

## **Coerced Proximate Contingent Material Cooperation: An Analysis of the HHS Contraceptive Mandate**

T.A. CAVANAUGH

*University of San Francisco*

Then the Pharisees went and took counsel together so that they might trap him in speech. And they sent to him their disciples with the Herodians, saying, “Teacher, we know that you are truthful, that you teach the way of God in truth, and that you do not concern yourself about anybody. For you are not a respecter of persons. So, tell us how it seems to you: is it right to pay tax to Caesar or not? But Jesus, knowing their malice, said, “Why do you test me, hypocrites? Show me the coin used for the tax”; so they showed him a denarius. And he said to them, “Whose image and writing is this?” They said, “Caesar’s.” Then he said to them, “Give back to Caesar, Caesar’s; and to God, God’s.” Hearing, they marveled; leaving him, they went away. (Matthew 22:15–22)

Jesus amazes. For, he shows that just as Caesar and legitimate authority more generally have claims upon those things on which their image and writing appear, so also does God. Of course, God’s image is the human being; His writing one finds in the conscience of each person. Jesus plainly states that one can be just towards Caesar and just towards God. Both have their due; neither do their dues conflict. For their images and writing occur on different entities.

While the question I address broadly belongs to the territory found in the above Gospel passage as it bears on the relation between the religious and the state, it differs in one crucial respect: justice. For my topic concerns Caesar making an unjust request. Specifically, may an employer comply with the requirements found in the U.S. Federal Health and Human Services (HHS) contraceptive mandate? Before proceeding, a brief explanation of the mandate is in order.

As authorized by the 2010 Patient Protection and Affordable Care Act (ACA; sometimes also referred to informally as “Obamacare”), in 2011 the HHS mandated that an employer provide, via its insurance policy, all Food and Drug Administration (FDA)-approved contraceptives to its

employees or face confiscatory fines of \$100 a day per employee.<sup>1</sup> While exempting employers such as churches and places of worship, the mandate requires religiously-affiliated employers such as hospitals, colleges, and universities to comply or face the imposition of fines. Notably, the mandate is just that: a command. Moreover, it is highly coercive. For most conscientiously-objecting employers would find the fines prohibitively onerous, ultimately leading to insolvency. Yet, can one in good conscience comply with the HHS mandate?

This question concerns complicity in another's wrongdoing. To analyze complicity, one relies on the criteria employed to assess what moralists refer to as cooperation. In what follows, I propose to do the same. In this instance, the wrong at issue is the use of a contraceptive as a contraceptive (and not, for example, to treat endometriosis, a legitimate use of some of the relevant drugs).

It may be helpful to begin with a brief history of the concept of moral cooperation. Saint Alphonsus Ligouri's *Theologia Moralis* serves as the *locus classicus* for the moral analysis of cooperation, especially as he distinguishes cooperation from other conceptually nearby acts (such as, for example, inducing another to wrongful action). Further, Alphonsus distinguishes formal (always unacceptable) from material (sometimes acceptable) cooperation as follows:

That is formal which concurs in the bad will of the other, and it cannot be without fault; but that is material which concurs only in the bad action of the other, beside the intention of the cooperator.<sup>2</sup>

While the formal/material distinction does not originate with Saint Alphonsus (1696–1787)—he himself relies on predecessors such as Hermann Busembaum, S.J., (1600–1688, also spelled Busenbaum) to whose work his own *Theologia Moralis* began as an annotation (in 1748)—he does (in the above-quoted text) offer what comes to be regarded as the definitive treatment. In that account and following a long tradition, Alphonsus employs Thomistic and, following Aquinas, Aristotelian terminology. Indeed, the ears of any student of Aristotle's perk up at the mention of a distinction between material and formal elements. Similarly, one who reads Alphonsus in his original Latin cannot help but be reminded of St. Thomas's famous treatment of double effect (found in *Summa theologiae*, IIa IIae q.64, a.7) when one encounters Alphonsus speaking of "*praeter intentionem cooperantis*" or "beside the intention of the cooperator." Accordingly, to

understand St. Alphonsus' account, and thereby the distinction between formal and material cooperation, a consideration of this terminology is in order.

