

Presence, Privilege, and Moral Appropriation: Reading *Zubik* as an Act of Protest

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Suppose a woman visits a Catholic health care facility and inadvertently leaves her purse behind. An employee delivers the purse to the facility’s Lost and Found, where the patient eventually returns to claim it. If the purse contained birth control pills, has the Catholic health care facility cooperated in supplying a patient with contraception?

For Catholic moral theology, the answer is relatively straightforward. Material cooperation has taken place: the facility did, in the matter of the act, provide a woman with contraception. However, formal cooperation—which shares, or cooperates in, the intent of an illicit act—was clearly absent.

I believe that evaluating cooperation in the *Zubik v. Burwell* case is equally straightforward. Specifically, I agree with the *Zubik* plaintiffs that it is reasonable to regard even so seemingly insignificant an act as signing a document as formal cooperation in offering birth control to employees.¹ As initially proposed by the Department of Health and Human Services (HHS), this act is not simply material cooperation; rather, it does indeed cooperate with the government’s intent to offer birth control. However, as Bernard Prusak suggests in his introduction to the present forum, determining whether an act is or is not cooperation is not sufficient for determining how one should proceed. Agents remain responsible for using the virtue of prudence to balance competing claims and appoint appropriate means to the ends they seek. More than anything else, cooperation reminds us of the world’s moral complexity and the impossibility of avoiding any contact with evil, even as we continually seek to resist it.

Moreover—as Prusak’s introduction goes on to show—the *Zubik* case offers many interesting lessons for Catholic moral theology that go far beyond determining if formal cooperation was at issue. For example, as the *Zubik* case proceeded, theologians writing on the Catholic Moral Theology blog debated the risk of giving scandal—inviting others to moral harm—in *Zubik*’s apparent threat to the legitimacy of the Affordable Care Act. If there is a danger of scandal in Catholic organizations’ accepting a mandate that violates conscience, might there not also be a

danger of scandal in opposing a bill with the potential to do so much good over what many Americans—including many Catholics—see as a misguided emphasis on contraception?² While this and many other reasonable objections raised during the case's time on the Supreme Court's docket deserve scrutiny, perhaps the most interesting question now before ethicists is what can be learned when evaluating cases that may involve cooperation in the future.

Toward this end, I propose to evaluate the *Zubik* case as an act of protest. This essay will focus on one plaintiff group, the religious order of the Little Sisters of the Poor, and the way the order used rhetorics of prophecy and opposition in its public participation in the case. The essay will suggest that the Little Sisters' engagement provides a model for protest in the face of cooperation with evil, and will draw lessons and cautions about such protest from Catholic moral theology.

Another advantage to a protest reading of the Little Sisters' participation in the *Zubik* case is that it allows us to see their participation as an act of agency, agency that was often questioned in public discussion of the case. For example, one commentator argued that the Little Sisters of the Poor were manipulated into serving as the public face of the *Zubik* plaintiffs, rather than Bishop David Zubik, the group Priests for Life, and other male members of the Church hierarchy.³ This commentator's feminist critique draws needed attention to the presence of patriarchy in the Catholic Church, but does so by neatly stripping a group of women religious of their own agency.⁴ A protest reading avoids negating the Little Sisters' agency in this way, instead reading their involvement as an exercise of what Rosita deAnn Mathews has called "power from the periphery."⁵ Whether or not one would have done or recommended the same actions in their situation, there is much to learn from the Sisters' prophetic approach to the *Zubik* case.

To begin with, through skillful engagement with the courts and the news media, the sisters succeeded not only in withdrawing their own participation in the provision of birth control, but also in framing the case as one of religious liberty and themselves as prophetic dissenters. The sisters' protest effectively argues for an engaged Catholic presence in the world, against a "neo-Augustinian" model of retreat into holy seclusion.⁶ It presents a model for effective protest that does not simply denounce, but offers alternatives. And it draws our attention to two underappreciated issues in Catholic theological thinking on protest: privilege and moral appropriation.

