Liberalism's Fault Lines

Dividing the Public from the Private in US and UK Cases of Conscientious Objection to Abortion

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Introduction

Women's rights and religious rights often appear to be at war with each other, particularly when legal access to abortion and contraception is at stake. Women's rights advocates claim that religion interferes with women's private choices; religious rights advocates respond that accepting the legality of abortion would mean denying their deeply held religious values. Underlying these debates are questions about the nature of the public domain: whose values are represented there? And what does that mean for those who disagree?

The line between the public and private has never been a particularly clear one, and religion is particularly prone to pushing that boundary through its presence in the public domain. Claims for conscientious objection[1] – the right to be exempt from some otherwise mandatory task based on a religious objection to it – are a contentious method of reshaping the line between public and private. Conscientious objection traditionally referred to objection to military service, but has recently been expanded to encompass objection to abortion and related health care. The form these objections take and the legal protections afforded to them vary, but almost all are controversial.

This thesis aims to answer the question: how is the public/private divide negotiated in cases of conscientious objection to abortion and reproductive health care? Utilizing insights from feminism and liberal political and legal theory, it examines two case studies, drawn from recent appellate court cases in the United States and the United Kingdom. These countries share a liberal legal heritage that embraces the public/private distinction; however, they have significantly different cultures around religion and religious freedom. Despite these differences, striking similarities emerged in the strategies used by both proponents and opponents of conscientious objection to distinguish the public from private in a way that supported their position. The central argument of this thesis is that ultimately, the dualisms between medicine and religion, women's rights and religion, and sincere and insincere beliefs used by both sides of the debate illustrate the inability of the public/private divide to address the complicated questions raised

[1] "Religious exemptions" is the preferred terminology for these kinds of accommodations in US jurisprudence, while "conscientious objection" is favored in European discussions and in medical ethics debates. For the purposes of this thesis they will be used interchangeably.

by conscientious objection. As a result, I consider the public/private divide insufficient to adequately address the rights at stake in these cases. In the rest of this introduction, I provide a brief overview of the thesis, outlining the main theoretical debates, key aspects of the case studies and the methodology used in the analysis before concluding with a chapter outline.

The contentious nature of the public-private divide

The public-private divide is a key tenet of liberalism, and provides the basis for Western understandings of religious freedom. Precisely what belongs in the private and what belongs in the public varies in political theory and feminist scholarship, as will be discussed in more detail in the following chapter. However, in general the public-private divide can be understood as a dualism dividing that which is considered (according to largely liberal secular criteria) reasonable, universally accessible and relevant to the common good (the public) from that which is individual and often irrational (the private.)[2] In this pairing, the private is subordinated to the public, which is privileged. This dualism between public and private is linked to other dualisms in Western thought – for example, rational and irrational, male and female, and science and religion. These pairings are generally seen as bipolar opposites.[3] One of the goals of conscientious objection is to carve out space for private religious beliefs in the public realm of health care policy. However, they also create political battlegrounds over how far the right to conscientious objection can properly extend before it interferes with women's rights and health, where women's bodies and their "privateness" or "publicness" become indirectly the object of debate.

Related to religion's place in the private domain is the idea in liberalism that the state must be neutral towards religion – it cannot hold a particular religious perspective of its own, or favor one religion over another.[4] Since it cannot make substantive judgments on the content of an individual's private

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[2] Erin Wilson, *After Secularism: Rethinking Religion in Global Politics,* (Basingstoke: Palgrave Macmillan, 2011), 11.
[3] Wilson, *After Secularism,* 11.
[4] In the United Kingdom, the goal of neutrality is somewhat undermined by the state support given to the Church of England; however, the state still claims to be neutral towards religion outside of the specific benefits given to the established church.

faith, the state[5] judges religion on other standards, such as the sincerity of the belief or the centrality of the belief to the believer's tradition. State neutrality theoretically allows religion to be part of the private domain, by protecting it from state judgment. However, in order to talk about religious freedom, the state has to hold some definition of what religion is and what it does. Declaring what religion is and does (and also, by implication, what it is not and what it does not do) means that the state is unavoidably involved in the normative reproduction of concepts of religion. For example, Protestantism heavily influences the Western concepts of religion deployed by the state. [6] These definitions are not and cannot be neutral. State neutrality in fact includes underlying cultural assumptions about religion that make their way into how it is defined and regulated in the public domain.

These theoretical concepts have made their way into laws that intend to guarantee religious freedom and balance claims for conscientious objection against other public needs. However, as Winnifred Fallers Sullivan notes, "Religion and law today speak in languages largely opaque to each other."[7] This thesis attempts to translate these mutually incomprehensible languages in a few ways. First, I trace the background of conscientious objection law in each case study country, putting it in the context of both larger national debates on religious freedom and historical and cultural developments. Previous scholarly work on these laws has been largely limited to medical and legal journals. By putting them in their historical, political, legal and cultural contexts, which are often overlooked in medical and legal scholarship, I hope to demonstrate how underlying ideas about religion in the public domain influence the formation and ongoing interpretation of the law. Though the issues raised by religious freedom jurisprudence in the United States and United Kingdom do not perfectly overlap with those raised in the cases, they provide an idea of the lens through which judges and stakeholders considered the issue of conscientious objection. Second,

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[5] The state is defined for the purposes of this thesis as the various offices and agents "that make and enforce the collective decisions and rules of a society," including the government and the judiciary. Barrie Axford et. al., *Politics: An Introduction*, e-book edition, (London: Routledge, 2005).

[6] Charles Taylor, "Western Secularity," in *Rethinking Secularism*, ed. Craig Calhoun et. al., (Oxford: Oxford University Press, 2011), 38.

[7] Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, (Princeton: Princeton University Press, 2005): 3.

I look at each court case itself not only through the judges' decisions, but also through statements by organizations representing the various interests at stake in each case – specifically, religious organizations, professional organizations, and women's rights organizations. Though their interpretations of the cases ultimately carry less weight than the judges', they are part of the larger cultural discourse about religion in the public domain, and contribute valuable insight about how the line between public and private is drawn by raising arguments outside of the legal boundaries of the cases.

Religion and the Public Domain in the United States

Liberal conceptions of the public and private domain in the United States (US) have developed into a definition of religious freedom that rejects both government regulation and government endorsement of religion, demanding the ability to both hold beliefs and manifest them without interference, except in dramatic circumstances. In federal law, restrictions on religion receive the strictest level of judicial scrutiny. While religious freedom has been central to American identity and national mythology throughout its history, [8] federal jurisprudence on the topic is relatively young. Developed substantially during the Culture War of the 1960s, the United States' approach to religious freedom includes substantial protections for conscientious objectors to abortion. American law requires that, within the medical profession, conscientious objection be permitted in a wide variety of circumstances both directly and indirectly related to abortion. The continued divisiveness of abortion in American culture combines with a skepticism towards government regulation of religion to support claims of conscientious objection, despite many recent changes and inconsistencies within the law regarding religious freedom.

How far claims for conscientious objection can stretch is one of the key questions addressed in *Hobby Lobby v. Sebelius.* In March 2013, the Tenth Circuit Court of Appeals heard the case brought by craft chain store Hobby Lobby, which claimed the right to an exemption to a portion of the Affordable Care Act of 2010 (ACA, also called "Obamacare"). The ACA required employers to provide coverage for contraception in company health insurance policies.

[8] Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us,* (New York: Simon & Schuster, 2010), 518-519.

Hobby Lobby argued that requiring the company to pay for contraception violated its (the company's) religious freedom under the Religious Freedom Restoration Act. The owners of Hobby Lobby, the Greens, are evangelical Christians, and object to certain forms of contraception that they feel cause abortions. Throughout the case, the court struggled to determine whether their beliefs could be considered the religious beliefs of their corporation. Women's rights organizations and professional organizations argued that they couldn't be, and that excluding birth control from their insurance plans was an intrusion into women's private decisions and undermined the public goods advanced by the law. These arguments put women's bodies in an ambiguous position; women's decisions to use contraception were depicted as private, but women using contraception was presented as a public good, furthering public health and women's participation in the public domain. The court ignored these arguments entirely, instead finding that Hobby Lobby held sincere religious beliefs, which merited protection. The decision raises questions about how neutral the state really is towards religion, and whether a broad understanding of religious freedom, which recognizes few legitimate restrictions on private religion in the public domain, can incorporate concerns about women's rights.

Religion and the Public Domain in the United Kingdom

In contrast to the United States, ideas of religious freedom in the United Kingdom (UK) draw heavily on the idea of nondiscrimination, and are based in both domestic legislation and European Court of Human Rights jurisprudence. Developed in the context of increasing migration and growing religious diversity, cases of religious freedom deal primarily with managing religious diversity in the public domain. As a result of the legacy of the Church of England and its continued influence, courts more frequently make judgments about the content of Christianity than other faiths, declaring which practices or beliefs are "core" to Christianity and thus protected and which are "peripheral" and can be regulated or infringed on. The UK also recognizes a wider variety of justifications for limiting manifestations of religion, under Article 9(2) of the European Convention of Human Rights. Because abortion is a less contentious issue in the United Kingdom, and the legalization of abortion preceded the development of strong protections for religious rights, conscientious objection has not been as

broadly discussed in UK law. However, it is provided for in the Abortion Act 1967, except in emergency circumstances, for medical professionals directly providing abortion. The original law largely ignores religion, allowing conscientious objection for any moral reason; however, recent case law, in light of the application of the European Convention of Human Rights to UK law and the related development of religious freedom jurisprudence, has considered the religious dimensions of conscientious objection in terms of balancing public state needs against private beliefs.

The Scottish Court of Sessions, an appellate court, addressed the question of how religion should be accommodated in the public domain when it heard the case *Doogan & Anor v NHS Greater Glasgow & Clyde Health Board (*hereafter *Doogan v. NHS* or the *Doogan* case) in April 2013. Mary Doogan and Concepta Wood were midwives in a Glasgow labor ward, with registered objections to performing abortions. However, their roles as Labour Ward Co-ordinators required them to supervise abortions performed by other midwives, which, they argued, violated their right to conscientious objection. They were supported by pro-life group Society for the Protection of Unborn Children, which put forth an interesting mix of religious and non-religious arguments, emphasizing the Christian nature of Doogan and Wood's beliefs while arguing that accommodating those beliefs served a public purpose of maintaining "professionalism." On the other hand, professional and women's rights organizations made similar arguments to those made in the United States, highlighting the danger conscientious objection posed to women's health and the need for midwives to fill a public, professional role shaped by medical ethics and science. These debates illustrated the ambiguity between the public and private in cases of conscientious objection and abortion.

Dualisms in the Cases

The cultural differences and competing understandings of religious freedom between the United States and United Kingdom were visible in the cases. Both deal with how far conscientious objection can extend beyond direct provision of abortion; however, the *Hobby Lobby* case, dealing with payment for emergency contraception, is far further removed from the actual act of abortion than the *Doogan* case, where the midwives could conceivably be asked to assist

with an abortion in their job duties. This reflects the more extensive understanding of religious freedom found in the United States. The *Hobby Lobby* case was also significantly more contentious, generating more public comment and debate, reflecting the unsettled nature of abortion in the US and the central place of religious freedom to American politics. However, despite these differences, the interpretations of the public and private domain, and how these should be divided with reference to religion and gender, were surprisingly consistent in both contexts.

All parties in both cases generally agreed that religion was part of the private sphere, but the implications of this were highly contested. For proponents of conscientious objection, religion's private nature meant that regulations on it were not justified. Opponents of conscientious objection, on the other hand, argued that because religion is private and individual, it should be subordinated to various public interests when necessary – for example, to protect the health of women seeking abortions. In their arguments, two dualisms emerged. One positioned religion in opposition to medical science. Medicine was depicted as unbiased and rational, in contrast to discriminating, irrational religion. Women's decision to have an abortion, the argument ran, should be made on medical grounds (in conjunction with doctors who presumably do not hold religious objections or are willing to put them aside), leaving no place for religious "interference" in those decisions. By potentially preventing or delaying access to contraception or abortion, opponents of conscientious objection depicted religion's presence in the public realm of medicine as dangerous and even deadly. The second dualism, between religion and women's rights, worked in a similar way. Women's participation in the public domain was furthered by access to abortion and contraception; therefore, religion that sought to limit access to these must be privatized. These arguments rely on an understanding of religion as irrational and a matter of personal choice. Both of these dualisms are ambiguous in how they position women themselves as part of the public or private; they give little attention to women's agency, and instead focus on creating boundaries between religion and the public domain.

The key dualism that proponents of conscientious objection (in these cases, religious organizations, the people claiming conscientious objection, and ultimately the judges of the appellate courts) relied on was an implied one,

between sincere or "core" beliefs and insincere or peripheral ones. Though especially important in the *Hobby Lobby* case, where Hobby Lobby had to prove that it held sincere religious beliefs as a corporation, this discourse of sincerity also appeared in the *Doogan* case. In these arguments, any sort of compromise to "public reason" was presented as impossible given the deeply held nature of religious convictions, making accommodation the only possible option. Willingness to compromise to the demands of a public role would have implied that the beliefs in question were insincere or relatively unimportant, undermining the legal claim for a conscientious objection.

Methodology

Close reading of primary sources around each case study, including the judgments themselves and documents by stakeholder organizations, reveals the varied and conflicting ways the public and private are constructed. Value-critical analysis, a methodology developed by Martin Rein and elaborated by Ronald Schmidt, provides a framework for looking at the debates, both inside and outside the courts, around religious exemptions.[9] Critical discourse analysis offers additional tools for conceptualizing and analyzing the competing cultural meanings given to the concept of religious freedom.

Value-critical analysis is a method based on identifying and examining the values that underlie political debates. By drawing out the core values of policy proponents, the analyst aims to create a comprehensive narrative of each position.[10] Because the claims for religious exemptions examined here have been made in court cases, some of the proponents' positions have already been neatly laid out. Analyzing the arguments in these judgments shows some of the legal considerations around religion in the public domain. However, debate over how the public and private should be delineated is not restricted to the courts. Groups with a stake in the outcome offer competing arguments, often beyond the scope of the specific legal issues of the cases, that rest on competing ideas about the public and private. In order to get a sense of those competing perspectives, I

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[9] Ronald Schmidt, Sr., "Value-Critical Policy Analysis: The Case of Language Policy in the United States," in *Interpretation and Method: Empirical Research Methods and the Interpretive Turn*, ed. Dvora Yanow and Peregrine Schwartz-Shea (Armonk, N.Y.: M.E. Sharpe, 2006), p. 302.

[10] Schmidt, "Value-Critical Policy Analysis," p. 310.

examine documents from professional organizations, women's rights organizations, and religious organizations.

Critical discourse analysis, a method developed by Fairclough and described by Jorgensen and Phillips, is a useful tool for drawing out the alternative interpretations of the cases. This method highlights that discourses do not exist in a void; rather, they draw on "genres" and other discourses.[11] Discussions of conscientious objection in health care draw on religious freedom discourse, but they also rely on discourses about women's rights or health care policy, for example. The interplay between these "genres" contributes to the construction of the line between the public and private domain.

Using critical discourse analysis, this study examines texts from relevant organizations with the goal of identifying their understanding of what criteria they use to distinguish between the public and private, and what that distinction means for the right to conscientious objection. Organizations in the United States were chosen from those organizations that submitted amicus curiae briefs in the Hobby Lobby case. They are the National Association of Evangelicals, the American Congress of Obstetrics and Gynecology, and the National Women's Law Center. In the United Kingdom, where amicus curiae briefs are not publicly available, organizations were chosen that had commented on the case in the media. These were the Society for the Protection of Unborn Children's Evangelicals group, the Royal College of Midwives, and Reproductive Health Matters. Two texts on the topic of religious exemptions and the ongoing cases were chosen from each organization. All examined texts are included as appendices to this thesis.

Structure of the Thesis

Chapter 1 discusses some of the various ways that the public and private have been distinguished in liberal political theory and the problems posed by those divisions, as well as some of the ways conscientious objections have been discussed within liberalism. It will also consider how feminist theory complicates this picture. This brief overview provides a theoretical background that is,

[11] Marianne Jorgensen and Louise J. Phillips, *Discourse Analysis as Theory and Method,* (London: SAGE, 2002), 67.

broadly speaking, shared by both case study countries, and informs my analysis of the cases that follow.

Chapters 2 and 3 describe conscientious objection in the United States. Chapter 2 offers a background on religious freedom in the United States, putting the topic of conscientious objection into the context of ongoing legal debates about the extent of religious freedom and their historical and cultural roots. These debates show how liberalism's understanding of religion as private have in the United States tended towards a reluctance to regulate religion in general and confusion about on what grounds religion can be restricted in the public domain. Chapter 3 turns to *Hobby Lobby v. Sebelius*, examining how the public and private are delineated within the judgment itself and the documents of selected interested organizations.

Chapters 4 and 5 focus on the United Kingdom. Chapter 4 discusses religious freedom in the United Kingdom, particularly noting the influence of minority religious communities and of the European Union, which has in the past 20 years led to significant changes in how religious freedom and potentially conscientious objection are interpreted. Chapter 5 examines *Doogan v. NHS* and documents from selected organizations, again looking for lines of division between the public and the private.

Chapter 6 compares the two cases and describes the common themes found in each. Both cases have three dualisms in common: between sincere and insincere belief, the former deserving accommodation in the public domain; between religion and medicine, the latter being a more appropriate standard for behavior and policy in the public domain; and between religion and women's rights, the latter necessarily circumscribing the former's presence in the public domain. Also raised by both cases is the question of what makes one a public actor, and how that role relates to claims for religious rights. The ambiguity of roles visible in the cases illustrates a serious weakness of relying on the public/private division to resolve conscientious objection.

The conclusion reviews the key themes of the thesis and considers possible solutions to the questions raised by the cases. The public/private divide, which presents religion and women's rights as two competing groups seeking to make their "personals" political and public, is ultimately insufficient for protecting women's rights and agency while also recognizing religious rights.

Chapter One: Defining "Public" and "Private" in Liberal Political Theory

The division between the public and private domain is rooted in liberal political theory and fundamental to liberalism's definition of religious freedom: religious belief, as part of the private domain, is free from government restriction, and while in the public domain government regulation can be justified. However, I argue that the "wall of separation" between church and state is much less solid than the famous metaphor would imply, and is shaped by competing conceptions of the public and the private. This chapter describes some of the key liberal theories used to distinguish between the public and private and address religion in the public domain, and how feminism complicates these theories.

The Public and Private in Liberal Political Theory

In *Public Religions in the Modern World,* José Casanova defines four theoretical divisions between the public and the private. Two of these are particularly relevant for understanding the cases presented here. The first is what he calls the "liberal-economistic" model, in which the "public" is identified with the state administration, and the "private" with the market economy (and everything else that is not the state.)[12] The second is the public-private divide identified by feminists, particularly Seyla Benhabib, between the private, domestic realm – identified with the feminine, the irrational, and the religious – and the public realm of the workplace, which is identified with the masculine, rational, and secular.[13] Claims for conscientious objections could therefore be seen as the religious equivalent of the feminist observation that the "personal is political," moving the subjective experience of religion in the private realm of the home into public discourse. Particularly in cases about abortion, the gendered dimension of the public and private are potentially very significant, because religious claims and claims about women's rights are sharing and perhaps competing for a similar discursive space.

The liberal-economistic model Casanova describes can be traced back to the political theory of the Enlightenment. John Locke's ideas about toleration, for

[12] José Casanova, *Public Religions in the Modern World,* (Chicago: University of Chicago, 1994), 41.
[13] Casanova, *Public Religions*, 64.

example, relied on a similar idea, and were influential in both the new United States and Britain, offering a shared starting point for both countries' understandings of religious freedom. Locke's argument for religious freedom was theologically grounded in Protestant Christianity. Religion is understood primarily as a matter of personal belief - Locke describes it in terms of one's "immortal soul, capable of eternal happiness or misery," attempting to reach salvation by believing and doing that which one thinks God requires.[14] Locke describes a division between the spiritual and temporal realms, with the former beyond human authority and the latter subject to laws, similar to more contemporary public/private divisions.

In contemporary political theory, John Rawls offered a possible liberal method for distinguishing between the private and the public in *A Theory of Justice.* While in general religious freedom requires that religion be exercised freely, certain state interests are serious enough to justify restrictions. Rawls sees justice as the conditions people would decide on for society from behind a "veil of ignorance," if they did not know what place they would hold in that society, including what their religious convictions would be or whether they would have religious obligations. Based on this mental exercise, Rawls concludes that expecting others to accept restrictions on their ability to live out their religious duties or moral obligations would be unjust.[15] Therefore, the state cannot favor or penalize religion or irreligion. Rawls' conception of neutrality forbids the state from favoring any particular "comprehensive doctrine" or "conception of the good," including religion.[16] However, Rawls states that liberty of religious practice can be regulated by the state's interest in public order and security.[17] The seriousness of the burden imposed on religion and of the government interest in restricting religion should be balanced, which might involve exempting religious groups from regulations which burden religion for relatively trivial reasons.[18] The result is something close to Casanova's liberal-economist model, where the state represents the public domain, and restrictions, when imposed, are based on

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[14] Jakob De Roover, and S. N. Balagangadhara, "John Locke, Christian Liberty, and the Predicament of Liberal Toleration," *Political Theory* 36, no. 4 (August 1, 2008): 529.
[15] John Rawls, *A Theory of Justice,* (Oxford: Oxford University Press, 1971), 208.
[16] Rawls, *Political Liberalism,* (Columbia: Columbia University Press, 2005), 192-193.
[17] Rawls, *Theory of Justice,* 212.
[18] Stephen Macedo, "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism," *Political Theory* 26, no. 1 (February 1, 1998): 73.

particular state interests. These interests are limited – for the most part, being part of the private sphere means being free from restriction – but ultimately the public domain, the state, holds the authority to decide when religion must be restricted.

Additionally, since laws in a liberal state must be based on "neutral," generally accessible reason, freedom to express religious views in the public domain is sometimes subject to restrictions. Political theorists disagree on to what extent believers can promote policies based on religious motivations, or whether they must "translate" their views into secular, generally accessible terms in order to participate in the public sphere. For example, Jürgen Habermas claims that the translation process is a mutual responsibility of secular and religious citizens, while Robert Audi places the burden entirely on secular citizens, and excludes religious arguments entirely from public debate.[19] What makes an argument religious or "neutral" is often unclear, given that much of the cultural framework for understanding religion, including definitions of religion used by the courts, the concept of religious freedom, and the concept of secularism, comes out of Protestant ideas.[20] The goal of neutrality towards religion is therefore complicated both in encouraging neutral contributions to the public domain and in defining neutrality at all.

In cases dealing with abortion and women's rights, Catholics and evangelicals in particular often hold strong religious objections to abortion that potentially conflict with liberal values of gender equality and personal freedom. Liberal political theorists would be happy to let them hold these views privately, but run into problems when conservative Christians argue in the public domain for restrictive laws based on their religious beliefs about the start of human life. Such situations are what Rawls had in mind when he required neutral reasons only in the public domain - since not everyone can accept, for example, the idea that life begins at conception, then conservative Christians must come up with a more accessible, less religious argument. Critics since, such as Jürgen Habermas and Christopher Eberle, have argued that this puts an unreasonable burden on

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[19] Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14, no. 1 (2006): 11.
Robert Audi, "Liberal Democracy and the Place of Religion in Politics," in *Religion in the Public Square*, ed. Robert Audi and Nicholas Wolterstroff, (Lanham: Rowman & Littlefield Publishers, 1997): 25.

[20] José Casanova "The Secular, Secularizations, Secularisms," in *Rethinking Secularism*, ed. Craig Calhoun et. al., (Oxford: Oxford University Press, 2011): 57.

people holding religious rationales for their political beliefs.[21] While they might try to come up with more religiously neutral reasons, ultimately they are motivated by the religious reason, and must be permitted to act on it. However, when religious motivations can be acted on freely in the public sphere by limiting access to abortion, it raises questions about how these can be practiced without infringing on the choices of women seeking abortion.

Much of liberal political theory rests on the assumption that some kind of common ground exists within liberal values; with or without "translating" the religious views, a neutral, accessible to all solution will eventually emerge. For example, Rawls requires that citizens accept a particular conception of justice, rationally determined based on the "veil of ignorance" idea described above. He acknowledges that some people hold competing values, but is unclear on how they should proceed.[22] People who are strongly motivated by religion, especially those holding positions that run counter to liberal values, pose a serious challenge to the idea that the world can be divided into secular and religious. This creates problems for Lockean liberal conceptions of religious freedom that depend on making such a distinction.

Conscientious objection to generally applicable laws are efforts to move and shape the line between the public and the private. These exemptions balance state goals against religious identities, revealing conflicts of values between liberal politics and religious exercise. As a result, some theorists such as Rawls and Macado have suggested that exemptions should only be granted when they are compatible with liberalism generally. Rawls would tolerate conscientious objection, which he defines as private noncompliance with a direct legal injunction or regulation (compared to the more public act of civil disobedience), when the ideals the person is acting on fit within "a just system of liberty" and does not disturb public order and security.[23] Macedo offers similar criteria for whose exemptions should be granted, arguing that conscientious objection should be tolerated if the dissenting group improves the moral quality of society as a

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[21] Habermas, "Religion in the Public Sphere," 10.
Christopher Eberle, *Religious Convictions in Liberal Politics*, (Cambridge: Cambridge University Press, 2002).
[22] Susan Mullar Okin, "*Political Liberalism,* Justice and Gender," *Ethics* 105, no. 1 (1994): 29.
[23] Rawls, *Theory of Justice,* 370.

whole.[24] For example, pacifists seeking exemption from conscription demonstrate more easily shared moral values than a group seeking exemptions in order to perform human sacrifices, to use the favorite hyperbolic example of an unacceptable religious practice. Choosing to exempt is therefore not a neutral process; rather, groups seeking to conscientiously object present a challenge to the government's justifications for restricting religion, which may or may not be recognized based on substantive judgments about the value of the religious practice or belief in question.

Liberal Feminism's Contributions

Liberal feminism shares many of the commitments of political liberalism, with a particular emphasis on ensuring personal and political autonomy for women.[25] Like political liberalism, it can be skeptical towards religion, which it sees as a potential source of restrictions on women's autonomy.[26] However, it relies less on the public-private divide, noting that this framework has historically been used to exclude women's voices from politics, and that barriers to women's autonomy exist in the private domain as well as the public and therefore both must be addressed by feminism.[27] Liberal feminism "take[s] seriously both the notion that those behind the veil of ignorance do not know what sex they are and the requirement that the family and the gender system, as basic social institutions, are to be subject to scrutiny;"[28] sex (and gender) are not acceptable basis for unfair treatment, based on Rawls' idea of the "veil of ignorance". Because of their emphasis on personal autonomy, liberal feminism argues strongly for women's rights to abortion. While much discussion of abortion focuses on the moral status of the fetus and even seems to ignore the pregnant woman herself altogether, it is important to remember that the woman maintains moral status and rights that must be respected at the same time.[29] Liberal feminism therefore often characterizes opposition to abortion as an attack on women's autonomy, and can

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[24] Macedo, "Transformative Constitutionalism," 74.
[25] Susan Moller Okin, *Justice, Gender and the Family*, (New York: Basic Books, 1989), 89. Martha Nussbaum, *Sex and Social Justice,* (New York: Oxford University Press, 1999), 46.
[26] See for example Okin, "Is Multiculturalism Bad for Women?" in *Is Multiculturalism Bad for Women?* ed. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, (Princeton: Princeton University Press, 1999), and Nussbaum, *Sex and Social Justice.*
[27] Naussbaum, *Sex and Social Justice,* 63.
[28] Okin, *Justice, Gender and the Family,* 101.
[29] Mary Anne Warren, "The Moral Significance of Birth," *Hypatia* 4, no. 3 (Fall 1989): 63.

tend to use oppositional language between women's rights and religious rights when religious opinions about abortion are seen to limit women's access.

