

## **The Ethics of Cooperation and the Contraceptive Mandate: Legal, Political, and Moral Dimensions**

BERNARD G. PRUSAK

*King's College (PA)*

Before the death of Justice Antonin Scalia on February 13, 2016, it appeared relatively easy to predict the outcome of the high-profile religious liberty case before the Supreme Court that term: *Zubik v. Burwell*, which consolidated seven cases involving thirty-six religious non-profit petitioners, including, most notoriously, the Little Sisters of the Poor, various other faith-based social services organizations, and a collection of colleges and universities. What was at issue in those cases, as in *Hobby Lobby* two years prior, is the Affordable Care Act (ACA)'s so-called contraceptive mandate. The ACA stipulated that employers' health insurance plans offer women "preventive care and screenings" without cost-sharing requirements. The ACA also authorized the Department of Health and Human Services (HHS) to specify what preventive care would be covered. HHS subsequently required that employers' health insurance plans make available all contraceptives approved by the Food and Drug Administration. These contraceptives include four that allegedly act as abortifacients: two forms of the morning-after pill, Plan B and Ella; and two types of intrauterine devices, Mirena and Paragard. (Research indicates, however, that only Paragard, which is a copper IUD, may on occasion prevent implantation; normally it works by impairing sperm, for which copper is toxic. Plan B and Ella inhibit ovulation, whereas Mirena prevents sperm from making it to the egg by changing the composition of the cervical mucus. At the same time, it should be noted that, when IUDs fail to prevent pregnancy, miscarriage rates double to about forty to fifty percent unless the IUD is removed early in the pregnancy.<sup>1</sup>)

What was at issue in *Zubik* can be put more precisely: whether the "accommodations" established by the Obama administration for religious non-profit employers (as opposed to houses of worship) satisfied the terms of the Religious Freedom Restoration Act of 1993 (RFRA), or instead violated the petitioners' religious liberty under RFRA. (*Hobby Lobby* was different in that there the petitioners were closely-held for-profit corporations whose owners had religious objections to the contraceptive mandate.) Initially, in order to be exempt from having to provide

contraceptive coverage, religious non-profit employers were required to register their opposition with their contracting insurance companies or third-party administrators, at which point the insurance companies or TPA issued separate contraceptive policies at no cost to the employers. Following litigation by the Little Sisters of the Poor, the accommodation took a second form: beginning in January 2014, in order to be exempt, religious non-profit employers were allowed to notify HHS of their opposition; HHS then had the responsibility to contact the insurance companies or TPA. This alternative introduced another step, and so a bit more distance, between the employers and the provision of the coverage to which they objected on religious grounds. The petitioners in *Zubik* claimed, however, that the accommodation in this form was likewise inadequate. For it nonetheless required that they cooperate in the provision of contraceptives, in particular by providing contact information for HHS to work with.

As readers of the news know, the Supreme Court decided, effectively, not to decide *Zubik*, in any event for now. In a May 16, 2016 *per curiam* order, the Court vacated “the judgments below” and remanded the various cases to the respective Courts of Appeals. “Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties” in supplemental briefings submitted after oral argument, “the parties on remand,” the Court declared, “should be afforded an opportunity 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’” (578 U.S. [2106], slip op. at 3–4). The Court also acknowledged, however, the possibility of remaining “areas of disagreement,” but deemed “the importance of those areas of potential concern [...] uncertain, as is the necessity of this Court’s involvement at this point to resolve them” (578 U.S. [2106], slip op. at 4). Time will tell.<sup>2</sup>

