RELIGIOUS EXEMPTIONS FROM HEALTH CARE LAWS: HAVE WE GONE OVERBOARD?*

Martha Swartz[**]

In *Burwell v. Hobby Lobby Stores, Inc.*, the United States Supreme Court affirmed that a for-profit corporation owned by people with strong religious beliefs can impose its religious beliefs on its employees, ignoring both the employees' own religious beliefs, and their important health interests.[1] The decision allows closely held corporations to deprive their employees of employer-financed insurance coverage for contraception.[2] There was no scientific basis for the corporations' conclusion that certain types of contraception (the Intrauterine Device, or "IUD," for example) caused abortions, which would conflict with their religious beliefs, but that fact did not matter to the Court since, by tradition, the Court does not inquire into the basis of a person's religious beliefs, and, notably, the corporations were treated like persons.[3]

In her dissent, Justice Ginsburg pointed out that the Court's opinion opens the door to religious employers denying their employees insurance coverage for any type of health care to which they have a religious objection.[4] As examples, Justice Ginsburg specifically listed "blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews and Hindus); and vaccinations (Christian Scientists, among others)."[5] Of course, abortion, sterilization, artificial insemination, circumcision and the

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* Originally published as a blog post on philly.com. Martha Swartz, *When is Enough Enough? Why Should There Be Religious Exemptions from Healthcare Laws*, PHILLY.COM (July 28, 2014, 6:00 AM), http://www.philly.com/philly/blogs/fieldclinic/When-is-Enough-Enough-Why-Should-There-Be-Religious-Exemptions-From-Healthcare-Laws.html.

** Adjunct Lecturer, Rutgers-Camden School of Law.

1. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
2. *Id.* at 2759-60.
3. *Id.* at 2769, 2778; *see also* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) (explaining that courts do not question validity of religious beliefs).
4. *Hobby Lobby*, 134 S. Ct. at 2804-05 (Ginsburg, J., dissenting).
5. *Id.* at 2805.

withdrawal of life-prolonging care have all, at one time or another, been objected to by various religions.[6] And that list does not even include those whose religions forbid them from providing certain types of medical care to entire groups of people, such as artificial insemination to lesbians.[7]

The Religious Freedom and Restoration Act of 1993 (RFRA), the application of which was at issue in *Hobby Lobby*, provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[8]

In *Hobby Lobby*, the Court, avoiding the controversy surrounding the importance of contraception to women's health and economic independence, refused to decide whether the contraceptive requirement serves a compelling governmental interest; instead it decided to "assume" that it serves such an interest.[9] However, the fact that the government's interest was treated as compelling did not result in a decision in the government's favor since the Court found there was a less restrictive means of accommodating the health interests of the corporations' employees.[10] In a rather audacious move that invoked Congress's appropriations authority, the majority suggested that the most obvious less restrictive alternative would be for the government to allocate additional funds to pay for contraceptives for all women.[11] In his concurring opinion, however, Justice Kennedy, pointed out that the government had already created its own less restrictive alternative by making available to non-profit religiously affiliated organizations a program in which all they have to do is certify that they object to the mandate, at which point the insurance coverage would be provided to their employees by health insurers free of charge.[12] All the government would have to do is make the same program available to closely held for-profit corporations.[13] But the sincerity of Justice Kennedy's proposed

6. Martha S. Swartz, *'Conscience Clauses' or 'Unconscionable Clauses': Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y L. & ETHICS 269, 276 (2006).

7. *See* N. Coast Women's Care Med. Grp. v. Superior Court of San Diego, 189 P.3d 959 (Cal. 2006).

8. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).

9. *Hobby Lobby*, 134 S. Ct. at. 2759.

10. *Id.* at 2781-82.

11. *Id. at 2780.*

12. *Id.* at 2786 (Kennedy, J., concurring).

13. *Id.*

solution was called into question the very next day, when the Court issued a temporary order permitting a Christian college to avoid participating in the alternative program because it believed that completing the government certification imposed a substantial burden on the college's religious beliefs because it made the college "complicit" in providing birth control to its employees.[14]

So, in the wake of *Hobby Lobby*, it looks as if religious individuals, as well as closely held corporations owned by religious individuals, can avoid complying with laws that the rest of us must obey. While this might appear to be unfair, religious exemptions from health care have been with us for quite a while. The Affordable Care Act itself, notwithstanding the many legal challenges to its contraceptive mandate, already excuses certain individuals and religious organizations from participating in the insurance mandate at all.[15] Moreover, at least 48 states have religious exemptions from immunizations. At least 38 states have religious exemptions regarding child abuse or neglect in their civil laws and many states have religious defenses to felony crimes against children.[16] One study