These liberal interpretations of the relationship between women's rights and religion risk missing a more nuanced view of how gender and religion relate. Changing gender roles and the apparent resurgence of religion in the public sphere are linked; in fact, the "global resurgence of religious fundamentalism" has been characterized as a reaction to gender equality and feminism.[30] It's true that sexuality, gender roles, and religion are deeply entangled in ways that often seem to run counter to the goal of women's equality. However, religion and women's rights are not necessarily in straightforward opposition. Following Brigit Heller, Casanova identifies three points of overlap between religion and gender: 1) women's status and roles within religious institutions; 2) images and norms of women within religious discursive traditions; and 3) women's own status as bearers of religious rights.[31] Religion should not be characterized as something solidly opposed to women's rights because religion is something that women themselves do as well. When addressing questions of women and religion, drawing a clean line between the public and private will not necessarily be sufficient to recognize the multiple levels on which gender and religion interact.

This brief overview introduces some of the problems with the liberal distinction between the public and private domain, and the related idea of state neutrality towards religion. Despite the unclear definitions of public and private and the difficulty that liberalism has maintaining neutrality while recognizing religion, these liberal understandings of religion provide much of the legal and political language used to discuss conscientious objection in both the United States and United Kingdom. The following chapters will explore how some of these problems play out in developing definitions of religious freedom and addressing cases of conscientious objection in each country.

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[30] José Casanova, "Religion, Politics and Gender Equality: Public Religions Revisited," working paper for United National Research Institute for Social Development, April 2009, 15. http://www.unrisd.org/80256B3C005BCCF9/search/010F9FB4F1E75408C12575D70031F321?OpenDocument (accessed 12 June 2014).

[31] Casanova, "Religion, Politics and Gender Equality," 17.

Chapter Two: Conscientious Objection in the United States

Religious freedom jurisprudence and existing conscientious objection legislation in the United States provide a sketch of how the public and private domain are considered in US legal and political culture against which the *Hobby Lobby* case can be understood. The Constitution is the legal source of religious freedom in the US, but exactly what it says on the topic is the subject of extensive debate. Laws exempting health care providers from conducting abortions or providing contraception are composed of a complicated mix of legislative and regulatory mandate and First Amendment jurisprudence, against the backdrop of a divisive culture war. These laws, combined with the Supreme Court's decisions in the *Lemon* and *Smith* cases, and Congress's response with Religious Freedom Restoration Act, demonstrate the boundaries of American understanding of the public and private domain with regards to religion. In this chapter, I provide a brief overview of each of these important elements shaping debates about conscientious objection in the United States. I argue that religious freedom in the United States can be defined as the ability to practice one's religion[32] unburdened by government regulations in the public domain, and uninfluenced by government endorsement of any particular belief. This division broadly follows what José Casanova refers to as the "liberal-economic" division between public and private, which characterizes the state as "public" and all else as "private."[33] By declining to regulate religion, the United States identifies it with the private domain in a way that severely limits the kinds of public concerns that can justify restricting religion.

Historical Background

American legal interpretation uses colonial and early American history as a reference point for understanding the intentions behind the Constitution,

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[32] The American judiciary has no set definition of religion, but frequently used criteria are the existence of a deity and similarity to "mainstream" religion, meaning Protestant Christianity. See: Jeffrey Omar Usman, "Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology," *North Dakota Law Review* 83, no. 1, 2007.

[33] Casanova, *Public Religions*, 41.

including its provisions for religious freedom. They therefore provide an appropriate starting point for understanding how the public and private are divided in US legal and political culture. The Religious Clauses of the Constitution include two potentially conflicting guarantees: First, that Congress "shall make no law respecting the establishment of religion," and second that Congress shall not "prohibit the free exercise thereof." The Supreme Court has stated, "It is imperative that constitutional jurisprudence maintain a loyal faithfulness to those who were central to the conception and subsequent drafting of the nation's religious liberty protections."[34] However, this is a complicated endeavor, because the new American states had long, widely varying histories and diverse policies on religious liberty.

For nearly two centuries prior to the drafting of the U.S. Constitution's First Amendment, religion in the British American colonies (primarily Christianity) was regulated by a patchwork of established churches, restrictions on particular denominations, and persecution.[35] Though America's founding mythology describes the Pilgrims as fleeing oppression in England to establish religious freedom in the New World, Massachusetts Bay Colony was in fact no kinder to non-conformists than England had been, replacing the Anglican State-Church with a Puritan State-Church.[36] Another colony, Rhode Island, was established as a safe haven for dissenters being banished from Massachusetts.[37] Beyond New England, Southern colonies also imposed religious restrictions; for example, in Virginia the Church of England was formally established and funded by taxes, and only Anglicans could hold office or vote. This directly contributed to James Madison and Thomas Jefferson's support of disestablishment in the Constitution.[38] The strength of the established church varied by colony, and some colonies, including Rhode Island, Maryland and Pennsylvania, provided protections for freedom of religion.[39] The amount of religious liberty therefore varied from colony to colony.

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[34] Usman, "Defining Religion," 128.
[35] Anthony Gill, *The Political Origins of Religious Liberty,* (New York: Cambridge University Press, 2008), 61.
[36] Gill, *Political Origins,* 64.
[37] Gill, *Political Origins,* 71.
[38] Gill, *Political Origins,* 73.
[39] Usman, "Defining Religion," 137.

English policy towards religious dissenters and towards the colonies contributed to an increase in religious tolerance in America. Early in colonial history, in the mid-17th century, King James I's policy towards religious groups was "love it or leave it (or be jailed)," and the presence of dissenters of all kinds in America contributed to the colonies' religious pluralism (as did internal migration by banished dissenters within the colonies).[40] After the Toleration Act passed, about fifty years later in 1688, colonists referenced it in political appeals against religious taxation in the colonies, leading several colonies to establish their own Toleration Acts.[41] Later, as tensions rose between England and the American colonies, the presence of a common enemy encouraged religious tolerance in the interests of presenting a united front.[42] It is against this diverse background – both in terms of denominations present, and in terms of policies in place in the new states – that the Constitution's religious protections were drafted.

With the removal of religious taxes in several colonies and the trend towards tolerance encouraged by the Revolutionary War, the writers of the Constitution debated the extent of protection for religious liberty. Influenced by Enlightenment thinkers such as John Locke, they agreed on the importance of religious freedom; James Madison, who wrote the first draft of the First Amendment, described it as "in its nature an unalienable right."[43] Madison and Thomas Jefferson also argued that religious duties take priority over secular duties.[44] However, others, such as George Washington, held that freedom of conscience must be balanced with state interests.[45] The idea of such a balancing act was not unprecedented; state religious freedom provisions of the time, such as the New York Constitution of 1777, often included clauses providing for free exercise of religion except in cases when it would conflict with peace, safety, or other state interests.[46] Recently, Supreme Court justices both for and against religious exemptions have referenced this historical debate, hoping to uncover the intended limits of conscientious objection implied in the Free Exercise clause.

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[40] Gill, *Political Origins,* 85.
[41] Gill, *Political Origins,* 107.
[42] Gill, *Political Origins,* 110.
[43] Michael W. McConnell, "Freedom from persecution or protection of the rights of conscience?: A critique of justice...," *William & Mary Law Review* 39 (February 1998): 824.
[44] Usman, "Defining Religion," 142.
[45] McConnell, "Freedom from," 832.
[46] McConnell, "Freedom from," 831.

Recent History and the Culture Wars

In more recent American history, the division between the public and private regarding religion has largely been regulated by the Supreme Court's numerous, varied, and conflicting answers to questions of religious liberty. The diversity of these cases highlights the importance of the issue in American politics; however religious freedom issues are in fact relatively new to the federal level, where much conscientious objection legislation has been made. Most First Amendment jurisprudence dates back only about a half century, for a few reasons. After the passage of the Fourteenth Amendment, guaranteeing due process to all citizens, in 1868, the provisions of the Constitution had to be "incorporated" one by one to apply to the states. The Free Exercise clause was incorporated in 1940, and the Establishment Clause in 1947.[47] Prior to that, religious clause cases were addressed almost entirely at the state level, except in a few cases where the federal courts handled cases brought in territories.[48] Additionally, increasing pluralism and the growth of government regulations became serious complications to the ideas of free exercise and non-establishment beginning late in the nineteenth century.[49] As a result of these factors, federal-level, national discussion of religious freedom did not really begin until the mid-twentieth century, just in time for the cultural upheaval of the 1960s, which further shook America's religious landscape.

Narratives about if the culture war exists and what caused it vary, but all give religion a role in the story. The end of World War II saw a surge in religiosity among both Democrats and Republicans, along with a sense of shared values (the term "Judeo-Christian" was coined in this period).[50] This pious national unity was shattered by the 1960s, and somehow, by the 1970s, political conservatives and religious people across denominations had become a united front against diverse social issues, notably abortion and homosexuality, reflecting

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[47] Incorporation of the Bill of Rights did not begin until the 1920s; prior to that, only violation of rights by federal authorities (rather than state or local ones) was tried in the federal court system. See Gitlow v. New York, 268 U.S. 652 (1925), for the first argument for application of the Bill of Rights to the states.

[48] Phillip E. Hammond, *With Liberty For All: Freedom of Religion in the United States,* (Louisville, KY: Westminster John Knox Press, 1998), 18-19.

[49] Hammond, *With Liberty For All,* 19.

[50] Putnam and Campbell, *American Grace*, 88.

changing understandings of gender and sexuality in American society. They were met with an equally impassioned response from the left, beginning what has been called a culture war. The term "culture war," coined by James Davidson Hunter, describes splits over social issues as indicative of deep moral division in American culture entering the political mainstream.[51] Both the "traditionalist" and "progressive" perspectives described by Hunter as the source of the conflict stretch across denominational lines, but correspond with debates between the religious and the secular over the place of religion in the public domain, as well as the role of women in society.[52] Shortly after the Supreme Court began taking up questions of religion, the question of what role religion should have in society was being loudly asked in American politics.

Exactly what triggered the emergence of the Religious Right is up for debate. Alan Wolfe, a prominent critic of the idea of a culture war, highlights the Establishment Clause decisions of the Supreme Court in the 1970s and 1980s, which sought to strictly separate church and state, as sparking the conflict, noting that, "however the courts resolve these questions, someone will feel aggrieved."[53] Desegregation offers another possible trigger point; encouraged by evangelical preachers such as Jerry Falwell, conservative Christians campaigned to protect religious tax exemption for private "white academies" after public schools in the South were desegregated, making what had previously been a civil rights issue a religious liberty issue.[54] Changing gender and sexual norms, particularly the decision to legalize abortion in *Roe v. Wade,* also contributed to a rise in evangelicalism, and gave Catholics and evangelicals common ground.[55] Whatever the trigger, by the 1980s the Religious Right was a recognized force in American politics, demanding a place for their religious perspective both in culture and in policy, particularly on issues related to gender, in the name of religious liberty.

This is not to say that religious liberty is a uniquely conservative issue –

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[51] James Davidson Hunter, "The Enduring Culture War," in *Is There A Culture War,* ed. by E. J. Dionne, E. J. and Michael Cromartie, (Washington DC: Brookings Institute Press, 2006), 13.
[52] James Davison Hunter, "The Culture War and the Sacred/Secular Divide: The Problem of Pluralism and Weak Hegemony," *Social Research* 76, no. 4 (2009): 1307.
[53] Alan Wolfe, "The Culture War That Never Came," in *Is There A Culture War,* ed. by E. J. Dionne, E. J. and Michael Cromartie, (Washington DC: Brookings Institute Press, 2006,) p. 65.
[54] Putnam and Campbell, *American Grace,* 114.
[55] Putnam and Campbell, *American Grace,* 116.

in fact, despite the culture war raging on through the 1990s, religious liberty was a place of common ground for both liberals and conservatives.[56] Douglas Laycock, who has written extensively on the constitutionality of religious exemptions, states that "whether and when to exempt religious practices from regulation is the most fundamental religious liberty issue in the United States today."[57] The Religious Freedom Restoration Act (RFRA), which will be described in greater detail below, was passed with overwhelming bipartisan support; the Coalition for Free Exercise of Religion, a group of nonprofit and lobbying organizations which campaigned for the bill, is perhaps the only time the American Civil Liberties Union and the National Association of Evangelicals, usually ideological opposites, have ever agreed on anything.[58] However, the Coalition fell apart after the passage of RFRA, divided primarily over abortion and homosexuality.[59] Questions of religious exemptions fell out of the limelight until the passage of the Affordable Care Act added fuel to the fire again.

Abortion's controversial place in American politics has been a driving force behind the creation of legislative religious exemptions. The Church Amendment, the first major federal legislation protecting doctors' rights to not perform abortions for religious reasons, was passed in response to *Roe v. Wade*. While state contraceptive mandates and pharmacist refusals to dispense contraception had raised the question of conscientious objection for contraceptives, the debate and passage of the Patient Protection And Affordable Care Act in 2010, and subsequent regulations from the Department of Health and Human Services (HHS) were responsible for bringing the issue into public discussion. The US Catholic Bishops launched a national campaign calling the contraceptive mandate an affront to religious freedom and pressuring Catholics to

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[56] It is worth noting that scholars do not agree that there even really is a culture war, or at least that most Americans are fighting it. Alan Wolfe, prominent critic of the culture war theory, argues that it only ever existed in the minds of elites and is not relevant now, citing the recent swing back towards an accommodationist perspective towards religion in the federal courts. After all, "not that many abortion providers have been killed in recent years." While the arguments that the culture war is primarily an elite phenomenon are strong, the need for high security around abortion clinics does imply that the issue remains divisive and controversial, to say the least. Alan Wolfe, "The Culture War," 66.

[57] Douglas Laycock, "The Religious Exemptions Debate," *Rutgers Law Review* 11 (Fall 2009): 145.

[58] Michael W. McConnell, "Why Protect Religious Freedom?," *Yale Law Journal* 123, no. 3 (2013): 773.

[59] Laycock, "Religious Exemption," p. 148.

vote against Barack Obama in the 2012 presidential election.[60] At the same time, a steady stream of legal challenges has kept abortion and contraception in the news, with evangelical organizations routinely conflating the two.[61] The case has raised a far greater response than similar conscience-based religious liberty cases due to abortion's contentious nature.

While the cases are consistently framed as questions of religious liberty,[62] they can also be viewed as a debate about the nature of contraception and abortion and about women's right to access reproductive health care. A 2013 Pew Research Center poll found that 45% of Americans still see abortion as a "critical" or "important" national issue, and the number rises to 64% among regular churchgoers. Such numbers suggest that the issue remains divisive.[63] Conservative pundits such as Rush Limbaugh and Mike Huckabee have dismissed the need for a contraceptive mandate by claiming that, for example, women who have more sex require more birth control pills,[64] or that birth controls help women "control their libido."[65] These statements imply that contraception is only used by sexually immoral women, and therefore should not be funded by the government. In this perspective, claims for religious liberty are tied up with public judgment of women's bodies and sexualities. While more tactful, religious liberty claims reflect a similar skepticism about the medical legitimacy of abortion and birth control. For example, the New England Journal of Medicine notes that some providers justify refusing to provide abortions or

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[60] Steven R. Goldzwig, "The U.S. Catholic Bishops, 'Religious Freedom,' and the 2012 Presidential Election Campaign: A Reflection," *Rhetoric & Public Affairs* 16, no. 2 (2013): 370.

[61] About 90 lawsuits have been filed against the contraceptive mandate, according to evangelical publication Christianity Today, including two class-action lawsuits. Jeremy Weber, "180 Evangelical Ministries Win Class-Action Lawsuit over Contraceptives (For Now)," *Christianity Today*, 20 December 2013. http://www.christianitytoday.com/gleanings/2013/october/guidestone-southern-baptists-becket-fund-hhs-contraceptive.html (accessed 12 June 2014).

[62] The Becket Fund, the law firm behind many of the challenges, works exclusively on religious liberty cases.

[63] "How Important is the Abortion Issue?," Pew Research Center, 24 January 2013. http://www.pewforum.org/2013/01/24/how-important-is-the-abortion-issue/ (accessed 12 June 2014).

[64] Maggie Fazeli Fard, "Sandra Fluke, Georgetown student called a 'slut' by Rush Limbaugh, speaks out," *Washington Post*, 2 March 2012. http://www.washingtonpost.com/blogs/the-buzz/post/rush-limbaugh-calls-georgetown-student-sandra-fluke-a-slut-for-advocating-contraception/2012/03/02/gIQAvjfSmR_blog.html (accessed 12 June 2014).

[65] Associated Press, "Huckabee: Democrats pitch women on birth control," *Washington Post,* 23 January 2014. http://www.washingtonpost.com/politics/huckabee-democrats-pitch-women-on-birth-control/2014/01/23/40bbcaa0-847f-11e3-a273-6ffd9cf9f4ba_story.html (accessed 15 May 2014).

contraception by distinguishing between "medical care and non-medical care," viewing abortion and contraception as "lifestyle choices," which implies similar judgment of women's health decisions to Limbaugh and Huckabee's statements.[66] Women's health advocates such as Planned Parenthood have taken issue with this characterization, trying to re-frame contraception as essential preventative care without reference to sex.[67] While claims for religious exemptions do not rest on the relative importance of birth control to women's health, the debate takes place against a backdrop of an oft-heated debate about reproductive health and women's sexuality that has been ongoing since the 1960s, roughly coinciding and often overlapping with national debate over religious free exercise. Religious freedom in the context of changing gender norms can again be understood as a question of state control, as religious people seek to maintain a place for their religious morals around gender and sexuality, putting them in opposition to government efforts to promote gender equality. In culture war discourse women's bodies, as much as the courts, are a site of public dispute between religious and government authority.

Religious Exemption Laws

Conscientious objection for abortion developed against this background of intense antagonism around abortion and women's reproductive health care more generally, and with historically unclear guidelines about under what circumstances religion could be restricted. Prior to the challenges to the ACA, conscientious objection for health care professionals had been written into legislation and executive regulation rather than settled by the courts. In 1992, over 2,000 such exemptions existed at both federal and state levels. More have passed since, including major legislation and regulations during the Clinton and George W. Bush administrations.[68] Federal law contains three major laws

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[66] R. Alta Charo, "The Celestial Fire of Conscience — Refusing to Deliver Medical Care," *New England Journal of Medicine,* 16 June 2005. http://www.nejm.org.proxy-ub.rug.nl/doi/full/10.1056/NEJMp058112 (accessed 12 June 2014).

[67] "The Facts on Birth Control Coverage for Women," Planned Parenthood. http://www.plannedparenthoodaction.org/issues/birth-control/facts-birth-control-coverage-women/ (accessed 12 June 2014).

[68] O'Callaghan, Nora. "Lessons from Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right," *Creighton Law Review* 39, no. 3 (April 2006): 625-626.

concerning religious exemptions in health care.[69] The first are the Church Amendments, named for their sponsor Senator Frank Church of Idaho, which were passed in 1973 in response to the Court's decision in *Roe v. Wade*.[70] The Church Amendments include several protections. First, public authorities cannot require entities or individuals receiving federal funds to perform abortions or sterilizations if doing so would violate their conscience. For example, licensing regulations requiring Catholic hospitals to provide facilities for abortion would violate this amendment. Second, health-related entities receiving government funding cannot discriminate in employment based on a person's refusal to perform abortions due to religious or moral convictions. Finally, the Church Amendments include protections for biomedical researchers receiving grants from the Department of Health and Human Services.[71] The Church Amendments allow both individuals and organizations to exempt themselves from any objectionable activity without penalty.

The second federal health care conscience protection statute is Section 245 of the Public Health Service Act, passed in 1996 under President Clinton. The act prohibits government discrimination against any entity or individual who refuses to provide or participate in abortions, or training, counseling, or referrals for abortions.[72] The Hyde/Weldon Conscience Protection Amendment, the most recent major health care conscience protection statute, passed in 2004. It aims to expand protection to insurance plans and "any other kind of health care facility, organization, or plan" that does not include abortion.[73] The Amendment denies federal funding to any institution that discriminates based on refusal to "provide, pay for, provide coverage of, or refer for abortions."[74] These latter two statutes reinforced and expanded the Church Amendment to include any health care

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[69] E. Christian Brugger, "Do Health Care Providers Have a Right to Refuse to Treat Some Patients?" *Christian Bioethics: Non-Ecumenical Studies In Medical Morality* 18, no. 1 (April 2012): 16.

[70] Brugger, "Health Care Providers," 16.

[71] "Church Amendments," Title 42 *U.S. Code,* § 300a-7. http://www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect/42usc300a7.pdf (accessed 12 June 2014).

[72] "Public Service Health Act," Title 42 *U.S. Code* § 238n. http://www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect/42usc238n.pdf (accessed 12 June 2014).

[73] Brugger, "Health Care Providers,"17.

[74] "Weldon Amendment, Consolidated Appropriations Act," Pub. L. No. 112-74, 125 Stat 786, 2012. http://www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect/publaw112_74_125_stat_786.pdf (accessed 12 June 2014).

related entity and to include conscientious objection to providing referrals for objected-to services. The Church Amendments and other federal conscience protection statutes are based on the Warren/Burger era court standard, discussed further below, that if a law potentially infringes on religious exercise, the courts would overturn it.[75] Although it includes similar provisions, the ACA was framed much more explicitly in terms of exemptions.

The ACA includes the same conscience protections as the Church and Whedon Amendments with regard to abortion. Executive Order 13535 directs executive agencies to ensure abortion services were distinguished from other health care services in the insurance exchanges created by the ACA.[76] However, the ACA raised a new set of conscience concerns when it mandated that insurance plans include full coverage for all contraceptive methods approved by the Food and Drug Administration.[77] Department of Health and Human Services (HHS) Secretary Kathleen Sebelius was responsible for creating exemptions to the contraceptive requirement. "Religious employers" are not required to provide contraceptive coverage. "Religious employers" are defined by HHS regulation as organizations which: 1) have the primary purpose of inoculating religious values; 2) primarily employ those who share their beliefs; 3) primarily serve those of the same faith; and 4) qualify as nonprofit organizations with the Internal Revenue Code.[78] Religiously affiliated organizations, including universities and hospitals, are not included in this definition. They must provide their employees with health insurance plans that pay for contraception.

Religiously affiliated employers raised complaints with the regulations. Catholics objected to facilitating access to contraceptives, which they regard as sinful.[79] Some evangelical Christians, while not opposed to contraception, objected to the inclusion of certain intrauterine devices and emergency

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[75] O'Callaghan, "Lessons from Pharaoh," 624-627.
[76] U.S. Executive Order no. 13535, *Code of Federal Regulations*. http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst (accessed 12 June 2014).
[77] Daniel J. Rudary, "Drafting a 'Sensible' Conscience Clause: A Proposal for Meaningful Conscience Protections for Religious Employers Objecting to the Mandated Coverage of Prescription Contraceptives," *Health Matrix: Journal Of Law-Medicine* 23, no. 1 (Spring 2013): 356.
[78] U.S. Department of Health and Human Services, "Coverage of preventative Health Services § 147.130," *Code of Federal Regulations: Title 45,* Washington DC: Government Printing Office, 2011, 692. http://www.gpo.gov/fdsys/pkg/CFR-2011-title45-vol1/pdf/CFR-2011-title45-vol1-sec147-130.pdf (accessed 12 June 2014).
[79] O'Callaghan, "Lessons from Pharaoh," 561.

contraceptives (Plan B and Ella, two brands of the "morning after" pill), which they see as abortifacients for potentially preventing a fertilized egg from implanting in the uterus.[80] Facing complaints from Catholic universities and other religiously affiliated employers, the Obama administration added a further exception to contraceptive coverage. Non-exempt organizations which oppose contraceptives for religious reasons and which "hold [themselves] out as a religious organization" may submit a form certifying their objection. The insurance company would then pay for contraceptive coverage directly.[81] Religious non-profits such as Notre Dame University, Catholic Charities of several cities, and Eternal World Television Network objected that this arrangement still makes them complicit in providing birth control in violation of their religious beliefs.[82] The case is pending in federal courts.[83]

For-profit corporations have also voiced complaints about the contraception mandate, claiming that it violates their religious beliefs and that forcing them to provide this coverage violates their religious freedom. The for-profit corporation's cases challenging the contraceptive mandate of the ACA have progressed further in the federal courts without compromise from the Obama administration. I will examine them in more detail in the following chapter.

Despite these objections, the ACA incorporates the existing, very comprehensive religious exemptions for individuals and entities objecting to abortion, as well as significant new exemptions for individuals and entities that object to contraception on specifically religious grounds.[84] These broad protections follow from an understanding of religious freedom that demands as few restrictions on religion as possible, and a deep skepticism towards and controversy around the legitimacy of abortion and contraception in American political culture.

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[80] *Hobby Lobby, Inc. et. al. v. Kathleen Sebelius et. al.,* U.S. Court of Appeals, Tenth Circuit, 27 June 2013, 43. http://www.ca10.uscourts.gov/opinions/12/12-6294.pdf (accessed 12 June 2014).
[81] U.S. Centers for Medicare and Medicaid Services, "Women's Preventive Services Coverage and Non-Profit Religious Organizations." http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (accessed 12 June 2014).
[82] "HHS Mandate Information Center," Becket Fund for Religious Liberty, http://www.becketfund.org/hhsinformationcentral/ (accessed 12 June 2014).
[83] U.S. Supreme Court, "Order in Pending Case No. 13A691 Little Sisters of the Poor, et al. v. Sebelius, Sec. of H&HS, et. al.," 24 January 2014. available http://www.supremecourt.gov/orders/courtorders/012414zr_6jgm.pdf (accessed 12 June 2014).
[84] While non-religious moral grounds are recognized as a reason for exemption in the abortion laws, the contraception exemptions are available only for religious reasons. Religion is not defined in the regulations for the purposes of the Act.

Constitutional Basis for Religious Exemptions

Conscientious objection for abortion and contraception is rooted in the Free Exercise Clause of the First Amendment of the United States Constitution, which prevents Congressional restrictions on the free exercise religion. Defining "religion" has largely been up to the courts, and their definitions generally emerge from Protestant theology. In the late 1800s, the Court characterized religion as any "mainstream" theistic belief, excluding groups such as the Church of Jesus Christ of the Latter Day Saints.[85] After the 1940s, the court began expanding its definition, but still using Protestant Christianity as a reference point and drawing on Protestant ideas, such as religion as "ultimate concern."[86] The court's approach to religion can be compared to its famous "I know it when I see it" approach to obscenity – no clear criteria for defining religion has been set, but the "obvious" case of Protestant Christianity serves as the starting point.

Beginning in the mid-twentieth century, concurrent with the culture war, the Supreme Court under Chief Justice Earl Warren, and later Warren E. Burger, handed down a series of decisions dramatically expanding religious exemptions.[87] The Court ruled in *Sherbert v. Verner* and *Wisconsin v. Yoder* that the government could not burden the exercise of religion without a compelling government interest.[88] "Government interest" refers primarily to the goals of legislative programs, such as provision of social benefits. In *Sherbert*, the court settled in favor of a Seventh Day Adventist who had been denied unemployment benefits when she was fired for refusing to work on Saturday for religious reasons.[89] In *Yoder*, Amish families successfully petitioned to remove their children from public schooling after eighth grade despite state law requiring students to attend school until age 16.[90] Essentially, the court granted Seventh Day Adventists an exemption from unemployment benefit regulations that hindered their religious practice and the Amish an exemption from Wisconsin educational laws. While the court acknowledged that the state had an interest in avoiding fraud in unemployment benefits and educating children, in both cases

[85] Usman, "Defining Religion," 167.
[86] Usman, "Defining Religion," 170.
[87] Laycock, "Religious Exemption," 140.
[88] Hammond, *With Liberty For All,* 42.
[89] Hammond, *With Liberty For All,* 45.
[90] Hammond, *With Liberty For All,* 46.

these interests were found to be insufficient to justify the burden placed on the particular individuals who objected. While the Supreme Court in practice rejected more claims for exemptions than they granted, the "exemption doctrine" imposed strict scrutiny on laws that could potentially violate religious exercise.[91] These and similar cases set a short-lived standard which became the foundation for current understandings of religious exemptions as crucial to religious liberty in the United States. The exemption doctrine provides the basis for conscientious objection to abortion, providing language by which opponents of abortion could call any pressure by the state to participate in abortion an unconstitutional burden on their religious exercise.

