

1 A VIEW FROM THREE PLACES

October 10, 2010

Dr. Weisman's office was painted in calming tones, and Janet focused on a colorful work of abstract art hanging on the wall behind the doctor's desk.

"What do you think it means?" Janet asked, pointing to the picture. She and Michelle had been together for twenty years through good times and bad. Michelle loved art and Janet hoped the distraction might calm her.

Michelle looked carefully, "I'm not sure. It looks like . . . well, kind of like, music."

A moment later Dr. Weisman appeared and walked around to his desk. "You have a heck of an eye," Dr. Weisman said, looking at Michelle. "It's a reprint of a Kandinsky piece and some experts think it's an attempt to represent music on canvas." Michelle smiled.

Dr. Weisman's tone became more serious. "I have good news and bad news. But the good news is pretty good. It's not stage III."

Michelle and Janet sighed in relief. "So what is it?" Janet asked.

Dr. Weisman took a deep breath, "Michelle has stage II ovarian cancer." Janet held Michelle's hand as Michelle began to cry. Michelle's heart raced and she started to hyperventilate. Janet put her arm around Michelle, trying to calm her even though Janet wanted to burst into tears herself.

Dr. Weisman gave them some time to recover. When he next spoke, his voice was soothing. "I know this is not what you wanted, but it can be treated and it has not spread outside of the ovaries and uterus."

Michelle wiped her eyes. "Will I be okay?"

Dr. Weisman nodded, “The prognosis is good in most of these cases. We will need to operate, but since it hasn’t spread very far we should be able to knock it out with surgery and several rounds of chemo. The chances of long-term survival are good, but we need to move as quickly as possible to make sure it doesn’t spread farther.”

Michelle seemed more at ease. Janet was ecstatic that the prognosis was good. Michelle would be okay. Nothing else mattered. It had only been a week or two, but it seemed like an eternity since the irregular test came back and then the follow-up showed signs of cancer. Janet and Michelle were powerless to do anything while they waited, but now they knew it was treatable. Yet Janet knew Michelle was terrified of chemo and still in shock from the newness of the situation. She wanted to make the fear go away, but she didn’t know how. She held Michelle closer and she could feel Michelle relax a bit.

Janet relaxed a bit too. Then it hit her. Janet held her anger back as fear and desperation gripped her. She was powerless. Thankfully, at that moment Michelle excused herself to go to the restroom. Janet looked at Dr. Weisman and began to speak. “What about insurance? Michelle isn’t covered. We have paid out of pocket for everything up to now.”

She and Michelle had been devoted partners for twenty years, but since their state did not allow them to marry and Janet’s employer, a mid-sized engineering firm, did not provide benefits for same-sex couples, Michelle could not be covered under Janet’s policy. Michelle’s job with a building supply company had been reduced to part time a year earlier and she lost her benefits, including health coverage. At first they thought Medicaid would provide coverage, but Michelle made too much to qualify for Medicaid, although just barely, so she remained uninsured. The desperate search for insurance coverage began long before Michelle learned she might have cancer, but after losing half her salary, any decent coverage was out of reach.

Dr. Weisman scratched his chin and thought for a few moments. “I can do the surgery for free. If you ever win the lottery you can pay me back,” he said as he smiled. Then his expression turned somber. “But the hospital and drug costs will be significant.”

“How much do we need?” Janet asked, her mind racing through every way in which they could raise the money.

“Just the hospital and drug costs will probably be more than \$50,000 and could be as much as \$175,000 depending on the amount of chemo Michelle needs and the recovery time,” Dr. Weisman replied. Janet calculated that they could probably raise \$15,000 from their own funds and friends and family, but even if they sold their house they would not have more than \$25,000 total given their current mortgage and sagging housing prices.

The conversation stopped abruptly when they heard Michelle talking to a nurse in the hallway. Both Janet and Dr. Weisman knew that Michelle did not need extra stress. When Michelle returned to her seat, Janet turned to her and gave her a hug. “Thank God it’s treatable,” Janet said warmly; yet she knew that getting the treatment quickly would not be easy without insurance.

December 10, 2015

Mandy Rodriguez stared at the letter. Her mind raced in a thousand directions. She had overcome so much. What about her 4.0 GPA in the graduate counseling program? What about all of her volunteer work to help poor patients in need of clinical services in the program’s counseling assistance program? The words on the page were inconceivable.

