

Religious Doctrine and the HHS Mandate

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I.

In 2010, U.S. President Obama signed into law the Patient Protection and Affordable Care Act, popularly known as the “Affordable Care Act” (ACA) or “Obamacare.” The ACA authorizes the U.S. Department of Health and Human Services (HHS) to enumerate a list of “preventative care” services that must be included in employer-sponsored health insurance plans. Qualifying employers who fail to sponsor health insurance that includes such coverage are subject to financial penalty.¹

The list the HHS published in 2012 included all Food and Drug Administration (FDA)-approved contraceptives, including some that some believe can act as abortifacients. A number of employers filed suit, arguing that the HHS mandate violated the Religious Freedom Restoration Act (RFRA). According to RFRA, the federal government may impose a substantial burden on a person’s exercise of religion only if this burden is the least restrictive means of furthering a compelling government interest.

In 2014, in *Burwell v. Hobby Lobby*, the U.S. Supreme Court ruled in favor of the plaintiffs. Being required, under threat of fines, to provide insurance coverage for services they deem objectionable on religious grounds constitutes a substantial burden on employers’ exercise of religion, the Court found, at least for employers that are “closely-held corporations.” And the Court found further that, even if the government has a compelling interest in ensuring coverage for all FDA-approved contraceptives, requiring employers to provide this coverage themselves is not the least restrictive means of furthering that interest. The Court pointed to the accommodation that the federal government had already extended to religious non-profits as an example of a less restrictive means. Under the final version of this accommodation, which was revised after *Hobby Lobby*, if a religious non-profit submits notice to the HHS stating its objections, then the HHS will submit notice to the non-profit’s insurer, upon which notice the insurer will be required to provide coverage for the relevant services without contracting with the religious non-profit to do so.

In *Hobby Lobby*, although the Court pointed to an earlier version of the accommodation as a less restrictive means of furthering the government's interests than the original mandate, it did not rule on whether the accommodation would itself violate RFRA. This is the question the Court faced in *Zubik v. Burwell*. In 2016, reduced to an even eight because of Justice Antonin Scalia's death, the Court made the unusual move of calling for supplemental briefings from the parties regarding a possible settlement in which, if a religious non-profit were to select a plan that does not include contraceptive coverage, the insurer would be required separately to provide free contraceptive coverage for that non-profit's employees. Evidently, the idea was that, under this arrangement, the government would still further its relevant interests, but the religious non-profit would not be required to trigger the provision of coverage of the relevant services by submitting formal notice of its objections to the HHS.

The parties' respective supplemental briefings indicated that, while the petitioners would be willing to accept this compromise, the government was less eager to settle. Ultimately, the Court vacated and remanded the split appeals court decisions rather than ruling on the merits of the case. At the time of this writing, it remains to be seen whether the change in presidential administration in 2017 will result in the resolution of the dispute.

In this essay, I will explore whether, accepting for argument's sake religious doctrines that prohibit absolutely the use of contraception, compliance with the HHS mandate is intrinsically impermissible—i.e., impermissible regardless of the circumstances. This question is of interest for a number of reasons. Most obviously, given the uncertain status of ongoing litigation, it is of interest to executives, whether of religious non-profits or of closely-held for-profit corporations, who accept religious doctrines that prohibit the use of contraception, as well as those who believe that some forms of FDA-approved contraceptives can act as abortifacients and who accept religious doctrines that prohibit abortion.² More broadly, however, it is of interest to lawyers on account of its implications regarding the merits of *Hobby Lobby* and *Zubik*, as well as to philosophers on account of the difficult issues it raises in ethics and the philosophy of action.

The most prominent religion whose doctrine prohibits absolutely the use of contraception is Roman Catholicism. As it turns out, Catholic moral theologians have also developed a robust framework for assessing the permissibility of cooperation with evil. I will be borrowing the central distinction in this framework—*viz.*, the distinction between formal and material cooperation with evil—for use in my own analysis. Doing so has the advantage of facilitating dialogue with Catholic

commentators who have weighed in on the question of whether compliance with the mandate is permissible under Catholic doctrine. But it does not thereby have the disadvantage of closing dialogue with everyone else. For although the distinction between formal and material cooperation with evil comes to us from eighteenth-century Catholic moral casuistry, it is properly speaking action-theoretical in character and should be acknowledged by anyone who acknowledges a distinction between intention and foresight.