Presence in the World Presents Occasion for Protest

It is clear from their public statements that the Little Sisters of the Poor regarded their participation in the *Zubik* case not simply as an opportunity to keep their “hands clean” from participation in the provision of birth control, but, consistent with their order’s mission, as a means of public protest in favor of the value of human life. Are they correct to view their participation in this way? Recent theological literature on protest has focused on a more traditional understanding of protest as organized, visible nonviolent resistance. For example, Kelly Brown Douglas calls for “moral participation” in resistance to violent stand-your-ground culture. Moral participation “involves commitment to a certain way of ‘living and moving and having our being’ in the world [...]. It is being the change that is God’s heaven.”⁷ In a similar key, Joerg Rieger and Kwok Pui-Lan praise the Occupy Wall Street movement for embodying the democratic, participatory environment the protestors sought for their nation.⁸ For Brown Douglas, Rieger, and Kwok, protests of nonviolent resistance have the power both to communicate dissent and to create a foretaste of the better future the movement seeks.

While the protest of *Zubik v. Burwell* did not entail direct nonviolent resistance, Brad Littlejohn aptly reminds us that protest can take place through established channels for interacting with government.⁹ Involvement in a legal case is certainly protest under this definition. Despite discomfort with “the unwelcome glare of the public eye,”¹⁰ the Little Sisters of the Poor portrayed their involvement in the case as one of prophecy. The Sisters’ understanding of prophecy appears to dovetail with that detailed by Cathleen Kaveny in a recent book: prophets offer social critique and demand social change, from a standpoint informed by the prophets’ relationship with God.¹¹ In an op-ed essay explaining “Why We Can’t ‘Just Sign the Form,’” Sr. Constance Veit of the Little Sisters of the Poor compared the Sisters to the biblical martyr Eleazar, who accepted death rather than eat food forbidden by Jewish religious laws (2 Maccabees 6:18–31). Veit invokes the theological term for actions that could lead others to moral harm when she refers to signing the form as possibly giving scandal.¹² She writes that just as “Eleazar feared the scandal he might cause the younger men,” for the Little Sisters of the Poor to sign the HHS accommodation form “could cause scandal by giving the example that it’s okay to ignore clearly stated Catholic doctrine.”¹³ In addition to viewing their participation as a witness to the sanctity of human life and to the authority of Church teaching, the Sisters also hoped to use the publicity of the case to draw attention to their charism of supporting the elderly poor and to the needs of that population.¹⁴

Some Christian ethicists today are skeptical of deep Christian engagement with the world, regarding the world as a site of potential contamination where Christian witness is unlikely to be effective or even intelligible.¹⁵ Catholic ethicists more reliably insist that Christians have a duty to bring their moral message into the world, even if doing so is messy and exposes Christians to moral risk. Eric Genilo has pointed out the limitations of a clean hands approach: following it, the Church may lose the opportunity to partner with other organizations, viewed as morally compromised, in joint efforts toward the common good.¹⁶

The Little Sisters' act of protest follows the traditionally Catholic model of engagement with the world. Running a Catholic health care facility is a clear message and embodiment of Jesus' care for the poor and vulnerable. In a world in which health care and employment in general are governed by complex federal, state, and local laws, running such a ministry engages a community deeply with the complex politics of a religiously plural society. It is precisely because they did not shy away from such complex engagement that the Little Sisters were positioned to take on their act of protest. They had a role as plaintiffs because they were Catholic employers. Had the order at some point decided to pursue "clean hands" by getting out of the health care business, the protest opportunity would have been lost to them. Their presence in the health care field presented the opportunity for prophetic witness.

