

Religion on Trial:
Religious Freedom Jurisprudence and the Constitution of Religious Subjectivity
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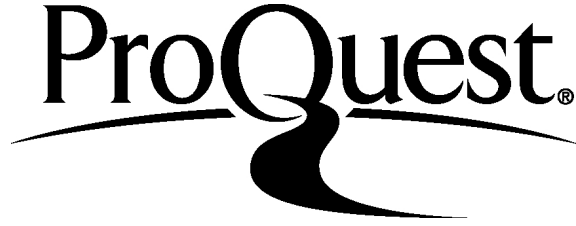
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Religion on Trial: Religious Freedom Jurisprudence and the Constitution of Religious Subjectivity

Thesis directed by Professor Greg Johnson

In two recent cases, *Elane v. Willock* and *Burwell v. Hobby Lobby*, courts considered religious freedom arguments regarding general regulations of for-profit businesses. A close reading reveals a key reason why one of these arguments succeeded where the other failed: judges in each case drew upon different assumptions about the nature of religion and religiosity. The work of Michel Foucault and Judith Butler can be used to frame this issue in terms of the constitution of religion and religious subjectivity. Modes of religiosity are constituted through their ongoing enactment, and the particular forms of religiosity that can or will be enacted are influenced by jurisprudence that recognizes some forms of religion over others for legal protection. This raises pragmatic and ethical problems for both religious freedom law and religious actors. Addressing these problems in a sophisticated and meaningful way will require a continual critique of how religion figures in our legal imagination and what the consequences of this are for religious practice and possible modes of religious subjectivity.

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Introduction: The Construction of Religion as a Legal Category

In the field of religious studies, the insight that there is no absolute, universal, or agreed-upon understanding of what religion is has become an almost banal truism.¹ Entire careers have been devoted to tracing how different understandings of the category arise and obtain. This is far from an idle, abstracted observation for academic navel-gazing, however; the particular ways in which religion is conceived have concrete impacts on societies and individual human lives. One of the clearest demonstrations of this fact is in religious freedom law. Here conceptual differences translate into legally enforced proscriptions and state sanctioned consequences. The concrete consequences of being designated as religion for purposes of law and the ambiguity of religion as a category generate serious problems whose complexity defies easy resolution.

To address these problems, I turn to two recent court cases: *Elane v. Willock* and *Burwell v. Hobby Lobby*. In each case, owners of for-profit businesses objected to legal regulations of their companies that conflicted with their stated religious beliefs. In *Hobby Lobby* the Supreme Court ultimately ruled in favor of the religious freedom claim, while in *Elane v. Willock* the religious freedom claim was rejected by three different courts. To unpack these cases, I will first provide an overview of key shifts in United States religious freedom jurisprudence, which provides necessary context for understanding them. Next, I will closely examine the opinions in each case to demonstrate that their different reactions to religious freedom arguments primarily stem from different stated beliefs that the judges had about the nature of religion and religiosity.

¹ For some salient and influential articulations of this point, see Jonathan Z. Smith, *Imagining Religion: From Babylon to Jonestown* (Chicago: University of Chicago Press, 1982), xi; Talal Asad, "The Construction of Religion as an Anthropological Category," *Genealogies of Religion* (Baltimore: John Hopkins University Press, 1993), 27-55; Tomoku Masuzawa, *The Invention of World Religions* (Chicago: University of Chicago Press, 2005); Jonathan Z. Smith, "Religion, Religions, Religious," *Critical Terms for Religious Studies*, ed. Mark C. Taylor (Chicago: University of Chicago Press, 1998), 269-285.

My argument is not merely that religious freedom law favors some forms of religion over others, however. By turning to the work of Michel Foucault and Judith Butler, I will show how legal conflicts over religious freedom contribute to the shaping or constitution of religions, modes of religiosity, and religious subjects that exist in the United States. This shift in perspective opens up a new set of problems to cope with, but also suggests ways of navigating the conflict and specific ways that scholars of religion can position themselves to assist in this processes.

Part I: From Reynolds to Hobby Lobby

It is important to understand the history of Free Exercise Clause jurisprudence in order to make sense of *Elane v. Willock* and *Burwell v. Hobby Lobby*. Each case should be seen as another skirmish in a much larger struggle, one that has run throughout U.S. history. The First Amendment guarantees the right to freely exercise one's religion, but offers no qualifications, limitations, clarifications, or definitions. This ambiguity raises the possibility, and even the necessity, of ongoing interpretation and contestation. To trace the trajectory of these interpretations and contestations, I will consider four key Supreme Court cases that mark substantial pivots in Free Exercise Clause jurisprudence. The last of these cases, 1990's infamous *Employment Division of Oregon v. Smith*, was controversial enough to provoke a legislative response in the form of the Religious Freedom Restoration Act (RFRA). After tracing the history of RFRA, its reception, and its ongoing legacy, I will be able to situate the *Elane* and *Hobby Lobby* and their broader significance.

The first major case that shaped Free Exercise Clause jurisprudence was *Reynolds v. United States* (1878). George Reynolds, a Mormon in the Territory of Utah, was charged with

bigamy for taking a second wife and claimed religious freedom as a defense. In responding to his arguments, the Supreme Court immediately noted the ambiguity of the First Amendment, writing that “The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning.”² The court turned to Madison’s “Memorial and Remonstrance” and Jefferson’s letter to the Danbury Baptists for its answer, concluding that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”³

The argument that polygamy violates social duties and subverts good order was rooted in racial and political beliefs of the 19th century. The Supreme Court described polygamy as “odious among the northern and western nations of Europe,” and as, prior to the advent of the Mormon Church, “almost exclusively a feature of the life of Asiatic and of African people.”⁴ Emphasizing the importance of monogamous marriage as a foundation for society, the court further cited Professor Francis Lieber’s claim that “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”⁵ Thus polygamy was figured not only as a feature of suspect Asian and African civilizations, but as a threat to democratic society itself. The parallel concerns of foreignness and destruction of U.S. society ran throughout the decision. For instance, the court referenced *sati* (the practice of widows burning themselves on

² *Reynolds v. United States*, 98 U.S. 161 (1879).

³ *Ibid.*, 162-164.

⁴ *Ibid.*

⁵ *Ibid.*, 166.

their husbands' funeral pyres that horrified English colonists in India) as another example of the chaos that could emerge from permitting religious beliefs to shield otherwise criminal actions.⁶

The opinion's ultimate conclusion was that the Free Exercise Clause cannot guarantee that religious practices contrary to law are protected, because doing so "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."⁷ To the *Reynolds* court, the only workable interpretation was to guarantee freedom of religious belief, but not religious action. To do anything less would invite anarchy, reducing law and government to hollow symbols incapable enforcing social order or warding off corrupting, foreign influences.

This formula was updated in important ways by the 1940 Supreme Court ruling in *Cantwell v. Connecticut*. Newton Cantwell and his two sons were Jehovah's Witnesses who went to a heavily Catholic neighborhood to distribute religious literature. They also played a phonographic recording for individuals that contained an attack on Catholicism. The Cantwells were charged with disturbing the peace and violating a local statute that required a permit for charitable or religious solicitation. The Supreme Court opinion in *Cantwell* is most important because it incorporated the Free Exercise Clause and Establishment Clause via the Fourteenth Amendment. Prior to *Cantwell* the two religion clauses in the First Amendment only limited Congress, not state or local governments. *Cantwell* marked the moment where, via the

⁶ Ibid.

⁷ Ibid.,167.

incorporation doctrine and Fourteenth Amendment, both clauses were extended to limit state and local governments.⁸

Cantwell is also significant because the Supreme Court allowed a religious freedom defense of *actions*, not mere beliefs. The opinion still remained close to the *Reynold's* distinction between protected belief and unprotected actions, however, concluding that “the [First] Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”⁹ The *Cantwell* opinion even used the same language as *Reynolds* when describing how laws can infringe on religion to preserve “good order.”¹⁰ The balancing test was that “the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”¹¹ Precisely what constitutes and undue infringement, however, was left unspecified.

A clearer test emerged in the 1963 Supreme Court ruling on *Sherbert v. Verner*. Adell Sherbert was an unemployed Seventh-day Adventist. Though there were some jobs available to her, they required working on Saturdays, which was contrary to her religion. Sherbert was subsequently denied unemployment benefits for refusing available work, and she appealed on religious freedom grounds.¹² The majority opinion of the Supreme Court strongly affirmed that even an indirect burden such as this was clearly a religious one:

⁸ *Cantwell v. Connecticut* 310 U.S. 303 (1940).

⁹ *Ibid.*, 303-304.

¹⁰ *Ibid.*, 304.

¹¹ *Ibid.*, 310.

¹² *Sherbert v. Verner* 374 U.S. 398 (1963): 398.

Here, not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.¹³

Anticipating a possible counter-argument, the majority also emphasized that even if unemployment benefits were a privilege, not a right on the same level as religious freedom, “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”¹⁴

The *Sherbert* court’s willingness to accept conditions placed on an economic privilege (unemployment benefits) by a neutral law of general applicability as an infringement on religious liberty marked the most robust period of Free Exercise Clause jurisprudence in U.S. history. Even more importantly, however, *Sherbert* set an explicit (and stringent) standard for when infringement on religious belief becomes Constitutionally impermissible. If there is a burden on religious liberty (even an indirect, incidental one concerning actions rather than beliefs), it can only withstand a Constitutional challenge if “any incidental burden on the free exercise of appellant's religion may be justified by a ‘compelling state interest in the regulation of a subject within the State's constitutional power to regulate...’”¹⁵ This compelling interest test, combined with a broad sense of religious freedom applicable even to incidentally burdened actions, was the strongest protection ever afforded by the Free Exercise Clause.

¹³ Ibid., 404.

¹⁴ Ibid.

¹⁵ Ibid., 403, quoting *NAACP v. Button*, 371 U.S. 415, 371 U.S. 438.

The 1990 ruling in *Employment Div. v. Smith* backpedalled away from *Sherbert* and similar Supreme Court precedents. Alfred Smith and Galen Black were members of the Native American Church, whose practitioners ingest peyote (a hallucinogenic cactus) as a sacrament.¹⁶ When Smith and Black were fired from their job and subsequently denied unemployment benefits because of illegal drug use, they appealed on religious freedom grounds.¹⁷ The *Smith* majority decision, filed by Justice Scalia, made a substantial return to *Reynolds*-era perspectives, a move that required creative logic to circumvent an intervening century of jurisprudence.

The *Smith* majority spoke to the compelling interest test and quoted *Reynolds* directly in voicing their concern that making “an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is ‘compelling’ – permitting him, by virtue of his beliefs, ‘to become a law unto himself,’”¹⁸ Justice Scalia wrote that “[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.”¹⁹ By his lights, the compelling interest test would destroy a society as cosmopolitan as the United States if applied to general laws of neutral applicability. This turns cases like *Sherbert*, which appear to have done just that, into a problem.

The *Smith* opinion did not simply overturn cases like *Sherber* or *Wisconsin v. Yoder* (a *Sherbert*-era case wherein Amish communities were granted an exemption to compulsory education past the eighth grade). The majority opinion claimed instead that the *Sherbert* test did

¹⁶ *Employment Division, Department of Human Resources of Oregon v. Smith* 494 U.S. 872 (1990): 872.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 885, quoting *Reynolds v. United States*, 98 U.S. 161 at 167.

¹⁹ *Ibid.*, 888.

not broadly apply to other cases, but instead pertained narrowly to unemployment benefits. Inconvenient for this story was the fact that the Supreme Court had *already* explicitly applied the compelling interest test to cases outside the context of unemployment benefits. Justice Scalia's solution was to say that those cases did not actually count because "[a]lthough we have sometimes **purported** to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied."²⁰

More broadly, the *Smith* majority sidestepped inconvenient rulings by declaring that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."²¹ Justice O'Connor noted in her dissent that this is absolutely not true of the cases that Justice Scalia cited, and characterized the move as an attempt "to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions" despite the fact that "there is no denying that both cases expressly relied on the Free Exercise Clause and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence."²² Legal scholars have largely agreed, characterizing the hybrid-rights distinction as a blatant attempt for the court majority to secure its desired outcome without overturning prior cases.²³

²⁰ *Ibid.*, 883, emphasis added.

²¹ *Ibid.*, 872-873.

²² *Ibid.*, 896, internal citations omitted.

²³ "The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions," *Harvard Law Review*, 123, no. 2 (2010): 1497-1498.

Disingenuous as it is, the *Smith* majority opinion is still the dominant model for Free Exercise Clause claims. This marks a large return to *Reynolds*, as the majority found that “the rule to which we have adhered ever since *Reynolds* plainly controls.”²⁴ Namely:

the [Free Exercise] Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.²⁵

In short, the only time that *actions* are protected by the First Amendment is when a law either specifically targets religious practices (such as a ban on animal sacrifice or idols meant for worship) or the law is already unconstitutional for other reasons. If the law is not discriminatory on its face (or otherwise already unconstitutional), then it can incidentally burden religious practices without triggering a compelling interest analysis.

The reaction against *Smith* was intense and united several generally opposing camps. In 1993, the Religious Freedom Restoration Act (RFRA) was passed unanimously in the House and with only three votes against it in the Senate. In the findings and declaration of purposes section, RFRA explicitly states that it is intended to reverse *Smith* and “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).”²⁶ To this end it instates strict scrutiny, requiring that:

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and

²⁴ *Employment Div. v. Smith*, 949 U.S. 872 (1990): 882.

²⁵ *Ibid.*, 872.

²⁶ *Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 103rd Cong. (Nov. 3, 1993).

