

## RELIGIOUS OBJECTIONS TO THE DEATH PENALTY AFTER *HOBBY LOBBY*

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In *Glossip v. Gross*,<sup>1</sup> the Supreme Court held that in order to prevail on the claim that a method of execution is cruel and unusual punishment, petitioners must prove that there is an available alternative that entails a lesser risk of pain. In this case, the state was using a method that is allegedly more painful than drugs used in the past because manufacturers of the preferable drugs objected to selling them for the purpose of executions.<sup>2</sup> These manufacturers are not alone in their desire to boycott the death penalty. Many religious groups have declared opposition to the death penalty, and jurors regularly report that their religious beliefs prevent them from imposing the death penalty.<sup>3</sup> Simultaneously, the law has recently become friendlier to religious objections to government policies. In *Burwell v. Hobby Lobby*,<sup>4</sup> the Court recognized a new kind of religious freedom claim—which has been described as a “complicity-based consciousness claim”<sup>5</sup>—in which a religious believer objects to a law that arguably makes him or her help another person commit an action that he or she believes is a sin. *Hobby Lobby* struck down a law requiring employers to cover contraceptives in their employees’ health insurance, holding that religious employers who oppose contraception should not be required to indirectly subsidize its use.

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1. No. 14-7955 (U.S. June 29, 2015).

2. *Id.* at 5-6. The Court held that the petitioners’ challenge must fail because they had not identified any available drugs that could be used in place of the lethal injection drugs, which the state is no longer able to obtain. *Id.* at 14.

3. Peter Steinfelds, *Beliefs; Religion Becomes a Force Behind a Change in the Public’s View on Capital Punishment*, N.Y. TIMES (May 12, 2001), <http://www.nytimes.com/2001/05/12/nyregion/beliefs-religion-becomes-force-behind-change-public-s-view-capital-punishment.html> (discussing a number of religious leaders, including Catholics, Jews, and Quakers, who have declared opposition to the death penalty).

4. 134 S. Ct. 2751 (2014).

5. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Consciousness Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015).

Following *Hobby Lobby*, religious nonprofits have challenged the requirement that they file a form declaring their religious objection to contraceptives, because this obligates their insurance company to cover them, and thereby facilitates their employees' use of contraceptives.<sup>6</sup>

In this short essay, I consider how the logic of the complicity-based claims in *Hobby Lobby* and subsequent nonprofit cases could be applied to challenge the common policy of "death qualifying" jurors in capital punishment cases—removing any juror who reports conscientious opposition to the death penalty. I argue that just like religious nonprofits that object to reporting a religious objection to contraceptives on the grounds that it enables someone else to provide contraceptives, a juror might object to reporting a religious objection to the death penalty on the grounds that it will enable someone else to replace them who is more likely to impose the death penalty.

### I. *HOBBY LOBBY* AND THE NEW WAVE OF COMPLICITY-BASED CLAIMS

In *Hobby Lobby*, religious employers challenged the Affordable Care Act's requirement that employers include contraceptives in employees' insurance coverage as a violation of the Religious Freedom Restoration Act (RFRA),<sup>7</sup> which prohibits the government from "substantially burden[ing]" a person's religious exercise unless the policy is the least restrictive means of serving a compelling governmental interest.<sup>8</sup> The Court held that requiring employers to provide insurance coverage for contraceptives substantially burdened their religious beliefs, as it mandated employers to indirectly subsidize their employees' access to contraceptives. The Court reasoned that the government had failed to show that it had a compelling interest in requiring small, for-profit religious corporations to cover contraceptives because it had already exempted religious nonprofits from this requirement, and the government could extend the same exemption to religious for-profits.

Yet, in the wake of *Hobby Lobby*, a number of religious nonprofits brought a new wave of complicity-based challenges to the process for claiming a religious exemption from the contraceptive mandate<sup>9</sup>: to avoid the mandate, they are required to file a form declaring their religious opposition with their insurance company and the government, and the insurance company is then obligat-

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6. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014).

7. 134 S. Ct. 2751 (2014).

8. 42 U.S.C. § 2000bb-1(a)-(b) (2013).