### **1.1 COMING TO TERMS: “Cooperation”**

Perhaps one best begins by noting that cooperation by definition involves wrongful action on the part of at least one agent, the principal. “Cooperator” refers to the other agent, the moral character of whose act one analyses. The cooperator's act furthers the principal's unethical act. Accordingly, we face a moral question concerning the status of the cooperator's act: namely, may the cooperator so act given his awareness of the wrongness of the principal's act? Note that the account concerning cooperation addresses situations in which the cooperator knows or reasonably expects that the principal acts unethically. One puts to the side cases in which one does not know or reasonably expect the other to act wrongly. For example, it is not an act of cooperation for a hardware store owner to sell a ladder to a customer who will use that ladder unbeknownst to the hardware store owner to rob a house. It would, however, be an act of cooperation were the hardware store owner to sell spray paint to a known graffitist. In addressing this kind of question, Alphonsus offers the distinction between material and formal cooperation. A slight excursus on the Aristotelian origin of these terms serves to elucidate Alphonsus' distinction.

### **1.2 COMING TO TERMS: “Material”/”Formal”**

Aristotle analyzes natural entities such as water, olive trees, and goats, into two aspects: one of which he refers to as its *hulē* (the Greek word for lumber, what comes to be called a thing's “matter”) and another which he refers to as its *morphē* (the Greek word for structure, what comes to be called a thing's “form”). Hence, his account comes to be called a hylomorphic account. One could call it a form/matter account. Considering a house, we would have the lumber or matter out of which one constructs the house and the shape the lumber takes. To borrow Aristotle's own example, when we analyze a sculpture, we have the bronze of which the work is made and the shape the bronze takes. Note that, as Aristotle's use of “lumber” (*hulē*) to refer to the matter indicates, matter need not be entirely without form. Rather, it has the character of being capable of a variety of forms, just as out of wood one can frame a house, build a ship, or make a chest. As capable of taking many forms, bronze and lumber have the character of matter. Similarly, when we consider our acts, we might think of the already somewhat structured stuff out of which the act

is made, say the picking up of a cup of coffee and the various further structures it can take, such as the different intents with which we pick up the cup of coffee: namely, to drink coffee ourselves or to serve coffee to another. In this respect, one might think of the act of picking up a cup of coffee as material with respect to the acts of drinking or serving a cup of coffee. Of course, the act of picking up a cup of coffee, just as in the case of lumber, already has a form or structure as an act. Intent forms the act and makes it to be one of picking up a cup of coffee (and not, for example, one of clearing the table, which it, of course, could be, were that one's intent). Just as lumber can take on further forms (house, chest, or boat) and hence be considered as matter with respect to those further forms, so also can an act already structured by the agent's intent take on further intentional structures. Accordingly, one can regard an act that has its own form as matter with respect to further forms of which it admits.

### 1.3 COMING TO TERMS: “*Praeter intentionem*” and Material Cooperation

As suggested above, the formal or structural aspect of an action is the agent's intent. Here we recall that Alphonsus defines formal cooperation as “concurring in the bad will of the other.” In material cooperation, the cooperator does not concur in the bad will of the other, but only in the bad act of the other. This concurrence is “*praeter intentionem*” or “beside the intention” of the cooperator. Here, as noted, we must recur to St. Thomas Aquinas, on whose account of intention Saint Alphonsus relies. Aquinas' account repays many readings and admits of many considerations. For our purposes, it suffices to recall that Aquinas pithily notes that to intend is, as the word “*intendere*” suggests, to tend towards. One tends towards an end through the means. Hence, St. Thomas suggests that one wills health; one chooses medicine; and one intends (*intendere*) health through medicine (*Summa theologiae*, IaIIae, q. 12). Our will bears on the end, our choice bears on the means, and our intent bears on the complex end-via-means (health-through-medicine). We intend both the end and means; we intend the end in itself and for itself and the means in itself, but not for itself (as means) but, rather, for the end. Hence, intent concerns ends and means.

