facing harm of compelled speech, such as the harm to moral integrity, may be less clearly ameliorated by means of distancing oneself from the act. Still, as Professor Micah Schwartzman observes in the context of compelled tax subsidies for objectionable government speech, it seems intuitively true that "[s]ince such speech cannot be attributed to them in any meaningful sense, there is no basis for the view that taxpayers are morally complicit in or culpable for how the government spends their money."[92] Perhaps one's psychic distress is lessened by the knowledge that one is acting under legal compulsion. As Schwartzman further explains, individuals are generally understood to be morally responsible only for intentional and voluntary conduct that actually makes a difference in causing harm—that is, when the harm would not have occurred without the individual's participation. Individuals may thus be seen as morally blameless when acting under legal compulsion to carry out programs that they did not intentionally create or support and that would continue with or without their participation.[93]

Two powerful sets of objections may be raised in response to this proposed approach. First, it is not clear that this sort of distancing actually works to ameliorate the harms either from complicity or from compelled speech. Indeed, some have criticized courts and scholars for underestimating such internal harms and overestimating the extent to which they can be mitigated by the tools of attribution and disassociation.[94] Similarly, voluntariness and intentionality may not always be prerequisites to moral culpability. As Professor Schwartzman concedes, we would generally hold individuals responsible for participating in an execution, even if they were doing so under legal compulsion and would face fines or imprisonment for refusing; such individuals, he points out, "can legitimately object that they are forced to choose between obeying the law and acting according to their consciences."[95] We might nonetheless expect those individuals to choose the morally correct course.

It is not clear, however, that this objection undermines the analogy between compelled-speech and complicity so much as it raises questions about the doctrinal devices of attribution and disassociation themselves. Indeed, because complicity claims track compelled-speech claims so closely, both will usually rise or fall together. And if some of the harms of complicity cannot be addressed by means of

92. Schwartzman, *supra* note 57, at 376.

93. *Id.* at 376–77.

94. *See, e.g.*, Greene, *supra* note 63, at 1494 (arguing that individuals have an interest in avoiding association with objectionable messages, "even if it is clear that the expression is being made or hosted under compulsion" and no one will mistake them for the individual's own beliefs); *see also* Sepinwall, *supra* note 30, at 1957–58 ("[A] person's sense of his own complicity may be greater or less than we would judge it to be . . . . In matters of professional or personal identity, individuals should be given some latitude to forge meaning and set boundaries for themselves . . . .").

95. Schwartzman, *supra* note 57, at 379.

disassociation or attribution doctrines, then the same is likely true of compelled-speech claims. In that case, it may be inappropriate to consider disassociation and attribution in both kinds of cases. Or, if it is possible to reliably determine the nature of the harm claimed in a particular scenario, perhaps attribution and disassociation should be applied in both compelled-speech and complicity cases only where the principal harm is outward-facing rather than inward-facing. In any case, whichever rule regarding attribution and disassociation that applies to one type of claim should also apply to the other.

A second powerful set of objections may seek to emphasize the uniqueness of religious complicity claims and the spiritual harm they entail.[96] One might therefore question whether the harms from compelled speech and complicity are actually so similar, or whether instead the difference in treatment is justified. It is possible, for example, to argue that complicity is not, in fact, a distinct type of religious claim. And admittedly, some claims may well be framed as either complicity claims or straightforward violations of one's religious beliefs. For example, the Jehovah's Witness in *Thomas v. Review Board of the Indiana Employment Security Division*[97] could say either that participating in the manufacture of munitions violated his religious beliefs because it involved facilitating the sinful conduct of killing, or he could say that manufacturing military equipment is itself contrary to his religious beliefs. Similarly, a Muslim taxi driver might claim that he cannot give a ride to a passenger who is carrying alcohol.[98] This could be understood as a complicity claim—serving the passenger is derivatively sinful, because drinking alcohol is sinful, and the taxi driver would be endorsing or facilitating the sin. Or it could be understood as a claim that being forced to transport alcohol itself violates the taxi driver's faith, without relying on any concept of endorsement or facilitation. Thus, it is not always evident when a law requiring complicity is at issue, as opposed to a law that requires conduct that is directly contrary to an individual's religious beliefs. In other words, it may not always be easy to draw the line between conduct that constitutes complicity, in that it involves facilitating another's sin, and conduct that constitutes participating in sinful conduct.