Slightly more controversial is whether this distinction rightly has the moral salience that it is accorded in the Catholic moral theological tradition. In what follows I will assume that the tradition is correct in at least this regard: if ϕ -ing is intrinsically impermissible, then acting with the intention that another ϕ is intrinsically impermissible. Philosophers who hold that, special cases aside, the intentions with which an agent acts are relevant only to the moral evaluation of her character, not her action, will likely reject this assumption. Still, to the extent that the Catholic moral theological tradition is representative of the religious convictions of those who object to the mandate, the assumption that, if ϕ -ing is intrinsically impermissible, then acting with the intention that another ϕ is intrinsically impermissible, is dialectically innocent. In any case, my conclusion in this essay would stand even if we were to relax this assumption.

My argument will proceed as follows. In Section II, I will articulate the distinction between formal and material cooperation with evil in a way that preserves the traditional judgment of Catholic moral theologians that formal cooperation with evil is intrinsically impermissible. Much of the debate among Catholic scholars concerning whether compliance with the mandate is intrinsically impermissible has focused on the question whether it intrinsically constitutes formal cooperation with evil. In Section III, I will examine two common arguments against the view that compliance with the mandate intrinsically constitutes formal cooperation with evil. I will maintain that these arguments are unconvincing because they fail to engage with the best case for the view that compliance with the mandate intrinsically constitutes formal cooperation with evil. Still, I will argue in Section IV, the best case for this view is unsuccessful. In Section V, I will draw the tentative conclusion that it is not the case that compliance with the mandate is intrinsically impermissible, even given religious doctrines that prohibit absolutely the use of contraception.

II.

The distinction between formal and material cooperation with evil is usually traced back to St. Alphonsus Liguori, although there is evidence that the terms were already in use by the time of his writing in the eighteenth century. The distinction is usually defined along the following lines: C's cooperation with P's impermissible action is *formal* if and only if C shares the intention of P in virtue of which P's action is impermissible; and any cooperation with evil that is not formal is *material*.

While this definition may be satisfactory for the purposes of most discussions, it could use some refinement. For one thing, it fails to explicate the notion of sharing an intention. One might worry that intentions are indexed to agents and therefore cannot literally be shared across them. I think we can avoid this concern by speaking instead about ends. There seems nothing problematic about saying that two agents intend the same end, even if their intentions of that end are distinct.

The concept of an "end" in play here is intensional: one and the same event might realize two or more distinct ends under different descriptions. In addition, one and the same action can be performed with two or more distinct ends in view. This highlights a second deficiency of our initial formula. Suppose that Jay is building a machine to destroy Los Angeles, and he wants to destroy Los Angeles in order to impoverish Kat, whose net worth consists largely in Los Angeles real estate. Liz helps build the machine because she believes that the world would be better off without Hollywood. In this case, one and the same action of Liz's counts as both formal cooperation with evil and material cooperation with evil with one and the same action of Jay's, only with respect to two distinct ends Jay has in view in performing that action: the intermediate end of destroying Los Angeles and the further end of impoverishing Kat, respectively. Formal and material cooperation with evil are thus relative to an end of the principal's action, something that our initial formula failed to capture.

The intensionality of the concept of an end leads to an additional complication that will be relevant later. Very plausibly, the fundamental form of expression of an end is, at least in some cases, infinitival rather than propositional. Thus: Billy intends to eat his vegetables; not (except in a special case): Billy intends that Billy eat his vegetables. Yet when what an agent intends is for another agent to do so something, then it seems that the fundamental form of expression of an end has to be propositional (otherwise, the identity of the other agent would go unspecified). Thus: Billy's mother intends that Billy eat his vegetables. Yet I take it that Billy and his mother share

the same end. Therefore, while the intensionality of the concept of an end requires something like identity of description as the criterion of identity of ends, this criterion must be loose enough to admit instances of *φ-ing*, intended by A, and *that A φ*, intended by B, as identical.

