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Funding Abortion as Facilitating It: The Complicity Argument in Religious Right Legal Efforts to Control Reproductive Choice in the United States

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Funding Abortion as Facilitating It: The Complicity Argument in Religious Right Legal Efforts to Control Reproductive Choice in the United States

A Thesis Submitted to

the Faculty of the College of Arts and Sciences

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Abstract

This study examines and critiques rhetorical use of the term *complicity* by the Religious Right in six U.S. Supreme Court cases from 1973 to 2021 as a tactic to restrict access to reproductive care and exert control over female reproductive bodies. Comparing the language invoked by Religious Right claimants and the Supreme Court justices to my working definition of *complicity* reveals that use of *complicity* regarding reproductive care in the United States has expanded in scope over time. However, the argument fails to meet four essential criteria necessary for being considered complicit. Religious Right claimants generally base their complicity arguments on a "slippery slope" fallacy and object to their perceived financial facilitation of abortion and contraceptive medications through taxes and healthcare. The evidence demonstrates that by drawing legal boundaries around the definition of *complicity*, the Supreme Court would improve its ability to evaluate the legitimacy of religious-based complicity claims, protect reproductive care access for third-party people with uteruses, and strike a better balance between the increasingly conflicting rights to religious and reproductive freedom.

Key Terms: complicity; abortion; contraceptives; morality; law and society; U.S. law; intersectionality; embodied subjectivity; Culture Wars; Religious Right; Contraceptive Mandate; reproductive rights; Corporate Conscience; religious freedom

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I. Introduction: Reproductive Care's Tenuous Intersectional Position in U.S. Law

In the 2020 U.S. presidential election, 68% of registered voters reported that healthcare is a "very important" issue to their presidential vote; 40% said the same of abortion (Important Issuesin the 2020 Election, 2020.) Although abortion had the lowest ranking in the survey, it appeared alongside 10 other issues voters deemed "very important," including the economy, Supreme Court appointments, the 2020 coronavirus outbreak, violent crime, foreign policy, gun policy, race and ethnic inequality, immigration, economic inequality, and climate change (Important Issues in the 2020 Election, 2020.) If "the personal is political," to quote the second-wave feminists of the 1960s and '70s, then reproductive care, and abortion specifically, is the quintessential example, with serious consequences.

Reproductive health care's tenuous position as both private and public makes it an issue fraught with misconceptions. For instance, abortion is far more common than people realize. According to a 2017 report by the Guttmacher Institute, nearly one in four women in the United States will have had an abortion by the time they are 45 years old, and at 34%, women aged 20-24 account for the largest number of abortions (Abortion is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates, 2017). This means that we very likely have someone in our lives who has had an abortion; I personally know of at least two. I remember being surprised when, after a night of drinking, a close friend of mine confided to me that she had undergone an abortion three years before, during her freshman year of college, after an unintended pregnancy with her longtime boyfriend. She explained that she kept it a secret because she was worried that people might perceive her differently and shame her for her choices; that *I*, her friend of ten years, would castigate her. I remember telling her that I did not think any less of her, and that she should be proud of herself for making a decision that felt right

to her. Knowing what I know now, I wonder how many others there are in my life, people whomI love, who treat their abortions as skeletons in the dark, reluctant to let them out for fear of the social stigma. As a woman living in the United States, that person could very easily be me.

Another misconception regarding reproductive care are the reasons why individuals take contraceptive medications. According to the Centers for Disease Control (CDC), from 2015-2017, 64.9% of women aged 15-49 in the U.S. were currently using a method of contraception (Daniels & Abma, 2018). In a 2011 report on the use of oral contraceptive pills, the Guttmacher Institute found that 86% of women use the pill for pregnancy prevention, but they also found that many women use the pill for non-contraceptive reasons (Many American Women Use Birth Control Pills for Noncontraceptive Reasons, 2011). They found that 31% of women use the pill for menstrual regulation; 28% of women used the pill for the "side effects" of menstruation (such as migraines and cramps); 14% of women use the pill to treat acne; and 4% of women use the pill to treat endometriosis. An individual person might use the pill for multiple reasons, but the study found that only 42% of women use the pill *exclusively* for pregnancy prevention. Other hormonal contraceptive methods such as the ring, patch, implant, and intrauterine device (IUD) offer similar benefits. From these statistics, it is clear that birth control is an essential form of healthcare for people with uteruses not only for sexual intimacy, but for their individual mental, emotional, and physical well-being.

Because abortion and contraception occupy the intersection between private and public spheres, this also means they rest at the intersection of the constitutionally protected rights to religious exercise and reproductive freedom. The U.S. constitution's simultaneous promises of separation between church and state and freedom to exercise religion, coupled with reproductive care's intersectional position, has made abortion and contraceptives particularly susceptible to

legal and legislative attacks. The Hyde Amendment, passed in 1976, blocks federal funds from being used for abortions, with the exception being in cases of rape, incest, or a threat to the pregnant woman's life. Under the facade of protecting women's health, Targeted Restrictions of Abortion Providers (TRAP) laws impose medically unnecessary requirements on abortion facilities with the goal of shutting them down. In *Burwell v. Hobby Lobby* in 2014, the Supreme Court gave for-profit corporations the right to religious exemption from the Affordable Care Act's federally mandated abortion and contraceptive coverage because to comply would conflict with the company owner's "sincerely held" religious beliefs and make them complicit in immoral conduct. In 2019, 25 abortion bans and 58 abortion restrictions were enacted, mostly in states in the South and Midwestern U.S. Restrictions ranged from gestational age bans, bans on specific abortion methods, bans on patient reasoning, to "trigger bans" in the event that *Roe v. Wade* is overturned (Access to Contraception, 2017). Through a combination of legislation and court rulings, the Religious Right has been largely successful in limiting abortion and contraceptive access to U.S. individuals with uteruses.