Now, consider St. Alphonsus' use of the term “*praeter intentionem*” in his definition of material in contrast to formal cooperation. One finds the *locus classicus* for the concept “*praeter intentionem*” in St. Thomas Aquinas' treatment of a private individual's homicidal act of self-defense, in *Summa theologiae*, IIaIIae, q.64, a.7. Due to the complexity of his account, I will put it to the side while elaborating upon the meaning of “*praeter intentionem*.”<sup>3</sup>

St. Thomas introduces the phrase “*praeter intentionem*,” literally “beside the intention,” to capture voluntary (known and willed) aspects of actions which the agent does not intend either as an end or means. Consider an example from contemporary medicine. An oncologist and his patient will the patient’s health; they choose a specific chemotherapy as a means to health; they intend health by means of this chemotherapy. Chemotherapy being what it is, however, they also know and will (as an unavoidable concomitant) the hair loss, nausea, and debilitation that comes of the chemotherapy. These aspects of the chemotherapy are beside their intentions (in Aquinas’ phrase, *praeter intentionem*) as the doctor and patient foresee but do not intend these characteristics of their actions. Note that the doctor and patient are entirely aware of these deleterious side effects. Moreover, they volitionally prefer the hoped-for health via chemotherapy allied with these obnoxious concomitants to alternatives, such as no chemotherapy/no restoration of health or less deleterious/less effective forms of chemotherapy. The patient and doctor have responsibility for the obnoxious effects of the chemotherapy insofar as they act voluntarily. Of course, were there an efficacious chemotherapy without such harmful concomitants, the physician and patient would choose it. As is at times the case, however, there is not a comparably effective yet harmless alternative. Life confronts us with such circumstances. Aquinas proposes that we understand concomitant effects of what we do intend as *praeter intentionem*. We might accurately refer to such side effects as voluntary but not intended.

Importantly—and in keeping with such effects being voluntary—Aquinas does not regard *praeter intentionem* effects as morally insignificant. Indeed, because they are voluntary, he thinks one must have a justification for effecting them. (I, of course, speak of harmful effects.) He does, however, regard them as justifiable in a way in which they would not be were one to intend them as an end or means. Consider our chemotherapy example again. Imagine a doctor who intends and seeks to sicken and debilitate his patient by means of chemotherapy. He would employ the drug in order to nauseate, weaken, and sicken the patient. Were he to regard healing as an obnoxious concomitant and simply a guise for his deleterious acts, his act would be a dark isomorph of doctoring. Of course, such an act would be malicious, sadistic, and highly objectionable. This is precisely Aquinas’ point in differentiating what is intentional from what is besides one’s intention. Two consequentially comparable acts could have quite different intentional structures such that one could be an act of healing and another an act of sickening, depending on the diverse intentions of the agents. While one would evaluate the healing act of administering chemotherapy allied with

obnoxious effects as justifiable in light of the intent to heal and the prospect of doing so, one would assess its isomorph as sadistic, ethically out of bounds, and, in principle, not justifiable. Allow the above to suffice as an elaboration of what Alphonsus means by something being besides one's intention (*praeter intentionem*) as it bears on material cooperation. Now, consider formal cooperation.

#### **1.4 COMING TO TERMS: Formal Cooperation**

By formal cooperation, Alphonsus means that the cooperator intends the morally objectionable act at issue. The cooperator's act entirely concurs with that of the principal. Given the ethically out of bounds character of the principal's act, so also one must assess the (formal) cooperator's act as out of bounds. The judgment follows logically: if it is wrong of the principal to  $\Phi$ , by parity of reasoning, it is wrong of cooperator to concur in the principal's  $\Phi$ -ing. Consider an alteration to our hardware store example. Say that there were a specific type of spray paint especially useful for spraying graffiti. The hardware store owner knows this. He knows that graffitiists favor this spray paint. Moreover, because it is a lucrative trade, he seeks to sell this paint to graffitiists. Were the owner to stock and sell this paint insofar as graffitiists favor it, his act would be one of formal cooperation. For the owner's acts of seeking out this kind of spray paint, stocking, and selling the same would be ordered towards the act of spraying graffiti. Alter the case, however. What if the owner knows that graffiti vandals do favor this paint, but so also do boaters as the paint works well in a marine environment? Because his store is nearby a marina, the owner stocks the paint, but not with the intent of selling it to graffitiists, but, rather, in order to sell it to boaters who use it legitimately. The owner also knows that some customers buy the paint intent on spraying graffiti. He, however, does not share this intent. For he does not order or stock or sell the paint insofar as it is suited to spraying graffiti. Hence, his acts of ordering, stocking, and selling this paint would be instances of material, not formal cooperation. Furthering acts of graffiti would be beside his intention.