This iteration of the forum “Ethics in Focus” concerns the ethics of cooperation as it applies to religious liberty cases like *Zubik*, *Hobby Lobby*, and no doubt others that will come before the Supreme Court. *Zubik* raised complex legal, political, and moral questions.<sup>3</sup> The legal questions, to begin with, concern the interpretation of RFRA, which was passed by Congress in response to the Supreme Court’s 1990 decision in *Employment Division v. Smith*. Before *Smith*, the Supreme Court generally used a balancing test in its First Amendment, free exercise cases. This balancing test, called the *Sherbert* test for the 1963 decision from which it derived, “took into account,” Justice Samuel Alito explained in the *Hobby Lobby* decision, “whether the [government’s action

in question] imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest” (573 U.S. [2014], slip op. at 4). By contrast, Justice Scalia’s 5–4 majority opinion in *Smith* argued to the “conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest” (494 U.S. 872, 886 n. 3 [1990]). In his colorful language, in view of our society’s diversity of religious belief, “we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order” (494 U.S. 872, 888 [1990]). Three years after *Smith* was decided, Congress made clear its disagreement. RFRA prescribes that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” not directed against this or that religious practice or interest. Notwithstanding, lest every citizen become a law unto him or herself—Justice Scalia’s fear if every law had to jibe with citizens’ religious practice and interests—Congress also allowed for exceptions. Burdens resulting from rules of general applicability are legally permitted when the government can demonstrate that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>4</sup>

A point of dispute in *Zubik* was whether RFRA simply restores the pre-*Smith* compelling interest test, or departs from and goes beyond the pre-*Smith* cases through its least-restrictive-means test. Another legal question was what constitutes a substantial burden of a person’s exercise of religion—that is, what are the criteria to make a burden “substantial”?—and further whether it is even the business of judges to determine if a burden really is substantial, rather than taking petitioners’ sincere word for it. No less contested, legally, is what weight to give *employees’* liberty interests. Dissenting in *Hobby Lobby*, Justice Ruth Ginsburg quoted from *Planned Parenthood v. Casey*: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives” (505 U. S. 833, 856 [1992]). In her own words, “Accommodations to religious beliefs or observances [...] must not significantly impinge on the interests of third parties,” whose beliefs may well differ from their employers’ (573 U. S. [2014], slip op. at 7). It is noteworthy in this regard that, according to the Pew Research Center, seventy-six percent of Catholics believe that the church should change its teaching and permit the use of contraceptives; among Catholics who attend Mass weekly, the percentage with this view is sixty-two. Moreover, the Guttmacher Institute reports that sixty-eight

percent of sexually active Catholic women have used the pill, IUDs, or sterilization in order to avoid pregnancy.<sup>5</sup>

These legal questions lead into political questions. Religious liberty is popularly called “America’s first freedom,” not merely because it is enshrined in the First Amendment of the Constitution, but because it is a fundamental freedom, the recognition of which ensures the recognition of further rights to freedom of speech, freedom of assembly, and privacy, among others.<sup>6</sup> By contrast, a government that does not recognize religious liberty is sure to limit other freedoms. Arguably, then, protecting religious liberty ought to be a priority of every liberal people. Along these lines, the amicus brief filed by the United States Conference of Catholic Bishops in *Zubik* proposes that

[a] government that places [...] pressure on religious charitable organizations [as the Obama administration allegedly did with the contraceptive mandate] engages in a kind of soft tyranny, for it means that they must think and act as the government commands on sensitive issues surrounding human life and reproduction, issues on which the religious community has a distinctive and prophetic voice.<sup>7</sup>

It is also arguable, however, that the charge of tyranny can be turned around. Though religious liberty is fundamental, when it is wielded to limit what others can do—for example, “control their reproductive lives”—prioritizing it may be seen as ceding all too much power to religiously-motivated objectors.

Despite authoring the decision in *Smith*, Justice Scalia joined Justice Alito’s majority opinion in *Hobby Lobby*, which interprets RFRA as going beyond the Court’s pre-*Smith* jurisprudence and holds that judges should defer to petitioners’ sincere belief that a governmental action constitutes a substantial burden on the exercise of religion. Along similar lines, Justice Alito also wrote that “the federal courts have no business addressing [...] whether [a] religious belief asserted in a RFRA case is reasonable” (573 U. S. [2014], slip op. at 36). There were two key beliefs in *Hobby Lobby*: first, that “the four contraceptive methods at issue are abortifacients” (the two forms of the morning-after pill and two types of intrauterine devices); second, that complying with HHS regulations was connected to the provision of the contraceptives “in a way that is sufficient to make it immoral” for the petitioners to do so (573 U. S. [2014], slip op. at 2, 36).

