Whose Conscience? Which Complicity?

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Near the very end of their paper on "Conscience Wars," Douglas NeJaime and Reva Siegal move from the ostensibly descriptive to the harshly evaluative. Those who make conscience based complicity claims—the plaintiffs in *Hobby Lobby* or in *Little Sisters*—aren't all that interested in accommodation, it turns out. Rather, they are trying to "integrate" us all into their vision of "community"--a "legal order shaped by their underlying religious convictions." They are not pluralists, who are willing to live and let live, but "evangelists," with religious liberty as a pretext for their evangelizing mission.

But couldn't the evangelists say the same thing in almost the same way? Those in favor of the contraceptive mandate use antidiscrimination or women's health as their pretext—*they* want a legal order shaped by their underlying secular convictions. *They* have claims about how to "live in community" with those who don't share their beliefs on "contested questions of sexual morality." They aren't pluralists, either. They are evangelists.

This is the state of the debate, unfortunately—so it is appropriate that NeJaime and Siegal call this situation a kind of *war* over conscience. And if this is where things stand, then the idea of religious accommodation—which always has held itself out as a way to get to a truce in the religious wars--is in real trouble. Bill Clinton, when it became clear in the Lewinsky affair that he could not come clean with the American people, that he could not admit that he had an affair and ask forgiveness without getting impeached or without having to resign, is reported to have said to Dick Morris, "We'll just have to win, then." In Nejaime's and Siegel's telling, *accommodating religious beliefs* is letting the other side win. It's not a truce, a way to get along; it's a defeat. And so we have to stop them, *we'll have to win, then*.

Who really believes in pluralism anymore? I hope I do, but RFRA is looking more and more like a poor vehicle for pluralism. That is, RFRA looks more and more like religious believers "winning" and antidiscrimination proponents "losing." And if the litigation in *Little Sisters* ends up in favor of the Little Sisters, we can imagine the story told by antidiscrimination advocates: it's just another instance of a majoritarian religion winning on an ever more attenuated claim of complicity.[2]

If we are to rehabilitate RFRA in the eyes of those on the side of antidiscrimination, which is what I want to do in this paper, that project has to have two aspects to it. The first, which is pro-religion, is establishing that RFRA really is in its own way an antidiscrimination statute. That means that the claims really are claims against discrimination of a sort, and not just religious special pleading. Religious believers want fair treatment, too, and sometimes fair treatment requires an accommodation. Here I disagree with Fred Gedicks, and argue for a rather expansive version of when religious believers are "burdened" under RFRA.

But the second aspect to this rehabilitation is pro-antidiscrimination. Antidiscrimination *is* a compelling governmental interest, and it should win out in a lot of cases. In fact, many missed how a lot of RFRA advocates were saying, regularly and forthrightly, that the private businesses would probably lose a lot of cases when antidiscrimination was in the balance—and that they probably *should* lose. Here I try to bridge the gap between me and NeJaime and Siegel.

In these clashes one side wins and the other side loses. That's the way law usually works. Religion is accommodated or it isn't; the government's compelling interest trumps or it doesn't. Someone is helped and someone is hurt. But there is a way that if both sides values are at least

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[2] Story other way, too.

acknowledged, then pluralism wins. Religious believers shouldn't be told that their religion isn't burdened when they sincerely think that it is; but at the same time, we shouldn't say that accommodations have "precisely zero" affect on the government's interest when this is probably false. After all, the government's compelling interest in these cases is also *someone's interest*, in getting health care or in getting a job. That interest should win in a lot of cases, but what the Court owes us above all is a fair and honest accounting of that interest. My point is a simple one, really: and it's that *process matters*. It matters when you are helping people avoid a hurt that you recognize that you might be hurting people too, and that the hurt might be unavoidable—but that it's a real hurt.

I. How RFRA Helps Religious Believers

Start with this picture, a sort of bizarro version of the NeJaime and Siegel article. Religious believers who assert not just that they do not *like* contraception but want their organization to be free of the obligation to provide contraception were (and are) called various names by opponents: bigots, anti-women, etc. Or consider the recent flap in Indiana over its state RFRA. There was name-calling there, too. The language got extreme, and harsh. The businesses that supported the exemption from antidiscrimination laws were at best homophobic and at worst Nazis—because of their religious convictions, sincerely held. If there are dignitary harms in being considered "sinners," they are dignitary harms in being called "Nazis", too. I assume, too, that we can consider the dignitary harm as swinging more or less free of the underlying truth of the matter being debated. Even if we are morally in the wrong on this or that issue, we can still be treated in ways we don't deserve, and that includes being called names.