Because the hardware store owner voluntarily (knowingly and willingly) sells the spray paint to customers who—as he suspects—do use it to vandalize property, our analysis does not end with the judgment that his act is one of material (and not formal) cooperation. Of course, were it formal cooperation, were he to intend to further the defacing of property in order to make a profit by the sale of paint, we would appropriately evaluate his act as out of bounds. Indeed, it would be out of

bounds just as spraying graffiti is out of bounds. For it would be the act of assisting another in the spraying of graffiti. Given that we cannot rule out the cooperator's act as one of formal cooperation, how ought we to further assess its ethical status?

## **2.1 FURTHER CRITERIA FOR ASSESSING THE MORALITY OF MATERIAL COOPERATION: Proximate/Remote**

Here, Alphonsus and other moralists suggest certain salient features of the act of material cooperation to which one attends when assessing the act's moral character. Of course, one cannot reduce prudence (practical wisdom) to a set of rules applicable to diverse circumstances. One can, however, as thinkers who employ these criteria attempt to do, attend to important aspects of acts that moral tradition suggests repeat themselves over many lifetimes. Amongst those salient features moralists consider, one especially finds emphasis placed upon proximate in contrast to remote and necessary in contrast to contingent material cooperation. Additionally, ethicists attend to how one's material cooperation might set a bad example for others who might (understandably) misunderstand one's act as an endorsement of the acknowledged wrong act of the principal and themselves so act. The issue here is scandal. As becomes clear, these criteria bear principally upon the weightiness of the justification one offers for the, in principle, justifiable act of material cooperation. As each of the criteria admit of differences of degree, the burden to be justified varies. Hence, as will become evident, the less proximate, necessary, and scandalous the cooperator's act, the less weighty the justification needed. Conversely, the more proximate, necessary, and scandalous, the greater the justification needed.

“Proximate” and “remote” suggest spatial and temporal relations between the act of the principal and that of the cooperator. Of course, we constantly have recourse to such concrete terms in our attempt to get at more abstract relationships. Be this as it may, one best understands the consideration of proximity or remoteness not in terms of actual physical distance or time between the act of the cooperator and the act of the principal, but in terms of how practically ordered the act of the cooperator is to the act of the principal. With this sense of proximity in mind, one attends to how determined the act of the cooperator is to the act of the principal. Is the cooperator's act so specified as to admit of few acts other than objectionable ones such as the principal's, or is it of a character so as to admit of advancing numerous other acts, amongst which one finds that of the principal?

The selling of spray paint—to have recourse to the spray paint example once again—lends itself to many further acts by others, very few of which are objectionable acts of vandalism. People purchase spray paint for countless legitimate reasons. Hence, the hardware or paint store owner's sale of spray paint to an individual whom the owner judges as likely to abuse the spray paint counts as remote. Because (as the spatio-temporal metaphor suggests) something can be more or less remote and, correspondingly, less or more proximate, changes to the imagined example will effect changes to this judgment concerning proximity. So, to consider an earlier suggested instance, imagine the kind of spray paint being, due to the design of the spray fount, etc., especially suited to “tagging” (the name for gang-related marking of territory using spray paint). For the sake of the example, stipulate that this design of the spray paint reduces its suitability for many legitimate purposes. Were this the case, the sale of such spray paint, while still material cooperation (unless the owner stocked it in order to cater to graffitiists in which case the cooperation would be formal), would be more proximate than the previous example. To reiterate, proximity and remoteness, although suggesting spatial or temporal aspects of the principal's and cooperator's acts, ought to be understood as indexing the extent to which the cooperator's act has (in the case of proximity) or lacks (in the case of remoteness) an ordination to the principal's act.

