Symposia & Debate

Obamacare and Conscientious Objection
Some Introductory Thoughts

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The United States *Patient Protection and Affordable Care Act* (HR 3590, "Obamacare", or, as we shall call it, "the ACA") was passed in spring 2010 and upheld by the United States Supreme Court in summer 2012. The main aim of the ACA is to reduce the number of uninsured Americans and the overall costs of health care in America. This symposium discusses one type of argument that critics have levelled against the ACA. Arguments of this type loomed large in discussions of the legal challenge to the ACA. According to them, the ACA does not accommodate rights of conscientious objection to the ACA mandate to fund contraceptive and, as some of the allege, abortive services.

For example, as the Supreme Court was deliberating, Timothy Dolan, the archbishop of New York and president of the US Conference of Catholic Bishops, wrote in the *Wall Street Journal*,

> Coercing religious ministries and citizens to pay directly for actions that violate their teaching is an unprecedented incursion into freedom of conscience […] Quakers and others object to killing even in wartime, and the government respects that principle for conscientious objectors. By its decision, the Obama administration has failed to show the same respect for the consciences of Catholics and others who object to treating pregnancy as a disease (Dolan 2012).

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Archbishop Dolan specifically lamented…

> [t]he sweeping new health-care mandate that requires employers to purchase contraception, including abortion-producing drugs, and sterilization coverage for their employees […] all but a few employers will be forced to purchase coverage for contraception, abortion drugs and sterilization services even when they seriously object to them (Dolan 2012).

And, he warned, these problems of conscience threaten even ordinary citizens: "All who share the cost of health plans that include such services will be forced to pay for them as well" (Dolan 2012).

This symposium discusses arguments of this type in the context of the ACA. But it also uses these arguments as a springboard for gleaning general lessons about legitimate and illegitimate demands by religious accommodation for conscientious objectors.

Legal scholar Holly Fernandez Lynch's contribution introduces us to the ACA and the challenge of conscientious objection to the individual mandate to purchase health insurance or to the employer mandate to provide coverage of certain preventive health services, including contraceptives. She describes the legal accommodations available in both contexts, as well as their limitations and possible legal status in light of pending litigation. Lynch concludes by offering her own view as to whether these accommodations are appropriate.

The three following contributions all focus on the level of proximity that exists between being forced to act against one's fundamental moral principles and being forced to pay taxes to fund others who act in violation of those principles.

Elizabeth Fenton asks whether her 'compromise position' on conscientious objection and health service provision leaves room for legitimate tax resistance in the ACA case. She offers a twofold test of the legitimacy of demands for accommodation for religious conscientious objection, based on 'fairness' and on 'moral culpability'. With respect to fairness toward professionals – pharmacists or physicians who object to providing

goods like the morning-after pill or abortive services – Fenton points out that under normal circumstances such professionals will have freely chosen their occupations. And if they did, she holds that they should be granted little room for exemption. Other things being equal, ordinary taxpayers would have stronger claims to conscientious objection, to facilitating what *they* find deeply objectionable through tax activities. Most taxpayers could not possibly evade the tax system simply by picking a different profession. Along the same lines, one could compare the difference between exemptions that one should give to professional soldiers and those for non-professional conscripts; the claims of conscripts seem to stand on firmer ground than those of professional soldiers. War tax resisters are like conscripts – and so are ordinary taxpayers. This also raises the important question of whether, within the ACA, the employer's mandate and the individual mandate should be treated in the same way. Being an employer may be more voluntary than being a mere tax-paying employee.

Fenton's emphasis on the voluntariness of membership weighs in favour of recognizing religious opposition to funding through tax activities that one finds objectionable, such as contraception for some Catholics. The second part of Fenton's test, that is, moral culpability, weighs against it. For Fenton, culpability with respect to a conscientiously-objectionable action depends on the *directness* of one's contribution to that action. Helping to fund conscientiously-objectionable actions is hardly the same thing as performing them. In this regard, the situations of conscripts and ordinary taxpayers are very different. Conscripts might have to kill people directly; taxpayers will not have to commit such acts directly. At worst, they will fund others who will kill. In short, the degree of directness seems to set apart the situations of doctors who are loath to perform abortions and of military service objectors on the one hand, and that of ACA objectors on the other. What ACA objectors oppose is not committing actions that they take to be inherently objectionable, only those (namely, paying tax) that are tainted by facilitating actions that they take to be inherently objectionable (see Table 1 below).