The reason why it appeared relatively easy to predict the outcome of *Zubik* before Justice Scalia's death is that the petitioners in *Zubik* believed, first, that the use of contraceptives is immoral and, second, that complying with HHS regulations—here, having to notify insurers, TPAs, or HHS of their opposition—was connected to the provision of contraceptives “in a way that is sufficient to make it immoral” to do so. If “the federal courts have no business addressing [...] whether [a] religious belief asserted in a RFRA case is reasonable,” *Zubik* would have been decided 5–4 just the same as *Hobby Lobby*.

But is it reasonable to believe that complying with HHS regulations—in particular, notifying HHS of opposition to coverage of contraceptives—is connected to the provision of contraceptives in a way that is sufficient to make it immoral to do so? With Justice Scalia's death, and notwithstanding the Court's May 16, 2016 order, it appears that what Justice Alito called, in *Hobby Lobby*, “a difficult and important question of religion and moral philosophy”—namely, the question of the right understanding of the ethics of cooperation in wrongdoing—can no longer be set aside. In Justice Alito's terms, this question concerns “the circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another” (573 U. S. [2014], slip op. at 36). The majority decision in *Hobby Lobby* castigated HHS for “[a]rrogating [to itself] the authority to provide a binding national answer to this religious and philosophical question” and declined to judge whether the petitioners' own answer was right or wrong (573 U. S. [2014], slip op. at 36–37). Neither the dissenting justices in *Hobby Lobby*, however, nor all the lower courts in the cases leading to *Zubik* showed this same reluctance. The Court's May 16, 2016 order hangs, accordingly, on the question of whether this point of disagreement between the petitioners and government can be resolved.

Here's background toward understanding the moral question in dispute.

In *Hobby Lobby*, Justice Alito cites, in a footnote, three discussions of the ethics of cooperation: one relatively recent discussion by the philosopher David Oderberg, and two older discussions by the Jesuit moralists Thomas J. Higgins and Henry Davis. Justice Alito quotes both Higgins and Davis (573 U. S. [2014], slip op. at 36 n. 34). From Higgins we hear that “[t]he general principles governing cooperation' in wrongdoing—i.e., ‘physical activity (or its omission) by which a person assists in the evil act of another who is the principal agent’—‘present troublesome difficulties in

application.”<sup>8</sup> From Davis we hear that “[c]o-operation occurs when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does.”<sup>9</sup> Justice Alito’s quotation from Davis’s text is in fact somewhat misleading. In the quotation in question, Davis is specifying so-called *material* cooperation as opposed to *formal* cooperation. In the sentence preceding what Justice Alito quotes, Davis writes, “Co-operation is formal when A helps B in an external sinful act, and intends the sinfulness of it.”<sup>10</sup> In any event, Davis agrees with Higgins that, in Higgins’ words quoted in part by Justice Alito, “The general principles governing co-operation [...] present troublesome difficulties in application.”<sup>11</sup> Davis makes an even stronger claim in this regard: in view of how “many factors enter into all questions of material co-operation [...], there is no more difficult question than this in the whole range of Moral Theology.”<sup>12</sup>

In context, Justice Alito’s quotation of Higgins supports the point that neither judges, nor all the more HHS administrators have any business mucking around with the ethics of cooperation. For surely they lack the competence to go where theologians fear to tread! Justice Alito goes on to quote from *Smith* that “courts must not determine [...] the plausibility of a religious claim” (573 U. S. [2014], slip op. at 37; see 494 U. S. 872, 887 [1990]). It might be wondered, however, just where the “religious claim” is here. The right understanding of the ethics of cooperation is indeed pertinent for moral theology, but in pursuing it moral theologians turn philosophical, which is to say, for present purposes, take up questions that human wisdom is charged with figuring out and to which divine revelation has not spoken. It’s true that much of the terminology used in discussing the ethics of cooperation is derived from the Roman Catholic tradition, but the distinction between formal and material cooperation, for example, has its roots not only in the work of the eighteenth-century moral theologian Alphonsus Liguori, but in that of the thirteenth-century philosopher and theologian Thomas Aquinas, and many centuries before him in that of the thinker Aquinas called simply the Philosopher, namely, Aristotle.