(2) is the least restrictive means of furthering that compelling governmental interest.²⁷

Religious Land Use and Institutionalized Persons Act (RLUIPA), which was passed in 2000, clarifies that the definition of religious exercise “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²⁸

RFRA is complicated by *City of Boerne v. Flores*, a 1997 decision that limited its applicability to burdens imposed by the *federal* government. In *Boerne*, the Supreme Court ruled that by attempting to overturn *Smith*, RFRA attempted to change the Free Exercise Clause rather than enforce it. As Congress does not have the right to do so, this application of RFRA was an overreach of its powers.²⁹ Congress does have the ability to limit its own power, however, and so RFRA still stands as it applies to the federal government. When state or local governments burden exercise of religion the federal RFRA does not apply.³⁰ To circumvent this, individual states have been passing state-level RFRA (or mini-RFRAs) sporadically ever since. These laws offer additional protections over and above Free Exercise Clause guarantees, mirroring RFRA (to a greater or lesser degree) to bring state and local religious freedom protections into alignment with federal ones. *Elane v. Willock* and *Burwell v. Hobby Lobby* both come from this legal context, and represent ongoing attempts to navigate and shape religious freedom jurisprudence in the United States.

²⁷ *Ibid.*

²⁸ *Religious Land Use and Institutionalized Persons Act, 2000*, Pub. L. No. 106-274, 106th Cong. (July 27, 2000).

²⁹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

³⁰ *Ibid.*, 509; see also *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 547 U.S. 418 (2006), where the religious use of a federally controlled, hallucinogenic drug was allowed under RFRA.

The facts in *Elane v. Willock* are straightforward and uncontested. Elane Photography is a limited liability company owned by Elane and Jonathan Huguenin. In September of 2006, Vanessa Willock emailed Elane Photography to ask if they would be able to photograph a “commitment ceremony.” She specified that it would be “a same-gender ceremony.”³¹ Elane Huguenin responded that “we photograph traditional weddings,” and, when asked by Willock for clarification, explained that “we do not photograph same-sex weddings.”³²

Because the New Mexico Human Rights Act (NMHRA) forbids public accommodations from discriminating on the basis of sexual orientation, Willock filed a discrimination charge with the Human Rights Council (HRC) of New Mexico.³³ The Council found in Willock’s favor and ordered Elane Photography to pay attorney’s fees and costs of about \$7,000.³⁴ Elane Photography appealed this decision three times in New Mexico courts, losing every time, and was eventually denied an appeal by the United States Supreme Court on April 7, 2014.³⁵

Elane Photography raised a wide number of defenses to appeal the HRC ruling to three courts. Most importantly for this thesis, they sought strict scrutiny religious freedom protections under the Free Exercise Clause (through a hybrid rights claim involving religious practice and freedom of expression) and under the New Mexico Religious Freedom Restoration Act (NMRFRA). The hybrid rights claim was dismissed at every level. The trial court refused to accept the hybrid rights doctrine at all. It characterized the reference to hybrid rights in *Smith* as

³¹ *Vanessa Willock v. Elane Photography, LLC*, Human Rights Commission of New Mexico HRD No. 06-12-200-685 (2008) at 2.

³² *Ibid.*, 5.

³³ *Ibid.*, 8.

³⁴ *Ibid.*, 19.

³⁵ “*Elane Photography, LLC v. Willock*,” SCOTUSblog, <http://www.scotusblog.com/case-files/cases/elane-photography-llc-v-willock/>.

“in dicta,” noted that the only other Supreme Court mention of hybrid rights was Justice Souter arguing that the concept is incoherent, and traced how other legal scholars and court decisions have rejected hybrid rights as “unclear,” “not binding,” or even “completely illogical.”³⁶ The appellate court glossed similar disputes over hybrid rights and declined to rule on whether or not they are actually applicable to religious freedom law. Regardless, it found that Elane Photography had not established colorable religious freedom claims or free expression claims, and so even if hybrid rights claims were a thing they would not grant strict scrutiny in this case.³⁷ The New Mexico Supreme Court found that Elane Photography did not adequately brief its argument for hybrid rights, and so the court refused to review the claim.³⁸ All three courts also rejected the argument for strict scrutiny from the NMHRA, because the NMHRA does not apply to disputes between two private parties.³⁹ This reduced Elane Photography’s religious freedom arguments to the *Smith*-era protections afforded by the Free Exercise Clause, which failed for reasons considered below.

The second case that I will consider is *Burwell v. Hobby Lobby*. Conestoga Wood Specialties Corporation is a furniture company owned by a Mennonite family, and Hobby Lobby Stores, Inc. is an arts and crafts company owned by a family of evangelical Christians. The two companies were involved in similar cases consolidated under the title *Burwell v. Hobby Lobby*. The Affordable Care Act required specified employers to offer health plans that provide

³⁶ *Elane Photography, LLC v. Vanessa Willock*, CV 2008-06632, slip op. (N.M. Dist. 2009) at 13-14.

³⁷ *Elane Photography, LLC v. Vanessa Willock*, No. 30,203, slip op. (N.M. App. 2012) at 30-32.

³⁸ *Elane Photography, LLC v. Vanessa Willock*, No. 33,687, slip op. (N.M. 2013) at 24-25.

³⁹ *Elane v. Willock* (N.M. 2013) at 25-26; *Elane v. Willock* (N.M. App. 2012) at 35-38; *Elane v. Willock* (N.M. Dist. 2009) at 17.

“preventative care and screenings” for women without “any cost sharing requirements.”⁴⁰ The ACA authorized the Department of Health and Human Services (or HHS) to specify exactly what preventative care must be provided.⁴¹ The HHS requirements included 20 kinds of contraceptives that employers had to provide at no cost to employees, but they allowed non-profit religious employers an exemption. In this case, no-cost contraceptives were still provided to employees, but at no cost to the employees themselves or the religious non-profits that employed them.⁴²

The owners of Hobby Lobby and Conestoga Wood Specialties objected to providing four of the required twenty contraceptives. They believed that the four contraceptives in question could cause an abortion, and thus refused to provide those contraceptives on religious grounds.⁴³ In the consolidated Supreme Court case, *Burwell v. Hobby Lobby*, the companies involved raised a RFRA defense against the contraceptive mandate. The majority opinion accepted the applicability of RFRA, and struck down the contraceptive mandate as applied to closely held, for-profit corporations on that basis.⁴⁴ Applying the strict-scrutiny test, they accepted that the government had a compelling interest in providing no-cost contraceptives to female employees. The Supreme Court majority did not, however, accept that forcing religious employers to subsidize the costs was the least restrictive means to achieve this goal. After all, the government *already* provided contraceptives for employees of non-profit religious corporations without making their employers pay, and it could do the same for employees of for-profit corporations by

⁴⁰ *Coverage of Preventative Health Services* 42 U.S.C §300gg-13(a)(4).

⁴¹ *Ibid.*

⁴² *Burwell, Secretary of Health and Human Services et al. v. Hobby Lobby Stores, Inc. et al.*, No. 13-354 slip op. (U.S. 2013) at 1-2.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 2.

subsidizing the costs itself.⁴⁵ Thus the contraceptive mandate passed the first part of strict scrutiny (pursuing a compelling interest) but failed the second (doing so through the least restrictive means available). This decision was especially controversial because, in order to apply RFRA to the case, the majority had to recognize for-profit businesses as legal persons capable of exercising religion.

Part II: Religion on Trial

At a glance, one might be forgiven for assuming that the different outcomes of *Elane v. Willock* and *Burwell v. Hobby Lobby* are the result of purely statutory distinctions. Hobby Lobby, Mardel, and Conestoga Wood Specialties received protection under the federal RFRA, while Elane Photography's attempt to invoke the New Mexico RFRA failed. That meant that Hobby Lobby *et al.* received stronger religious freedom protections than Elane Photography. The fact that Hobby Lobby *et al.* won and Elane Photography lost then seems to follow as a straightforward consequence of the different legal standards that applied.

As I will demonstrate, this reading does not hold up to a close examination of the court opinions in each case. The *Elane* courts emphasized that even if RFRA-level protections applied, Elane Photography's claim would have still failed. The *Hobby Lobby* decision ended in a 5-4 split, with four justices vehemently asserting that RFRA should not be read to grant religious freedom exemptions to for-profit businesses. The issue at hand is much messier than what law applies. In fact, the central problem was a cultural one as much (or more so) as it was a legal one.

⁴⁵ *Ibid.*, 38-49.

A critical question for each case was whether or not (or to what degree) a general regulation of for-profit businesses can burden business owners' religious practice. How judges answered this question was influenced in large part their understanding of the nature of religiosity itself. The *Elane* courts and the *Hobby Lobby* dissent primarily understood religion's truest, most authentic form to be private and completely distinct from public, commercial activity. By compartmentalizing the religiosity of business owners from the conduct of their for-profit businesses, these courts concluded that regulating the latter has little to no effect on the former. In contrast, the *Hobby Lobby* majority understood the religiosity of business owners as co-extensive with the actions of their companies. By rejecting a compartmentalized understanding of religion, they presented for-profit corporations as direct, authentic religious actors.

The first two court decisions in *Elane v. Willock* demonstrate most clearly that the key issue is not whether RFRA or the Free Exercise Clause is controlling. In each of these cases the court rejected Elane Photography's attempt to invoke the New Mexico RFRA (as well as its attempt to invoke similar scrutiny through a Free Exercise Clause and Free Speech Clause hybrid-rights claim). These courts also considered what would happen if stronger protections hypothetically *did* apply, however. In the lower court, Judge Malott spoke directly to strict scrutiny standards when he wrote that "the [New Mexico Human Rights] Act is the least restrictive means to further the government's interest in eliminating discrimination against certain groups."⁴⁶ Even further,

the "burden" placed on Plaintiff is not clear. Neither Plaintiff nor its owner-operators have been prohibited from practicing their religion or adhering to their

⁴⁶ *Elane v. Willock*, (N.M. Dist. 2009) at 15.

beliefs. At most, they have been directed to respect Defendant Willock’s belief system and religious observation. They are not being asked to participate in the observation or to adopt—or even defend—Defendant’s beliefs. They are merely asked to photograph it, for an agreed fee in the ordinary course of their business.⁴⁷

The Court of Appeals of New Mexico decision echoed this logic, noting that “Elane Photography is not entitled to a heightened scrutiny analysis for its free exercise claim” but that “even if a compelling state interest were required, we agree with the district court that the burden on freedom of religion experienced by Elane Photography is unclear.”⁴⁸ Thus, even if *Elane v. Willock* had been judged by the same legal standard as *Burwell v. Hobby Lobby*, Elane Photography would still have lost.

Importantly, the opinion of these two courts was not that there is a justifiable burden on Elane’s religious freedom. It was that *Elane Photography did not demonstrate any burden at all*. Both found that Elane Photography has failed to demonstrate a clear burden, and Justice Malott even went further to explicitly assert that photographing a same-sex commitment ceremony did not stop Elane Photography or the Huguenins from “practicing their religion or adhering to their beliefs,”⁴⁹ despite the Huguenin’s claims to the contrary. The reasoning behind this takes us to the fundamental question of *Elane v. Willock* and *Burwell v. Hobby Lobby*: what is the authentic domain of religiosity, and how does it relate to for-profit business? For the *Elane* courts, the answer was “personal, non-commercial activity” and “only tenuously and obliquely at best.”

Both the lower and appellate court drew on a distinction made in *Swanner v. Anchorage Equal Rights Commission* to assert that “**Voluntary commercial activity** does not receive the

⁴⁷ Ibid., 14.

⁴⁸ *Elane v. Willock*, (N.M. App. 2012) at 32-33.

⁴⁹ Supra note 47.

same status accorded to **directly religious activity**.”⁵⁰ The assumption here is obvious: commercial activity cannot be directly religious activity. In this model, religiosity exists (primarily, most authentically) in a realm distinct from voluntary commerce, and the latter can only be religious in a pale, indirect sense. If religion only shines through weakly in for-profit businesses, then it follows naturally that the religious freedom protections for such entities should be similarly weakened.

The emphasis on the voluntary nature of commercial activity was also a consistent theme of the *Elane* court opinions. When the lower court quoted *Swanner*, it also included this context:

[Landlord] has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or “Hobson’s choice,” of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. [Landlord] is voluntarily engaging in property management.⁵¹

Swanner concerned a landlord who refused to rent apartments to unmarried couples because of his religious beliefs. The court’s response was simple: if you *choose* to rent out apartments, then you *choose* to follow the relevant regulations. If your religion conflicts with those regulations, then you can *choose* to pursue another career, because nothing in your religion forces you to work in this one. The *Elane* courts presented the same response: when the Huguenins chose to operate a public accommodation, they chose to adhere to the relevant regulations. This was echoed by the New Mexico Court of Appeals decision: “Elane Photography was created as a limited liability company and was organized to do business in New Mexico. Elane Photography

⁵⁰ *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994) at 283, quoted by *Elane v. Willock* (N.M. Dist. 2009) at 16 and *Elane v. Willock* (N.M. App. 2012) at 34; emphasis added.

⁵¹ *Ibid.*

voluntarily entered public commerce and, by doing so, became subject to generally applicable regulations such as the NMHRC.”⁵²

The New Mexico Supreme Court opinion offered a similar response to Elane Photography’s free speech claims:

If a commercial photography business wishes to offer its services to the public, thereby increasing its visibility to potential clients, it will be subject to the anti discrimination provisions of the NMHRA. If a commercial photography business believes that the NMHRA stifles its creativity, it can remain in business, but it can cease to offer its services to the public at large. Elane Photography’s choice to offer its services to the public is a business decision, not a decision about its freedom of speech.⁵³

The same refrain from the previous two courts was repeated here: entering a regulated business is a voluntary choice. Elane Photography’s decision to enter a specific business was not a religiously motivated one (nor, in the case of this example, “a decision about its freedom of speech”), but was instead a voluntary, commercial choice. If the Huguenins disagree with the courts and feel that regulations of their public accommodation infringe upon their religious practice or the expression of their religious beliefs, they are free to close their doors to the public or find another career. Any lurking concerns about potential burdens are assuaged by the voluntary nature of entering a regulated business in the first place.

