Alexi Machek Velez

Rutgers School of Law – Camden

What *Burwell v. Hobby Lobby* means for women: Exploring the ramifications on notions of bodily autonomy, whether corporate "persons" have been assigned a place in the gender hierarchy, and the rights of women to privacy in the closely held for-profit corporate workplace

Burwell v. Hobby Lobby was one of the most divisive Supreme Court cases of 2014. Though the decision may not have been surprising given the current bench, the landscape of women's rights, with regard to their bodies and rights to make private family planning decisions, changed dramatically. The opinion was proffered in affirmation of the right of closely held for-profit corporations to declare religious identities and assert religious freedoms, but the true impact was on the rights of women. Further, it would be naïve to say that the detriment to women was merely collateral damage—the decision and its impact were measured and volitional.

While there is no concession herein that there are only two genders, in general, the opinion drafted by Justice Alito, and joined by Justices Scalia, Roberts, Kennedy, and Thomas, makes clear that in addition to the gender binary of men and women, which in hierarchical application has made the corporate workplace rife with inequity, we must now also consider the closely held corporate form as an individual with a right to religious freedom as part of that stratification. There is a valuation implicit in *Hobby Lobby*, and it is a valuation in which corporations win, and women decidedly lose.

As background, the Patient Protection and Affordable Care Act (ACA) imposed regulations, enforced by the Department of Health and Human Services, which mandated the provision of health insurance by certain employers to their employees, with said insurance meeting "minimum essential coverage." In particular, the preventative services coverage mandate required that new health insurance policies include contraceptive and family planning services and medications, and "preventative care and screenings" for women without "any cost sharing requirements." While certain exemptions and exceptions applied, an employer who failed to provide a compliant plan and who had at least one employee enroll in coverage under the ACA was subject to a monetary penalty. Congress did not make determinations regarding what coverage, specifically, would satisfy the requirements

of the legislation, but rather charged the Health Resources and Services Administration (HRSA) with determining the discrete services required to avoid penalty. This, of course, is consistent with the rulemaking provisions of the Administrative Procedure Act.

In 2011, the HRSA promulgated guidelines with regard to the treatment of women. In general, nonexempt employers became required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling." While most "FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." "Religious employers" were already exempt from these guidelines, and included "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order." Additionally, certain other "eligible organizations" were also exempt.

However, the plaintiffs argued that the Religious Freedom Restoration Act of 1993 (RFRA), which protects a "person's" exercise of religion, was inclusive of "corporate persons." Plaintiffs argued that the guidelines imposed by the HRSA, by virtue of the ACA, created a substantial burden, prohibited by the RFRA, which was neither in furtherance of a compelling government interest nor applied in the least restrictive means of furthering any potentially compelling government interest. The divided Supreme Court agreed, in abrogation of the earlier Autocam Corp. v. Sebelius, where the Sixth Circuit held only a year earlier that secular, for-profit corporations were not "persons" capable of religious exercise under the RFRA. The Supreme Court conceded (or rather "assumed") that the government interest in providing cost-free access to the four types of contraceptive care was compelling, but rejected the government's argument that the guidelines were "'the least restrictive means of furthering that compelling governmental interest.'" In short, the Supreme Court held that, "[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA." Justice Kennedy drafted a separate concurring opinion, pallidly arguing the narrowness of the majority opinion. Justice Ginsburg, joined by Justices Sotomayor, and Kagan and Breyer in Part, wrote a powerful dissent.

Justice Ginsburg noted that on that day the "Court h[eld] that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs," just how outrageous such a holding is, and expressed her unabashed disappointment in the majority. Justices Breyer and Kagan, in their separate three-sentence dissent, disagreed only with Justice Ginsburg's

assertion that the plaintiffs' claim failed on the merits and asserted that they do not decide whether the RFRA can even apply to for-profit corporations.

Justice Ginsburg was the would-be heroine of the day, championing the grave importance of the rights of women to make decisions regarding their reproductive health. She pointed out that it is only through women's ability to control and take ownership over our own health and bodies that we have been able to participate meaningfully and with anything nearing equality in the social and economic arenas of our Nation in the last half century.

In the stratifying dynamic of the private workplace, where women continue to struggle to assert their rightful place as co-equal to their male counterparts, women were pushed down another rung on June 30, 2014. Our constitutional right to privacy and statutory right to employer-provided insurance that meets "minimum essential coverage" requirements lost in favor of the religious rights of a legal fiction, that of the corporate person. Legal scholars should take pause and remember that corporate personhood is, first, a legal fiction—albeit a useful one, as most legal fictions are, and second, exists primarily to constructively privilege shareholders with limited personal liability for corporate debts and grant business entities the freedom to contract.

A legal fiction involves "the deployment of a patently false statement as a necessary component of a legal rule[.]" One legal scholar noted, "[t]hese patently false statements and deeming principles empower lawyers and decision-makers to resolve novel legal questions through arguments of equivalence and creative analogical reasoning." Corporate personhood is a device of legal analogy and analysis, but it is not an actual or natural truth. We concede personhood of business entities in the law because legal fictions are "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." The legal fiction of the corporate person surely fulfills the latter, but it is a fictive device nonetheless. The innate personhood of woman is not.

In sum, women's rights lost out to the religious freedoms of imagined entities in *Hobby Lobby*. Somehow, I doubt that the drafters had such a result in mind when advancing religious freedom in our Constitution. Naysayers will argue that women are not precluded from seeking the healthcare *Hobby Lobby* refuses to make "religious" for-profit closely held corporations provide, but that is a fallacy. Women who rely on their employers to help mitigate the costs of treatment and care may well be unable to afford what the ACA had entitled them to, vis-à-vis their employers lest the employers pay a penalty for their failure. Justice Ginsburg said it best:

In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by *Hobby Lobby* and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent. To be sure, "[w]omen paid significantly more than men for preventive care… ; in fact, cost barriers operated to block many women from obtaining needed care at all." The effect of *Hobby Lobby* is that a great many women lost access to choice, all women suffered another blow to their precious rights to privacy and bodily autonomy, and the court echoed an unfortunate and pervasive sentiment within our society—that the rights of women matter less—less than those of men and, now, less than those of corporations. *Hobby Lobby* reflects a sad time in American jurisprudence, indeed.

An effective legislative response against this reading of the RFRA would be to amend the Act to preclude corporate persons. Simply, the RFRA should be modified from reading, "[g]overnment shall not substantially burden a person's exercise of religion," to "… a natural person's exercise of religion[.]" The problem is not the ACA, but the precedential application of the RFRA to for-profit corporate persons, implicating all legislation that impinges on corporate religiosity, excluding only taxation. This amendment would largely restore affected ACA entitlements to women.