Looking at the U.S.'s legal and legislative history, it is clear that as the private matter of reproductive care becomes increasingly public and subject to religious scrutiny, so too do women's bodies become increasingly controlled by the state, thereby denying them full reproductive agency and autonomy. In 2017, nearly 49% of pregnancies were unintended, and were especially common among low-income women and women of color. Despite *Roe v. Wade*'s legalization of abortion in 1973, high out of pocket costs, deductibles, copayments, legislation like the Hyde Amendment, and legal rulings such as *Hobby Lobby* have prevented individuals with uteruses from fully exercising their right to reproductive freedom, particularly low-income women who are more likely to be uninsured. Even if contraception is covered, women still pay

approximately 60% of the out-of-pocket cost compared with the typical out-of-pocket cost of only 33% for non-contraceptive medications. Furthermore, at the same time that Catholics are one of the most vocal groups opposed to abortion and contraceptives, 10 out of 25 of the largest U.S. health systems are Catholic-sponsored facilities (Access to Contraception, 2017). Given both *Hobby Lobby*'s ruling and the tradition of legal precedence, there exists a strong potential for this ruling to expand and allow physicians, nurses, and even pharmacists to deny individuals reproductive care on religious grounds. Can you imagine the outrage if health insurance coverage of medications like Viagra were suddenly unavailable to individuals with penises due to the religious preferences of their employer or healthcare provider? Better yet, as I am writing in the moment of the COVID-19 pandemic, what if the religious convictions held by employers' or healthcare providers denied individuals access to the COVID-19 vaccine, a vaccine that is essential for ending a public health emergency?

II. Statement of the Problem: Religious Right and Legal Understandings of Complicity

Much research has been conducted examining legislation and legal rulings as locations for the Religious Right to subvert the right to reproductive care that was established by *Roe v. Wade* in 1973. Extensive research has also been published arguing why Religious Right claims against abortion and contraceptives in the legal sphere are morally and scientifically incorrect, with a special focus on how these claims undermine reproductive care access and are harmful to people with uteruses. Indeed, as I have already illustrated, the effects of reproductive care restrictions are immense. However, while academic work has devoted significant effort to refuting Religious Right claims against abortion and contraceptives by focusing on the

implications, and rightfully so, little scholarly work has been devoted to understanding the *logic* of Religious Right claims against these activities, and why they have been successful in U.S law.

Few scholars recognize that a central component to Religious Right claims against abortion and contraceptives in the courtroom is not a blatant disregard for people with uteruses' reproductive agency and autonomy. Rather, it is the notion that their *own* actions (or inactions) have influence in reproductive care outcomes, and as such, their actions (or inactions) are also capable of making them complicit, or even *potentially* complicit, in conduct they believe to be morally abhorrent. Their initial, individual action might be innocent in and of itself, but *can* and *does* lead others to perform subsequent acts that end in the destruction of a fetus, an act that is inherently and immoral. It is under this framing that Religious Right legal claims against abortion and contraceptives have been institutionalized and continue to operate in the U.S.

Many scholars have started to investigate the complicity claim, particularly as it pertains to *Burwell v. Hobby Lobby* (2014), in which the complicity claim was made very explicitly. Many seek to answer questions such as: What does *complicity* look like? How do we measure it? Is *complicity* based on our proximity to a specific action being taken? Is it based on our relationship to the individual taking that action? While few researchers strive to answer these questions, even fewer recognize that the complicity claim is not isolated to *Hobby Lobby*; in fact, the complicity claim is an identifiable trend in Religious Right legal arguments against abortion and contraceptives that has existed since *Roe v. Wade* (1973). While academic work has extensively examined the political and legal implications of Religious Right complicity logic, little work seeks to combat the complicity logic itself, whether it be amongst individuals or within U.S. legal institutions. Because of this neglect, research meant to encourage Religious

Right anti-choice advocates to join the pro-choice movement falls on deaf ears, sometimes even exacerbating the culture war divide.

This project answers the questions: How have Religious Right anti-choice claimants' rhetoric of *complicity* evolved and expanded under U.S. Supreme Court rulings since *Roe v. Wade* in 1973, and is their rhetorical use of *complicity* legitimate? To answer this question, this study analyzes rhetorical trends in six U.S. Supreme Court cases from 1973 to 2020 in which Religious Right claimants use the *complicity* argument as a legal tactic to restrict abortion and contraceptive access. By applying feminist theories of state control of the body and intersectionality with multi-disciplinary legal and philosophical interpretations, I use my own working definition of *complicity* to argue that Religious Right complicity claims regarding reproductive care have expanded in ways that are not only harmful to people with uteruses, but also that are flawed and illegitimate. This case study lays the groundwork for how legal boundaries around the definition of *complicity* might be constructed as a potential solution for the Supreme Court to better assess Religious Right complicity claims and balance religious and reproductive freedoms without one undermining the other.

III. Literature Review: Legal Philosophies

It is clear that as American society has evolved, so, too, has American citizens' relationshipwith the law. In her book *Invitation to Law and Society: An Introduction to the Study of Real Law*, scholar Kitty Calavita discusses the varying ways in which the law shapes society. She reveals that whether individuals realize it or not, the law shapes the way individuals live by creating conceptual boundaries and determining the content of those boundaries (Calavita, 2010). Kimberlé Crenshaw's critical race theory and theory of intersectionality are introduced to

demonstrate not only how social categories like race and gender are socially constructed, but also how these categories are often disempowered by the law because they tend to be viewed as mutually exclusive (Calavita, 2010). The law is not as fair, neutral, or just as it may outwardly appear. American law contains gaps that lead to non-enforcement, selective enforcement, and different interpretations of the statutes, and as a result the law in practice impacts individuals differently based on their social positionality (Calavita, 2010).