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14. *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2898 (2014). In a similar case filed by the University of Notre Dame, the Honorable Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit ruled that completing the form did not impose a substantial burden on the university, writing: "The form is two pages long—737 words, most of it boring boilerplate . . . . [Completing it] could have taken no more than five minutes." Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014). Notwithstanding Judge Posner's observation, in a continuing effort to accommodate those religious organizations that object to providing contraceptive coverage and to address the *Hobby Lobby* and *Wheaton College* decisions, the government published revised Interim Final Rules that modify the obligations of these organizations. The Interim Final Rules no longer require objecting organizations to fill out a "self-certification form," but rather, offer them the alternative of directly notifying the Department of Health and Human Services (HHS) in writing of their religious-based objections to "all or a subset of contraceptive services." HHS would then direct insurance companies or third party administrators to arrange for separate coverage for contraception for the employees of these objecting organizations, at no additional cost to the employees. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,092-94 (Aug. 27, 2014) (to be codified at 47 C.F.R. pt. 147). Of course, even this accommodation was objected to by the Little Sisters of the Poor Home for the Aged in its continuing pursuit of a preliminary injunction to permit it not to participate in the contraceptive mandate. In its appeal before the Tenth Circuit, the Sisters of the Poor argue that the Interim final rules should have either exempted religious organizations entirely, provided contraceptives itself as suggested in *Hobby Lobby*, or "allowe[d] employees of religious objectors to purchase subsidized coverage on the government's own exchanges." Brief for Appellant on the Interim Final Regulations at 1, Little Sisters of the Poor Home for the Aged v. Burwell, No. 13-1540 (10th Cir. filed Sept. 8, 2014).

15. 26 U.S.C. § 5000A(d)(2) (2012); 26 U.S.C. § 1402(g)(1)(D)-(E) (2012). In addition, the ACA includes a provision prohibiting federal funding for abortions, a clause advocated strongly by certain religious organizations. *See* 42 U.S.C.A § 18023(b)(2) (2012).

16. *Religious Exemptions from Health Care for Children*, CHILDREN'S HEALTHCARE

concluded that out of 172 children that died as a result of medical care being withheld on religious grounds, 140 of those children would have had a ninety percent chance of survival if medical care had been administered.[17] In 1991, there were hundreds of measles cases in Philadelphia among children associated with Faith Tabernacle and First Century Gospel Church, which refused immunizations, resulting in six deaths.[18] Pennsylvania even has a law providing religious exemptions from bicycle helmets, a common sense public health requirement.[19]

Numerous federal and state laws have confirmed the right of health care professionals and health care institutions to refuse to participate in all types of medical care based on their personal religious beliefs, leaving many people, especially in rural areas served only by religious hospitals, without access to certain types of care.[20] Pharmacists have refused to fill prescriptions for contraceptives.[21] Hospitals have refused to participate in the withdrawal of life support.[22] Physicians, nurses, and even secretaries have refused to participate in abortions.[23] In 2001, a Pennsylvania woman was forced to have her uterus removed due to an infection of her amniotic fluid, after a physician refused to induce the woman into labor because doing so might have resulted in a termination of her pregnancy, which conflicted with the physician's religious beliefs.[24]

While some of these laws and related court decisions are grounded in the First Amendment's protection of religion, others, including *Hobby Lobby*, are predominantly based on the RFRA.[25]

IS A LEGAL DUTY, INC., http://childrenshealthcare.org/?page_id=24/#Exemptions (last visited Oct. 15, 2014).

17. Seth M. Asser & Rita Swan, *Child Fatalities from Religion-Motivated Medical Neglect*, 101 PEDIATRICS 625, 625 (1998), *available at* http://childrenshealthcare.org/wp-content/uploads/2010/07/Pediatricsarticle.pdf.

18. Karen De Witt, *Putting Faith over the Law as Pupils Die*, N.Y. TIMES, Feb. 23, 1991, *available at* http://www.nytimes.com/1991/02/23/us/putting-faith-over-the-law-as-pupils-die.html.

19. 75 PA. CONS. STAT. ANN. § 3510(b)(3) (West 2005).

20. *See* Swartz, *supra* note 6, at 331-33.

21. Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005 at A1.

22. *See, e.g.*, Bartling v. Glendale Adventist Med. Ctr., 228 Cal. Rptr. 847 (Cal. Ct. App. 1986) (Christian hospital raised religious objections to disconnecting a seriously ill patient's ventilator, notwithstanding the patient's wishes).

23. *See, e.g.*, Spellacy v. Tri-County Hosp., 395 A.2d 998 (Pa. Super. Ct. 1978) (part-time admissions clerk refused to perform her clerical duties due to her objection to cooperating in abortion or sterilization on religious grounds).

