

Impact case study (REF3)

Institution: University of Reading		
Unit of Assessment: 30 Philosophy		
Title of case study: Promoting Freedom of Conscience in Health Care		
Period when the underpinning research was undertaken: 2004-2018		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
David Oderberg	Professor of Philosophy	1 October 1996 - present
Period when the claimed impact occurred: 2014-2020		
Is this case study continued from a case study submitted in 2014? N		
<p>1. Summary of the impact</p> <p>The US Supreme Court cited David Oderberg's work on the role of conscience in health care in 2014. Since then, Oderberg has engaged with legislators, policy makers and advocates in the UK and internationally to promote freedom of conscience in medicine, with a focus on developing sensible policy proposals. He has worked with members of the House of Lords on proposed UK legislation; consulted for the leading Canadian promoter of conscience in medicine; advised on draft legislation in Ontario and Alberta; written reports for Polish policy makers; engaged with leading UK and US judges; and produced a public declaration on medical conscience, generating over 500 signatories. Oderberg has developed his research through academic papers, a policy monograph for a leading UK think tank, and more popular material. Overall, he has had a significant impact on law and policy on the topic of conscience in medicine, both in the UK and internationally.</p>		
<p>2. Underpinning research</p> <p>Inspired by the noble tradition of legal protection for conscientious objectors in wartime, Oderberg has argued that rapid advances in medical technology mean health care workers will come under increasing pressure to act in ways contrary to sincere and deeply held ethical or religious principles. His remedy is a statutory framework for the protection of conscience in respect of medical treatments and procedures, which would build on human rights conventions but be supplemented by a necessary case law jurisprudence on medical conscience. Oderberg argues that this legal protection should extend also to acts of "co-operation" with medical treatments and procedures objected to on conscience grounds.</p> <p>Oderberg's 2004 paper (output 1) was cited with approval by the US Supreme Court in <i>Burwell v. Hobby Lobby</i> (2014). The Court was wrestling with the issue of "assistance with activities" to which a plaintiff objects on conscientious grounds (particularly in health care) and led Oderberg to focus on the broader implications of the ethics of co-operation. He developed a larger project on freedom of conscience in health care, including freedom from coercion to "co-operate" with activities objected to on sincerely and deeply held ethical and/or religious grounds.</p> <p>After subsequent research into the jurisprudence on conscience in health care, the "Obamacare mandates" and the "Doogan case" in the UK Supreme Court, and having discussed the issues with lawyers and medical ethicists both in the UK and USA, Oderberg wrote a detailed analysis of the morality of co-operation as applied to health care, published in the leading medical ethics journal, the <i>Journal of Medical Ethics</i> (output 2). The article featured as an "Editor's Choice" and stimulated significant peer debate among ethicists. His main argument was that whilst conscientious objection to a certain activity might be a matter of legal protection if the belief is sincerely held, a "sincerity" test should not be extended to "co-operation" since this can be assessed on objective grounds. A mere sincerity test would lead to absurd results if someone</p>		

could obtain legal shelter simply by claiming a sincere belief that highly “remote” assistance with an objected-to activity amounted to real “assistance” with that activity. For instance, a nursing administrator might sincerely believe that euthanasia is wrong but also sincerely believe that by posting a nursing rota on the noticeboard in the ICU where euthanasia was practised they were literally “assisting” in its performance. On objective grounds, this would not constitute a case of co-operation deserving conscience protection. Just as there is a criminal law of aiding and abetting, which is not based on a person’s subjective beliefs about what they were doing, so there is a need, according to Oderberg, for a parallel civil law of co-operation as a basis for adjudicating medical conscience cases.

In 2017 Oderberg was invited by the editor of online ethics journal *Expositions* to write a less technical analysis of the topic, primarily for a US audience (output 3). He engaged with legal theorists in the US, including discussions with a judge on the US Supreme Court. These discussions, which highlighted the need for an accessible resource for policymakers on how the ethics of co-operation could be developed, led Oderberg to write an extended policy monograph on conscience and co-operation, with special reference to health care.

Oderberg produced – on commission from the Institute of Economic Affairs – a 30,000 word policy monograph: *Opting Out: Conscience and Cooperation in a Pluralistic Society* (output 4). The monograph sets out in detail his idea that the courts need to develop a “civil jurisprudence of co-operation” to complement the existing criminal law of complicity. This could be used to settle “conscience cases” under a recommended statutory framework. In the monograph, Oderberg goes on to outline a suggested framework.

The policy recommendations are further developed in Oderberg’s *Declaration in Support of Conscientious Objection in Health Care* (output 5) and consist primarily of an eighteen-point declaration and a nine-point policy plan setting out a way to give statutory and common-law protection to freedom of conscience in medicine.

In addition, Oderberg published a paper in *The New Bioethics* (output 6) in which he argues that conscience in medicine is not distinctive in principle, though it is in practice. In 2018 he wrote two reports on freedom of medical conscience in the UK and in Scandinavia, for a project at Nikolaus Copernicus University in Poland, funded by the Polish Ministry of Justice.