## **2.2 FURTHER CRITERIA FOR ASSESSING THE MORALITY OF MATERIAL COOPERATION: Necessity/Contingency**

As noted above, another prominent criterion employed in the evaluation of an act of cooperation concerns how crucial a role the cooperator's act plays in furthering the principal's. Moralists often refer to this criterion as that of necessity or contingency. While terminology can vary, necessity attends precisely to the causal dependence of the principal's act upon the cooperator's.<sup>4</sup> This is, of course, a highly reasonable criterion upon which to focus. For, were the cooperator's act necessary for the success of the principal's, then by not cooperating, the cooperator could prevent the objectionable act. Given one's (defeasible but real) obligation to prevent objectionable acts, the more the principal's act depends on the cooperator's, the greater the justification required of the cooperator to act. Conversely, the less requisite the cooperator's act is for the principal's, the less justification the cooperator needs to act. Considering the ubiquity of spray paint and the many stores from which one can acquire it, the merchant's sale of spray paint is contingently, not necessarily, related to the act of spraying graffiti.

### **2.3 FURTHER CRITERIA FOR ASSESSING THE MORALITY OF MATERIAL COOPERATION: Scandal**

A third salient criterion attended to as one evaluates the justifiability of an act of material cooperation concerns the possibility of (passive) scandal. For many people, “Scandal” names a highly popular contemporary television series. For moral theologians, it refers to what we might more commonly refer to as “setting a bad example.” Aquinas, as is often the case for moral theologians, provides the *locus classicus*, in *Summa theologiae* IIaIIae, q. 43 a. 1–8. As the adage “monkey see, monkey do” suggests, our acts serve as models for others’ acts. Hence, when assessing the justifiability of cooperating in another’s wrongful act, one attends to the likelihood that others might understandably misunderstand one’s in principle permissible act of material cooperation as wrongful for a variety of reasons. For example, a third party might think that the cooperator intends to further the act of the principal. Alternatively, one might judge that the cooperator, while not seeking to advance the principal’s wrongful act, does not regard the principal’s act as that objectionable.

### **2.4 FURTHER CRITERIA FOR ASSESSING THE MORALITY OF MATERIAL COOPERATION: The Goods at Issue and the Justification of Material Cooperation**

Finally, to justify an act of material cooperation, in light of the previous criteria, one considers the reasons for performing the act of cooperation with those for not so acting. If one’s reasons for acting have proportionate gravity to those for foregoing cooperation as related to the aforementioned criteria, one may act. In light of the above criteria, a merchant’s selling of spray paint to otherwise legally entitled purchasers whom he suspects will use it in acts of graffiti is justified, as follows.

First, selling spray paint is an ethically wholesome act by which the merchant seeks to make a living while meeting the needs of legitimate customers. Important goods such as the earning of a livelihood and the provision of necessary household products to legitimate customers are at issue. Second, the merchant does not intend the illicit use of the paint; this is beside his intention. Hence, the cooperation is material. Third, selling the paint serves numerous legitimate ends of the merchant and of his typical customers. Hence, it lacks ordination or determination towards vandalism. It is remotely—not proximately—related to acts of graffiti. Fourth, were the merchant not to sell spray paint to those whom he suspects of using it illicitly, they would readily come by

it otherwise. Hence, his selling of the spray paint is contingently related to their abuse of it. Fifth, by publically refusing to sell spray paint illegally to minors (by ensuring that those who purchase it are of age, etc.), reasonable observers will not be led to think that the merchant condones vandalism. Hence, the sale of spray paint will not scandalize third parties.

Hopefully, this example illustrates the application of the concept of cooperation adequately. With these criteria limned, let us consider a conscientious religious employer confronted with the HHS mandate. How would one employing these criteria analyze such an employer's compliance?