One of the most significant ways that American society's relationship with the law has changed is due to the power of Christian religion on legislation. Despite the American Constitution's provision of the separation between church and state, Christian religion has become increasingly present, and even dominant, in the law, which has a particularly harmful and discriminatory impact on non-Christians, women, and the LGBTQ+ community. In *A Brief, Liberal, Catholic Defense of Abortion*, Dombrowski and Deltete (2000) outline the roots of many religious claimants' opposition to abortion and "abortifacients," which includes the aspect of natural law that sex should only occur in monogamous marriage for a solely procreative purpose, as well as the perception of a fetus as a *potential* human person, and that having a human body provides enough evidence of a fetus having a human soul (Dombrowski & Deltete, 2000). Other Religious Right anti-choice claims are based on the belief that life begins at the moment of conception, or that contraceptives prevent the fertilization of an ovum that would otherwise become human life (Corrado Del Bo, 2012, pp. 133-145).

Since the Supreme Court's decision to protect women's right to privacy in the 1973 case *Roe v. Wade*, the Religious Right has used popular culture, state legislatures, Congress, and the courts to exert influence and effectively undermine sexuality policy (Joffe, 2007). Using the rhetoric of war, emergency, or catastrophe, the Religious Right has started a "Culture War"

between the constitutionally protected rights to freedom of religion and freedom to reproductive care (Ben-Asher, 2018). By encouraging the passage of parental-consent laws, TRAP laws, and cultural stigmatization of abortion, Religious Right efforts have been largely successful (Joffe, 2007). The courts especially have been a major location of triumph for the Religious Right against abortion rights, as cases like *Harris v. McRae* (1980), *Webster v. Reproductive Health Services* (1983), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Gonzalez v. Carhart* (2003) have upheld abortion restrictions such as preventing their federal funding and banning "partial birth abortions" (Joffe, 2007, p. 72).

Most recently, the Supreme Court case *Burwell v. Hobby Lobby* in 2014 marks a revolutionary strengthening of the historical trends of Religious Right claims against reproductive rights. Under the Affordable Care Act (ACA), employers are required to uphold the "Contraceptive Mandate" and provide employees with insurance coverage for abortion and contraceptive healthcare. The Religious Freedom Restoration Act (RFRA), the law on which the *Hobby Lobby* decision was based, was enacted in 1993 to protect the first amendment rights of religious minorities in the aftermath of *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), and it was enabled under the ACA in 2010 to allow non-profit employers to exempt themselves from the Contraceptive Mandate on religious grounds (Ben-Asher, 2018). Although accommodations have historically existed in private spaces in the U.S., until recently, religious exemptions were largely uncommon, and *Hobby Lobby* became the first case in which a public, commercial entity could do so (Sepper, 2016, p. 652). In the *Hobby Lobby* case, the Supreme Court decided that the RFRA applied to not only non-profit organizations, but *for*-profit companies as well because they are a collective of individuals with

their own moral and religious beliefs who should not have to be complicit in an act that they find morally objectionable.

In essence, the Supreme Court gave the Hobby Lobby corporation permission to discriminate against thousands of its employees, regardless of their religious beliefs, who may become pregnant from receiving abortion and contraceptive coverage. This third-party harm was left largely unconsidered by the Court (Sepinwall, 2015). In a legal system that follows legal precedent, the doctrine of "corporate conscience" has dangerous implications for people with uteruses as more individuals have sought religious exemptions from providing abortion and contraceptive care, including pharmacists, doctors, and other healthcare workers (Sepper, 2015). These implications extend beyond abortion and contraceptives toward medical procedures such as end-of-life care. In her dissent in *Hobby Lobby* (2014), Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, explains that women's participation in the economic sphere depends on their ability to control their reproductive lives. Furthermore, women pay much more than men for preventative care, and cost is capable of blocking women from receiving any preventative care at all. As such, providing religious exemptions would deny coverage to women who do not share their employer's religious beliefs. In her conclusion, she quotes an opinion made by the Lee Court, "'When followers of a particular sect enter into commercial activity as a matter of choice . . . the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity'" (*Burwell v. Hobby Lobby Stores, Inc*., 2014, sec. IV).

The increasing scope of how religious claimants define *complicity* begs the question, how has their philosophical definition of *complicity* in abortion and contraceptive services evolved and expanded under U.S. Supreme Court rulings since *Roe v. Wade* in 1973? Where is the

boundary between *complicity* and *responsibility*? Should the Court draw legal boundaries around the definition of *complicity*, and if so, how should it be measured? According to Nejaime and Siegel (2015), there are two dimensions to complicity-based conscience claims; the third party's conduct, and the claimant's relationship to the third party (p. 2518). Sepinwall (2015) goes even further, and argues that complicity can be determined based on moral claims, empirical claims, and relational claims (p. 1912). She points out that complicity is not as simple as a claimant's proximity to the act in question, because often the claimant has no choice in what actions the third party does or does not take, and measuring by proximity denies moral responsibility for actions one does not directly participate in (Sepinwall, 2015). Furthermore, it is clear that in contrast to the law, religious claimants believe that a "relatively weak" relationship to the act in question is enough to implicate them (Sepinwall, 2015, p. 1935). At the same time, courts must weigh religious claims against government and third-party interests, and there must be empirical standards for courts to determine their validity (Sepinwall, 2015, p. 1929, 1933).