NeJaime and Siegel are right that there are real-world harms to being denied contraceptive coverage. But consider the real-world harms if religious organizations are denied an accommodation. Hobby Lobby would lose money in the form of fines, and probably go out of business. Maybe not a *huge* deal, but Hobby Lobby runs a rather progressive company (in terms of wages, time off, etc.) and its workers would suffer if it went out of business. And then we perhaps get to more serious harms. Some hospitals, if denied an accommodation, would close; adoption serves would have to shut down if they had to approve adoption to gay couples. Other charities would probably follow suit. We can call such things churlish and maybe hope that things were different. But the facts don't change—or more appropriately, the convictions that would prompt these actions won't change. We either accommodate them, or we don't. But if we don't accommodate them, there are real world consequences to this.

So we could re-write "Conscience Wars" in this bizarro mode, pointing out how religious believers can face dignitary and concrete harms if they and their beliefs are not accommodated. Even here we may not get to the heart of the matter, which is that religious believers in general should have a right to pursue and practice their religious convictions. They should do so more or less free of insult and it is nice that religious believers do some good in the world. But at bottom, religious believers have a right not to be discriminated against. Freedom from discrimination on the basis of religious belief really is a civil right. I assume that the same is true of the antidiscrimination right on the other side of this debate: gays and lesbians should be able to live in the world without being discriminated against. That they are able to live in the world without being insulted and to engage in projects that help others—these are great things, but they are not at the root of the right. The root of the right is a norm against discrimination.

The fact that the religious beliefs that get protected are majoritarian should not be too the point. Even those in the majority have the right to free speech and privacy, etc. Rights are not just for groups in the minority. Or perhaps better: it is not the case that those in the majority *are in the majority in all facets of their lives*. We may be majorities with regard to one facet of our lives, but minorities in another. We may be part of a majority religion, but physically disabled—so we may not have to worry

too much about our religion being persecuted, but worry about access to buildings, etc. If we need to assert a right, it is usually because some majority—maybe a permanent majority, maybe a shifting coalition that just happens to be the majority at the time—is pressuring us, and risks violating that right.

What about the problem of attenuation? One major theme of "Conscience Wars," is that the burden asserted by religious organizations is becoming ever more attenuated. Fred Gedicks in his essay argues that there *is* a problem here, and that courts should be more aggressive in policing when a burden on the believer is or isn't "substantial." But there *are* substantial costs to not complying with the mandate absent an accommodation: fines for those businesses or organizations that don't comply. And if the question is whether the violation of their religion is substantial or not, well, there may be a difference here. The religious believer him- or her- or it- self may be the best judge of this: when what the government is asking them to do *goes too far* or whether it is something they can live with.

This sort of deference may seem exceptional, and to a certain extent it is, but I would think we should extend the same *kind* of deference to the other side. Don't question whether not having access to this or that contraceptive is really a burden—the point is a larger one, of principle. There's a real and perhaps significant deprivation, and that prevents full and equal treatment, even if the deprivation could be construed from a certain point of view as relatively minor. We should want to say, "*Who are you to say whether this access is really important or not that I don't have access to these different types of contraception. It's a denial of access, and I say it's important*."

I'll return to this point.[3] But I can bring this Part to a close with an example that I think many lower courts have gotten wrong, and for revealing reasons. Take a prison inmate who has a "strange," non-minority religious belief. He claims that his religious belief and practice is "substantially burdened" by the prison's food policy, which requires him to at least once a week—and sometimes more, in cases when there is "lockdown" of the prison—to forego a meatless meal. Instead his only option at those times is to go without food or eat the meals the prison provides, which means he violates his religious beliefs. This kind of thing happens a lot.

Should plaintiffs like this win on RFRA? In the end maybe not, but I think it's important *how* they lose, if they lose. A lot of courts in this situation second guess the religious believer—they say missing one meal is *de minimis*, not enough to get to the level of a substantial burden. *But how,* I want to say, *do they know this is the case*? Even if our prisoner's beliefs were not shared by other members of his sect, that he was a minority of one, he could *still* be substantially burdened. If he loses (and he probably should) I want to insist that there is a value in losing in the right way, at a later point down the road, at the compelling interest stage. That is, his claim to be substantially burdened deserves to be validated even if the prison has a compelling interest in running its meal policy the way it does. Getting the process right matters, because recognizing the values at every step of the way matters, and treating the parties involves matters.