There are two possible responses to this concern. The first is that, with careful attention to the facts, it may be possible to draw a line between claims that arise from some form of active participation and those that involve more attenuated endorsement or support of another's conduct. Indeed, Professor Angela Carmella has suggested precisely such a distinction.[99] The distinction between endorsement and

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96. *See, e.g.*, Frank S. Ravitch, *Complicity and Discrimination*, 69 SYRACUSE L. REV. 491, 498 (2019) (suggesting an analogy between discrimination claims and complicity claims and arguing that "[f]or those asserting conscience claims, those claims are not negotiable as though one can separate religious convictions from being in public life, and forcing one to do so is to force that person to violate something at his or her core").

97. 450 U.S. 707 (1981).

98. *See, e.g.*, Todd Melby, *Minnesota Muslims in Culture Clash at Airport*, REUTERS (June 13, 2007), https://www.reuters.com/article/us-usa-muslims-taxi/minnesota-muslims-in-culture-clash-at-airport-idUSN3035513520070613 [https://perma.cc/N4AS-BJ72].

99. Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between "Participation" and "Endorsement" in Claims of Religious Complicity*, 69 RUTGERS U. L. REV. 1593, 1596 (2017).

participation, she asserts, is that in the case of mere endorsement, the sinful act itself is done entirely by third parties; the religious claimant plays no direct role.[100] Though they are not always perfectly airtight categories, it may be possible to distinguish between claims of complicity and claims of forced participation in many circumstances.

A second possible response is that courts' difficulty distinguishing when a claim involves complicity arises from their own failure to require claimants to articulate clearly the nature of their religious objections. In some cases, the Supreme Court has accepted without much probing the religious claimants' assertions that the challenged regulation violates their religious beliefs, declining to require claimants to articulate the nature of their objections with any degree of specificity. For example, the Supreme Court in *Thomas* noted that "the basis and the precise nature of Thomas' belief [was] unclear," but nonetheless went on to uphold his Free Exercise Clause claim.[101] The same could be said of *Hobby Lobby*, in which the Court noted the plaintiffs' belief that life begins at conception and therefore that they were opposed to certain drugs that could prevent implantation of a fertilized egg. However, the Court did not interrogate whether or how their religious beliefs were infringed when an employee made an independent decision to access and use those particular products under an insurance plan covering a broad range of health care benefits.[102] If courts were to scrutinize such claims more carefully and, at a minimum, require claimants to describe with specificity the nature of their religious objections, it might be easier to distinguish true complicity claims from other sorts of religious objections.

Relatedly, one may question whether it is within the competence of secular courts to tell religious claimants when they are and are not complicit in evil acts; complicity is a religious concept that arguably can only be defined within one's own religious tradition.[103] Indeed, one of the Supreme Court's earliest complicity cases—*Thomas*—appears to stand for precisely this proposition: the Court held that courts should defer to the religious claimant's own view of what his religion required, even though it was not universally accepted within that faith community.[104] In fact, Roman Catholicism has a highly developed doctrine relating to cooperation with evil, including outlining specific factors that adherents should consider in determining whether particular acts of complicity or facilitation are morally acceptable.[105] It is

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100. *Id.* at 1611–12.

101. *Thomas*, 450 U.S. at 713 (describing the trial court's conclusion); *see also id.* at 714 (noting that the state supreme court had stated that "although the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was").

102. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 701–03 (2014); *id.* at 724 (refusing to consider the attenuated nature of the connection between the plaintiffs' religious beliefs and the legal requirement to provide contraceptive coverage, because the religious beliefs were found to be sincere).

103. Brief of 28 Theologians, *supra* note 79, at *7–8 (arguing that courts are to defer to individuals' interpretations of their own religious beliefs and may not "choose sides in intrafaith disputes").

104. *Thomas*, 450 U.S. at 714–15 (1981).