9. *Wheaton Coll.*, 134 S. Ct. at 2807 (2014); *Little Sisters of the Poor*, 134 S. Ct. 1022.

ed to cover contraceptives for their employees independently.<sup>10</sup> As Justice Sotomayor put it, the religious nonprofits argue that “filing of a self-certification form will make [them] complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which [they] object[.]”<sup>11</sup> The Supreme Court has issued several preliminary injunctions exempting these claimants from having to file for exemptions while these cases are pending before the lower courts.<sup>12</sup> This suggests that these claims have a high chance of succeeding on the merits.<sup>13</sup> Douglas NeJaime and Reva Siegel observe that the novel “complicity-based consciousness claims” in *Hobby Lobby* and the religious nonprofit cases “differ in form” from preceding religious freedom claims: rather than being forced to personally violate their beliefs, the plaintiffs complain of “being made complicit in the assertedly sinful conduct of others,”<sup>14</sup> and they “focus on the conduct of those outside the faith community.”<sup>15</sup>

About twenty states<sup>16</sup> have enacted laws analogous to the federal Religious Freedom Restoration Act. Controversy surrounding these laws has focused largely on whether they will allow business owners and employers to claim religious exemptions from laws prohibiting discrimination on the basis of sexual orientation.<sup>17</sup> Here I consider one other potential application of these re-

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10. *Wheaton Coll.*, 134 S. Ct. at 2809 (Sotomayor, J., dissenting) (quoting 45 C.F.R. § 147.131(b) (2013); 78 Fed. Reg. 39874 (2013); 29 C.F.R. § 2590.715-2713A(b)(1) and (c)(1) (2013)).

11. *Wheaton Coll.*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting).

12. *Id.* at 2807 (majority opinion); see also *Little Sisters of the Poor*, 134 S. Ct. 1022 (granting injunction); *Zubik v. Burwell*, 135 S. Ct. 1544 (2015) (granting stay); *Priests for Life v. U.S. Dep’t of Health and Human Servs.*, 2013 U.S. App. LEXIS 26035 (D.C. Cir. Dec. 31, 2013) (granting injunction pending appeal), *cert. denied*, 134 S. Ct. 1785 (2014).

13. See *Wheaton Coll.*, 134 S. Ct. at 2808 (Sotomayor, J. dissenting) (noting that the issuance of an emergency injunction is only appropriate where “the legal rights at issue are indisputably clear” (quoting *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993))). While the Court has granted stays in a number of these cases—suggesting there is merit to the plaintiffs’ claims—a number of lower courts have rejected the religious nonprofits’ argument. See, e.g., *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 13-1540 (10th Cir. July 14, 2015); *E. Tex. Baptist Univ. v. Burwell*, No. 14-20112 (5th Cir. June 22, 2015); *Geneva Coll. v. Sec’y of U.S. Dep’t of Health and Human Servs.*, 778 F.3d 422, 427 (3d Cir. 2015).

14. NeJaime & Siegel, *supra* note 6, at 2518.

15. *Id.* at 2520.

16. See Dave Johnson & Katie Stiemetz, *This Map Shows Every State with Religious Freedom Laws*, TIME (Apr. 2, 2015), <http://time.com/3766173/religious-freedom-laws-map-timeline>. According to the National Conference of State Legislatures, at least twenty-one states have Religious Freedom Restoration Acts. See *State Religious Freedom Restoration Acts*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

17. E.g., Jeff Guo, *Here’s How to Use Religious Freedom Laws to Fend Off a Gay Discrimination Lawsuit*, WASH. POST (Apr. 3, 2015),

religious freedom laws, as they have been interpreted to cover complicity-based claims: the religiously contentious practice of capital punishment.

## II. “DEATH QUALIFYING” JURORS

In criminal cases in which the death penalty may be imposed, jurors are usually “death qualified”—required to fill out a form reporting any religious opposition to the death penalty—and those with objections are almost always struck from the jury.<sup>18</sup> Some states have statutes prohibiting jurors with a conscientious objection to the death penalty from serving on a jury in a capital case.<sup>19</sup> Criminal defendants have challenged the practice of excluding anti-death penalty jurors on the ground that it violates the impartial jury requirement of the Sixth Amendment.<sup>20</sup> The Court has rejected these claims, holding that the prosecution may remove jurors who are “substantially impaired” in their “ability to impose the death penalty.”<sup>21</sup> It reasoned that “the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.”<sup>22</sup> Defendants have also challenged religion-based peremptory strikes (e.g., eliminating all Muslims) under *Batson v. Kentucky*,<sup>23</sup> which held that the Equal Protection Clause prohibits race-based peremptory strikes.<sup>24</sup> In religion-based *Batson* cases, appellate courts have held that it is not permissible to strike jurors based solely on their religious affiliation (i.e., eliminating someone just because they are Muslim, without any reason that their religion would impact their judgment), but it is permissible to

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<http://www.washingtonpost.com/blogs/govbeat/wp/2015/04/03/heres-how-to-use-religious-freedom-laws-to-fend-off-a-gay-discrimination-suit>.