Effective Protest Offers Alternatives

Certainly one reason for the success of the *Zubik* case in the courts and in public opinion was its offer of a clear alternative to the proposal it denounced and sought to avoid. The *Zubik* plaintiffs argued publicly that alternatives to their cooperation with the mandate were possible, including insurance companies providing contraception directly or the federal government offering it on health care exchanges.¹⁷ Catholic protest in the U.S. has not always been clear about its preferred alternatives. Accordingly, Kristin Heyer and Bryan Massingale criticize early U.S. Catholic contributions to the civil rights movement for condemning racial segregation but failing to offer specific policy prescriptions, such as integrating churches or promoting equality of voting access.¹⁸ By contrast, Heyer and Massingale credit *Gaudium et Spes* for advocating a new relationship between Church and world that inspired many white Catholics to embody the just world they wished to see, by marching shoulder to shoulder with African-American civil rights activists.¹⁹ Christians who protest would do well to emulate such calls to practical alternatives, without

forgetting to offer broader, but no less necessary alternative visions and values systems rooted in Christian understandings of personhood, society, and shared responsibility for all.

Protest Is a Privilege

While supporters of the *Zubik* plaintiffs sometimes portrayed the Little Sisters of the Poor as helpless nuns opposing a powerful Leviathan government, in fact, the sisters were backed by a deep bench of powerful supporters. Their legal team, the Becket Fund for Religious Liberty, has won respect for its work from an impressive roster of legal experts and religious leaders, including Pope John Paul II.²⁰ The Becket Fund, which also handled media contacts for the Little Sisters of the Poor (quite skillfully), receives funding from such deep-pocketed donors as the Knights of Columbus and the Koch Brothers.²¹ Certainly, the United States government is also deeply resourced, but the same cannot be said for the employees of the *Zubik* plaintiffs, many of whom are low-paid healthcare workers. Political scientists Kay Schlozman, Henry Brady, and Sidney Verba found that “with the exception of unions, those who do unskilled work have no occupationally based membership groups at all to represent them.”²² Of the economic organizations active in U.S. politics, only nine percent represent a group that includes eighty percent of U.S. adults: namely, “lower-level white-collar, blue-collar, and service workers as well as those who are unemployed, in school, at home, disabled, or retired.”²³ That the Sisters did not claim to represent the views of their employees in their involvement in the case is evident from their explicit admission, discussed below, that employees might wish to seek birth control elsewhere.²⁴

Protest is about asserting the power we have, and there is nothing wrong with using the resources available to us to pursue a goal we deem to be right. But the fact that powerful organizations rushed to the aid of the Little Sisters of the Poor is a stark reminder that a majority of U.S. people are unable to command such a privilege. Unless they are represented by a labor union, few health-care workers, of whatever skill and income level, have the skills and expertise at their disposal to navigate the U.S. legal system and the media as adroitly as the Little Sisters did with the support of the Becket Fund. Furthermore, as Michael Jaycox has pointed out in the context of protest movements involving nonviolent resistance, when those with power and privilege do engage in protest, they may be rightfully distrusted by those with less power. The powerful and privileged may be less effective in movements where the tactic of nonviolent resistance entails

accepting risk to oneself, because they have more to lose and are often less willing to incur risk.²⁵ Whether protest takes place in the streets or through the legal system, it is incumbent upon Christians to attend to the role of privilege in protest and to ask whose voices are not being heard.

Attend to Moral Appropriation

The observation that protest is an act of privilege brings us to the concept of moral appropriation. Cathleen Kaveny coined the concept of moral appropriation to describe situations, analogous to cooperation with evil, where the agent does not assist in an act of evil but rather benefits from an evil act that has already taken place. Moral cooperation is traditionally understood as assisting in an act of evil; thus, the *Zubik* plaintiffs regarded assisting in the provision of birth control to employees as moral cooperation. In moral appropriation, by contrast, agents “take advantage of the fruits or byproducts of someone else’s wrongful acts in order to facilitate their own morally worthwhile activity.”²⁶ While the classical example of cooperation with evil is the servant who holds a ladder so his employer may commit adultery, Kaveny’s example of appropriation of evil describes someone who accepts a promotion, knowing that the former occupant of the position was unjustly fired.²⁷ The new employee may not have caused the injustice, but she chooses to benefit from it. While protesting as privileged persons remains an act oriented to the common good, continuing to benefit from privilege that accrues to us unjustly, without attempting to oppose or dismantle structures of privilege, is an act of moral appropriation that should be avoided.

