7th Annual Feminist Legal Conference
University of Baltimore School of Law
Applied Feminism and Families

Abstracts

Hospital Breastfeeding Laws in the U.S.:
Paternalism or Empowerment?

In the United States, hospital breastfeeding law is surfacing as a new area of maternal and child health legislation, with recent laws passed in California and New York. Joining legislation concerning breastfeeding in public and in workplaces, these laws aim to increase the number of infants that are breastfed exclusively during the first 6 to 12 months of life, in keeping with recommendations from the U.S. Surgeon General and the World Health Organization. Healthy People 2020 seeks to have 25.5 percent of U.S. infants breastfed exclusively through six months of age by 2020.

The benefits of breastfeeding throughout the first six months of life are well documented. For example, breastfeeding is known to reduce lifelong obesity risks and promote other positive health outcomes. However, today only 14.1 percent of U.S. infants are breastfed exclusively through six months of age. This is likely due to several factors, including hospital policies and practices that promote formula use or prevent women from breastfeeding within a few hours after birth. Studies have shown that the key to long-term breastfeeding success is early initiation, within the first 2 to 6 hours after birth and no formula supplementation unless medically necessary.

As states such as California begin to require hospitals to institute evidence-based policies to support breastfeeding, important considerations arise about the non-public health impact of these laws. Public health laws are sometimes viewed as constraining personal liberties, but in many ways hospital breastfeeding laws expand the reproductive rights of women by mandating that hospitals provide breastfeeding policies for women and guidelines for employees. These laws could act to exchange paternalism for empowerment by allowing women more choices in infant feeding (e.g., by requiring hospitals to provide needed support and resources to help ensure success for those wishing to engage in breastfeeding). Yet these laws may also inappropriately increase state influence over matters traditionally reserved to the private sphere, as many women make the decision to breastfeed in the context of varied factors that may or may not prioritize public health.

Though hospital breastfeeding laws seek to increase exclusive breastfeeding rates, the structure, and likely effect, of the laws vary significantly. This presentation and paper will compare the New York and California hospital breastfeeding laws to determine the possible influence these laws may have on diverse populations of women, especially with regards to adequately addressing the circumstances and needs of vulnerable and minority groups. Finally, we will examine the role of the state in relation to the rights of women to make choices about infant feeding and consider whether hospital breastfeeding laws are an appropriate mechanism to increase exclusive breastfeeding rates.

We request that this submission be considered for both a presentation and for publication in the symposium volume of the University of Baltimore Law Review.

Submitted by:
Jennifer Bernstein, JD, MPH (Corresponding author)
Senior Attorney
Network for Public Health Law, Mid-States Region
University of Michigan School of Public Health
1415 Washington Heights
Ann Arbor, MI 48109
Tel: 734-764-6772
jbernstein@networkforphl.org

Lainie Rutkow, JD, PhD MPH
Assistant Professor
Department of Health Policy & Management
Johns Hopkins Bloomberg School of Public Health
624 N. Broadway, Room 513
Baltimore, MD 21205
Tel: 410-614-6404
hrutkow@jhsph.edu

Corbin, Caroline Mala
Associate Professor
University of Miami School of Law
1311 Miller Drive
Coral Gables, FL 33146
United States

Abstract:

Do for-profit corporations have a right to religious liberty? This question is front and center in dozens of cases challenging the Obama administration's "contraception mandate." Whether for-profit corporations are entitled to religious exemptions is a question of first impression, and one the Supreme Court is likely to soon answer. Most scholars writing on this issue argue, "yes," they do have the right to religious liberty, especially after the Supreme Court recognized that for-profit corporations have the right to free speech in Citizens United.

This essay argues "no," for-profit corporations do not and should not have religious liberty rights. As a matter of current law, neither the Free Exercise Clause nor the Religious Freedom Restoration Act recognizes the religious rights of for-profit corporations. Citizens United changes nothing in religious liberty jurisprudence, as its protection for corporate speech is based on the rights of audiences and not the rights of corporate speakers.

