

# *Co-operation in the age of Hobby Lobby: when sincerity is not enough*

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## CO-OPERATION IN THE AGE OF *HOBBY LOBBY*: WHEN SINCERITY IS NOT ENOUGH

David J. Gunkel, Department of Philosophy, University of Reading

At the time of writing, it has just been announced that the federal Office for Civil Rights has upheld the California Department of Managed Health Care's instruction to health insurers covering employees of churches, religiously-affiliated schools and universities, and other religious organisations, that they must cover abortion in their plans under the Affordable Care Act – irrespective of any objections by the plan purchasers.<sup>1</sup>

This Californian problem has been rumbling on for several years, and the latest ruling reaffirms the state government's attitude: conscientious objection has no force against the provision of abortion via Obamacare. Needless to say, the complaint will run its course through the courts, but it seems, given previous judicial rulings, that only the Supreme Court can save conscientious objection in California.

In such a blatant case as this, it is clear that the plan purchasers would be compelled to co-operate in wrongdoing. (I leave aside the substantive question of the morality of abortion, which is another topic. The objectors sincerely believe that abortion is wrong, so let us *assume* it to be wrong for the purpose of analysis.) But what does co-operation in wrongdoing amount to, and how do we judge what kinds of co-operation are themselves morally objectionable? The primary distinction is between *formal* and *material* co-operation.<sup>2</sup> In formal co-operation, the co-operator *intends* the wrong committed by the

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<sup>1</sup> <http://www.adfmedia.org/files/CDMHInvestigationClosureLetter.pdf>

<sup>2</sup> My original paper on the topic is 'The Ethics of Co-operation in Wrongdoing', in A. O'Hear (ed.) *Modern Moral Philosophy* (Cambridge: Cambridge University Press, 2004; Royal Institute of Philosophy Annual Lecture Series 2002-3): 203-27. This paper was cited in the majority judgment of the U.S. Supreme Court in *Burwell v. Hobby Lobby* (2014);

principal agent, even if he does not intend to do more than this, and even if he does not

believe the principal act is wrong.<sup>3</sup> In other words, he *shares the guilt* of the principal. The

Californian case is clear: the plan purchasers do not *intend* either for the insurer to cover

abortion or for any abortion to be performed.

So they count as *material* co-operators. Here, the relevant principles are those governing the doctrine of double effect in general (DDE).<sup>4</sup> Why so? Because the agential structure is the same as in double-effect cases: the agent intentionally performs an act with

both good and bad effects from which only the good one is permitted in the right conditions apply even though doing good and *avoiding* evil is the fundamental principle of morality.

First, what the agent does must itself be at least morally permissible. Secondly, the agent must not intend the bad effect itself. Third, the bad effect must not itself be a means to the good one, for otherwise the agent would be using a bad means to a good end. Finally, there must be some kind of proportionality between the good and bad effects, sufficient to permit the causation of the latter for the sake of<sup>5</sup> the former. Proportionality is not essentially a balancing of outcomes as per consequentialism, but rather an answer to the question: Are there good enough reasons for permitting the bringing about of the bad effect, in terms of what is achieved by production of the good effect?

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[http://www.supremecourt.gov/opinions/13pdf/13-354\\_olp1.pdf](http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf)), Slip Op: 36, n.34 [last accessed 4 July 2016].

<sup>3</sup> Hence a formal co-operator does *approve* the wrongful act, but can do so even if they don't see it *as* wrong. A person might think it just fine to rape someone as an act of revenge, say, and so approve the act, without thinking the act *wrongful*. In other words, approval of the wrongful act does not entail thinking of it as wrong, and in fact usually occurs in conjunction with the belief that it is somehow justified.

<sup>4</sup> For an outline and defence of PDE, see my *Moral Theory* (Oxford: Blackwell, 2000): ch.3, as well as my 'The Doctrine of Double Effect', in T. O'Connor and C. Sandis (eds) *A Companion to the Philosophy of Action* (Oxford: Wiley-Blackwell, 2010): 324-30.

<sup>5</sup> To repeat, not as a *means* to.

Here, it seems fairly clear that the first condition is violated because the act of the plan purchaser is to purchase health insurance for employees that covers abortion. As an act, it is no more morally permissible than a doctor's signing a certificate authorising someone else to perform an abortion. But even if the co-operative act (purchasing the insurance) were considered permissible, there would be a question over the fourth condition. The bad effect is co-operation in the provision of abortion. The good effect is the avoidance of the severe penalties of non-compliance with the Affordable Care Act and related state laws and regulations. The penalties might be sufficient (let us suppose) to put the plan purchaser out of business or stop their effective functioning (a church, say). This is a great evil, but it is not a threat to life or limb; abortion, on the other hand, is a direct attack upon life. (Again, we are supposing this for the purpose of analysis.) So there seems to be a clear disproportionality between the good and bad effects.