That said, there is a much more interesting example of moral appropriation afoot in the *Zubik* case. A key point in the plaintiffs’ case, one that the Little Sisters of the Poor emphasized strenuously in their public communications, was that the employees of the *Zubik* plaintiffs had alternative ways to obtain birth control without the involvement of their religious employer. That is, the plaintiffs made clear that they were not, in fact, trying to prevent their employees from obtaining and using birth control, merely trying to stay out of the system by which employees acquired it. “As the Little Sisters have argued all along,” says a public statement still available on the order’s website, “the [Supreme Court] ruling in no way bars the government from providing these services to women who want them as long as the government stops trying to take over the Little Sisters’ health plan.”²⁸ This wording is a bit misleading, as government does not pay for birth control under the Affordable Care Act—insurers pay for it without direct cost sharing on the part of patients.²⁹ What the Little Sisters seem to mean here is that the ruling does not prevent

government from arranging birth control coverage for employees of religious organizations, without involving the employers.

This is a clear-cut case of moral appropriation under Kaveny's definition. The Little Sisters of the Poor benefited from the fact that provision of birth control was already taking place. They used this fact to bolster their case in the court of public opinion and before the Supreme Court. The Supreme Court decision reflected the Sisters' argument, directing the parties—the Catholic employers and the Department of Health and Human Services—to “arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans ‘receive full and equal health coverage, including contraceptive coverage.’”³⁰

As Kaveny cautions, moral appropriation does not necessarily mean the appropriator is to blame for the morally evil actions she appropriates, since she may not have intended the morally evil actions in question and may, in fact, have been powerless to stop them. According to Kaveny, “it is not necessarily the case that appropriators intend the contemporaneous or future evil acts whose fruits or byproducts they appropriate in order to further their own ends.”³¹ For example, under normal circumstances, medical researchers who make use of aborted fetal tissue may predict that such tissue will continue to become available through the practice of abortions, but to predict an act is not to intend it: we cannot intend where we exercise no power to control.³² However, what Kaveny calls moral “seepage” remains a danger to guard against in moral appropriation. In the example of research on fetal tissue, even if the researchers do not intend for abortions to be performed, it is possible that their reliance on the tissue may soften or otherwise affect their reaction to the practice of abortion.³³

Along the same lines, the Little Sisters cannot legitimately be said to intend that the government assist women in receiving contraceptive coverage. Nor should they be criticized because their protest did not extend to attempting to stop this activity, but only to removing themselves from cooperation with it. Rather, this choice reflects a prudent understanding of the possibilities and limits of prophecy. Like the Little Sisters of the Poor, Christians engaged in protest would do well to have a clear-eyed view of their goals: to avoid moral cooperation (a goal easily defined, whether or not it is easily achieved); to avoid moral appropriation (perhaps a more challenging goal, given the presence of systemic evil in the world); or to eradicate an evil practice from the world altogether.

Julie Hanlon Rubio has argued for increased attention to cooperation in Catholic social ethics, showing that cooperation (like Kaveny's moral appropriation) appropriately helps us broaden our sense of where we are responsible.³⁴ I agree that cooperation and appropriation direct our attention to our interdependence with others and to the fact that our characters are shaped by acts throughout our lives, but these tools cannot provide a guideline for action in every possible circumstance. The Little Sisters' approach to dealing with the realities of moral cooperation and appropriation serves as a model for Catholics attempting to live faithful lives in a morally complex world. By joining the *Zubik* case to avoid cooperation, they were able to prophetically witness to their respect for life and the value of religious freedom. Moreover, by accepting the moral appropriation of allowing insurers to offer their employees contraception directly, they were able to allow their employees to follow their own consciences and offer the Obama administration a solution they could portray as a win. Indeed, the Sisters themselves portrayed it this way, writing that "[t]he unanimous decision by the Supreme Court was a big win for the Little Sisters. But that does not mean anyone lost."³⁵ This irenic approach is a model for Catholic organizations seeking to exercise corporate conscience in a morally complex world where secular and religious laws can at times clash.

