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Whose Freedom? Teaching the Contraceptive Coverage Cases as a Bridge from Policy to Bioethics

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WHOSE FREEDOM? TEACHING THE CONTRACEPTIVE COVERAGE CASES AS A BRIDGE FROM POLICY TO BIOETHICS

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One of the pleasures (yet one of the challenges) of teaching health law is the way that various topics within it comprise their own microcosm of the law's bramble bush.[1] It is inevitable that a professor teaching a survey course will encounter subjects that do not obviously relate to each other, yet all clearly come within the ambit of health law. Teasing out the threads that connect those subjects is a matter not only for good casebook authors but also for each professor to do in her own way. In this essay, I share a method I have used to link two portions of a single course: one addressing the Affordable Care Act ("ACA") and one addressing bioethics. Even in a post-ACA world, this method would work to link a discussion of health care coverage with one addressing bioethics.

I. THE ACADEMIC SETTING

Nova Southeastern University's Shepard Broad College of Law offers two survey courses that together comprise the foundation of health law.[2] One—named Health Care Organizations, Regulation and Access ("HCORA")—

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1. KARL N. LLEWELLYN, THE BRAMBLE BUSH (1951). Reviewing this book, Professor Grant Gilmore explained:

> *The Bramble Bush*, as manifesto, tells us that the law is not a self-contained set of logical propositions; that rules of law do not explain results at law; that the stated reasons for decision regularly mask the inarticulate major premise; that facts are slippery things with a nasty habit of changing shape and color, depending on who is looking at them; that judges are not automatons who announce the law but human beings, possibly neurotic; that juries are barely human; that the truth is not in the law books, which should nevertheless still be studied; that we don't quite know yet where the truth is, but it is somewhere—in economics, or sociology, or anthropology, or psychology, or in the murky reaches of Freudian theory.

Grant Gilmore, Book Review, 60 YALE L.J. 1251, 1252 (1951).

2. Although not named Health Law I and Health Law II, they are the equivalent of those courses at many schools.

covers health care financing and business matters.[3] The other, which I teach, addresses—well, it addresses what it is called: Health Policy, Bioethics, and Quality of Care ("HPBQ").[4] Each is a three-credit course taught once a week. To deal with the length of the class period yet achieve active learning,[5] both professors incorporate many in-class exercises to engage the students in the learning process.

Both of the foundational courses address ACA (and likely still will to some extent even in a post-ACA setting), but the professors teaching them take care to approach it from different perspectives. In HPBQ, the first few weeks utilize legal history and empirical data to prepare students for in-depth examination of *National Federation of Independent Business v. Sebelius*[6] and its impact on expansion of coverage within each segment of America's fractured health care "non-system."[7] The course examines these developments through the eyes of a

3. The course description reads:

> Course surveys the statutes, regulations, cases, legal issues, and policy considerations facing health care professionals, providers, and consumers in a rapidly changing field. Topics include an overview of the American health care enterprise and health care delivery models; the impact of federal health care reform legislation; the regulation of health care institutions for quality and safety; liability of health care institutions; issues relating to access to health care services and health care cost and payment including the duty to provide care, health care insurance and managed care; ERISA; Medicare and Medicaid; professional relationships and structures; and operational and business aspects including fraud and abuse, competition and antitrust, human subjects research, and technology and the globalization of health care services.

Course Descriptions, NOVA SE. UNIV., https://www.law.nova.edu/current-students/course-descriptions.html [https://perma.cc/C772-3E6N].

4. This course description reads:

> Course surveys the health law policy considerations, bioethics issues and mechanisms for assuring quality of health care that challenge health care professionals, providers, and consumers in a rapidly changing field. Bioethics topics include death and dying; modern reproductive issues including fetal and maternal decision making, assisted reproduction, cloning and human genetics; justice in health care access and coverage; and organ donation/transplantation. The course also surveys the major mechanism assuring the quality of health care including regulation of health professionals and related discipline or quality matters; the professional-patient relationship including informed consent, privacy, confidentiality and human subject research; and liability of health professionals and organizations.