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Yet condition 4 is not merely about weighing effects, however this is done. The good effect of avoiding the severe penalties for non-compliance is substantial, though not as substantial as the evil effect of taking a life. This does not of itself rule out or in the co-operative act. What it means is that the co-operator needs a *greater reason* for assisting the principal than he would were the good and bad effects comparable. Environmentalists like to tell us that taking the car needs greater justification when the good effect does not significantly exceed the bad effect of the extra pollution than when the good effect is substantially greater.<sup>6</sup> Compare taking the car on a walkable trip to buy milk versus taking your child on a long journey to the hospital. It is, of course, easy to imagine cases where the disproportionality is so great that nothing can justify co-operation: if I threaten not to be

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<sup>6</sup> A classic double-effect case. One can think of similar cases if this sort of example does not convince.

your friend unless you help me beat up an old lady, it is hard to see what reason could compensate for the massive lack of balance between effects.

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When it comes to working out what sort of reason can justify certain behaviour in a given situation, the question in co-operation cases is how the effects relate to the co-

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operator’s action: the more the co-operator is *implicated* in the principal act, the graver the reason they need for co-operating. Someone who edits pornography movies prior to sale,

for instance, needs greater reason for co-operation than someone who sells the cameras.

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The former is a more *proximate* co-operator than the latter. Proximity is a factor in

implication: it is not only, and sometimes not at all, about spatio-temporal distance between

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the principal agent and the co-operator. It is about the *executive character* of the co-

operative act, in other words, whether or not the co-operator is more like the

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principal in what they do than someone else actually or hypothetically situated in the same

chain of events. Proximity is not an absolute matter; one is more or less proximate relative

to others, or to how oneself or another *might* have been situated. Now entering into a

contract to provide insurance coverage for abortion, although not as proximate as assisting

the abortionist in the clinic, is more proximate than, say, typing up the contract and posting

it to the insurer. Indeed, in activities where insurable risk is present, providing the insurance

is one of the key factors that supports the risky activity itself, allowing it to be carried out in

confidence of protection. One of the motivating ideas behind the ACA is that ‘reproductive

rights’, as they are called, be given ‘seamless coverage’.<sup>7</sup> Insurance provides the backstop

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<sup>7</sup> The term ‘seamless coverage’ is used in connection with the ‘contraceptive mandate’, but obviously applies equally to abortion, as far as the Government is concerned (and note that objectors to the contraceptive mandate have sometimes focused on the abortifacient contraceptives in particular, as in *Hobby Lobby*): see oral argument in *Zubik v. Burwell*, [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-1418\\_1bn2.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1418_1bn2.pdf), at pp.19, 20, 32, 42, 48, 60, 83 [last accessed 4 July 2016].

whereby abortion can be carried out without fear of cost or administrative burden.

Therefore, as well as protecting the act in general, the insurance protects particular acts at particular times. This gives the insurance, as with most insurance, an executive character putting it very close to the act itself.

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Moreover, the co-operation looks to be *indispensable*, in the following way. It is not that indispensable co-operation has to be an absolute sine qua non of the principal act, in

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the sense that without it the act simply cannot be performed short of a miracle. It is, rather, that the principal act, practically speaking, cannot be performed, or would be performed

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with great difficulty, or would have its probability significantly lowered without the co-operation. Providing the burglar with the code to a safe that only you know is as

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indispensable as can be assuming you have decided to do so. Providing the burglar the keys to your car is dispensable, assuming the burglar could threaten anyone else to do the same.

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Again, there is a spectrum of cases: we are not dealing with mathematics but with ethics,

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and as we cannot repeat too often, Aristotle taught us not to expect more precision than the subject matter allows.

Now, though, we have a problem: What is it that a hypothetical employee of the plan purchaser might want? Is it abortion? Is it abortion without cost-sharing? Is it abortion without cost-sharing while remaining an employee of the purchaser? We have to look at all the circumstances and ask ourselves what exactly the plan purchaser would be *helping* the employee to do. Two important questions to ask here are: What does the employee *want* help with, and what does the employer *think* they are helping with? It seems pretty clear that, given the purpose of the ACA and of employee health plans generally and given the situation of the parties, by purchasing the coverage the employer is helping the employee get trouble-free and cost-free abortion coverage *as an employee*. As such, the employer’s

co-operation is well nigh indispensable, practically speaking, even though in the current situation the employee could make alternative arrangements with difficulty.