Annabelle Lever points out that not all opponents of contraception, or even abortion, oppose them on the ground that they would amount to murder, nor do those who believe abortion to be murder invariably oppose laws that legalise it, or taxation that supports it. Hence, she argues, we ought to be careful when comparing opponents of contraception and abortion to pacifists who oppose military service. Lever also emphasizes voluntariness of membership, but in a different way from Fenton. For Lever, "As no religion has a duty to provide public services to others […] there is no threat to freedom of religion in requiring major providers of public services to abide by generally applicable laws, or to risk losing state funding for public service provision" (138).[1] And like Fenton, Lever relies on concerns about directness of involvement.

Lever also ties the legitimacy of accommodation for religious objectors to the *importance* to third parties of the controversial services that it is up to the objectors to provide: non-availability of "sweets and other non-essential goods" for third parties is not the same as the non-availability of "goods which unquestionably constitute something of enormous importance to most people," such as adoptive services (for homosexual couples) and contraceptive and abortive services. And Lever gives high priority to the question: how *substitutable* are religious objectors in providing such important services? Are there alternative ways to provide similar services to third parties, with minimal costs to these parties? For Lever, non-discrimination in the provision of important services takes priority over and constrains the freedom not to provide services: "where religious hospitals are the main source of medical care in their area, or the main source of care for those lacking expensive insurance, then the state has compelling reason to ensure that the services cover contraception and adoption" (139). What Lever emphasizes here could be referred to as the 'discriminatory impact' of refusal to perform the conscientiously-objectionable action. It also points at the fact that since some types of involvement are more geographically circumscribed than others, religious

accommodation can mean that some third parties face severe risks and serious burdens when the objector refuses to perform them. This is an obvious problem insofar as positive rights go unfulfilled but Lever's appeal to 'discrimination' may suggest a distributive problem as well. Risk pooling and even burden sharing across geographical locales might have made religious accommodation more legitimate.

Lever's emphasis on the *availability of alternatives* (given geographical and other constraints on finding such alternatives) may suggest that conscientious objection to paying tax tends to block third parties' access to needed services *less* than does conscientious objection to act in kind. But note that failure to pay taxes can also have discriminatory results. When health care is funded through *local* taxes, geographical concentrations of objectors might arise and objection to tax could threaten the actual exercise of rights by local beneficiaries. Conversely, military service, despite involving more than a *cash* contribution, has wide, not merely-localized, impact – as does the refusal of such service.

The following table seeks to map various actions that have given rise to conscientious objection claims. It compares them on the basis of three possible determinants of the legitimacy of conscientious objection mentioned thus far: the voluntariness of the objector's membership, the directness of the contribution of his or her action to outcomes that he or she deems to be intrinsically objectionable, and the degree to which the impact of his or her refusal to perform these actions would be discriminatory. Some actions that display a high level of one determinant display only a low level of another.

Note in this table the interesting case of war conscripts. Conscripts directly commit violence and other acts that pacifists find highly objectionable. And yet, the involuntary nature of conscription or the substitutability and unconcentrated impact of most conscripts' conscientious objection to war participation may account for our intuition that conscripts are entitled to refuse to participate in wars.

	Low level of…	*High level of…*
…voluntariness of membership	• War tax • Compulsory health care funding • Conscription	• Work (as a physician, pharmacist, professional soldier)
…directness of contribution	• War tax • Compulsory health care funding	• Work (as a physician, pharmacist, professional soldier) • Conscription
…discriminatory impact	• War tax • Compulsory health care funding • Conscription	• Work (as a physician, pharmacist)

Table 1: Legitimacy of Conscientious Objection: Three Determinants

Noam Zohar develops an argument from unsustainability or non-generalizability against excessive accommodation in religious conscientious objection. In any democracy, Zohar points out, each of us is likely to object honestly to at least some ways in which the state spends its budget. Therefore, "if each citizen were to withhold taxes that support state activities" with which he or she disagrees, this would lead to "anarchy" (144). Zohar then envisages a case in which tax resistance would be limited to funding life and death-affecting activities, suggesting a further way in which to disambiguate a concern about 'directness', which we may call 'directness of what?'. Both killing in war and providing health care are directly related to life and death matters, in that both can directly make an identifiable person live or die. By contrast, road construction, environmental policy, and other foci of public debate are only *indirectly* matters of life and death. Roads and their constructors can cause death, but, unlike drivers, they do not do so directly. This suggests that 'directness' might be disambiguated as follows. Directness of impact *of* policy could refer to the degree to which a given policy is directly a life and death matter; directness of impact *on* policy could refer to the degree to which a person actually contributes to a policy.