This study adds to the body of research done on Religious Right anti-choice complicity claims by comparing the language invoked by Religious Right claimants and Supreme Court justices with qualitative analysis of how these claimants perceive their complicity to the abortion/contraceptive act they are objecting to. It examines how the increasing scope of *complicity* affects people with uteruses' access to abortion and contraceptive services, how direct the lines of complicity are, and whether legal boundaries must be established around complicity's definition in order to ensure more fair and consistent legal decision-making. This study argues that Religious Right anti-choice complicity claims are invalid and harmful to people with uteruses, and as such, boundaries around *complicity* are necessary for the Court to better assess their legitimacy. By developing my own working definition of *complicity*, this study

demonstrates why Religious Right anti-choice complicity claims are invalid, how they negatively impact people with uteruses, and that definitional boundaries around *complicity* are a potential solution for the U.S. legal system to strike a better balance between protecting religious and reproductive freedoms.

IV. Research Design: Defining "Complicit"

My research study follows an interpretive case research design in order to conduct a qualitative study of how Religious Right anti-choice claimants understand *complicity* regarding reproductive care, how they employ *complicity* rhetoric in the U.S. Supreme Court setting as a tactic to restrict reproductive care, and why their *complicity* rhetoric fails. To study this, my unit of analysis comes from six U.S. Supreme Court cases specifically dealing with abortion, contraceptives, and questions of complicity between 1973 (when *Roe v. Wade* was decided) and the present (2021). To select the cases for analysis, I started with the cases that appeared most frequently in academic work on this topic, then narrowed it down to the cases whose legal issue in question best fit my definition of *complicity*. For the purposes of this research, my definition of *complicity* draws from the Oxford English Dictionary, Black's Law Dictionary, U.S. criminal law, and previous scholarship to provide a more philosophically and legally comprehensive definition. The definitions of *complicity* from these sources are as follows: According to the Oxford English Dictionary, *complicity* is "The being an accomplice; partnership in an evil action" (Complicity, n.). Black's Law Dictionary (Garner, 2019) is more precise. In Black's, "complicity" means "1) Involvement in a crime together with other people; association or participation in a criminal act as an accomplice. Under the Model Penal Code, a person can be an accomplice as a result of either that person's own conduct or the conduct of another (such as an

innocent agent) for which that person is legally accountable" or "2) Involvement in or knowledge of a situation that is morally wrong or entails dishonesty." According to U.S. criminal law, such as that of the Washington State Legislature:

1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
2) A person is legally accountable for the conduct of another person when:
    a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or
    b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or
    c) He or she is an accomplice of such other person in the commission of the crime.
3) A person is an accomplice of another person in the commission of a crime if:
    a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
        i) Solicits, commands, encourages, or requests such other person to commit it; or
        ii) Aids or agrees to aid such other person in planning or committing it; or
    b) His or her conduct is expressly declared by law to establish his or her complicity.
4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

5) Unless otherwise provided by this title or by the law defining the crime, a person isnot an accomplice in a crime committed by another person if:
    a) He or she is a victim of that crime; or
    b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.
6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted (Liability for Conduct of Another—Complicity.)

The verbiage of these definitions of *complicity* make it clear that it is very active concept, not passive, using verbs like *promote*, *facilitate*, *solicit*, *command*, *encourage*, and *request*. *Complicity* also has an inherently negative connotation, as these definitions contain language like *crime*, *dishonesty*, *culpability*, *accomplice*, and *wrong.* Additionally, these definitions demonstrate that *complicity* has a close relationship to *responsibility*, which the Oxford English Dictionary defines as **"**The state or fact of being accountable; liability, accountability *for* something" (Complicity, n.). As such, how do we differentiate between when we are *responsible* and when we are *complicit*?

From these sources and their definitions of *complicity*, I developed my own working definition in an attempt to capture *complicity*'s simultaneous legal specificity and moral ambiguity. For the purposes of this research project, while *responsibility* describes an individual

as being the *primary* if not the *only* agent in an act of wrongdoing, *complicity* describes *degrees* of agency one has in an act of wrongdoing, and specifically an act of wrongdoing done by another person. The more agency one has in the act, the more complicit they are. One is not complicit legally if they are a victim of the evil act, if one ends their involvement before the evil act is committed, or if one has no way of knowing/reasonable suspicion that another person is performing an evil act. The act can be positive or negative, done intentionally or unintentionally, and with awareness or unawareness of the consequences. *Complicity* and *responsibility* both mean being accountable for others' well-being, but they also mean being accountable for others' suffering. One can also be collectively responsible and/or collectively complicit with others for something. For instance, no one is singularly responsible for climate change, but individuals are collectively complicit in climate change because everyone emits varying amounts of greenhouse gases. These individuals are collectively responsible for each others' health and the well-being of the planet. Individuals do not necessarily have agency over each others' carbon emissions (and therefore cannot be *responsible* for them), but they do have agency over their *own* carbon emissions, and therefore a responsibility to lower them for the collective good.

Based on this definition of *complicity*, I selected six U.S. Supreme Court cases, which includes *Beal v. Doe* (1977), *Harris v. McRae* (1980), *Williams v. Zbaraz* (1980), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), *Burwell v. Hobby Lobby* (2014), and *Little Sisters of the Poor v. Pennsylvania* (2020).

I use these six cases to examine how Religious Right anti-choice claimants' understand their own complicity in abortion and contraceptive care and how the scope of their self-assumed complicity has broadened under Supreme Court rulings from 1973 to the present. Through this

analysis, I assert that their claims to complicity are not only harmful to people with uteruses' right to reproductive choice, but also that these complicity claims are flawed and illegitimate.