Id.

5. *See* Steven I. Friedland, *Adaptive Strategies for the Future of Legal Education*, 61 LOY. L. REV. 211, 231–32 (2015); Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1, 3–4 (2003).

6. 132 S. Ct. 2566 (2012).

7. Laurence B. McCullough, *Should We Create a Health Care System in the United States?*, 19 J. MED. & PHIL. 483, 484 (1994).

patient/individual requiring health care services, whereas HCORA examines its subject matter from a business/health care provider perspective.

Thus, in the section about health care policy, HPBQ first covers the Medicaid expansion and then the individual mandate, using *National Federation of Independent Business v. Sebelius* and exercises requiring students to shop for health insurance and determine coverage eligibility.[8] By the fourth week of class, students have absorbed the messages that health insurance is expensive and the Medicaid population may not look like the population they envision when they hear the words "Medicaid coverage."[9] These lessons will remain useful regardless of what, if anything, happens to the individual mandate and the Medicaid expansion.

Next, it is time to transition to the bioethics portion of the course, through a class titled "Intersection of Policy & Bioethics Issues Part I: Coverage of Certain Treatments, Drugs, or Procedures."[10] In other words, it is time for the ACA contraceptive coverage cases: *Burwell v. Hobby Lobby Stores, Inc.*[11] and the Court of Appeals' opinions the Supreme Court reviewed in *Zubik v. Burwell*.[12]

II. THE TRANSITION CLASS

The goal of the transitional class session is to analyze coverage of controversial contraceptive prescriptions or devices as being of interest and importance in both policy and bioethics. Contraceptive coverage allows for consideration of the reasons why access to contraception is important to

8. Thank you to Professors Seth Chandler and Sidney Watson for the exercises I have adapted to use in these classes. They are available in the Health Law Professors Syllabus Bank maintained by Saint Louis University School of Law.

9. *See* John V. Jacobi, *Medicaid, Managed Care, and the Mission for the Poor*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 187, 188 (2016) ("Medicaid was created fifty years ago as a vehicle for providing for the health care needs of the 'needy poor.' In the years since, up to and including the amendments to Medicaid in the Affordable Care Act (ACA), the program has expanded the services and beneficiaries covered, but it remains a medical insurance program for low-income Americans."). That much students recognize, but they do not recognize before these exercises that their neighbors in a middle-class neighborhood may require the Medicaid expansion because of the high cost of health insurance premiums, deductibles, and co-pays and the very low incomes identified as Federal Poverty Level, on which Medicaid eligibility is based. *See U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, U.S. DEP'T OF HEALTH & HUMAN SERV. (Jan. 25, 2016), https://aspe.hhs.gov/poverty-guidelines [https://perma.cc/SNZ9-KHYL].

10. Later in the course, there is another "intersection" class, considering the legalization of medical marijuana from both a policy and a bioethics viewpoint. The first transition must occur at or around week four at the latest if the course is going to devote one-third of its coverage to each of its three portions; NSU Law has 13-week-long semesters.

11. 134 S. Ct. 2751 (2014).

12. 136 S. Ct. 1557 (2016).

women and the country in both financial and sociological ways. It also provides a vehicle to begin discussing conscientious objection, which will arise again later in the course in the end-of-life decision making context. The assigned readings (the contraceptive coverage cases and casebook notes about them) address primarily the coverage issues, but I press the students to articulate why contraceptives are important to the women who receive it through the coverage mandate. This forces the students to synthesize the lessons from the past few weeks about access to health care through coverage with material they should recall from Constitutional Law. I guide them toward consideration of constitutional and bioethical concepts of autonomy and medical decision-making during this discussion because those concepts underlie the reason access to contraceptive medicine is so important.[13] Thereafter, the in-class exercise, which appears in Appendix A, requires students to extrapolate their knowledge out to analyze religiously based objections to covering another controversial treatment.