The decisions of the *Elane* courts thus cannot be reduced to a matter of the Free Exercise Clause offering more paltry protections for religious freedom than RFRA. Both the lower court and the appellate court were explicit that, even judged by RFRA standards, Elane Photography’s claims would fail. Instead, what mattered was their assumptions about the nature of religiosity

⁵² *Elane v. Willock* (N.M. App. 2012) at 33.

⁵³ *Elane v. Willock* (N.M. 2013) at 14.

itself and its relationship to for-profit business. They viewed the primary domain of religion as personal and non-commercial, rendering the actions of a for-profit company only obliquely religious at the most. In compartmentalizing the religiosity of business owners from the actions of their businesses, these courts similarly established that general regulations of a public accommodation could not directly burden the owner's religion. There *might* have been an indirect burden (worthy of less protection than what is perceived to be a direct, authentic expression of religion), but the business owners chose to bear that burden when they chose to open and operate a public accommodation.

Burwell v. Hobby Lobby touched on many other issues, but the fundamental problem was the same. As with *Elane v. Willock*, it raised the question of how religiosity should be properly understood for legal purposes and, more specifically, how it relates to for-profit business. The 5-4 split in the Supreme Court's decision can be understood in terms of two different answers to this question. The dissent, written by Justice Ginsburg, agreed with the *Elane* courts that for-profit businesses and religious agents exist in separate spheres with little to no overlap. The majority opinion, written by Justice Alito, affirmed a radically different perspective on religion.

In the majority opinion, there was no compartmentalization of religious actors from their for-profit businesses (so long as they are closely held). The majority accepted freedom of religion arguments from for-profit corporations because "protecting the free-exercise rights of corporations like Hobby Lobby... protects the religious liberty of the humans who own and control these companies"⁵⁴. In their opinion, "[b]usiness practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the 'exercise of

⁵⁴ *Burwell v. Hobby Lobby* (U.S. 2014) at 18.

religion’ that this Court set out in *Empolyment Div., Dept. of Human Resources of Ore. v. Smith*.⁵⁵ Consider how sharply this departs from the *Elane* courts’ repeated assertion that voluntary, commercial activity is not, and does not enjoy the protections of, directly religious activity. Here there was no devaluation of corporate religiosity, nor was there an assumption that non-commercial activity is somehow more directly or authentically religious than voluntary commerce.

The *Hobby Lobby* majority was well-aware of objections to this understanding of religion. The rulings of lower courts in the case, the Supreme Court dissent, and HHS all presented arguments that *Hobby Lobby et al.* could not receive protection from RFRA because they could not exercise religion. In evaluating and rejecting this position, the *Hobby Lobby* majority made several important moves. First, they noted that “the corporate form alone cannot provide the explanation” as to why *Hobby Lobby et al.* could not be understood as a person exercising religion (and thus entitled to RFRA protections).⁵⁶ A lower court in the *Hobby Lobby* case wrote that “general corporations do not, separate and apart from the actions and belief systems of their individual owners or employees, exercise religion.”⁵⁷ The Supreme Court majority fired back that “All of this is true—but quite beside the point. Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”⁵⁸ The corporation has no agency aside from that of its owners and operators. Critically, the majority saw this as entangling the religious agency of owners (of closely held corporations)

⁵⁵ *Ibid.*, 13.

⁵⁶ *Ibid.*, 20.

⁵⁷ *Burwell v. Hobby Lobby*, 724 F. 3d (3rd Cir. 2014) at 385 quoted by *Burwell v. Hobby Lobby* (U.S. 2014) at 18.

⁵⁸ *Burwell v. Hobby Lobby* (U.S. 2014) at 18-19.

with that of their businesses. This is what motivated their aforementioned argument that applying religious freedom protections to corporate persons is a way of protecting the religious practices of their owners.

Furthermore, both the dissent and HHS acknowledged the fact that non-profit corporations can and do receive RFRA protections. On what basis could the law recognize non-profit corporations as legitimate religious actors entitled to RFRA protections but not for-profit ones? One possible response that the majority considered (and rejected) was an argument offered by the *Elane* courts: for-profit corporations exist to make money, and thus their commercial activity could only be indirectly religious.

Against this argument, Justice Alito first drew on *Braunfeld v. Brown*, a case where Orthodox Jewish merchants in Philadelphia objected to a law mandating that businesses close on Sundays. Here the Supreme Court “entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims.”⁵⁹ While several “lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money,” the *Hobby Lobby* majority flatly rejected this argument as “[flying] in the face of modern corporate law.”⁶⁰ Specifically, “modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.”⁶¹

Justice Alito gave several examples to support this, such as a for-profit corporation that chooses to spend large amounts of money to be environmentally friendly (forgoing potential

⁵⁹ *Ibid.*, 21.

⁶⁰ *Ibid.*, 22-23.

⁶¹ *Ibid.*, 23.

profit in favor of pursuing the goal of sustainability), or corporations that donate substantial amounts of their profits to various charities and humanitarian causes. To his reading, religious goals were not distinguishable from these other aims: “If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.”⁶² Speaking directly to where Hobby Lobby, Mardel, and Conestoga Wood Specialties were founded, Justice Alito wrote “the laws of those states permit for-profit corporations to pursue ‘any lawful purpose’ or ‘act,’ including the pursuit of profit in conformity with the owners’ religious principles.”⁶³

In addition to rejecting the claim that corporate form or profit-seeking disqualify a legal person from RFRA protection, the *Hobby Lobby* majority dismissed another key argument presented by the *Elane* courts. Recall that in *Elane v. Willock*, a consistent theme was the voluntary nature of public commerce. If the Huguenins chose to operate Elane Photography as a public accommodation, then they chose to accept the regulations that apply to public accommodations in New Mexico. If they found these regulations to be unacceptable, then they could either close their doors to the public (operating as a business but not a public accommodation, and thus circumventing the regulations of the New Mexico Human Rights Act), or they could find a different career. In that sense, what was regulated were businesses decisions, not religious beliefs or practices, and any lurking suspicions about religious burdens were assuaged.

⁶² Ibid.

⁶³ Ibid., 25.

The *Hobby Lobby* majority responded to this argument by emphasizing this choice as a unique burden to the religious. The issue came up in response to the HHS' argument that Hobby Lobby *et al.* surrendered RFRA protections by incorporating as a for-profit business: "the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as formal matters, apply only to the companies and not the owners as individuals."⁶⁴ In response, the majority returned to *Braunfeld v. Brown* (the case of Orthodox Jewish merchants objecting to a Philadelphia law on religious freedom grounds):

According to the HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial proaction of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.⁶⁵

Here the logic of choice was presented as a burden itself, not a way to assuage burdens. It is important to acknowledge that the HHS' argument and that presented by the *Elane* courts are not perfectly parallel. The HHS argued that (for-profit) corporations should not receive any religious freedom protections from neutral regulations because of their incorporation. For the *Elane* courts the issue was not whether or not religious freedom protections applied, but whether or not there was a religious burden to seek protection from. However, the same logic that the *Hobby Lobby* majority applies to the HHS' arguments could be applied to the rulings of the *Elane* courts: forcing religious business owners to choose between a beneficial form of operation (legal incorporation, or a public accommodation that can advertise its services to the general population) or stronger religious freedom protections is itself a burden on the religious.

⁶⁴ *Ibid.*, 16.

⁶⁵ *Ibid.*, 17.

The majority opinion of *Hobby Lobby* represented just over half of the Supreme Court. Justice Ginsburg wrote the dissenting opinion, with whom Justice Sotomayor joined. Justices Breyer and Kagan joined with most of the dissent, but stated that they “need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act.”⁶⁶ Justices Ginsburg and Sotomayor had no such reservations. In the section of the dissent that Justices Breyer and Kagan did not join, Justice Ginsburg wrote that “the exercise of religion is characteristic of natural persons, not artificial legal entities.”⁶⁷ This immediately raised the challenge posed by Justice Alito: if non-profit religious corporations can and do successfully seek free exercise protections, how can for-profit religious corporations be distinguished as uniquely unqualified for such protections? Justice Ginsburg responded:

Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations.⁶⁸

This same logic was also why Justice Ginsburg dismisses the examples of goals other than profit that a company can pursue:

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations... Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill.⁶⁹

⁶⁶ *Hobby Lobby v. Burwell*, (U.S. 2014) (Breyer, Kagan, dissenting) at 1.

⁶⁷ *Hobby Lobby v. Burwell*, (U.S. 2014) (Ginsburg, Sotomayor, dissenting) at 14.

⁶⁸ *Ibid.*, 17.

⁶⁹ *Ibid.*, 16.

The critical distinction for Justice Ginsburg was thus the *purpose* and the *people* that different corporations are formed to serve. When a corporation exists to further the religious interests of a homogenous, religious community, it is reasonable to grant it religious freedom protections. A for-profit company, however, exists to make profits and cannot serve a homogenous, religious community (because for-profits are forbidden from exclusively hiring from one religious denomination). Thus a for-profit might choose to use some funds to religious ends, but it does not and cannot exist primarily to serve them. This returns us to the logic of the *Elane* courts articulated through the *Swanner* decision—commercial activity is fundamentally distinct from directly religious activity, and unworthy of equivalent protections.

Justice Ginsburg presented a similar argument in rejecting the majority's use of *Braunfeld v. Brown*. In the section that only Justice Sotomayor joined, Justice Ginsburg noted that the Court raised the question of why a sole proprietorship seeking to make a profit (such as the Orthodox Jewish merchants who objected to Philadelphia's Sunday closure law) could assert a free exercise claim, but an incorporated business like Hobby Lobby could not. Her response was that:

In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.⁷⁰

Again the distinction came down to the *purpose* of the corporation. In this case, the key point was not that for-profit corporations exist to make money rather than to serve a homogenous religious community, but that corporations exist to legally isolate the individual owner from the corporate entity. If Hobby Lobby or Elane Photography are sued, it is the company that is

⁷⁰ *Ibid.*, 19.

responsible, not the individual owners. To say that the owners are compartmentalized from the company in such cases, but coextensive with it when it comes to applying their religious freedom protections to the corporation's actions, is somewhat akin to having one's cake and eating it, too. If incorporation serves to isolate the owner from the business, then that isolation should not be selectively ignored to the owner's benefit.

In summary, the critical issue at stake in both *Elane v. Willock* and *Burwell v. Hobby Lobby* was not whether the Free Exercise Clause or a RFRA (at the state or federal level) controls. The *Elane* courts would not have changed their ruling even if RFRA protections applied, and the *Hobby Lobby* court was fiercely divided over whether or not RFRA protections were sufficient even if they did apply. Instead, the driving question behind the various arguments presented was how religiosity should be understood for the purposes of law and how it relates to for-profit commerce.

For the *Elane* courts, there was a tendency to present authentic, directly religious practice as something inherently distinct from public commerce. This sense of religion exists primarily in the private realm, and if it carries over into one's public business it does so only in a pale, limited, and indirect form. What laws require of a business thus have no direct bearing on the religion of business owners, who are assumed to accept regulations by virtue of voluntarily incorporating a public business. To this view, there is no reason to think that regulating Elane Photography could burden the religion of Elane Huguenin.

A similar view was expressed by Justice Ginsburg's dissent in *Hobby Lobby*. Religious exercise is limited to *natural* persons, not legal ones. A corporate entity that exists to serve the religious interests of a homogenous religious community can receive some free exercise

protections because it is a direct and legitimate extension of the individual community members' religiosity. A for-profit corporation, however, cannot exist to serve the interests of such a religious community. Quite the opposite, it exists to make money and to legally compartmentalize the human owners from the business. As such, a for-profit corporation cannot practice religion, and regulating such a company with neutral laws of general applicability cannot burden religion.

Justice Alito's majority presented a radically different view. Here the religious agency of business owners extends into the businesses themselves, for corporations have no agency apart from that of the humans who own and run them. That means that the policies of a for-profit business can be direct, authentic exercises of religion on the same level as going to church. To that view of religion, it is clearly a burden to make a person choose between running their business in accordance to their religious principles or forfeiting the advantages of for-profit incorporation.

Having considered how each of these opinions *drew from* a particular understanding of what religiosity is, where it belongs, and how it relates to for-profit corporations, I can now move to a consideration of how these opinions played a part in the *constitution and enforcement* specific modes of religiosity, particular domains of religion, and their relationship to public commerce.

Part III: Constitution and Domestication of Religiosity

To understand how these court decisions could constitute particular modes of religiosity rather than merely assuming and endorsing one over another, I turn to Michel Foucault and

Judith Butler. It is common to divide Foucault's work into three periods: early (characterized by works such as *Madness and Civilization*), middle (such as *Discipline and Punish* or *The History of Sexuality vol. 1*), and late (including volumes 2 and 3 of *The History of Sexuality*). The middle and late periods, and especially the transition between the two, are key to my analysis. Foucault's middle work emphasizes how particular kinds of subjectivity are imposed on humans in the context of larger structures of power relations. His late period turns to how subjects can transform themselves in the context of ethical concerns. I am especially interested in Foucault's transition between these two periods, because it is here that he considers how these two ways of constituting subjectivity influence each other. Judith Butler's work is an important elaboration on these perspectives. As I will show, her theories about the performativity of gender can be mapped onto the performativity of religiosity. This provides important nuance for understanding what is at stake in religious freedom jurisprudence. Taken together, these perspectives allow us to understand disputes over religious freedom law as struggles to shape or even create different kinds of religious subjects and different kinds of religions.