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There is a lot more that could be said about the California case and its specifics. My purpose has been to show that there is a principled way of looking at co-operation cases that does not involve appeal to religious doctrine or expression per se and that is not wholly

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subjective. Here, the employer took a principled stand and the same material co-operator in wrongdoing by providing the coverage, assuming for the sake of argument that the initial act of purchasing the coverage is itself permissible (an assumption I in fact deny).

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As such, it would be morally wrong to purchase the coverage, and the state would be compelling the objector to engage in immoral behaviour. As in UK cases, where Catholic

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adoption agencies have all but ceased functioning as such due to government compulsion to pair children with homosexual couples,<sup>8</sup> it would be incumbent on the Californian objectors to submit to the penalties even if it meant going out of business or radically changing the nature of their operation.

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The situation is similar to that in *Burwell v. Hobby Lobby*, where a ‘closely-held for profit corporation’ was granted an exemption from purchasing employee coverage under the ‘contraceptive mandate’, particularly with reference to abortifacient drugs. As is well known, the Supreme Court held that the mandate substantially burdened the freedom of religion of the employers under the Religious Freedom Restoration Act 1993 (RFRA). Unfortunately, though, matters start to get even thornier than many observers of the

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<sup>8</sup> Some have closed while others have disaffiliated from the church in order to continue providing gay adoption and hence maintain charitable status under the law. See <http://www.catholicerald.co.uk/commentandblogs/2013/07/04/how-many-catholic-adoption-societies-have-actually-closed-down-and-how-many-are-now-quietly-handing-children-over-to-gay-adoptive-parents/> [last accessed 4 July 2016].



current state of play think they already are. For whilst I agree with the decision in *Hobby*

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*Lobby*, I do not think the case was decided for the right reasons. Yes, the plaintiffs were

compelled by the mandate to become illicit co-operators in wrongdoing; and *perhaps*, given

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the RFRA jurisprudence, the case was correctly interpreted. If it was, though, then that

jurisprudence is in my view wrong, and open to explanation. Many use the reasoning in *Hobby*

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*Lobby* has led to the impasse over *Zubik v. Burwell*, in which SCOTUS reversed the previous

decisions per curiam and sent the case back to the lower courts where, at the time of

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writing, it lies.<sup>9</sup>

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The problem centres on the question of how a conscientious objector’s belief about

co-operation is to be understood. Is it a religious/conscientious<sup>10</sup> belief, or is it a belief that

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we might call *ancillary* to a religious belief, perhaps one that is derived from a mixture of

religious and non-religious beliefs? We need to get clear about the structure of a standard

case of *Hobby Lobby*-style conscientious objection. There is a *principal* act that the objector

sincerely believes contravenes their religious beliefs. Abortion is the most common case

post-ACA (including abortifacient ‘contraception’). In other words, taking the Christian

context – for it seems to be Christians litigating the most frequently – it is an accepted

Christian doctrine that abortion is immoral. The objector *believes* that doctrine. Clearly,

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<sup>9</sup> [https://www.supremecourt.gov/opinions/15pdf/14-1418\\_8758.pdf](https://www.supremecourt.gov/opinions/15pdf/14-1418_8758.pdf) [last accessed 27 July 2016].

<sup>10</sup> I will usually refer only to ‘religious’ belief since the bulk of the jurisprudence in the area concerns religious freedom, and after all the key legislation is the *Religious Freedom Restoration Act*. Nevertheless, the same issues apply to conscientious objection in general, where the grounds are generically *ethical* rather than specifically religious. I will, however, continue to speak of ‘conscientious objection’ as well as ‘religious objection’ since the former is standard terminology even in the religious context.

then, the belief is a belief that is essentially *religious* in nature, one derived from religious teaching.<sup>11</sup> Call this the *primary* belief – the one involving disapproval of the principal act.

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In addition, there is the objector’s belief – call it *secondary* – that *co-operating* with the primary act is itself immoral. Is this secondary belief *itself* a religious belief? Well, if the objector can show that the belief is somehow embodied in religious teaching, then it too

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will be a religious belief. For example, certain kinds of co-operation in wrongdoing are condemned by old-style moral theology manuals of the Catholic Church.<sup>12</sup> The

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condemnation is not idiosyncratic to a few denominations. It is accepted as standard moral theological teaching across the texts used in seminaries, schools, and universities. We can

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presume that something roughly similar applies in many Christian churches; indeed,

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plaintiffs in the recent cases have been either Catholic or of various Protestant denominations.