As a normative matter, for-profit corporations should not have free exercise rights. There is no principled basis for extending a purely personal right to profit-making corporations, and for-profit corporations cannot be equated to churches or other voluntary religious associations. Finally, granting religious exemptions to corporations risks trampling on the religious liberty of individual employees.

Professor Linda C. Fentiman
LFentiman@law.pace.edu or 914/522-0031

Pace University Law School
78 North Broadway
White Plains, New York 10603

ABSTRACT: THE 2014 APPLIED FEMINISM & HEALTH CONFERENCE[*]

BLAMING MOMS: How Unconscious Gender and Racial Stereotypes and the Psychosocial Processes of Risk Construction Intersect with Ostensibly Neutral Legal Principles to Promote a Legal Regime in Which Mothers Are Primarily, If Not Solely, Responsible for Promoting Children's Health

This speech will examine the current preoccupation – in medicine, popular culture, and law – with ways in which mothers pose a risk to their children's health. From the use of alcohol, tobacco, and other drugs during pregnancy to the "risk" posed by deciding not to breastfeed their newborns, over the last four decades, American society and American law have increasingly focused on pregnant women and mothers as *the* primary source of risk to children. Both law and culture reflect an anti-feminist backlash, propounding the same essentialist view of women posited by Jean Jacques Rousseau in enlightenment-era France. It is not coincidental that religious and political conservatives who are challenging women's access to abortion, contraception, and other reproductive health services have seized upon the literally increased visibility of the fetus (via ultrasounds, stethoscope, etc.) to make women the sole guarantor of fetal and child health, threatening tort liability, civil commitment, and criminal prosecution to scores of pregnant women. This myopic focus on the threat of maternal harm ignores the significant genetic and environmental contributions of fathers, as well as other sources of injury, including exposure to toxic chemicals, dangerous social environments, poverty, and other multi-factorial contributors to childhood harm.

My speech will examine two building blocks of American legal doctrine – the "reasonable person" (which defines both duty and its breach) and causation (which tends to focus on singular and close sources of harm rather than distant, multi-factorial ones) – and explore the social and psychological construction of these concepts. I will address the significance of discretionary decision-making – by police and other investigators, jurors, and judges – in framing essential legal concepts such as negligence and proximate cause. I will then show how unconscious racial and gender biases and cultural scripts influence how these decision-makers determine whether a particular woman's conduct meets the applicable legal standard. Throughout my analysis I will consider how feminist legal theory – and in particular the long-running sameness-difference debate - can shed light on how children's health can be promoted in a way that neither deifies nor demonizes mothers.

[*] I am proposing to present at the conference, but not publish my remarks. My presentation grows out of a work in progress, a book, Blaming Mothers: Mothers, Children, and the Quest for a Harm-Free Childhood (forthcoming New York University Press).

Health Fiduciaries in a World of Dependency

Margaux Hall[1]

Who makes decisions regarding our health insurance—what services will it cover, and under what terms? For the majority of Americans, employers do. In 2010, 55% of persons in the U.S. received their health insurance through their place of employment or that of a family member. Employers are the primary health insurance providers in the United States. And yet, they are more than *providers*; they are also health insurance *deciders* on behalf of employees and their families. Historically, the law has supported this structural arrangement, allowing employers to make almost all decisions about employees' (and in many instances their families') health insurance with virtually unlimited discretion. Employers make decisions affecting health care cost, quality, and access—and the tradeoffs among them—even when their choices subvert employees' interests. The contraceptive mandate litigation sweeping through federal courts is but one example of the tensions that can result—tensions that have often implicated reproductive rights.

Employers' powerful role in this respect is not unusual. Our system of health care delivery is replete with third-party relationships, in which patients must rely on others (employers, unions, insurers, and otherwise) to make decisions on their behalf. Such dependency can offer benefits—improved decision-making, risk-pooling, or otherwise. Yet, it also carries risks—paternalism or conflicts of interest that allow third parties to exploit the patient's very vulnerability. As feminist legal scholars have recognized in other settings, such structural arrangements may silently, without justification, undermine women's equality under the law. Academic literature has not adequately recognized the potential conflicts in these dependent health care arrangements; and the law, in turn, provides no current framework to resolve these conflicts.