Dear Ms. Rodriguez:

I am sorry to inform you that you have been expelled from the counseling psychology program at Sycamore State University. The hearing committee voted unanimously to expel you due to your refusal to counsel clients in same-sex relationships about marriage issues in the mandatory counseling clinic. The committee found that you have no right to refuse such counseling based on your religion. Moreover, the committee found that your willingness to counsel gay or lesbian clients on any issues unrelated to marriage, and your willingness to refer clients in same-sex relationships who seek counseling regarding marriage issues, while positive steps, are inadequate to enable you to meet the clinical requirements for graduation. You must be willing to counsel any client on any issue regardless of sexual orientation.

Dean Francis Smith-Maquid

Mandy tried to hold back the tears. She had worked so hard, not just for herself but also for her five-year-old son, Andrew. She had escaped an abusive relationship and wanted to find a career where she could help people and support her son. Counseling psychology was perfect.

Mandy hadn't had any problems until Prof. Stinson's clinic. She was asked to counsel a same-sex couple regarding marital issues. Mandy referred the couple to another student in the clinic because she held a deep religious belief that marriage should be between a man and a woman. She had no problem counseling gay and lesbian clients about other issues, and in fact she had counseled a lesbian client whose ex-husband was abusive before and after the client came out.

Prof. Stinson was furious that Mandy referred the same-sex clients seeking marriage counseling to another student. Mandy recalled the conversation as a tear rolled down her cheek. Prof. Stinson said, "What is wrong with you! You have a duty to counsel everyone who comes through the door under our policies!"

Mandy was scared, but she was prepared for this. She responded to her professor, "I have counseled everyone who has come through the door until now, and I have no problem counseling gay and lesbian clients about any other issues, but my religious commitments do not allow me to counsel same-sex couples about marriage. I would be no good to them so I referred them to a student who could counsel them without objection. The other student gave me one of her client files involving spousal abuse so that my caseload was not reduced and her caseload was not increased."

"Do you honestly believe that same-sex marriage is such a sin that you can't counsel about it? This program is built for the twenty-first century, not the fifteenth!" Prof. Stinson huffed.

"Yes, I do, but it's nothing against gay people. It just has to do with my religious commitments and beliefs about marriage. If I help with that kind of relationship I would be facilitating the sin. I can't do that." Mandy was almost in tears.

"You can't refer a client just because it violates your views." Prof. Stinson said.

"I checked the policies and there is nothing preventing it, and there is a policy allowing referrals for patients who want to terminate their life

because of the moral issues it raises for counselors. My issues come from religion, but they are still moral issues,” Mandy said.

“I will be filing disciplinary charges against you,” Prof. Stinson said.

Mandy remembered the sting she felt when Prof. Stinson said that. A week later, Professor Stinson filed charges against Mandy. Two weeks after the charges were filed, the department held a hearing. Mandy attended the hearing and testified. She had thought that the hearing went well. Even Prof. Stinson was respectful of her views. Maybe it was all a ruse to make her feel confident and not raise a complaint outside of the university. Mandy wasn’t sure what to do. She was frozen.

“Mommy, why are you crying?” Andrew asked.

“It’s okay, Andrew. Mommy was just reading a sad letter.”

“From who? Why is it sad?” Andrew asked.

“From some people who don’t know how to respect beliefs they disagree with.”

“They must not be very nice.”

“Well, that’s not for us to decide, Andrew.” Mandy hugged Andrew tightly, crying quietly so he wouldn’t worry.

October 15, 2014

Amy looked at her pack of birth-control pills. She had been on them since her surgery to remove an ovarian cyst, just after she turned 25. Her mom, Betty, had ovarian cysts as well. Both aunts on Betty’s side of the family had had ovarian cancer. Aunt Anna did not catch it before it was too late and died from it.

Amy remembered her initial visit with Dr. Brock after the surgery. Dr. Brock told her in no uncertain terms that she needed to take the pill to lower her risk of ovarian cysts and ovarian or uterine cancer. Amy was happy to have an edge in fighting her genetic predisposition, and it gave her even greater hope that she would be there to see her children and grandchildren grow up.

Amy looked at the pictures on her nightstand. There was one of her and Jim at the beach, and pictures of Abby and Max in their little jeans and t-shirts playing in the front yard. Amy allowed a smile as she thought about that day at the beach with Jim. It was the day they decided to adopt. They went to the beach to help relax after learning that Amy had fertility issues. When Jim found out, he joked that he was

like a kid, so they didn't need to have kids. Amy did not buy his calm front. She heard the pain underneath his laughter, and she suggested they take a weekend at the beach near her parents' house. Amy also began researching adoption.

Now she could not imagine life without Abby and Max. That's what made the letter from her employer even more troubling. Amy was angry, but what could she do?