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Not every kind of co-operation is wrong, however, whether by religious or non-religious lights. So it is not as though a plaintiff can simply say, for example: ‘Co-operation in abortion is wrong, as taught by my church. By purchasing employee health coverage for abortion I would be co-operating in abortion. Therefore my religious freedom is being violated.’ To repeat, not *every* kind of co-operation in wrongdoing is itself wrong. Hence there must be an implied *tertiary* belief involved, e.g: purchasing health insurance for abortion is a *wrongful* form of co-operation. What should we say about *this* sort of belief? The specific example is relatively uncontentious, as I have already claimed: purchasing such coverage (at least as I have *assumed* it to be in the Californian scenario) is proximate,

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<sup>11</sup> Whether or not the objector also believes abortion is wrong for non-religious reasons.

<sup>12</sup> An excellent overview of the teaching can be found in J.A. McHugh and C.J. Callan, *Moral Theology: A Complete Course*, vol. 1 (New York: Joseph F. Wagner, Inc., 1958): 615-41. The references by Alito J in n.34 of *Hobby Lobby* are also pertinent sources.

indispensable co-operation and, as such, wrong. Now, the theological textbooks agree on the principles, and usually on their application, albeit the purchase of health insurance is not exactly a staple of books from the 1950s and 1960s, where co-operation is discussed extensively. But even if they do so, or if some do not, it is not the case that, that purchasing health coverage for abortion was illicit co-operation, in my view this would not *itself* be a religious belief and protected as such by RFRA and the associated jurisprudence.

Why not? The reason is that the *application* of religious principles to particular facts is not *itself* a matter of religious belief or teaching, *even* if all religious authorities make the same application in the same way and say so in their texts. More specifically, applying principles of co-operation – even ones that are a matter of religious teaching – to the facts of a particular case is a matter of logic, prudence, and common sense, not a matter of religious belief. When theologians, or religious authorities, apply the principles of co-operation to particular cases, they are neither explaining existing religious teaching nor amplifying it. They are using logic, prudence, and common sense to derive particular conclusions about particular cases. Now, maybe a trained theologian can do this better than the man in the street, but something is not ipso facto a theological matter because it is done by a theologian.

To see this more clearly, we have to recognise that the principles of co-operation, minus questions of wrongdoing, apply just as well to cases of perfectly acceptable behaviour. For instance, I co-operate formally with your mowing the lawn when I plug the brand new mower in for you and show you how to use it. You co-operate materially with my buying a six-pack of beer by lending me the money because you are my friend, knowing that beer is what I am going to buy, but not intending for me to buy it – say due to worries that I might not be sober enough for work the next morning. If you have forgotten the password

to your computer and I alone know it, I co-operate indispensably with you by reminding you what it is. You co-operate proximately with my driving to the shop by filling up my car with petrol for me. My co-operation with your going for a jog is remote when I merely offer to pick up your children from a school for you. And so on.

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In other words, the application of general principles of co-operation to particular cases straddles both wrong and permissible behaviour. The application itself is morally neutral, nor is it a matter of religious doctrine. One can apply the principles without knowing or caring about religion, and without knowing that the principles themselves are theological in nature. In fact, although my argument does not hang on this, I doubt that even the principles themselves – e.g., that formal co-operation in wrongdoing is itself wrong – are essentially theological. That is, they are not doctrines that seem to be part of common-sense moral reasoning, just as the Doctrine of Double Effect, despite its codification in religious textbooks, is itself a piece of common-sense moral reasoning.

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In any case, recognising that the application of the principles of co-operation is not itself a religious matter is essential to seeing what went wrong with *Hobby Lobby* and now bedevils the theory of co-operation in the wake of that important case. For it is settled law that no court can look behind the *sincerity* of a person’s religious beliefs when the person objects to an infringement of their freedom of religion, whether under RFRA or under the Constitution more generally. As the majority point out in *Hobby Lobby*, in respect of the sincere belief of the owners of the relevant corporations that providing coverage under the contraceptive mandate violated their religious beliefs, ‘it is not for us to say that their religious beliefs are mistaken or insubstantial’, only to determine that the objectors have an

‘honest conviction’ that this is so.<sup>13</sup> This has long been the legal position as far as religious beliefs are concerned.<sup>14</sup>

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If, then, the belief of an objector that by doing X they are co-operating illicitly in some other act Y is *itself* a religious belief, no court is allowed to look behind the sincerity with which it is held. In other words, no court is allowed to assess the *reasonableness* of the

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belief. Now in the case of *Hobby Lobby* this did not present a problem, which is why the

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outcome was in my view correct. The Greens and the Hahns, owners of the relevant corporations, sincerely believed they would be illicitly co-operating with abortion by

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providing employee coverage under the contraceptive mandate. Any way is of the recent

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California case above would lead to the same result: purchasing health insurance to cover

employees engaged in wrongful activity would not itself be a morally indifferent act. Even if

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it was, the employers would be material but proximate co-operators in serious wrongdoing,

without a reason sufficient to outweigh the gravity of what they would be involved in. The

financial penalties for non-compliance would be severe, perhaps threatening the survival of

the corporations themselves and the livelihoods of many people. Yet it is hard to see how

proximate co-operation in the taking of life can be justified by a pecuniary penalty for

refusing.