This paper proposes a fiduciary framework to reclaim women's equality, choice, and agency, both in the contraceptive mandate disputes and more broadly across third-party health care relationships. Fiduciary relationships, rooted in notions of dependency, form when one person (the fiduciary) acts on behalf of a beneficiary, making discretionary decisions over something to which the beneficiary has a claim of right. Here, women have a claim of right to certain health services, grounded in the Affordable Care Act's statutory entitlements (to contraceptives and otherwise), and also in the inherent structure of healthcare financing. After all, health care users pay for their health insurance either directly through their premium contributions or indirectly through a wage-benefit tradeoff. Fiduciary law constrains third parties who make decisions on their behalf. Significantly, the duty of loyalty requires that fiduciaries act in patients' sole interest, disregarding their own social or other preferences. Fiduciary law also has powerful equitable remedies that require fiduciaries to act "as if" they had discharged their duties properly, providing potential corrective force in circumstances of wrongdoing.

Drawing on feminist legal theory, the fiduciary reframing accepts a world of dependent health care relationships, particularly given the complexity of health care decision-making. Yet, it guides third parties' discretionary decision-making in order to promote women's equality before the law.

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[1] Center for Reproductive Rights Academic Fellow, Columbia Law School, 435 West 116th Street, New York, NY 10027, mhall@law.columbia.edu, (917) 858-0815.

"Sex selection in the United States: A Contextualist Feminist Approach" *forthcoming* in the UCLA Journal of International Law & Foreign Affairs

Sital Kalantry, University of Chicago Law School, skalantry@uchicago.edu

Several studies have shown that the ratio of girls to boys has drastically decreased in some countries in the last few decades. China and India are usually cited as countries where the starkest disparities exist. The normal at-birth ratio for boys to girls is 1000 boys to 952 girls.[1] Yet the overall ratio across India is 1000 boys to 943 girls, according to the 2011 census.[2] Many assume that this greater sex ratio gap in India is due to sex selection.

Anti-abortion legislators and groups in the United States have pointed to the widespread practice of sex selection in India and have begun to import (often inaccurate) information about India to lobby for, and in many cases successfully enact, state-wide sex selection bans in the United States. Five states have passed sex selection bans;[3] bills are pending to ban sex selection abortion in ten states,[4] and a federal bill has been reintroduced in Congress.

Sex selection can be achieved by means other than an abortion, including sperm sorting (which sorts sperm carrying the X and Y chromosomes before artificial insemination is used to implant the sperm of the desired sex)[5] and pre-implantation genetic diagnosis (whereby embryos are fertilized in vitro, tested for sex, and then implanted into the uterus).[6] However, the statutes that have been enacted and the bills that have been proposed in the United States do not limit pre-implantation sex selection, but only sex selection if it involves aborting a fetus.

An analysis of the recent legislative hearings in Arizona and in Congress reveals extensive references to sex selection in India and other countries to support enacting laws in the United States. On the other hand, Illinois (in 1984) and

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[1] *See* Natalie Wolchover, *Why Are More Boys Born than Girls?*, LIVESCIENCE (Sept. 9, 2011, 5:13 PM), http://www.livescience.com/33491-male-female-sex-ratio.html. This number is usually expressed as 105 boys to 100 girls. However, I modified so that it correlates with the way the Indian government expresses the at-birth ratio.

[2] *Sex Ratio of India*, CENSUS ORG. INDIA, http://www.census2011.co.in/sexratio.php (last visited Oct. 4, 2013).

[3] Illinois (720 ILL. COMP. STAT. ANN. 510/6 (West 2013)), Pennsylvania (18 PA. CONS. STAT. ANN. § 3204 (West 2013)), Oklahoma (OKLA. STAT. ANN. tit. 63, § 1-731.2 (West 2013)), Arizona (ARIZ. REV. STAT. ANN. § 13-3603.02 (2013)), and North Dakota (N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2013)).