The compelling interest standard established by *Sherbert* and *Yoder* was overturned in 1990 with the case *Oregon Employment Division v. Smith.* In that case, two Native Americans were fired after using peyote, a drug used in religious rituals by the Native American Church. Both men were denied unemployment benefits because the drug was prohibited under Oregon law. The court found that, because the law did not deem peyote a prohibited drug with the *intention* of discriminating against Native Americans, the state did not need a compelling interest to penalize the defendants for using it.[92] The compelling interest was then limited to those regulations that specifically targeted religious groups for discrimination, not to generally applicable, "neutral" laws. State and federal courts disagree on what constitutes general applicability or neutrality, but at minimum such laws will not specifically target a particular religion. The *Smith* decision significantly increased the ability of the government to pass legislation or regulations with the potential to burden religious practice.

Beginning in the 1960s, the Sherbert test was used for judging the constitutionality of government infringement on free exercise. Based on the previously detailed case *Sherbert v. Verner*, the court must determine: 1) whether the individual has a sincere religious belief; 2) whether the individual's ability to act on that belief was infringed upon by government action; 3) whether the government had a compelling interest that justified this infringement; and 4) whether the government pursued that interest in the way least burdensome to

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[91] Frederick Mark Gedicks, "Religious Exemptions, Formal Neutrality, and Laïcité," *Indiana Journal Of Global Legal Studies* 13, no. 2 (2006): 474.
[92] Hammond, *With Liberty For All,* 15.

religion.[93] The Sherbert test was overturned with *Smith*. However, *Smith* was not a popular decision, opposed by virtually every religious and civil liberties group in the country, and Congress promptly took action to return to the previous standard. It passed the Religious Freedom Restoration Act (RFRA) in 1993 with an unanimous vote in the House and by a 97-3 margin in the Senate, reinstating the compelling interest tests in free exercise cases.[94] The "exemption doctrine," which required minimal restrictions on religion and only based on the most important of state interests, was therefore reinstated.

RFRA has been challenged in court for overstepping the bounds of Congressional authority. In *City of Boerne v. Flores* in 1997, the court ruled that the RFRA was unconstitutional as it applied to state governments.[95] As a result, state courts interpret free exercise clauses inconsistently. Fifteen states enacted their own versions of the RFRA, and several state courts have adopted something like the compelling interest standard.[96] On the other hand, California and New York have used the standard established in *Smith* –which allowed burdens on religion as long as the law itself did not target a particular religious group –to defend contraceptive mandates similar to the one in the ACA, a mandate without broad religious exemptions.

A California case reveals the complexity of determining what constitutes religious discrimination in applying *Smith* to demands for religious exemptions. In 2004 Catholic Charities of Sacramento challenged the California Women's Contraceptive Equity Act, claiming that it violated their religious free exercise by requiring them to provide contraceptive coverage for their employees. The law included a narrow exemption, identical to that in the ACA, including some but not all Catholic organizations. The court found that because the law applied to all employers and advanced a legitimate secular interest, it did not discriminate against Catholics. As the exemption did not include all Catholic organizations, the court did not find that the non-exempt organizations had been deliberately targeted.[97] However, the legislative record indicates that ensuring coverage for employees of Catholic hospitals and universities was indeed a goal of the law. A

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[93] Hammond, *With Liberty For All,* 44.
[94] McConnell, "Why Protect?," 773
[95] Rudary, "'Sensible' Conscience Clause," 372.
[96] Laycock, "Religious Exemptions," 142.
[97] Rudary, "'Sensible' Conscience Clause," 372.

study at the time of the debate indicated that 90% of insured Californians were covered for contraceptives; supporters of the bill indicated that its goal was to close the gap for the remaining 10%, including specifically "religious employers," through the narrow exemption.[98] Justice Brown of the California Supreme Court argued that, "none [of the women employed by Catholic Charities] are faced with a pervasive practice which would prevent them from finding more congenial employment" – meaning that their lack of access to contraception was not a serious enough problem to legislate.[99] Ultimately, legislators' intent to cover women employed by religiously affiliated organizations was not found to constitute religious discrimination. The narrow exemption was upheld.

In his dissent, Justice Brown also claimed that, "[t]his is such a crabbed and constricted view of religion that it would define the ministry of Jesus Christ as a secular activity."[100] His comment reflects claims often made by religious organizations seeking exemptions that do not meet the strict criteria of narrow exemptions. While Catholic hospitals and universities both employ and provide services to non-Catholics, they understand their work as a *ministry* and thus as part of their religious practice. For example, under Canon Law, Catholic hospitals are defined as Church property, "to be used *only for* the ecclesiastical ministries," (emphasis original) potentially bolstering claims that work there should be understood as religious activity.[101] By the Church's own definition, a doctor serving in a Catholic hospital is participating in a religious activity; however, to the patient, the hospital's work looks similar to that of a secular hospital. In Free Exercise cases seeking conscientious objection, determining constitutionality often hinges, directly or indirectly, on the matter of where the line between secular service and religious practice is drawn, mirroring the broader dilemma of where to draw the line between public and private spheres. This creates a problem for the courts; on the one hand, neutrality towards religion demands that they not make substantive decisions about what religious activity is, but not doing so makes it difficult for the state to justify exercising authority over religious organizations that serve people outside their own group, which seems to make

[98] O'Callaghan, "Lessons from Pharaoh," 629-630.
[99] O'Callaghan, "Lessons from Pharaoh," 631.
[100] O'Callaghan, "Lessons from Pharaoh," 630.
[101] Kristen L. Burge, "When It Rains, It Pours: A Comprehensive Analysis of the Freedom of Choice Act and its Potential Fallout on Abortion Jurisprudence and Legislation," *Cumberland Law Review* 40, no. 1 (January 2009): 240.

them in some way public. Current First Amendment jurisprudence generally requires that the court make some judgment about what constitutes religious practice; that which they deem to be legitimate religious practice becomes "private" and protected.

A Working Definition for Religious Freedom in America

A working definition of religious freedom in America can be sketched from this analysis of the Religion Clauses and their historical interpretation. Religious freedom in the United States may be understood as the ability to practice one's religion unburdened by government regulations in the public domain and uninfluenced by government endorsement of any particular belief. Religiously motivated actions can be regulated only when there is a compelling government interest at stake, or if the offending law is not discriminatory towards a particular religion, depending on jurisdiction within the United States (and how the judges are feeling that particular day). In other words, religion is largely conceived of as private, with very limited public reasons for restrictions.

First Amendment jurisprudence and the culture war have shaped efforts to protect the rights of doctors to refuse to perform abortions for religious reasons. The Warren and Burger Courts dramatically expanded the scope of permissible exercise of religion in *Sherbert* and *Yoder,* encouraging legislative creation of religious exemptions to avoid court challenges. At the same time, *Roe v. Wade*'s controversial decision legalizing abortion prompted the passage of the Church Amendment, which remains the primary federal law protecting religious exemptions in health care. When the Court moved to limit religious exemptions with *Smith* in 1990, the backlash led to the passage of the Religious Freedom Restoration Act in 1993. Though this has led to some confusion of interpretation, it provides the legal basis for challenges to the contraceptive mandate in the Affordable Care Act in 2014. While religious freedom is certainly one of the issues at stake in these challenges, ongoing culture war conflicts about the place of abortion in society and about women's sexuality in general provide important context. As the law currently stands, health care professionals, health care organizations, and health insurance providers have extensive protections of their religious freedom to refuse to provide services they find morally objectionable, which largely impact women and are often linked to ideas about women's sexual

morality. Contraception (sometimes understood to be abortion itself) and the religious rights of employers, unprotected by existing laws such as the Church Amendment, are the major areas of conflict in current debates over conscientious objection, making gender a key issue. The following chapter will examine *Hobby Lobby v. Sebelius*, a case that addressed some of these questions.

Chapter Three: Case Study – *Hobby Lobby v. Sebelius*

The "exemption doctrine" of religious freedom in the United States tends to conceive of the public as the state and to avoid restrictions on religion, which is seen as private. The swiftness and unanimity with which efforts to change this definition were shot down, through the passage of the Religious Freedom Restoration Act (RFRA), demonstrates the cultural importance of religious freedom for Americans. However, conscientious objection to abortion complicates this picture, making women's bodies and decisions the topic of public debate, while opponents of objection simultaneously demanding the "privateness" of women's bodies through the right to be free from religious influence in their decisions. In the *Hobby Lobby* case, the picture becomes even more confusing because the entity claiming religious rights is a business, and businesses hold an unclear place in US religious freedom jurisprudence. State neutrality towards religion is difficult, if not impossible, in a context where the very questions of what counts as religious exercise for a business must be answered in order to determine what is public and private. In this chapter, I argue that these ambiguities invite new interpretations of the public-private divide as advocates of religious freedom and of women's rights negotiate the limits of conscientious objection, as seen in the case *Hobby Lobby v. Sebelius*.

In February 2012, the Department of Health and Human Services published its rules for the coverage of preventative services under the 2010 Patient Protection Affordable Care Act (ACA). The regulation required insurers, with narrow exceptions for religious employers, to provide coverage for "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[102] In September of the same year, Hobby Lobby Stores Inc., Marcel Inc., and the family that owns the companies, the Greens, filed suit under the RFRA, seeking an injunction based on their religious opposition to four of the twenty covered contraceptive methods. They were originally denied an injunction and appealed. Their case was heard at the Tenth Circuit Court of Appeals, and in

[102] Department of Health and Human Services, "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act," *Federal Register* 77, no. 31 (15 February 2012). http://www.gpo.gov/fdsys/pkg/FR-2012-02-15/pdf/2012-3547.pdf, (accessed 12 June 2014).

July 2013 the court found in their favor, agreeing that the regulation imposed a substantial burden on the corporation's sincerely held religious beliefs.

In the decision, the court grapples with questions of whose religious freedom is really being considered, and how the government's interests should be weighted against Hobby Lobby's (or the Green's). In the case, the judge followed previous jurisprudence by identifying religion as a private affair that can only be restricted under limited circumstances based on narrow public interests. However, the case itself is not the only interpretation of Hobby Lobby's claim; dozens of organizations filed Amicus Briefs in support or opposition to a religious exemption for contraceptive coverage by for-profit corporations, and these organizations also used press releases and other media to convey what they felt was at stake in the case. In the *Hobby Lobby* case, the court, the Greens, and the National Association of Evangelicals maintained a liberal-economic public-private divide that identifies the public with the state and resists restrictions on religion. The American College of Obstetricians and Gynecologists and National Women's Law Center, by contrast, also referred to this divide, but placed it alongside a feminist public-private divide that included the market in the public domain and justified restrictions to religion through dualisms that put religion in opposition to medical science and women's rights. In this chapter, I first describe the case and the positions and values held by each side, as well as the public-private division declared by the court, before turning to discourse analysis of how other organizations interpreted the case and constructed public-private lines that supported their positions.

The Case

I used value critical analysis, described in the introduction, to examine the interests presented by each side in the case. Value critical analysis requires first identifying the proponents of each position, and then examining their arguments and values in order to create a narrative of each position. One side, the government, represented by Department of Health and Human Services (HHS) Secretary and Obama administration appointee Kathleen Sebelius, aimed to defend the ACA through claiming that the contraceptive mandate represents a compelling government interest. However, the other side consists of several entities that claim to be exercising religious freedom. There are two corporate

plaintiffs. The first is Hobby Lobby Stores, Inc., a craft store chain with over 500 stores and approximately 13,000 employees. The second is Marcel, Inc., a chain of 35 Christian bookstores with about 400 employees. David and Barbara Green own both of these companies, along with their three children.[103] In four concurring decisions and two dissenting, the judges struggled with the question of to what extent the corporate plaintiffs' religious beliefs can be considered the same as the individual plaintiffs', and with whether or not a corporation can exercise religion. The question of whether a corporation can hold religious beliefs challenges the distinction between the public and private sphere; in a "liberal-economic" perspective, corporations are entirely private, but from a feminist perspective they are entirely public.[104]

In the leading judgment, Judge Tymkovich, who was appointed to the court by George W. Bush, considers the corporations as religious actors in their own rights that exercise religion themselves. He cites the fact that Hobby Lobby's statement of purpose includes a commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."[105] He also notes that Hobby Lobby buys proselytizing newspaper ads and closes on Sundays as evidence of the company's religious beliefs.[106] However, he asserts throughout the judgment that Hobby Lobby's religious character is related to its status as a "closely held family business," suggesting that the Greens' religious beliefs are synonymous with Hobby Lobby's. Judge Gorsuch, another Bush Jr. appointee, argues in his concurring opinion that the Greens' religious rights, as individuals, have been violated, because they as individuals have to carry out the objectionable regulation. While the question of whether or not corporations have religious rights is an important one, the justices' interpretations were based on the Greens' particular beliefs whether they were speaking about the corporations or about the Greens as individuals. In this section I will first summarize the Greens' position, then the government's, before examining the court's decision.

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[103] *Hobby Lobby, Inc. et. al. v. Kathleen Sebelius et. al.,* U.S. Court of Appeals, Tenth Circuit, 27 June 2013, 43. http://www.ca10.uscourts.gov/opinions/12/12-6294.pdf (accessed 12 June 2014). (Hereafter *Hobby Lobby v. Sebelius* for leading judgment dissenting and concurring opinions identified by judge' name.)
[104] Casanova, *Public Religions*, 41.
[105] *Hobby Lobby v. Sebelius,* 10.
[106] *Hobby Lobby v. Sebelius*, 11.

The Greens brought their case under the Religious Freedom Restoration Act, which requires that Congress not burden a sincere religious belief, unless the burden is justified by a compelling interest and accomplished in the least restrictive way possible, as seen in the previous chapter. The key value underlying their position is an extensive view of religious freedom, understood as the right to exercise one's private beliefs free from any government regulation. They claim to run their business according to "Christian principles" through a management trust, of which each member of the family is a trustee. Members of the trust must sign a family statement of faith and promise to regularly read the Bible and pray as part of "maintain[ing] a close intimate walk with the Lord Jesus Christ."[107] Part of the Greens' religious beliefs is the conviction that life begins at fertilization; as a result, they object to anything that would destroy a fertilized egg. The Greens believe that emergency contraceptive pills and intrauterine devices could prevent the implantation of a fertilized egg, and object to providing insurance coverage for these to their employees in order to avoid facilitating abortion.[108] According to Judge Tymkovich, whether or not such devices actually cause abortion is ultimately irrelevant, because the key issue in the case is the Greens' beliefs, reasonable or not.[109] While this runs counter to liberal political theory, which requires a certain degree of reasonableness for beliefs to be accepted in public discourse, US federal courts have consistently rejected this requirement in order to avoid putting the court in the position of evaluating theological claims.

The claim that religiously motivated businesses merit protection is not unprecedented. For example, in 1982, the Supreme Court heard *United States v. Lee*, which considered a Free Exercise claim by an Amish business owner who objected to paying into Social Security for religious reasons. While the court ultimately found that maintaining Social Security was a compelling interest, it recognized that the Amish employer's religiously motivated business decisions were protected under the First Amendment. Technical differences distinguish the *Lee* case from Hobby Lobby's claims, such as the fact that Lee's business was unincorporated and significantly smaller than the Greens' businesses. However,

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[107] *Hobby Lobby v. Sebelius*, 11.
[108] *Hobby Lobby v. Sebelius*, 12.
[109] *Hobby Lobby v. Sebelius*, 13, footnote 3.

the basic scenario - a religious individual claiming religious freedom against government regulations of his business - is similar, showing the uncertain place of businesses in religious freedom jurisdiction.

The view of religious freedom that underlies their claim is quite broad, failing to recognize any clear distinction between government regulation over the secular and the religious and claiming wide moral culpability based on religious beliefs.[110] By arguing that even providing access to certain forms of birth control violates their consciences, the Greens cast themselves as accountable for their thousands of female employees' potential decisions. Though the conscience-violating action is both indirect and to be undertaken as a business rather than as individuals, the Greens understand their right to religious freedom to extend far enough to encompass their business, even though it appears to exist outside of the realm of private religious exercise generally understood to be protected by the First Amendment.

The government's key goal in the case is to put forward a competing, narrower view of religious freedom, which allows the state to determine where the line between religious and secular interests is placed in order to advance other interests despite religiously motivated objections. The court points out in their opinion that allowing Hobby Lobby to deny coverage for four forms of contraceptive out of twenty to the women among their 13,000 employees will hardly make a dent on contraceptive coverage nationally, especially when other exemptions exist in the law which leave women uncovered for other reasons, and claims that as a result it is difficult for the government to justify refusing this particular exemption. However, the coverage for those women in particular, while important, is not the only issue at stake in the government's arguments; rather, they make a case for why government restriction on private businesses is permissible generally, despite the owner's sincere beliefs.

The government attempts to place the line between private religious exercise and the public domain between non-profit organizations and for-profit organizations, arguing that this distinction is implied in both the text of the First Amendment and in the Religious Freedom Restoration Act. They compare RFRA with similar laws, such as Title VII, which forbids discrimination based on

[110] *Hobby Lobby v. Sebelius*, 57.

religion but exempts "[any] religious corporation, association, educational institution, or society."[111] The government argues that since that in Title VII, the Americans with Disabilities Act, and the National Labor Relations Act, it accorded religious exemptions only to "natural persons and religious organizations," this understanding of who is entitled to seek religious exemptions is carried through to the Religious Freedom Restoration Act.[112] The Greens as individuals have religious rights, but the Affordable Care Act, which is targeted at corporations, does not address them as private individuals, viewing them only in their capacity as the decision-makers for a regulation-bound organization.

While basing free exercise rights on the tax code in some ways seems arbitrary, the government seems to insist that a line must be drawn *somewhere*, and that the for-profit/non-profit distinction is a workable proxy for the public/private distinction. Incorporation as a for-profit business, the dissenting justices argue in agreement with the government, creates a new legal entity with unique public responsibilities.[113] The marketplace is equated with the public domain, in a way similar to the work/home distinction identified by feminists such as Benhabib, which identifies the domestic sphere as private and the market as public, in contrast to the liberal-economic model that identifies the market as private. The centrality of the marketplace to a corporation's legal identity is held up as reason to distinguish its actions from the religious beliefs of its owners.

Having drawn a line between the public and the private based on the secularity and legal distinctiveness of corporations in the marketplace, the government turns to the question of what compelling interests legitimize the contraception mandate; they cite gender equality and public health. Interestingly, the government makes little effort to say that either of these values is more important than the Greens' religious freedom; neither of these interests is constitutionally protected or holds religious freedom's status as "first freedom". Rather, they argue that these interests place little burden on the Greens by pointing to the indirect nature of the burden. As the Greens themselves say, their beliefs are not "even implicated" by their employee's choices. They object to potentially facilitating those choices, because they feel that their religion forbids

[111] *Hobby Lobby v. Sebelius*, 29.
[112] *Hobby Lobby v. Sebelius,* 30.
[113] Briscoe, *Hobby Lobby v. Sebelius*, 19.

them from "participating in, providing access to, paying for, training others to engage in, or otherwise supporting" these forms of contraception.[114] The government recognizes that they are burdening this belief, but argues that the private nature of the women's choices sufficiently distances the Greens, making the burden not substantial enough to merit exemption.

Unexpectedly, the court used an essentially theological argument to respond to this claim. The leading judgment states that while such limited moral culpability has sufficed for the government, religious believers' moral culpability extends further. They emphasize that this sense of participating in immoral action need not be reasonable, only sincerely held. While the Greens claim that they do not intend to prevent their employees from purchasing contraception, arguing that they could use their own money to do so, the court accepts that the Greens have some moral responsibility for their employees' choices that merits legal protection. Rather than attempting to establish some secular standard of moral culpability, the court is willing to take a religious understanding. While this might be interpreted as an effort at neutrality – taking religion at its word rather than making theological judgments –the government takes issue with this interpretation, identifying the religious understanding as an unfair endorsement of Christian perspectives in the public domain. The government proposes individual choice as another possible line for delineating private religious exercise and regulations in the public domain, where religion is in the public sphere when it is in a position to limit someone else's personal choices. The government presents liberal values such as privacy and free choice as appropriate limits on religious freedom.

The case, then, rests primarily on competing understandings of where the limits between religious life and the secular public domain properly lie. The Greens deny that any such limits exist; their religious beliefs extend to their business decisions and give them broad moral responsibility, and therefore their exercise of those beliefs merits protection. The government responds by accepting the Greens' beliefs, but proposing possible limits, such as participation in for-profit business or the privacy and choice of others, on exercise. While religious exercise might be said to be burdened beyond those limits, the burden is

[114] Briscoe, *Hobby Lobby v. Sebelius,* 22.

not substantial, because it is distanced in some way from the believer's individual choices. Ultimately, the court sided with the Greens, unsatisfied with the government's answer to the admittedly problematic task of dividing the public and private.

Discourse Analysis

In order to see a broader picture of the issues in the case, I examined documents from several organizations that submitted amicus briefs to the court in support of either Hobby Lobby or the government. To select the organizations, I examined the list of groups that had submitted amicus briefs and divided them into three categories: Faith-based organizations, which organized around a religious conviction or denomination; professional organizations, organizations which advocated on behalf of medical professionals;[115] and women's rights organizations, organizations whose goals focused on promoting women's legal and social equality, often through legislation. I selected one group that had commented publically on the case from each category. Chosen groups were active in political discourse, for example through maintaining lobbying offices and issuing press releases on political issues; they each also included members across the country (rather than state or local organizations) and had websites with detailed descriptions of their backgrounds and positions. In press releases and reports, the organizations were able to move beyond legal arguments to describe the values they saw at stake. Two texts were selected from the organization's websites, looking first for texts related to the Hobby Lobby case specifically and then for texts related to religious objections more generally. All texts were from the period following the filing of the Hobby Lobby case, between November 2012 and January 2014, and they fell between 250 and 400 words.[116] Full texts of all documents are included in the appendices.

The discourse analysis involved close repeated reading of the texts with the following questions in mind:

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[115] Though this might sound like a comparably narrow category, it contained a wide variety of organizations, as pro-life and pro-choice doctors, nurses, and specialists often maintained separate organizations.

[116] The ACOG committee report, at 1600 words, is an exception; however only part of this document explicitly addressed conscientious objection, and only that part, about 350 words, was included in analysis, making it comparable to the other documents.

1. What are the core concepts in each text?
2. How are these concepts used?
3. How does the organization distinguish between the public and the private?
4. What concept of religion is being deployed?

The goal of these questions was to identify what each organization saw as the interests at stake in the case and the definition of religious freedom and its limits that they constructed as a result. As in the case itself, the texts revealed conflicting ideas about the appropriate distinction between the public and the private and about the nature of religion.

National Association of Evangelicals

The National Association of Evangelicals (NAE) portrayed the case, through press releases, as a case of government infringement on religious freedom – public intrusion to the private domain. According to their website, NAE represents "more than 45,000 local churches from 40 different denominations," and maintains an office in Washington, DC to "represent evangelical concerns to the government and to mobilize evangelicals to engage in the public sphere."[117] They expressed their support for Hobby Lobby in two press releases: the first, released on October 29, 2013 and edited with further information on November 26, urged the court to hear the case,[118] and the second, on January 28, 2014, announced that NAE had filed an amicus brief in the case.[119] Both documents emphasized the organization's understanding of religious freedom as a highly important right under threat from an intrusive government.

NAE focuses exclusively on the rights of religious organizations and religious business owners; employees are barely mentioned in either document. Interestingly, when the earlier press release describes "contraception coverage for employees," the later document uses almost identical language, except to refer

[117] National Association of Evangelicals, https://www.nae.net/ (accessed 22 February 2014).
[118] "NAE Asks High Court to Consider Mandate Covering Contraception," National Association of Evangelicals, 29 November 2013. http://nae.net/resources/news/1034-nae-asks-high-court-to-consider-mandate-covering-contraception (accessed 22 February 2014). Appendix 1.
[119] "NAE Files Supreme Court Brief for Hobby Lobby, Conestoga," National Association of Evangelicals, 28 January 2014. http://nae.net/resources/news/1070-nae-files-supreme-court-brief-for-hobby-lobby-conestoga (accessed 22 February 2014). Appendix 2.

instead to "cover[ing] contraception in company-offered health insurance plans," removing employees from the discussion entirely. Instead, the spotlight is on business owners, which NAE claims are given "unsatisfactory accommodations" and "no protection" for their beliefs. This language is not unique to the Hobby Lobby case; according to their website, a majority of their advocacy dealing with religious exercise in the workplace focuses on protecting the rights of conservative Christian religious employers.

The critical importance of religious freedom is underlined by the threat of government violation; the press releases tell a story of a sincere religious family forced to violate its biblical beliefs by illegitimate government authority.[120] The NAE makes this quite explicit in the November press release, responding to the possibility that the case will open up the way for all kinds of religious objections to laws:

> The opposite is more dangerous. To uphold the HHS mandate is to license this and future administrations to object to every religious belief and practice on the grounds of government authority. In America we want religious freedom and the First Amendment to be the first priority.

In this statement, the place of religion and government appear reversed: instead of religious people objecting to particular laws, the government is seen to object to religious beliefs, enacting illegitimate authority over religion. The NAE appears to leave no room for a line between the public and private in the lives of religious people, arguing that under no circumstances should government "violate the religious beliefs of any of its citizens, including business owners." Rather, the government should carve out accommodations and exemptions that leave religion alone, putting the limits of its authority at the place where any citizen's religious beliefs begin.

American College of Obstetricians and Gynecologists

The American College of Obstetricians and Gynecologists (ACOG) emphasized the medical importance of contraception, dividing the public and private based on a dualism between medicine and religion. According to their

[120] The NAE uses "biblical," "religious" and "moral" interchangeably to describe beliefs.

website ACOG is a private, voluntary, nonprofit organization with approximately 57,000 members, or more than 90% of certified ob-gyns in the United States.[121] It lobbies the government on both the national and state levels. In November 2012, when the Hobby Lobby case and similar objections were beginning to enter the courts, ACOG's Committee on Health Care for Underserved Women published a Committee Opinion on access to emergency contraception, highlighting among other barriers the problem of religious objections for access to contraception.[122] On November 26, 2013, ACOG released a statement expressing their support for the contraceptive coverage mandate. Neither of these documents discussed the issue in terms of religious freedom, emphasizing instead privacy and the legitimacy of contraception.[123] When religion was mentioned – only briefly in both documents, which downplayed the religious issues at stake – it was depicted as irrational and irrelevant to medical decisions.

ACOG paints contraception as morally neutral and misunderstood by religious people: if doctors' scientific opinions were correctly understood, religious people would be willing to facilitate access to contraception. They discuss "common misconceptions" that emergency contraception causes abortion, and cite scientific literature extensively, about half of the references in the opinion, to support the claim that it does not. They also support regulations that would require religious hospitals and pharmacies to provide access to contraception or referrals to non-objecting physicians. Within the medical profession, then, ACOG recommends education and legislation to avoid situations of religious objection. However, in the Hobby Lobby case, they reject the idea that the Greens' religious beliefs have any place in the discussion: "Decisions about medical care should be made solely between a woman and her

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[121] American Congress of Obstetricians and Gynecologists. http://www.acog.org/About_ACOG (accessed 22 February 2014).

[122] "Committee Opinion: Access to Emergency Contraception," American College of Obstetricians and Gynecologists, November 2012. http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Access_to_Emergency_Contraception (accessed 22 February 2014). Appendix 4.

[123] "Contraceptive Coverage Essential to Women's Health," American College of Obstetricians and Gynecologists, 26 November 2013. http://www.acog.org/About_ACOG/News_Room/News_Releases/2013/Contraceptive_Coverage_Essential_to_Womens_Health (accessed 22 February 2014). Appendix 3.

physician, with no involvement from her boss."[124]

ACOG casts religious opinions as irrelevant and possibly irrational in medical decisions, which are part of the public domain and therefore should be free from religious interference. Physicians and women take center stage, with Hobby Lobby's owners and their religious beliefs mentioned only briefly and dismissively, as interference in a private decision. The public sphere discussion of public health is seen as appropriately limited by medical and scientific discourse, leaving religious opinions in a private domain beyond the reach of citations.