3. References to the research

The underpinning research is considered to be of at least 2* quality because it was published in peer-reviewed journals and has become an important point of reference, serving as a catalyst to new thinking and policies. The *JME* is a high-impact publication, with Oderberg’s paper having “Feature Article” status and gaining an Altmetric score of 25, putting it in the top 5% of all research outputs scored by Altmetric.

1. Oderberg, D. (2004). 'The Ethics of Co-operation in Wrongdoing', in A. O'Hear (ed.) *Modern Moral Philosophy* (Cambridge: Cambridge University Press; Royal Institute of Philosophy Annual Lecture Series 2002-3): 203-27. ISBN 9780521603263
doi: <https://doi.org/10.1017/S1358246100008511>
2. Oderberg, D. (2017). 'Further Clarity on Cooperation and Morality', *Journal of Medical Ethics* 43: 192-200 ISSN 1473-4257 doi: <https://doi.org/10.1136/medethics-2016-103476>
3. Oderberg, D. (2017). 'Co-operation in the Age of Hobby Lobby: When Sincerity is Not Enough', *Expositions* 11: 15-30. ISSN 1747-5376
4. Oderberg, D. 2018: *Opting Out: Conscience and Cooperation in a Pluralistic Society* (London: Institute of Economic Affairs). ISBN 9780255367615
5. Oderberg, D. 2018: Website: Declaration in Support of Conscientious Objection in Medicine: <https://research.reading.ac.uk/conscientious-objection-in-health-care-declaration/>
6. Oderberg, D. (2019). 'How Special is Medical Conscience?', *The New Bioethics* 25: 207-220. ISSN 2050-2885 doi: <https://doi.org/10.1080/20502877.2019.1651078>

4. Details of the impact

The seminal US Supreme Court case of “Burwell v. Hobby Lobby” (2014) concerned the extent of protection for freedom of conscience among certain kinds of corporation that were required by the Affordable Health Care Act (“Obamacare”) to provide insurance cover for the purchase of contraceptives that were potential abortifacients for use by employees. The plaintiffs sought protection from state coercion in respect of their religious and ethical beliefs, arguing amongst other things that they were being required to co-operate with what they conscientiously believed to be wrong. In its majority judgment for the plaintiffs, the Court cited Oderberg’s 2004 article on the ethics of co-operation (E1), which set out general principles for assessing the ethics of cases involving forced co-operation. It is clear from the official summary of the case that Oderberg’s article influenced the judgment reached by the Court (E1).

It is unusual for a court – let alone the US Supreme Court – to cite a technical philosophical research article. The footnote in which Oderberg’s work was cited was described by an eminent legal scholar, Jeffrey Rosen in a book on the case, as “one of the most philosophically sophisticated footnotes I’ve seen in a Supreme Court decision recently” (E1). For the article to play a role in helping the Court reach its decision is, possibly, unique.

The US Supreme Court’s recognition of Oderberg’s research, and the messages from lawyers that followed, inspired Oderberg to develop his work on conscience and co-operation, with special reference to medicine. The first major output was Oderberg’s *JME* article (2017), which he complemented with a *British Medical Journal* blog post that was reposted by the Kenendy Institute of Ethics, one of the world’s leading ethics research centres.

A justice of the US Supreme Court read the *JME* article with great interest, asking several detailed questions about the theory of conscience and co-operation defended in the piece. Oderberg was able to give equally detailed responses. The judge said: “Your article has given me much to think about, and I am sure that it will be helpful if similar issues come before my court in the future”. It was evident that both the *JME* article and follow-up correspondence had an impact on the judge’s thinking, as had Oderberg’s original article cited in the “Hobby Lobby” case (E2).

Oderberg was invited by a leading UK think tank – the Institute for Economic Affairs (IEA) – to write a 30,000 word policy monograph on the topic, which was published in 2018 (output 4). In the monograph, Oderberg set out in detail sensible policy recommendations backed by legal and ethical analysis, in order to convince policymakers at the IEA of the importance of medical conscience (E3).

Having developed the policy recommendations, Oderberg streamlined them into a package to attract the interest of medical professionals and the wider public. This led to publication in early 2018 of his *Declaration in Support of Conscientious Objection in Health Care* (E4), a direct reply to the “Consensus Statement” opposing medical conscience published by fifteen academics in 2016. Oderberg’s purpose was twofold: (i) to give a voice to the many medical professionals and other concerned people who wanted publicly to show solidarity in support of medical conscience; (ii) to leverage the Declaration in his promotion of the issue with judges, politicians, and policy makers (see below concerning Canada).

The Declaration has attracted over 500 signatures from medical professionals in many fields, including surgeons, consultants, general practitioners, nurses and midwives, as well as concerned lay members of the public across the world. Signatories include one of the midwives in the famous Doogan case (UK Supreme Court 2014) in which two midwives lost their jobs, and their subsequent court case, for refusing on conscience grounds to manage an abortion ward in a Scottish hospital.