[4] Colorado (H.B. 1131, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 56, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013)), Florida (H.B. 845, 115th Reg. Sess. (Fla. 2013); S.B. 1072, 115th Reg. Sess. (Fla. 2013)), Indiana (H.B. 1430, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013)), Missouri (H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013)), New Jersey (Assemb. B. 2157, 215th Leg., 1st Ann. Sess. (N.J. 2012)), New York (S.B. 2286, 236th Legis. Sess. (N.Y. 2013)), North Carolina (H.B. 716, 2013 Gen. Assemb. (N.C. 2013)), Texas (H.B. 309, 83d Leg. (Tex. 2013)), Wisconsin (Assemb. B. 217, 101st Leg., Reg. Sess. (Wis. 2013)), and Virginia (H.B. 1316, 2013 Reg. Sess. (Va. 2013)).

[5] Bumgarner, *supra* note 5, at 1293.

[6] *Id.* at 1294.

Pennsylvania (in 1989) adopted sex selection bans before this recent legislative push by anti-abortion groups. In analyzing the legislative hearings from those states, I found that supporters of bans in those two states did not use global sex ratio trends or depictions of sex selection abortion in other countries in lobbying to enact those laws.

The issue of sex selection is dividing people who consider themselves pro-choice in the United States because equality for women appears on both sides of the argument. On the one hand, one could argue that sex selection should not be permitted because some people may be aborting female fetuses because of a culture of "son preference" that values boys more than girls. On the other hand, prohibiting sex selection constrains women's autonomy over their bodies. The issue of sex selection places women who typically value autonomy rights in a dilemma, causing many to support sex selection bans in the United States or to be agnostic about the issue.

Pro-choice groups have typically taken universal positions on sex selection bans—they should not be put into place in the United States, India, or elsewhere.[7] In line with liberal feminist thought, this position gives primary weight to the right to autonomy of the woman without any limitations. Feminists who take universal positions on the issue (i.e., that sex selection abortion should not be banned in any country) may not have engaged with the true reality of the situation in other countries. As a result, they are not able to effectively counter the inaccurate framing and importation of information on sex selection abortion from India.

By engaging with the reality and complexities of the situation in India, pro-choice organizations in the United States will be better able to paint a more accurate narrative of sex selection in India. This understanding will also help distinguish the situation in the United States from India more appropriately. I propose a contextualist feminist approach that prioritizes women's equality, but recognizes that if the practice of sex selection is widespread, it likely reflects and perpetuates inequality of women and girls in society.

Part 1 of this article provides an overview of the development and use of sex selection abortion in India. Part 2 describes the use of sex selection abortion as part of a legislative strategy to restrict abortion rights by anti-abortion groups in the United States. Part 3 describes how information about what is happening globally is in fact influencing policymaking in the United States. Part 4 provides an overview of some of the main feminist approaches to sex selection. Part 5 develops a framework that uses the lens of women's equality to understand sex selection.

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[7] *See, e.g.*, CTR. FOR REPROD. RIGHTS, STATEMENT OF POLICIES AND PRINCIPLES ON DISCRIMINATION AGAINST WOMEN AND SEX-SELECTIVE ABORTION BANS (2009), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Statement%20on%20Sex%20Selective%20Abortion%20Bans%20FIN_1.pdf.

PROPOSAL FOR "APPLIED FEMINISM AND HEALTH," MARCH 6-7, 2014

REMOVING ACCESS TO HEALTH CARE FROM EMPLOYER AND STATE CONTROL: THE ACA AS ANTI-SUBORDINATION LEGISLATION

Submitted by: W. David Koeninger[1]

In trying to explain why the United States -- unlike every other western industrial democracy -- lacks a national health care system, reformers usually tell a story about labor unions and large corporations each taking advantage of favorable post-World War II conditions to forge an alliance in their mutual interest, creating our system of employer-based health insurance. Thus, our failure to agree upon the need for a national health plan results from what Paul Starr has called "the American health policy trap," --a system of employer-provided insurance that conceals its true costs from those who benefit from it. However, an examination of the claims of those aligned against the implementation of the Patient Protection and Affordable Care Act (the ACA) suggests that this is not the full story.