A third and final deficiency of our initial formula is that it is in tension with the traditional understanding of formal cooperation with evil as intrinsically impermissible. It is plausible that, for some ends E, the fact that A is acting with E in view constitutes *defeasible* grounds for holding that A is acting impermissibly. Suppose that, in cooperating with P's pursuit of such an end E, C also intends E. Then the presence of a defeater to the impermissibility of C's acting with E in view but not to the impermissibility of P's acting with E in view may yield the result that, although C cooperates formally with evil by the formula above, C acts permissibly. E.g., suppose that stealing \$1B from Jay is necessary and sufficient to prevent him from completing his machine. Unmoved by the threat of Los Angeles's destruction, Max wants to steal \$1B from Jay in order to make himself rich, but he needs help. Surely it is permissible for Ned to lend a hand with the intention of saving Los Angeles by bringing it about that Max steals \$1B from Jay. In the case of Ned's action but not Max's, it seems, the *pro tanto* impermissibility of intending a theft is defeated by the circumstances and the agent's further intentions. If so, then we have an action that our initial formula classifies as formal cooperation with evil but that is nevertheless permissible.

In light of these considerations, we can reformulate the distinction between formal and material cooperation with evil as follows. If by doing Φ C is cooperating with P's pursuit of end E, then

- (FC) Φ constitutes *formal cooperation with evil* relative to E if and only if (a) P's pursuit of E is impermissible in virtue of the fact that in doing it P intends E, and (b) Φ is impermissible in virtue of the fact that in doing it C intends E;

whereas

- (MC) Φ constitutes *material cooperation with evil* relative to E if and only if (a) P's pursuit of E is impermissible in virtue of the fact that in doing it P intends E, but (-b) it is not the case that Φ is impermissible in virtue of the fact that in doing it C intends E.

This formulation of the distinction has the virtues of rectifying the three deficiencies of our initial formula by (i) circumventing concerns about the notion of sharing an intention, (ii) relativizing the concepts of formal and material cooperation with evil to an end of the principal's action, and (iii) reconciling an absolute prohibition on formal cooperation with evil with the existence of merely *pro tanto* prohibitions on acting with the intention of certain ends. Further refinement of the distinction may be possible, but (FC) and (MC) will do for our purposes.

We are now ready to consider whether compliance with the mandate intrinsically constitutes formal cooperation with evil. With respect to which end(s) of which action(s) of which principal(s) would compliance with the mandate intrinsically constitute formal cooperation with evil, if indeed it does? There are two (compatible) possibilities. First, compliance might constitute formal cooperation with evil with respect to the pursuit, by those who acquire contraceptive coverage as a result of one's compliance, of the end of using contraception. Second, it might constitute formal cooperation with evil with respect to the pursuit, by the officials at the HHS who issued the mandate, of the end that those who acquire contraceptive coverage as a result of one's compliance use contraception.

By the criteria we settled on when considering Billy, these ends are identical. Therefore, if compliance with the HHS mandate intrinsically constitutes formal cooperation with evil, then—regardless of relative to which action(s) of which principal(s) it does—it necessarily involves intention of the end that those who as a result acquire contraceptive coverage use contraception. Hence, if we can show that compliance with the mandate need not involve intention of that end, then we will have shown that it is not the case that compliance with the mandate intrinsically constitutes formal cooperation with evil.

III.

Many commentators are quick to dismiss the notion that one who complies with the mandate necessarily intends others' contraceptive use. Their grounds for their dismissals fall into two categories. First, some commentators think that intention of an end requires "approval" of, "endorsement" of, or at least a lack of "personal opposition" to that end. Because one can comply with the mandate without having such attitudes towards others' contraceptive use, these commentators conclude, one can comply with the mandate without intending others' contraceptive use.

This way of thinking about formal cooperation with evil is common. Here is Robert Miller:

In *formal cooperation*, the cooperating party endorses the wrongful act of the primary wrongdoer.³

Given this gloss, it is no surprise that Miller thinks it obvious that it is not the case that compliance with the mandate intrinsically constitutes formal cooperation with evil.

Everyone in the debate agrees that, because the objecting employers obviously do not *want* to provide the coverage they find objectionable, there is no question of their compliance involving them in formal cooperation with evil.⁴

Because reluctance indicates a lack of endorsement, compliance is not formal cooperation with evil as long as it is reluctant.