Jim had lost his job a few months earlier. They were able to scrape by on Amy's salary while Jim looked for work. They had always been a two-salary family, with both Amy and Jim adjusting their schedules to make sure Abby and Max were taken care of. The letter she held would cost them at least \$700 a year, and given that they were already in debt and just scraping by, Amy didn't know what to do. The letter read:

Dear valued Slangontech employee:

Slangontech is proud of each of our 7,000 employees. We are writing to inform you of a change in our benefits program that may affect some of you. In light of the United States Supreme Court's recent ruling in *Burwell v. Hobby Lobby*, we will no longer cover contraceptive care. We are a self-insured and closely held company.

John and Ellen Slangton and their family respect all employees, but their religious commitments prevent them from covering contraceptive care. Slangontech has reluctantly covered contraceptive care since 2010 under the state's mandatory contraceptive coverage law, and since 2014 under the Federal Affordable Care Act. Doing so has caused the Slangtons great pain. We believe that the recent decision by the United States Supreme Court in *Hobby Lobby* allows us to stop covering these items under the Affordable Care Act, and we also believe our state constitution will be interpreted in the same manner so that we need not cover contraceptives despite the state's mandatory contraceptive coverage law.

No other benefits will be affected. We wish you and yours a grace-filled year.

Slangontech, Inc.

Amy knew without looking how much her pills would cost. The doctor told her she needed to be on Yasmin 28 for a variety of reasons, including that two other pills she had tried caused her to have

migraines. She had been taking the generic version, but even the generic cost \$60 per month, and that was without any price increases; \$720 a year, she thought. She could cut back on food and not buy the kids much for Christmas, but even that might not cover it. Or, she thought, she could go off the pill until whenever Jim got a job. Dr. Brock was clear that she needed to stay on the pill, but would a few months without it hurt? She knew the answer. Dr. Brock was clear that going off the pill for any period of time put her at risk for ovarian cysts, and that the longer she stayed off the pill the greater her risk of ovarian or uterine cancer. But what else could she do?

September 23, 2014

Jonathan Stein sat in his room. He felt nauseous, and the feeling would not go away. Ever since he spoke with Mr. Winston and Coach Fenton, he couldn't sleep or eat. Now, his parents were at school pleading his case to the principal. It wasn't fair. He never had these problems at his old school district. He didn't mind moving to his new school until all this started. He liked having a nice big yard and a smaller school, but now he felt like an outcast with a scarlet J, for "Jew," on his chest. All of this because he needed to miss two days of school for Rosh Hashanah, the second most important Jewish holiday of the year.

Between Coach Fenton's threat to bench Jonathan, who was a starting linebacker for the school's football team, if he missed two practices for "some Jew holiday," and Mr. Winston's refusal to allow him to take a makeup for a test that would greatly affect his grade in chemistry because, "I don't give makeup tests unless there is a medical reason," Jonathan felt like his life was falling apart. He was only in the eleventh grade, but he had a serious chance at a college scholarship for football or academics. Being benched would keep college scouts from seeing him play, and a low mark in chemistry would decrease his GPA. He couldn't afford either. His parents didn't have a lot of money, and he knew a scholarship would be needed if he wanted to have a brighter future.

Jonathan heard the front door open and hope returned. He went downstairs and saw his mom crying in the kitchen. His dad looked dumbfounded. Jonathan's dad saw Jonathan and said, "Jon, come and sit down." Jonathan sat at the kitchen table. His dad continued, "Jon, I don't know how to reason with these people. The principal said that it

is up to the teacher whether to allow a makeup test. He has talked to Mr. Winston, but Mr. Winston won't budge. The principal disciplined Coach Fenton for the way he spoke to you, but he can't make him change his mind about benching you if you miss practice without being injured."

Jonathan's mind raced and he remembered eighth-grade civics. "What about the Constitution? Don't we have a right to be who we are?" Jonathan's mom looked dejected. "We brought that up and the principal said these are general policies that apply to all students the same so they don't have to give you an exception. He said if the state had something called a religious freedom law, he would be able to help, but there is no religious freedom law here so it is up to the teachers."

Jonathan wanted to cry. He noticed that his dad was close to tears too. "It's my fault," his dad said. "We should have never moved here. I should have never taken the new job."

"But it's a great job and until this everything has been good here." Jonathan's mom said. "Who could have known about this? There is no way you could have known."

"Jon, I don't know what to tell you. We will support you whatever you choose to do about Rosh Hashanah. We can't force a decision on you," Jonathan's dad said in a soft voice.

"I don't really have a choice," Jonathan accepted his fate. "We have observed Rosh Hashanah for more than two thousand years. Even during the worst times people found a way. I'm not going to stop just because Mr. Winston and Coach Fenton are so ignorant."