Here is how the philosopher David Oderberg, cited but not quoted by Justice Alito, distinguishes between formal and material cooperation:

The formal co-operator intends the wrong committed by the principal [...]. Material co-operation does not involve such an intent.<sup>13</sup>

What *informs* the cooperator's will in facilitating the principal's action—in a word, the cooperator's intention in acting—is the crucial consideration. Likewise, the amicus brief submitted by “50 Catholic Theologians and Ethicists in Support of Petitioners” states:

“Formal” cooperation in wrongdoing occurs when one commits an action that contributes to or assists another's wrongful act, in such a way that the cooperator shares in the wrongful intention of the other actor.<sup>14</sup>

By contrast, the brief goes on:

Material cooperation occurs when the cooperator facilitates or assists in the performance of the forbidden action without sharing in the wrongful intention.<sup>15</sup>

What constitutes, however, “sharing in the wrongful intention”? The literature on cooperation in wrongdoing is full of colorful, sometimes fanciful cases. Say that you are being held at gunpoint. The aggressor wants to know from you the details of your business partner's bank account so that he can steal from it.<sup>16</sup> If you tell the would-be thief the details (which it is stipulated you know), would your cooperation in wrongdoing be “formal” or “material”? That is, would you share in the wrongful intention or not?

This question is sometimes answered by another question in turn: Do you approve of the action in which you're cooperating? If not, it is suggested that your cooperation is material and not formal. So Oderberg writes: “Formal co-operation involves approval of the wrong and willing participation in its guilt.”<sup>17</sup> And according to another author: “Whereas formal cooperation involves intended approval of [the principal's] action, material cooperation is first and foremost helping [the principal] to accomplish an external action [...] without approving of the external action.”<sup>18</sup>

But now it has to be asked what “approving” amounts to. To begin with, as Oderberg observes in his contribution to this forum, “one can approve of a wrongful act without *thinking* that it is wrong. One might think it's just fine to rape someone, as an act of revenge, say, and so approve it, even though one does not see it as a heinous act.”<sup>19</sup> But is approval a distinct mental act or disposition of an agent known only to him or her? Further, is an agent's claim to approve or

disapprove of an action in which she has cooperated incorrigible, in the way that a sincere claim to have dreamt this or that, or to have felt sleepy, or anxious, or angry isn't open to rebuttal, so long as the agent knows the meaning of the concepts she's invoked? Otherwise put, can an agent say of any and every action in which she has cooperated that she did not approve of it? Do all such actions admit of this disclaimer?

The drift of these questions is clearly toward *no*. As the philosopher Elizabeth Anscombe remarked, "Circumstances, and the immediate facts about the means you are choosing to your ends, dictate what descriptions of your intention you must admit."<sup>20</sup> Or again, "A man's intention in acting is not so private and interior a thing that he has absolute authority in saying *what* it is—as he has absolute authority in saying *what* he dreamt."<sup>21</sup> To claim otherwise is practically to invite the ridicule that Blaise Pascal, in the seventh of his *Provincial Letters*, heaped on his fictional Jesuit's *grande méthode de diriger l'intention* permitting one to do otherwise prohibited actions on the condition that one is able to find for these same actions a licit "object."<sup>22</sup>

Oderberg, well aware of this point, acknowledges it with the statement that "intent to assist may be implied by the circumstances": it may be, that is, implicit or explicit.<sup>23</sup> More fully, an action may count as formal cooperation when the claim of not having intended some particular end just can't be admitted in view of the fact that one's action was directly ordered to that end.<sup>24</sup> An example in the literature is willingly participating in the sacred rites of a pagan cult. Saying, after the fact, that you did not intend to cooperate in the worship of Dionysus or Mithras makes no sense; your willing participation does not admit of any other intention, even if you didn't "approve" of the rites.