The Federal Government's first meaningful involvement in health care came during Reconstruction, as the Freedman's Bureau sought to address the health needs of former slaves. Then, as now, there was deep concern over how much government involvement was necessary and the "danger" of instilling dependence on the government in otherwise able-bodied individuals. Thus, American health care eventually became what Nicole Huberfeld has called "path dependent" – linked to labor for the able-bodied and linked to frailty for those who would rely on government programs. Further, access to health care became a means of control – for employers to control their workers and state governments to control their citizens. To those who oppose the ACA, that statute is dangerous precisely because it threatens this state of affairs, allowing workers to obtain health care independently from employment and attempting to nationalize the Medicaid program over state objections.

At its passage, the Affordable Care Act was seen by many as a civil rights enactment, with South Carolina Congressman James Clybourn describing it as the "civil rights act of the twenty-first century." And yet, of all the briefs filed before the Supreme Court in *NFIB v. Sebelius*, only the amicus brief of the National Women's Law Center actually argued that the ACA should be upheld as civil rights legislation within the ambit of the Commerce Clause (remedying discrimination against women). Since that time, many of the lawsuits filed to challenge the ACA have implicated women's access to birth control and family planning. Just this month, in a lawsuit filed to prevent Ohio's governor from expanding his state's Medicaid program, two right to life organizations have claimed that expanding Medicaid frees up health care and family planning resources so that abortion providers can perform more abortions. All of the challenges implicate access to health care as a means of control.

Thus, in these cases, feminists can help the cause of health justice by invoking anti-subordination theory in support of the challenged provisions of the ACA. In Part I of my paper, I will describe America's path-dependent health care system and the use of access to health care as a means of controlling workers and low-income, often minority, citizens. Part II will discuss how key provisions of the ACA-- its health care exchanges, federal subsidies, and Medicaid expansion -- operate to liberate individuals from employer and state government control. Part III will review the types of lawsuits filed to challenge the implementation of the ACA, particularly those implicating women's access to healthcare. Finally, Part IV will describe an anti-subordination view of health care reform that can serve as a means of responding to ACA lawsuits and supporting the implementation of the ACA.

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[1] Managing Attorney for Special Projects and Program Performance, Advocates for Basic Legal Equality, Inc., The Center for Equal Justice, 525 Jefferson Avenue, Suite 300, Toledo, OH 43604, dkoeninger@ablelaw.org (419) 930-2558

kara.loewentheil@yale.edu * (347) 306-1594 * 127 Wall St, New Haven CT 06511

WHEN FREE EXERCISE IS A BURDEN: PROTECTING "THIRD PARTIES" IN RELIGIOUS ACCOMMODATION LAW

Kara Loewentheil[*]

Forthcoming in DRAKE L. REV. (Winter 2014)

As of August 2013, over 60 lawsuits have been filed under the First Amendment and the Religious Freedom Restoration Act ("RFRA"), challenging the contraceptive coverage requirement ("CCR") of The Patient Protection and Affordable Care Act, more than half brought by for-profit employers with religious objections to providing insurance coverage for contraception. The conflict combines questions of the reach of the regulatory state, the nature and purpose of free exercise rights, women's social and economic equality, and a lightning-rod political debate. No wonder then that these cases have produced a circuit split, and are now primed for a Supreme Court ruling.

But will the Supreme Court be able to make any more sense of these claims than have the Circuit Courts? It is no surprise that these cases have produced such divergent results, because the problem lies not with the courts, but with the doctrine, which frames the conflict as being between the State and the religious objector. But as the CCR cases make clear, this relationship is often beside the point entirely. Rather, some religious accommodation cases regulate not only the relationship between the State and the objector, but a variety of conflicts and relationships between the religious objectors and various other rights-holders – in the case of the CCR, the women whose contraceptive coverage would be blocked if accommodations were granted. The courts and the scholarship have occasionally noticed that such conflicts may exist but have not suggested any systematic way of thinking about or resolving them.