In a piece published two years before his death, Foucault explains that the unifying goal of his work "has been to create a history of the different modes by which, in our culture, human beings are made subjects."⁷¹ In the middle period of his work, Foucault accomplishes this by tracing the historical evolution of how normalizing standards and dividing classifications are imposed on individuals. Here bodies of knowledge are created about subjects that posit a normative standard, continually evaluate individuals on the basis of this standard, and classify them based on their conformity to it. A major theme of this work is to show how knowledge

⁷¹ Michel Foucault. "The Subject and Power," in *Power (The Essential Works of Foucault, 1954-1984)*, ed. James D. Faubion (New York: The New Press, 2001), 326.

about humans is not timeless or stable, nor is human subjectivity individual and ahistorical. The normalizing standards imposed on humans, and the classifications that they create, are neither pre-given nor arbitrary; they arise (and change) in particular historical moments as part of a constant interplay between dynamic, complex relations of power.

For example, *Discipline and Punish* considers Europe's relatively quick transition from brutally torturing criminals in public to imprisoning them. Foucault does not present this as the forward march of moral progress or the discovery of a more objectively true understanding of human nature. Instead, he explains it in terms of the rise of *discipline*, a more efficient technique of power "which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility."⁷² Here docility is meant specifically as receptiveness to power and utility as providing some useful function. A soldier might be disciplined to obey orders and maintain specific codes of conduct (docility) and to effectively wield a weapon in a formation with other soldiers that maximizes deadly force (utility). Importantly, discipline works on bodies not just by imposing certain exercises and regulations on them, but by creating knowledge about them. Individuals are judged according to a normative standard (such as what it means to be a good soldier or an upstanding citizen) and classified based on their adherence to or deviance from it (differentiating the upstanding citizen from the criminal). Disciplines regulate minute aspects of conduct that the law ignores (when one wakes up, what one wears, who one speaks to, etc.), and further

⁷² Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 137.

distinguish themselves from laws in that they punish (or reward) an individual for adherence to a normative standard, not for committing a forbidden act.⁷³

For Foucault, the rise of disciplines and their accompanying bodies of knowledge about humans is neither the discovery of an objective, pre-given truth nor an arbitrary event. Instead, it is a response to specific conditions in Europe at a particular historical moment, such as an increasingly large floating population in the 18th century and the rapid increase in the scale and complexity of economic production.⁷⁴ The entire range of historical causes that Foucault posits is tangential to this argument; what is important is that particular ways of understanding human subjects (and imposing these classifications onto individuals as a technique of power) emerge in response to broader historical and social conditions. Furthermore, the bodies of knowledge constituted about subjects and the relations of power that subjugate them become mutually reinforcing:

First the hospital, then the school, then, later, the workshop were not simply 'reordered' by the disciplines; they became, thanks to them, apparatuses such that any mechanism of objectification could be used in them as an instrument of subjection, and any growth of power could give rise in them to possible branches of knowledge; it was this link, proper to the technological systems, that made possible within the disciplinary element the formation of clinical medicine, psychiatry, child psychology, educational psychology, the rationalization of labour.⁷⁵

As institutions increasingly adopt the model of disciplining subjects by imposing normative standards on them, they increasingly give birth to bodies of knowledge regarding the classification of people. These bodies of knowledge, in turn, reinforce the power of disciplinary

⁷³ Ibid., 178-9.

⁷⁴ Ibid., 218.

⁷⁵ Ibid., 224.

practices and institutions. This does not mean that the knowledges in question are flat-out false, or only true in a facilely relative sense, but that their particular perspectives and classificatory schema are shaped by (and shape in turn) the relations of power running through society.

Foucault's emphasis on the relationship between imposed forms of subjectivity and power is part of another major theme of his middle-period work: the move beyond a limited conception of power. Sometimes this limited conception is called "juridical" (because it is modeled on a sense of the law *qua* forbiddance; power as a rule that prohibits) and sometimes it is called juridico-discursive (because it is often associated with the authoritative statements of a sovereign who has the right to declare something forbidden). In *The History of Sexuality vol. 1*, Foucault describes this (insufficient) sense of power as:

It is defined in a strangely restrictive way, in that, to begin with, this power is poor in resources, sparing of its methods, monotonous in the tactics it utilizes, incapable of invention, and seemingly doomed always to repeat itself. Further, it is a power that only has the force of the negative on its side, a power to say no; in no condition to produce, capable only of positing limits, it is basically anti-energy. This is the paradox of its effectiveness: it is incapable of doing anything, except to render what it dominates incapable of doing anything either, except for what this power allows it to do. And finally, it is a power whose model is essentially juridical, centered on nothing more than the statement of the law and the operation of taboos. All the models of domination, submission, and subjugation are ultimately reduced to an effect of obedience.⁷⁶

This form of sovereign power is characterized by *prélèvement* (deduction, withdrawal, or taking, which in French is often used in the context of taxes or levies), and draws its model from the king who forbids. In Foucault's reading of history it precedes the widespread emergence of

⁷⁶ Michel Foucault, *The History of Sexuality Vol. 1: An Introduction*, trans. Robert Hurley (New York: Vintage, 1990), 85.

techniques of power that are normalizing and constructive in Europe. Juridico-discursive power acts solely as a top-down negation or a prohibition, a static rule of refusal and nothing more.⁷⁷

It is important to note that while the term “juridico-discursive,” references the model of law, Foucault’s point is not that all laws operate in this top-down, negative manner. He admits that it was a “confused” mistake in his prior work to have sometimes used “repression” and “law” as “equivalent notions.”⁷⁸ In fact, Foucault even cites the law as an example of what he means by “power” (in a non-juridico-discursive sense), explaining that “power must be understood” in terms of different force relations at the most basic levels of society, how they interact with each other, how when they support each other they form “a chain or a system” (as well as how they can undermine each other to dismantle such systems), and finally, “as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formation of the law, in the various social hegemonies.”⁷⁹ Foucault does not exclude law from his sense of power. He simply demands that we see it as more than mere *prélèvement* or forbiddance, and that we recognize it as one stratum in a complicated and dynamic field of power relations.

This provides us with the first key step towards understanding religious freedom jurisprudence as a struggle to constitute different kinds of religious subjects and different kinds of religiosity. While the model of discipline is generally not applicable to these cases in a rigorous or straightforward sense, the broader sense of normalizing power is (a fact that actually fits the narrative of *Discipline and Punish*, in which the normalizing techniques of enclosed

⁷⁷ Ibid., 87-91.

⁷⁸ Ibid., 82.

⁷⁹ Ibid., 92-93.

institutions gradually migrate to the larger society).⁸⁰ As shown above, the decisions in *Elane* and *Hobby Lobby* both rested in large part on what models of religion and religious subjectivity are endorsed for purposes of law. In that sense, a ruling in favor of one party or another was also a ruling in favor of one normative model of religiosity over another. Understandings of what religion is and legal authority over how religion is practiced become mutually reinforcing. Religious freedom jurisprudence constructs a body of knowledge regarding how religion should be normatively understood for legal purposes, and this knowledge in turn guides whether or not subsequent court cases will authorize specific religious liberty claims.

In the model of power that Foucault does suggest, however, this is not a homogenous process or one that necessarily moves in a single, self-reinforcing direction. Different levels of activity, from individual actions to patterns of social and communal organization continually shift and reinforce, undermine, or modify each other, and legal formations represent the macro-level, “institutional crystallization” of various strategies that have reinforced each other.⁸¹ United States jurisprudence is thus not a homogenous picture of the one model of religion enshrined and enforced by the courts. Instead, we see multiple levels of society (including individual religious and non-religious people, religious groups, local and state and federal governments, businesses, economic markets, different court circuits, etc.) engaging in strategic contestations and negotiations, supporting and undermining each other in the pursuit of their own goals. At times different strands of these power relations interlock to form resilient structures with lasting influence, but there is always heterogeneity, resistance, and contestation.

⁸⁰ Michel Foucault, *Discipline and Punish*, 293-309.

⁸¹ *Supra* note 79.

Acknowledging the complexity of the situation and the variety of potential actors and alliances means that we have to push our analysis further. It is insufficient to describe religious freedom jurisprudence merely as the imposition of a particular normative standard, even if we nuance our assertions to acknowledge that there is some debate over which normative standard should be enforced. For one, the courts do not directly insist that religiosity is this and not that, nor do they directly demand that the losing parties amend their religious subjectivity. No one told the Huguenins that they could not or should not understand their Christianity to proscribe photographing a same-sex commitment ceremony. Instead, the courts told them that the only legal way to enact this interpretation was to get out of the public photography business. This raises the second issue. The religious are not merely passive objects sculpted by an external, judicial will; they are individuals who exercise an agency of their own. They are not purely atomistic individuals acting on purely self-originating desires and beliefs, and the ways in which they navigate their subjectivity are both conditioned and constrained, but they still have a say in what they do and how they think.

To address these concerns, I first turn to Foucault's later work (and especially the period of transition into it). A pair of lectures that Foucault gave at Dartmouth College in 1980, published together as "About the Beginning of the Hermeneutics of the Self" is a helpful start. Drawing from Habermas, he describes three kinds of "major types of techniques in human societies... techniques of production, techniques of signification, and techniques of domination."⁸² The last of these broadly includes "techniques which permit one to determine the

⁸² Michel, Foucault, "About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth." *Political Theory* 21, no. 2 (1993): 203.

conduct of individuals, to impose certain wills on them, and to submit them to certain ends or objectives.”⁸³ To this list, Foucault adds a fourth, “techniques or technology of the self” that:

permit individuals to effect, by their own means, a certain number of operations on their own bodies, on their own souls, on their own thoughts, on their own conduct, and this in a manner to transform themselves, modify themselves, and to attain a certain state of perfection, of happiness, of purity, of supernatural power, and so on.⁸⁴

Foucault explains that he has “been obliged to change my mind on several important points,” namely that:

I think that if one wants to analyze the genealogy of the subject in Western civilization, he has to take into account not only techniques of domination but also techniques of the self. Let’s say: he has to take into account the interaction between those two types of techniques—techniques of domination and techniques of the self. He has to take into account the points where the technologies of domination of individuals over one another have recourse to processes by which the individual acts upon himself. And, conversely, he has to take into account the points where the techniques of the self are integrated into structures of coercion or domination. The contact point, where [how] the individuals are driven and known by others is tied to the way they conduct themselves and know themselves, is what we can call, I think, government. Governing people, in the broad meaning of the word, governing people is not a way to force people to do what the governor wants; it is always a versatile equilibrium, with complementarity and conflicts between techniques which assure coercion and processes through which the self is constructed or modified by himself.

When I was studying asylums, prisons, and so on, I insisted, I think, too much on the techniques of domination... We must not understand the exercise of power as pure violence or strict coercion. Power consists in complex relations: these relations involve a set of rational techniques, and the efficiency of those techniques is due to a subtle integration of coercion-technologies and self-technologies.⁸⁵

This shift to what Foucault would later term “governmentality” marks the integration of his middle-period focus on imposed norms as a technique of power and his late-period focus on how

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid. 203-204.

individuals constitute themselves according to their own beliefs, values, and ethics. The reason that governing (in the broadest sense) links these two themes is his particular understanding of *assujettissement*, or “subjection.”⁸⁶

Foucault presents a more developed understanding of subjection two years after the Dartmouth lectures in “The Subject and Power.” Foucault emphasizes two meanings of the word “subject” here: “subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power that subjugates and makes subject to.”⁸⁷ Subjection is thus a “form of power that... categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him that he must recognize and others have to recognize in him.”⁸⁸ Subjection both creates a particular understanding of the subject and, in doing so, implicates the subject in relations of power. How individuals relate to themselves and others is affected by the particular ways that they are understood as subjects (and vice-versa).

This is why governing in its broadest sense serves as the contact point between coercion-technologies and self-technologies.⁸⁹ Subjection is both a coercion-technology (as shown in Foucault’s middle work) and a self-technology (as he addresses in his late work). Government encompasses both of these senses of subjection. Government as a coercion-technology refers to the various power relations that try to manage the behavior of individuals and populations

⁸⁶ Foucault develops his own neologism, “subjectivation” in both English and French to denote this particular sense of subjection. This change does not occur until late in his career, however; in his earlier works he uses the term *assujettissement* or, rarely, *sujétion*. I have followed Mark G.E. Kelley in translating both terms as “subjection.” See Mark Kelley, *The Political Philosophy of Michel Foucault* (New York: Routledge 2009): 87-89 for a more thorough discussion of the different translations and their implications.

⁸⁷ Michel Foucault, *The Subject and Power*, 331.

⁸⁸ Ibid.

⁸⁹ Supra note 85.

through subtle influences, not juridico-discursive *prélèvement*. That includes subjection in the form of things like discipline or other normalizing practices. Foucault also uses government to refer to government of the self (a matter of serious ethical concern in his reading of Greek and Roman culture), where it serves as a self-technology.⁹⁰ As he argued in “Hermeneutics of the Self,” subjectivity is not merely something imposed from without, but also something that one can shape for oneself.⁹¹

Government (and specifically subjection) is also the point of contact because between self-technologies and coercion-technologies because it encompasses the ways in which each technology reacts to, incorporates, influences, or modifies the others. This recalls Foucault’s emphasis on “the points where the technologies of domination of individuals over one another have recourse to processes by which the individual acts upon himself” and on those “where the techniques of the self are integrated into structures of coercion or domination.”⁹² Self-technologies and coercion-technologies are not independent processes united by government only insofar as government can be defined broadly enough to include both senses of subjection. The two techniques are deeply interwoven at the point of individual subjection, where they can be used to reinforce or undermine each other. As such, government is not merely a point of *contact*; it is often a site of conflict and contestation where strategies of coercion and strategies of self-constitution compete over the nature of the subject.