Jon's mom and dad smiled with pride, but inside their hearts ached because they knew this would hurt Jon's chances of getting a college scholarship, whether academic or for football.

I INTRODUCTION

We are in the midst of a supposed war between sexual freedom* and religious freedom. If you watch the news, spend time in the

* The term "sexual freedom" is under inclusive. Clearly, LGBT and reproductive rights are about far more than sex. They are about fundamental questions of one's ability to be free and control one's destiny. LGBT rights are about being who you are without discrimination

blogosphere, or listen to activists and politicians, you will hear examples of discrimination against one side or the other. It seems, at least in most media accounts, that the conflict between religious freedom and LGBT rights is insurmountable. Yet, there is a fundamental problem with this supposed conflict, namely, that in many cases it is not real. Religious freedom, LGBT rights, and reproductive freedom can coexist – at least in many contexts – even if some on one side or the other of the culture wars are uncomfortable with this fact.

Yet, the visceral attacks on the Supreme Court's recent decision to protect same-sex marriage and the equally visceral attacks on proposed state religious freedom laws in Michigan, New Mexico, Kentucky, Georgia, Indiana, and other states demonstrate that factions on both sides are adept at attacking laws and policies with which they disagree. Unfortunately, when one observes these attacks it becomes clear that many of those attacking have a complete inability, or perhaps lack of desire, to find common ground or put themselves in the shoes of those with whom they disagree. This sometimes brings public discourse on the relationship between religious and sexual freedoms down to the lowest common denominator, which is an affront to those who seek to move America forward without leaving millions of Americans behind.

Immoderate factions on both sides have had a disproportionately large role in framing the issues in the court of public opinion. The media, it should be no surprise, has often latched onto more radical voices and given the impression that those voices speak for one side or the other. Make no mistake; much of the problem here is based on perception and the framing of issues rather than on an inherent tension between religious freedom and sexual freedom. By the time you finish reading this book, you will understand how these important freedoms can coexist in many contexts, and how in those situations where common ground cannot be found, informed choices can be made that will allow the remaining walls between religious freedom and sexual freedom to stand without increasing

in the most fundamental aspects of life, and reproductive rights are about the freedom to control your body and determine your own future. I use the term "sexual freedom" in this book as shorthand for all of this. In this sense, the term "sexual" addresses far more than sex and the term "freedom" addresses far more than freedom in the bedroom.

hostility toward the broader freedoms that are important to each side. Hopefully, together, we can work to reframe these issues in a more productive way.

Of course, reframing these issues in a productive way cannot be done by burying our heads in the sand. Religious freedom and sexual freedom do conflict in several situations. For example, what should be done when a closely held for-profit entity denies benefits or services to employees based on religious objections? How can religious universities or adoption agencies representing faiths that oppose same-sex marriage continue to serve their missions in light of the issues raised by legal recognition of same-sex marriage? What should be done about government officials who refuse to grant marriage licenses to same-sex couples based on religious objections? And, of course, should Mandy Rodriguez in the hypothetical example have any legal recourse to avoid expulsion from her university?

These questions are important and serious. They will be addressed in detail in later chapters, but for now it is important to understand that many religious freedom claims are more like Jonathan Stein's situation. They have no impact on sexual freedom. Moreover, in many cases religious freedom claims have much in common with claims for LGBT and reproductive rights. After all, in all these situations people are seeking to keep government from interfering with or denying them their most fundamental, and often personal, aspects of being. Opposing or blocking all religious freedom laws to prevent discrimination could actually end up fostering discrimination against religious minorities, as well as mainstream Christians, in contexts where there is no discrimination against anyone else.

Mandy's situation is somewhat different from Jonathan's. Mandy's situation raises what is often called a "conscience claim." These claims sometimes, but not always, impact third parties. Conscience claims run the gamut from less controversial issues (at least less controversial in the twenty-first century), such as conscientious objection to military service to more controversial issues, such as the refusal of county clerks to issue marriage licenses to same-sex couples and the refusal of hospitals to allow abortions to be performed in their facilities. As will be seen, common ground may be found in some of these cases, but whether this can be done is a fact-sensitive question. The answer

depends on the impact that accommodation of religion-based conscience claims will have on others.

II BALANCING RELIGIOUS FREEDOM, LGBT RIGHTS, AND REPRODUCTIVE FREEDOM

Stepping back from all the rhetoric, fear, and accusations launched by the most radical combatants in the culture wars, we can see some common elements within the struggles of the LGBT community for civil rights and civil liberties, religious people seeking to live their faith without being penalized by laws or policies that may have never considered them, and women seeking reproductive freedom without government interference. Each of these important struggles will be addressed in turn.