Zohar adds that even if one limits oneself to cases involving policy with direct impact (very direct impact *of* policy), the following non-complicity principle remains too strong: "If I contribute to X being done by another agent, then my own contributing action is tainted by the evil of x and is therefore also forbidden" (146). As Zohar puts it, "living up to such a sweeping conception of complicity is impossible" (146). Tax payers make minute contributions (*indirect* impact) to almost every policy. He proposes instead to limit the realm of legitimate conscientious objection in the case of tax resistance to instances of 'absolute evil', only to ones that lie 'beyond the pale' of even pluralistic disagreement. Beyond such truly extreme cases, the very fact that a policy is directly linked to acts that a citizen finds objectionable is insufficient, because the impact of each taxpayer *on* policy is relatively indirect. Zohar agrees that paying taxes to fund genocide would qualify as grounds for conscientious objection; but funding a defensive war, capital punishment, *or* contraception and abortion would not.

I. Glenn Cohen offers a sophisticated treatment of a different aspect of conscientious objection to the ACA. So far we have mentioned the individual and the employer's potential objections to mandates that might bind them to fund policies they oppose. Cohen discusses a third party: in a federal system, each state receives funding from the federal government, but also legal restrictions attached to that funding. Do states have a right to object to those restrictions? Does it make sense then to apply the conscientious objection concept to states, as opposed to individuals? If, for example, the rationale behind rights to conscientious objection is the value of the moral integrity of a *person*, does it make sense to apply this to a merely-legal person such as a state? And doesn't it make sense in turn to apply this to employers who are likewise merely-legal persons? Cohen inquires whether the ACA's provisions depriving states from Medicaid funding if they refuse to expand their covered populations – the one piece of the ACA the Supreme Court struck down as unconstitutional – is, as the Supreme Court concluded, inappropriately coercive.

Finally, philosopher Peter Singer's reprinted contribution invites us to think about the differences between religious freedom claims and conscientious objection claims. The latter, Singer believes, are seldom based on religious mores proper. In particular, "Catholicism does not oblige its adherents to run hospitals and universities" (165).

Beyond questions about the American federal context, healthcare, the law, and contraceptive service funding, this symposium attracts our attention to under-explored questions about conscientious objection. Several contributions suggest that different variables play a role in determining the legitimacy of conscientious objection and the duty to accommodate conscientious objectors. Mapping and examining them could be useful. In particular, it might be fruitful to work out why we have different moral intuitions about different types of conscientious objection. First, to what extent do objectors' circumstances and personal backgrounds matter? In this vein, it seems pertinent that the voluntariness of being an employer or a professional is typically greater than that of being an employee or a taxpayer or a conscript. Second, how far should we distinguish between performing actions that one sees as intrinsically objectionable *versus* paying taxes that fund such actions by others? Similarly, is it relevant to separate actions that are normally matters of life and death and those that directly affect lesser matters? Third, it may be useful to work out the exact relevance of the impact of conscientious refusal on others: how much does it matter whether the objector is 'substitutable' in the fulfilment of positive rights? How much does it matter whether the detrimental effect of his or her refusal is concentrated among some victims, rather than more widely spread?

The analysis leaves open further questions. First, while allowing for exemptions, should we make conscientious objectors internalize the social costs of refusal, or should non-objectors share in or entirely cover these costs – perhaps because any participation in the costs amounts to the tax that gave rise to conscientious objection? Second, should we intentionally make conscientious refusal costly, by fining objectors (and isn't *that* a

tax?) or by demanding services in return, as we often do for conscientious objectors to army conscription? Third and relatedly, should rights to refuse funding of conscientiously-objectionable activities be accommodated more easily for taxes and other mandated payments that have been (perceived as) formally earmarked for these activities? All in all, this symposium highlights the opportunities for more fine-tuned theories in the area of conscientious objection and religious accommodation.[2]

Works Cited

Dolan, Timothy M. 2012. "ObamaCare and Religious Freedom." *Wall Street Journal*, January 25.

Notes

1. Note also a different version of the argument: "No one has a *religious* duty to be the main provider of important public services." (138; italics ours).

2. We wish to thank Dan Brock, Leah Price, and an anonymous referee for their comments. Special thanks go to Louis-Léon Christians, Sophie Minette and Gérald Tilkin, who triggered our interest in this topic. For the sake of a more balanced debate, the symposium editors approached two prominent conservative Catholic thinkers in the hope that they would defend conscientious objection to the ACA. Both declined or ran short of time, too late to contact alternate contributors.