National Women's Law Center

Like ACOG, the National Women's Law Center (NWLC) emphasized women's health in its statements about the Hobby Lobby case; however, they framed the Greens' religious freedom claim as an effort to impose religion on women's lives, emphasizing women's right to privacy – putting women's bodies in the private domain. NWLC lobbies for women's rights legislation and offers legal counsel in non-discrimination cases. It published two press releases about the case. The first, on November 26, 2013, announced the Supreme Court's decision to hear the case and included a statement from the organization co-president defending the contraceptive coverage requirement.[125] The second, on January 28, 2014, announced that NWLC had submitted an amicus brief in the case.[126] Both emphasized the legitimacy and efficacy of the contraceptive mandate for women's health, framing it as a compelling government interest in the public domain of the state, and described granting a religious exemption as imposing religious beliefs on women's personal choices. It frames religious freedom and women's rights as in opposition in order to justify restrictions on religion, creating a dualism in which religion must be privatized (removed from

[124] While NAE refers to the plaintiffs in the case as called them "owners" or "employers," ACOG and NWLC describe them as "bosses." One possible explanation for this is that "bosses" emphasizes the Greens' power over their employees in a way "employers" does not.
[125] "Supreme Court to Hear Challenge to Contraceptive Coverage Benefit," National Women's Law Center, last modified 26 November 2013, accessed 22 February 2014. http://www.nwlc.org/press-release/supreme-court-hear-challenge-contraceptive-coverage-benefit. Appendix 5.
[126] "National Women's Law Center Submits Amicus Brief in Support of Birth Control Coverage Benefit," National Women's Law Center, last modified 28 January 2014, accessed 22 February 2014. http://www.nwlc.org/press-release/national-womens-law-center-submits-amicus-brief-support-birth-control-coverage-benefit. Appendix 6.

the public domain, where it was introduced by conscientious objection) in order to protect women's private choices.

NWLC used similar language to ACOG in describing Hobby Lobby's position in the case: "Bosses and companies have no business interfering in their employees' personal health care decisions." This statement reflects a feminist understanding of the public-private division – the workplace is part of the public sphere, rather than just the state. However, the NWLC statements also justify the contraceptive mandate in terms of public (state) goals, emphasizing the importance of contraception for women's health, and describing the large number of women already covered by the policy. They also describe contraception (without distinction between emergency contraception and other kinds) as important to women's full participation in the public domain: "ensuring that women can obtain the forms of birth control that best fit their lives [promotes] women's health and participation in society."[127] The emphasis on privacy and access, particularly highlighting the personal nature of decisions about contraception, reflects the importance of the right to privacy in other discussions of reproductive rights, notably *Roe v. Wade,* and positions the decision to use birth control as part of the private (domestic) sphere. However, this decision is also in some way public, with facilitating women's use of birth control held forward as a legitimate state goal.

The co-president of the organization, Marcia Greenberger, described the companies as using "their free exercise of religion [as] a sword" against women's health. The statements do not necessarily imply that requiring companies to buy birth control *does not* impose a burden on the Greens' religious beliefs; rather, they emphasize that the benefits of the policy justify any burden, and characterize the Greens as attempting to prevent women from accessing birth control at all. This is reflected in the lack of distinction between emergency contraception and other kinds of birth control; Hobby Lobby comes across as seeking a more extensive exemption than they are, and therefore posing a greater threat to women's health. Religious beliefs are framed as damaging to women's rights – limiting women's autonomy, in liberal feminist terms - and needing to be restricted by laws that consider women's interests. This juxtaposition between

[127] "National Women's Law Center Submits Amicus Brief," National Women's Law Center.

women's rights and religion attempts to re-establish a firm line between the public and the private by emphasizing women's rights as a compelling interest under threat.

Analysis

Women's interests are conspicuously absent from the court's reasoning. Rather, the justices consider both the Greens' and the government's proposals for where the line between the private sphere and public sphere is appropriately drawn. The Greens contend that their business practices are best understood as an extension of their private beliefs, and therefore should be constitutionally protected. Given that they feel morally responsible for potentially facilitating abortion, even indirectly and in a scientifically dubious way, they argue that they cannot comply with the regulation without violating their beliefs. For them, the fact that the regulation impacts their for-profit business rather than some aspect of their personal lives is irrelevant – ultimately, they are responsible for complying, and feel unable to do so. Therefore, they consider the regulation a violation of their religious freedom, broadly understood in a way that extends the private sphere to include their business.

The National Association for Evangelicals agrees with this framing of religious freedom. In fact, they potentially go further by casting government as "objecting to" religion rather than the other way around, putting religious obligations above government interests and reversing the liberal dualism that privileges the public over the private. Exemptions to laws that violate a religious person's conscience are taken as a key feature of religious freedom, and failure to accommodate religion is portrayed as government intrusion on religious beliefs. By placing religious freedom at the top of a hierarchy of rights, NAE rejects the possibility of balancing religion against other compelling interests in this case.

While the NAE and to a lesser extent the Greens portray government as threatening to and intruding on religious freedom, the National Women's Law Center and the American College of Obstetricians and Gynecologists depict religion as an irrational, threatening force, interfering with private medical decisions. ACOG constructs scientific and medical knowledge as part of the appropriate distinction between the religious and the secular, and emphasizes the health benefits of contraception to women rather than discussing the religious

interests at stake. They describe government regulation as justified in the interest of women's health and privacy. NWLC makes similar arguments, as well as claiming that access to contraception increases women's ability to participate fully in society. Religion is further understood as a mater of personal choice, with the implication that the Greens could and should choose to believe differently based on public reason. Neither the ACOG nor NWLC denies that the Greens will have to violate their religious conscience. Rather, they emphasize that religious beliefs are outweighed by the need to support women's health, and suggest that religious ideas about contraception are misinformed or intrusive. The right to privacy and access to health care create limits on the public expression of religion.

While the government states that gender equality and public health are at stake in the case, its argument does not rest on the compelling nature of these interests. Rather, it objects more specifically to the idea that the Greens are entitled to make religious freedom claims in what the government casts as the secular realm of the marketplace. They propose that for-profit companies should be understood as public and therefore subject to regulation; because corporations are distinct legal entities, their owners cannot make religious claims through them. They also object to the Greens' claim to be morally accountable for their employees' behavior, arguing that their religious freedom can be properly limited when the objection is indirect and others' ability to make personal decisions is at stake. The fact that neither the Greens nor the government spends much time discussing women's interests in the case is surprising; perhaps the government seeks to avoid similar cases in the future by clarifying when religious freedom claims are permitted more generally.

All parties accept that the Greens have a sincere religious belief which the ACA contraceptive mandate violates; the government, ACOG, and NWLC argue that their belief simply does not matter, either because it is held in the public domain of the market where religion is not included, or because it is outweighed by the state's interests in promoting gender equality and women's health. The court rejects the compelling interest argument rather quickly, arguing that women can simply pay for their own contraception, and further rejects efforts to draw a distinction between the public and the private based on corporate status.

The difficulty the government has drawing such a line is unsurprising,

given what a fraught enterprise defining either "religion" or "secularism" is, but the ease with which arguments from other liberal rights such as gender equality were set aside is startling. Perhaps, as the NAE argues, the court views religious freedom a "first priority," superseding other rights, particularly since neither gender equality nor public health have constitutional protection. However, it is also possible that the court is working from an understanding of religious freedom that depends on public-private or secular-religious dualisms which recognizes no legitimate regulations in the private domain, and finding Hobby Lobby's claim religious and private cannot find cause to weigh it against other considerations. By viewing Hobby Lobby as a direct extension of the Greens' religious beliefs rather than a unique legal entity, the court puts off the question of whether corporations should be properly considered part of the public or the private domain. Supporting this interpretation is the fact that the court leaves open the possibility that other kinds of entities might not have religious rights – larger corporations, for example. There is still a line to be drawn somewhere, but this is not the place; and the Greens' beliefs are covered.

In this chapter, I have reviewed the arguments made by the Obama administration, the Greens, and the court itself in *Hobby Lobby v. Sebelius,* showing the multiple strategies used to divide the public from the private within the case. Despite arguments by the government that for-profit companies were in some way public, the court ultimately maintained a public-private divide that limited the public to the state. This view was both reflected and challenged in documents by the National Association of Evangelicals, the American College of Obstetricians and Gynecologists, and the National Women's Law Center. However, the liberal-economist divide used by the court and the NAE relied on the complete absence of women from their reasoning; when women's choices were brought into the picture by the ACOG and NWLC, the divide became more ambiguous. These organizations attempted to depict Hobby Lobby's actions as placing religion in the public domain, and then justify restrictions on these actions by constructing dualisms between religion and medicine and religion and women's rights. Each public-private divide in the case relied on the exclusion of either religion, through dualisms that subordinated religion to other concerns, or through the exclusion of women. The public-private divide was therefore insufficient to address the issues at stake, preventing all sides from addressing

each other's claims. In the following chapter, I will provide background on conscientious objection in the United Kingdom, where similar discourses emerge despite a different legal and cultural framework for the public-private divide.

Chapter Four: Conscientious Objection in the United Kingdom

Though religious freedom and abortion are both less contentious in the United Kingdom than they are in the United States, they remain a source of ongoing debates about religion's role in the public domain and how the line between public and private should be drawn. The presence of an established church in the United Kingdom and the development of religious freedom jurisprudence in response to growing migrant populations give discourses around religious freedom a significantly different shape. However, despite these differences, the underlying reliance on the public-private domain as a way of managing religion persists, and gender remains an important element in religious freedom jurisprudence, which in the UK deals extensively with women's religious dress and same-sex marriage.

Religious freedom in the United Kingdom draws on comparatively recent legal precedents. Until recently, religious freedom was not explicitly protected under the law of the United Kingdom. Rather, it was covered by the UK's unwritten constitution, a mix of common law, legislation, and judicial precedent. Since the application of the European Convention of Human Rights, the UK has faced a high number of complaints regarding Article 9, which guarantees freedom of thought, conscience and religion. Employment discrimination claims have been particularly prominent, with employees claiming the right to manifest religious beliefs even if these interfere with their performance of job duties. While refusals to perform abortions or disperse contraception are protected in the UK by the Abortion Act 1967 and professional regulations, interpretation of this act is influenced by cases from other EU countries, particularly France and Poland.

Understandings of religious freedom and the right to manifest religious beliefs in the UK have therefore been shaped by both legislation and recent domestic and European case law that permits religious exemptions for medical professionals while allowing significant restrictions on religious exercise. Religious discrimination cases in the UK brought under Article 9 have had very different results for members of minority religions than for Christians, based on ECHR precedent and UK jurisprudence which links religion to race and ethnicity. In this chapter, I argue that religious freedom in the United Kingdom is best

understood as an effort to manage minority religions. By recognizing religion as a component of race or ethnicity and allowing judicial interpretation of religious beliefs, British law understands the place of minority religions in public life to be unclear, while Christianity's place in public life is taken for granted. This perspective has been challenged by legislation concerning nondiscrimination for non-heterosexuals and, to a lesser extent, by questions of conscientious objection to abortion. In this chapter, I will provide a historical background of UK religious freedom jurisprudence, the cultural place of religion in British society, and the development of conscientious objection legislation.

Historical Background and the British Constitution

While religious liberty is included in British constitutional tradition, it is difficult to pinpoint its source, since the constitution is not codified in a single document. Questions of human rights are resolved by a combination of common law, judicial precedent, and statutory legislation, and more recently with reference to European Union law and the European Convention of Human Rights.[128] As a result, recognition of rights for religious minorities was historically an incremental process, with statutes in the eighteenth and nineteenth centuries laying the foundations for religious freedom in the United Kingdom by recognizing the rights of particular groups. For example, restrictions on the role of Catholics in public life were lifted in 1829.[129] Despite these sometimes-dramatic changes, prior to 1998, no codified, general right to religious freedom existed outside of narrower legislation and common law, meaning there also existed no clear criteria for distinguishing the public from the private. While British law in general applies to England, Wales, Scotland, and Northern Ireland, each country also has unique internal law. Scotland and Northern Ireland maintain separate judicial systems, though all countries share the Supreme Court of the United Kingdom as their highest court of appeal.

The Church of England's influence as the established church has similarly diminished incrementally; for example, limits were placed on the number of

[128] Joanna Collins-Wood, "Religion: Individual Expression or Intertwined with Culture?" *Duke Journal of Comparative & International Law* 23, no. 2 (Winter 2013): 337.
[129] Peter Cumper, "The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief," Emory International Law Review 21, no. 1 (Spring 2007): 16.

bishops who may sit in the House of Lords at any given time in 1847, and the bishops are now understood as representatives of faith in general to Parliament rather than of their own denomination.[130] The presence of the Bishops in the House of Lords is debated; some commenters argue that state neutrality requires the Bishops be removed.[131] Scotland has its own state-recognized church, the Church of Scotland. Northern Ireland and Wales have both fully disestablished. The Church of England and Christianity more generally occupy an ambiguous place in British national identity. In 2000, only 2.5% of the population of England and Wales were members of the Church; however, according to the 2008 British Social Attitudes Survey, and annual survey of national values, 25% of the population of England, Scotland and Wales identifies as affiliated with the Church of England, 9.4% with the Catholic Church, and 50% overall as Christian.[132] The number of self-identified Christians is significantly higher in Northern Ireland. Though church membership and attendance are low, they hide wider identification with Christianity.

Church of England is also a source of civil religion in all four countries, as it provides the setting for major cultural events such as coronations, royal weddings, funerals and memorials.[133] The coronation of Elizabeth II at Westminster Abbey in 1953 can be seen as a high point of post-war British Christian civil religion, featuring extensive religious symbolism, which was broadcast around the country.[134] Commentators at the time saw it as evidence of the Christian nature of the country, and it coincided with an increase in church membership across Christian denominations.[135] Though church attendance has since declined, Christianity remains influential in British culture, and the Church of England has strong ties to elite institutions such as schools, the law, Oxbridge,

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[130] Mathew Guest, Elizabeth Olson and John Wolffe, "Christianity: loss of monopoly," in *Religion and Change in Modern Britain,* ed. Linda Woodhead and Rebecca Catto, (New York: Routledge, 2012), 68.

[131] See for example Catherine Bennett, "Lords reform: Will nobody finally rid us of these bumptious buffoons?," *The Guardian*, 1 April 2012. http://www.theguardian.com/commentisfree/2012/apr/01/catherine-bennett-lords-reform-bishops (accessed 12 June 2014), and Owen Jones, "Britain's church and state should divorce: it would set them both free," *The Guardian,* 17 April 2014. http://www.theguardian.com/commentisfree/2014/apr/17/david-cameron-faith-church-state-divorce (accessed 12 June 2014).

[132] Guest, Olson and Wolffe, "Christianity," 62.

[133] Linda Woodhead, "Introduction," in *Religion and Change in Modern Britain,* ed. Linda Woodhead and Rebecca Catto, (New York: Routledge, 2012), 6

[134] Guest, Olson and Wolffe, "Christianity," 57.

[135] Guest, Olson and Wolffe, "Christianity," 58.

and the royal family, making it in some ways part of the British public domain.[136] In Scotland and Wales, Church of Scotland and Welsh nonconformist 'chapels' also served as a source of national identity, though this declined with the rise of secularist nationalist political parties at the end of the twentieth century.[137] In Northern Ireland, religion remains a potent source of identity, and brought national attention to the dangers of religious conflict during the Troubles, which lasted from the 1960s to 1998.[138] Both Catholicism and Protestantism were linked with nationalist political parties (Irish and Unionist, respectively) and national identity. However, religion also offered options for conflict resolution; throughout the Troubles, ecumenicalism provided an alternative source of both religious and civil identity.[139] Christianity in the United Kingdom, though in some ways diminished by secularism as in the cases of Wales and Scotland, remains a powerful source of national culture and identity, and contributes to shaping understandings of religion's place in the public domain more generally.

Prior to the application of the European Convention of Human Rights to British law, religious free exercise cases were pursued under the Race Relations Act 1976. Under this act, which prohibited discrimination on racial grounds, "racial group" included nationality and ethnicity, allowing minority religious groups that were tied to ethnic groups to bring claims of racial discrimination.[140] For example, Sikh children seeking the right to wear symbols of their faith were granted exemptions to school dress codes under the Race Relations Act. The motivation for this framework was an increase of visible migrant communities; policy-makers tended to conceptualize race as the most significant identifier for newly arrived social groups.[141] As a result, the court has established a precedent of making judgments about the centrality of a religious practice to group identity. While this was beneficial for small faiths with clear rules such as Sikhism, it potentially limited the ability of members of larger faiths to make free exercise claims based on their own understanding of their religious obligations. During the 1990s, groups such as Hindus and Muslims began to challenge a strictly racial

[136] Guest, Olson and Wolffe, "Christianity," 69.
[137] Guest, Olson and Wolffe, "Christianity," 64.
[138] Gladys Ganiel and Peter Jones, "Religion, politics and law," in *Religion and Change in Modern Britain,* ed. Linda Woodhead and Rebecca Catto, (New York: Routledge, 2012), 310.
[139] Ganiel and Jones, "Religion, politics and law," 313.
[140] Collins-Wood, "Religion: Individual Expression?" 348.
[141] Ganiel and Jones, "Religion, politics and law," 301.

understanding of multiculturalism that neglected religious identity, but legally religious freedom claims as such, untied from ethnicity, could only be heard in European courts, not domestic ones.

The European Convention of Human Rights was applied to domestic law through the Human Rights Act of 1998.[142] Since then, religious exercise cases have been brought under Article 9 within the UK court system, but have generally been less successful than cases that include racial or ethnic components. This is illustrated in a series of cases brought by women seeking to wear religious jewelry in public places. In a 2008 case heard under the Race Relations Act, a young girl was granted an exemption to her school's dress code allowing her to wear a Kara, though it was not strictly required by her faith. In an almost identical case heard under the Human Rights Act in 2007, a girl was prohibited from wearing a purity ring with her school uniform, and the court found that this did not violate her Article 9 rights as the ring was not required by her religion.[143] Similarly, in Eweida v. British Airways, an employment discrimination case that reached the European Court of Human Rights in 2013, a British Airways employee's request to visibly wear a cross necklace during work was denied. The Court noted that the claimant was not obligated by her belief to wear a cross, and therefore found that the individual disadvantage she faced was not sufficient to justify a free exercise claim.[144] In the absence of strong, widely recognized religious duties, British law is hesitant to provide accommodations for religious practice, except for Sikhs and Jews, who are seen as ethnic groups rather than religious ones.

The Human Rights Act 1998's codification of freedom of religion in British law was further developed by the Employment Equality (Religion or Belief) Regulations 2003, which were then incorporated into the Equality Act 2010. The act addressed discrimination based on age, disability, gender reassignment, marriage, civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation, consolidating almost two hundred earlier acts and regulations that previously comprised the UK's antidiscrimination

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[142] Collins-Wood, "Religion: Individual Expression?" 357.
[143] Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom,* (Alphen aan den Rijn: Kluwer Law International, 2012) 52.
[144] Collins-Wood, "Religion: Individual Expression?" 355.

law.[145] The religious protections of the act were particularly controversial. Several conservative Christian groups launched a vocal campaign seeking to protect exemptions from employment discrimination legislation, in order to maintain permission to discriminate against homosexuals.[146] Stephan Hunt notes that calls for maintaining the religious protections were framed "within a rhetoric of rights rather than couched in Christian moral terms."[147] Despite the Act's recognition of religion as a protected characteristic, Christians seem to have perceived nondiscrimination legislation as prioritizing sexual orientation over their religious beliefs.[148]

The passage of the Equality Act 2010 took place against the backdrop of several high-profile cases that raised questions about indirect discrimination towards religion and religious exceptions in the workplace, all of which dealt strongly with questions of gender. R (Begum) v. Headteacher and Governors of Denbigh High School, a 2006 case similar to Eweida v. British Airways, discussed above, dealt with the right of a student to wear a conservative style of Islamic dress not permitted by her school's uniform. The school denied her request, in part citing concerns that changing the dress code could put pressure on other girls at the school, and endorsing the "mainstream" Islam that the less conservative uniform represented.[149] The Court found the restriction on the student's individual practice to be justified in the school's interest in "respect[ing] Muslim beliefs… in an inclusive, unthreatening, and uncompetitive way."[150] However, while it supported "inclusive, unthreatening" Islam, the Court declined to comment on whether or not the claimant's belief in her obligation to wear the more conservative dress was a "core" belief as it did in the Eweida case; rather, they emphasized the need of the school to accommodate a multicultural student body and protect the rights of its female students – a public concern – and found that in light of this need the restrictions placed on the claimant's private practice were proportional.

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[145] Stephen Hunt, "Negotiating Equality in the Equality Act 2010 (United Kingdom): Church-State Relations in a Post-Christian Society," Journal Of Church & State 55, no. 4 (December 2013): 692.
[146] Hunt, "Negotiating Equality," 697.
[147] Hunt, "Negotiating Equality," 699.
[148] Malory Nye and Paul Weller, "Controversies as a lens on change," in *Religion and Change in Modern Britain,* ed. Linda Woodhead and Rebecca Catto, (New York: Routledge, 2012), 44.
[149] Collins-Wood, "Religion: Individual Expression?" 353.
[150] Collins-Wood, "Religion: Individual Expression?" 354.

The other high-profile religious expression case around the time of the passage of the Equality Act 2010 was Ladele v. London Borough of Islington, which was heard by the Court of Appeal in 2009 and later appealed to the European Court of Human Rights, who dismissed the case. Ladele was a registrar of Births, Deaths and Marriages in Islington, and was designated to perform civil partnerships for same-sex couples.[151] When she requested an exemption from performing civil partnerships for same-sex couples for religious reasons, Ladele was disciplined and eventually dismissed. Ladele did not claim that her religious freedom had been violated; as in Eweida, the religious jewelry case, the court looked at the question as one of indirect discrimination. Ladele was not disciplined for her Christianity as such, but because of her refusal to conduct civil partnerships based on her Christianity. The court found against Ladele, noting that she was a public sector employee, and that public sector organizations should promote equality on the grounds of sexual orientation.[152] Like in the Eweida case, the Court considered whether disapproval of homosexuality was a "core" part of Ladele's beliefs, and found that it was not.[153] Such determinations raise questions about the state's neutrality, with their explicit judgments on theological matters,[154] and stand in contrast to cases like *Begum*, where the court decreed that it was not its role to determine the validity of a strongly held religious view.[155] However, by identifying disapproval of homosexuality as not a core part of Ladele's religion, the Court was able to justify greater restrictions on her religious exercise based on the rule of proportionality.[156] The case is interesting by comparison to the *Begum* case for its willingness to make claims about the content of Ladele's belief in a way that the Court would not for Begum's. Christianity and Islam are treated differently in UK jurisprudence; however, for both Christians and Muslims, the court makes substantive judgments about what kind of religion can be appropriately expressed in the public domain.

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[151] Lucy Vickers, "Religious Discrimination in the Workplace: An Emerging Hierarchy?" *Ecclesiastical Law Journal* 12, no. 3 (September 2010): 290.
[152] Vickers, "Religious Discrimination," 292.
[153] Vickers, "Religious Discrimination," 295.
[154] The court did not explain how it came to this conclusion in its judgment, but rather stated as fact that her opposition to same-sex marriage was not "core" to her religion.
[155] Vickers, "Religious Discrimination," 296.
[156] Vickers, "Religious Discrimination," 298.

The right to religious freedom has been increasingly codified in United Kingdom law, through the incorporation of the European Convention of Human Rights and through nondiscrimination legislation such as the Equality Act. These legal mechanisms thus far have tended to not provide accommodation or exemption for religious exercise, giving substantial power to organizations such as schools and workplaces to establish regulations that may violate religious practice. However, in the case of abortion, there are additional statutory protections and regulations for conscientious objections.

Abortion Act 1967 and Other British Regulations

While British law and professional regulations address several of the concerns found in European resolutions about conscientious objection, some medical providers have sought to expand the boundaries of actions protected by the law. The primary legal source of the right to conscientious objection in a health care setting is the Abortion Act 1967, which applies to England, Scotland and Wales, though not Northern Ireland, which maintains stricter abortion regulations. The law was opposed by the Society for the Protection of the Unborn Child, which drew its primary support both in members and in resources from the Catholic Church; divided opinions among Protestants and medical organizations prevented widespread, coordinated opposition to the law.[157] Section 4 states:

> (1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:
> Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.
> (2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.[158]

The legal questions, in determining who may object under this provision, have been, first, what is meant by "participating in treatment," and second, does this

[157] Melvyn D. Read, "The pro-life movement." *Parliamentary Affairs* 51, no. 3 (July 1998): 448.
[158] Abortion Act 1967. http://www.legislation.gov.uk/ukpga/1967/87/contents (accessed 12 June 2014).

act imply a duty to refer the patient to another provider? The key case in answering the first question is *Regina v. Salford Area Health Authority (Respondent) ex parte Janaway.*[159] The House of Lords heard the case in 1988. Mrs. Janaway, a Catholic, was a receptionist at a general practitioner's office, and was asked to type a letter referring a woman seeking an abortion to a consultant. She refused, and was dismissed. She claimed that her refusal should have been protected under Section 4 as participation in procuring an abortion, but the Court disagreed. They found that "participate" meant "actually taking part in treatment administered in a hospital … for the purpose of terminating a pregnancy."[160] Participation is therefore defined quite narrowly, extending protection only to the people performing the abortion itself. This finding has been interpreted to mean that the Abortion Act does not protect general practitioners who object to signing "the green form" to refer patients for abortions.[161] Further, if they object anyway, they have a duty under the National Health Service (General Medical Service Contracts) Regulation 2004 to promptly refer women to a provider who does not have an objection. Representatives of the Department of Health have echoed this opinion.[162] In 2003, the High Court of Justice Queens Bench Division found that doctors also have an obligation to provide adequate counsel to pregnant women, even if this information could lead the woman to seek abortion. In the case, a Catholic doctor failed to inform his patient about her heightened risk for fetal abnormalities and available screenings; the court found his reasons to be "coloured by his belief in Roman Catholic doctrine."[163] This state of affairs is not uncontested; a recent case in Scotland dealing with the rights of nurses to refuse to participate in treatment, broadly defined, will be considered in detail in the following chapter as my key case study for the United Kingdom.

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[159] *Regina v. Salford Area Health Authority (Respondent) ex parte Janaway*, United Kingdom House of Lords, 1 February 1998.

[160] *Janaway.*

[161] The "green form" is the certificate that must be signed by two registered medical professionals for an abortion to be legal in the United Kingdom.

[162] "[T]he provision of advice and referral in cases of unplanned or unwanted pregnancy, … where the contractor has a conscientious objection to the termination of pregnancy, prompt referral to another provider of primary medical services who does not have such conscientious objections" Daniel J. Hill, "Abortion and conscientious objection," *Journal Of Evaluation In Clinical Practice* 16, no. 2 (April 2010): 346.

[163] Christina Zampas and Ximena Andión-Ibañez, "Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice," *European Journal Of Health Law* 19, no. 3 (June 2012): 251.

Recommendations by professional organizations also play a substantial role in shaping the understanding of conscientious objection in the United Kingdom. While not legally binding, the ethical codes of medical organizations are considered authoritative. The guidelines of the British Medical Association (BMA) and Royal College of Obstetricians and Gynaecologists (RCOG) have informed judicial interpretation of the Abortion Act.[164] Both organizations require that objecting doctors refer women to non-objecting doctors without delay. The BMA further recommends that objecting doctors inform their supervisors as soon as possible, to ensure that an adequate number of providers are available. Similarly, National Health Service (NHS) guidelines on appointment of doctors to hospital posts state that, when abortion would not otherwise be available, terminating pregnancy can be included among job duties (essentially allowing hospitals to refuse to hire objectors for certain posts).[165] In the case of objection to providing contraception, pharmacists are covered under the regulation of the General Pharmaceutical Council, which requires that objecting pharmacists "inform those responsible for organizing services" and refer patients to another provider.[166] Professional bodies in the United Kingdom maintain restrictions on conscientious objection that require both prompt referral and efforts to ensure that willing providers are available.