As Janet and Michelle's case demonstrates, LGBT rights, including the recently recognized right to same-sex marriage, are about fundamental things that most people never have to think about but have created untold pain and stress for members of the LGBT community. Think about the following questions: Can my bond to the person I love be legally recognized just like anyone else's? Can the person I love share my health and retirement benefits like anyone else in a similar relationship? Can I visit the person I love in the hospital in an emergency as spouses are able to do? Can I prevent my employer from discriminating against me because I chose to marry the person I love, and so on?¹

Most couples take these things for granted, but until June 2015 same-sex couples could not in many parts of the United States, despite the fact they are consenting adults, some of whom have been together for decades. Moreover, no federal antidiscrimination law protects LGBT individuals from discrimination and many states lack such laws as well. One of the outcomes this book advocates for is the combination of antidiscrimination laws protecting the LGBT community and religious freedom laws protecting people of faith. Having both types of laws can help create a balance that can maximize protection and minimize harm for the LGBT community, as well as maximizing accommodation for people of faith. The balance between these sorts of

laws when they appear to conflict is complicated, but I will explain these interactions and the best way to approach them in an easy to understand manner in Chapters 3, 4 and 5.

Thankfully, some states already have both sorts of laws. We can look to these states as examples. Utah recently passed a fascinating law aimed at balancing religious freedom and LGBT rights. This law, and others, will be explained throughout the rest of this book. They serve as evidence that when people sit down and talk with a willingness to compromise, both religious freedom and sexual freedom can be protected.

Despite the promise of what has become known as the “Utah Compromise,” at a national level religious freedom has been increasingly, and unfairly, framed as the irrational enemy of LGBT rights. This misunderstands religious freedom claims and underestimates the role that religion plays in Americans’ lives. Two sub-issues rise from framing religious freedom in this way: first, that it is the enemy of LGBT rights; and second, that it is irrational, especially where it conflicts with LGBT rights.

There are certainly cases in which religious freedom claims conflict with LGBT rights, but these do not represent the majority of religious freedom claims. Moreover, the fact that a religious freedom claim can be asserted does not mean that it will be victorious. Much of the rest of this book is devoted to navigating religious freedom claims that *do* conflict with sexual freedom and determining if and when they should be, or will likely be, victorious. Each side will win on some issues and lose on others, but I hope to demonstrate that the key to these determinations should be whether the religious freedom claim poses a direct and meaningful harm to third parties. The meaning of “direct and meaningful” is key to this analysis and will be explained and discussed beginning in the next chapter.

Debates and dialog over the rationality of religion have become more popular in recent years, with some militant secularists lambasting and lampooning everything religious. The question of whether religion is irrational could be the topic of a multivolume set, and a detailed discussion is far beyond the scope of this book; but it is necessary to address the topic at some level, because if religion were as irrational and

immoderate as some in the current debate allege it to be, there would be strong arguments against protecting it. Of course, those who attack religion either turn it into a monolithic caricature or engage in the very sort of rhetoric and deductive thought that they accuse religious people of engaging in. Not all religions are the same, and even within a given religion there can be a wide range of views.

Moreover, in the United States religious freedom and freedom of conscience have been given special attention and protection, albeit inconsistently, since the founding of the nation. If anything, the problem has not been that religion has received too much protection over time but rather that sometimes dominant religions have been protected while less dominant religions have not. The solution to this problem is not to decrease protection for larger religions but rather to increase protection for religion generally.

At the same time, it is essential to protect the LGBT community from discrimination, and a balance must be found that will minimize harm for members of the LGBT community while allowing religious freedom claims that do not inflict direct and meaningful harm on others to be accommodated. As will be seen in the following chapters, this will not necessarily lead to conflicts with LGBT rights; when it does, it may be that religion must yield unless religious concerns can be accommodated without harming the rights of others. This suggestion will ring hollow to those who wish to undermine religious freedom generally, as well as to those who wish to expand religious freedom regardless of its impact on others. It could be a good thing if it upsets those firmly entrenched on each side of this polarized debate, because ruffling those feathers could indicate progress toward greater equality and protection of rights on both sides.

The sorts of religious freedom claims that have often arisen under the Constitution and religious freedom laws, however, do not generally create serious conflict with the rights of others. For example, can I receive a simple accommodation to miss school to observe a holiday central to my faith without being penalized? Can the courts empower my doctor to force me to get a blood transfusion when my religion forbids it? Can our tribe continue to follow its ancient traditions on land taken, and now owned, by the federal or state government? Can a local zoning board prevent our church from building a facility to feed the

poor or from using our existing facilities to do so? Can I grow a short beard in prison because my faith requires it, even though the prison rules say no beards? Can the government punish me for following my faith's long-standing tradition of drinking hallucinogenic tea in a highly controlled ceremony? Can the government require an autopsy of my brother or sister after a car accident even though our faith strictly prohibits autopsies? All of these questions are adapted from real cases; if religious accommodations were given in every one of these cases, there would be no significant negative impact on the freedom of others.