105. *See, e.g.*, Garvey & Coney, *supra* note 71, at 318–19.

arguably problematic, given the need for deference, to require courts either to apply these factors in determining whether complicity is present, or to develop their own factors and their own secular understanding of complicity.

An exchange between Justice Breyer and counsel for a Catholic foster care agency seeking to avoid the requirement of placing children with same-sex couples is particularly illustrative of the disconnect between secular and religious understandings of complicity, attribution, and the possibility of disassociation:

> JUSTICE BREYER: … [Y]our objection is to being required to evaluate and provide written endorsements of a same-sex relationship. But they [i.e., the City] aren't saying to do that. Indeed, they say add something onto any response you make and say that you do not endorse same-sex marriages. Say it. . . . So suppose [this] were written right into your contract, allowing you to say whatever you want about same-sex. All they want you to do is evaluate this couple irrespective of same or different sex. What is your religious objection to that?
>
> MS. WINDHAM: … [T]he head of Catholic Social Services testified that certifying a home of a same-sex couple would be in violation of that religious belief, that a home study is essentially a validation of the relationships in the home, and that a final home study includes a written endorsement of the relevant relationships of the foster parent. . . . What the City is asking CSS to do here is to certify, validate, and make statements that it cannot make. And I'm not aware of any case where this Court has said it's okay to compel speech or coerce religious exercise as long as you can tag a disclaimer onto the end of it.…
>
> JUSTICE BREYER: Well, you don't have to say, according to them, whether the couple is married, whether it's not married, whether it's same-sex, whether it's different sex. You just put that to the side, make a note that you're putting it to the side, and say, other than that, they're okay or they're not okay. That's all you have to do. Now what's the problem? I still don't quite see it. You said in your response that you don't want to do it, which I understand that you don't. But they say they're imposing a requirement that does not interfere with your -- they can't figure out how does it interfere…. But … say you can say something if you want, or you don't have to if you don't want to, but just take same-sex, different sex, and put it to the side and say, other than that, are they qualified.[106]

In this exchange, the two discussants are talking past each other; Justice Breyer is unable to comprehend the harm that the agency perceives from participating in the screening and acceptance of same-sex couples as foster parents, when it could simply take steps to distance itself from any perceived endorsement. The attorney for the Catholic foster care agency, by contrast, can only assert it is being forced to endorse certain conduct in violation of its beliefs. The two speakers are evidently approaching the question from profoundly different perspectives.

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106. Transcript of Oral Argument at 10–12, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19-123).

This objection, too, is a substantial one. The response, however, is simply that courts must be guided by legal principles, not religious ones. The alternative to applying limiting legal principles, derived from the analogous context of compelled speech, to complicity claims is not just deference to religious belief—it is complete abdication of the courts' responsibility to determine an essential aspect of the free-exercise or RFRA claim, i.e., whether the religious claimant's religious exercise is substantially burdened. As Justice Ginsburg explained in the *Hobby Lobby* case, "RFRA, properly understood, distinguishes between 'factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept as true, and the 'legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened,' an inquiry the court must undertake."[107] And if religious claimants are relieved of the responsibility to articulate and prove a substantial burden on their religious exercise, then those claimants will get the automatic benefit of strict scrutiny in challenging the application of virtually any regulation to them.

III. RELIGIOUS ATTRIBUTION AND DISASSOCIATION

Applying the concepts of attribution and disassociation in the context of complicity claims would arguably lead to a more nuanced, contextual doctrine of religious free exercise under RFRA and the First Amendment. When claimants raise complicity claims, courts would ask whether a reasonable observer would be likely to attribute a particular act of a third party to the religious claimant and whether the claimant can disassociate herself from the offending act. However, it could be challenging to apply these rules to complicity doctrine. How are courts to tell whether a claimant is sufficiently distant from a sinful act that the complicity claim is not legally cognizable? This Part sketches out some principles for applying the concepts of attribution and disassociation in the complicity context.