Beal v. Doe is a 1977 case in which anti-choice advocates sought to uphold a Pennsylvania law that prevented Medicaid funds from going toward nontherapeutic abortions except for in situations where an abortion was medically necessary (*Beal v. Doe*, 1977).

Examining Title XIX of the Social Security Act, the Supreme Court upheld the Pennsylvania lawand ruled that "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care" (*Beal v. Doe*,1977). Thus began the first of a chain of cases in which the Court ruled that while people with uteruses have reproductive rights, the state is not required to provide finances that allow them to exercise those rights.

Harris v. McRae is a 1980 case in which appellees from New York contested that similar to the Pennsylvania law in *Beal v. Doe* (1977), the Hyde Amendment that was enacted in 1976 was unconstitutional on the grounds that it violates the Due Process Clause of the Fifth Amendment and the Religious Clauses of the First Amendment (*Harris v. McRae*, 1980). The appellees claimed that that the state has a duty under Title XIX to provide Medicaid funding for abortions, a duty that the Hyde Amendment does not relieve. The central question in this case was, does "Title XIX require a State that participates in the Medicaid program to fund the cost of medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment" (*Harris v. McRae*, 1980)? In its analysis, the Supreme Court concluded that *Roe v. Wade* "did not translate into a constitutional obligation of [the state] to subsidize abortion," and the Hyde Amendment "does not permit federal reimbursement of all medically necessary abortions" (*Harris v. McRae*, 1980). The Court also declared that the Hyde Amendment does not

violate the separation of church and state because it serves a secular legislative purpose" (*Harris v. McRae*, 1980). The Court asserted that "the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life" (*Harris v. McRae*, 1980). As such, the Hyde Amendment is constitutional, and like *Beal v. Doe*, although individuals with uteruses have a right to an abortion, the state is not obligated to pay for them.

Williams v. Zbaraz is another 1980 case related to *Harris v. McRae* (1980) (*Williams v. Zbaraz*, 1980). This case concerned an Illinois statute that prohibited government financial assistance toward abortion procedures except in cases where the abortion is necessary to save the woman's life. The District Court ruled that the Hyde Amendment, which prohibits the use of federal funds for abortions, does not relieve the state of its responsibility under Title XIX of the Social Security Act to fund medically necessary abortions regardless of the threat to the woman's life. The District Court ruled that the Illinois statute and the Hyde Amendment violated the Equal Protection Clause of the Fourteenth Amendment. However, the District Court lacked jurisdiction to judge the constitutionality of the Hyde Amendment. The central issue in this case, then, was if the District Court had the authority to consider the Hyde Amendment, and if the Hyde Amendment allows a state to restrict funding of abortions that it is obligated to fund by Title XIX. Here, the Supreme Court ruled that although the District Court claimed that the same analysis for the Illinois statute would apply to the Hyde Amendment and make both unconstitutional, it should not have considered the Hyde Amendment because it was outside of its jurisdiction. At the same time, using *Harris v. McRae* (1980) as precedent, the Supreme Court proclaimed that a state is not obligated to fund medically necessary abortions, and a statute like Illinois's or the Hyde Amendment does not violate the Equal Protection Clause of the Fifth

Amendment. By extension, then, the Hyde Amendment also does not violate the Equal Protection Clause of the Fourteenth Amendment and is constitutional. Based on this reasoning, the Hyde Amendment has remained constitutional to this day.

Planned Parenthood of Southeastern Pennsylvania v. Casey is a 1992 case regarding the Pennsylvania Abortion Control Act of 1982, which required a woman seeking an abortion to give informed consent, a 24-hour waiting period between consent and the abortion procedure, as well as sign a statement claiming that she has informed her husband, or a parent if the seeker is a minor (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992). These requirements were exempted in the case of an emergency. The law also contained reporting requirements for facilities that provide abortions. The petitioners in this case were five abortion facilities, an individual physician, and a class of physicians who charge that all of the provisions of the act were unconstitutional and would overturn *Roe v. Wade* (1973). In the Supreme Court's analysis, the justices made sweeping claims about who is involved in abortion decisions. The Court concluded the case by replacing the trimester framework established by *Roe v. Wade* (1973), which outlined at which stages of pregnancy abortions were legal, with the undue burden standard for whether or not a law was an impediment to an individual's ability to exercise their reproductive rights. In regard to the Pennsylvania law, the Court ruled that the informed consent requirement, the 24-hour waiting period, and the spousal notification requirement, or parental notification if the abortion-seeker was a minor, imposed no undue burden on women's ability to access an abortion. As such, the Pennsylvania statute was constitutional, and it opened the door for who has a say in people with uteruses' reproductive decisions.

Burwell v. Hobby Lobby, the 2014 case that has already been mentioned several times in this project, concerned the Green family who own and operate Hobby Lobby stores nation-wide

according to their Christian faith, including their belief that contraceptives are immoral (*Burwell v. Hobby Lobby Stores, Inc.*, 2014). One of the sons in the Green family also runs an affiliated Christian bookstore company called Mardel. The Green family's case was joined with a case brought by the Hahn family, who run a for-profit business called Conestoga and are members of the Mennonite Church, a Christian denomination, and run their business according to their religious principles, which includes that life begins at conception. Both families of all three companies believe that facilitating access to contraceptive drugs and devices violates their religion. In September 2012, the Green family sued Kathleen Sebelius of the Secretary of the Department of Health and Human Services to contest the requirement that their healthcare plans for employees cover contraceptives as federally mandated by the Patient Protection and Affordable Care Act (ACA). Looking at the RFRA, which prohibits the government from "substantially burdening" a person's religious exercise unless it is for a "compelling governmental interest" and is done in the "least restrictive means," the central question was whether or not RFRA, which traditionally only applied to *non*-profit companies, could apply to *for*-profit companies. In its analysis, the Supreme Court turned to the Dictionary Act, which states that the word *person* includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" (*Burwell v. Hobby Lobby Stores, Inc.*, 2014). The Supreme Court ruled that since for-profit companies are made up of individuals with their own "sincerely held" religious beliefs and the contraceptive mandate only serves a broad government interest of "public health" and "gender equality" rather than a "compelling" interest, the contraceptive mandate violates the RFRA (*Burwell v. Hobby Lobby Stores, Inc.*, 2014). The Court then declared that the RFRA does apply to for-profit companies, meaning for-

profit companies can be exempted from the Contraceptive Mandate and deny contraceptive healthcare coverage to their employees on religious grounds.