This paper synthesizes theory, doctrine, and practice to address a pressing social and legal question, one that directly affects women's rights in its current incarnation but has broader implications for many equality-seeking groups. In it, I propose a framework for identifying and analyzing these under-theorized conflicts, elaborating on strands of concern for third parties in the doctrine that have never been fully fleshed out. I argue that once we identify the set of cases in which there are sufficiently weighty third-party interests at stake – whether practical or expressive – to merit deviation from the standard doctrinal framework, the question should be whether the State can provide a solution that respects all the rights in question. If so, it should have an obligation to do so. If not, the group with equality-implicating rights (again, whether practical or expressive) should "win" – with any "tie" going to the third parties, because the purpose of religious accommodation law is to protect the equality of religious objectors, not to privilege religion. The CCR suits present a paradigmatic example in which the State's most important interest lies in its representation of the rights of third parties, and in which comprehensive solutions respecting all parties' rights are possible but not doctrinally required, thus providing a clear illustration of why the framework I suggest would be an improvement in religious accommodation law and would better protect women's rights.

NB: This paper is submitted solely to present; it is forthcoming in Drake Law Review.

[*] Postdoctoral Associate-in-Law & Fellow, Yale Law School.

Abstract

Submitted by Tzili Mor*

The Shame in Honor: feminist analysis of the health consequences of legal systems premised on notions of women as communal gauges of honor

This paper critiques the entrenched separation between feminist contextual analysis and calls for "gender equal" law reform in legal systems premised on communal notions of honor. Using Jordan as a case study, the paper illustrates how such calls often fail to account for the intersections of law and health, gender, ethnic and community affiliations, and the need for systemic dismantling of assumptions about "gender-appropriate" social, sexual, and reproductive behavior and holding girls and women as gauges of collective honor.

Last year's outcry in Morocco and across the world over the suicide of a teenager whose family allegedly forced her to marry her rapist highlighted the inherent injustice in legal systems premised on gendered notions of "honor." Just as under Moroccan law, Jordan's Penal Code exonerates a rapist who marries his victim. However, calls to amend that provision in isolation of its context are misguided. Feminist legal theory provides a holistic analysis of health and legal implications of notions of "shame" and "honor" not as mere concepts but as the foundational tenets of legal codes and jurisprudence.

By drawing on Jordan's experience – generally seen as a "modernist state" – the paper reveals a paradox of laws and policies which both undermine and extol women's rights to health and equality. Looking critically at the current feminist movements in the country and their call for reform highlights the bifurcation and often banishment of women's reproductive and sexual needs and rights from concerted legal reform strategies. The exoneration of a rapist from punishment for marrying his victim is often the only viable legal and social solution for the victim herself.

Legal frameworks premised on the criminality of socio-sexual relations in terms of "shame" and its corollary "honor" not only ignore the health consequences for victims and their families, but reinforce patterns of abuse. In the absence of legal abortions, including in cases of incest and rape; the availability of reduced penalty for abortion carried out to preserve the "honor" of one's family; the lack of enforced legal protections for free and consensual marriage; lingering loopholes for child marriage; and mitigating circumstances for so-called "honor killings", focusing solely on ensuring the rapist is prosecuted instead of betrothed is grossly insufficient.

The intersection of rights (law) and health is absent from calls for law reform in Jordan. This paper draws on feminist legal analysis to link cause, impact, and power dynamics together to transform the laundry-list approach to law reform characterized by lengthy lists of proposed amendments to sex-discriminatory provisions, to a thoughtful, comprehensive legal framework bridging health and rights, context and reality.