European Opinions and Regulations

With the passage of the Human Rights Act, the European Convention of Human Rights entered into force in UK domestic law, and European Court of Human Rights precedents have played a significant role in how UK judges have interpreted religious freedom. Therefore, European-level jurisprudence and policy influences British understandings of religious freedom, including with regards to abortion and conscientious objection. Given the wide range of abortion laws in Europe, it is unsurprising that European institutions have given somewhat piecemeal and conflicting responses to conscientious objection for medical professionals. However, both European Union and Council of Europe institutions

[164] Zampas, "Conscientious Objection," 252.
[165] Zampas, "Conscientious Objection," 248.
[166] "Review of core moral standards including standard about religious or moral belief," General Pharmaceutical Council, 20 February 2013. http://www.pharmacyregulation.org/review-core-standards-including-standard-about-religious-or-moral-beliefs (accessed 12 June 2014).

have passed resolutions expressing concern over the appropriate limits of conscientious objection and religious freedom under Article 9 more generally. These include two key cases at the European Court of Human Rights, a 2002 European Parliament resolution, and the 2009 resolution by the Parliamentary Assembly of the Council of Europe, as well as the 2005 opinion by the EU Network of Independent Experts on Fundamental Rights. Even in resolutions defending the right to conscientious objection, such as a 2010 PACE resolution, conscientious objection is referred to as something that requires regulating to ensure women's continued access to care.

Court Cases

While no case before the European Court of Human Rights has directly addressed the right to conscientious exemption in the context of health care, two have come close. In *RR v. Poland*, a 2011 case, a Polish woman faced delays in accessing genetic testing necessary to make a decision to end the pregnancy. The court found that her treatment was "marred by procrastination, confusion, and lack of proper counseling and information," in violation of her Article 3 right to be free from inhumane or degrading treatment. It also found Poland's failure to implement effective abortion laws to violate its positive obligations under Article 8, the right to a private life. [167] Among the claims made by the Polish government justifying the delay was that the physicians had a right to refuse service on grounds of conscience under Article 9. The court disagreed that Article 9 applied in this case, stating, "the word 'practice' used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief" and that the Polish government was responsible for ensuring doctors could exercise their freedom of conscience without blocking patients' access to legal treatments.[168] While religious rights were not the primary issue at stake and thus did not receive lengthy discussion, the Court did suggest that what counts as "practice" for the purpose of religious exemptions is limited by other considerations, particularly access to care.

The Court's wording in the decision came directly from an earlier case, *Pichon and Sajous v. France*, in which two pharmacists claimed that their

[167] Zampas, "Conscientious Objection," 240.
[168] *RR v. Poland*, European Court of Human Rights, 28 November 2011, para. 206.

religious freedom was violated when they were required to sell contraceptives, which they were morally opposed to. Their application to the Court was declared inadmissible. They found that, where contraception is legal and only available at a pharmacy, "the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere." It also noted that Article 9 refers mostly to matters of "individual conscience" and "acts of worship or devotion … in a generally accepted form." [169] This finding suggests that limits to conscientious objection exist both based on professional obligations and based on the need to avoid imposing one's beliefs on others.

Opinions and Resolutions

In 2005, the EU Network of Independent Experts on Fundamental Rights released an opinion that sparked significant debate about conscientious objection. It referred to a treaty between the Slovak Republic and the Holy See that included assurances that the Slovak Republic would protect a broadly defined right to conscientious exemption in health care. As previous treaties between the Holy See and EU Member States had not included such a provision, the European Commission asked the Network of Independent Experts on Fundamental Rights for their opinion on the compatibility of the draft treaty with European Union law and human rights. The Network acknowledged that many EU states, including the United Kingdom, have conscientious objection laws in place for not only military service but health care and same-sex marriage, and that a right to such exemptions can be derived from Article 9 as a way of avoiding indirect discrimination based on religion.[170] However, they list several rights that justify restriction on the right to conscientious objection. While there is no right to abortion as such within the ECHR, the Network argues that failure to provide effective access to abortion in circumstances where it is legal, such as when the mother's life or health are at risk, violates the mother's right to life. Additionally, when abortion laws are restrictive, women might be driven to seek unsafe illegal

[169] *Pichon and Sajous v. France*, European Court of Human Rights, 2 October 2001.
[170] "Opinion n° 4-2005: The right to conscientious objection and the conclusion by EU member states of concordats with the Holy See," EU Network of Independent Experts on Fundamental Rights, 14 December 2005, 15.

abortions, further threatening their right to life.[171] They also note that refusals to perform abortion potentially subject women to degrading treatment, as found in *RR v. Poland*, and could be considered gender discrimination. Based on these, they argue that doctors' refusals to perform abortions must be balanced by effective remedies for the women refused, including an appeals process, a legal obligation to promptly refer the woman to another doctor, and ensuring that other doctors willing to perform the procedure are indeed available.[172] The Network therefore expresses strong reservations about the draft treaty, which states:

> (1) The right to exercise objection of conscience shall apply to: … b) performing certain acts in the area of health care, in particular acts related to artificial abortion, artificial or assisted fertilisation, experiments with and handling of human organs, human embryos and human sex cells, euthanasia, cloning, sterilisation or contraception;"[173]

While the Network recognized a right to conscientious objection, it prioritized managing objections in such a way that access is not jeopardized, presenting objectors as potential barriers to women's lives and health. Doctors objecting to abortion are seen as imposing their private religion on the public domain of health care, and putting women at risk as a result; this justifies removing religion from the public domain through restrictions on conscientious objection.

Both the European Parliament and the Parliamentary Assembly of the Council of Europe have passed resolutions advocating restrictions on conscientious objection. In a 2002 resolution encouraging Member States to liberalize their abortion laws, the European Parliament calls on governments to ensure that "in case of legitimate conscientious objection of the provider, referral to other service providers must take place."[174] A 2010 Parliamentary Assembly of the Council of Europe resolution, which was originally titled "Women's Access to Lawful Medical Care: the problem of unregulated use of conscientious objection", was heavily amended and retitled "The right to conscientious objection in lawful medical care."[175] The resolution stated that the "vast majority of Council of Europe member states" have appropriate regulations for

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[171] "Opinion n° 4-2005," 19.
[172] "Opinion n° 4-2005," 20.
[173] "Opinion n° 4-2005," 28.
[174] Anne E.M. van Lancker, "Report on sexual and reproductive health and rights," European Parliament, 6 June 2002, 9.
[175] Zampas, "Conscientious Objection," 243.

conscientious objection, but reiterates that these should include prompt referral to another provider.[176] It also stresses the importance of timely care in emergency situations. The tension created by conscientious objection is visible in the text of the resolution – while it assures the reader that conscientious objection is an important right and that most states are managing it appropriately, it also acknowledges the risk it poses for women's access to treatment.

Throughout these judgments and opinions, particularly in the 2005 opinion, religious rights are placed in opposition to women's rights, constructing the two as mutually exclusive. While this kind of juxtaposition is common in discussions of women's rights, it is important to note that the relationship between religion and gender is in fact more complicated. Framing abortion access, or any apparent conflict between religious exercise and gender equality, as individual religious objectors against individual women ignores both the fact that women are bearers of religious rights themselves, and the fact that religion's influence stretches beyond individual believers to the cultural context in which abortion policies are created and practiced. In the case of the United Kingdom, cultural understandings of the place of Christianity in British society and conceptions of religious freedom influenced by minority religion play a significant role in shaping abortion law and its exemptions. While some kinds of religion are accepted in the British public sphere, such as the continued existence of an established church, religion is generally seen as private, and the state can restrict its presence in the public domain, and women's rights are often put forward, particularly in EU discourse, as an important reason for removing religion from the public domain.

A Working Definition of Religious Freedom in the United Kingdom

Nondiscrimination is a central concern of the UK understanding of religious freedom. This is a result of both domestic legislation, notably the Race Relations Act, and of influence from the European Court of Human Rights, which recognizes interference on the manifestation of religion only in limited circumstances. While some judges have questioned whether it is appropriate to "impose an evaluative filter" on religious belief, the centrality and level of

[176] "Resolution 1763 (2010): The right to conscientious objection in lawful medical care," Parliamentary Assembly of the Council of Europe, 7 October 2010.

obligation of a religious practice have both been consistently used to determine the seriousness of interference on religious belief.[177] "Core" or obligatory practices are seen as "manifestations" of religious belief, protected under Article 9 section 2, while peripheral beliefs are seen as being merely "motivated" by religion.[178] As a result, UK judges sometimes make substantive judgments about the importance of various religious practices, despite claiming to be neutral towards religion.[179] Vickers points out that judges are much more willing to determine whether or not a belief is "core" in cases involving Christianity than those involving minority faiths, perhaps reflecting both greater cultural familiarity with Christianity and with the history of establishment in the United Kingdom.[180] Though the courts describe religious freedom as an individual right based on personal beliefs, practices associated with collective identity also make a stronger showing in the courts than what are considered matters of preference, such as Christian jewelry. The combination of the legacy of the Race Relations Act's race-centered understanding of religion and culture and the interpretation of "manifestation" found in ECHR jurisprudence creates a situation where majority and minority faiths encounter different understandings of religious freedom. Christianity's place in British culture provides a partial explanation for the court's willingness to identify what is and is not a "core" Christian practice in a way they do not for minority religions. Judges play a role in defining the nature of British Christianity. The Church of England has strong links to both the legal system itself and to the institutions that educate the middle and upper-middle classes, including lawyers and judges.[181] A particular view of Christianity is therefore in some ways built into and enforced by the legal system itself.

The different legal outcomes for minority and majority religions are also reflected in the importance of discrimination law in British understandings of religious freedom. The need for religious accommodation is often framed in terms of indirect discrimination, where an otherwise neutral law disproportionately impacts a particular group due to their religious practices. Religious freedom is thus understood as a matter of social equality. This

[177] Hill, *Religion and Law,* 49.
[178] Vickers, "Religious Discrimination," 296.
[179] Saba Mahmood and Peter G. Danchin, "Immunity or Regulation? Antinomies of Religious Freedom, *South Atlantic Quarterly* 113 no. 1 (Winter 2014): 130.
[180] Vickers, "Religious Discrimination," 295.
[181] Guest, Olson and Wolffe, "Christianity," 69.

framework also raises questions about social integration and British identity, when accommodation is interpreted as special privileges, or failure by migrants to adapt to British culture.[182] The almost complete failure of Christians to win exemptions in court, and the opposition of some Christians to measures such as the Equality Act 2010 for protecting sexual orientation in ways they saw as detrimental, supports an understanding of religious discrimination legislation as an effort targeted at the integration of minority populations. This is not to say that Christians are oppressed relative to minority religions, though some may well see it that way; rather, the disparity reflects the fact that minority religions are seen as problematic in a way that Christianity is not. The criteria used for deciding when to accommodate Christianity in the public domain are different than those used for other religions. However, in both cases, the court is willing to make theological judgments, extending greater accommodation in public to "core" or "mainstream" beliefs and privatizing those it considers peripheral.

Though claims for religious freedom have a long legal history in the United Kingdom, in its current form it is best understood as a reaction to multiculturalism aimed at managing and integrating minority religion populations. Mahmood and Danchin have argued that religious freedom can be seen as a method of regulating religion, particularly when the values and norms of the majority religion are taken for granted as part of the "public order."[183] Religious freedom in the United Kingdom can be defined as the right to be free from discrimination or disadvantage based on one's religious identity and core practice, with "mainstream" Christian beliefs and practices receiving greater state support. Religious expression in the public domain is limited by not only state concerns about public order and safety but by institutional concerns of entities such as employers and schools, with women's rights identified as a particular area of concern both at the EU level and in UK jurisprudence. While cases concerning sexual orientation have begun to challenge this understanding, they are not the only points of contention. The *Doogan* case, seeking to extend the protections of Section 4 of the Abortion Act, provides a rare instance of a Christian claimant winning an exemption, in contrast to not only recent case law but to previous cases under the same act. This represents a potential challenge to

[182] Nye and Weller, "Controversies," 49.
[183] Mahmood and Danchin, "Immunity or Regulation?" 130.

understandings of religious freedom focused primarily on minority populations, and to the connected assumption that Christian identity in the public domain of the United Kingdom is unproblematic.

Though abortion has not been as substantial a source of debate about religious freedom in the United Kingdom as in the United States, religious freedom debates in the UK remain deeply concerned with gender, through discussions of what women wear and how they participate in the church, as well as in debates about same-sex marriage. UK religious freedom jurisprudence has developed relatively recently and is heavily influenced by ECHR jurisprudence and the growing presence of religious minorities; it is less hesitant about restrictions on religion than US jurisprudence, and more willing to take steps to remove religion from the public domain, particularly beliefs that are not "core" or "mainstream." Women's rights are put forward as a significant reason for restricting religion, drawing a dualism between women's rights and religion that justifies privatizing religion to protect women's ability to participate in the public domain, even when it is women themselves seeking religious accommodation. The following chapter will examine the case *Doogan v. NHS,* which despite its different background involved similar ambiguities between the public and private to those in *Hobby Lobby v. Sebelius*.

Chapter Five: Case Study - Doogan v. NHS

Though religious exemptions are part of UK law, the focus on nondiscrimination over non-restriction of religion (as in the US) and the greater grounds on which religion can be limited in the public domain meant that from the 1970s onwards, conscientious objection to abortion was narrowly constructed and relatively uncontested. Conscientious objection to abortion is limited to doctors directly performing the procedure, and objecting doctors have a de facto obligation to refer patients to another provider. The National Health Service, as part of the state, is solidly within the public domain. However, it remains unclear what this means for medical professionals who are involved in abortion and hold objections, but do not meet the narrow criteria for exemption. How are their private beliefs to be understood in the context of the United Kingdom's relatively recent religious freedom jurisprudence, which developed after the existing conscientious objection regulations were developed? A 2013 case in Scotland, *Doogan & Anor v NHS Greater Glasgow & Clyde Health Board*, sparked a change to the interpretation of the public-private divide in the conscientious objection clause of the Abortion Act 1967.

Mary Theresa Doogan and Concepta Wood, both practicing Catholics, registered as conscientious objectors when they began working as Labour Ward Co-ordinators at Southern General Hospital in Glasgow, Scotland. At the time, abortions were rarely performed in their ward (only after the eighteenth week of pregnancy), so their refusal to participate in abortions was unproblematic. However, after changes to hospital policy in 2007 and the closure of a nearby maternity hospital in 2010, the number of abortions performed in SGH's labor ward increased significantly.[184] Seeking reassurance that they would not be required to participate in abortion – which they understood to include delegating, supervising or supporting staff that performed abortion – they initiated a formal grievance procedure in September 2009. When the hospital's Board refused to recognize their grievance, in June 2011, the case went to court. It was heard in February 2012, where the court ruled in favor of the NHS and did not recognize

[184] *Doogan & Anor v NHS Greater Glasgow & Clyde Health Board,* Scottish Court of Session, Inner House CSIH 36, 24 April 2013. Hereafter *Doogan v. NHS.*

Doogan and Wood's objections to supervising abortion. This decision was appealed to Court of Sessions,[185] which found in Doogan and Wood's favor.

In the decision, the court focuses primarily on a semantic question – what exactly is meant by "treatment" in abortion, to which one can object? However, underlying this argument is an analysis of what role conscientious objection plays in British society, and where the burden must fall when religious beliefs conflict with the law or with pragmatic concerns. Professional organizations, women's rights organizations, and anti-abortion organizations struggled with the same question in their commentary on the case, in some cases drawing attention to religion and in others diverting attention away from it as they articulated differing conceptions of how conflicts between religion and liberal norms should be resolved. I argue that the court's decision moves away from relying on a distinction between the public and private spheres by attempting to recognize both religious rights and the rights of women seeking abortions, which professional and women's rights organizations try to maintain through the creation of dualisms between religion and women's rights and religion and medicine. In this chapter, I examine the case, the positions and values held by each side, and the public-private division decided by the court; I then turn to discourse analysis of how several organizations interpreted the case and constructed public-private lines that supported their positions.

The Case

As in the previous case, value critical analysis entails first identifying the proponents of each position, and then examining their arguments and values in order to create a narrative of each position. In this case, the midwives, Doogan and Wood, argue in favor of a broader interpretation of conscientious objection that covers supervision, in addition to other tasks. The NHS Greater Glasgow and Clyde Health Board argues for limiting conscientious objection to only those directly performing abortions.

As Labour Ward Co-ordinators, Doogan and Wood are responsible for delegating, supervising and supporting other midwives, including directly providing care if the midwife is on break or there is an emergency. As a result,

[185] The Inner House of the Court of Sessions is Scotland's highest appellate court. Cases from the Court of Sessions can then be appealed to the Supreme Court of the United Kingdom.

they argue that their conscientious objection, which exempts them from performing directly in abortions, should also exempt them from delegating, supervising and supporting midwives who are performing abortions. The text of the Abortion Act 1967 exempts objectors participation in "treatment," and the midwives argue that treatment involves not just the direct termination of pregnancy itself, but rather involves pre- and post-operative care, a team effort of which supervision is a necessary part. *Janaway*, the 1988 case on conscientious objection discussed in the previous chapter, had found that some tasks, involving writing a letter referring someone for abortion, were too far removed from the abortion itself to be covered by the right to conscientious objection, which was to be limited to direct care. However, Doogan and Wood argue that their tasks are part of treatment, even if they are not the abortion itself.

Based on this understanding of treatment, Doogan and Wood argue that their exemption should be "co-extensive with the bounds of their beliefs."[186] That is, they should not be required to perform any task that violates their beliefs, despite being indirectly related to the abortion itself. They argue that delegating tasks to other midwives makes them morally responsible for the task, and that they therefore cannot consciously perform their supervision duties in cases of abortion. They further point out that, other than placing the burden of proving the sincerity of one's belief on the objector, the Act does not provide any further grounds for restricting conscientious objection. While exempting Doogan and Wood from supervision duties in some circumstances might be inconvenient for their supervisors, inconvenience is not an acceptable reason for limiting their right to conscientious objection based on the Act.

While Doogan and Wood mentioned but did not argue from Article 9 of the ECHR, freedom of religion and belief, they did describe their conscientious objection in terms of religious freedom. Quoting an earlier religious freedom decision, the decision notes that:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of

[186] *Doogan v. NHS,* para. 13.

> religious communities to define for themselves which laws they will obey and which not."[187]

While *Christian Education SA v Minister of Education* finds that believers cannot claim an automatic exemption from whatever laws they want, the state ultimately has a responsibility to avoid forcing believers to choose between following their faith or following the law.[188] The exemption within the Abortion Act 1967 is identified as one effort to avoid such a conflict, and Doogan and Wood therefore argue that it should be interpreted with that goal in mind. To put it in the terms of Article 9, NHS has insufficient reason to limit their manifestation of belief in the *forum externum*, given the importance of respecting religion in a democratic society.

The NHS conceded that the midwives' duties as Labour Ward Co-ordinators could potentially require them to participate in abortion, particularly the requirement that they take over for midwives on break and assist in medical interventions. However, they were unwilling to give Doogan and Wood a blanket exemption from any tasks related to abortion. Rather, they argued that the exemptions ought to be decided by the midwives' managers on a task-by-task basis, and only granted in cases where the midwives would directly bring about the end of pregnancy. General nursing care for a woman undergoing an abortion, or delegation and supervision of midwives administering abortion drugs, was not considered "treatment" covered under their interpretation of Abortion Act's conscientious objection provision. This distinction rests on the 1988 *Janaway* case, which distinguished between "actually participating in treatment" and indirect participation, and on professional guidelines such as those issued by the Royal College of Midwives, which recognize conscientious objection only for "active participation in abortion." While the midwives had understood themselves to be exempt from any activities involving abortion, the NHS argued that the exemption available to them through conscientious objection had always been limited.

The NHS justified placing limits on conscientious objection primarily to protect patient safety. The broad exemption the midwives requested, they argued, would potentially cover so many duties as to only be manageable on a case-by-

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[187] *Christian Education SA* v *Minister of Education,* 9 BHRC53, 2001.
[188] *Doogan v. NHS,* para 22.

case basis, potentially delaying or compromising care. As a result, not only did they argue for upholding the standard of providing conscientious objection only in cases of direct involvement in abortion, but they asked that the burden of finding someone who did not have an objection to perform tasks be placed on the midwives themselves in cases where the line between indirect and direct was unclear. They argue that this would improve patient safety.[189]

Though the midwives did not pursue an argument from Article 9, the NHS's case, with its emphasis on safety as a legitimate reason for restricting conscientious objection, is very clearly made in those terms. Public safety and health are both named by Article 9 as legitimate reasons for restricting the manifestation of religion. In the NHS's interpretation, a hospital is very solidly within the public domain, where private religious beliefs must ultimately be secondary to concerns about health and safety. They appear to recognize the right of conscientious objection only in so far as it can be practically managed in a way that does not impede the smooth running of the hospital.

The court ruled in favor of Doogan and Wood, ultimately supporting an expanded understanding of conscientious objection. On the linguistic argument about what is meant by "treatment," they follow earlier cases related to abortion but not related to conscientious objection, which defined treatment as "the whole process" of terminating a pregnancy. While the court recognizes that this ran counter to professional guidelines, it is dismissive of the RCM's advice: "[S]uch guidance, from however eminent a body, was not relevant. It was for the court to determine the meaning of the legislation."[190] Though the NHS leans heavily on the RCM's interpretation of conscientious objection in their case, the court embraces a broader understanding of treatment, undermining the NHS's argument.

The court also addresses the question of how to balance patient safety and conscientious objection. They conclude that managing conscientious objection in a way consistent with safety is the employer's responsibility. Discussing patient safety, they argue that asking the midwives themselves to find someone willing to take tasks they objected to, or deciding objections on a case-by-case basis,

[189] It is unclear why the NHS thinks that requiring the midwife to find someone to complete tasks she objects to would cause less delay than some alternative. However, the goal of the court is to find a legal solution, not a practical one, so neither party clearly laid out a practical solution.
[190] *Doogan v. NHS,* para. 40.

threatened rather than protected safety by forcing nurses to make difficult decisions about their consciences in stressful situations.[191] In the absence of clear evidence that extending the midwives' exemption would compromise patient care more than any alternative arrangement, the court finds that this burden on the midwives both violates their conscience and even threatens the very safety the NHS relies on to justify its restrictions. Rather than taking the Article 9 approach to safety as a clear limiting factor on manifestations of religion, the court aimed for a more nuanced view of the relationship between safety and religion in abortion treatment.

According to the court, conscientious objection provision should be interpreted in a way that allows objectors to follow their beliefs as much as possible. While the court is clear that the exemption does not apply in cases where the mother's life is at risk, it otherwise prioritizes respect for the "strong moral and religious convictions" which abortion inspires. Therefore, decisions about the limits of these exemptions should be made with respect for the objector's beliefs in mind. Since the provision for conscientious objection allows for exemptions from any participation in treatment, the court rules that they cannot be responsible for managing the exemption themselves. Asking the midwives to find someone else willing to do the tasks they will not involves them in abortion; therefore, the court rules that it is the employers responsibility to make sure exemptions are arranged. Ultimately, therefore, the court accepted the midwives' claim that their exemption should be coextensive with their beliefs. The Abortion Act's conscientious objection provision is interpreted to have recognized abortion-related beliefs as uniquely respected and therefore free from much regulation. While in some ways this could be seen as concluding that beliefs about abortion are sufficiently "private" to be free from regulation, the court's complicating of the relationship between religion and safety and emphasis on avoiding conflict between religion and the law through exemptions move away from making a clear distinction between the public and private.

Discourse Analysis

While the *Doogan* case generated significantly less media coverage than

[191] *Doogan v. NHS*, para. 34.

the *Hobby Lobby* case,[192] several organizations commented on the case. Amicus briefs were not publicly available, so I selected organizations to analyze that had commented in media coverage of the case. I chose one religious organization, one professional organization, and one women's rights organization, based on the same criteria used for organizations in the United States case: national reach, political involvement, and the availability of organizational websites with current information. Press releases and reports offered an alternative perspective of the values at stake. Two texts were selected from the organizations' websites; all related to the *Doogan* case specifically. Texts referred to both the original case and the appeal, and were published between February 2012 and October 2013, and were between 300 and 1600 words.

The same questions used in the discourse analysis of the US case were applied:

1. What are the core concepts in each text?
2. How are these concepts used?
3. How does the organization distinguish between the public and the private?
4. What concept of religion is being deployed?

Examining the issues raised by organizations that were not included in the court case itself reveals alternative interpretations of the division between public and private.

Society for the Protection of Unborn Children

The Society for the Protection of Unborn Children (SPUC) was founded in 1967. While officially free from any church ties, it was primarily supported financially and in membership by the Catholic Church. Currently it also supports groups for Muslims and Evangelical Christians.[193] On 24 April 2013, shortly after the appeal was decided, the SPUC as a whole issued a press release celebrating the midwives' victory, including a statement by the midwives

[192] The greater media coverage of the *Hobby Lobby* case likely results from from the controversy around the Affordable Care Act in general, the contentious place of abortion in American political discourse, and the importance of religious liberty in American culture.
[193] Society for the Protection of Unborn Children, "Aims," accessed 8 April 2014, https://www.spuc.org.uk/.

themselves, whom the SPUC had supported in the case.[194] In autumn 2013, the SPUC Evangelicals issued a newsletter discussing the case at length.[195] Interestingly, the press release for the general media and the newsletter aimed at the Evangelical group used very different rhetoric. The press release focused on concepts of professionalism and on the applicability of the law to any faith (or to people of no faith) to legitimize conscientious objection in secular terms. The Evangelical newsletter, on the other hand, described limits to conscientious objection as part of a broader trend of oppression of Christianity in the UK.

The press release portrayed conscientious objection as an aspect of professionalism. The midwives, who are quoted in the release, describe their work as care for two patients, the mother and the unborn child; therefore, exercising their conscientious objection is part of patient care. The press release makes repeated references to the midwives' long experience in their positions and describes the case as having "disrupted their professional lives." Framing the case as an aberration in the midwives' career downplays the religious implications of the exemption by focusing attention away from the conflict. The release goes on to highlight that the provision applies to any objection to abortion "rather religious or purely moral."[196] The SPUC's emphasis on the midwives' professional lives, rather than any particular religious obligation, implies that given the legitimate disagreement over the morality of abortion, conscientious objection plays an important secular role regardless of the faith (or no faith) of the person claiming it. The press release deemphasizes religious freedom altogether, avoiding the question of to what extent public manifestation of religious beliefs should be regulated.

However, the newsletter is completely uninterested in the professional or secular purposes of conscientious objection. Rather, it portrays efforts to limit conscientious objection as part of an organized effort by "the colossal abortion establishment," marking a trend of legal undermining of Christian values.[197] A banner headline proclaims: "Right to conscience under attack." With frequent

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[194] "Abortion ruling welcomed by SPUC who backed Glasgow midwives' case," Society for the Protection of Unborn Children, 24 April 2013. https://www.spuc.org.uk/news/releases/2013/april24 (8 April 2014). Appendix 7.
[195] "SPUC Evangelicals," Society for the Protection of Unborn Children, Autumn 2013. http://www.spuc.org.uk/about/evangelicals/2013autumn (accessed 8 April 2014). Appendix 10.
[196] "Abortion Ruling."
[197] "SPUC Evangelicals," Society for the Protection of Unborn Children.

scripture references and dramatic metaphors, SPUC Evangelicals makes an emotional case for Christian morality in the face of what they perceive as overwhelming opposition. Arguing that "we should … expect a continued attack" on Christian morals, the newsletter links the conscientious objection case to the UK's recent approval of same sex marriage. It encourages Christians to use conscientious objection as a way to prevent abortions from happening entirely, arguing that if more people objected, "many lives might be saved." While the press release avoided discussions of religious freedom, the newsletter pushes them to the forefront, portraying evangelicals as oppressed in their efforts to practice their faith. Anything short of permitting Christians to act publicly on their morals, particularly disapproval of abortion and same sex marriage, is depicted as an impermissible violation of religious freedom. Interestingly, the newsletter does not seem that interested in stopping those violations – while it asks supporters to pray that the Supreme Court uphold a broader interpretation of conscientious objection, it spends much more time saying that violations should be expected and encouraging supporters to "stand against evil" regardless.