Conclusion

The *Zubik v. Burwell* case is of interest to ethicists seen through many different lenses, from bioethics to religious freedom to questions of fundamental moral theology, such as cooperation and appropriation. I have suggested that reading the case as an act of protest contains lessons for Christians who may be confronted with occasions of moral cooperation in a pluralistic and complex world. One plaintiff group, the Little Sisters of the Poor, exercised agency in framing their participation as prophetic. Their successful involvement indicates the limitations of a "clean hands" approach to participation in the world and the effectiveness of protest that offers alternatives. Cautions about protest from Catholic moral theology include attention to the role of privilege in protest and to the need for prudence in navigating the demands of moral cooperation and appropriation. With their involvement in *Zubik v. Burwell*, the Little Sisters of the Poor provide a useful test case for effective Christian protest in a morally complex world.

Notes

1. Sr. Constance Veit, “Why We Can’t ‘Just Sign the Form,’” *Diocese of Madison Catholic Herald*, <http://www.madisoncatholicherald.org/guestcolumn/6174-veit-column.html>. Accessed November 4, 2016.
2. Dana Dillon, et al., “HHS Roundtable: Cooperation with Evil | Catholic Moral Theology,” *Catholic Moral Theology*, <http://catholicmoraltheology.com/hhs-roundtable-cooperation-with-evil/>. Accessed January 15, 2017.
3. Patricia Miller, “‘Little Sisters’ Being Sold As Face of Contraception Case,” *Religion Dispatches*, March 22, 2016, <http://religiondispatches.org/little-sisters-being-sold-as-face-of-contraception-case/>.
4. Along the lines of maligning or questioning the Sisters’ agency, I remember reading an opinion piece at the time of the case, though I was unable to locate it for this essay, which portrayed the Sisters as manipulative for wearing their habits (that is, the everyday clothing of their religious order) to the Supreme Court hearings. To be sure, in the debate over the HHS mandate, it was not only the Little Sisters of the Poor who had their motives impugned, their agency denied, and worse. Kristin Heyer and Bryan Massingale remind us that women religious, including CHA president Sr. Carol Keehan and members of NETWORK, were charged with damaging the Church and had their Catholic faith publicly questioned by bishops for airing their support of the ACA in prudent judgments of conscience. See Kristin E. Heyer and Bryan N. Massingale, “*Gaudium et Spes* and the Call to Justice: The U.S. Experience,” in *From Vatican II to Pope Francis: Charting a Catholic Future*, ed. Paul Crowley, S.J. (Maryknoll, New York: Orbis Books, 2014), 93–94.
5. Rosita deAnn Mathews, “Using Power from the Periphery,” in *A Troubling in My Soul: Womanist Perspectives on Evil and Suffering*, ed. Emilie Maureen Townes, Bishop Henry McNeal Turner Studies in North American Black Religion, vol. 8 (Maryknoll, NY: Orbis Books, 1993), 92–106.
6. See Lisa Sowle Cahill’s four “streams” of Christian ethics in her “Catholic Feminists and Traditions: Renewal, Reinvention, Replacement,” *Journal of the Society of Christian Ethics* 34 (2014): 27–51.