18. Clay S. Conrad, *Are you “Death Qualified”?*, CATO INST. (Aug. 10, 2000), <http://www.cato.org/publications/commentary/are-you-death-qualified>.

19. For example, California’s Trial Jury Selection and Management Act provides that a juror may be challenged for bias “[i]f the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.” CAL. CIV. PROC. CODE § 229(h).

20. *E.g.*, *Uttecht v. Brown*, 551 U.S. 1 (2007).

21. *Id.* at 9. This implies that a juror who refuses to answer a voir dire question about his or her willingness to impose the death penalty would also almost certainly be struck for cause, since the Court has deemed opposition to the death penalty a relevant factor that the prosecution may consider. *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 153 (1878) (noting that the prosecution struck a juror who refused to answer a voir dire question out of fear of self-incrimination).

22. *Uttecht*, 551 U.S. at 9.

23. 476 U.S. 79 (1986).

24. *Id.*

strike a juror when the juror states that a specific religious belief, such as opposition to the death penalty, will alter their judgment in the case.<sup>25</sup>

### III. A NEW CHALLENGE TO DEATH QUALIFICATION AFTER *HOBBY LOBBY*

The logic of the complicity-based claims in *Hobby Lobby*, and especially the religious nonprofit cases, makes a new type of religious challenge to the practice of death qualifying jurors conceivable. This claim would be based on religious freedom acts (state or federal), as opposed to the Sixth and Fourteenth Amendment claims described above. A religious juror's argument would be analogous to that of the religious nonprofits that object to reporting their objections to contraceptives because it means that someone else will provide contraceptives in their place. This claim essentially argues that when a party voices a religious objection to a policy that applies to them, no one else should be allowed to carry out the practice over their objection, since this will make the act of objecting an act of complicity. Likewise, a juror could argue that being forced to report religious opposition to the death penalty makes him or her complicit in its imposition—he or she will be replaced by another juror more willing to impose the death penalty. If, as the religious nonprofit employers argue, reporting a religious objection to contraceptives violates their religious freedom because it enables someone else to provide contraceptives, being forced to report a religious objection to the death penalty violates the juror's religious freedom because it enables someone else to impose the death penalty. In support of their claim that the death qualification process imposes a substantial burden on their religious freedom, religious jurors could point out that the Court has long recognized that individual jurors have a strong participatory interest in serving on a jury: "With the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."<sup>26</sup> Excluding jurors with certain religious beliefs from capital cases excludes their viewpoints from this democratic institution in cases where their beliefs are most salient.

This RFRA claim is distinct from Sixth Amendment challenges to the practice of death qualifying jurors and Fourteenth Amendment challenges to peremptory strikes based on religion. In challenges relying on the Sixth Amend-

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25. See, e.g., *United States v. Brown*, 352 F.3d 654, 666-67 (2d Cir. 2003) (holding some religion-based peremptory challenges unconstitutional); *United States v. DeJesus*, 347 F.3d 500, 511 (3d Cir. 2003) (distinguishing "between a strike motivated by religious beliefs and one motivated by religious affiliation," and holding that strikes based on specific beliefs are acceptable); see also *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (stating in dicta that "it would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, . . . [but] [i]t would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing.").

26. *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

ment right to an impartial jury, the Court has not applied RFRA's strict scrutiny framework, which requires the state to show that the policy is the least restrictive means of serving a "compelling" government interest. Rather, the Court has acknowledged that the state has a "strong" interest in having jurors who are able to apply capital punishment within the framework state law prescribes,<sup>27</sup> but it did not ask whether that state interest was compelling. Furthermore, in Sixth Amendment cases, the right at stake was the defendant's right to an impartial jury, not the juror's right to religious freedom. Here, the claim is based on the juror's right to religious freedom and their participatory interest in serving on the jury. Insofar as the juror's (rather than the defendant's) right is being asserted, this RFRA claim is closer procedurally to a *Batson* challenge brought under the Fourteenth Amendment, where the defendant asserts the juror's Equal Protection rights. But this RFRA claim also differs in substance from the *Batson* challenges to religion-based peremptory strikes because it does not argue that the juror was invidiously discriminated against based on religious affiliation. Rather, the juror in this case admits that his or her religious belief is relevant to jury service. But he or she seeks a religious exemption from the policy of excluding jurors who oppose the death penalty in capital cases.