The students receive the in-class exercise as part of their reading assignment. It forces them to discuss matters with which they may not be comfortable by asking them to consider religiously based objections to covering gender reassignment surgery.[14] In addition to the two exercises discussed earlier, which address other populations,[15] this one develops the students' cultural competence. Specifically, it seeks to cultivate tolerance for and empathy with transgender individuals. This is important for an institutional reason; NSU Law has established a set of learning outcomes for the health law concentration that includes demonstrating cultural competency and cultural empathy. Moreover, on a class-wide and individual level, properly understanding the medical rationales underlying gender reassignment surgery, which is essential to considering whether it should be a covered benefit, requires breaking through barriers some students may bring to class with them.

One way to use this exercise is to discuss it immediately at the beginning of class, trusting that students have understood the reading assignment, including the exercise. As this is one of the two foundational health law

13. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (prohibiting distinction between unmarried and married people in controlling the sale of contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (declaring unconstitutional statute criminalizing the provision of contraceptives to a married couple).

14. The choice of gender reassignment surgery is not random. It appears as if the performance of such surgery is increasing. *See* Sumathi Reddy, *With Insurers on Board, More Hospitals Offer Transgender Surgery*, WALL ST. J. (Sept. 26, 2016, 12:31 PM), http://www.wsj.com/articles/with-insurers-on-board-more-hospitals-offer-transgender-surgery-1474907475 [https://perma.cc/RL87-AT9A].

15. The first asks them to put themselves into the shoes of working-class and middle-class families seeking health care coverage on an exchange, and the second requires each of them to assist an undocumented immigrant requiring access to medical care.

courses, however, and given ACA's complexity, its regulatory structure, and health-law-specific concepts such as *third-party administrators* and *self-insurance*, I have found that the vast majority of students benefit from a gently Socratic doctrinal session about the case-related material before engaging with the exercise in class. This is especially true in the immediate aftermath of *Zubik*, given that the *Zubik* Court left in place conflicting circuit court interpretations of the Religious Freedom Restoration Act (RFRA)[16] as applied to not-for-profit religious organizations.[17] To properly respond to the exercise under the law as it stands requires the students to (1) identify the statutory source of a gender reassignment coverage mandate;[18] (2) consider how that statutory source differs from the source of the contraceptive coverage mandate; (3) briefly touch upon arguments about insurance contract provisions limiting coverage to medically necessary treatments;[19] (4) categorize the varying types of religious employers who might object to providing or facilitating coverage;[20] (5) identify the employers' potential religious objections,[21] at

16. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

17. *Zubick*, 136 S. Ct. at 1560.

18. I call this a coverage "mandate" to simplify discussion of it on the same day as the contraceptive coverage mandate, but, of course, the two coverage requirements differ in an important way. The contraceptive coverage mandate is a part of the definition of essential health benefits that must be provided. This coverage requirement, in contrast, does not mandate that insurers cover gender reassignment surgery in the abstract; the surgery must be covered if it is medically necessary and analogous to other surgeries covered by the plan. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,435, 31,427–31,428 (May 18, 2016) (codified at 45 C.F.R. pt. 92); 45 C.F.R. § 92.207(b)(3) (2016); 42 U.S.C. § 18116; *see also* Sharon Coolidge, *Transgender Library Insurance Dispute Goes to Court*, CINCINNATI.COM (Sept. 26, 2016, 11:50 AM), www.cincinnati.com/story/news/politics/2016/09/26/transgender-library-insurance-dispute-goes-court/91107324/ [https://perma.cc/N5XY-KBSG] (describing case); Stephen Koff, *Cincinnati Transgender Woman Sues Insurer, Public Employer for Not Covering Sex-Reassignment Surgery*, CLEVELAND.COM (Sept. 27, 2016, 7:56 AM), http://www.cleveland.com/metro/index.ssf/2016/09/transgender_woman_sues_ohio_in.html [https://perma.cc/HTF8-7AVG].