Despite these dramatically different interpretations of the case, a few commonalities emerge in the SPUC documents. While both the professional and women's rights organizations point out the midwives' Catholicism (see below), the SPUC does not mention it at all. In the press release, downplaying the midwives' specific religion supports their emphasis on the broad applicability of conscientious objection, removing it from the sphere of particular religious beliefs to something closer to secular morality. In the newsletter, avoiding mention of Catholicism supports their evangelical theological interpretation of the case, which depicts a Christianity unified by resistance to oppression. In both cases, the division between the public and the private is downplayed. The press release places conscientious objection in the public domain as a matter of professionalism rather than specific beliefs. The newsletter accepts no justification for limiting religious belief in the public domain, and encourages believers to oppose or even ignore any efforts to impose such limits. While the two seem to imply different understandings of religious freedom, both ultimately defend the ability to act on religious convictions in the public domain without restriction.

Royal College of Midwives

The Royal College of Midwives (RCM) in its current form was founded in 1941; its forerunner, Matron's Aid, was founded in 1881. It represents midwives in all four countries of the United Kingdom, both providing professional support and lobbying the government.[198] In the *Doogan* case, the NHS's argument relied heavily on RCM's guidelines for midwives regarding conscientious objection, which allowed it only in cases of direct participation. RCM commented on the original case twice, in a press release and in an article in its magazine, *Midwives*, both on 29 February 2012.[199] The original case's decision agreed with RCM's guidelines. The RCM has not commented on the outcome of the appeal. However, in its comments on the original case, RCM relies on an understanding of midwives as serving a public role to justify restrictions on religious beliefs, and frames religion as harmful to women's health.

In both documents, RCM distinguished between the midwives' claims that they were "entitled" to refuse to supervise staff during abortion and the "right to conscientious objection regarding delivering direct patient care."[200] This distinction allowed them to voice support for what they depicted as legitimate conscientious objection, performing abortions themselves, while criticizing Doogan and Wood's objection. Describing the midwives as "entitled" suggests that their request for an extended exemption is an imposition, bringing their personal beliefs into the public sphere where they do not belong. RCM goes on to highlight midwives' professional code of conduct as the appropriate arbitrator for when conscientious objection is allowed, and advises midwives to address any moral concerns to their managers. Though they voice support for some kinds of conscientious objection, they prioritize professional ethics over midwives'

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[198] Royal College of Midwives, "About Us," accessed 8 April 2014, http://www.rcm.org.uk/college/about/.

[199] "RCM Comments on two Catholic midwives losing legal challenge to Glasgow Health Board's decision to refuse recognise entitlement to conscientious objection for supervising staff during abortions," Royal College of Midwives, 29 February 2012. http://www.rcm.org.uk/college/about/media-centre/press-releases/rcm-comments-on-two-catholic-midwives-losing-legal-challenge-to-glasgow-health-boards-decision-to-refuse-recognise-entitlement-t/ (accessed 8 April 2014). Appendix 9.
Robert Dabrowski, "Catholic midwives fail in abortion legal case," *Midwives,* 29 February 2012. http://www.rcm.org.uk/midwives/news/catholic-midwives-fail-in-abortion-legal-case/ (accessed 8 April 2014). Appendix 10.

[200] "RCM Comments," Royal College of Midwives.

beliefs. In contrast to the SPUC, the RCM casts Doogan and Wood's conscientious objection as violating rather than upholding professional standards.

The reason for this limitation to conscientious objection, according to the RCM, is the need to seek "the best possible outcome … for the benefit of the woman and her family." Interestingly, they specifically reference terminations for fetal abnormalities in both the press release and the magazine article, stating that both the midwives performing those terminations and the women themselves need to feel supported, and this must take priority over Doogan and Wood's unwillingness to supervise abortions. While fetal abnormalities were mentioned once in the case in the context of new screening capacities at the hospital, they were less prominent than early term abortions, as later-term abortions had already been performed on the labor ward prior to Doogan and Wood's complaint. RCM's use of that particular reason for abortion, then, is likely less reflective of the case itself and more an effort to put forward a more sympathetic image of abortion in this situation. Both documents take the moral acceptability of abortion for granted and position the needs of the women seeking abortion as the baseline against which claims of conscientious objection should ultimately be considered.

In both documents, conscientious objection (or at least efforts to expand it beyond direct care) are subject to restriction based on the RCM code of ethics and on the needs of women. In the public realm of the hospital, restrictions are justified based on the importance of patient health and wellbeing. While the RCM never criticizes Doogan and Wood, acknowledging that the case was "a very difficult situation for all individuals concerned," it ultimately sees no place for their beliefs in its understanding of professional ethics. In fact, its references to women's need for emotional support as well as medical care suggests that Doogan and Wood's religious beliefs might be harmful to women emotionally even if they do not interfere with access to abortion itself. RCM sees midwifery as a public role protecting the wellbeing of women, and frames private religious influence on that role as harmful to women's health. In this framework, ambiguities – such as religious women, who both hold religious rights and women's rights – are left out in order to create a dualism that excludes not only religious manifestations but also religious expression (voicing opposition to abortion) from the public domain.

Reproductive Health Matters

Reproductive Health Matters (RHM) is a London-based academic journal founded in 1992 that aims to promote sexual and reproductive rights, including unrestricted access to abortion.[201] In addition to publishing academic articles, it is a member of Voice for Choice, a coalition of pro-choice organizations in the United Kingdom that lobbies Parliament for expanded abortion rights, and publishes a blog on reproductive health policy. It is the only member of Voice for Choice that commented publicly on the *Doogan* case, in two blog posts: a detailed description of the case in May 2013,[202] and a summary of the case in an October 2013 meeting report on abortion in international criminal law.[203] In their blog, RHM characterized the *Doogan* case as an extension of conscientious objection that violated international human rights law by limiting abortion access, therefore threatening women's rights and health.

RHM criticized the Court of Session's judgment, arguing that it "[paid] scant attention to the rights of women," particularly with regards to access to abortion.[204] They recognize the right to conscientious objection, but claim that it must be balanced with protection of the right to access, and that this was not done at all in the *Doogan* case. They raise several ways that conscientious objection could potentially threaten access, both directly, if one provider in a team objects to participating, and indirectly, by contributing to stigmatization of abortion. In the October blog post, they make a hyperbolic argument that the extension of conscientious objection to supervision could eventually "lead to shortfalls in staff that could even result in women's deaths."[205] In the May blog post, they suggest that "orchestrated anti-abortion groups" support conscientious objection with the goal of blocking access to abortion.[206] Ironically, this mirrors the language of the

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[201] Reproductive Health Matters, "about rhm," accessed 8 April 2014, http://www.rhmjournal.org.uk/about/about-rhm.php.

[202] Louise Finer, "Conscientious objection in Scotland: A worrying precedent," RHM Blog, 14 May 2013. http://rhmatters.wordpress.com/2013/05/14/conscientious-objection-in-scotland-a-worrying-precedent/ (accessed 8 April 2014). Appendix 11.

[203] "Abortion in criminal law, UK and internationally: brief meeting report," RHM Blog, 23 October 2013. http://rhmatters.wordpress.com/2013/10/23/abortion-in-the-criminal-law-uk-and-internationally-brief-meeting-report/ (accessed 8 April 2014). Appendix 12.

[204] Finer, "Conscientious objection."

[205] "Abortion in criminal law," RHM blog.

[206] Perhaps not an unreasonable claim, given the SPUC's statements about using conscientious objection to prevent abortion.

SPUC, which worried about coordinated pro-abortion efforts to silence Christian opposition to abortion.

While the SPUC backs up its claims of conflict between Christians and women seeking abortion with scripture, RHM relies on a different higher authority – international law. In the May blog post it provides extensive information about how the *Doogan* case could potentially bring the United Kingdom into conflict with its obligations under international human rights law to provide access to health services, including abortion. Referencing the United Nations in particular, it argues that the right to refuse to supervise abortion could potentially lead to refusals to refer for abortions, in violation of "a clear responsibility under human rights law." It also argues that any delay of access to services that arose from conscientious objection would put the UK in violation of human rights law. It therefore claims to endorse a broadly accepted view of conscientious objection put forward by the UN and other international rights bodies. However, the restrictions to conscientious objection recommended (but not legally required) by the European Union involve only an obligation to refer to another provider and to provide care in emergencies. The UN documents they reference only explicitly recommend an obligation to refer. Doogan and Wood were not writing referrals, so the issue was not addressed, and treatment in emergency was explicitly required by the case, with no argument from the proponents of conscientious objection. RHM's use of international law appears to be based more on concerns about the possibility of extensions to conscientious objection than this case's failures to recognize women's rights.

RHM's arguments seem to reflect not just concerns about the potential expansion of conscientious objection in the *Doogan* case, but about the place of abortion in British society more generally. By highlighting that stigma and anti-abortion sentiment can pose threats to access to abortion beyond just the practical concerns of managing conscientious objection, they suggest that anti-abortion beliefs might not have a place in the public sphere, where women have a right to access abortion. Their focus on the potentially dangerous results of denying access to abortion justifies limiting conscientious objection to direct treatment as a way to guarantee women's health. It interprets international law to require the privatization of religious rights, which are viewed as threatening to women's rights if permitted in the public domain.

Analysis

All parties voice agreement with the existing definition of conscientious objection, which allowed exemptions for providers directly participating in abortion. However, disagreement arose over whose interests should take priority outside of direct participation: those of the religious objector or those of the woman seeking treatment. The court avoided the question by finding that there was no evidence that allowing the broader conscientious objection would harm women's interests. It also pushed the task of finding a solution if a conflict did arise to the hospital. The other groups, however, were skeptical that a balance could be struck, based on conflicting conceptions of what was an appropriate reason to restrict religious beliefs in the public domain. Though SPUC used different discourses in its arguments the case, depending on its audience, it supported accommodations for religious beliefs and actions in what it depicted as a potentially hostile public sphere. On the other hand, RHM and to a slightly lesser extent RCM viewed religious beliefs as hostile to women's rights, health, and wellbeing, and drew on the authority of ethics codes or international human rights law to justify restrictions.

SPUC's linking of this case to the passage of marriage equality and RCM's somewhat hyperbolic use of UN guidelines indicate that both see more at stake in this case than the specific details of conscientious objection at one Glasgow hospital. SPUC sees a consistent pattern of excluding Christian (or, in the press release, religious) views and actions from the public domain. On the other hand, RCM sees religious views as a source of stigma against abortion and barriers to access, and therefore not only a pragmatic but an ideological threat to women's health, where women's ability to make individual decisions is deliberately constricted by religious people.

However, the court did not accept a straightforward conflict between religious and women's rights, and its interpretation of the Abortion Act might represent a departure from previous discourses of religious freedom. Religious freedom in the UK has typically been discussed in terms of nondiscrimination, and has focused on managing minority religions in the public domain, as discussed in the previous chapter. Christians have generally been unsuccessful at claiming religious discrimination, in part because judges are more comfortable

making claims about what "core" Christian beliefs are and how they fit into public life. However, in this case, the judge rejected the earlier, narrow interpretation of the conscientious objection clause of the Abortion Act, on the grounds that the act should be interpreted in a way that allows as much latitude to religious beliefs as possible. Though the Court of Sessions does not use this language, it is possible that opposition to abortion is recognized as a "core" element of Catholicism, and thus entitled to stronger protection. It might also represent a shift in legal attitudes towards conscientious objection. The last major case dealing with conscientious objection, *Janaway*, which established the "direct care" standard previously used, was in 1988, and contained no discussion about the role of religious beliefs in public life.[207] In the 15 years between *Janaway* and this case, religious rights gained both greater legal authority (in the Human Rights Act and nondiscrimination law) and greater visibility in the form of growing minority religion populations. The fact that the Court spent more time considering how to appropriately accommodate religion in a liberal, secular context could reflect the higher profile of religious issues generally. Whatever the reason, the case moved beyond a focus on discrimination as such to questions about the place of religion in public life.[208]

RCM and RHM see this shift as a threat to women's rights, which are best protected by fully privatizing religion, which is characterized as irrational. However, the conflicting discourses of "professionalism" put forth by SPUC and RCM might offer an alternative understanding of how beliefs that liberalism would view as "private" can function in a public setting such as a hospital. While RCM talks about professionalism as obedience to an ethical code and prioritizing the patients' needs, SPUC uses professionalism to mean a lack of conflict of conscience that would distract from doing one's job. SPUC suggests that, given accommodation for their religious beliefs, midwives will be better able to provide (non-abortion-related) care for patients. The court seems to embrace this definition, highlighting that pressure on midwives to violate their conscience could also be potentially harmful to women's health by requiring midwives to make difficult decisions in stressful, time-sensitive situations. RHM is deeply skeptical that this "best of both worlds" solution is workable in practice,

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[207] *Janaway*.
[208] It then arguably pushed this question off on hospital management.

highlighting legitimate concerns about access to abortion, and the court agrees that conscientious objection is not absolute; it reaffirms several times that the midwives would be required to participate in abortion in emergency situations, for example. However, considering women's health and conscientious objection as related but not oppositional moves away from relying on a public/private distinction found elsewhere in UK conceptions of religious freedom.

In this chapter, I have reviewed the arguments made by the NHS, Doogan and Wood, and the court itself in *Doogan v. NHS,* who grappled with the extent to which liberalism requires that religion be accommodated in the public domain. The court ultimately gave religion the benefit of the doubt in setting the line between public and private; in the absence of evidence of harm to women's health and safety, it allowed for a broader interpretation of conscientious objection, accommodating private religious belief. In contrast to the *Hobby Lobby* case, the court gave serious consideration to the needs of women seeking abortions. Despite this, their interpretation worried both the RCM and RHM, who sought to shore up the NHS's public role through reference to secular ethical codes and international law, presenting these things as protections of women's health and medical science against the threatening presence of religion. Interestingly, perhaps because of the NHS's more obviously public position than Hobby Lobby's, the SPUC gave some recognition to the public role of the NHS, attempting to position conscientious objection as not an intrusion of the private domain but an appropriate element of "professionalism" within the NHS's public role, a view that the court in some ways accepted. However, the SPUC, in the document targeted squarely at its religious base, contested this interpretation by emphasizing the moral and biblical rightness of opposition to abortion regardless of what the law said. While RCM and RHM relied heavily on dualisms to attempt to exclude religion from the private domain, SPUC and the court itself were slightly more ambiguous in their treatment of religion, suggesting that accommodation of conscientious objection itself might serve a public role that justified the presence of religion in the public domain. This stands in contrast to the US case, which justified conscientious objection by reaffirming the private nature of religion. Despite these differences, however, both cases came to similar conclusions – the expansion of conscientious objection – opposed by groups that used identical dualisms to argue for an alternative public-private distinction. In

the following chapter, I will compare the US and UK cases, call attention to the common interpretations of the public-private divide found in both cases, and discuss some of the shortcomings of these interpretations.

Chapter Six: Comparison and Analysis

The *Hobby Lobby* case in the United States and *Doogan* case in the United Kingdom are both efforts to pin down the shifting line between public and private in order to define the limits of religious freedom. Though they have different approaches to religious freedom, informed by different legal histories, both the United States and the United Kingdom draw on liberal political and legal theory to try to understand the appropriate place of religion in the public domain. However, these cases pose questions about the effectiveness of that framework. In attempting to distinguish between the public and the private in a way that restricted religious freedom, women's rights organizations and professional organizations relied on dualisms that pitted religion against science and women's emancipation. However, the courts rejected these concerns, constructing the public-private distinction based on the distinction between "core" and "peripheral" beliefs. Both of these divisions are problematic. The cases also raised questions about what kind of entities were public or private and how individuals' beliefs fit with their public roles, calling attention to the conflicting ideas of what is public and what is private in liberal political theory.

The obvious similarities between the cases invite comparison: Both occurred in 2013 at the second-highest court of appeal, were appealed further to the highest court in each land, generated media interest and public comment, and dealt with the intersection between religious freedom and reproductive health. However, there are some key differences that complicate comparison. First and most glaringly, the cases differ in how far they extend religious freedom. Both the United States and the United Kingdom recognize the right of doctors to religiously object to providing abortion without much controversy; the question is how far this right extends to those indirectly involved. The *Hobby Lobby* case, which dealt with an employer who would only pay for the health care and with birth control which may or may not cause abortion, is far further removed from the actual act of abortion, compared to the nurses in *Doogan* who could conceivably be asked to step in and provide direct treatment in their role as supervisor. While the issues at hand and the language, legal and public, used to frame them are similar, it is important to remember that from the start the United States embraces a far broader understanding of religious freedom. Similarly, the

legality of abortion (and of birth control) is far more settled in the United Kingdom than the United States. Finally, the *Hobby Lobby* case was the subject of much more public comment in the form of amicus briefs and press coverage than the *Doogan* case; though this study examined the same number of documents from each case, *Hobby Lobby* was by far the more controversial and commented-upon case.

Despite these differences, both cases raised similar issues and therefore can be usefully compared as case studies in how the lines between the public and private domain are drawn by conscientious objection in the context of abortion. In this chapter, I will first compare the legislation and background in each country, focusing on differences in how religious freedom is considered and what these imply for the place of religion in the public domain. I will then compare how the lines between the public and the private are drawn within the case studies themselves, focusing on the way religion is put into dichotomies with medicine and gender equality, as well as on how religion is interpreted by the judges. I argue that dualisms used to divide the public from the private in these cases are insufficient to resolve the different rights at stake in these cases.

Laws, Definitions, and Establishments

In chapters two and four, I proposed two working definitions for religious freedom in the United States and the United Kingdom respectively. In the United States, I argued religious freedom may be understood as the ability to practice one's religion unburdened by government regulations in the public domain and uninfluenced by government endorsement of any particular belief. Religiously motivated actions can be regulated only when there is a compelling government interest at stake, or if the offending law is not discriminatory towards a particular religion. In the United Kingdom, I argued that religious freedom may be defined as the right to be free from discrimination or disadvantage based on one's religious identity and core practice, particularly in terms of widely recognized obligations. This is limited by not only state concerns about public order and safety but by institutional concerns of entities such as employers and schools, with women's rights identified as a particular area of concern both at the EU level and in UK jurisprudence.

Several key differences are apparent in US and UK treatment of religious freedom and particularly of religious exemptions. The US emphasis on freedom from regulation and government influence provides a greater scope for religion in the public domain than the UK definition, which focuses on discrimination. In the US definition, restrictions are inherently problematic; in the UK, on the other hand, inequality between religious groups is the problem, making restrictions that are applied evenly potentially acceptable. This intuition from the definitions is backed up by the acceptable reasons for restrictions in each country's law. Under the US Constitution, restrictions on religion of any kind are only permissible in the service of a "compelling government interest," which, as we have seen, is so narrowly interpreted as to exclude such important goals as public health or women's equality. The United States also sees religious freedom as a key part of its national identity, describing it as the "first freedom" and prioritizing it over other concerns. On the other hand, the United Kingdom gives religious freedom a less central place and allows for greater restrictions. Under Article 9, section 2 of the ECHR, which defines the permissible reasons for restrictions of religion in the United Kingdom, religion may be restricted for any number of reasons: "public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." The last reason, protection of the rights and freedoms of others, is particularly relevant in the cases examined here, because it allows women's rights to be used as a justification for limits on religion alongside the health-based arguments put forward by the hospital. While both of these approaches are rooted in liberal political theory and end up offering religious exemptions as one solution to the problem of religion in the public domain, they set different bars for what kinds of restrictions on religion are acceptable.

Patterns of establishment also help explain the differences between understandings of religious freedom in the United States and the United Kingdom, and how these understandings inform the outcomes of court cases. While the United Kingdom could be characterized as having established churches (Church of England and Church of Scotland) and the United States prohibiting them, this focus on the presence of a state church overlooks other patterns of interaction between religion and state which shape the way religion is understood, regulated, and publicly expressed. For example, the United States is

often said to have a de-facto Protestant establishment for the serious influence Protestantism has had on American history and culture, despite the lack of formal interaction between Protestant church bodies and the state.[209] However, there is also a firm rejection of anything that appears to be state endorsement or "entanglement" with religion, exemplified by the Establishment Clause of the First Amendment. As a result, a heavily Protestant-influenced understanding of religion and its place in the public domain remains relatively unchallenged as the basis for defining religion in the courts, which is unconcerned with inequality between religious groups.[210] Claims such as Native American's efforts to protect sacred lands under the First Amendment, which have no clear analogies to Protestant worship or practice, have been less successful than claims by Christian groups. The court has in general declined to comment on whose interpretation of Christianity is theologically correct – reflecting, in itself, a Protestant understanding of religion as a matter of individual understanding. However, it is more likely to recognize the "religiousness" of beliefs and practices that are comparable to Protestantism.

In the United Kingdom, on the other hand, the presence of an established church has had the opposite effect. Like Protestantism's influence on the definition of religion in the United States, Church of England in the United Kingdom provides a benchmark for understanding religion. However, judges in the United Kingdom, who in general are more comfortable with restrictions on religion and more concerned about inequality between religious groups as noted above, take their understanding of Christianity as justification for restrictions. Because of the presence of an identifiable, national form of Christianity, judges are able to identify "core" beliefs which merit protection, compared to peripheral beliefs, which can be restricted. Efforts to make similar judgment calls in non-Christian religions have failed, as in the *Begum* case, where the lower court attempted to engage Islamic theology before declaring that they were not able to comment on the religious issues at stake. They could not identify "core" beliefs, so they declined to characterize Begum's belief at all in that way, deciding based on other criteria.

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[209] Lori G. Beaman and Winnifred Fallers Sullivan, "Neighbo(u)rly Misreadings and Misconstruals: A Cross-border Conversation," in *Varieties of Religious Establishment*, ed. Winnifred Fallers Sullivan and Lori G. Beaman, (Surry: Ashgate Publishing, 2013), 4

[210] Beaman and Sullivan, "Neighbo(u)rly Misreadings," 5.

These different definitions, national attitudes towards religious freedom, and patterns of establishment inform the way religious freedom is characterized in public discourse and the courts. Despite these differences, however, both cases examined struggled with the line between the public and private and came to surprisingly similar conclusions in this negotiation. I will next examine some of the discourses used by organizations and the courts to distinguish between the public and private domain.

Religion/Medicine

Some varieties of secularism (what Jose Casanova calls "political secularism") position religion as an irrational force in opposition to science and rationality, which therefore should be removed from the public sphere.[211] This attitude was visible primarily in the documents of the professional organizations, the American College of Obstetricians and Gynecologists and the Royal College of Midwives, to a lesser extent in the women's rights organizations, the National Women's Law Center and Reproductive Health Matters, and in the arguments put forward by the NHS in the *Doogan* case. By highlighting medical concerns and portraying religious beliefs as inappropriately interfering with or even actively harming women's health, these organizations drew on the presumed opposition between religion and science and established science as the boundary of the public domain. On the other hand, particularly in the United States, the National Association of Evangelicals and the court rejected the relevance of science to limiting religious practice. These arguments dismissed science – the rationality of their religious beliefs was portrayed as irrelevant.

The American College of Obstetricians and Gynecologists most clearly uses medicine as a way to draw the line between the private sphere of religious beliefs and the public sphere where they should not be considered. For example, it states, "a woman's … health care should not be determined by the personal or religious beliefs of the company's owners. Decisions about medical care should be made solely between a woman and her physician, with no involvement from her boss." The press release goes on to list the medical benefits of contraception,

[211] Casanova "The Secular, Secularizations, Secularisms," 67.

without reference to the religious questions put forward by the case.[212] In another document, it describes religious health care institutions as "a barrier to access," and suggests that religious disapproval of contraception is the result of a misunderstanding of science.[213] The possibility that women themselves might have religious objections to contraception is never discussed; rather, the focus is on religious health care providers and employers, whose concerns are depicted as scientifically unsound and therefore irrelevant to women's medical decisions, which are made in the rational public sphere.

Reproductive Health Matters, the United Kingdom women's rights organization, similarly uses medical concerns as a line beyond which religious influence should not cross, though in a much more dramatic way. It warns that allowing conscientious objection, expanding the place of religion, will "lead to shortfalls in staff that could even result in women's death."[214] The document does not engage with the religious beliefs of objectors at all; they are irrelevant in the face of such a serious threat to women's lives. Seriously limiting the possibility of health care providers refusing to provide abortions, by privatizing their religious beliefs, is implied as the only way to ensure women's health and safety. This argument is rejected by the Court of Sessions, which cites the requirement that objections not apply in emergency situations.

In these arguments, organizations treat religious claims as at best misguided and at worst directly threatening to women's health, and seek to exclude them from the public sphere of medicine, science and health. Religious beliefs are removed from the realm of medical decision-making, which is governed by science (for example, in the heavily-cited reassurances the ACOG provides that emergency contraception is not abortion) and by medical ethical codes (for example, in the Royal College of Midwives' advice to midwives to consult the RCM's code of conduct if they have moral concerns about participating in abortion.) Conscientious objectors, who bring their religious beliefs to bear on medical issues, are therefore intruding. In these cases in particular, which deal with indirect participants in abortion, religious objections are depicted as interfering with the ability of the doctor or midwife to provide

[212] "NAE Asks High Court," National Association of Evangelicals.
[213] "Committee Opinion," American College of Obstetricians and Gynecologists.
[214] "Abortion in criminal law," RHM Blog.

(medical, scientific) care. Interestingly, the possible religious concerns of the doctors providing direct care, or of the women themselves, are not discussed at all; their relationship and decisions are depicted as non-religious, placing them in opposition to religious ideas. The arguments based on this dualism fail to take seriously religious rights, making them insufficient to address the question of conscientious objection.

Religion/Women's Rights

Religion is placed in opposition to women's rights in a similar dualism to that between religion and medical science. The women's rights organization documents and some legal arguments imply that the privatization of religion and the emancipation of women are linked; in order for women to be full participants in the public sphere, they must be unrestricted by religious ideas. On the opposite end, religious organizations claim that women's rights are not compromised by religious positions, either by insisting that their actions to not restrict access to abortion, or by denying the existence or importance of a right to abortion. The line between the public and private sphere is constructed in different ways within this dualism; in some cases, women's legal right to abortion is positioned as part of the public sphere, within which religion should not intrude. In other cases, however, the emphasis is on women's personal decisions, suggesting that these are a private matter on which the public sphere should be neutral, again meaning that religion's presence there is unwelcome.

Focusing on women's legal rights emphasizes the place of women in the public domain. This approach is particularly prominent in the Reproductive Health Matters documents, which highlight the legal right to abortion with reference to international law. For example, they argue that the Court of Session decision pays "scant attention to the rights of women," and potentially violates international human rights obligations. RHM sees expanding the right to conscientious objection as stigmatizing abortion, stating, "on reading the judgment one could almost be forgiven for forgetting that women in the UK do have a right to access legal abortion."[215] It also identifies conscientious objection as a consequence of retaining abortion as part of UK criminal law, a classification

[215] Finer, "Conscientious Objection."

that does not sufficiently recognize access to abortion as a right.[216] RHM frames abortion access as a right rooted in international law, suggesting that it is part of the public sphere and cannot share that space with religion, which must be privatized to ensure women's access to their human rights.