24. Thomas v. Abdul-Malak, No. 02-1374, slip op. at 14-40 (W.D. Pa., July 29, 2004).

25. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4

Ironically, the RFRA was passed by Congress as a reaction to an earlier Supreme Court decision, *Employment Division v. Smith*, in which the Court upheld the denial of unemployment benefits to two drug counselors who had smoked peyote as part of a religious ritual and were fired as a result.[26] Justice Scalia wrote the majority opinion, concluding that the First Amendment did not relieve someone from complying with a law that *incidentally* forbids the performance of an act that his religion requires as long as the law was not aimed solely at the performance of religious acts and is otherwise generally applicable.[27] Justice Scalia rejected the requirement that a state would have to show a compelling interest before applying a generally applicable law that incidentally interfered with an individual's religious practices, writing: "To make an individual's obligation to obey . . . a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is 'compelling'—[would permit] him, by virtue of his religious beliefs, to become a law unto himself."[28] Unfortunately, Justice Scalia's logic in *Smith* could not win the day in *Hobby Lobby* since, in reaction to *Smith*, Congress passed the RFRA, which statutorily established the requirement that the government must show a compelling interest before enacting a law that imposes a "substantial burden" on an individual's religious beliefs if a less restrictive alternative is available.[29]

To combat governmental interference with religious rituals, RFRA sets a very high bar for a governmental entity to satisfy before being able to enact a law that affects religion. In the case of the denial of employer-financed health care for contraception at issue in *Hobby Lobby*, this meant that the compelling governmental interest in protecting women's health did not outweigh the "substantial burden" placed on the corporations' religious beliefs, since the government had other ways to provide insurance coverage for contraception to protect women's health.

The fact that Hobby Lobby's religious objection to certain forms of contraception had no basis in scientific fact was not considered by the Court.[30] The Court made no distinction between philosophical *beliefs*, e.g., that an embryo deserves all of the legal protections provided to an adult person, and mistaken *facts*, e.g., that an IUD

(2012).

26. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

27. *Id.* at 878.

28. *Id.* at 885.

29. 42 U.S.C. §§ 2000bb to 2000bb-4. The RFRA resurrected the Supreme Court's holding in *Sherbert v. Verner*, 374 U.S. 398 (1964), in which the Court held that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.

30. *Hobby Lobby*, 134 S. Ct. at 2778.

kills an embryo before it implants, rather than the more generally accepted scientific fact that an IUD actually interferes with fertilization by incapacitating the sperm.[31] Thus, the Court leaves open the possibility that a corporation not only would be permitted to deny health insurance coverage altogether because of a *belief* that any medical treatment interferes with God's plan, but would also be able to refuse to provide insurance coverage for x-rays, relying on the misunderstood "fact" that an x-ray takes away a person's soul.

The refusal to examine the basis for someone's religious beliefs, coupled with the high bar set by RFRA, leaves us in the state we are in today: vulnerable to our employers imposing their religious beliefs upon us, irrespective of whether there is any scientific basis for the facts upon which they are based and however inconsistent they might be with our own religious beliefs.[32] Let us just hope that there is no employer out there who refuses to pay for insurance coverage for pain relief since it believes that experiencing pain is an important step on the ladder to heaven. Isn't it time we asked ourselves whether Justice Scalia's conclusion in *Smith* wasn't right after all; that is, everyone should have to comply with neutral laws of general applicability, without regard for their religious beliefs? At the very least, shouldn't those who believe that a law poses a "substantial burden" on their religious beliefs have to do something more than merely assert their position? Shouldn't they have to show that there is some scientific or factual support for their conclusion that a legal requirement has seriously adversely affected their ability to practice their religion? Otherwise, every religious person in America may be a law unto himself.

31. Irving Sivin, *IUDs are Contraceptives, Not Abortifacients: A Comment on Research and Belief*, 20 STUD. IN FAM. PLAN. 357 (1989), *available at* http://www.popcouncil.org/uploads/pdfs/Sivin.pdf.

32. Democrats in Congress have proposed a bill to override the *Hobby Lobby* decision, requiring for-profit corporations like Hobby Lobby to pay for contraception and any other form of health coverage mandated by the ACA, while still providing exceptions for religious organizations. Wesley Lowery, *Senate Democrats Unveil Bill to Override* Hobby Lobby *Decision*, WASH. POST, July 9, 2014, http://www.washingtonpost.com/blogs/post-politics/wp2014/07/09/senate-democrats-to-unveil-bill-to-override-hobby-lobby-decision/.