What about indispensability? I have assumed in the California case that co-operation is indispensable.<sup>15</sup> In *Hobby Lobby*, the Court noted that alternative arrangements

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<sup>13</sup> *Hobby Lobby*, Slip op: 37-8.

<sup>14</sup> *Thomas v. Review Board of the Indiana Employment Security Division* (450 U.S. 707 [1981]); *Hernandez v. Commissioner of Internal Revenue* (490 U.S. 680 [1989]).

<sup>15</sup> Whether it really is does not matter for present purposes; in any case, the availability of coverage without employer co-operation is hard to work out given the changing circumstances in which the ACA is being implemented.

for coverage could be made for employees using federal exchanges and independent action by health insurers or third party administrators, without employer involvement.<sup>16</sup> Given

this, the co-operation in *Hobby Lobby* looks more to be dispensable. Still, the proximity of

the cooperation and the nature of the evil involved arguably outweigh dispensability.

Consider the imaginary albeit slightly fanciful case of a large landowner renting his property

to slave owners. Suppose the government considered slavery to be so important to the

economy that it required landowners to provide slavery insurance covering some or all

of the tenant slave owners' cost of acquisition and/or maintenance of their slaves. Would

we not find the purchasing of such insurance to implicate the landowner in so grave a wrong

that he would be justified in objecting, even if the government were to step in with

coverage should the landowner refuse to provide it? Moreover, wouldn't the prospect of

the landowner going out of business altogether be seen as a price worth paying for resisting

complicity in such a wrong?

Whatever one thinks of the outcome in *Hobby Lobby*, however, the point is that it was decided on the sole ground that the objectors *sincerely believed* they would be illicit co-operators. That is, the judgment was that purchasing the insurance 'substantially burdened' the objectors' exercise of religion under RFRA, *not* because they would be illicit co-operators in what they sincerely believed, according to religious teaching, to be an immoral act, but because they *sincerely believed* that, according to religious teaching, they would be guilty of such co-operation. Deciding the case on that ground, however, seems to me a grave mistake, whether or not it is the right way of interpreting the jurisprudence on religious freedom.

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<sup>16</sup> *Hobby Lobby*, Slip Op: 9-10, and n.8.



Why, though, does it matter, given that the outcome was correct? Precisely because of what has just happened in *Zubik v. Burwell*, where SCOTUS vacated the previous judgments and sent the parties back to the negotiating table to work out an arrangement that would be judicially acceptable. *Zubik* was the consolidation of a number of lower-court cases, including most famously *Little Sisters of the Poor v. Burwell*,<sup>17</sup> in which a religious non-profit organisation also objected to the contraceptive mandate as substantially burdensome to freedom of religion under RFRA. The difference from *Hobby Lobby*, however, is crucial: whereas in *Hobby Lobby* the Supreme Court held that the objectors (owners of closely-held, for-profit corporations) were entitled to the same accommodation granted to religious non-profits, allowing them to opt out of providing the relevant insurance coverage, the objectors in *Little Sisters of the Poor* and then in *Zubik* objected to the very accommodation *itself*.

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Now, without going into the technical details of how the accommodation – or ‘opt-out’ – operates, and although it is fair to say that a good chunk of the argument revolved around these minutiae, when it is distilled to its essence the objection was against the *very idea of opting out*. In other words, the objectors argued that by having to give notice, either to the Department of Health and Human Services or to their insurer or third-party administrator (TPA), that they objected on religious grounds to purchasing the coverage, they were illicit co-operators in wrongdoing. They claimed that ‘submitting this notice substantially burdens the exercise of their religion, in violation of the Religious Freedom Restoration Act’.<sup>18</sup>

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<sup>17</sup> <http://www.becketfund.org/wp-content/uploads/2015/07/LSP-Op.pdf> (2015) [last accessed 6 July 2016].

<sup>18</sup> *Zubik*, Slip Op: 3.