Finally, *Little Sisters of the Poor v. Pennsylvania* is the most recent case, brought to the Supreme Court in 2020 by Little Sisters of the Poor, a Roman Catholic organization that runs religious nonprofits (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 2020). Similar to *Hobby Lobby,* Little Sisters of the Poor claimed that complying with the Contraceptive Mandate of the ACA and completing the self-certification form of the RFRA would "force them to violate their religious beliefs by 'tak[ing] actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme" (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 2020). The organization was opposed to four specific methods of contraception covered by the Contraceptive Mandate that they believed "risked causing the death of a human embryo," and if they were to provide them, they would be made complicit in abortion (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 2020). In this case, the central issue was if the federal government had lawfully allowed for religious objectors to be exempted from the contraceptive mandate of the ACA. Again turning to the RFRA, the Supreme Court majority opinion ruled that because the language of the RFRA never mentions contraceptives, Congress failed to protect contraceptive coverage. This means that the Contraceptive Mandate is capable of violating the RFRA, and the Departments had the authority to exempt Little Sisters of the Poor from the Contraceptive Mandate.

To summarize these cases, *Beal v. Doe* (1977), *Harris v. McRae* (1980) and *Williams v. Zbaraz* (1980) are a chain of three cases in which the Supreme Court ruled that while people with uteruses have reproductive rights, as ruled in *Roe v. Wade* (1973), neither the state nor the

federal government are obligated to pay for them. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court ruled that a 1982 Pennsylvania abortion law was constitutional because they claimed it posed no undue burden on abortion access, and it widened the scope of who has a say in people with uteruses' reproductive decisions. Finally, *Burwell v Hobby Lobby* (2014) and *Little Sisters of the Poor v. Pennsylvania* (2020) are two cases in which the Court declared that religious objectors have a right to be exempted from the Contraceptive Mandate based on the employers' religious beliefs, regardless of whether they are a for-profit company or a nonprofit organization.

The language in these cases fit my definition of *complicity* by evoking closely related terms such as *obligation*, *immoral, sinful*, *violate*, *implicate*, *facilitate*, *consequence*, *authority*, *participate*, *permission*, *"sincere belief,"* and the term *complicit* itself, all of which suggest a negative perception of abortion and contraceptives and the existence of an influential relationship between the religious petitioner and the respondent. This is an ideal sample because not only are these six cases accessibly located in the public domain, but because of federal supremacy, the interpretations of *complicity* made by the Supreme Court and religious claimants are highly generalizable to the U.S. population and U.S. law at the local, state, and federal levels. Additionally, because the cases are spread across the 47-year period between 1973 and the present, and because of the U.S. tradition of legal precedence, they adequately represent the long-lasting legal changes in the understanding of *complicity* by religious claimants and U.S. judges over time. This sample is also valid and reliable, as extensive research has been conducted on the relationship between religion and reproductive rights using these same casesand arriving at the conclusion that religion tends to undermine reproductive rights. That beingsaid, this research is somewhat limited because only six cases out of the 46 abortion and contraceptive

cases available in the public domain, but the principle of legal precedence accommodates for this limitation as each case draws on the rules established by those before thatdealt with similar legal questions.

By analyzing the language used by Religious Right anti-choice complicity claimants in the Supreme Court setting, my research adopts the interpretive method to develop a theory about how Religious Right anti-choice claimants' define and perceive their own complicity, and how their perception of complicity has expanded under legal rulings over time. In doing so, I dissect these Religious Right anti-choice complicity claims to demonstrate the fallacies on which they rest and the negative consequences they have on people with uteruses.

V. Findings

Complicity as Financial Facilitation

All of the cases dealing with complicity raise questions regarding state and federal programs and employer responsibilities. Within this context, it is no surprise that in one way or another, allof the cases convey the perception of complicity in abortion and contraceptive services as being mainly centered around some sort of financial facilitation. Beginning with *Beal v. Doe* (1977), inwhich the central question is if "Title XIX requires Pennsylvania to fund under its Medicaid program the cost of *all* abortions that are permissible under state law," the question itself suggests that state funding for abortions might make the state complicit in an act it finds morallyreprehensible (*Beal v. Doe*, 1977). In this case, the Supreme Court consistently repeated that the state has an "important and legitimate interest" in protecting human life, and as such, "nothing in the [Title XIX] suggests that participating States are required to fund every medical procedurethat falls within the delineated categories of medical care" (*Beal v. Doe*, 1977). The

Court concluded that a state *may* provide funds for abortions if it so chooses, but it is not *required* to. This not only suggests that abortions are an immoral act, but it also gives the state the ability to make its own conscientious decisions regarding what is moral or immoral, and whether or not tomake itself complicit in certain acts by means of financial facilitation.