Ultimately, I want to defend Miller's conclusion, which is that it is not the case that compliance with the mandate intrinsically constitutes formal cooperation with evil. I do not, however, wish to rest that conclusion on his reasoning. Many, myself included, find dubious the notion that an agent intends only those consequences of her action that, independently of the practical reasoning that issued in her action, she approves of or endorses. Elizabeth Anscombe, for example, famously identified the order of intention with the order of practical reason.⁵ According to her, "it is the agent's [practical knowledge] that gives the descriptions under which what is going on is the execution of an intention."⁶ Recently, much attention has been given to the contrasts between Anscombe's approach to the philosophy of action and that of the New Natural Lawyers.⁷ But at least on this point, Anscombe and the New Natural Lawyers seem to be in agreement. According to John Finnis, Germain Grisez, and Joseph Boyle,

intentions are constituted by acting persons' reasons for making their choices and by precisely what they choose to do, not by what they feel, or would like, or are reluctant or eager to do, or regret the "necessity" of doing.⁸

If we wish to present a robust defense of the view that it is not the case that compliance with the mandate constitutes formal cooperation with evil, then we will have to do more than point out that one can comply with the mandate without approving of others' contraceptive use.

Christopher Tollefsen does not subscribe to the conception of intention that lies behind Miller's remarks; he is a champion of the New Natural Law theory of action. Yet he too is quick to dismiss the notion that one who complies with the mandate necessarily intends others' contraceptive use:

Where the HHS mandate is concerned, there should be little doubt that formal cooperation is not at issue. If the president of a Catholic college is compelled to offer the coverage and complies, it will not be done for the sake of enabling his employers [*sic*] to contracept, but for the sake of complying with a legally authoritative, even if unjust, policy. Accordingly, the form of cooperation at stake is material, not formal.⁹

Tollefsen invites us to consider the orthodox Catholic employer who offers coverage for contraception only when compelled by law. Presumably such an employer offers the coverage not in order to secure an independent interest in others' contraceptive use, but rather in order to comply with the legally authoritative mandate, avoid fines, etc. From this, Tollefsen infers that the employer complies with the mandate without intending others' contraceptive use.

Again, I want to defend the conclusion that it is not the case that compliance with the mandate intrinsically constitutes formal cooperation with evil. But I do not wish to rest that conclusion on Tollefsen's reasoning either. Surely the defender of the view that compliance with the mandate intrinsically constitutes formal cooperation with evil thinks just that: that compliance *intrinsically* constitutes formal cooperation with evil, not compliance only when done in furtherance of an interest that one who complies could just as well not have. On this account, compliance with the mandate involves intention of a *teleologically loaded* means. Intention of such a means entails intention of the ends intrinsic to it. In the case of compliance with the mandate, the account would go, these ends include the end that those who acquire contraceptive coverage as a result of one's compliance use contraception. While Tollefsen may not agree,¹⁰ I think that it is at least plausible that a means can be teleologically loaded in this sense.

In the next section, I will consider whether compliance with the mandate might be intrinsically ordered to others' contraceptive use in one way in which it is plausible that a means can be intrinsically ordered to an end, *viz.*, the way in which a part of a collective project is intrinsically ordered to the end that unites the project as a whole. Although there may be other ways in which one might argue that compliance with the mandate is intrinsically ordered to others' contraceptive use, this way strikes me as the most plausible. Thus, by ruling it out, we will warrant a tentative conclusion that it is not the case that compliance with the mandate intrinsically constitutes formal cooperation with evil.

IV.

Suppose, borrowing a classic example from Anscombe, that Ann is plotting to assassinate some political leaders gathered in a rural cottage for a secret meeting. She pours poison into the house's water source. Then she pumps the poisoned water into the cistern so that, next time the party leaders go for a drink of water, they will ingest the poison and die.