** Currently a Human Rights & Gender Specialist, American Bar Association Rule of Law Initiative (ABA ROLI) Amman, Jordan. Visiting Jurist at UCLA Law's Visiting Scholars and Researchers Program to commence January 2014.*

Time to Lift the Veil of Inequality in Health Care Coverage: Using Corporate Law to Defend the Affordable Care Act's Reproductive Health Care Mandate
(Interested in publishing in the University of Baltimore Law Review)

Under the Affordable Care Act (ACA), large employers, except for religious organizations, must provide employees with health insurance coverage, including several health care services related to reproduction, from birth-control pills to pregnancy screening. This reproductive health care provision goes a long way to help close the inequality gap that exists between insured women and men. However, some corporations owned or operated by religious families opposed to certain covered benefits (especially those birth control methods that work as abortifacients), have argued in several lower court cases that these reproductive health services mandated by the Affordable Care Act conflict with their religious beliefs. In the *Conestoga Wood Specialties Corp. v. Sebelius* case, the Third Circuit Court rejected Conestoga Wood Specialties Corp.'s challenge to the ACA rule, holding that a for-profit corporation cannot exercise religion, so the corporation itself must comply with the ACA's reproductive health provisions. The Third Circuit ruled that the contraceptive mandate applies to the corporate entity, and not to the family that operates the entity. The Third Circuit also rejected the view that the family's religious beliefs somehow flow through to their corporation. The Sixth Circuit similarly ruled in *Autocam v. Sebelius* that Autocam Corp., an automotive and medical manufacturer, must comply with the ACA's contraception rule for similar reasons. However, in *Hobby Lobby v. Sebelius*, the Tenth Circuit Court of Appeals ruled last June that the Christian-owned Hobby Lobby should not be subject to fines for not complying with the contraceptive mandate while it is appealing its case. This issue will likely reach the Supreme Court, as Conestoga has petitioned the Supreme Court to review its case, and the Department of Justice has petitioned the Supreme Court to review the Hobby Lobby case.

This Article examines these cases through a corporate law lens and explains why a shareholder's constitutional religious exercise rights do not extend to the corporation itself, even in a closely held business. Elementary corporate law deems a corporation a separate entity from its shareholders. Thus, corporations are taxed as an entity and also enjoy limited liability as an entity. Corporations enjoy the protection of a corporate veil that allows shareholders, or another corporation, to be exempt from liability for the corporation's actions. The rare cases of "piercing the corporate veil," ("PCV") occur in instances where there is a unity of ownership and interest between the corporation and the shareholder and where not piercing the corporate veil would constitute fraud or injustice. Although PCV is an established corporate doctrine, it is very rarely used, usually in extreme cases where corporate formalities were ignored and thus the shareholders are personally liable to third parties. Some academics, such as Stephen Bainbridge, have suggested that reverse veil piercing be used to justify treating a shareholder's religious beliefs as the same as the religious belief's of the corporation. Reverse veil piercing is even less common that PCV, and much less well established. Instead of just third parties, in reverse veil piercing, corporate insiders also have the opportunity to reverse pierce the corporate veil. This Article traces the history of the reverse veil piercing doctrine and distinguishes past cases where it has been successfully used from the current contraceptive mandate cases. In this paper, I use some of Bainbridge's own previous work about reverse veil piercing, as well as other doctrinal sources, to argue that reverse veil piercing is a disfavored corporate doctrine that should never be used in the ACA contraceptive context. I also argue that allowing corporations to apply the religious beliefs of their shareholders would begin a slippery slope that could lead to many additional inequalities for women.

In this Article, I use a feminist legal approach to analyze how the reproductive health care provisions of the ACA help eliminate gender-based disparities that exist in current health insurance coverage and the health care system. I also address how the focus on the contraceptive provision has taken attention away from the non-reproductive health care provisions, which promote better health care for women from disadvantaged groups. The public discourse of the ACA has essentialized women by focusing on their capacity as baby making machines. In reality, the ACA covers a whole host of preventative care services that will go a long way in closing the gap in health care outcomes for poor and minority women.