The distinction between formal and material cooperation is not, however, quite so simple as that example might suggest. What if your participation was not fully "willing"? What if you participated under duress, maybe even severe duress? Recall here our case involving the details of your business partner's bank account. Let it be stipulated that you do not approve of the theft. (Oderberg writes: "presumably your will is directed against that of the thief."<sup>25</sup>) Nonetheless, it might be claimed that you do intend to facilitate the theft of your partner's money. Yes, what's driving your action is that you intend to save your own life, but can it be denied that you intend to facilitate the theft as a means toward saving your life? Can it be denied, that is, that you "share in the wrongful intention"?

In brief, it might be argued, though controversially, that your cooperation here is formal. You intend to facilitate what the principal intends (namely, stealing from your partner) under the description, “doing what he intends for me to do.” More fully, you intend “doing what he intends for me to do so that he can do what he intends.”<sup>26</sup> Yet it boggles the mind that it would be morally impermissible for you to cooperate.<sup>27</sup> In other words, such a conclusion would clearly be wrong—who but a philosopher in the grip of an argument would claim you should die rather than reveal the bank account details?—with the upshot either that it must *not* be the case that all formal cooperation in wrongdoing is wrong, or that this instance of formal cooperation should not be categorized as formal cooperation *in wrongdoing*, or that what we have here is not formal cooperation after all (as Oderberg contends). One way or the other, it appears that formal cooperation is wrong only when two conditions are met: you intend not only “doing what he intends for me to do so that he can do what he intends” (necessary condition #1), but you share the principal’s intention that the intended wrong come to pass (necessary condition #2 and, with the first condition, jointly sufficient). In other words, perhaps more precisely, it is your intention that an evil be done with your help. You lend your hand, so to speak, to this intention; in theological language, you intend the *sinfulness* of the action in question, not simply the action under an arbitrary description, but under the description whereby it is wrong.<sup>28</sup> Against this background, it is understandable why the question of “approval” entered the literature on cooperation.

If you don’t intend that an evil be done with your help, as presumably you wouldn’t in the case involving your partner’s banking account, it might be claimed that you cooperated formally in the thief’s action, but your cooperation *in wrongdoing or in evil* was merely material. For what you did was but matter—but building blocks, we might say—toward the evil that came to pass. You intended, it might be claimed, “doing what he intends for me to do so that he can do what he intends,” but you didn’t share the principal’s evil intention that evil be done. That evil be done didn’t inform your will—it was contrary to your will—and thus cannot be ascribed to you as your intention.<sup>29</sup>

There is much still to say about material cooperation, which may be morally permissible or not depending on whether it is immediate or mediate (that is, depending on how “near” the cooperator’s action is to that of the principal: “the degree to which the physical extension of the action of the cooperator overlaps with the wrongful action of the principal”<sup>30</sup>); proximate or remote (depending on whether the cooperator’s action “provides a probable instrument of wrongful

use”<sup>31</sup>); and indispensable or dispensable, among other considerations. It should be stressed, however, that these are precisely *considerations*, not make-or-break factors in a decision calculus. For example, the more indispensable, or necessary, the cooperator’s action is toward the wrong in question, the graver the consequences of *not* cooperating must be in order to permit the cooperation. But here practical wisdom—*prudentia* or *phronesis*—can’t be dispensed with; it is needed to come to terms with the particularities of the case. To illustrate this point further, the graver the consequences of cooperating are—toward others as well as the agent him or herself—the greater the reason must be in order to permit it, with the implication that in some cases that reason will not be great enough. Again practical wisdom is indispensable. By way of example, say that a gun-wielding aggressor wants, not the details of your partner’s bank account, but the launch codes for your country’s nuclear weapons. Cooperation in the evil would be material, but, as the practically wise person would quickly see, morally impermissible for more reasons than one.

How does all this bear, finally, on cases like *Zubik v. Burwell*? Would compliance with the administration’s “accommodations” constitute impermissible formal or material cooperation, as fifty Catholic theologians and ethicists claimed in an amicus brief submitted in support of the petitioners?<sup>32</sup> Should judges—can judges?—avoid taking a stand on this question? Is the judgment that cooperation would be impermissible a “religious claim” warranting deference? Or is the appeal to religious liberty here misguided, in particular in a constitutional democracy like the United States, characterized by pervasive pluralism?<sup>33</sup> The contributors to this iteration of “Ethics in Focus” speak richly to these questions and multiple others. Charles F. Capps is pursuing a J.D. and a Ph.D. in philosophy at the University of Chicago; T.A. Cavanaugh is Professor of Philosophy at the University of San Francisco; David S. Oderberg is Professor of Philosophy at the University of Reading (U.K.); and Kate Ward is Visiting Assistant Professor of Theology at Marquette University.