19. The medical necessity analysis is necessitated by the differences highlighted above in footnote 18. Some courts have begun to trace through the medical necessity analysis, as well as related ones such as interpretation of exclusions of coverage for cosmetic procedures. *See., e.g.*, Cruz v. Zucker, 195 F. Supp. 3d 554, 559 (S.D.N.Y. 2016), *on reconsideration*, No. 14-CV-4456 (JSR), 2016 WL 6882992 (S.D.N.Y. Nov. 14, 2016), and *appeal withdrawn*, (Dec. 30, 2016).

20. Three that come immediately to mind are churches; family-owned, closely held for-profit corporations; and not-for-profit organizations of the type at issue in *Zubik*.

21. *See, e.g.*, *States, Providers Challenge ACA Antidiscrimination Rule*, Health Care Daily Rep. (BNA) No. 164, at 2–4 (Aug. 24, 2016) (describing plaintiffs, four states, and a Catholic health system, as "complain[ing] that the regulations should have included religious or conscience-based exceptions for providers"). After *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, one author predicted that that case "represents a wake-up call for civil rights groups, especially those in the LGBT community, to not be caught off-guard when planning future cases or agreeing to the inclusion of overly broad religious exemptions in future civil rights

which juncture they must analyze the two lines of authority at issue in *Zubik*; (6) determine which line of authority they favor and why; and (7) apply the facts to their chosen legal principles. Creating organization out of that chaos before asking the students to analyze the facts of the problem helps tremendously. Generally, students benefit from professor-level interaction in thinking through numbers one through three on this list, thus being guided through the statutory and regulatory argument a person seeking coverage would make. Thereafter, they may pick up with the analysis themselves in small groups beginning at number four, articulating employers' objections and analyzing potential defenses based on the assigned class reading.

Initially, the exercise was self-contained within the class session, requiring students to read and analyze the materials relating to gender reassignment surgery on the spot, in the context of the contraceptive coverage law they had read before class. Very shortly, however, it became apparent that the students would produce more thoughtful work if they were able to review the exercise before class, along with their reading. Part of their course grades depend on preparation for and participation in class discussion, and having the exercise ahead of time permits them to do a thorough job. After the doctrinal portion of the class, as they break into small groups for discussion, they all begin with the thoughts they formulated on their own ahead of time, now informed by what they learned during the first part of the class session. Discussion is usually lively, and when students report back from each small group, conclusions often differ.

One of the reasons this exercise serves as a good transitional exercise between policy and bioethics is the connection one may draw between contraceptive coverage and the liberty interest in medical decision making autonomy. As noted above, I steer students to consideration of those Fourteenth Amendment, bioethical concepts during in-class discussion of the contraceptive coverage cases. During debriefing after they work on the exercise in small groups, I again steer them in that direction. I ask if transgender individuals may make any constitutional argument, assuming that state action exists, as it would in cases involving Medicaid coverage. One, of course, is Equal Protection;[22] if coverage for, and thus access to, a hysterectomy is available to a woman for fibroid tumors, then (assuming medical necessity) it also should be available to a woman undergoing the

legislation." Vincent J. Samar, *Interpreting Hobby Lobby To Not Harm LGBT Civil Rights*, 60 S.D. L. REV. 457, 473 (2015). At least one transgender individual already has filed suit against a Catholic hospital system's self-funded health plan challenging the plan's exclusion of coverage of "sex transformation" surgery. *See Dignity Health Wants Transgender Coverage Suit Thrown Out*, Health Care Daily Rep. (BNA) No. 139, at 5–6 (July 20, 2016).

22. U.S. CONST., amend. XIV.

physical transition to a man's body for gender dysphoria.[23] This argument may become even more important if ACA section 1557[24] is repealed.