It cannot be the case that, whenever a person is acting pursuant to a legal compulsion, that person would be viewed by the reasonable observer as acting on behalf of the government and therefore that the act would not be attributed to her. As Justice Thomas correctly pointed out in the context of compelled speech, such a rule would swallow the entire doctrine.[108] But in some circumstances, it is more likely that observers will perceive the claimant's actions as reflecting governmental requirements and priorities rather than representing the individual actor's beliefs. For example, in domains that are heavily regulated, and particularly when government regulation reflects strong interests in uniformity and nondiscrimination, individual compliance with those regulations is not likely to be understood as the product of individual choice. This is true in the context of taxes and public benefit programs, such as the ACA. This may also be true of public accommodations and other nondiscrimination laws, in which individual market participants will generally be understood as complying with a regulatory regime that exists to ensure equal access,

107. *Burwell*, 573 U.S. at 759 (2014) (Ginsburg, J., dissenting) (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)).

108. Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1744 (2018) (Thomas, J., concurring in part).

rather than endorsing or condoning the acts of individuals. Individuals' actions in such cases can thus be understood as the equivalent of "government speech."

In the Supreme Court's earlier free exercise jurisprudence, claimants seeking to avoid participation in broad social welfare programs on religious grounds faced an uphill battle. In *United States v. Lee*,[109] for example, the Supreme Court held that an Amish employer could not be exempted from paying social security taxes, notwithstanding the fact that it burdened his religious beliefs, because there was a compelling government interest in the viability and uniformity of social security benefits.[110] Making relatively short shrift of the plaintiff's free exercise claim, the Court explained:

> The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees . . . . The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system.[111]

Although this explanation is provided in order to support the Court's holding that the government had a compelling interest in requiring every employer to participate in the system, it also points to an alternate rationale for upholding the mandated contributions. If all employers are required to participate in a broad public benefit, with few, exceedingly narrow exceptions,[112] then it is hard to see the participation of any employer as being an endorsement of the program itself. As with paying income taxes, participation is like a ministerial act in which the employer exercises no real discretion.[113] In addition, no single employer's participation is essential to the integrity of the system or leads directly to any one result, which further undermines the complicity argument.[114]

A better analogy may actually be derived from the Establishment Clause context, where the Supreme Court has found that the sprawling nature of public benefit programs, such as the tax exemption for nonprofit entities, minimizes the constitutional significance of the benefit flowing to any one entity, such as a church. As the Court explained in *Walz v. Tax Commission of City of New York*:[115] "[t]here is no genuine nexus between tax exemption and establishment of religion . . . . The

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109. 455 U.S. 252 (1982).

110. *Id.* at 257–58.

111. *Id.* at 258.

112. *Id.* at 260.

113. *See supra* text accompanying notes 92–93; *cf.* Garvey & Coney, *supra* note 71, at 321 (contrasting the role of a judge in a death penalty case to the role of the clerk, who "files death sentences and discovery orders indifferently").

114. *See, e.g.*, Brief of 67 Catholic Theologians and Ethicists as Amici Curiae in Support of Hobby Lobby Stores, Inc., and Conestoga Wood Specialties Corp., at *4, Sebelius v. Hobby Lobby Stores, Inc., Nos. 13-1354, 13-356, 2014 WL 317716 (stating that in Catholic doctrine, an important consideration in the sinfulness of facilitating a sinful act is "whether the believer is a 'necessary' or 'essential' cause of the objectionable action").

115. 397 U.S. 664 (1970).

exemption creates only a minimal and remote involvement between church and state . . . ."[116] Although the Court partly relied on the fact that the challenged law involved the *exemption* from a tax, rather than an imposition, in holding that there was no state sponsorship of the religious organizations, Justice Brennan's and Justice Harlan's separate opinions emphasized the all-encompassing nature of the program as minimizing the appearance of government endorsement. Justice Brennan explained that "[t]he very breadth of this scheme of exemptions negates any suggestion that the State intends to single out religious organizations for special preference."[117] For the same reason, allowing private religious speech in a legitimately open public speech forum does not give rise to the appearance of government endorsement of the religious content; the broad and nondiscretionary nature of the all-comers policy dilutes both the appearance and the reality of association with the speech.[118] In like fashion, any one employer who participates in a universal and nondiscriminatory public benefit program such as social security or the ACA would not be viewed as directly associated with that program—nor should it be. Moreover, if it is necessary to remove any doubt, the employer could always simply provide a disclaimer indicating that its participation was not willing and should not be understood as an endorsement of every aspect of the program itself.[119]