7. Kelly Brown Douglas, *Stand Your Ground: Black Bodies and the Justice of God* (Maryknoll, New York: Orbis Books, 2015), 224.
8. Joerg Rieger and Pui-lan Kwok, *Occupy Religion: Theology of the Multitude* (Plymouth, U.K.: Rowman & Littlefield Publishers, 2013), 122–27.
9. Brad Littlejohn, “Taxation and Christian Ethics, Pt. 3: What Is Christian Protest?” May 13, 2011, <https://bradlittlejohn.com/2011/05/13/2011513taxation-and-christian-ethics-pt-3-what-is-christian-protest-html/>.
10. Sister Constance Veit, “Taking the Long View on Journey to the Supreme Court,” *Pittsburgh Catholic*, September 25, 2015, <http://pittsburghcatholic.org/Columns/Taking-the-long-view-on-journey-to-the-Supreme-Court->.
11. M. Cathleen Kaveny, “Appropriation of Evil: Cooperation’s Mirror Image,” *Theological Studies* 61 (2000): 245.
12. James T. Bretzke, *Handbook of Roman Catholic Moral Terms* (Washington, D.C.: Georgetown University Press, 2013), 207–8.
13. Veit, “Why We Can’t ‘Just Sign the Form.’”
14. John Allen, “Little Sisters Say Fight over Contraception Has Been Worth It,” *Crux*, August 3, 2016, <https://cruxnow.com/uncategorized/2016/08/03/little-sisters-say-fight-contraception-worth/>.
15. This perspective is often referred to as “Augustinian” or “neo-Augustinian”; see Cahill, “Catholic Feminists and Traditions,” 29–30.
16. Eric Genilo, “Clean Hands,” *Catholic Theological Ethics in the World Church*, <http://www.catholicethics.com/forum-submissions/clean-hands>. Accessed January 14, 2017.
17. “Little Sisters of the Poor v. Burwell,” *Little Sisters of the Poor*, 2016, <http://thelittlesistersofthepoor.com/>. Accessed November 4, 2016.
18. Heyer and Massingale, “Gaudium et Spes and the Call to Justice,” 86–87.
19. *Ibid.*, 87–88.

20. “Becket Fund Mission Statement,” *Becket Fund*, <http://www.becketfund.org/our-mission/>. Accessed January 15, 2017
21. Tony Carrk, “The Koch Brothers: What You Need To Know about the Financiers of the Radical Right” (Center for American Progress Action Fund, April 2011), https://www.americanprogressaction.org/wp-content/uploads/issues/2011/04/pdf/koch_brothers.pdf; Josh Israel, “How One Religious Organization Bankrolls America’s Social Conservative Movement,” *ThinkProgress*, December 22, 2014, <https://thinkprogress.org/how-one-religious-organization-bankrolls-americas-social-conservative-movement-b2d4a22b9239>.
22. Kay Lehman Schlozman, Sidney Verba, and Henry E Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (Princeton: Princeton University Press, 2012), 326.
23. *Ibid.*, 331.
24. See also David E. DeCosse and Kristin E. Heyer, “Introduction,” in *Conscience and Catholicism: Rights, Responsibilities, and Institutional Responses*, eds. David E. DeCosse and Kristin E. Heyer (Maryknoll, NY: Orbis Books, 2015), xv.
25. Michael Jaycox, “Dangerous Memories, Dangerous Movements: Christian Freedom in the Empire,” *Catholic Theological Ethics in the World Church*, <http://www.catholicethics.com/forum-submissions/dangerous-memories-dangerous-movements-christian-freedom-in-the-empire>. Accessed January 14, 2017.
26. Kaveny, “Appropriation of Evil,” 286.
27. *Ibid.*, 292.
28. “Supreme Court Rules Unanimously In Favor of Little Sisters,” *Little Sisters of the Poor*, n.d., <http://thelittlesistersofthepoor.com/#supreme-court-ruling>.
29. Internal Revenue Service, Employee Benefits Security Administration, and Health and Human Services Department, “Coverage of Certain Preventive Services Under the Affordable Care Act,” *Federal Register*, July 2, 2013,

<https://www.federalregister.gov/documents/2013/07/02/2013-15866/coverage-of-certain-preventive-services-under-the-affordable-care-act>.

30. Per Curiam, *Zubik v. Burwell* (Supreme Court of the United States, May 16, 2016), https://www.supremecourt.gov/opinions/15pdf/14-1418_8758.pdf.
31. Kaveny, “Appropriation of Evil,” 297.
32. *Ibid.*, 298–300.
33. *Ibid.*, 310.
34. Rubio, “Moral Cooperation with Evil and Social Ethics.”
35. “Supreme Court Rules Unanimously In Favor of Little Sisters.”