Like many actions, Ann's project of assassinating the party leaders divides into parts. She has to acquire the poison; she has to get it in the water; she has to pump the water into the cistern. The sense of "part" here is teleological; not just anything that happens during any arbitrarily chosen stretch of time during which Ann's project is ongoing counts as a "part" in this sense (just as not just anything that occupies an arbitrarily chosen region of a living body counts as an "organ"). The parts of an intentional action, in the sense of "part" I have in mind, are themselves intentional actions performed for the sake of the whole of which they are parts. Thus Ann acquires the poison, pours it into the well, pumps the water, etc., all with the intention of assassinating the party leaders.

Intuitively, it seems that the teleological structure of the project remains intact if Ann decides to outsource one or more parts to an accomplice. For example, suppose she pays Bob to pump the water. Intuitively, it seems that pumping the water remains for the sake of assassinating the party leaders even though it is now Bob who is doing it. I am not suggesting that Bob pumps water with the intention of assassinating the party leaders simply because it is a part of Ann's plan that he pumps water. If Bob is the cottage attendant going about his usual job, having no idea that the well is poisoned, then "executing a part of Ann's plan" can hardly be a description under which he is acting intentionally because it is not a description under which he is aware that he is acting at all. And even if Bob knows that the well is poisoned, he may not care, and may be going about his

daily responsibilities without intending to cooperate with Ann. In these cases, it is not *qua* part of Ann's project of assassinating the party leaders that pumping water is Bob's means to his further ends (doing his job, making a living, etc.).

But if Bob is hired by Ann specifically to play a part in the assassination, then he cannot pretend that his means to collecting the money that she offers is anything other than playing that part in the assassination.¹¹ And to play the water-pumping part in the project of assassinating the party leaders *just is* to pump water in order to assassinate the party leaders. To be sure, the further ends to which Bob subordinates this means in his own practical reasoning may not include the death of the party leaders. For example, suppose that Bob is paid up-front, as soon as he is finished pumping the water, so that he will receive his pay regardless of whether the party leaders end up dead. In this case, it is true, the death of the party leaders is not itself instrumental in Bob's practical reasoning to the end of making money. But that does not change the fact that pumping water *intending* the death of the party leaders is instrumental in Bob's practical reasoning to the end of making money. In a case like this, we do not have two intentions in order: pumping water with the intention of assassinating the party leaders, and assassinating the party leaders with the intention of making money. Instead, we have two orders of intention: pumping water with the first-order intention of assassinating the party leaders, and all that with the second-order intention of making money.

One could argue that the compliance with the mandate is structurally similar to pumping poisoned water as part of the assassination. Among the government's stated objectives in enforcing compliance with the mandate is to promote contraceptive use. Getting employers to provide insurance for contraception—or, under the accommodation, getting employers to submit notice the purpose of which is legally to obligate their insurers to provide coverage for contraception—is the government's means to that end, just as getting Bob to pump poisoned water is Ann's means to assassinating the party leaders. True, whereas Ann is using the carrot of a reward to motivate Bob to play the relevant part in her project of assassinating the party leaders, the government is using the stick of fines to motivate employers to play the relevant part in its project of promoting contraceptive use. But this difference is of no significance. Changing the further intention with which one plays a part in a collective project does not change what it means to play a part in a collective project. Therefore, one might conclude, just as Bob pumps water intending the death of the party leaders, so those who comply with the mandate, whether in its original form or under the

accommodation, do so intending that those who as a result acquire contraceptive coverage use contraception.

This strikes me as the best case for the view that compliance with the mandate intrinsically constitutes formal cooperation with evil. Still, I do not think that it is successful. In the water-pumping case, Bob's reward hangs directly on his participation in the assassination. This means calculating his performance of the role that is his to play with an eye to the end that unites the project as a whole (again, this is just what it means to perform a *part*, in the relevant, teleological sense of "part," of an action). If Bob complies with the letter of Ann's instructions but not their spirit, and Ann finds out, then she would correctly hold him in breach of their agreement. So Bob does not announce to the party leaders that their water supply is poisoned; nor does he draw attention to the empty poison cans in the garbage; if the poison was deposited in one part of the water source but not another, then he takes care to pump from the poisoned stock; etc. Quite generally, assuming that he is indeed playing his part in the enterprise and not double-crossing or otherwise cheating Ann, Bob calculates his performance to promote the assassination of the party leaders according to plan. This is true even if he does not take additional steps beyond playing his part in the enterprise in order to ensure that it is successful.

