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In the Hobby Lobby case before the Supreme Court, law is not ethics

Thomas Reese | Apr. 11, 2014 Faith and Justice

Aristotle may have argued, "Law is reason free from passion," but you would never believe it when reading the transcript of an oral argument before the U.S. Supreme Court, especially one as controversial as the Hobby Lobby case [1]. If you expect polite, scholarly presentations and debate, go somewhere else.

The company objects on religious grounds to paying for certain contraceptives mandated by the Affordable Care Act. The case is similar to the cases being brought by some Catholic institutions in objecting to the contraceptive mandate, except these religious institutions object to all contraceptives and Hobby Lobby is a for-profit corporation.

The first thing you notice in the oral argument is that the lawyers do not get much of a chance to present their case. Paul Clement, representing Hobby Lobby Stores, did not even finish his second sentence when Justice Sonia Sotomayor interrupted him with a question. Likewise, Solicitor General Donald Verrilli Jr. got three sentences into his presentation on behalf of the government when Chief Justice John Roberts interrupted him.

In actuality, this is not as bad as it appears. Both lawyers had submitted extensive written arguments to the court prior to their day in court. Anything worth saying was presented in writing, so the time in court is really an opportunity for the justices to grill the lawyers on their arguments. The process is more like a dissertation defense before a hostile committee than a high school debate before a panel of neutral judges.

The Hobby Lobby case is full of ethical issues.

Contrary to some news reports, the company is not opposed to providing birth control to its employees through its health insurance program as required by the Affordable Care Act. Rather, its objection is to four techniques the company argues are abortifacients; that is, they cause the fertilized egg not to be implanted in the uterus. For the owners of Hobby Lobby, this is equivalent to an abortion, to which they are morally opposed because of their religious beliefs. (There is a companion case involving Conestoga Wood Specialties Corp., which opposed all birth control on religious grounds, but it got practically no attention in the oral arguments.)

An ethical approach to the Hobby Lobby case would require asking if it is wrong to prevent a fertilized egg from being implanted. And if so, it would also require asking whether the specific techniques actually do that. These two questions were never directly addressed in the oral arguments.

Rather, the argument was over the law. The solicitor general argued that federal and state laws, "which do preclude funding for abortions, don't consider these particular forms of contraception to be abortion." Abortions, according to the law, only occur after implantation. He also argued that most Americans, including the 2 million women who use intrauterine devices, don't consider it abortion.

Clements argued that this is irrelevant. All that matters is that Hobby Lobby considers the activity contrary to its religious beliefs. For the federal government to force someone to do something contrary to his or her religious belief would violate the 1993 Religious Freedom Restoration Act (RFRA).

Once the activity is judged to be immoral, the next step in ethical thinking would be to determine whether any cooperation or help in that activity could be permitted. Ethicists distinguish between formal and material cooperation. In formal cooperation, you agree with the goal of the activity, whereas in material cooperation, you assist in the activity but do not agree in the goal.

The classic example is the slave whose master tells him to take a note to the master's mistress, telling her he will visit her that evening. Traditional moralists argued that the slave could deliver the letter as long as he did not approve of the adultery. He could give material but not formal cooperation. The more distant the material cooperation, the less morally responsible the cooperator is for the other person's activity. The slave's culpability is further reduced by the fact that he would be punished if he disobeyed. He is acting under compulsion.

It is clear that Hobby Lobby is not "formally" cooperating -- it disagrees with the use of these items. Its material cooperation is by paying for insurance that its employees may or may not use to purchase these items. In addition, it is acting under compulsion because the government will fine it if it does not provide the insurance. Many ethicists would say that under these circumstances, the company is free from any guilt. They would point to Catholic institutions in Italy that pay employee taxes for a government health insurance program that includes abortion.

This does not mean they should not fight the law; it simply means that if they lose, they will not be morally guilty if they comply with the law.

But such ethical analysis is not the way the courts look at things. For the court, the question is, "Does this requirement impose a substantial burden on the believer?"

When Verrilli argued that the requirement was not a substantial burden because it is closer to a "tax situation than to imposing a direct obligation to act," Justice Samuel Alito raised the issue of cooperation:

"Isn't that really a question of theology or moral philosophy, which has been debated by many scholars and adherents to many religions? "A" does something that "B" thinks is immoral. How close a connection does there have to be between what "B" does that may provide some assistance to "A" in order for "B" to be required to refrain from doing that action." *[Editor's note: Quote has been edited for clarity.]*

Alito went on to say: "It is a religious question and it's a moral question. And you want us to provide a definitive secular answer to it?"

Verrilli responded in the negative, that the court can "accept the sincerity of the belief, but the Court still has to make a judgment on its own about what constitute a substantial burden." Thus, the legal analysis of what is a substantial burden is different from the ethical analysis of material cooperation. The legal analysis concerns the burden put on the believer rather than how helpful the believer is to the sinner.

The discussion during the oral arguments also touched on other purely legal issues, especially the meaning and application of the Religious Freedom Restoration Act. Was its intention to simply overturn the *Employment Division* v. *Smith* decision [2], or was it even more generous in protecting the rights of believers? The *Smith* decision, written by Justice Antonin Scalia, wiped out decades of court decisions protecting believers from state action. The RFRA now says the state must have a "compelling interest," must not impose a "substantial burden," and must use the "least restrictive" alternative available. Much time was spent arguing the meaning of these

words.

It should be remembered that the court struck down the RFRA as unconstitutional with regards to states, so it only applies to the federal government. Since many states have contraceptive mandates, even if it wins, Hobby Lobby might still have to provide the objectionable contraceptives to its employees in some states.

Those opposing the Hobby Lobby position also raised questions about the implications of a decision in its favor. Could any corporation object to any law or regulation on religious grounds? Vaccinations? Transfusions? Products made of pork?

Another point of contention was whether corporations such as Hobby Lobby have religious rights. Since the court in striking down campaign finance laws [3] has said corporations have free speech rights, it is an open question whether the court might also grant them religious rights.

A final issue raised in the oral arguments was over the conflict of rights between the rights of the employer and the rights of the employees. As Justice Anthony Kennedy put it: "The employee may not agree with these religious beliefs of the employer. Does the religious beliefs [of the employer] just trump?"

Everyone perks up when Kennedy asks a question because he is often the swing vote on close decisions. Clements argued that a burden from an employer is "not as serious as a burden that comes directly from the government."

On the other hand, Sotomayor cited the *United States* v. *Lee* case [4], where the court ruled against an employer who objected on religious grounds to paying Social Security taxes for his employees.

Court observers felt the justices appeared to be leaning toward supporting Hobby Lobby. Whatever the outcome, it will be based on legal arguments, not ethical analysis. And despite Aristotle, there will be a lot of passion displayed when the decision is announced.

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