Now the Supreme Court declined to decide the case on the merits, no doubt under the influence of the recent death of Justice Scalia, leaving SCOTUS at a four-four split in terms of liberals versus conservatives, broadly speaking. Be that as it may, and despite the ‘spin’ that somehow *Zubik* was a ‘victory for objectors’,<sup>19</sup> the fact remains that at the time of writing all prior decisions have been vacated and the parties are required by SCOTUS to reach some sort of arrangement. Yet the Tenth Circuit Court of Appeals judgment in *Little Sisters*, which effectively no longer stands, is remarkable for the insight it delivers on the case. The Federal Court decided by a majority that the opt-out was a ‘*de minimis* administrative task’ that did *not* substantially burden the objectors’ exercise of religion under RFRA or the Constitution.<sup>20</sup> Unlike the purchasing of coverage, which constitutes *compliance* with the ACA obligation, opting out by government contractors constitutes a way of *avoiding* compliance with that obligation: it ‘relieves objectors of their coverage responsibility, at which point federal law shifts that responsibility to a different actor’.<sup>21</sup> As a *de minimis* task – filling in a form or sending an email – the opt-out was not substantially burdensome either in terms of the complexity of the task or, more important, in terms of making the objectors co-operators in what they sincerely believed to be wrongdoing. As the Tenth Circuit put it: ‘Opting out would eliminate their complicity with the Mandate and require only routine and minimal administrative paperwork, and they are not substantially burdened by the Government’s subsequent efforts to deliver contraceptive coverage in their stead.’<sup>22</sup>

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<sup>19</sup> See, e.g., <http://www.heritage.org/research/reports/2016/05/supreme-court-decision-a-huge-victory-for-little-sisters>.

<sup>20</sup> *Little Sisters*, Slip Op: 42, 45, 50, 51, 78, 79, 84 (header pagination).

<sup>21</sup> *Ibid*: 60.

<sup>22</sup> *Ibid*: 82.



Yet didn't the objectors *sincerely believe* they would 'trigger' the coverage simply by opting out? Indeed they did, and the District Court in *Reaching Souls International v.*

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*Sebelius* emphasised this point,<sup>23</sup> which is why it granted an injunction against the Government. The Tenth Circuit, however, declined to follow this reasoning. It seems, though, that given the reasoning in *Hobby Lobby* they should have! For recall, the objectors' belief that they would be an illicit co-operator was treated by SCOTUS as a sincerely held religious belief that it was not for the Court to second-guess. The District Court in *Reaching Souls* was applying just that reasoning in *Little Sisters*.<sup>24</sup> However, the Tenth Circuit Court insisted that opting out had the exact *opposite* effect to implicating the objectors: it *relieved* them of implication in provision of coverage under the mandate. The objectors in *Little Sisters* specifically raised the point that their sincere belief they would be implicated by the opt-out had to be accepted as amounting to a substantial burden since that belief would be violated by opting out. Yet the Tenth Circuit Court explicitly rejected that argument. It was entitled, the Tenth Circuit held, to assess objectively whether a law or regulation amounted to a substantial burden,<sup>24</sup> which is precisely what it did by judging the opt-out to be an *eliminator* of complicity rather than a *facilitator*.

The essence of the judgment comes out well in the way the Court in *Little Sisters* handled the causation question. The objectors argued that opting out of coverage by giving notice, whereupon the insurer, TPA, or government stepped in, would 'trigger' the coverage itself.<sup>25</sup> As such, the objectors were painting themselves as having a *causal role* in the provision of objectionable coverage under the mandate. Well, if they sincerely believed they

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<sup>23</sup> 2013 WL 6804259, at <http://www.clearinghouse.net/chDocs/public/FA-OK-0002-0001.pdf>, pp.13-14, quoted in *Little Sisters*, Slip Op: 36.

<sup>24</sup> *Little Sisters*, Slip Op: 48, n.23.

<sup>25</sup> *Ibid*: 55.

had such a role, who is the court to disagree, given *Hobby Lobby*? It looks, on the face of it, that the Circuit Court gets itself into knots on precisely this issue. It affirms that ‘opting out

is necessarily a but-for cause of someone else’ providing the coverage – whether the insurer, the TPA, or the government.<sup>26</sup> But the Court then goes on to say that the objectors ‘do not “cause” contraceptive coverage by exercising their ability to opt out.’<sup>27</sup> So which is it, and why the scare quotes around “cause”?

It seems to me the Tenth Circuit Court is wrestling with the problem of giving an objective analysis of co-operation in this case while respecting the objectors’ honest beliefs

about what they are doing. The term ‘but-for cause’ is not defined, but presumably the Court means that on a simple counterfactual test the objectors, by opting out, do cause the

coverage: if they were not objectors, coverage would be provided by an independent agent, viz. the TPA, the insurer, the government, or some combination thereof. But even that is not quite right. If the employer were to resist and do nothing, you can be sure that one of the other independent agents, i.e. not paid by the employer and not objecting to the coverage, would provide it. If the employer were to opt out by giving notice, the same would apply. If the employer were simply to go ahead and waive their objection, it is true that no independent agent would step in, since it would be the employer *themselves* footing the bill, with the other agents working with or on behalf of the employer to facilitate the process. In the latter scenario, then, the employer would be a cause in the counterfactual sense. But comparison with that scenario is not the right one to make. By analogy, consider

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<sup>26</sup> Ibid: 66.