Harris v. McRae (1980) and *Williams v. Zbaraz* (1980) take the implication of state complicity from *Beal v. Doe* (1977) one step further, and suggest that through federal funding of abortion and contraceptive services, *taxpayers* may even be considered complicit. In the Supreme Court case *Harris v. McRae* (1980), the central issue was if "Title XIX require[s] a State that participates in the Medicaid program to fund the cost of medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment" (*Harris v. McRae*, 1980) Similarly, in *Williams v. Zbaraz* (1980), the Court considered the question if "the District Court ha[d] the authority to consider the Hyde Amendment, and does the Hyde Amendment allow a state to restrict funding of abortions that it is obligated to fund by Title XIX" (*Williams v. Zbaraz*, 1980)?

The Hyde Amendment is a U.S. policy still in place today that was enacted in 1976 to "[p]rohibi[t] the use of federal funds for any health benefits coverage that includes abortion," except in cases of rape, incest, or if the pregnancy threatens the life of the woman (pregnant person) (Casey, 2013). Any healthcare plans receiving federal funds must keep those funds separate from funds for abortion services (Casey, 2013). The law itself implies that not only might the state be complicit if it appoints funding toward abortions, but that the taxpayers who supply the finances for that funding would *also* be complicit.

In *Harris v. McRae* (1980), the appellees claimed that "the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but

not to relieve a participating State of its duty under Title XIX to provide for such abortions in its Medicaid plan" (*Harris v. McRae*, 1980). This demonstrates a fundamental difference in how abortion is perceived. Whereas the appellees viewed abortion as a "duty" and "responsibility" for the state to provide, the state of Pennsylvania viewed it as an "evil" act in which providing Medicaid funding would make it complicit. As such, the Court ruled that because

> the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan, it follows that Title XIX does not require a participating State to include in its plan any services for which a subsequent Congress has withheld federal funding (*Harris v. McRae*, 1980).

Instead, as the Court claimed, the Hyde Amendment "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest" (*Harris v. McRae*, 1980). Thus, "by encouraging childbirth except in the most urgent circumstances, [the Hyde Amendment] is rationally related to the legitimate governmental objective of protecting potential life" (*Harris v. McRae*, 1980). This reasoning was used as precedent to reach the same conclusion in *Williams v. Zbaraz* (1980). The rulings of both of these cases demonstrate that "encouraging childbirth" is the preferential, moral alternative to abortion, and that to direct federal funding toward such an "evil" act would make both the state and its lawful, taxpaying citizens complicit in immorality. By preventing federal funding from going toward abortion and specific contraceptive services, the state and taxpayers can prevent an evil act from occurring and avoid assuming guilt if it does.

Complicity as Financial Facilitation: Healthcare

If *Beal v. Doe* (1977), *Harris v. McRae* (1980), and *Williams v. Zbaraz* (1980) established that financial facilitation is grounds for complicity, *Burwell v. Hobby Lobby* (2014) and *Little Sisters of the Poor* (2020) expanded that rhetoric to include healthcare coverage as a form of financial facilitation. In *Hobby Lobby* (2014), the Hahn family who own Conestoga Wood Specialties argued that because they believe that life begins at conception, it is "'against [their] moral conviction to be involved in the termination of human life' after conception, which they believe is a 'sin against God to which they are held accountable'" (*Hobby Lobby*, 2014). Due to this assumption of complicity, the Hahns "accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients" (*Hobby Lobby*, 2014). This notion of complicity as financial facilitation through healthcare becomes even more explicit throughout the case, as the Hahns claimed that "'it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs'" (*Hobby Lobby*, 2014). Similarly, the Green family who own Hobby Lobby also believed "that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point" (*Hobby Lobby*, 2014).

Hobby Lobby's (2014) understanding of healthcare coverage as facilitation of abortions and therefore complicity in them was used as precedent in *Little Sisters of the Poor* (2020), in which the religious organization claimed complicity on two grounds, with the first being "to the requirement that they maintain and pay for a plan under which coverage for contraceptives would be provided," and the second being "to submission of the self-certification form required by the accommodation because without that certification their plan could not be used to provide

contraceptive coverage" *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 2020). For the Hahns, the Greens, and Little Sisters of the Poor, their opposition to the Contraceptive Mandate suggests their belief that to comply would not only be *permitting* and making it *possible* for abortions to occur (specifically among their employees), but that they are *actively causing* those abortions be performed. Without healthcare coverage of abortions and "abortifacients," the "termination of human life" cannot take place. While *Beal v. Doe* (1977), *Harris v. McRae* (1980), and *Williams v. Zbaraz* (1980) planted the seeds for what complicity could look like, *Burwell v. Hobby Lobby* (2014) and *Little Sisters of the Poor* (2020) broadened the term and made it explicit.

The Supreme Court rulings in *Beal v. Doe* (1977), *Harris v. McRae* (1980), *Williams v. Zbaraz* (1980), *Burwell v. Hobby Lobby* (2014), and *Little Sisters of the Poor v. Pennsylvania* (2020) suggest the existence of a relationship between money and property as a basis for complicity. According to the classical liberal thinker John Locke, whose philosophy predominates U.S. political thought, what we put our labor into becomes our property (Locke, 2003, p. 191). What these five cases imply is that if the federal government, states, or taxpayers put their labor or money into the abortion and contraceptive services, whether it be direct funding or healthcare coverage, their financial property is permitting and in fact being used for an act they perceive as immoral. By extension, then, the "immoral" act of abortion and contraceptive services is their property, an act in which they must assume *responsibility* and they are *complicit* in because it is their money. Although money leaves their hands, and although they do not know whether or not those funds toward abortions are being used, because the money originated in their property, the resultant immoral act that is performed, or that could *potentially* be performed, is also their property. If funding is the means to an end, whether it be directly through federal

subsidizing or indirectly through healthcare, then to deny that funding avoids an assumption of guilt for an undesirable end. The Supreme Court rulings in *Beal v. Doe* (1977), *Harris v. McRae* (1980), *Williams v. Zbaraz* (1980), *Burwell v. Hobby Lobby* (2014), and *Little Sisters of the Poor v. Pennsylvania* (2020) demonstrate not only the institutionalization of the Religious Right belief that abortion and "abortifacients" are immoral, but also that the state and its taxpaying citizens are capable of being complicit in such an "immoral" act, an assumption of guilt that policies like the Hyde Amendment and the RFRA are designed to prevent.