### **3.1 ANALYZING COMPLIANCE WITH THE HHS MANDATE**

Prior to the ACA and the HHS mandate, religiously-affiliated employers who found contraceptive coverage morally objectionable simply did not offer health insurance with such coverage. The mandate, however, requires that all health insurance cover FDA-approved contraceptives. Hence, the mandate removes the prior option of providing insurance without the morally objectionable contraceptive coverage. As a putative workaround for those who object to providing contraceptive coverage, the government proposes that objecting employers certify both their eligibility to object and their objection in writing to a third party. This written certification itself would then serve bureaucratically in the provision of the objectionable services to the employer's employees. Hence, in a Catch-22-like fashion, the document by which an employer seeks to register a religious objection to the provision of contraceptive coverage at once serves as a link in the provision of that very coverage.<sup>5</sup> That their objection itself becomes the means by which third parties provide contraceptive coverage to their employees troubles the consciences of numerous religious employers. How would one evaluate the act of an employer who files the relevant document?

### **3.2 ANALYZING COMPLIANCE WITH THE HHS MANDATE: Coercion**

Initially, one notes that the HHS mandate involves government coercion. The employer can either cooperate with the mandate, or face prohibitive fines of \$100 per day per employee, approximately \$26,000 a year per employee. Needless to say, an employer cannot afford to absorb such confiscatory fines. Additionally, full-time employment often comes with health insurance. Thus, employers would find it difficult to find employees absent the provision of health insurance. Moreover, under the ACA, employers (of fifty or more employees) who do not offer health coverage face penalties of about \$180 per month per employee. Of course, employers

understandably regard the provision of health care coverage a positive benefit to provide to their employees. But for the mandate, objecting employers wish to provide health coverage. While the coercive aspect of the HHS mandate does not settle the question, absent the cooperation being formal, the presence of coercion, of course, counts towards justifying the cooperator's act.

### **3.3 ANALYZING COMPLIANCE WITH THE HHS MANDATE: Formal or Material?**

Of course, were an employer's act of certifying the organization as eligible and as objecting to the contraceptive coverage itself an act of providing such coverage, the certification, regardless of its (duly noted) coercive aspect, would amount to formal cooperation and would, thereby, be morally out of bounds. Is such certification formal cooperation? The answer to this question is not immediately obvious. Perhaps in answering the question it helps to note that we here consider a bureaucratic act in contrast to what we might refer to as a personal act. That is, we consider an employer's filing of a form or written notice. To capture the nature of the act, one must think in terms of how written documents function and play causal roles.

In the words of the EBSA Form 700, the "form or a notice to the Secretary [of HHS] is an instrument under which the [health care coverage] plan is operated." This sentence states that the form or notice is a tool by which one operates the insurance plan. The operation of the insurance plan concerns the provision of care, not the act of the employer objecting to that care. In this respect, the filing of the form serves as a causal link in the provision of contraceptives. At the same time, by means of the form, the employer attests that the organization is eligible and objects to providing such coverage. Were the form only an instrument of the plan, to file it would be an act of formal cooperation. For it would be nothing more than a form required for the provision of contraceptive coverage to an employee. Were the form only the means by which one objected to providing such coverage, no well-formed conscience would find it objectionable. The difficulty arises from its joint role as an instrument of the plan and as the means by which one certifies both an employer's eligibility and religious objection. Given that the form or notice does serve as the means by which one certifies an employer's religious objection (and eligibility to object), the filing of the form does not amount to formal cooperation. However, as noted, were the form not serving a dual purpose, this would not be the case, and the filing of the form would be formal cooperation. For the form would solely be an instrument of the plan by which the plan provides the objectionable coverage. Thus, certification amounts to material cooperation, not formal. For a

good-willed employer files the form as a means of objecting, not as a means of providing contraceptive coverage.