⁹⁰ Michel Foucault, *The History of Sexuality Vol. 2: The Use of Pleasure*, trans. Robert Hurley (New York: Vintage, 1990).

⁹¹ Supra note 84.

⁹² Supra note 85.

This resolves one of the two concerns raised above with an attempt to understand *Elane* and *Hobby Lobby* solely in terms of Foucault's middle work: that it does not account for the agency of the religious subjects themselves. A model of subjection as both a way that individuals can shape themselves and a way that they can be externally shaped provides a space to acknowledge the agency of religious subjects in relation to coercive impositions of legal regimes. This still leaves the other concern, however: justices may assume a particular model of religiosity for the purposes of law, and their decisions may favor some conceptions of religiosity over others, but this still does not show how their decisions *actively constitute* particular modes of religiosity or particular religious subjects. Foucault gives us a model for how external coercion and self-transformation can meet in the subject, but not necessarily an understanding of how legally *proscribing* certain activities for businesses can serve as a *prescription* of subject identity or proper religiosity. For this final piece of my argument, I turn to Judith Butler.

In expanding Foucault's arguments about subjection in general to the specific question of sex and gender in a feminist context, Butler offers the critical contribution of *performativity*. Early in her career, Butler explains that "[g]ender reality is performative which means, quite simply, that it is real only to the extent that it is performed."⁹³ Instead of viewing gender as a pre-given truth that is expressed or represented through gendered actions, she argues that the behaviors are ontologically prior to the genders that they are taken to represent. Gender is then not *represented* by actions, but instead *constituted* by them:

If gender attributes, however, are not expressive but performative, then these attributes effectively constitute the identity they are said to express or reveal. The distinction between expression and performativeness is quite crucial, for if gender

⁹³ Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory," *Theater Journal* 40, No. 4 (1988): 527.

attributes and acts, the various ways in which a body shows or produces cultural signification, are performative, then there is no preexisting identity which by an act or attribute might be measured; there would be no true or false, real or distorted acts of gender, and the postulation of a true gender identity would be revealed as a regulatory fiction.⁹⁴

Writing in an explicitly feminist context, Butler is especially concerned with how the performance of gender is regulated. When the performance of gender is regulated (by social norms dictating that men and women behave in certain ways, by the threat of violence or harassment for those who do not conform to prescriptive gender roles, etc.), then the possible range of genders that can be constituted is narrowed, often at the expense of those who fall at the margins or outside of these narrow, normative constructs (transfolk, intersex persons, and a wide variety of other gender and sexual minorities, for example).

Importantly, Butler's conception of performativity does not imply disingenuousness or that the performed identities are fake, artificial, or purely arbitrary. Some critics have misread her on this point, suggesting, for example, that her views on gender undermine or dismiss the experiences of trans people. In response, Butler has explained that she does *not* view "gender as a 'choice' rather than as an essential and firmly fixed sense of self," nor does she believe that "what trans people feel about what their gender is, and should be, is itself 'constructed' and, therefore, not real."⁹⁵ The feelings of gender identity experienced by trans people are real and not merely an imposition of social norms; what Butler instead views as constructed and imposed are the terms by which one could navigate these identities. For some people the terms available work adequately, while others find that the imposed gender assignments do not match their (very real)

⁹⁴ Ibid., 528.

⁹⁵ Judith Butler, interview by Christian Williams, *The TransAdvocate*, last update May 1, 2014, http://www.transadvocate.com/gender-performance-the-transadvocate-interviews-judith-butler_n_13652.htm.

feelings of identity, so they have to modify or reject the terms given to more to “[open] the way for a more radical form of self-determination, one that happens in solidarity with others who are undergoing a similar struggle.”⁹⁶ The *identity* of gender is not pre-existing, but is instead constituted by its ongoing performance, but this does not imply that the *feelings* which incline one to map their identity onto a particular gender (or reject the available gendered schema to create a new one that better reflects their self-determination) are fake, arbitrary, or purely a product of social imposition.

In *Gender Trouble* Butler expands this argument to sex as well as gender and begins to sketch out options for resistance. Her Foucauldian background makes her skeptical of the possibility of simply stepping outside of power relations, and so she tries to work within the structures that constitute sex/gender as a means of destabilizing them. Butler’s response here is largely in terms of disruptive performance: if gender is constituted only by its consistent, ongoing performance according to certain norms, then “the very multiplicity of their construction holds out the possibility of a disruption of their univocal posturing.”⁹⁷ That is to say that sex/gender can be performed disruptively, such as by cross-dressing, expressing same sex affections, or otherwise breaking gender norms in a visible manner which illustrates that they only exist to the extent that they are performed. These disruptions challenge the assumed normativity and coherence of sex/gender and undermine dominant conceptions of gender. The fact that an identity is constituted through performance does not imply that one’s *affinity* with that identity is performative as well.

⁹⁶ Ibid.

⁹⁷ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990): 32.

The argument of performativity is readily exportable to other aspects of identity, namely religion. Without speculating on the truth or falsehood of religious beliefs about reality, we can say that the truth of a religion's existence as one thing or another (ie: "Christianity is a distinct religion from Judaism" or "Islam is based on the beliefs expressed by the *Shahada*") is only true insofar as it is performed as such. This statement should hardly be controversial within the increasingly anti-essentialist context of religious studies. It's a common approach that allows us to understand shifts in religions (such as the parting of the ways, in which Christianity transformed from a Jewish sect to a distinct religion) and the diversity with which specific religions manifest (such as competing claims over what "true" Islam is and what relation it should have to law and government). A performative perspective avoids positing, in Butler's words, "true or false, real or distorted" version of Christianity or Islam, avoiding "a univocal posturing" in favor of understanding how different practices in specific contexts constitute religions multivocally.⁹⁸ When Christians speak and act as if they are a Jewish sect, then they constitute Christianity as a Jewish sect. When Christians speak and act as if they are distinct religious group, then they constitute Christianity as such. This means that, given the wide range of different religious performances, any one religion is simultaneously constituted in different ways by different individuals and groups (ergo its multivocality).

This provides the missing link for the argument at hand. By regulating the possible *performances* of religion, courts regulate its *constitution*. Recall how the *Sherbert* court argued that denying the appellant unemployment benefits for refusing to accept work on Saturday burdened her religious freedom because "the pressure upon her to forego that practice is

⁹⁸ Supra notes 94 and 97.

unmistakable.”⁹⁹ This is precisely what Foucault is getting at with his broad concept of government, which “is not a way to force people to do what the governor wants,” but instead “is always a versatile equilibrium, with complementarity and conflicts between techniques which assure coercion and processes through which the self is constructed or modified by himself.”¹⁰⁰ In *Sherbert*, the South Carolina employment law does not *force* anyone to forego a Saturday sabbath. It does, however, *pressure* them to do so by penalizing a Saturday sabbath (or, approached from the other direction, rewarding a Sunday sabbath).

If we understand religiosity as performative, then we can see how pressuring individuals to perform their religion in a specific way is pressuring them to constitute it in a specific way. Telling Elane Photography that there is no clear religious burden (for legal purposes, at least) in demanding that it photograph a same-sex commitment ceremony does not *force* the Huguenins to accept a particular interpretation of Christianity. It does force the Huguenins to choose between the economic advantages of running a public accommodation and the freedom to refuse to service same-sex weddings, however. This, in turn, *pressures* them to interpret their religion in a way that permits taking such jobs. If they do not, they can stay true to their beliefs but will suffer an economic penalty. The same problem appears in the “difficult choice” that the *Hobby Lobby* majority saw in the HHS’ insistence that a for-profit corporation cannot raise religious freedom defenses: business owners must choose between the religious benefits of staying unincorporated or the economic benefits of incorporation.¹⁰¹ Protecting or penalizing specific modes of

⁹⁹ Supra note 13.

¹⁰⁰ Supra note 85.

¹⁰¹ Supra note 65.

religiosity encourages the performance, and thus constitution, of some senses of religion over others.

This positions the legal recognition of religious freedom as a force of domestication. By this I mean that the law encourages forms of religion that do not disrupt secular governance, and conversely discourages those forms of religion which are disruptive. Even if court decisions do not acknowledge themselves as *constituting* or *shaping* forms of religion, they often recognize themselves as *tolerating* or *protecting* more domesticated forms of religion. Consider the arguments raised in *Reynolds* and *Smith* that some forms of religion cannot be offered legal protection without threatening fundamental aspects of United States society like democracy or rule of law.¹⁰² While some of these arguments, such as the *Reynolds* court's suspicion of polygamy, might rely more on ethnic or national prejudice than a sober assessment of genuine threats, the fact remains that this is a legitimate concern to have.

There is both a pragmatic question and a moral one here: how much religious freedom is just, and how much religious freedom can the legal, political, and social structure of the United States actually sustain? Religions or modes of religiosity that are too "wild" cannot be accommodated by law. Deprived of legal protection, these modes of religiosity are pressured, but not necessarily forced, to either be re-performed in a more domesticated way (ie: the Huguenins of Elane Photography start photographing same-sex weddings despite their religious objections) or to simply be abandoned. As the shifts in religious freedom protections from *Reynolds* to *Hobby Lobby* demonstrate, however, there is no clear consensus on where the line between "domesticated enough" and "too wild" is to be drawn. It is also important to recognize the

¹⁰² Supra notes 5-7 and 19.

substantial difference between a religion that is merely perceived to be too wild for accommodation and a religion that genuinely cannot be accommodated. Labeling a foreign or unpopular view fundamentally incompatible with society has been a convenient way to avoid having to accommodate it throughout the history of religious freedom jurisprudence.

A corresponding set of issues emerge for the religious. As illustrated earlier in this section, they are not passive recipients of legal subjection, but active agents in their own self-constitution. This dynamic has been explored in particular depth by Saba Mahmood, who is similarly influenced by both Foucault's middle-to-late period work and Judith Butler's theories of performativity. Following Foucault's late-period turn to the self-constitution of the subject as an ethical problem for Ancient Greece, Mahmood emphasizes an Aristotelian notion of morality wherein "morality was both realized through, and manifest in, outward behavioral norms."¹⁰³ In this sense of "positive ethics," seen by Mahmood in the work of Aristotle as well as in Foucault's return to similar Ancient Greek thought, people perform certain disciplined actions with the intent of transforming themselves into ethical subjects.¹⁰⁴

Mahmood also draws heavily on Judith Butler's conception of performativity, but her own feminist project in *Politics of Piety* is specifically directed at the practices of Muslim women who seek to sculpt or constitute themselves as ethical subjects. This leads to an important point of contrast: Butler emphasizes agency in terms of *disrupting* or *rejecting* or *re-signifying* norms (such as a drag queen whose performance of gender parodies certain gender roles and undermines their claim to naturalness), while Mahmood's informants are expressing agency by

¹⁰³ Sabah Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005), 25.

¹⁰⁴ *Ibid.*, 25-29.

submitting to, reinforcing, and maintaining norms of subjectivity and conduct.¹⁰⁵ The salience to the issues at hand should be obvious. The law is confronted with the moral and political/pragmatic problem of how much religious freedom can be granted and how much religion must be domesticated. The religious, who are also agents in shaping their subjectivity, are faced with a corresponding moral and pragmatic problem. They must perform their religion and constitute themselves as religious subjects in ways that both honor their religious/moral commitments and are compatible with their larger legal, political, and social context.

Conclusions: Narrative and Critique

Demonstrating that religious freedom jurisprudence actively helps to constitute the religiosity that it regulates is important because it expands the range of problems to be considered. Even if we merely claim that the law burdens some forms of religions more than others, there are still important issues to consider, however. The fact that generally applicable laws will incidentally burden some religions more than others raises a conflict between two notions of legal equality. On the one hand there is equality *qua* laws applying equally to all people regardless of their religion, which consequently means that certain laws will burden some religions more than others. On the other hand there is equality *qua* preventing these unequal burdens by extending religious freedom exemptions to general laws, which requires treating people differently based on their religious status. How these competing concerns are balanced for the purposes of legally regulated acts (and refusals to act) has wide-ranging consequences for both religious actors and those who their actions might affect. This raises both a moral problem

¹⁰⁵ Ibid., 163-165.

(what sense of religious liberty and egalitarianism *should* we endorse when protecting or forbidding religiously motivated actions?) and a pragmatic, governmental one (what forms of religiously motivated action *are possible to accommodate* within a given society's legal, social, and political structure?). These problems are both important, but they are limited to the management of actions understood strictly in terms of *prélèvement*. What actions can be allowed, and what actions must be forbidden?

The more robust claim that struggles over religious freedom jurisprudence help to constitute religions and modes of religious subjectivity expands the issue beyond a focus on permissible actions. Religions, understandings of religion, and ways of being religious become moral and pragmatic problems for government of the self and of others. Furthermore, the stakes are raised. Rather than merely penalizing or discouraging some forms of religiosity, disputes over religious freedom jurisprudence can also be seen as actively encouraging, reinforcing, and shaping other forms of religiosity. Government is not totally deterministic in any of its forms, and so this process influences the constitution of religiosity rather than controlling it, but the new dimension is still an important one to consider. In cases like *Hobby Lobby* and *Elane*, the fundamental problem was government of religiosity itself, not just the specific actions that it might motivate. The consequences of how that problem is addressed affect not just actions, but the forms of religiosity that flourish or decline in the United States.