<sup>27</sup> Ibid: 68. Both quotations occur specifically in the context of self-insured employers and their TPAs, since Justice Baldock’s partial dissent (pp.109-33), whilst agreeing with most of what the majority held, distinguished the case of TPAs. I will not get into the details of that issue; the point is that the Court is quite clear that what it says in these quotations applies *a fortiori* to employers who are not self-insured via TPAs.

the case of a conscientious objector to serving in the military – the comparison often made by the courts in these recent cases. Suppose he protested that by notifying the government of his objection to serving he would be a counterfactual cause of someone else's serving,

and so would be somehow 'triggering' a third party's participation in the military, a form of illicit 'but-for' causality. Is this really plausible? What ground could the conscientious

objector give for this reading of his situation? It seems the only available one is that the remaining *alternative* course of action was for the *objector himself* to *waive* his objection

and be the one to take up arms instead! In other words, if an objector is to be taken seriously in their claim of being a counterfactual cause of X, the comparison has to be with an alternative scenario in which the objector is a direct cause of X.

*the objector himself* would be a direct, personal cause of X.

Returning to *Little Sisters*, then, the problem is that the relevant alternative scenarios would *not* prevent coverage being provided, as the Federal Court itself recognised.<sup>28</sup> If the objectors resist altogether, i.e. do not opt out but sit on their hands instead, a third party will still intervene. If the objectors opt in, *they* will be the cause themselves. So, from the counterfactual causation point of view, if there is any co-operation by the objectors it is highly dispensable and hence easier to justify than if the opt-out were absolutely necessary for any coverage to be provided.<sup>29</sup> So what could the Tenth Circuit Court have meant by initially saying that opting-out was a 'but-for' cause of the coverage? Perhaps it had in mind the implicit comparison by the objectors to the case where *they* footed the bill instead. As we have just seen, however, such a comparison is of no avail. Or

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<sup>28</sup> Ibid: 68.

<sup>29</sup> As Justice Baldock, partially dissenting, thought was the case with self-insured plaintiffs and their TPAs.

perhaps the Court was merely giving a nod to the objectors' sincere belief that they were a 'but-for' cause of the coverage. In the end, however, the Court simply could not hold back

from giving a dispassionate analysis of the causal situation, nor should it have done

otherwise. I think we should interpret the Court as saying something like the following: 'If

the objectors sincerely believe they are in some way causally responsible for the coverage

should they opt out, they can have their belief. In some bare sense, a "but-for" sense

involving a comparison on the merits or otherwise, nothing more and no less. But causation is

*not* complicity. You do not become a co-operator, let alone a co-operator in wrongdoing,

merely by being a bare cause.'

If that is what the Tenth Circuit meant, they grasped the situation correctly. Opting

out is no more a form of co-operation than walking away when there is no duty to act, even

though by walking away someone else will do something to which you object. Of course the

devil can be in the detail, which was the subject of much analysis both by the Tenth Circuit

and in oral argument before the Supreme Court. There is no room to discuss all of that here.

Suffice it to say that in no way was any form of opt-out available to the objectors an

*authorization*, explicit or implicit, for anyone else to go ahead and provide coverage. There

was no 'permission slip', as the objectors complained; on the contrary, as the Tenth Circuit

Court observed, 'The government is not compelling the plaintiffs to endorse or license

something they consider objectionable; instead, the government is allowing them to decline

a legal responsibility while requiring another party to perform it in their stead.'<sup>30</sup>

The distinction seems to me impeccable. An opt-out, by its very nature, does not

meet the definition of a co-operative deed, one that *assists* a principal agent in carrying out

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<sup>30</sup> *Little Sisters*, Slip Op: 66, n.36.

a primary act. It is certainly not formal co-operation, but neither is it *material*. The objector cannot say: 'I am a material co-operator by opting out, since I know that by doing so the

principal agent will provide that to which I object'. One might as well say that, by running away from a riot in order to protect oneself, one is assisting the rioters. Now there might be a good reason not to run away, just as there might be a good reason not to opt out: one

might be able to help stop the riot in the former case, and in the latter one might be able to stop the objectionable primary act by not opting out (although, as already noted, this was

highly unlikely in the case under discussion, except perhaps for TPAs if Justice Baldock's partial dissent is correct). But that is *different* from saying that by opting out one is a co-

operator. Merely being knowingly involved, in some bare causal sense, perhaps merely counterfactual, in the occurrence of some state of affairs does not make one a co-operator.