The American women's rights organization, National Women's Law Center, took a different approach, focusing on the personal nature of health care decisions in order to construct the same dualism between religion and women's rights. The Royal College of Midwives also used this framing. For example, NWLC says that employers must not "[interfere] in [women's] private reproductive health decisions,"[217] and RCM argues that women "need to feel supported."[218] In both of these instances, the person objecting – the health insurance provider or midwife, in this case – is depicted in their public role as a provider of health insurance or health care, and this role is seen to require acceptance of abortion. Because this role is public, it must be neutral on women's personal decisions, which are part of the private realm.

Women's position in these dualisms is ambiguous – are their bodies public, as implied by the references to rights favored by RHM, or private, as NWLC and RCM argue? This uncertainty is linked to the ambiguous status of women's bodies in the public domain in general. Reproductive health and pregnancy are particularly fraught issues for women, as pregnancy has become more publicly visible and policed.[219] In media discussions of religion, women's dress is also often used as a public symbol for the presence of religion in the public domain, for example in debates about the veil.[220] While pregnancy and contraception are not as visibly religiously loaded as the veil, they do represent ongoing unease with how women's bodies should be managed in the public domain. The dual language used in these debates – recognizing the "privateness" of women's personal choices while also assigning these choices a public significance as part of the broader agenda of women's emancipation –

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[216] "Abortion in Criminal Law," RHM Blog.
[217] "Supreme Court to Hear Challenge," National Women's Law Center.
[218] Dabrowski, "Catholic midwives fail."
[219] Kristin Heffernan, Paula Nicholson, and Rebekah Fox, "The next generation of pregnant women: more freedom in the public sphere or just an illusion?" *Journal of Gender Studies* 20 no. 4 (2011): 322.
[220] Nuraan Davids, "Muslim Women and the Politics of Religious Identity in a (Post) Secular Society," S*tudies in Philosophy and Education* 33, no. 3 (2014): 306.

complicates the task of dividing the public and the private at the intersection of religion and gender. Either way, like the dualism between religion and medicine, constructing religion only a limit on women's agency that must be privatized fails to give claims for religious rights appropriate consideration.

Sincerity and Centrality of Beliefs

Though it was not central to the courts' decisions in these cases, both US and UK law depend on making some interpretation of the religious person's belief. Though liberal political theory demands that the state be neutral towards religion, in practice the courts make calls about what religion is, and therefore what merits protection based on the sincerity of the religious belief, in US jurisprudence, and the centrality of the beliefs to the religion, in UK jurisprudence. More sincere and more central religious beliefs merit more protection than insincere or peripheral beliefs, which are less accommodated in the public domain. The US court's finding that Hobby Lobby's – the corporation's - religious beliefs were sincere contributed to its conclusion that these beliefs should be considered part of the private domain and therefore free from restriction, despite Hobby Lobby's public role. Religious organizations in both the UK and US echoed this emphasis on the sincerity of religious belief as justification for not restricting conscientious objection.

US law mandates that the court determine that a religious belief be sincerely held in order to gain Free Exercise Clause protection. In the *Hobby Lobby* case, this posed a problem – how does one determine the religious sincerity of a corporate entity? To solve this dilemma, the court focused on the religious beliefs of the business owners, noting that they included religious principles in documents for the trust through which they owned the business and used business funds to print proselytizing advertisements. Another problem for the question of sincerity was the possibility that Hobby Lobby's belief that some kinds of contraception can cause abortion was medically unsound. Ultimately, the court rejected this concern as well; if Hobby Lobby sincerely believed that they would be morally culpable for abortion if they paid for birth control, it did not actually matter if the contraception caused abortion or not. In an effort to avoid passing judgment on the content of religious beliefs and maintain the neutrality required by liberal political theory and the Establishment Clause, the court

accepted at face value Hobby Lobby's sincerity and did not subject their religious arguments to any scrutiny.

Religious believers shared the conviction that the content of their beliefs, and their own understanding of their moral culpability in abortion, was beyond question. For example, the National Association of Evangelicals repeatedly claimed that the government "violates the religious beliefs" of business owners without further elaborating on their contents.[221] They emphasized that religious freedom should be "the first priority" in America, so that religions are free from laws they disagree with.[222] While the Society for the Protection of Unborn Children in the UK was less optimistic about receiving protection for their beliefs, they agreed that religious objection to abortion was morally "undeniable," regardless of the legal issues involved.[223] Both organizations rejected the idea that the public domain required them to use "public reason" or modify their religious beliefs.

Though perhaps it's unsurprising that they view their own beliefs as morally correct and therefore to be accommodated, such an attitude reflects an unwillingness on behalf of religious people to recognize the public-private divide that liberal political theory argues they should uphold. At the same time, the US court's unquestioning acceptance of Hobby Lobby's sincerity allowed them to avoid passing judgment on the content of religious beliefs, but made it difficult for them to justify including Hobby Lobby in the public domain. While it was not an issue in this case, the United Kingdom has distinguished between "core" and peripheral beliefs, making more substantive judgments about religious beliefs to justify restrictions on religion. While the UK approach might allow for greater flexibility in considering how religion should be treated in the public domain, it raises questions about the extent to which the state can make judgments about the content of religion. However, failing to make such judgments makes it difficult to justify any restrictions at all, even in cases where the rationality or legitimacy of the religious claims might be questionable. The dualism between "core" and "peripheral" beliefs also failed to give consideration to the legitimate concerns

[221] "NAE Files Supreme Court Brief," National Association of Evangelicals.
[222] "NAE Asks High Court," National Association of Evangelicals.
[223] "SPUC Evangelicals," Society for the Protection of Unborn Children.

about women's rights raised by the cases, making it inadequate for resolving the questions of conscientious objection.

Businesses, Organizations, and Individuals as Rights-Bearers

A final question raised by the two cases in their efforts to define the public sphere is: Who has rights and agency in these conflicts? The conflation of the Green family with Hobby Lobby the corporate entity is the most dramatic example of difficulty defining whose rights, precisely, are at stake. However, similar uncertainty existed in the *Doogan* case's discussions of professionalism, which offered conflicting descriptions of how the midwives' personal beliefs related to their public role as government-funded health care providers. Determining whether an entity is "public" or "private," and how this status relates to individual rights, has serious implications for how religion will be accommodated or not accommodated in the public domain.

In the *Hobby Lobby* case, the government argued, supported by the professional and women's rights organizations examined here, that Hobby Lobby's legal status as a for-profit corporation made it ineligible for religious rights. Put another way, corporate law made Hobby Lobby a distinct legal entity that was in some way "public" – serving a public role and accountable to a wide variety of legal restrictions – in a way that excluded its ability to hold private religious beliefs, despite the beliefs of its owners. The court rejected this argument, finding that corporate entities could indeed hold religious beliefs, or rather could reflect the religious beliefs of their owners in some constitutionally relevant way. However, the discussion of the case by both religious and non-religious organizations focused primarily on the Greens as individuals, downplaying Hobby Lobby as a corporation and what its public role was under the Affordable Care Act. For example, the National Association of Evangelicals called for protection of the "biblical beliefs of the family that owns the business,"[224] while the National Women's Law Center described "interference from [women's] bosses," as if the Greens' interference were personal rather than a corporate decision by a separate legal entity.[225] Conflating the Greens as private individuals with rights with Hobby Lobby the corporation prevented further

[224] "NAE Asks High Court," National Association of Evangelicals.
[225] "NAE Files Brief," National Association of Evangelicals.

elaboration on Hobby Lobby's status as a private business serving the public function of providing health insurance.

In the *Doogan* case, the midwives, as employees of the NHS at a government-funded hospital, played a more obviously "public" role. This role was referenced by the Royal College of Midwives, who emphasized that Doogan and Wood were accountable primarily to the RCM's code of conduct and to their managers.[226] However, the Society for the Protection of Unborn Children questioned the idea that this role clearly excluded a broad definition of conscientious objection. They described conscientious objection as a matter of "professionalism," focusing on the midwives' self-described obligation to two patients – the mother and the unborn child – and the need to facilitate "good morale and good relations" in the workplace.[227] In their view, the midwives public role and private beliefs were not in conflict because the midwives' objections were in line with the purpose of their profession and removed fraught moral questions from the workplace, where they did not belong.

In both cases the relationship between women's rights and religion is oversimplified in ways that obscure the impact of religion on women's ability to exercise agency in their reproductive decisions. Reproductive Health Matters drew a sharp contrast between women's rights and religious rights, without reference to the fact that the midwives claiming exemptions were also women whose rights were in question. Are religious rights, when held by women, part of "women's rights?" Suggesting that the two are in conflict, as RHM does, oversimplifies both the place that religion holds in women's lives and the ways which religion influences women's ability to exercise their rights. In the *Hobby Lobby* case, the court also oversimplified the relationship between religion and women, but did so by ignoring women almost entirely. In the decision, women are barely mentioned at all, except to note that their rights are not a sufficiently compelling government interest to justify restricting religious practice. In practice, this means that the right of thousands of female employees of Hobby Lobby to equal access to the benefits of the Affordable Care Act, which would facilitate their ability to make choices about their contraceptive used (perhaps religiously informed, perhaps not), is seen in the court's decision as so

[226] "RCM Comments," Royal College of Midwives.
[227] "Abortion ruling welcomed," Society for the Protection of Unborn Children.

unimportant as to not even merit discussion. While the exclusion of women from the court's decision is the more harmful oversimplification, both the US court and RHM fail to recognize women as bearing both religious rights and reproductive rights and therefore fails to examine the relationship between the two and its implication for women's agency.

Analysis

The United States and United Kingdom have significant differences in their approaches to religious freedom. The United States recognizes religious freedom as the "first freedom," holds its protection as a matter of national identity, and therefore rejects restrictions to religious practice except for narrowly-defined "compelling government interests." The United Kingdom's law reflects greater concern with equality and nondiscrimination, and permits a wider range of restrictions. Patterns of establishment in both countries also influence how restrictions on religion are interpreted, with the United States offering greater protection to practices analogous to Protestantism. With its national church providing an example of what British Christianity should look like, the United Kingdom is willing to restrict beliefs that deviate from the recognized "core" of Christianity.

Despite these differences, both states recognize conscientious objection to abortion, and grapple with how far these exemptions should extend. Conscientious objection can be imagined as a way of adjusting the line between the public and private domain, accommodating private religious practice in the public sphere by freeing it from restrictions which otherwise apply. As a result, the *Hobby Lobby* case, *Doogan* case, and the public commentary on each grappled with the question of how to draw the line between private, protected religion and the public domain. Medical science and women's rights were both proposed as markers to the boundary of the public domain, suggesting that "irrational" religious belief could be restricted when it disagreed with medical opinion, or when it interfered with women's legal rights, particularly the right to abortion. However, both the US and the UK court rejected both of these lines, though the Scottish Court of Sessions maintained the possibility that those considerations might apply at some point in the future, if not in this particular case.

The content and sincerity of religious beliefs, though traditionally off-limits in liberal political theory, which requires state neutrality on religious issues, offered another way of attempting to determine how the public and private should be distinguished. By accepting without question the sincerity of Hobby Lobby's religious beliefs, allowing them protection despite their potentially provable inaccuracy, the US court placed Hobby Lobby in the private sphere. This somewhat all-or-nothing approach to religious belief was echoed by believers in both countries, who argued that they should be permitted to act on their religious beliefs without compromise. Though liberal political theory asks citizens to use "public reason" and put aside their religious beliefs in public discourse, both the NAE and SPUC made no such distinction, arguing that their religious beliefs necessarily impacted their decisions and therefore required protection.

Finally, both cases raised questions about what kinds of entities could exercise religious and other rights and how those rights related to each other. While NHS clearly had a public role in the *Doogan* case, the midwives and their supporters argued that exercising their religious rights was compatible with that role. Hobby Lobby, on the other hand, rejected claims that it had a public role entirely, raising but not answering questions about what responsibilities, if any, corporations have in the public domain. In both cases, women's rights and religious rights were depicted as being in opposition; as a result, both the courts and the commentators tended to be dismissive of one or the other, and failed to recognize that women hold both reproductive and religious rights, and that the relationship between the two is not always straightforward.

The wide range of possible public-private divides arising from the case shows the inadequacy of the concept for determining the limits of religious rights. In the United States case in particular, the aversion to placing restrictions on religion and an all-or-nothing view of religious sincerity led to a judgment that ignored the complex implications of granting a corporation religious rights and denied agency to the female employees of Hobby Lobby. The alternatives proposed by professional organizations and women's rights organizations in their comments on the case were also inadequate, relying on secularism's dualisms between religion and science and religion and women's rights and unrealistically demanding religion's privatization based on the assumption that religion is

irrational and primarily a matter of personal choice. The United Kingdom's approach was more successful at striking a balance between women's access to abortion and midwives' desire to conscientiously object, but apparently pleased no one. The evangelicals of SPUC still viewed themselves as oppressed by an immoral secular government, and professional and women's rights organizations sought stronger guarantees of women's rights. The same dualisms limited both sides' ability to recognize each other's rights and consider the compromise the court proposed.

The neatly divided public and private spheres sought by the case likely cannot actually be separated. Hobby Lobby is a private corporation run by individuals with private religious beliefs, but as an employer it serves a variety of public roles and holds public obligations. The NHS is a public organization, but its midwives have private religious beliefs, which are protected by law and which have serious implications for its ability to provide its services. In both cases, navigating these conflicting roles and obligations has very real impact on the ability of women to access and make decisions about their own health care. Attempting to maintain a public sphere free of religion fails to recognize the reality of religion's influence on believer's lives, and declaring all things religious part of the private sphere fails to protect women's right to access legal health care that religion often finds objectionable. Both these cases, but particularly the *Hobby Lobby* case, demonstrate how important possible areas of analysis fall through the cracks when the courts depend on a dualism between public and private to solve conflicts between religious rights and the law. The cases point to a need for rethinking the public-private divide and the dualisms that support it, and for alternatives that better deal with the ambiguities present in these debates.

Conclusion

The line between the public and private has never been clear, and efforts to distinguish them seem unsuccessful at disentangling the complex claims of rights, moral accountability, and agency at stake in cases of conscientious objection for abortion and abortion-related care. In the cases examined here, religious organizations claimed, broadly speaking, that their religious beliefs and behaviors could not be so divided; these beliefs had implications for their business decisions, their sense of professionalism, and their understanding of their own moral responsibility in ways that they could not or would not detangle from their public roles or obligations in the workplace.[228] For various reasons, the courts agreed, coming to decisions that expanded the right to conscientious objection by prioritizing religious freedom over women's right to access abortion (explicitly in the US case, implicitly in the UK case.) In their efforts to construct alternative understandings of the public-private split that challenged these decisions and protected women's rights, women's rights and professional organizations relied on dualisms that both oversimplified the issues at stake and that were ultimately not accepted as grounds for restricting religion.

Liberal political theory, shared by both the United States and the United Kingdom, has long understood religious freedom in terms of a division between the public and private, upholding the right to religion in the private domain while restricting its presence in the public. Theories of secularization and modernization demanded a neutral public sphere, linking the privatization of religion to both democracy and the emancipation of women. However, since the 1980s, religion has "deprivatized," revealing entanglements with the public domain that liberalism struggles to accommodate. Gender issues sit at the heart of both understandings of the division between public and private and of the current sense of a revival of religion, with questions of reproduction and sexuality sparking conflict about the boundaries of religious rights.

In the United States, where religious freedom is celebrated as the "first freedom," extensive protections for doctors who do not want to perform abortions

[228] Public in the feminist sense of public workplace and private domestic sphere. In the neoliberal sense, the workplace in the United States was private and therefore its inseparability from religious decisions was less problematic, while the British workplace was public through its connection to the state.

for moral reasons have existed for as long as abortion has been legal, supported by a strict constitutional standard that limits restrictions on religion to those required by "compelling government interests." America's allergy to religious restrictions came into conflict with provisions of the Affordable Care Act when Hobby Lobby, a private, for-profit company owned by a religious family, claimed a religious objection to paying for forms of contraceptives that it understood to cause abortion. All parties involved recognized how far removed the Hobby Lobby owners were from the employee who might use her health insurance to purchase contraceptives. However, despite this distance, the court recognized the sincerity of Hobby Lobby's beliefs and the owners' own sense of moral responsibility for facilitating their employees' choices, and ruled in their favor, granting them an exception from the contraceptive mandate of the Affordable Care Act.

While religious organizations cheered the decision, highlighting the right of business owners to run their companies in accordance with their religious principles, professional organizations and women's rights organizations sought to reconstruct the division between the public and private in a way that favored their concerns. They described religion in opposition to medicine and to women's rights, suggesting that the dictates of medical science or the need to protect women's interests in the public domain created limits on religion. They also challenged Hobby Lobby's construction of itself as a private entity, highlighting its commercial activity as part of the "public" in a way that echoed feminist understandings of the public sphere as the sphere of work. These organizations rightly criticized the court's decision for failing to give women's rights and individual women's agency any consideration at all in their decision. However, the alternative they proposed relied entirely on privatizing religion, without regard for the complex role that it plays in public life.

In the United Kingdom, codified understandings of religious freedom are more recent historically, and strongly rooted in ideas of nondiscrimination and equality in a way that permits greater restriction. Additionally, the established church provides a framework for understanding "British Christianity" that allows greater limits on Christianity in the public domain than would be accepted in the United States. Despite this, the court came to a relatively similar conclusion when faced with a case of conscientious objection for indirect participation. When two

Scottish midwives claimed that supervising abortion violated their right to conscientiously object to abortion, the court agreed, finding that when there is a risk that their consciences might be violated the responsibility to accommodate them lies on their employer. Though the court recognized that the practical problems of managing their objections could be detrimental to women's access to care, it ultimately relied on religious freedom as an interpretive principle, emphasizing that the purpose of the law was to protect doctors' consciences even if it caused inconvenience.

As in the United States, religious organizations celebrated the ruling, legitimizing the introduction of religion to the public domain of health care by linking it to ideas of professionalism and religious equality. On the other side, professional and women's rights organizations depicted religion as intrusive and threatening to women's health, appealing to higher powers such as the RCM code of ethics and international law to prioritize women's right to access abortion over religious rights. Though protections of women's rights were included in the decision (specifically, recognizing that having midwives struggling with their consciences could delay care, and reasserting the requirement that abortion be provided in emergencies regardless of conscientious objections,) RHM decried the decision as the start of a slippery slope of disregard for women's health. In its assessment, privatization of religion not only ensured women's access to abortion, but also combatted stigma that might further limit women's access to abortion. The very presence of religious objection to abortion was depicted as a threat to women, again creating a dualism between religious and women's rights.

Liberalism aims to protect religious freedom and maintain state neutrality by privatizing religion and limiting its presence in the public domain, but how the public and private are divided is a moving target. The liberal-economist model, equating the public with state interests, proved overly narrow: it required that judges make judgments about the sincerity and content of religion that brought their neutrality into question, and often failed to address very real concerns about women's health, access to health care, and bodily autonomy. The feminist model, which identified the domestic with the private and the workplace and market with the public, relied on unworkable dualisms in order to justify removing religion from the public domain, ignoring the role religion plays in many women's lives,

which is not as straightforwardly antagonistic as the dualism between religion and women's rights assumes.

Both solutions proposed in these cases, I argue, are insufficient for properly recognizing the rights at stake. On the one hand, declaring religion fully private and therefore free to refuse involvement with abortion, no matter how indirect, denies women the agency to make their own choices about their reproductive health. Even the most sincere, core religious belief in one's own moral culpability for other's choices does not change the fact that it is someone else's choice, not the believer's. On the other hand, simply using women's emancipation or medical science as a bright line to delineate the public sphere, beyond which religion shall not pass, ignores that such a distinction might not be feasible for believers' own understanding of their faith, and misses a more nuanced understanding of the role religion plays in the public domain, including in the lives of women as they make their reproductive decisions. The understandings of religion that underpin efforts to exclude it from the public domain characterize religion as irrational, and as a matter of personal choice that can be realistically set aside based on "public" reason. Such a limited view of religion fails is insufficient to provide any kind of religious rights; however, the alternative offered by these cases of simply declaring religion as a whole off-limits is also unworkable.

Ultimately, the Scottish Court of Sessions, by depicting conscientious objection as primarily a management problem to be handled within certain guidelines, might have had the right idea. A similar solution has been proposed for the *Hobby Lobby* case as it moves towards the Supreme Court: if Hobby Lobby stopped providing health insurance to its employees, they would be free to seek government-subsidized health insurance that included the full range of contraceptives, and Hobby Lobby would no longer be morally culpable for providing them. However, the cases also suggest that new ways of conceptualizing the public, the private, and how they relate to definitions of religious freedom are required. Women's rights and religious rights are often depicted as pitted against each other as two groups seeking to make their conflicting "personals" political. Putting aside the public/private divide that underlies this interpretation could lead to new possibilities for understanding and resolving such conflicts.

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Appendix 1: National Association of Evangelicals Press Release, 29 October 2013.

October 29, 2013

NAE Asks High Court to Consider Mandate Covering Contraception

The National Association of Evangelicals has joined with several other organizations in asking the U.S. Supreme Court to hear the *Hobby Lobby* and *Conestoga* cases involving the Health and Human Services mandate in the Affordable Care Act that requires employers to provide contraceptive coverage to their employees even if it violates the moral beliefs of the owners. These two employers are for-profit closely held corporations operated in accord with the biblical beliefs of the family that owns the businesses.

Over widespread objections to the mandate, the administration finalized rules that exempt only churches, provide other religious nonprofits with unsatisfactory accommodations, and offer no protection to business owners who seek to apply their faith to their businesses.

For more information on the HHS mandate, visit the NAE's webpage on Freedom of Conscience in Health Care.

Update 11/26/13: The Supreme Court agreed to hear these cases. In response NAE President Leith Anderson said, "The Supreme Court has an opportunity to stand by the First Amendment and for religious liberty in America when it decides the Hobby Lobby & Conestoga Wood case. Some argue that a decision against the HHS mandate will allow Americans to object to every law on the grounds of religious freedom. The opposite is more dangerous. To uphold the HHS mandate is to license this and future administrations to object to every religious belief and practice on the grounds of government authority. In America we want religious freedom and the First Amendment to be the first priority."

Appendix 2: National Association of Evangelicals Press Release, 28 January 2014

January 28, 2014

NAE Files Supreme Court Brief for Hobby Lobby, Conestoga

The National Association of Evangelicals (NAE), representing 40 denominations with more than 45,000 congregations, filed an amicus brief with the U.S. Supreme Court today on behalf of Hobby Lobby and Conestoga Wood in their case against the administration's mandate to cover contraception in company-offered health insurance plans even when doing so violates the religious beliefs of the owners.

"This case is important, historic and precedent setting," said Leith Anderson, NAE President. "The ruling will have vast implications on what the government can mandate business owners to do. The government does not have the right to violate the religious beliefs of any of its citizens, including business owners."

Hobby Lobby and Conestoga Wood are for-profit closely held corporations operated in accord with the biblical beliefs of the families that own the businesses. These businesses do not object to contraception generally, but do object to so-called "morning after" drugs that may act as abortifacients.

Some claim that it is unlawful to exempt religious businesses in a manner that shifts the cost of contraception to their employees. In the brief, the NAE rebuts this claim arguing that such a shift does not violate the Establishment Clause, nor is avoiding such a shift a compelling interest of the government.

Carl Esbeck, NAE Legal Counsel and author of the brief, said, "A little common sense is called for, because the very nature of a regulatory exemption is 'that government does not establish a religion by leaving it alone.'"

Over widespread objections to the contraception mandate, the administration finalized rules that exempt only churches, provide other religious nonprofits with unsatisfactory accommodations, and offer no protection to business owners who seek to apply their faith to their businesses.

"Business owners in America should be able to run their businesses according to their religious faith and values," Anderson said.

Appendix 3: American Congress of Obstetricians and Gynecologists Press Release, 26 November 2013

Contraceptive Coverage Essential to Women's Health
Ob-Gyns Oppose Employer Interference in Medical Decisions

November 26, 2013

Washington, DC -- In light of the US Supreme Court's decision today to hear Sebelius v. Hobby Lobby Stores Inc and another similar case*, the American Congress of Obstetricians and Gynecologists (ACOG) reiterates our full support of the Affordable Care Act's (ACA) no-cost birth control benefit as the best medicine for women and their families. A woman's insurance coverage for contraception or other health care should not be determined by the personal or religious beliefs of the company's owners. Decisions about medical care should be solely between a woman and her physician, with no involvement from her boss.

Contraception remains of paramount importance to women's health for many reasons. The benefits of contraception include the following:

Allows a woman to be as healthy as possible before pregnancy, leading to healthier pregnancies and healthier babies. For example, women who take folic acid supplements before they conceive reduce the risk of serious birth defects of the brain, spine, or spinal cord (neural tube defects) by 50%.
Lowers the risk of unplanned pregnancies and abortions.
Allows for adequate birth spacing, lowering the risks of low birth weight and preterm birth. In fact, a prominent medical study showed that women who became pregnant less than six months after their previous pregnancy were 70% more likely to have early rupture of membranes (breaking of the water) and a 30% higher risk of other complications.
Offers important noncontraceptive benefits, including lowering the risk of certain cancers, treating heavy menstrual bleeding and dysmenorrhea (painful menstruation), and reducing symptoms of endometriosis.

ACOG has long advocated for vital well-woman care and access to contraception based on the tremendous impact on a woman's overall health and well-being. To that end, ACOG worked closely with the US Congress and the Institute of Medicine to encourage insurance coverage of women's preventive health care, including contraception. In addition, ACOG has filed 12 amicus briefs in support of the contraceptive coverage provision of the ACA. Similarly, ACOG consistently advocates for the patient-physician relationship and opposes legislative interference.

ACOG strongly supports the ACA provisions that help to guarantee that all women have insurance coverage for the full range of contraceptive methods and other critical preventive health care. ACOG also believes that companies must not be allowed to interfere in women's relationships with their physicians.

*Conestoga Wood Specialties Corp v. Sebelius

Appendix 4: American College of Obstetricians and Gynecologists Committee Opinion, November 2012[229]

Number 542, November 2012

Committee on Health Care for Underserved Women

Background

Emergency contraception may be used to prevent pregnancy after an unprotected or inadequately protected act of sexual intercourse. Emergency contraception is effective in preventing pregnancy within 120 hours after unprotected intercourse but is most effective if used within 24 hours (1, 2). The most common emergency contraceptive method is oral progestin-only pills (levonorgestrel), but use of the antiprogestin ulipristal acetate or use of a combined regimen (high doses of ethinyl estradiol and a progestin) also are effective (3). A copper intrauterine device (IUD) is the most effective form of emergency contraception for medically eligible women and may prevent pregnancy if inserted up to 5 days after unprotected intercourse (4, 5).

Progestin-only emergency contraception is better tolerated and more efficacious than the combined regimen. In the United States, the two levonorgestrel-only regimens include a single-dose regimen (1.5 mg levonorgestrel) and a two-dose regimen (two tablets of 0.75 mg of levonorgestrel taken 12 hours apart). The levonorgestrel-only regimens are available without a prescription to women aged 17 years or older with government-issued photo identification. However, the antiprogestin, a 30-mg tablet of ulipristal acetate, requires a prescription (6). Ulipristal acetate is at least as effective as levonorgestrel in preventing pregnancy up to 72 hours after unprotected intercourse and appears to be more effective than levonorgestrel in preventing pregnancy when used between 72 hours and 120 hours after unprotected intercourse (7).

Barriers to Access

Misconceptions

Mechanism of Action

A common misconception is that emergency contraception causes an abortion. Inhibition or delay of ovulation is the principal mechanism of action (8–13). Review of evidence suggests that emergency contraception cannot prevent implantation of a fertilized egg (1, 12–14). Emergency contraception is not effective after implantation; therefore, it is not an abortifacient.

Effect on Risky Sexual Behavior

Another misconception is that making emergency contraception more readily available promotes risky sexual behavior and increases the rates of unintended

[229] Italicized paragraphs deal with religion and conscientious objection. Notes available online.

pregnancy among adolescents (15). Ready access of adolescents to emergency contraception is not associated with less hormonal contraceptive use, less condom use, or more unprotected sex (16). This misconception also has been raised among adult women. However, numerous studies have shown that this concern is unfounded (3).