The first level of problems, those following from merely considering the regulation of religiously motivated *actions*, is taken up insightfully by Winnifred Fallers Sullivan's article on *Burwell v. Hobby Lobby* published on the blog *The Immanent Frame*. The article, "The Impossibility of Religious Freedom," shares the title of her 2005 book dealing with similar legal

issues. The core of Sullivan’s argument in both works is that “the Religion that is protected in constitutions and human rights law under liberal political theory, is... a modern invention, an invention designed to separate good religion from bad religion, orthodoxy from heresy—an invention whose legal and political use has arguably reached the end of its useful life.”¹⁰⁶ She traces this problem throughout the history of religious freedom jurisprudence in the United States, referencing *Reynolds* and *Smith* in connection to *Hobby Lobby*:

The need to delimit what counts as protected religion is a need that is, of course, inherent in any legal regime that purports to protect all sincere religious persons, while insisting on the legal system’s right to deny that protection to those it deems uncivilized, or insufficiently liberal, whether they be polygamist Mormons, Native American peyote users, or conservative Christians with a gendered theology and politics. Such distinctions cannot be made on any principled basis.¹⁰⁷

Sullivan sees two key reasons for the impossibility of making such legal distinctions on a principled basis. First, there is the lack of a “shared understanding” concerning what sense of religion is protected by law.¹⁰⁸ In *Hobby Lobby*, this is clearly illustrated by the fact that both the majority and dissent affirmed their commitment to religious liberty, but critically disagreed over “what counts as an exercise of religion.”¹⁰⁹ Second, there is “no neutral place from which to distinguish” it.¹¹⁰ This is especially true when different understandings of what religion is are provided by religious groups. As her book of the same title asks, how can courts rule that one

¹⁰⁶ Winnifred Fallers Sullivan, “The Impossibility of Religious Freedom,” *The Immanent Frame* (2014), <http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom/>.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

religious group's understanding of religiosity is legally recognized and protected but not another's "without setting up a legal hierarchy of religious orthodoxy?"¹¹¹

In the article Sullivan writes specifically to liberals who support the *Hobby Lobby* dissent, arguing that the opinion establishes such a legal hierarchy without any defensible basis. As an example, she rebuffs Justice Ginsburg's assertion that religious organizations exist to serve the interests of a homogenous community of believers (the key argument that allowed Ginsburg to distinguish between non-profit religious organizations that can be legally said to exercise religion and for-profit religious corporations that cannot):

As with the other justices in this case and others, her Delphic pronouncements about religion seem to come from the ether. How does she know this? Few who study religion would agree with this statement. Religious organizations, if indeed such a set can be rationally collected, exist for a wide range of purposes and consist of and cater to a diverse group of people.¹¹²

This problem does not stem from justices such as Ginsburg, however, but is a fundamental flaw of religious freedom legislation "under which courts would necessarily have to do the impossible, that is distinguish an exercise of religion, necessarily dividing good religion from bad religion, all the while denying that that was what they were doing."¹¹³

In both the book and the article, Sullivan concludes that the necessary solution is to drop the category of religion from law entirely. In her book, she explains that without constitutional protections for religious freedom, "religious persons and communities would, like other groups asserting difference, have to make arguments for the special legal accommodation of difference

¹¹¹ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005) 3.

¹¹² Winnifred Fallers Sullivan, "The Impossibility of Religious Freedom."

¹¹³ Ibid.

to legislative bodies,” and “[g]overnment favoritism (or endorsement) could be prevented by vigorous insistence on principles of equality, as is happening now in the case of gay marriage.”¹¹⁴

In the article, she cites Clifford Geertz’s claim that the question for humans is “not whether everything is going to come seamlessly together,” but “whether human beings are going to be able . . . to imagine principled lives they can practicably lead.”¹¹⁵ Sullivan concludes that religion should be removed as a category of jurisprudence because “Judges cannot do this work.”¹¹⁶

By removing religion as a basis for legal protection, Sullivan’s proposal does sidestep establishment concerns. The core problem, however, still remains: marginalized or unpopular religious groups seeking protection from unequal treatment by the government or social majority must appeal to the government and social majority for protection. Furthermore, they must do so using shared concepts whose legal interpretation is dictated by the government and heavily influenced by social majorities. Whether the question is phrased as “what forms of religion does the law recognize and protect?” or “what ‘principles of equality’ does the law recognize and protect?” the problem is the same: the unpopular or minority positions most likely to need protection are also the ones most likely to be defined out of the protectable category.

Sullivan’s analysis is also limited to the model of *prélèvement* and favoritism. Her argument comfortably fits within the paradigm of jurisprudence favoring some forms of religion over others as it manages permissible actions. It addresses how particular conceptions of religion influence judges, and how their decisions burden some religions or forbid some actions over others as a result, but not how the legal constraints on religious practice might in turn affect the

¹¹⁴ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, 149.

¹¹⁵ Winnifred Fallers Sullivan, “The Impossibility of Religious Freedom.”

¹¹⁶ *Ibid.*

ways in which religion is conceived and constituted. The closest that Sullivan comes to making the *constitution* of religion, not merely the regulation of religious acts, a problem for political and moral thought is her allusion to Geertz at the end of her *Immanent Frame* article. Here the struggle “to imagine principled lives they can practicably lead” hints at the pragmatic problem of developing a workable sense of religious subjectivity, but Sullivan explicitly excludes judges as participants in this process.¹¹⁷ In doing so, however, she neglects to address the fact that (whether using the language of legally recognized forms of religion or that of legally recognized forms of equality) judges will necessarily be affecting what sorts of principled lives (religious or otherwise) people can practicably lead.

This is where the importance of framing the issue in terms of the *constitution* of religiosity, not merely favoritism of some religions or regulation of religious acts, is critical. By understanding religiosity and religions as performative, we do not lose sight of how the law helps to constitute them regardless of whether or not it uses the language of religion. Here I draw on a sense of criticism developed by Foucault. Early inklings of this sense of criticism can be found in “About the Beginning of the Hermeneutics of the Self,” the Foucault lecture considered earlier in this essay that begins to address the question of how subjection *qua* coercion-technology and subjection *qua* self-technology meet in government. After exploring various attempts in Western culture to identify the positive foundations of the self, he suggests that:

Maybe the problem of the self is not to discover what it is in its positivity, maybe the problem is not to discover a positive self or the positive foundation of the self. Maybe our problem is now to discover that the self is nothing else than the historical correlation of the technology built into our history. Maybe our problem is to change those technologies. And in this case, one of the main political

¹¹⁷ Supra note 1116.

problems would be nowadays, in the strict sense of the word, the politics of ourselves.¹¹⁸

Foucault picks this line of thought up in more detail in an interview given less than a year later. When asked if he intends to shift from reform to criticism as “the reproach was often made that the criticism made by intellectuals leads to nothing,” Foucault responds in part by emphasizing the necessity of a particular form of critique to any genuine or lasting reform.¹¹⁹ In this sense,

critique is not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest...

Criticism is a matter of flushing out that thought and trying to change it: to show that things are not as self-evident as one believed, to see that what is accepted as self-evident will no longer be accepted as such. Practicing criticism is a matter of making facile gestures difficult.¹²⁰

This sense of critique is crucial for reform because “[a] transformation that remains within the same mode of thought... can merely be a superficial transformation” while “as soon as one can no longer think things as one formerly thought them, transformation becomes both very urgent, very difficult, and quite possible.”¹²¹

This is precisely what Sullivan sets out to do in both the article and the book “The Impossibility of Religious Freedom.” The facile gestures she seeks to make difficult are legal appeals to religion and religious liberty as some pre-given, neutral, assumed thing that judges could easily and uniformly identify. She does this by showing how our legal practices, extending

¹¹⁸ Michel Foucault, “About the Beginning of the Hermeneutics of the Self,” 222-223.

¹¹⁹ Michel Foucault, “Practicing Criticism,” in *Michel Foucault: Politics, Philosophy, Culture*, ed. Lawrence D. Kritzman (New York: Routledge, 1988), 154.

¹²⁰ *Ibid.*, 154-155.

¹²¹ *Ibid.*, 155.

protection to some exercises of religion but not others, rest on particular assumptions about what religion is. By turning the focus to these specific assumptions (and their dubious justifications), she raises a political problem that is otherwise glossed over. Once we consider the particular assumptions that are being made about religion rather than simply assuming that it is a familiar and neutral category, then we must evaluate the consequences of our particular assumptions and their alternatives. This is where, in the language of Foucault, real transformation becomes urgent, difficult, and possible.

My analysis of *Elane* and *Hobby Lobby* is rooted in the same critical approach. My goal in demonstrating how different understandings of religion affected the outcome of each cases is to make the legal conceptualization of religion a problem for political and moral thought. Here I follow Sullivan in highlighting the uneven and inconsistent ways that religion is identified in law to make these identifications themselves a problem whose answer must be justified rather than assumed. As explained above, I break with her proposed solution to simply remove the category of religion from law. While I am not necessarily opposed to a legal shift away from religious protections and towards a broader sense of protections for freedom of conscience and equality, the two main problems exist regardless of the particular language of protections.

First, the sense of religion or conscience that is protected by law will necessarily include limitations and produce uneven burdens. The pragmatic and moral need for constraints on human action, as well as the fact that a uniform constraint can unevenly burden some religious commitments more than others, means that any particular conception of legally protected religion (or equality) will contain limitations that especially burden some religious subjects. Marginalized subjects excluded from protection will still have to appeal to majoritarian

perspectives on what forms of religion or equality are legitimately worthy of legal protection. Sullivan proposes a means by which individuals and communities can petition for greater protection: through the legislature under the broad principle of equality. There is no reason, however, to believe that majoritarian conceptions of equality will be more easy to overcome than majoritarian conceptions of religion, making it unclear that Sullivan's proposal would alleviate this problem.

Second, there is the problem that Sullivan does not consider—not merely negative penalties on certain kinds of religious subjects or performances of religion, but the positive constitution or shaping of particular modes of religiosity.¹²² Sullivan's article on *Hobby Lobby* ends by asserting that judges have no role in the imagining of workable, moral principles to live by. Her aim in removing the category of religion from law is precisely to get them out of this processes. The work of Foucault and Butler, however, highlights the fact that judicial constraints on behavior do more than simply discourage or forbid certain ways of doing; they encourage and actively help shape certain ways of doing, thinking, and being. Whether or not it uses the language of religion, the law (and its interpretation by various judges) is a positive force in the constitution of human subjectivity, ethical, religious, and otherwise.

Sullivan applies critique to the legal concept of religion, exposes it as contested, non-neutral, and complicit in uneven exercises of power, and concludes that as a result we should abandon the concept. I, being skeptical of a more neutral alternative to displace the problem

¹²² Jakob De Roover directly addresses Sullivan's work and introduces the concern of how legally protecting some modes of religiosity over others can *shape*, not merely assist or burden, forms of religion. He does so in the context of how they can "insert Protestant-Christian structures into the different forms of religion and tradition that exist in our liberal-democratic societies," not in terms of religious domestication, however. See: Jakob De Roover, "Secular Law and the Realm of False Religion," in *After Secular Law*, ed. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubio (Stanford: Stanford University Press, 2011), 57.

onto, instead suggest applying *more* legal and political focus to the category of religion, not less. Foucault argues that critique should not be reserved for some situations or some phases of reform (and thus contrasted to other times that would call for concrete transformation), but that “the work of deep transformation can only be carried out in a free atmosphere, one constantly agitated by a permanent criticism.”¹²³ Power relations, which for Foucault broadly include any way of acting upon the range of actions free subjects might choose to take, are an inescapable fact of material and social reality. We cannot undo power relations tied to our conceptions of religion by displacing them onto a different, neutral ground, because no such ground exists. Instead, the best that we can do is to constantly, intensely, and explicitly scrutinize our choices and concepts so that we have to justify them.

Our laws will inevitably protect some understandings of religion but not others. Instead of appealing to religion as a uniformly or neutrally protected category, we should be explicit about what forms of religion are protected and what ones are not. More than that, we should frame the issue in terms of its consequences. Legal protection of some forms of religion over others will inevitably encourage and support some ways of being religious while discouraging and undermining others. Instead of treating religious freedom law as the regulation of how pre-conceived identities are expressed through regulated actions, we should openly acknowledge what forms of religiosity our laws pressure people to enact, and what forms of religiosity our laws pressure people to abandon. Framing the issue explicitly in terms of what religions and modes of religiosity should we allow or forbid, encourage or discourage, reinforce or undermine, constitute or efface, draws attention to the very real biases and consequences that will exist

¹²³ Ibid.

regardless of whether or not we acknowledge them. In doing so, we make a facile appeal to religion difficult, requiring instead an explicit justification for the particular sense of religion and the consequences that it will carry.

In popular narratives about religious freedom in the United States, this sense of critical reflectivity is unfortunately absent. While the federal RFRA was an extremely popular bill with almost unanimous, bi-partisan support, and though state-level RFRA's have been proposed and passed uncontroversially for decades, they have recently come under sharp scrutiny because of cases like *Hobby Lobby* and *Elane*. In an environment where legal recognition of same-sex marriage and social acceptance of various gender and sexual minorities has rapidly spread, mini-RFRA's are now frequently characterized as anti-gay bills attempting to defend discriminatory practices and bigoted attitudes. These concerns are not entirely without merit. In a post-*Hobby Lobby* environment cases, religious limitations such as those in *Elane* become increasingly difficult to sustain. In a recent trial court decision, a Kentucky judge accepted the religious freedom defense of a company that refused to print t-shirts for a gay pride festival.¹²⁴ The opinion of the court cites *Hobby Lobby* to justify the applying Kentucky's RFRA-level protections to a for-profit business.¹²⁵ Furthermore, some recent RFRA legislation appears to be specifically crafted to overcome the objections raised in *Elane*. For example, Indiana recently passed a RFRA that applies "regardless of whether the state or any other government entity is a party to the proceeding," which circumvents the problem that stopped courts from applying the New Mexico

¹²⁴ *Hands on Originals, Inc. v. Lexington-Fayette Urban County Human Rights Commission*, No. 14-CI-04474, slip op. (E.D. Ky 2015).