Mandy's situation is also loosely adapted from a real case.² In that case, the plaintiff prevailed, in part, because no direct harm would have been inflicted on the clients who were referred, and because the policy at the university in question allowed for referrals in other situations. The result in that case was almost certainly correct, but perhaps more for the former reason than the latter. Other conscience claims may raise much harder questions, and the answers will vary depending on the specific facts involved.

In light of a world that has changed quickly, both individuals and faith traditions that oppose same-sex marriage on religious grounds may ask: "In a nation of freedom, why must I be forced to accept these cultural changes that conflict with my religion, so long as I do not harm anyone else? Why am I under attack for holding to my faith and conscience when I mean no ill will toward anyone else? Why is freedom of conscience suddenly under attack?" This does not mean that religion should give people a free pass to discriminate, but it does mean that writing these people and faiths off as a bunch of unrepentant bigots will likely lead to bigger problems within the culture wars than would taking the claims seriously. As a religious person who believes strongly in LGBT and reproductive freedom, I am always struck by how easily people on one side or the other simply write off claims made by those with opposing viewpoints, as though those claims are not even worth consideration.

Like LGBT rights, reproductive freedom goes to the core of self-determination and the freedom to control one's body without government interference. Similar concerns about personal autonomy motivate those seeking reproductive freedom. Here the question is

whether government should be able to interfere with core issues of self-determination and personal freedom, such as one's ability to control one's own body, career, and education. All of these issues come into play when government or any other entity tries to limit a woman's right to reproductive freedom. Unlike the right to same-sex marriage, however, reproductive freedom has been recognized as a national right since *Roe v. Wade* was decided in 1973.³

Opposed to reproductive freedom are a variety of interests, many of which are religious. The positions of these religions vary from viewing contraception itself as a sin to rejecting products or procedures that abort a fetus,⁴ whether from the time of conception or later in the fetus's development. The key here is that these people believe deeply that aborting a fetus after conception is murder and against God's will. Therefore, if they do anything that helps facilitate abortion, even indirectly, they are complicit in what they view as a fundamental violation of God's law. Thus, we sometimes hear of doctors, pharmacists, and hospitals from certain religious traditions that refuse to perform procedures or give out medication that they believe will take a life.

The conflict between this worldview and that of those advocating reproductive freedom is stark. Yet, compromises have been reached at both the state and federal levels that allow conscientious objections by doctors and hospitals but also protect the rights of doctors and hospitals that perform abortions and other procedures to which conscientious objections are raised, and most importantly do not deny women access to these procedures. Problems have arisen, however, when the scope of protections for conscientious objectors has combined with other laws that are designed to minimize women's access to these procedures.

Importantly, however, if we look carefully common themes emerge between reproductive freedom and religious freedom. Both seek to keep government from interfering with the most fundamental aspects of a person's autonomy, self-determination, and being. Of course, this commonality may be of little solace to people of faith who view many reproductive choices as sin. The subject of conscience claims by religious organizations, doctors, and pharmacists is complex and will be discussed in Chapters 3 and 6 of this book.

For now, it is useful to note that many religions do not oppose – and some even advocate for – reproductive freedom. This is often forgotten in the black-and-white, polarized world of the extreme culture warriors on each side. Of course, the fact that some faiths do not oppose reproductive freedom does not remove the conflict between religions that oppose it and the people and organizations that support it. This conflict leads to some of the most significant barriers against balancing religious freedom and sexual freedom, but as we will see, even these barriers are surmountable, at least legally.

When I look at these questions I see common themes, not inherent conflict. While culture warriors on both sides may view these as disparate or irreconcilable concerns, many people of faith and many within the U.S. LGBT community – which includes a large number of people of faith⁵ – as well as many reproductive freedom advocates, can envision common ground. Unfortunately, moderate voices are often drowned out by those who yell the loudest.

III THE DIFFERENCE BETWEEN INTEREST ADVOCACY AND RELIGIOUS AND SEXUAL FREEDOM

Significantly, there is a fundamental difference between religious freedom, which seeks to accommodate people of faith so that government cannot interfere with or penalize them for practicing their religion without an adequate government interest, and religious interest advocacy, which seeks to influence broader government policies and actions. Certainly religious freedom is an important issue in religious interest advocacy, but it is just one of many issues. Religious freedom has often been understood in terms of results in specific cases and in terms of the legal tests used to decide those cases. Religious interest advocacy often focuses on influencing public opinion and on affecting entire legal regimes on issues such as reproductive freedom and LGBT rights.