Second, once students have not only reflected on but also debated the reasons transgender individuals desire (even need) gender reassignment surgery, I ask if they can argue that other constitutional rights are at stake with respect to a transgender individual's ability to transition fully to a body displaying the physical characteristics accurately depicting his or her gender. Eventually, someone will come up with *Casey*'s statement explaining why the Constitution protects personal decision making in procreation and other medical decision-making areas:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[25]

At this stage of discussion, I find it necessary to take care to focus the students narrowly on the choice of undergoing the surgery, at the risk of the conversation devolving into a debate over whether transgender individuals are making choices about their genders. That is sometimes a difficult line to draw, but there is much to be gained in terms of development of empathy among the students by tackling the issue.

III. LESSONS FOR THE FUTURE

In the past, I have assigned only the contraceptive coverage cases and casebook notes about them as substantive background for class discussion and the in-class exercise. Thus, I have relied on the students' having taken Constitutional Law already so that they understand Equal Protection law and have encountered *Roe v. Wade*[26] and *Casey*[27] previously. In the assignment itself, I urge students who may not have encountered them or who cannot

23. *Cf.* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,429 (codified at 45 C.F.R. pt. 92). This has been argued. *See, e.g.*, *Pa. Medicaid Agency Rescinds Transgender Coverage Ban*, Health Care Daily Rep. (BNA) No. 138, at 8 (July 19, 2016) (reporting settlement of Doe v. Dallas, Complaint, 2016 WL 683640 (E.D. Pa. Feb. 17, 2016)).

24. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified as amended 42 U.S.C. § 18116).

25. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). *See also* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) (discussing such rights, plus others such as the right to marry, as "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs").

26. Roe v. Wade, 410 U.S. 113 (1973).

27. *Casey*, 505 U.S. 833.

recall them to at least review their reasoning.[28] In the future, I likely will add those cases, or at least *Casey*, to the assignment. Doing so will permit me to press the students more on those cases and the boundaries of the rights those cases recognized when teasing out constitutional arguments for entitlement to coverage for gender reassignment surgery.

The desire to urge students to creatively craft such arguments also has prompted me to assign this same problem in a Bioethics and Law course. There, the lesson follows immediately after coverage of *Roe*, *Casey*, and *Gonzales v. Carhart*.[29] Although not directly at issue in Bioethics and Law, I also introduce the Supreme Court's 2015 opinion in *Obergefell v. Hodges* at this point, for its description of marriage as one of several "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[30] Adding *Obergefell* as recent authority permits me to raise questions later in the bioethics course about whether *Washington v. Glucksberg*,[31] the Supreme Court's 1997 decision upholding a state law prohibiting aid in dying, should be reconsidered due to its unduly narrow view of autonomous medical decision making near the end of life.

Other readings I have contemplated adding to the problem are the anti-discrimination provision of ACA itself, cases challenging refusals to cover gender reassignment that have appeared since I created the problem in 2013, and one or more academic medical or psychological article(s) about gender dysphoria. Such materials lead to deeper understanding of the issues. They even may prompt a more far-ranging discussion of discriminatory motives; without disparaging the religious objections some employers assert, illegal and discriminatory attitudes unrelated to religion could underlie refusals to cover gender reassignment surgery. Yet, as illustrated in Appendix A, thus far I have chosen to draw the line in my assignment after the contraceptive coverage cases and a few popular press articles describing religious objections and insurance company reasoning regarding coverage of that surgery. The course is not focused on transgender issues or even on discrimination. I have chosen to analyze these issues as a consciousness-raising exercise of statutory construction potentially raising constitutional issues. My goals include inspiring creative lawyering, exposing connections between areas of health law that do not seem to be connected, and developing empathy and cultural competency among the students. These materials have sufficed so far.

28. *See* APPENDIX A.
29. Gonzales v. Carhart, 550 U.S. 124 (2007).
30. *Obergefell*, 135 S. Ct. at 2585.
31. 521 U.S. 702 (1997).