### **3.4 ANALYZING COMPLIANCE WITH THE HHS MANDATE: Proximate or Remote?**

Having determined that the filing of the form amounts to (as noted, coerced) material cooperation, how does one assess the degree of proximity involved in this act? Given the form's function as an "instrument of the plan" by which the plan provides contraceptive coverage, the cooperator's certification is proximate material cooperation. For the filing of the form (or note) has a high degree of determination in the scheme of providing employees contraceptive coverage. As an instrument of the plan, the certification serves as a legally necessary document in the provision of such coverage. Hence, the certification is proximate material cooperation. How necessary is the employer's act in the provision of contraceptive coverage to employees?

In answering this question, one notes that there are, at least, two aspects under which to analyze what role the certification plays in an employee's use of contraceptives. First, there would be the employee's use of contraceptives under the employer's insurance plan. In this respect, the certification plays a necessary role in the employee receiving contraceptives as an employee of this employer, as it were. Absent certification, the employee as an employee of this employer would not receive contraceptive coverage. Hence, in this respect, the act of certification plays a necessary role. Albeit not decisive, this has import, especially as it bears on scandal. For the employer could prevent employees, as employees of this religiously affiliated employer, from objectionable acts. The second aspect under which to evaluate the cooperator's act in terms of necessity concerns not the employee receiving coverage as an employee, but, rather, the employee simply receiving contraceptives. That is, absent the employer's certification, would an individual be capable of securing contraceptives? Given their ubiquity, relative inexpensiveness, and the government's commitment to provide them widely, one reasonably concludes that an individual not covered via insurance could readily secure contraceptives. Hence, in this second aspect, the cooperator's act would not be necessary; rather, it would be contingently related (and highly so) to an employee's actually using contraceptives. Accordingly, while the cooperator's act is necessary as it bears on an employee qua employee taking contraception, it (very) contingently bears on the more primary wrong of an individual using contraception. In light of this analysis, the

act of certification (as currently structured) amounts to coerced proximate contingent material cooperation. A number of further considerations remain, including scandal, to which I now turn.

### **3.5 ANALYZING COMPLIANCE WITH THE HHS MANDATE: Scandal**

As noted, for the employee (as an employee) of a religiously-affiliated employer to receive items to whose use the relevant religion objects, potentially scandalizes others (both members of that religion and those who do not practice it). To avoid scandal, it will be important for such employers to publish their efforts not to be implicated in the objectionable acts. Moreover, such employers must continue strenuously to object by legal, political, and other means of suasion to the government's coercion. Informed people will understand that the religiously-affiliated employer has acted in accordance with a well-formed conscience.

### **3.6 ANALYZING COMPLIANCE WITH THE HHS MANDATE: The Goods at Issue in Light of Aforementioned Criteria**

Thus far, I have argued that an employer who files the written certification required by the HHS mandate cooperates in a material, coerced, proximate, and contingent fashion without undue risk of scandal. As proximate, the cooperation requires serious reasons in order to be justified. As noted, absent cooperation, the employers face the prospect of no longer being capable of continued operations, crippled either by confiscatory fines or by the inability to offer the most basic employment benefits. As religiously-affiliated employers, almost all of whom operate as non-profits, the apostolic work at hand has great import. It instances myriad works of spiritual and corporal mercy. These are, indeed, serious goods at issue, including, as it bears on educational institutions, the intellectual, moral, and spiritual formation of the next generation. No institutions other than religiously-affiliated colleges and universities will offer such formation. Hence, non-compliance certainly threatens profound goods. Moreover, as the above analysis bearing on contingency indicates, the goods jeopardized by compliance would remain significantly threatened were the employer not to cooperate (non-compliance). Thus, while non-compliance certainly risks goods (religious formation of the youth, etc.), it does not as certainly preserve (other) goods (e.g., prevent recourse to contraception). These considerations suggest that an employer can file the required certification in good conscience.

#### **4.1 Moral Theology, Law, and Judgments Concerning Material Cooperation: A Concluding Note**

In the above, I argue that cooperation with the HHS mandate amounts to permissible coerced proximate contingent material cooperation. How does this conclusion fit with the vociferous objections with which some religious employers have met the HHS mandate? To find cooperation with the HHS mandate permissible does not equate to opposing vehement opposition to the mandate. Diverse reasonable people find the HHS mandate morally and politically objectionable. So, also, they regard the attempt to force religiously-minded employers to comply with the mandate wrong and, perhaps more importantly, foolish, unimaginative, ham-handed, and gratuitous. As reputedly said of Napoleon's behavior on one occasion, "C'est plus qu'un crime, c'est une faute" ("it is more than wrong, it is an error").