Since 2015 Oderberg had been following the fate of the Conscientious Objection (Medical Activities) Bill, introduced into the House of Lords as a private member’s bill. He identified an opportunity for his research to influence the content and direction of the proposed legislation, so

he approached the sponsors to offer consultation on the process. Oderberg collaborated in several ways: composing a short speech for one of the peers; writing several memoranda for the nine peers supporting the Bill; advising on revisions to the draft; responding to objections from the Bill's critics, including amendments tabled by its leading opponent (E5). Oderberg publicly explained many of the key points in a blog post for the *Journal of Medical Ethics*. The peers sponsoring the Bill were delighted with Oderberg's expert assistance, using his points in the debate and persuaded by his suggestions for improvement to the language of the Bill (E5).

In 2018, Oderberg was invited to join the Advisory Board of the Protection of Conscience Project (PCP) in Canada – the leading policy and advisory body in Canada promoting conscience in health care. The director told him his “expertise, energy and dedication would be exceptionally valuable” (E8). Oderberg now advises the director regularly, across a range of projects. He helped the director to improve the “complainant worksheet” used by health care workers denied conscience protection, and persuaded the director to formulate an explicit policy on the role of co-operation in conscience cases. Oderberg also advised PCP in the revision of submissions to the Canadian Medical Association and World Medical Association on freedom of conscience, including emphasis on co-operation. He has also brought about significant improvements to the Model Statute on the freedom of conscience in health care – a seminal resource used by Canadian legislators to draft new legislation (E6).

Oderberg has been involved, both as adviser to PCP and as an independent consultant, on draft medical conscience legislation planned for the legislatures of Alberta and Ontario. He has worked closely on both draft bills, advising their promoters on how best to formulate the provisions. For example, text from the preamble to Oderberg's Declaration (output 5) was included in the preamble to the Alberta bill, and other suggestions incorporated into the main text of the bill. The PCP's Model Statue, on which Oderberg was a lead adviser, informed drafting of the Ontario bill. In particular, Oderberg's research defending the importance of co-operation informed both bills.

Oderberg's research has also influenced legislation in Europe. In 2018 he was commissioned by Nikolaus Copernicus University, Poland, to write two comprehensive reports on the legal status of freedom of medical conscience in Scandinavia and in the UK. The Polish social policy project was initiated by the Ministry of Justice, and the reports were published in 2019. Their stated purpose is to “educate Polish and foreign lawmakers, as well as public opinion about possible [legal] reforms” (E7). The MP promoting the Alberta legislation also used them to provide him with much needed information on other jurisdictions; Oderberg supplied his reports to the MP via his legislative consultant (E8).

Oderberg's work promoting medical conscience extends to articles and interviews for mainstream media and has stimulated reaction from various sources. Oderberg publicised his Declaration with an article for *The Conversation* (4707 reads) which was reprinted in the popular ethics blog Mercatornet (for which Oderberg was also interviewed) and the news blog News Weekly. This led on to a piece in *The Guardian* (circulation 109,533). The Declaration was covered by articles in *The National Review*, *America*, *First Things*, and the leading bioethics blog Bioedge. Oderberg publicised his IEA monograph with an article for the new blog Freer UK, and both the Declaration and monograph with an article for *The Daily Globe* and an interview with *cnsnews.com*. He also gave an invited video lecture on *Opting Out* and conscience in medicine to lawyers and interested non-specialists at the Caroline Chisholm Library seminar in Melbourne, and a more specialist talk to nurses at the Royal College of Nursing.

Oderberg's objective from the outset has been to promote and influence debate on conscience in medicine at an international level, focusing on those jurisdictions where he could have most effect. He has aimed his work at health care professionals, politicians, lawyers, judges and policy makers, and has supplemented this with material aimed at a wider audience in order to generate popular interest. Overall, his research in a sensitive and challenging aspect of health care – one that will only increase in prominence and urgency with the development of medical technology – has had a deep effect on supporting the idea of freedom of conscience in medicine. In particular, he has been a leading influencer of developments in law and policy in the UK, USA, and Canada.

5. Sources to corroborate the impact

- [E1] Information concerning citation in US Supreme Court case of “Hobby Lobby”
- [E2] Correspondence with IEA regarding commission of policy monograph
- [E3] Correspondence with US Supreme Court judge regarding *Journal of Medical Ethics* article
- [E4] Declaration in Support of Conscientious Objection in Health Care
- [E5] Documents (memoranda, speech, email correspondence) with members of House of Lords and advisers regarding *Conscientious Objection (Medical Activities) Bill*
- [E6] Correspondence with director of Protection of Conscience Project
- [E7] Correspondence concerning Polish reports
- [E8] Correspondence on draft Canadian legislation (Alberta, Ontario)