II. How RFRA Hurts Others, Sometimes

The *Hobby Lobby* opinion has the strange distinction of being one that both affirms the compelling interest at stake (basically conceding the government has shown a compelling interest) but at the same time, being open to some pretty fair accusations that it doesn't take the compelling interest seriously enough. The interest (broadly construed) is women's health, and the Court simply assumes (for the sake of argument) that promoting women's health is a very good thing, and moreover, that it is something that the Affordable Care Act does promotes. But the Court rules against that interest anyway, because it says that there are other means to get to that end, means that accommodate religion rather than run over it. It is in saying that this "means" is adequate that the Court suggests that

[3] Baseline problem.

it might not be taking the compelling interest all that seriously. Consider two things it does in this respect.[4]

The first thing it does is to suggest, in passing, that the state might have an obligation to start a *wholly new* program that would subsidize contraception for everybody. If the government really did believe that contraception was so important to women's health, then, the opinion seems to be asking, why not go whole hog? Why leave *anything* to the market, and to employers? This is bizarre for several reasons. First, it potentially upends a lot of free exercise jurisprudence—churches don't have to pay minimum wage, because the state could subsidize it, etc.[5] Second, and more importantly, it is not obvious that such a program *would* pass, and even if it did, there would be massive delays in getting it up and running. It is not clear that, in fact, in practice, the full government subsidy option would be realistic *or for that matter* any more effective than what Obamacare itself proposed, viz., having employers cover contraception out of their insurance plans.

And this gets me to the second thing that the Court doesn't, I think, sufficiently take into account when it says that there is another legitimate means for the government to use to get to itsend of promoting women's health. [6] The "other means" the Court eventually settles on is the one that the Obama administration proposed for religious non-profits (the one that is now being challenged in the *Little Sisters* litigation): that the insurance companies themselves pay for contraceptive coverage themselves. This is the one that the Court says would involve a "precisely zero" cost to women. But this is just not true. What *would* have had no ("zero") cost to women would be if the women were covered by their employer's insurance—they would have been covered *already*. By the time *Hobby Lobby* gets to the Court, *some* women have already paid *some* cost.

Maybe we don't count the time to litigation as part of the cost—we're just in a state of equipoise then. Fine. But even after the Court made the *Hobby Lobby* decision was handed down there was delay in women getting contraceptive coverage. Maybe that is de minimis. But hold on. Certainly there is *some point* where the delay would become something that cut against the government's compelling interest. If we take the interest seriously as *compelling*, there has to be—because if we allow that any amount of delay to be permissible, we're basically saying *we don't think the interest is all that important*. The precisely zero remark glosses over this—it needs to be at the very least qualified. Because not only is it not true, *it just can't be true.* The Court has to be assuming that *some* delay in getting coverage to women is perfectly OK—that is, that *some* delay is consistent with the government's compelling interest.[7]

I think in the end its clear that the opinion in *Hobby Lobby* doesn't count the cost fully—to show that helping hurts some of the parties involved, that the fit between means and ends isn't perfect on the other means. The Court ends up being at least a little disingenuous in assuming the compelling interest on the one hand and then hiding the ball as to the costs to that interest by the alternative means on the other. But maybe Hobby Lobby still wins. There has to be some balancing of interests, and maybe the means is good enough and the promotion of the compelling interest doesn't have to be *as good* as it would have been under the original means. It just has to be *very nearly* as good—and if it is, then the protection of religious liberty wins out. That would seem right, given that the point of RFRA is to tip the balance in favor of religious liberty.

But again, the balance should be *tipped* in favor of religious liberty; it shouldn't always be a slam dunk in favor of religious liberty. The promotion of women's health and even the seamless running of the Affordable Care Act both seem to be good candidates for compelling interests that are *important*

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[4] Also note the extended dicta discussion of grandfathered plans, etc.

[5] Alamo, e.g.

[6] Gedicks.

[7] Respond to Lund point, "when we get to it, the cost will be zero."

and powerful. The *Hobby Lobby* opinion did us no favors by punting on the question of what made the interest here compelling, because it just (sort of) assumed that they were—and shifted the question to the adequacy of the alternative means. It did say preventing racial discrimination was a compelling interest. The Indiana RFRA defenders were, on the whole, less cagey about what interests are compelling—in fact, they conceded that the antidiscrimination interest *would probably and should probably* win out in a lot of the cases that opponents of RFRA worried about. This was a point frequently lost in the debates. The point was something like, "Yes, there are really important state interests here, we just ask you to go through the balancing; we are not saying that we'll win, we're just saying that there's a burden on the believer."

If we lose that difference, then RFRA as a policy of accommodation is a lost cause. Courts need to be counted on not just only to carefully assess the compelling interests in each case, but also the affect on third parties. They should not ignore real burdens—real hurt—on the side of religious believers. Nor should they ignore the real cost—the real hurt—to parties on the other side, which is not just the government, but those who stand to benefit from the government's efforts to help. The point here is modest, and it is again a point about process, and respecting the participants in the process. We have to see the *burdens* on both sides before making a decision about accommodation. Courts should defer to plaintiffs who say that there is a burden, but courts should also not skimp on noting the costs to the government of accommodating that burden. I do not think we can say at the outset what interests are automatically compelling, or for that matter, what burdens will be substantial.[8] But we should do our best to acknowledge both of them, in all of their fullness.

Conclusion

[To be added]

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