Those admirable, religiously-committed employers who have contested the mandate in court may disagree, of course, with my judgment concerning the moral permissibility of complying with it. My conclusion, however, does not lead one further to conclude that one need or ought not oppose the mandate's imposition, and this for a number of reasons. First, one has an obligation to avoid material cooperation. Were one not earnestly to strive against compliance with the mandate, one would be failing in this moral and religious duty. Second, and a point allied to the first, when confronted with the prospect of cooperation, the scandal one might give to others looms large in determining the permissibility of cooperation. (Of course, this point particularly bears on religiously-affiliated employers who—ideally—serve as exemplars for right-conduct.) If one heroically contends in court, as the employers have, against the imposition of cooperation, one thereby significantly reduces scandal. For, if one complies after unsuccessful extensive legal contention, one obviously does so only under coercion. Third, and finally, as one account has it, the law often amounts to "what is boldly asserted and plausibly maintained." Our legal system has an agonistic character. Were one not zealously to oppose instances of material cooperation imposed by the state, one would certainly face more profound intrusions on the exercise of one's religion. Hence, for these and numerous other reasons, from a judgment concerning the permissibility of cooperation, one cannot conclude that one lacks obligations to oppose the imposition of that very cooperation if one can. Simply, the two judgments differ and, therefore, can diverge.

## Notes

1. FDA-approved contraceptives include standard (low-dose) oral contraceptives (“the pill”), intra-uterine devices (IUDs), high-dose levonorgestrel (emergency contraceptives or “Plan B”), and ulipristal acetate (“Ella”). While controverted, some of these methods—perhaps all; the evidence is ambiguous and the fora that might permit greater clarity polarized—that do prevent conception may also act as abortifacients by preventing implantation of a fertilized ovum in the uterus. Of course, if the contraceptives do have abortifacient effects, that constitutes a more grave injustice than contraception, as a homicide ending life is worse than an act that prevents it from beginning in the first place. Because all parties to the dispute acknowledge the contraceptive character of the drugs at issue, in what follows, I bracket the issue concerning the possible abortifacient character of some (or all) of the drugs and focus on cooperating in the provision of contraceptives as contraceptive.
2. St. Alphonsus Liguori, *Theologia moralis*, Volume II, 63: “illam esse formalem, quae concurrat ad malam voluntatem alterius, et nequit esse sine peccato; materialem vero illam, quae concurrat tantum ad malam actionem alterius, praeter intentionem cooperantis.” The initial work of 1748 is entitled *Medulla Theologiae Moralis R. P. Hermanus Busembaum Societatis Jesu Theologi cum adnotationes per Rev. Patrem D. Alphonsum de Liguori*; subsequently, in 1753, it comes to be titled *Theologia Moralis concinnata a R. P. Alphonso di Liguori*. During the Saint’s lifetime, the work went into nine editions; the ninth was published in 1785.
3. For an extended consideration of Aquinas’s account, see T.A. Cavanaugh, *Double-effect Reasoning: Doing Good and Avoiding Evil* (2006, Oxford: Clarendon Press), 1–37.
4. One notes that a papal document contrasts “cooperationem necessarium et liberam”: a difference between the necessary and the “free.” See *Responsa ad quaesita conferentiae episcopalis americae septentrionalis circa sterilizationem in nosocomiis catholicis, Sacra Congregatio pro Doctrina Fidei*, 13 March 1975, available online at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19750313\\_quaecumque-sterilizatio\\_lt.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19750313_quaecumque-sterilizatio_lt.html).

5. As of August, 2014, employers can use an Employer Benefits Security Administration (EBSA, a division of the U.S. Department of Labor) Form 700- Certification that they will then send either to their insurer or TPA (in the case of the self-insured), or employers can notify in writing the Secretary of HHS of their eligibility and their objection.