Religious lobbying can conflict with (or support) LGBT and reproductive rights, but religious advocacy and religious freedom are not the same thing. Religious freedom does not, contrary to what you may have heard in the media, involve getting government to do your bidding.

In fact, until the U.S. Supreme Court decided *Burwell v. Hobby Lobby*,⁶ a case in which for-profit entities were given religious exemptions that allowed them to deny certain contraceptives to female employees, religious freedom was never understood to allow direct imposition on the rights of others.

It is true that accommodation in the land-use context, which is governed by the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA), could possibly impose some burden on those who do not want the increased construction or traffic related to a religious land use. This could be viewed as imposing a burden on others as a result of accommodating religious land use. Yet, not until *Hobby Lobby* did the Court support a direct imposition on third parties as a result of religious accommodation. The Court denied there would be any imposition on third parties in that case, but as will be explained in the next chapter, the tenor and implications of the *Hobby Lobby* decision leave open the distinct possibility religious accommodations may harm third parties in other situations.

The very claim in *Hobby Lobby* – to deny certain federally mandated reproductive benefits to female employees – involves imposition on the female employees of the company. As will be seen in the next chapter, the *Hobby Lobby* Court’s protestations to the contrary – claiming that the burden placed on female employees was “precisely zero” – ring hollow over the long run in light of political reality. Therefore, *Hobby Lobby* may be fairly viewed as a case where religious freedom was recognized in a fashion that might directly harm third parties. Yet, *Hobby Lobby* is the exception not the rule in religious freedom cases.

Interest advocacy has led some states to consider religious freedom laws that cloud traditional notions of religious freedom by providing broad protection for for-profit entities. Such laws have been considered in Arizona, as well as in a number of other states, but they have mostly failed to pass state legislatures or have been vetoed by the governor as happened in Arizona. Yet those who attack such legislation often ignore the fact that these laws are usually attempts to accommodate people of faith in a quickly changing world. There is no doubt that religious freedom claims by for-profit entities can create conflict, but as will be seen those claims

threaten religious freedom as much as sexual freedom, and they have weak legal purchase.

Most of what we hear about the conflict between religious freedom and sexual freedom from interest advocates on both sides turns rights into straw men and eschews rational, moderate thinking in favor of propaganda. For example, Jim Daly, president of Focus on the Family, wrote in response to the Supreme Court's ruling on same-sex marriage: "We are also concerned that this decision will fan the flames of government hostility against individuals, businesses and religious organizations whose convictions prevent them from officiating at, participating in, or celebrating [same-sex] unions."⁷ On the other side, Elliot Minberg from People for the American Way, wrote in *Salon*, "[Recent state religious freedom laws] are, in part, a component of the far right's efforts to reframe their decades-long war against every advance in societal acceptance and legal rights for lesbian, gay, bisexual, and transgender (LGBT) Americans into a noble effort to protect 'religious liberty.'"⁸

These are among the more moderate statements we have seen from partisans on each side. Yet, both are mostly wrong. Jim Daly talks about the threat to religious freedom of "individuals, businesses and religious organizations," but it is businesses that are most likely to have issues; prior to the *Hobby Lobby* decision, many courts did not think for-profit businesses could exercise religious freedom. Meanwhile, there is no serious threat to an individual's right to believe or practice his or her faith. No one is forced to attend same-sex weddings or take birth control pills. Moreover, no church or minister will be required to perform same-sex marriages despite what you may have heard. There may be issues with tax exemptions and government grants to religious organizations, but as will be explained in detail in later chapters the impact should be limited.

Other issues, such as county clerks who refuse to issue marriage licenses to same-sex couples and adoption agencies that refuse to place children with same-sex couples are fact sensitive and complex. The specific facts, such as the availability of other clerks or agencies in the same community willing and able to serve in the place of a clerk or an agency that receives a religious exemption, as well as the adequacy of these alternatives, would be central to answering these

questions if religious accommodations were available. These nuanced issues can not be carefully addressed through partisan rhetoric.

At the same time, Minberg's characterization of recent religious freedom restoration act laws as an attempt by the far right to harm LGBT rights mistakes the motives of some religious freedom advocates for the purpose of religious freedom laws more generally.⁹ Many who support religious freedom, myself included, also support same-sex marriage and reproductive freedom. In fact, we view these rights as part of a continuum of freedom. Most of us are hardly part of the Christian Right. In many cases, religious freedom protects religious minorities, as well as those from more dominant religious groups who have suddenly found themselves out of public favor in a fast-changing world. Religious freedom applies to everyone regardless of the size or power of their religion. Yet a garden variety religious freedom case such as Jonathan Stein's is a far cry from condoning discrimination against LGBT individuals or couples.