Similarly, if the independent actions of third parties are the deciding factor in whether the sinful conduct occurs, it also seems that the conduct should not be morally attributable to the individual asserting a complicity claim. Much as the reasonable observer is likely to attribute the "message" conveyed by a custom wedding cake to be that of the marrying couple rather than that of the baker, the morally autonomous choice of the couple to marry—over which the baker has no

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116. *Id.* at 675–76.

117. *Id.* at 689 (Brennan, J., concurring); *see also id.* at 697 (Harlan, J., concurring) ("As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including . . . groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.").

118. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995).

119. The Supreme Court similarly explained in Board of Educ. of Westside Cmty. Schools v. Mergens, 496 U.S. 226 (1990), a case involving an Establishment Clause challenge to a religious group sponsored by a public high school:

> If a school already houses numerous ideological organizations, then the addition of a religion club will most likely not violate the Establishment Clause because the risk that students will erroneously attribute the views of the religion club to the school is minimal. To the extent a school tolerates speech by a wide range of ideological clubs, students cannot reasonably understand the school to endorse all of the groups' divergent and contradictory views. But if the religion club is the sole advocacy-oriented group in the forum, or one of a very limited number, and the school continues to promote its student-club program as instrumental to citizenship, then the school's failure to disassociate itself from the religious activity will reasonably be understood as an endorsement of that activity.

Id. at 266 (Marshall, J., concurring in judgment).

control and in which the baker does not participate—should not be considered to make the baker morally complicit for purposes of a RFRA or free exercise claim. Similarly, no complicity concerns should arise in the case of a county clerk who is asked to issue marriage licenses to all comers who are legally entitled to obtain them, regardless of their sexual orientation. In that case, the reasonable observer would assume that the clerk was simply doing her job and not impute the independent decisions of third parties to her. In the same vein, the independent moral decision to use contraception should be attributed to the user rather than to the employer who pays into contraceptive coverage, and no complicity claim should be available.[120] Indeed, the concept of disassociation that breaks the causal chain between the actor and the problematic act can be seen in the Establishment Clause context, as well. The intervention of "true private choice"—in which the independent act of a private individual results in public money being directed to a religious activity or institution—is seen as nullifying the inference of government support of religion that would arise if the government channeled funds directly to a religious institution.[121]

Courts should not be precluded from considering the nature of the complicity claim and whether it truly holds water—whether, for example, an employer who pays for broad health insurance coverage including all forms of contraception can realistically claim moral responsibility for the possible future decision of an employee to use that particular form of contraception and for the possible effect on a fertilized egg that may or may not ensue. To hold otherwise is to create an incentive for claimants to raise claims of complicity that they need not prove or demonstrate, or even explain, but to which courts must instantly defer, thus exempting the plaintiff from the challenged regulation unless it can be shown by the government to survive strict scrutiny.

CONCLUSION

Compelled speech and complicity are cognate claims, reflecting similar concerns about endorsing or facilitating conduct with which one disagrees. They address similar harms, both outward-facing and inward-facing. Yet, only in the case of compelled speech claims do courts consider whether the reasonable observer would likely attribute the third-party's conduct to the claimant and whether the claimant can take steps to disassociate from the objectionable activity. This Article has argued that the concepts of attribution and disassociation may prove useful in limiting the nearly boundless reach of complicity claims under current doctrine. If attribution and disassociation are not appropriately applied to complicity claims, however, then they should not be applied to compelled speech claims. Because complicity claims track compelled speech claims so closely, both should rise or fall together.

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120. In a similar but not identical vein, Professor Angela Carmella distinguishes between *participation* in and *endorsement* of morally objectionable conduct, arguing that religious claimants should be protected against the former but not the latter. Carmella, *supra* note 99, at 1596.

121. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) ("Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.").