## Notes

1. See for discussion Jen Gunter, “The Medical Facts about Birth Control and Hobby Lobby—from an OB/GYN,” *The New Republic*, July 6, 2014, <https://newrepublic.com/>

- [article/118547/facts-about-birth-control-and-hobby-lobby-ob-gyn](http://www.theatlantic.com/health/archive/2014/03/heres-why-hobby-lobby-thinks-iuds-are-like-abortions/284382/); and Olga Khazan, “Here’s Why Hobby Lobby Thinks IUDs Are Like Abortions,” *The Atlantic*, March 12, 2014, <http://www.theatlantic.com/health/archive/2014/03/heres-why-hobby-lobby-thinks-iuds-are-like-abortions/284382/>.
2. See, for one assessment of what’s likely to come, Linda Greenhouse, “The Supreme Court’s Wishful Thinking about Compromise,” *New York Times*, May 26, 2016, [http://www.nytimes.com/2016/05/26/opinion/the-supreme-courts-wishful-thinking-about-compromise.html?\\_r=0](http://www.nytimes.com/2016/05/26/opinion/the-supreme-courts-wishful-thinking-about-compromise.html?_r=0).
  3. I use the terms “ethics” and “morals” interchangeably for present purposes.
  4. See for the text of RFRA (42 U.S. Code Chapter 21B) <https://www.law.cornell.edu/uscode/text/42/chapter-21B>.
  5. See the Pew Research Center’s report “U.S. Catholics Happy with Selection of Pope Francis,” March 18, 2013, <http://www.pewforum.org/2013/03/18/us-catholics-happy-with-selection-of-pope-francis/>; and the Guttmacher Institute’s “Guttmacher Statistic on Catholic Women’s Contraceptive Use,” February 15, 2012, <http://www.guttmacher.org/media/inthenews/2012/02/15/>. See further, for discussion, Peter Steinfels, “Why the Catholic Church Should Talk about Contraception,” *Washington Post*, September 11, 2015, [https://www.washingtonpost.com/opinions/why-the-catholic-church-should-talk-about-condoms/2015/09/11/94e45458-5313-11e5-933e-7d06c647a395\\_story.html](https://www.washingtonpost.com/opinions/why-the-catholic-church-should-talk-about-condoms/2015/09/11/94e45458-5313-11e5-933e-7d06c647a395_story.html).
  6. Compare Rick Garnett’s contribution to the SCOTUSblog symposium on Zubik, “Integrity, Mission, and the Little Sisters of the Poor,” December 17, 2015, <http://www.scotusblog.com/2015/12/symposium-integrity-mission-and-the-little-sisters-of-the-poor/>.
  7. Brief *Amicus Curiae* of United States Conference of Catholic Bishops et al., 26–27, <http://www.scotusblog.com/wp-content/uploads/2016/01/Zubik-USCCB-brief.pdf>.
  8. Thomas J. Higgins, S.J., *Man as Man: The Science and Art of Ethics*, revised ed. (Rockford, IL: Tan Books and Publishers, 1958), 341, 343. Justice Alito quotes from the 1949 edition, citing pages 353 and 355. Higgins’ definition of cooperation is more or less standard.

Compare James F. Keenan, S.J., “Prophylactics, Toleration, and Cooperation: Contemporary Problems and Traditional Principles,” *International Philosophical Quarterly* 29 (1989): 205–220, at 207: “Cooperation asks whether A can help B to act in light of an unconditional intent by B to act illicitly.” See also M. Cathleen Kaveny, “Appropriation of Evil: Cooperation’s Mirror Image,” *Theological Studies* 61 (2000): 280–313, at 293: “the category of cooperation [...] applies to situations in which the cooperator’s *act* and/or its fruits or byproducts are used to facilitate the wrongdoing of the principal agent.” More fully, 282: “one agent (the ‘cooperator’) faces a situation in which his or her act will somehow contribute, in a subordinate way, to a morally unacceptable action plan designed and controlled by someone else (the ‘principal agent’).”