To be a material co-operator, one has *knowingly to assist* the primary agent; when one opts out, one does *not* do this. In such a case, questions of proximity and the like do not even arise.

So the Tenth Circuit in *Little Sisters* accurately assessed the situation and implicitly resiled from the reasoning in *Hobby Lobby* without saying as much. In his partial dissent, however, Justice Baldock clearly and explicitly recognises the problem, albeit he does not see it *as* a problem. So we have him citing lower-court judges who held that even if 'religious organizations are misguided in thinking that this scheme . . . makes them complicit in facilitating contraception or abortion',<sup>31</sup> that is not for the courts to second-guess. Justice Baldock adds: '*Hobby Lobby* supports this position well.'<sup>32</sup> Nevertheless, he does not pursue

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<sup>31</sup> Baldock J in *Little Sisters*, Slip Op: 111, citing dissent of Kavanaugh J in *Priests For Life v. HHS*, No. 13-5368 (2015), Slip Op: 35, at <http://cases.justia.com/federal/appellate-courts/cadc/13-5368/13-5368-2015-05-20.pdf?ts=1432159255> [last accessed 7 July 2016].

<sup>32</sup> *Little Sisters*, Slip Op: 111.

this issue and goes on instead to focus on a possible technical distinction between insured plaintiffs, where he agrees with the majority, and self-insured plaintiffs using TPAs, where he argues the plaintiffs' sincere beliefs align with reality.

## **WARNING – AUTHOR'S DRAFT**

For my purposes, the point is that some judges do think that mere sincerity is enough when it comes to RFRA cases, and as a matter of fact *Hobby Lobby* supports this

## **ONLY!**

view. I submit that this is an absurd position to be in. One *might* salvage the situation by

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arguing that, just as Justice Brandeis did with sincerity and reality in the case of self-insured

plaintiffs, so in *Hobby Lobby* what was *really* going on was that purchasing coverage, to

## **CIRCULATION.**

which the owners objected, was clearly not morally neutral, as I suggested earlier in

discussing the situation in California. On this line of reasoning, the sincere belief of the

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owners that they would be illicit (material) co-operators was grounded in reality, and so no

deep analysis was needed to show that the plaintiffs' sincere belief in co-operation actually were.

## **PUBLISHED VERSION.**

Yet this is mere speculation; on the face of it, *Hobby Lobby* does support the 'mere sincerity' view, which is troubling because it strictly does allow that RFRA applies to a sincere belief that an opt-out can be a means of illicit co-operation.<sup>33</sup> If sincerity is enough, then by the reasoning in *Hobby Lobby* a court might allow a RFRA claim by an employee of a *non-objecting* corporation, who was required on pain of dismissal to take the company mail to the post office – including health insurance contracts the employee found objectionable. Although the employee's co-operation would be both remote and dispensable, her sincere belief that she was an illicit co-operator could not be gainsaid on the most obvious interpretation of *Hobby Lobby*.

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<sup>33</sup> Assuming that it is a genuine opt-out, i.e. that it is not something else in disguise. And we must add the usual 'all things being equal' rider.



The courts should not allow sincerity to be enough. What they have to do, and what the Supreme Court, for reasons one can understand, ducked in *Hobby Lobby*, is to articulate some general, reasonable, and *objective* principles of co-operation that would enable a dispassionate analysis of where a conscientious objector might stand, whatever their sincerely held beliefs. Justice Alito was quite right to assert in *Hobby Lobby* that the ethics of co-operation represent ‘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.’<sup>34</sup> Difficulties notwithstanding, courts need to take notice of what both philosophers and theologians have said about this very question. Taking notice of moral theology does *not* entail assessment of the merits of a distinctively *religious* belief, nor does it entail adopting any particular religious position. Rather, it means recognising the philosophical merits of the hard work put in by some very clever moral theologians over the decades, and using the fruits of that labour to bring some order into what currently threatens to be judicial chaos. With freedom of religion and of conscience on the line as never before, the least the courts can do is to give objectors a clear pathway through the legal thickets. Those asserting their RFRA rights and who are not, objectively, illicit co-operators in wrongdoing still have many other avenues to make their protests heard, such as the time-honoured ones of pressure on Congress, media publicity, and civil disobedience to unjust laws.

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<sup>34</sup> *Hobby Lobby*, Slip Op: 36, n.34.