In the case of the mandate, on the other hand, employers' immunity from fines hangs not on their furtherance of the objectives that the officials at the HHS had in view in issuing the mandate, but rather on their compliance with the mandate itself. And what it means to comply with a law is independent of the further objectives the lawmaker had in view in enacting it. A law is not an invitation to participate in the projects of the lawmaker; it has a public meaning that is opaque to the further, private intentions with which the lawmaker enacted it. As a result, there is no expectation that employers will calculate their compliance with an eye to promoting contraceptive use. For example, suppose, rather fancifully, that employer X awards the company contract to insurer Y even though X's employees have a superstitious aversion to using contraception purchased under insurance plans issued by Y. If the government took X to court for failing to further the ends that the officials at the HHS had in view in enacting the mandate, then the judge would rightly rule in favor of X. As long as X selected a plan that includes coverage of the mandated services, X is in compliance with the law. So it is not *qua* playing the insurance-providing part in the lawmakers' project of promoting contraceptive use, but rather *qua* complying with the law, that compliance with the mandate conduces to the end of avoiding fines.

V.

Where does this leave us? We have ruled out what strikes me as the best case for the view that compliance with the mandate intrinsically constitutes formal cooperation with evil. This is enough to establish a presumption, albeit tentative, against the view that compliance with the mandate is intrinsically impermissible on account of the intentions of the one complying. And it is not as if an unfair or otherwise disproportionate balance of consequences is somehow baked into the concept of compliance with the mandate. I tentatively conclude, then, that it is not the case that compliance with the mandate is intrinsically impermissible, even given religious doctrines that prohibit absolutely the use of contraception.¹²

That said, for the reasons given in Section III, I do not think that this conclusion is as obvious as some commentators seem to suppose. The philosophical issues it implicates are difficult enough that what I characterized as the “best case” for the view that compliance with the mandate intrinsically constitutes formal cooperation with evil is hardly an unreasonable application of a body of religious doctrine such as that of the Catholic Church, even if it is, as I have argued, ultimately mistaken. Getting clearer on these issues would be worthwhile and would pay dividends for moral theory far beyond resolving questions of relatively parochial interest concerning compliance with the HHS mandate.

Notes

1. I am grateful to John Sauer for reviewing a previous draft of this paper.
2. Henceforth, to bracket the question of which if any FDA-approved forms of contraception can act as abortifacients, I will speak only of religious doctrines that prohibit contraception, using Catholic doctrine as the paradigm example. That said, if indeed any of the FDA-approved forms of contraception can act as abortifacients, then what I say applies also to the many non-Catholic religious doctrines that prohibit abortion.
3. Robert T. Miller, “The HHS Mandate, Cooperation with Evil, and Coercion,” *Public Discourse*, February 22, 2012, available online at <http://www.thepublicdiscourse.com/2012/02/4817/>.

4. Ibid.
5. G.E.M Anscombe, *Intention*, 2nd ed. (Cambridge, MA: Harvard University Press, 1963), 79–80.
6. Ibid., 87.
7. See, for example, Matthew B. O'Brien, "Elizabeth Anscombe and the New Natural Lawyers on Intentional Action," *National Catholic Bioethics Quarterly* 13 (2013): 47–56.
8. John Finnis, Germain Grisez, and Joseph Boyle, "Direct and Indirect: A Reply to Critics of Our Action Theory," *Thomist* 65 (2001). 1–44, at 8.
9. Christopher O. Tollefsen, "Mandates and Bad Law," *Public Discourse*, February 20, 2012, available online at <http://www.thepublicdiscourse.com/2012/02/4779/>.
10. See Tollefsen, "Response to Robert Koons and Matthew O'Brien's 'Objects of Intention: A Hylomorphic Critique of the New Natural Law Theory,'" *American Catholic Philosophical Quarterly* 87 (2013): 751–778, especially at 752.
11. Cf. Anscombe, *Intention*, 41–55.
12. This is not to deny, of course, that compliance with the mandate may be impermissible *in certain circumstances* given religious doctrines that prohibit absolutely the use of contraception.