CONTACT INFORMATION: Seema Mohapatra, JD, MPH, Associate Professor of Law,
Barry University Dwayne O. Andreas School of Law
Email: smohapatra@barry.edu Phone: 407 375 6230,
Address: 181 Nandina Terrace, Winter Springs, Florida 32708

Jessica L. Waters, J.D.
Assistant Professor
American University, 4400 Massachusetts Ave NW
Washington DC 20016
202-885-6217 waters@american.edu

The Patient Protection and Affordable Care Act of 2010 (ACA) contraceptive mandate has generated a hotbed of federal litigation -- over 60 cases are currently pending in federal courts -- with much of this litigation focused on the scope of the exemption and whether the mandate violates employers' rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (RFRA) and/or the First Amendment's Free Exercise Clause. In June 2013, the Tenth Circuit enjoined the enforcement of the ACA's contraceptive mandate provisions against Hobby Lobby, a for-profit corporation, because "their exercise of religion is substantially burdened" by the contraceptive mandate.[1] *Hobby Lobby* is most certainly not the last word on the scope of mandate's religious employer exemption. Indeed, the Third Circuit's recent decision holding that "for-profit, secular corporations cannot engage in religious exercise" (and thus cannot assert RFRA or First Amendment Claims to escape the contraceptive mandate's reach),[2] sets up a Circuit split -- making the Supreme Court almost certain to take up the question (indeed, cert petitions have already been filed).[3]

The ACA controversies are not the only arena where we see courts attempting to discern whether business employers can have constitutionally or statutorily protected religious beliefs, and how such beliefs should be balanced against employees' fundamental reproductive rights. For example, 2012 saw a spate of cases where female employees of private Catholic schools were fired for becoming pregnant out of wedlock or for utilizing assisted reproductive technology (ART).[4] Many of these cases contained tortured legal analysis regarding whether the employee was fired because she was pregnant, or because she did not comply with the religious employer's contractual terms by becoming pregnant out of wedlock/via ART; the former would not be permitted under Title VII, but the latter—with a broad reading of religious exemptions—would possibly withstand judicial scrutiny.

This paper argues that courts' increased willingness to treat an organization's assertion of religious liberty as equivalent -- that is, deserving of equal weight and thus protection -- to an employee's assertion of a constitutionally and statutorily protected reproductive right improperly balances the asserted rights. Looking closely at the cases challenging the ACA's contraceptive mandate and Title VII's prohibitions on sex and pregnancy discrimination, this paper argues that legislatures and courts have treated the rights as equivalent because they are increasingly improperly equating employees' assertions of constitutionally and statutorily protected reproductive rights (such as accessing contraception, abortion, or assisted reproductive technology) with *moral* decision-making. This is happening in two related ways: organizations (employers) are able to assert that their religious beliefs allow them to take adverse employment actions against employees who exercise these reproductive rights, and the employees' reproductive decisions are then framed as moral choices (rather than protected rights) contravening those religious beliefs. This conflation allows improper subordination of the reproductive right, allowing employers to, for example, seek the shelter of Title VII's religious organization exemptions. Precedent permitting organizations (as employers) to evade the requirements of federal laws -- be it the ACA's contraceptive mandate or Title VII's prohibitions against sex and pregnancy discrimination-- permits a stifling of fundamental reproductive freedom that would not be permitted in other employment discrimination contexts (e.g, an employer would be hard pressed to assert that it's "religious beliefs" permit racially discriminatory hiring). This paper will explore untangling moral decision-making from reproductive decision-making in order to give proper weight to the asserted reproductive right.

Submission to present or present and publish

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[1] Hobby Lobby Stores, Inc. v. Sebelius,723 F.3d 1114, 1137-38 (10th Cir. 2013).
[2] Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health --- F.3d ----, 2013 WL 3845365 (3rd Cir. 2013).
[3] Lyle Denniston, *Courts Split on Contraception Law (FURTHER UPDATE)*, SCOTUSBLOG (Jul. 26, 2013, 12:28 PM), http://www.scotusblog.com/2013/07/courts-split-on-contraception-law/.
[4] Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 47 (2013).