Significantly, and I cannot stress this enough, advocates of conservative religious values and advocates of progressive secularist values have the right to freedom of speech, just as they have every right to engage in partisan rhetoric and to advocate for laws that protect their interests. As things stand now, it appears that both religious conservatives and militant secularists risk losing these battles in the long run if they continue to frame the issues as they do; but as will be explained in Chapter 5, the risk currently seems greater for religious freedom than sexual freedom. Religious conservatives are not likely to succeed over the long run in changing the outcome of *Obergefell v. Hodges* (the same-sex marriage decision) either before the Court or through legislation. The real risk is that their rhetoric and actions will enable militant secularists who want to stereotype religious freedom as an invitation to discriminate to succeed in imprinting that characterization on the court of public opinion. This will lead to the defeat of religious freedom bills that are not designed to harm third parties. Ironically, religious minorities, religious progressives, religious moderates, and politically uninvolved people of faith are all caught between religious conservatives who want to roll back advances for LGBT and reproductive freedom and secular progressives who view all religious freedom laws as dangerous.

This is not to say that the core values of religious conservatives and secular progressives are free from risk in the current state of affairs. The fast progress of LGBT rights has seemed like an assault on the values of some religious conservatives; without strong religious freedom protections, religious conservatives' core values could be trampled. The same is also true for secular progressives, who view religious objections to progress on LGBT and reproductive freedom as a fundamental risk or barrier to equality, as well as an assault on human rights. In Chapters 4 through 7, we explore attempts to balance these concerns in a productive way, such as recent laws in Utah and a few other states, and see that some of these laws can help protect religious freedom, LGBT rights, and reproductive freedom. As you will see, other legal proposals are not so productive and will likely lead to the long-term degradation of rights on one side or the other.

Of course, both the religious conservatives and secular progressives miss the vast expanse of common ground and common purpose between religious freedom and sexual freedom. The possibility of seeing this common ground has often been overshadowed by rhetoric on both sides of the culture wars, and a media all too willing to report on every ridiculous action or word. As an example, in 2015 a lot of attention was paid to statements by Roy Moore. Moore is the unabashedly religious conservative and brazenly anti-LGBT Alabama Supreme Court justice who advocated that Alabama need not follow a federal trial court decision ordering the state to recognize same-sex marriage, and who later claimed the U.S. Supreme Court decision on same-sex marriage was worse than *Plessy v. Ferguson*, a case decided by the Supreme Court in 1896 that upheld racial segregation.¹⁰

More recently, Moore grabbed national headlines when he issued an order under his authority as the "Administrative Head of the Unified Judicial System of Alabama," telling Alabama probate judges not to issue any marriage licenses to same-sex couples because doing so would violate Alabama law. Moore's order clearly conflicts with the Supreme Court's ruling upholding the constitutional right to same-sex marriage. Moore's legal arguments supporting his order are unsound and violate basic principles of constitutional law. Yet, his actions captured the national spotlight for several days and are likely

to do so again as his showdown with the U.S. Constitution and common sense continues. He was recently suspended after charges were filed against him by the Alabama Judicial Inquiry Commission.¹¹

Focusing on these sorts of statements and situations does tremendous harm to religious freedom because it makes religious freedom and those advocating for it seem incapable of compromise. Yet Moore is a caricature, albeit a real-life one. He does not speak for most people of faith, nor does he speak for the vast majority in the legal community.

Every public official who openly seeks to use religious freedom to discriminate actually puts religious freedom further at risk. While many in the media and some radical sexual freedom advocates focus their attention on these sideshows, the many religious freedom claims made by people like Jonathan Stein, Mandy Rodriguez, and others, whether Christian, Jewish, Muslim, Native American, Buddhist, Sikh, Hindu, or otherwise, are put at risk and minimized. It is like confusing the forest for the trees. Claims like those addressed in *Hobby Lobby* represent one tree in a vast forest of religious freedom concerns. Chopping down the entire forest because a few trees have become diseased does not make sense. We can try to heal those trees, and we can chop them down if necessary to save the forest, but the forest itself is not the danger.

We sit on freedom's edge, and if a balance is not struck between protecting both sexual freedom and religious freedom, we will fall off the edge in one extreme direction or the other and lose a piece of what it means to be an American in the process. This book shows how to keep from falling off the edge and how to maximize freedom on all sides. It will not be easy, but it must be done, lest we let the extremes define American freedom.