¹²⁵ *Ibid.*, 14.

RFRA to Elane Photography.¹²⁶ However, Indiana governor Mike Pence repeatedly maintained that Indiana’s RFRA would not enable the forms of discrimination by public accommodation that its opponents claimed that it would and, in the face of national controversy and backlashes over the law, called on the Indiana legislature to pass an amendment to the legislation explicitly clarifying that it “does not authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public.”¹²⁷

Though some level of concern is warranted, the general anti-RFRA response has been alarmist and often reductive to the point of obfuscation. At its most sympathetic, the narrative paints RFRA as an overreach of religious freedom with discriminatory consequences. More often, the laws are presented as cynical, dishonest, and knowing attempts to enshrine anti-GSM discrimination under the false pretense of religious liberty. Sources commonly describe RFRA as “‘so-called’ religious freedom” laws or use scare quotes to suggest that the “religious freedom” in RFRA is no such thing. This rhetoric can be seen in sources ranging from local papers to major national and international news outlets, and from individual bloggers to members

¹²⁶ *Senate Enrolled Act No. 101: Religious Freedom Restoration*, 119th Indiana General Assembly, 1st Sess. (2015), 3.

¹²⁷ *Senate Enrolled Act. No. 50*, 119th Indiana General Assembly, 1st Sess. (2015), 1.

of Congress.¹²⁸ It is also common for the coverage to ignore all of the limitations and conditions of RFRA legislation, simply stating that the laws make it illegal for the government to substantially burden exercise of religion without any qualifications or explanations of how the government absolutely can impose substantial burdens under RFRA standards.¹²⁹ At its most alarmist, this omission leads to extreme and dubious claims. For example, when Michigan passed

¹²⁸ For a very small survey of such responses to two of the most recent cases, Arizona and Indiana, see: Laura Meckler, “Arkansas Governor Calls for Changes to ‘Religious Freedom’ Bill,” *The Wall Street Journal*, last modified April 1, 2015, <http://www.wsj.com/articles/arkansas-governor-calls-for-changes-to-religious-freedom-bill-1427904740>; Tony Cook and Tom LoBianco, “Indiana governor signs amended ‘religious freedom’ law,” *USA Today*, last modified April 2, 2015, <http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/>; Sabrina Siddiqui and Nadja Popovich, “LGBT battle far from over as ‘religious freedom’ bills multiply across the US,” *The Guardian*, last modified April 6, 2015, <http://www.theguardian.com/world/2015/apr/06/religious-freedom-bills-multiply-across-country-battle-is-far-from-over>; Bob Unruh, “Congressmen Attack ‘So-Called Religious Freedom,’” *WND*, last modified April 15, 2015, <http://www.wnd.com/2015/04/congressmen-attack-so-called-religious-freedom/>; Pat Lenhoff, “Reaction to Indiana’s religious freedom act reveals modern spirituality,” *The Chicago Tribune*, last modified April 15, 2015 <http://www.chicagotribune.com/suburbs/vernon-hills/news/ct-vhr-lenhoff-tl-0423-20150415-column.html>; (continued on next page)

¹²⁸ (cont.) Emily Peck, “Big Business is Leading the Charge on Gay Rights Now,” *Huffington Post*, last modified March 31, 2015, http://www.huffingtonpost.com/2015/03/31/business-boycotts-indiana_n_6980388.html; Campbell Robertson and Richard Pêza-Peña, “Bills on ‘Religious Freedom’ Upset Capitols in Arkansas and Indiana,” *The New York Times*, last modified March 31, 2015, <http://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html>; Boston Globe editorial board, “Indiana’s ‘Religious Freedom’ Law Should be Repealed,” *The Boston Globe*, last modified March 31, 2015 <http://www.bostonglobe.com/opinion/editorials/2015/03/31/indiana-religious-freedom-law-should-repealed/LmM9y4Iru36ygz63u41UVL/story.html>; Matthew Dowd, “Indiana Religious Freedom Law: A Fascinating and Frightening Insight into America,” *ABC News*, last modified April 1, 2015 <http://abcnews.go.com/Politics/indiana-religious-freedom-law-frightening-fascinating-insight-america/story?id=30051125>; Hunter Schwartz, “Religious freedom debate now includes atheists - AKA the least-accepted group in politics,” *The Washington Post*, last modified April 2, 2015, <http://www.washingtonpost.com/blogs/the-fix/wp/2015/04/02/religious-freedom-debate-now-includes-atheists-a-k-a-the-least-accepted-group-in-politics/>; Erin Murhpy, “‘Religious freedom’ law unlikely in Iowa,” *The Gazette*, last modified April 6, 2015, <http://thegazette.com/subject/news/religious-freedom-law-unlikely-in-iowa-20150406>; Adam Serwer, “Why ‘religious freedom’ laws could be a license to discriminate,” *MSNBC*, last modified 2/24/14, <http://www.msnbc.com/msnbc/religious-freedom-or-discrimination>; LZ Granderson, “The real lesson of Indiana’s anti-LGBT law,” *CNN*, last modified April 1, 2015 <http://www.cnn.com/2015/04/01/opinions/granderson-indiana-pence-culture-wars/>.

¹²⁹ Some examples include: Associated Press, “Mississippi governor Phil Bryant signs anti-gay bill,” *Politico*, last modified April 4 2014, <http://www.politico.com/story/2014/04/mississippi-governor-phil-bryant-signs-anti-gay-bill-105378.html>; Sunnive Brydum, “Miss. Gov. Signs ‘License to Discriminate’ Into Law,” *The Advocate*, last modified April 3, 2014, <http://www.advocate.com/politics/2014/04/03/miss-gov-signs-license-discriminate-law>; Nicole Hemmer, “Bigotry Is Bad for Business,” *US News*, last modified February 25, 2014, <http://www.usnews.com/opinion/blogs/nicole-hemmer/2014/02/25/anti-gay-bills-bring-business-and-liberals-together>; Adam Serwer, “Arizona passes law allowing discrimination,” *MSNBC*, last modified February 21, 2014, <http://www.msnbc.com/msnbc/arizona-passes-law-allowing-discrimination>; Ray Sanchez and Miguel Marquez, “Arizona lawmakers pass controversial anti-gay bill,” last updated February 21, 2014, <http://www.cnn.com/2014/02/21/us/arizona-anti-gay-bill/>; Lisa Fernandez, “Oakland Mayor Bans City Travel to Indiana in Protest of ‘Religious Freedom’ Law,” *NBC Bay Area*, last modified April 1, 2015 <http://www.nbcbayarea.com/news/local/Oakland-Mayor-Bans-City-Travel-to-Indiana-in-Protest-of-Religious-Freedom-Law-298304501.html>.

a state-level RFRA major news sources claimed that the law enabled EMTs to refuse to provide emergency medical services to gay people.¹³⁰

In addition to glossing over the nuances and particularities of the law, these narratives default to an unreflective sense of legitimate religion as a means to delegitimize RFRA legislation. This is most clear in the repeated reference to the laws as “so-called religious freedom restoration acts” or “‘religious freedom’ restoration acts.” Another common line of rhetoric is to describe RFRA in terms of a “right” or “freedom to discriminate” which is immediately contrasted to a (genuine or legitimate) right to or freedom of religion.¹³¹ The implicit message here is that religion (or, as Winnifred Fallers Sullivan would say, “Religion,” the big ‘R’ category as imagined for the purposes of legal protection in human rights and liberal government) does not properly lend itself to such actions, and so what is in question cannot really be religion or religious freedom, but instead is just bigotry cynically disguised as religion to abuse the law. There is no consideration of how different understandings of religion or religiosity could be in conflict, and so there is no justification for why one sense of religion should be favored over another. Instead there is just the facile gesture, the appeal to religion as a

¹³⁰ “Bill would let Michigan doctors, EMTs, refuse to treat gay patients,” *CBS*, last modified December 11, 2014, <http://www.cbsnews.com/news/bill-would-let-michigan-doctors-emts-refuse-to-treat-gay-patients/>; Emma Margolin, “‘Religious freedom’ measure moves forward in Michigan,” *MSNBC*, last modified December 10, 2014, <http://www.msnbc.com/msnbc/religious-freedom-measure-moves-forward-michigan>.

¹³¹ Leigh Hedger, “George Takei ‘outraged over Indiana Freedom to Discriminate law,” *The Indianapolis Star*, last modified April 3, 2015 <http://www.indystar.com/story/news/2015/03/26/george-takei-says-hell-encourage-gen-con-to-move-convention-out-of-indianapolis/70483988/>; Steven Bensen, “The real-world implications of right-to-discriminate laws,” *MSNBC*, last modified April 1, 2015, <http://www.msnbc.com/rachel-maddow-show/the-real-world-implications-right-discriminate-laws>; Alex Stedman, “Wilco cancels Indianapolis tour date due to Indiana’s ‘Religious Freedom’ law,” *The Boston Herald*, last modified March 31, 2015, http://www.bostonherald.com/entertainment/music/music_news/2015/03/wilco_cancels_indianapolis_tour_date_due_to_indianas; Ben Winslow, “Religious liberties bill slammed as ‘a license to discriminate,’” *Fox 13 News*, last modified February 12, 2015, <http://fox13now.com/2015/02/12/religious-liberties-bill-slammed-as-a-license-to-discriminate/>; Teresa Wiltz, “‘Religious Freedom’ or a ‘License to Discriminate?’” *Stateline*, last modified December 12, 2014, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/12/12/religious-freedom-or-a-license-to-discriminate>.

fixed category that could never legitimately include something like the refusal of services to a same-sex couple.

A similar trope that has seen widespread use is the contrast between religious freedom as a shield and religious freedom as a sword.¹³² This seems like an improvement on its face—after all, it contrasts two different kinds of religious freedom rather than unreflectively reifying one conception as the only possible form of religious liberty. Even here, however, there is an implication that authentic religion could not motivate something like Elane Photography’s refusal. A shield is wielded by someone to protect *themselves*, so the metaphor of religious freedom as a shield is a metaphor of liberty that protects *religion*. A sword is wielded to attack someone *else*, so the metaphor of religious freedom as a sword is one of religion attacking *something external to itself*. If shielding religion does not include shielding religiously motivated discrimination, then religiously motivated discrimination cannot be an intrinsic part of the shielded religion or what the *Elane* courts referred to as *directly* religious activity. It can only be the religion stepping outside of or beyond itself to engage in other behavior, behavior that is *indirectly* religious at the most. In this model Elane Photography was not seeking to shield its religion or the religiosity of its owners from actions that would compromise them, but instead was attacking something outside of it (the women to whom it refused service).

¹³² Steve Benen, “Religious freedom is a shield, not a sword,” *MSNBC*, last modified February 21, 2014, <http://www.msnbc.com/rachel-maddow-show/religious-freedom-shield-not-sword>; “Religious Liberty: Shield or Sword?” *People for the American Way*, last accessed April 22, 2015, <http://www.pfaw.org/media-center/publications/religious-liberty-shield-or-sword>; Nicole Hemmer, “A Weapon for Discrimination,” *US News*, last modified March 31, 2015, <http://www.usnews.com/opinion/blogs/nicole-hemmer/2015/03/31/indiana-law-showed-how-religious-freedom-becomes-weapon-for-discrimination>; Lisa Wurm, “In Vogue: ‘Religious Freedom’ as Discrimination,” *The ACLU of Ohio*, last modified March 30, 2015, <http://www.acluohio.org/blog-posts/in-vogue-religious-freedom-as-discrimination>; “Religious freedom laws becoming more a sword than a shield,” *The Palm Beach Post*, last modified April 1, 2015, <http://www.mypalmbeachpost.com/news/news/opinion/editorial-religious-freedom-laws-becoming-more-swo/nkjfz/>.

The problems that religious freedom poses in a culturally diverse and legally structured society are intractable. The tension in how marginalized individuals and communities must use shared language that often conceals majoritarian biases to appeal to the majority for increased protection will not disappear regardless of the language with which we navigate it. The ability of evenly applicable laws to produce uneven burdens on different religious actors, and the unequal nature of religious freedom exemptions designed to equalize such burdens, poses pragmatic and moral difficulties that cannot be complexly ameliorated. The actions and limitations of government cannot be untangled from the forms of religiosity and the religious subjects that it seeks to govern. We will always, morally and pragmatically, be struggling with a scale of better or worse (to some perspectives, in some contexts), not a binary of broken or fixed. The actions of individuals, of cultural and political communities, of legislators and judges, will always be engaged in competition and contestation at the level of the subject, arriving at messy compromises and pragmatic outcomes but not settled conclusions.

In the face of such a perpetually unsettled, uneven field, what is desperately needed is more nuance in our concepts, more criticism of our assumptions, and more interrogation of their consequences. Flattening, reductive appeals to religion or religious liberty as “this but not that,” or attempts to sidestep the entire quagmire by abandoning the term religion itself, will not provide this necessary granularity and critical reflectivity. The debate, in law, in politics, in popular media, in the lives and communities of religious and non-religious actors alike, must be re-cast in terms of our specific conceptual commitments and their consequences. If religion and the religious subject are already a battleground for competing forces, then we need to make the particularity of this subjection and its consequences the explicit focus of our thought. Scholars of

religion have a vital part to play in this process. Their professional commitment to providing more nuance and detail, often through an explicitly critical lens, to our understanding of religion and religions uniquely positions them to expose and contextualize assumptions, making facile appeals to reductive perspectives more difficult or even impossible.¹³³ Specific arguments about reform or policy or morality are certainly an important and worthwhile contribution to make, but the most important contribution that academics could make here may still be the complication of an all too simple narrative.