CONCLUSION

Perhaps others can benefit from this peek into the first class session within my HPBQ course during which I merge policy and bioethics. This class plan has engaged students since I began teaching it three years ago, and I expect to use it for at least a few more years. It should remain fresh because it is doubtful the Supreme Court will tackle the contraceptive coverage issue again soon, and both gender reassignment surgery and disputes over coverage of it are on the increase. The lesson not only opens students' minds in a variety of ways, but it also is a joy to watch their thought processes develop while teaching it. I hope you enjoy that, too.

APPENDIX A

HPBQ Activity 3

This reading relates to religiously-based objections to mandates that certain medications or treatments be covered by employer-provided health care coverage. In this activity, we're going to go a little further than the obvious (the abortion objection) and consider other treatments that might meet religious objections but also might differ in important ways.

GOALS OF THIS ASSIGNMENT:

(1) Think beyond the obvious about the employers' objections in *Hobby Lobby* and *Notre Dame*.[32]

(2) Consider whether and to what extent any proposed coverage mandate of certain other treatments might meet the same objections as a religious matter.

(3) Consider whether those other sorts of treatments would have the same level of legal protection as abortion-related treatments have.

(4) Consider more broadly the societal implications of the general acceptance of coverage for certain treatments as opposed to others.

As preparation for this in-class activity, please read the articles at the following links and come to class with some notes about your thoughts on the above four matters. I will not be collecting those notes, so you can scribble them in handwriting if you wish. I will, however, be watching to see that you have actual notes with you, as part of my evaluation of your class participation in this in-class activity. (I also will be watching to see that you are basing your comments on something beyond emotion and general beliefs.) For example, related to number three above, think about the similarities and differences between the subject discussed below and abortion in the sense of the United States Supreme Court's rulings in *Roe v. Wade*, *Planned Parenthood v. Casey*, *Gonzales v. Carhart*, etc. If you did not read any of those opinions in a previous class (Con Law?),[33] make sure you do a little reading about them (or

32. This is the in-class exercise I used in the spring semester of 2016. My essay, which discusses assigning *Zubik* instead of *Notre Dame*, reflects plans for the next time I teach the course. As in almost every other health law course, rapidly changing law confounds attempts to use handouts and even some lesson plans from year to year. I have used a variation of this exercise every year between 2013 and 2016.

33. This caution is intended to capture students whose professors may not have covered individual rights, preferring to confine their Constitutional Law courses to structural considerations. Other students who may need to read these cases include those who are foreign lawyers seeking LL.M. degrees or others who may not have taken Constitutional Law for some reason, such as master's-degree-level students in a school in which master's-degree-level students take the same classes as J.D. students.

that you read those opinions) as part of your preparation for this in-class activity.

For your reading/preparation pleasure:

http://www.aetna.com/cpb/medical/data/600_699/0615.html [https://perma.cc/5XUP-XWAY]

http://www.washingtonpost.com/national/health-science/ban-lifted-on-medicare-coverage-for-sex-change-surgery/2014/05/30/28bcd122-e818-11e3-a86b-362fd5443d19_story.html [https://perma.cc/PW9G-VSL8]

http://www.thedailybeast.com/articles/2014/08/25/obamacare-now-pays-for-gender-reassignment.html [https://perma.cc/ES9P-9XJX]

http://www.religionnews.com/2014/06/10/southern-baptists-oppose-gender-reassignment/ [https://perma.cc/WV6J-QRTE]

http://www.forbes.com/sites/peterubel/2012/10/04/is-sex-reassignment-surgery-a-basic-human-right/#2715e4857a0b29cbc53d6866 [https://perma.cc/H8XZ-C9G8]

http://www.marketwatch.com/story/obamacare-states-and-insurers-make-gender-reassignment-surgery-more-accessible-2015-06-02 [https://perma.cc/L822-UG9V]

http://www.catholicreview.org/article/home/playing-god-changing-genders-the-ethics-of-sex-reassignments [https://perma.cc/KY4D-SZAP]