Safety of Repeated Use

Data are not available on the safety of current regimens of emergency contraception if used frequently over a long period. However, emergency contraception may be used more than once, even within the same menstrual cycle (3). Information about other forms of contraception and counseling about how to avoid future contraceptive failure should be made available to women who use emergency contraception, especially to those who use it repeatedly.

Financial Barriers

Women's financial resources and insurance coverage limit access to contraceptive methods. Women who lack health insurance or disposable income, have substantial copayments, deductibles, or both, or do not have coverage for over-the-counter medications may not have access to any method of emergency contraception (17). Out of pocket costs for oral emergency contraception average $25–60 and IUD costs can be more than $500, depending on insurance (18–20). Some insurance companies reimburse women only for the cost of emergency contraception in specific circumstances (eg, in the case of sexual assault if a police report has been filed) and most require a prescription (19).

Education and Practice Barriers

Although use of emergency contraception has increased, many women and health care providers remain unfamiliar with the method or are unaware that a physical examination or testing is not needed before emergency contraception is provided. Women often are reluctant to ask health care providers for an advance prescription because they do not anticipate needing it and then have difficulty locating a provider when a prescription for emergency contraception is needed (21, 22). Health care providers often discuss or provide emergency contraception only on request or when a woman reports an unprotected sexual encounter (21). Some health care providers believe that routine counseling about emergency contraception is too time consuming or have a misperception that the patient is unable to properly use the method (18).

Facilities

Women in underserved communities face additional challenges in obtaining emergency contraception. Some communities simply lack a nearby facility or a health care provider willing to prescribe emergency contraception. In other communities, hospitals and pharmacies affiliated with a religious institution present a further barrier to access (15). Emergency departments affiliated with religious institutions have been the target of legislation and lawsuits seeking to enforce compliance with state laws that require emergency contraception be

offered to sexual assault survivors (23). Even within the large network of Title X funded clinics, which provide reproductive health services to approximately 5 million low-income women and adolescents annually, some communities do not have a health care provider willing to prescribe emergency contraception.

Pharmacy Barriers

Some pharmacists refuse to dispense emergency contraception and some pharmacies refuse to stock emergency contraception (17). The prescription requirement for females younger than 17 years of age and pharmacy hours are additional barriers. One study found that pharmacy-related barriers occurred 30% of the time when patients called to obtain emergency contraception, including the need to call more than one pharmacy, wrong numbers given by pharmacy staff, delays in speaking with a knowledgeable staff member, being asked unnecessary embarrassing questions, and disconnection while on a phone referral to another facility (24). Another study found that pharmacists gave inaccurate information regarding the correct age threshold for over-the-counter access by adolescents, especially in low-income neighborhoods (25). Pharmacists are key members of our health care system and could be instrumental in improving access to emergency contraception (22). For example, nine states allow pharmacists to dispense emergency contraception without a physician's prescription under certain conditions (26).

Special Populations

Access to emergency contraception remains difficult for adolescents, immigrants, non-English speaking women, survivors of sexual assault, those living in areas with few pharmacy choices, and poor women. The barriers most frequently cited by teens are confidentiality concerns, embarrassment, and lack of transportation to a health care provider or a pharmacy. Because nonprescription access to emergency contraception is restricted by age, pharmacies must keep emergency contraception behind the counter and request proof of age before dispensing it, thus restricting access for females aged 17 years or older who do not have government-issued identification. Although more than one half of pharmacies offer Spanish language services, expansion of Spanish and other language services could improve timely access to emergency contraception (18).

Up to 5% of sexual assault survivors become pregnant (27). A 2003 survey of Oregon hospitals found that only 61% of hospitals routinely offered emergency contraception to sexual assault survivors (28). Almost one half of health care providers in emergency departments did not prescribe emergency contraception 48 hours after an assault despite proven efficacy up to 120 hours after unprotected intercourse. Thirty percent of hospitals that provide emergency contraception to sexual assault survivors prescribe combined oral contraceptive pills instead of the more effective and tolerated dedicated progestin-only product, ulipristal acetate, or insertion of an IUD (29).

Recommendations

Remove the age restriction (prescription only for females younger than 17 years) to create true over-the-counter access to emergency contraception for all women.

Encourage federal agencies to meet the Healthy People 2020 goal to increase to 87.7% (a 10% improvement) the proportion of publicly funded family planning clinics that offer methods of emergency contraception approved by the U.S. Food and Drug Administration on site (30).

Support media campaigns clarifying that emergency contraception will not terminate an established pregnancy.

Encourage private and public insurers to provide coverage for both prescription and nonprescription emergency contraception and to publicize this coverage to their clients (22). According to an analysis by the Kaiser Foundation Health Plan in California, the distribution of both effective contraceptive methods and of emergency contraception increased once universal contraceptive coverage was offered to its members (31).

Amplify education campaigns that target health care providers and their staff. Health care providers should have refresher training sessions regarding contraceptive counseling and the effectiveness of each method of emergency contraception. They should be reminded that emergency contraception can be offered up to 5 days after unprotected intercourse; however, the sooner it is taken, the more effective it is (11). Most health care providers consider education essential for increasing acceptance and provision of emergency contraception (21).

Emphasize that a copper IUD is the most effective form of emergency contraception (32).

Write advance prescriptions for emergency contraception, particularly for females younger than 17 years, to increase awareness and reduce barriers to immediate access (24).

Integrate counseling about emergency contraception into all clinical visits of reproductive-aged women, including provision of written information and creation of forms that remind clinic staff to address emergency contraception during the visit (21).

Provide referrals to women who desire emergency contraception if a health care provider has an objection to providing it.

Support legislation to increase access to emergency contraception by requiring that it be dispensed confidentially by all pharmacies and by requiring provision of emergency contraception for survivors of sexual assault. Collaborate with pharmacies to avoid confusion and misinformation and to ensure timely access to emergency contraception.

Use social media to conduct campaigns regarding access to emergency contraception (eg, practices that have Facebook and Twitter accounts could provide links to information about emergency contraception).

Appendix 5: National Women's Law Center Press Release, 26 November 2013

Supreme Court to Hear Challenge to Contraceptive Coverage Benefit

November 26, 2013

(Washington, D.C.) Earlier today, the Supreme Court announced it will hear arguments in Hobby Lobby v. Sebelius and Conestoga Wood v. Sebelius, two cases challenging the contraceptive coverage provision of the Affordable Care Act, which requires health insurance plans to cover all FDA-approved birth control methods with no out-of-pocket expense to the woman. The provision went into effect August 1, 2012 and now covers nearly 27 million women.

In these cases, the Supreme Court will take up the question of whether a for-profit corporation is a "person" capable of exercising religion under the Religious Freedom Restoration Act; whether the birth control coverage benefit substantially burdens religious exercise; and if it does burden religious exercise, whether the benefit is justified by compelling government interests, and whether the benefit is the least restrictive means of furthering those interests. In addition, the Supreme Court will consider whether the benefit violates the Free Exercise Clause of the First Amendment.

The following statement is from Marcia D. Greenberger, Co-President of the National Women's Law Center:

"Despite the fact that nearly 27 million women can already benefit from the contraceptive coverage provision, some bosses want to take it away. Among them are the owners of two private, for-profit companies – arts and crafts chain Hobby Lobby and custom wood manufacturer Conestoga Wood – who are asking the Supreme Court to allow their companies to make personal health care decisions for their employees.

"The contraceptive coverage benefit is a huge step forward for women. Requiring coverage with no co-pays removes a serious financial barrier that many women have faced. Birth control is a critically important part of women's health care but its cost, including co-pays, can be an impediment to a woman's consistent use of it or to her ability to use the safest method for her. This benefit removes this financial barrier to women getting and affording the birth control they need.

"If the Supreme Court decides for bosses rather than for women's health, far-reaching consequences could result. Women could find their bosses not only interfering in their private reproductive health care decisions, but other care as well. Bosses have no business meddling in their employees' deeply personal health care decisions, and existing legal precedents should lead the Supreme Court to affirm the laws' protection that women need and deserve.

Appendix 6: National Women's Law Center Press Release, 28 January 2014

National Women's Law Center Submits Amicus Brief in Support of Birth Control Coverage Benefit

January 28, 2014

(Washington, D.C.) The National Women's Law Center (NWLC) today submitted an amicus brief to the Supreme Court in the cases of Sebelius v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialties v. Sebelius. These cases present the question of whether for-profit companies must comply with an important benefit in the Affordable Care Act (ACA) that ensures that women have access to insurance coverage of birth control without any out-of-pocket costs.

The plaintiffs in these cases include Hobby Lobby, a national craft supply chain headquartered in Oklahoma with 525 locations and more than 13,000 employees across the country, and Pennsylvania-based Conestoga Wood Specialties Corporation, a company that makes and sells wood cabinets. The owners of these for-profit companies seek to impose their religious beliefs on their employees by refusing to provide comprehensive health insurance that includes birth control coverage.

NWLC's brief underscores the compelling and vitally important interests the government has in requiring that insurance plans cover birth control without any out-of-pocket cost to the woman – namely, improving public health and gender equality.

"The ACA's birth control provision is already benefitting more than 27 million women, protecting their ability to control their reproductive lives and get preventive health services without interference from their bosses," said NWLC Co-President Marcia Greenberger. "This requirement helps prevent unintended pregnancies by ensuring that women can obtain the forms of birth control that best fit their lives, thus promoting women's health and participation in society.

"While the companies in this case claim their religious freedom is being violated, in fact they seek to turn the law's protection of their free exercise of religion into a sword to impose their beliefs on others. Bosses and companies have no business interfering in their employees' personal health care decisions, and existing legal precedents should lead the Supreme Court to uphold the birth control benefit and ensure that women have the comprehensive preventive health coverage they need and deserve."

The National Women's Law Center filed today's brief on behalf of itself and 68 other organizations representing a wide range of national, state, and regional organizations that support women's access to this critically important benefit.

Appendix 7: Society for the Protection of Unborn Children Press Release, 24 April 2013

News, Abortion ruling welcomed by SPUC who backed Glasgow midwives' case

24 April 2013: The Society for the Protection of Unborn Children (SPUC) www.spuc.org.uk welcomed today's verdict in the appeal by two Glasgow midwives fighting for their right to opt out of abortion.

Connie Wood and Mary Doogan, who won their appeal against the Greater Glasgow and Clyde Health Board, are senior midwives each with more than 20 years' experience and had the role of Labour Ward Co-ordinators. (See further below for a statement by the midwives today.)

SPUC has given the midwives its backing throughout the case. Responding to the judgment, Paul Tully, SPUC's general secretary, said: "Today's verdict is very welcome and we congratulate Connie and Mary on their tenacity and deep sense of professionalism. We hope that the Health Board will abide by this verdict and enable life to return to normal for Connie and Mary. The result is a tremendous victory for these devoted and caring professional women. This outcome will be a great relief to all midwives, nurses and doctors who may be under pressure to supervise abortion procedures and who are wondering whether the law protects their right to opt out.

Mr Tully continued: "The difference this judgment makes is that hospital managers must recognise that the legal right to opt out of abortion goes beyond those who directly undertake abortions. For the sake of good morale and good relations with all members of staff, it is important that the Board move to re-establish normal working relations straight away. The mothers and babies depending on the Southern General Hospital deserve no less.

"Mary Doogan and Connie Wood deserve the fullest support and gratitude of their medical colleagues for resisting the pressure to give up their legal protections. It is important to recognise that their stand applies to people of all faiths and none: the right to refuse to participate in abortion is based on conscientious objection, whether religious or purely moral, so it applies to everyone", said Mr Tully.

"They are anxious to get back to normal after the protracted internal grievance procedure and legal action. This dispute has seriously disrupted their professional lives over the past 4 years and more", concluded Mr Tully.

Statement by Connie Wood and Mary Doogan:

"Connie and I are absolutely delighted with todays judgement from the Court of Session, which recognises and upholds our rights as labour ward midwifery sisters to withdraw from participating in any treatment that would result in medical termination of pregnancy.

In holding all life to be sacred from conception to natural death, as midwives we have always worked in the knowledge we have two lives to care for throughout labour; a mother and that of her unborn child.

Today's judgement is a welcome affirmation of the rights of all midwives to withdraw from a practice that would violate their conscience and which over time, would indeed debar many from entering what has always been a very rewarding and noble profession. It is with great relief we can now return to considerations that are all to do with child birth and midwifery practice and less to do with legal matters.

Lastly, we wish to thank the many individuals the length and breadth of Britain and, indeed, further afield, who have given us great help and support throughout the duration of our dispute with GG&CHB. Though too numerous to individually highlight, special mention has to be given to both sets of family, without whose support we could not have taken on this case, to SPUC and to our very talented legal team whose expertise and support we could not have done without. Thank you to each and everyone."

Background to the case:

Midwives employed at Glasgow's Southern General Hospital as Labour Ward Co-ordinators (LWCs) were told that they had to oversee abortion procedures when the hospital reorganised abortion services, transferring late abortion patients to the labour ward rather than the gynaecology ward.

Previously midwives who opposed abortion on grounds of conscience had always been allowed to opt out of any involvement under the conscience clause in the Abortion Act, which recognises the right not to participate in abortion treatment.

The Court of Session heard arguments about whether midwives in the role of LWC are entitled to opt out of delegating and supervising abortions in which staff midwives are providing most of the hands-on treatment, with LWCs as the first line of back-up.

Appendix 8: Society for the Protection of Unborn Children Evangelicals Newsletter, Autumn 2013

Right to Conscience Under Attack

Last year we highlighted the case of the Glasgow midwives who had been denied the right to refuse involvement with abortions as part of their work.

Mary Doogan and Connie Wood had been told in 2007 that they could no longer object to supervising staff on the labour ward where they worked who were involved in abortions. In 2012 their case finally came to court (with SPUC's backing) but the judge found against them.

We were delighted in when in April 2013 an appeal court overturned this judgment. However, the management board of the hospital is now taking the case to the Supreme Court, and the outcome could affect how the law is interpreted in England and Wales as well as Scotland in the future.

Whatever the legal considerations, moral justification for the stand of the midwives is undeniable. Directing and helping those who are engaged in the process of killing unborn children would mean sharing the moral responsibility for the act. A similar case was the young Saul of Tarsus, who shared the guilt of those who stoned Stephen when he looked after their clothes (Acts 7:58, 8:1); they have rightly drawn the line here.

It is clear that there is a pressure to narrow the protection of conscience that was written into the Abortion Act in 1967, and it affects many who, like the midwives, are not actively involved with abortion. General Practitioners who will not refer for abortion are told they should pass patients on to a colleague who will. Clerical and other staff are not legally protected from handling work related to abortion.

Yet the moral responsibility for this participation cannot be escaped, as can be seen quite clearly when we look at parallels elsewhere. We do not doubt that a person who provides an introduction to a contract killer is partly to blame for the resulting murder. We shudder at the civil servants who efficiently administered the apparatus of the holocaust.

The colossal abortion establishment in this country requires far more participants than those who wield a suction curette. It could not be sustained without the support of a wide range of people, and many therefore have good reason to wish to avoid being implicated.

Behind the contemptuous overriding of the consciences of those who want no part in abortion lies something fundamental. What we see as the killing of innocent human beings others refuse to see as anything more than a service. While those with conscientious objections shrink from shedding innocent blood, their failure to co-operate is regarded by others as an inconvenient disruption to the provision of that service.

As Christians, we should not be surprised by this. Righteous behavior is not understood or appreciated by the unrighteous. 'They think it strange that you do not plunge with them into the same flood of dissipation," writes the Apostle Peter, 'and they heap abuse on you.' (1 Peter 4:4)

We should therefore expect a continued attack on the right to follow conscience. The protection afforded by the Conscience Clause in the Abortion Act is in danger of being whittled away, and it is noticeable that all attempts to put something like it into the recent Marriage (Same Sex Couples) Bill were strongly resisted.

In the face of this, those who bravely stand against evil, sometimes at great personal cost, should be commended and supported. We Christians have not always been good at this, in spite of biblical example and instruction (e.g. 1 Kings 18:4, Psalm 15:4). One of the hardest things about taking a stand as a Christian is to feel that we have been deserted by our brothers and sisters in the Lord.

The abortion industry relies on a great number of people participating in it. A few individuals who refuse to bend to its demands will not bring it to an end, although their principled stand may secure greater liberty of conscience for others. If more people were to follow their example, however, and act in conscience, the machinery of death would be dealt a severe blow, and many lives might be saved.

Please support Connie and Mary in your prayers, and ask the judge of all the earth that there may be a just judgement from the Supreme Court. If you would like to help with the cost of the legal case, you can send a donation to SPUC (who are underwriting the legal costs) at the headquarters address overleaf.

Appendix 9: Royal College of Midwives Press Release, 29 February 2012

RCM Comments on two Catholic midwives losing legal challenge to Glasgow Health Board's decision to refuse to recognize entitlement to conscientious objection for supervising staff during abortions

For immediate release, Wednesday 29th February 2012.

Commenting today (Wednesday 29th Feb.) on two Catholic midwives losing their legal battle to change the Greater Glasgow and Clyde Health Board's decision to allegedly refuse to recognize their entitlement to conscientious objection over supervising staff during abortions, the RCM's Director for Scotland Gillian Smith said: "The RCM supports any midwife's right to conscientious objection regarding delivering direct patient care and will always support midwives' concerns

"Nevertheless, we are delighted that the case has given clarity to what has been a very difficult situation for all individuals concerned. The midwives who provided the direct care to these women undergoing terminations for fetal abnormality need to feel supported, as do the women. Whilst midwives have a code of conduct that they must adhere to, if they have any moral or ethical concerns about the delivery of care, they need to address the issue with their managers, regardless of the situation. The best possible outcome should be sought for the benefit of the women and her family. The RCM did not represent the two midwives involved in this case."

Appendix 10: Royal College of Midwives *Midwives* magazine article, 29 February 2012

Catholic midwives fail in abortion legal case

02/29/2012 - 04:25

Two Catholic midwives are unsuccessful in challenging a decision to allow them to refuse abortion involvement.

Posted: 29 February 2012 by Robert Dabrowski

Two Catholic midwives have been unsuccessful in challenging a health board's decision that they were not allowed to refuse to be involved in abortion procedures.

Mary Doogan, 57, and Concepta Wood, 51, consider it 'abhorrent' to be told to assist in or facilitate action leading to the termination of a woman's pregnancy.

As conscientious objectors, they said they were entitled to refuse to delegate, supervise and support staff taking part in abortions, or providing care to patients during the process.

They argued that being required to supervise staff involved in abortions is a violation of their human rights and took their case against NHS Greater Glasgow and Clyde to the Court of Session in Edinburgh.

But a judge has ruled that the midwives did not have direct involvement in the procedure to which they object.

Lady Smith dismissed their judicial review petition and said they are 'sufficiently removed from direct involvement'.

Gillian Smith, RCM director for Scotland, said: 'The RCM supports any midwife's right to conscientious objection regarding delivering direct patient care and will always support midwives' concerns.

'Nevertheless, we are delighted that this case has given clarity to what has been a very difficult situation for all individuals concerned.

'The midwives who provided the direct care to these women undergoing terminations for fetal abnormality need to feel supported, as do the women.

'Whilst midwives have a code of conduct that they must adhere to, if they have any moral or ethical concerns about the delivery of care, they need to address the issue with their managers, regardless of the situation.

'The best possible outcome should be sought for the benefit of the woman and her family.'

The RCM did not represent the two midwives involved in this case.

Appendix 11: Reproductive Health Matters Blog Post, 14 May 2013[230]

Conscientious objection in Scotland: a worrying precedent
By Louise Finer, Managing Editor, RHM

The recent decision of judges from the Scottish Court of Session – an appeal court – in the case of Doogan and Wood v. NHS Greater Glasgow & Clyde Health Board [2013] CSIH 36 tests the limits of the conscientious objection provisions in the UK Abortion Act (1967), setting a worrying precedent for women seeking abortions in the UK.

Mary Teresa Doogan and Concepta Wood, Labour Ward Coordinators at the Southern General Hospital in Glasgow and both practising Roman Catholics, sought to exercise conscientious objection to their role in the "delegation, supervision and/or support" to other staff performing medical termination of pregnancy. Their conscientious objection to performing abortions had already been lodged and accepted. This case, reportedly brought in response to the increase in terminations in the labour ward which resulted from the closure of services elsewhere in the city, sought to extend this objection.

The decision of the Scottish Court of Session – an appeal court – reverses the 2012 decision that found against the two women's claim on the grounds that "nothing they have to do as part of their duties terminates a woman's pregnancy". In reaching their decision, Judges Drumadoon, Dorian and McEwan pay scant attention to the rights of women, the duty to make available and accessible health services set out by law, or the ethical obligation on midwives – as health providers – to make the care of people their first concern, to provide care without discrimination, and to act as an advocate for the people for whom they care[1].

The right to conscientious objection: not without limits

At the heart of the case is the determination of whether Doogan and Wood's attempt to invoke conscientious objection is legitimate. According to the UK 1967 Abortion Act (Art.4), one can conscientiously object to 'participation in treatment'. This warrants the discussion of whether their role – in "delegation, supervision and/or support" to the provision of abortion – constitutes "participation" in the procedure. But the case also throws up human rights concerns that must be examined alongside the UK's international human rights obligations.

That there is a right to conscientious objection is not up for debate, it is clearly grounded in the right to freedom of religion, conscience and thought, as set out in the International Covenant on Civil and Political Rights among other human rights instruments to which the UK is party. Yet the right is not absolute, and the freedom to manifest one's religion or beliefs may be limited for the protection of the rights of others[2].

[230] Notes available online.

The application of conscientious objection to the field of sexual and reproductive health has grown significantly in past decades, in parallel to the increasing liberalisation of abortion around the world. It is most commonly applied to abortion, but also sterilisation and fertility treatment

This judgment should be seen alongside the significant body of national and international law that has developed in response to the increased invocation of conscientious objection. The question at the heart of the Scottish case is "how direct does your participation in a procedure have to be for your conscientious objection to be justified". Existing jurisprudence suggests very direct:

- In 2001, the European Court of Human Rights dismissed the case brought by pharmacists Bruno Pichon and Marie-Line Sajous in France who refused to sell contraceptives based on their religious beliefs, ruling that "as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere."[3]

- In Colombia in 2006, the Constitutional Court set out unequivocally that only individuals can exercise conscientious objection, and therefore any attempts by institutions such as hospitals or health centres, to object to the provision of legal abortion, would violate women's rights[4].

- In the UK, in 1988, the House of Lords rejected an appeal brought by Mrs Janaway, a secretary who claimed conscientious objection to refuse to type a letter referring a woman for an appointment that may have ended in her obtaining an abortion[5]. The appeal was rejected on the grounds that this did not constitute "actually taking part in treatment administered in a hospital or other approved place".

United Nations human rights bodies have consistently warned states of their responsibility to ensure that access to safe and legal abortion, contraception and other sexual and reproductive health services is not restricted by the practice of conscientious objection.

It is interesting to note that even Pope John Paul II recognised that invoking conscientious objection should not result in the limitation of the rights of others: "freedom of conscience does not confer a right to indiscriminate conscientious objection. When an asserted freedom turns into license or becomes an excuse for limiting the rights of others, the State is obliged to protect, also by legal means, the inalienable rights of its citizens against such abuses.[6]"

The Scottish ruling: a worrying precedent

The Court of Sessions' ruling is worrying on a number of counts.

• Firstly, in stating that "the right of conscientious objection extends not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose" it broadens exponentially the definition of treatment that

can be subject to conscientious objection. Without providing any further clarity on where "the whole process of treatment" begins and ends, the judges' approach directly undermines existing clinical guidelines specifying that midwives "should be prepared to care for women before, during and after a termination in a maternity unit under obstetric care" and that "the conscientious objection clause solely covers being directly involved in the procedures a woman undergoes during the termination of pregnancy..."[7].

• Secondly, in failing to address the claim to conscientious objection to "delegation" in particular, the court strays dangerously close to condoning any failure of conscientious objectors to refer patients seeking the services to which they object. Referring patients on in such circumstances is the only guarantee that they will be able to access the services to which they are entitled, and a clear responsibility under human rights law [8]. Accepting the role of "supervision" as grounds for conscientious objection leads to an unworkable situation: how far up the hierarchy of a health service does the ability to conscientiously object to playing a supervisory role reach?

• Thirdly, in dismissing the respondents' concerns about the administrative and financial burden of allowing staff in the petitioners' position to conscientiously object, the Court fails to give credence to the responsibility of public health services to make available and accessible health services including abortion. Any evidence that the exercise of conscientious objection were to delay or hinder access to health services would bring the UK into violation of its human rights obligations.

• Fourthly, and perhaps most importantly, the Court pays scant regard to the necessary balancing of rights that arises from any situation relating to conscientious objection. Just as conscientious objection is a right recognised in international human rights law, the right to access health services is also a recognised human right. On reading the judgment one could almost be forgiven for forgetting that women in the UK do have a right to access legal abortion, and that abortion is just one of the necessary medical procedures that health services provide by law.

What next? A call for "conscientious commitment"

The power dynamics at play behind conscientious objection must not be ignored. Women who seek a legal procedure that, for some, is religiously or morally contentious, must necessarily rely on health providers. These health providers may have chosen to work in an area of health even in the knowledge that their objection to certain legal procedures will mean they are unable to provide the full range of services to which women are entitled. As Professor Bernard Dickens has written:

'Health care professionals who place their own religious or moral interests above their patients' health care interests experience an especially unethical conflict of interest because physicians enjoy the power of a legal monopoly over the provision of medical services [9]'.

How far should health services have to go to accommodate the conscientious objection of its staff? The implications are wide-reaching and have the potential to be unworkable, even in a large health facility where there are sufficient trained staff to cover the duties of those who object. Doogan and Wood claimed objection to supervising abortions, and the judges considered that as "part of the team responsible for the overall treatment and care of the patient" their objection is warranted. This formulation not only blurs the distinction between individual and collective roles as subject to conscientious objection, but it suggests that the objection of one member of a team could trump the commitment of another person in the team to providing the procedure. The judges pay insufficient attention to the delays in care that will be caused by expanding the application of conscientious objection to managerial roles. This ruling, if implemented, will lead to unworkable situations for the management of health services and quite possibly delays in care that jeopardise the health of women seeking abortions.

The decision in this case sets a worrying new precedent. For judges to suggest that the right to conscientiously object exists "because it is recognised that the process of abortion is felt by many people to be morally repugnant" without also recognising that many not only do not find the legal procedure morally repugnant, but find the idea of denying health services and autonomy to women unacceptable on ethical and human rights grounds, is a serious omission that fuels its stigmatisation.

As orchestrated anti-abortion groups seek new ways to hinder access to, and stigmatise women seeking abortions, it is time for doctors, nurses and others to declare their conscientious commitment to providing abortion services. It is also time for judges to remember the rights of women – to health, to autonomy, to dignity and to respect – when reaching decisions that affect them directly.

Appendix 12: Reproductive Health Matters Blog Post, 23 October 2013[231]

Abortion in the criminal law, UK and internationally: brief meeting report

Last year a Scottish court ruled against two midwives who sought the right to refuse supervision of people carrying out abortions – effectively an increase in the previously understood scope of the right to conscientious objection. Barrister Elizabeth Prochaska told the meeting about the Scottish appeal court judgment which overturned this decision and granted the midwives the right to refuse supervision duties. This decision is likely to be appealed by the Glasgow Health Board at the UK Supreme Court next year with opportunities for expert organisations to submit Amicus Curiae Briefs. Prochaska observed that the ruling may have created so much latitude in the right to conscientiously object as to lead to shortfalls in staff that could even result in women's deaths. It was noted that there are already those who refuse to participate in ante-natal testing because they see it as a part of a process that could result in abortion. Prochaska argued that the main weakness of the appeal process had been the lack of reference to human rights laws and conventions by either the plaintiff's lawyers or the judges. Other legal experts have argued that there are additional grounds to challenge the judgment including a more thorough consideration of the way in which this

[231] Only the relevant section is included in this appendix.