¹³³ Many commendable examples of scholarship that complicate conceptions of religion and subsequently problematize its legal, political, and social deployment already exist. Some have been referenced in this paper, such as Talal Asad's *Genealogies of Religion*, Winnifred Fallers Sullivan's *The Impossibility of Religious Freedom*, or Jakob De Roover's "Secular Law and the realm False Religion". For other, recent work along these lines, see J.Z. Smith: "God Save this Honourable Court," in *Relating Religion*, (Chicago: University of Chicago Press, 2004), 375-390; Elizabeth Shackman Hurd: "A Suspension of (Dis)Belief: The Secular-Religious Binary and the Study of International Relations," in *Rethinking Secularism*, ed. Craig Calhoun, Mark Juergensmeyer, and Jonathan Van Antwerpen (New York: Oxford University Press, 2011), 166-184; and Markus Dressler, "The Religio-Secular Continuum: Reflections on the Religions Dimensions of Turkish Secularism," in *After Secular Law*, ed. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbio (Stanford: Stanford University Press, 2011), 221-241.

Bibliography

- Asad, Talal, "The Construction of Religion as an Anthropological Category," *Genealogies of Religion* (Baltimore: John Hopkins University Press, 1993)
- Associated Press, "Mississippi governor Phil Bryant signs anti-gay bill," *Politico*, last modified April 4 2014, <http://www.politico.com/story/2014/04/mississippi-governor-phil-bryant-signs-anti-gay-bill-105378.html>
- Bensen, Steven, "The real-world implications of right-to-discriminate laws," *MSNBC*, last modified April 1, 2015, <http://www.msnbc.com/rachel-maddow-show/the-real-world-implications-right-discriminate-laws>
- Bensen, Steve, "Religious freedom is a shield, not a sword," *MSNBC*, last modified February 21, 2014, <http://www.msnbc.com/rachel-maddow-show/religious-freedom-shield-not-sword>
- "The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions," *Harvard Law Review*, 123, no. 2 (2010)
- "Bill would let Michigan doctors, EMTs, refuse to treat gay patients," *CBS*, last modified December 11, 2014, <http://www.cbsnews.com/news/bill-would-let-michigan-doctors-emts-refuse-to-treat-gay-patients/>
- Boston Globe editorial board, "Indiana's 'Religious Freedom' Law Should be Repealed," *The Boston Globe*, last modified March 31, 2015 <http://www.bostonglobe.com/opinion/editorials/2015/03/31/indiana-religious-freedom-law-should-repealed/LmM9y4Iru36ygzg63u41UVL/story.html>
- Burwell, Secretary of Health and Human Services et al. v. Hobby Lobby Stores, Inc. et al.*, No. 13-354 slip op. (U.S. 2013)
- Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990)
- Butler, Judith, interview by Christian Williams, *The TransAdvocate*, last update May 1, 2014, http://www.transadvocate.com/gender-performance-the-transadvocate-interviews-judith-butler_n_13652.htm.
- Butler, Judith, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory," *Theater Journal* 40, No. 4 (1988)

Brydum, Sunnive, “Miss. Gov. Signs ‘License to Discriminate’ Into Law,” *The Advocate*, last modified April 3, 2014, <http://www.advocate.com/politics/2014/04/03/miss-gov-signs-license-discriminate-law>

Cantwell v. Connecticut 310 U.S. 303 (1940)

Cook, Tony and LoBianco, Tom, “Indiana governor signs amended 'religious freedom' law,” *USA Today*, last modified April 2, 2015, <http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/>

Coverage of Preventative Health Services 42 U.S.C §300gg-13(a)(4)

City of Boerne v. Flores, 521 U.S. 507 (1997)

De Roover, Jakob, “Secular Law and the Realm of False Religion,” in *After Secular Law*, ed. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubio (Stanford: Stanford University Press, 2011)

Dowd, Matthew, “Indiana Religious Freedom Law: A Fascinating and Frightening Insight into America,” *ABC New*, last modified April 1, 2015 <http://abcnews.go.com/Politics/indiana-religious-freedom-law-frightening-fascinating-insight-america/story?id=30051125>

Dressler, Markus, “The Religio-Secular Continuum: Reflections on the Religions Dimensions of Turkish Secularism,” in *After Secular Law*, ed. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubio (Stanford: Stanford University Press, 2011), 221-241

Elane Photography, LLC v. Vanessa Willock, CV 2008-06632, slip op. (N.M. Dist. 2009)

Elane Photography, LLC v. Vanessa Willock, No. 30,203, slip op. (N.M. App. 2012)

Elane Photography, LLC. v. Vanessa Willock, No. 33,687, slip op. (N.M. 2013)

“Elane Photography, LLC v. Willock,” SCOTUSblog, <http://www.scotusblog.com/case-files/cases/elane-photography-llc-v-willock/>

Employment Division, Department of Human Resources of Oregon v. Smith 494 U.S. 872 (1990)

Fernandez, Lisa, “Oakland Mayor Bans City Travel to Indiana in Protest of ‘Religious Freedom’ Law,” *NBC Bay Area*, last modified April 1, 2015 <http://www.nbcbayarea.com/news/local/Oakland-Mayor-Bans-City-Travel-to-Indiana-in-Protest-of-Religious-Freedom-Law-298304501.html>

- Foucault, Michel, "About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth." *Political Theory* 21, no. 2 (1993)
- Foucault, Michel, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995)
- Foucault, Michel, "Practicing Criticism," in *Michel Foucault: Politics, Philosophy, Culture*, ed. Lawrence D. Kritzman (New York: Routledge, 1988)
- Foucault, Michel, *The History of Sexuality Vol. 1: An Introduction*, trans. Robert Hurley (New York: Vintage, 1990)
- Foucault, Michel, *The History of Sexuality Vol. 2: The Use of Pleasure*, trans. Robert Hurley (New York: Vintage, 1990)
- Foucault, Michel. "The Subject and Power," in *Power (The Essential Works of Foucault, 1954-1984)*, ed. James D. Faubion (New York: The New Press, 2001)
- Granderson, LZ, "The real lesson of Indiana's anti-LGBT law," *CNN*, last modified April 1, 2015 <http://www.cnn.com/2015/04/01/opinions/granderson-indiana-pence-culture-wars/>.
- Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 547 U.S. 418 (2006)
- Hemmer, Nicole, "A Weapon for Discrimination," *US News*, last modified March 31, 2015, <http://www.usnews.com/opinion/blogs/nicole-hemmer/2015/03/31/indiana-law-showed-how-religious-freedom-becomes-weapon-for-discrimination>
- Hemmer, Nicole, "Bigotry Is Bad for Business," *US News*, last modified February 25, 2014, <http://www.usnews.com/opinion/blogs/nicole-hemmer/2014/02/25/anti-gay-bills-bring-business-and-liberals-together>
- Hands on Originals, Inc. v. Lexington-Fayette Urban County Human Rights Commission*, No. 14-CI-04474, slip op. (E.D. Ky 2015)
- Hedger, Leigh, "George Takei 'outraged over Indiana Freedom to Discriminate law,'" *The Indianapolis Star*, last modified April 3, 2015 <http://www.indystar.com/story/news/2015/03/26/george-takei-says-hell-encourage-gen-con-to-move-convention-out-of-indianapolis/70483988/>
- Kelley, Mark, *The Political Philosophy of Michel Foucault* (New York: Routledge 2009)

- Lenhoff, Pat, "Reaction to Indiana's religious freedom act reveals modern spirituality," *The Chicago Tribune*, last modified April 15, 2015 <http://www.chicagotribune.com/suburbs/vernon-hills/news/ct-vhr-lenhoff-tl-0423-20150415-column.html>
- Mahmood, Sabah, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005)
- Margolin, Emma, "'Religious freedom' measure moves forward in Michigan," *MSNBC*, last modified December 10, 2014, <http://www.msnbc.com/msnbc/religious-freedom-measure-moves-forward-michigan>
- Masuzawa, Tomoku, *The Invention of World Religions* (Chicago: University of Chicago Press, 2005)
- Meckler, Laura, "Arkansas Governor Calls for Changes to 'Religious Freedom' Bill," *The Wall Street Journal*, last modified April 1, 2015, <http://www.wsj.com/articles/arkansas-governor-calls-for-changes-to-religious-freedom-bill-1427904740>
- Murphy, Erin, "'Religious freedom' law unlikely in Iowa," *The Gazette*, last modified April 6, 2015, <http://thegazette.com/subject/news/religious-freedom-law-unlikely-in-iowa-20150406>
- Peck, Emily, "Big Business is Leading the Charge on Gay Rights Now," *Huffington Post*, last modified March 31, 2015, http://www.huffingtonpost.com/2015/03/31/business-boycotts-indiana_n_6980388.html
- "Religious freedom laws becoming more a sword than a shield," *The Palm Beach Post*, last modified April 1, 2015, <http://www.mypalmbeachpost.com/news/news/opinion/editorial-religious-freedom-laws-becoming-more-swo/nkjfz/>.
- Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 103rd Cong. (Nov. 3, 1993)
- Religious Land Use and Institutionalized Persons Act, 2000*, Pub. L. No. 106-274, 106th Cong. (July 27, 2000)
- "Religious Liberty: Shield or Sword?" *People for the American Way*, last accessed April 22, 2015, <http://www.pfaw.org/media-center/publications/religious-liberty-shield-or-sword>
- Reynolds v. United States*, 98 U.S. 161 (1879)
- Robertson, Campbell and Péza-Peña, Richard "Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana," *The New York Time*, last modified March 31, 2015, <http://>

www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html

Sanchez, Ray and Marquez, Miguel, “Arizona lawmakers pass controversial anti-gay bill,” last updated February 21, 2014, <http://www.cnn.com/2014/02/21/us/arizona-anti-gay-bill/>

Schwartz, Hunter, “Religious freedom debate now includes atheists - AKA the least-accepted group in politics,” *The Washington Post*, last modified April 2, 2015, <http://www.washingtonpost.com/blogs/the-fix/wp/2015/04/02/religious-freedom-debate-now-includes-atheists-a-k-a-the-least-accepted-group-in-politics/>

Senate Enrolled Act. No. 50, 119th Indiana General Assembly, 1st Sess. (2015)

Serwer, Adam, “Arizona passes law allowing discrimination,” *MSNBC*, last modified February 21, 2014, <http://www.msnbc.com/msnbc/arizona-passes-law-allowing-discrimination>

Serwer, Adam, “Why ‘religious freedom’ laws could be a license to discriminate,” *MSNBC*, last modified 2/24/14, <http://www.msnbc.com/msnbc/religious-freedom-or-discrimination>

Elizabeth Shackman Hurd: “A Suspension of (Dis)Belief: The Secular-Religious Binary and the Study of International Relations,” in *Rethinking Secularism*, ed. Craig Calhoun, Mark Juergensmeyer, and Jonathan Van Antwerpen (New York: Oxford University Press, 2011), 166-184

Sherbert v. Verner 374 U.S. 398 (1963)

Siddiqui, Sabrina and Popovich, Nadja, “LGBT battle far from over as 'religious freedom' bills multiply across the US,” *The Guardian*, last modified April 6, 2015, <http://www.theguardian.com/world/2015/apr/06/religious-freedom-bills-multiply-across-country-battle-is-far-from-over>

Smith, Jonathan Z., : “God Save this Honourable Court,” in *Relating Religion* (Chicago: University of Chicago Press, 2004), 375-390

Smith, Jonathan Z., *Imagining Religion: From Babylon to Jonestown* (Chicago: University of Chicago Press, 1988)

Smith, Jonathan Z., “Religion, Religions, Religious,” *Critical Terms for Religious Studies*, ed. Mark C. Taylor (Chicago: University of Chicago Press, 1998), 269-285

Stedman, Alex, “Wilco cancels Indianapolis tour date due to Indiana’s ‘Religious Freedom’ law,” *The Boston Herald*, last modified March 31, 2015, http://www.bostonherald.com/entertainment/music/music_news/2015/03/

wilco_cancels_indianapolis_tour_date_due_to_indianas

Sullivan, Winnifred Fallers, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005)

Sullivan, Winnifred Fallers, “The Impossibility of Religious Freedom,” *The Immanent Frame* (2014), <http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom/>

Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994)

Unruh, Bob, “Congressmen Attack ‘So-Called Religious Freedom,’” *WND*, last modified April 15, 2015, <http://www.wnd.com/2015/04/congressmen-attack-so-called-religious-freedom/>

Vanessa Willock v. Elane Photography, LLC, Human Rights Commission of New Mexico HRD No. 06-12-200-685 (2008)

Wiltz, Teresa, “‘Religious Freedom’ or a ‘License to Discriminate’?” *Stateline*, last modified December 12, 2014, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/12/12/religious-freedom-or-a-license-to-discriminate>

Winslow, Ben, “Religious liberties bill slammed as ‘a license to discriminate,’” *Fox 13 News*, last modified February 12, 2015, <http://fox13now.com/2015/02/12/religious-liberties-bill-slammed-as-a-license-to-discriminate/>

Wurm, Lisa, “In Vogue: ‘Religious Freedom’ as Discrimination,” *The ACLU of Ohio*, last modified March 30, 2015, <http://www.acluohio.org/blog-posts/in-vogue-religious-freedom-as-discrimination>