There are several procedural methods by which religious opponents to the death penalty might be able to rely on state or federal RFRA's to bring this sort of challenge to the practice of death qualifying jurors. In *Carter v. Jury Commission of Greene County*,<sup>28</sup> the Court held that a juror who was wrongfully struck based on race has standing to bring suit against the state on his or her own behalf for injunctive relief ordering the state to eliminate the practice that caused the discrimination in jury selection. In a case like this, the remedy sought would be an injunction prohibiting the state from forcing jurors to report their conscientious objections to the death penalty, and striking them on this basis. *Carter* suggests that individual religious jurors (or an organization of them) would have standing to bring suit seeking this sort of declaratory and injunctive relief. In states like California, which have statutes requiring death qualification, religious members of a jury pool (or a religious organization whose members have been struck from jury pools) would have standing to challenge the state's statute as applied to them. Finally, rather than the juror bringing the claim, this sort of RFRA claim might also be brought in the same manner as a *Batson* claim, in which the criminal defendant has third-party standing to assert the Equal Protection rights of jurors who are struck based on race (this is true even if the defendant is not the same race as the juror who was struck, which suggests that a defendant could assert the rights of a juror who is

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27. *Uttecht*, 551 U.S. at 9.

28. 396 U.S. 320, 321 (1970).

not the same religion).<sup>29</sup> In a RFRA challenge to excluding jurors based on religious objections, the defendant would be asserting the religious freedom rights of jurors who were struck. In these challenges, the remedy sought would be for the court to enjoin the practice of death qualifying jurors who hold religious objections to the death penalty—i.e., to allow them to serve on the jury regardless of their views on capital punishment.

And if the religious nonprofits succeed in their claim that filing a religious objection is a substantial burden on religious exercise, there is reason to believe RFRA would require states to accommodate jurors' religious beliefs. RFRA mandates strict scrutiny for any substantial burden on religious exercise. This requires the state to show that its policy is the least restrictive means of serving a compelling governmental interest. In *Hobby Lobby*, the Court explained that the compelling interest standard requires a court to “loo[k] beyond broadly formulated interests and to scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants—in other words, to look to the marginal interest in enforcing the [policy] in these cases.”<sup>30</sup> And the Court stressed that the least restrictive means standard is “exceptionally demanding.”<sup>31</sup>

In this case, the juror would argue that the state lacks a compelling interest in ensuring that every member of a particular jury is willing to impose the death penalty, as opposed to life without parole. In Sixth Amendment cases the Court has said that the state has a “strong interest” in having jurors who are able to administer capital punishment according to the framework provided by state law,<sup>32</sup> but it has not addressed whether the state has a *compelling interest* in a jury being willing to impose the death penalty, as opposed to alternative punishments such as life without parole. The fact that a legislature has made the death penalty available as one punishment for a crime does not establish that the state has a compelling interest in the jury selecting the death penalty, as opposed to life without parole, in any particular case.<sup>33</sup> The state would have to explain why its penal and law enforcement interests could not be equally served by life without parole. This would be a factual question for the trial court to evaluate in a particular case.

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29. *Powers*, 499 U.S. at 410 (“[A] criminal defendant has standing to raise the equal protection rights of a juror excluded from service.”).

30. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2779 (2014) (quotations omitted).

31. *Id.* at 2780.

32. *Uttecht*, 551 U.S. at 9.

33. For example, in *Hobby Lobby*, the Court recognized that the government may have a compelling interest in granting women access to contraceptive products, but found that the government had failed to show that it had a compelling interest in applying the contraceptive coverage requirement to every single closely-held, for-profit religious employer.

## CONCLUSION

This complicity-based challenge to the practice of death qualifying jurors is largely contingent on the outcome of the religious nonprofit challenges to the exemption from the contraceptive coverage mandate. I do not intend to express an opinion on whether either of these claims should prevail. Rather, my purpose is to illustrate the potential implications of the religious nonprofits' claim that reporting a religious objection violates religious freedom whenever it means someone else will carry out the objectionable policy. This claim essentially argues that when a party voices a religious objection to a policy that applies to them, no one else should be allowed to carry out the practice over their objection, since this will make their act of objecting an act of complicity. I have argued that, under this logic, a juror in a capital case could object to the practice of death qualifying jurors, on the grounds that excluding him or her based on his or her religious beliefs will enable someone else to carry out the death penalty. Courts should consider these implications as they decide the pending complicity-based claims of the religious nonprofits.