9. Henry Davis, S.J., *Moral and Pastoral Theology*, vol. 1, *Human Acts, Law, Sin, Virtue*, ed. L.W. Geddes, S.J., 7<sup>th</sup> ed. (New York: Sheed & Ward, 1958), 341.
10. *Ibid.*
11. Higgins, *Man as Man*, 343.
12. Davis, *Human Acts, Law, Sin, Virtue*, 342. Compare David S. Oderberg, “The Ethics of Co-operation in Wrongdoing,” in *Modern Moral Philosophy*, ed. Anthony O’Hear (Cambridge: Cambridge University Press, 2004), 203–227, at 226: “the ethics of cooperation is a complex and subtle area of moral theory.”
13. Oderberg, “The Ethics of Co-operation in Wrongdoing,” 205.
14. Brief of 50 Catholic Theologians and Ethicists as *Amici Curiae* in Support of Petitioners, 2, <http://www.scotusblog.com/wp-content/uploads/2016/01/50-Catholic-Theologians-and-Ethicists1.pdf>.
15. *Ibid.*, 4.
16. See Oderberg, “The Ethics of Co-operation in Wrongdoing,” 213. Compare Charles F. Capps, “Formal and Material Cooperation with Evil,” *American Catholic Philosophical Quarterly* 89 (2015): 681–698, at 689, n. 21.
17. Oderberg, “The Ethics of Co-operation in Wrongdoing,” 209.

18. Keenan, "Prophylactics, Toleration, and Cooperation," 215.
19. Oderberg, "Co-operation in the Age of *Hobby Lobby*: When Sincerity Is Not Enough," *infra*.
20. Elizabeth Anscombe, "Action, Intention and 'Double Effect,'" *Proceedings of the American Catholic Philosophical Association* 56 (1982): 12–25, at 23.
21. Anscombe, *Intention*, 2<sup>nd</sup> ed. (Cambridge, MA: Harvard University Press, 1963), 36.
22. Blaise Pascal, *Les Provinciales*, in *Œuvres complètes*, ed. Michel Le Guern (Paris: Gallimard, 1998), vol. 1, 648–649.
23. Oberberg, "The Ethics of Co-operation in Wrongdoing," 206.
24. See Keenan, "Prophylactics, Toleration, and Cooperation," 214.
25. Oberberg, "The Ethics of Co-operation in Wrongdoing," 213.
26. I follow here Capps, "Formal and Material Cooperation with Evil," 686.
27. *Ibid.*, 689–690, n. 21.
28. This terminology follows Oderberg.
29. Oderberg at one point invokes "the plausible presumption that a person intends the freely chosen (i.e. duress-free) natural and probable consequences of his acts," with the implication that a person does not intend the consequences of acts chosen under duress. See "The Ethics of Co-operation in Wrongdoing," 214.
30. Kaveny, "Appropriation of Evil," 285, n. 9.
31. Oderberg, "The Ethics of Co-operation in Wrongdoing," 224.
32. See further Margaret Monahan Hogan, "Catholic Institutions within a Democratic Polity: A Potential Procrustean Bed," forthcoming in *Contemporary Controversies in Catholic Bioethics*, ed. Jason Eberl, a volume in the Springer series Catholic Studies in Bioethics, edited by Christopher Tollefsen. Contrast Nicholas P. Cafardi, "Cul-de-Sac Catholicism,"

*America*, April 12, 2010, <http://americamagazine.org/issue/733/100/cul-de-sac-catholicism>, and “HHS Revision Update II,” *America*, February 5, 2013, <http://americamagazine.org/content/all-things/hhs-revision-update-ii>.

33. Compare the *Commonweal* editorial, “Lights, Camera, Contraception? The USCCB’s Dubious Take on Religious Liberty,” May 17, 2016, <https://www.commonwealmagazine.org/lights-camera-contraception>.