Complicity as a Snowball Effect, or the Slippery Slope Fallacy

Finally, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), *Burwell v. Hobby Lobby* (2014), *Little Sisters of the Poor* (2020) illustrate the expansion made by previous cases of *what* kind of financial facilitation constitutes complicity in abortion and "abortifacients," as well as a snowball effect logic for *who* is capable of being complicit through such financial facilitation and *how*.

The first component of a snowball effect logic of Religious Right complicity claims concerns *who* is considered involved in the execution of an abortion or "abortifacient." The majority opinion in *Casey* (1992) makes this particularly clear in stating:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted (*Planned Parenthood of Southeastern Pennsylvania v. Casey*,1992).

What this statement suggests is a snowball effect of both who is involved with the abortion decision, as well as who is affected by it. Meanwhile, in *Burwell v. Hobby Lobby* (2014), the Court acknowledged the snowball effect, but chose not to address it in full. Instead, the Court wrote:

> The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[34] Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step (*Burwell v. Hobby Lobby*, 2014).

Likewise, in *Little Sisters of the Poor* (2020), Justice Alito's concurrence directly addresses the snowball effect problem of where to draw the line of complicity, then chooses to not answer it. Instead he says:

> Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 2020).

What these three cases indicate is an enlargement of the circle of people involved in ending the life or potential life of a fetus. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992),

Burwell v. Hobby Lobby (2014), *Little Sisters of the Poor* (2020) broaden Religious Right rhetoric of complicity not just in terms of who is capable of facilitating an abortion procedure or "abortifacient" itself, but also who is capable of experiencing its presumed repercussions.

The second component of the snowball effect logic of Religious Right complicity claims concerns *how* one becomes complicit, meaning, how their initial, individual action leads to a chain of subsequent events that end with an "immoral" abortion procedure or "abortifacient" use. However, in the case of Religious Right petitioners, there are little to no subsequent actions between their financial facilitation and the termination of a fetus. Instead, their financial facilitation is perceived as *direct* and *active*. *Little Sisters of the Poor* (2020) best exemplifies this snowball logic, as the organization believed that "completing the certification form would force them to violate their religious beliefs by 'tak[ing] actions that *directly* [my emphasis] cause others to provide contraception or appear to participate in the Departments' delivery scheme'" (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 2020). To this claim the Court conceded, proclaiming that:

> If an employer has a religious objection to the use of a covered contraceptive, and if the employer has a sincere religious belief that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 2020).

Little Sisters of the Poor (2020) demonstrates the Religious Right's assumption that providing funds, whether through federal subsidies or employee health care plans, will *directly lead* to others to having abortions or using "abortifacients;" there are no steps in between, nor are there alternative endings to the chain of events. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), *Burwell v. Hobby Lobby* (2014), *Little Sisters of the Poor* (2020) demonstrate Religious Right's

use of the term *complicity* to designate a slippery slope in a chain of actions that starts with their financial facilitation, and culminates with the perceived immoral behavior of terminating a fetus.

VI. Discussion: Why Religious Right Rhetorical Use of *Complicity* Fails

The Religious Right's rhetorical use of the term *complicity* in abortion and contraceptive care has been effective in the courtroom, but not without some inherent flaws. Based on my working definition of *complicity*, Religious Right complicity claims fail on four grounds: on the "evil" criterion; on the agency criterion; on the involvement criterion; and on the "reasonable suspicion" criterion. The following section argues how Religious Right complicity claims fail on each of these criteria respectively.

On the "Evil" Criterion

Drawing on the work of Dombrowski and Deltete (2000), I wish to problematize the first criterion for complicity in Religious Right claims against abortion and contraceptives, which is on the "evil" criterion. First, at least up until the second trimester, even if a fetus has a human form, this is insufficient evidence to qualify it as a human person. Second, a fetus also has no identity or claim to rights. Third, for these reasons, neither the fetus nor Religious Right petitioners can claim victimhood from the act of abortion and contraceptive use. Finally, it is on this philosophical and scientific understanding with which the reason of legality, and therefore not "criminality," of abortion and contraceptives operates.

The Religious Right views abortion and "abortifacients" as "evil," and by extension "criminal," despite the Supreme Court having legalized their use through the right to privacy in cases like *Griswold v. Connecticut* (1965) and, in a larger scope, *Roe v. Wade* (1973). As

previously stated, although the law might reflect the dominant culture's acceptance of abortion and contraceptives, the morality of an act cannot rest solely on its legality. However, Religious Right claims to abortion and contraceptives as being "evil" does not fail only because these acts are legal in the U.S, but also because they rest on a scientifically and philosophically incorrect assumption of both when human life begins and what constitutes potential human life.

According to Catholic scholars Deltete and Dombrowski, there are several reasons for why abortion is not murder and therefore not immoral. First, they draw from Catholic thinking to provide a philosophical argument for why a fetus is not a human person. Using the argument of the prominent Catholic Saint Augustine, if having a human form is the basis for having human life, "the question of homicide is not even pertinent with respect to the unformed fetus" (Dombrowski & Deltete, 2000, pp. 24, 27). Saint Augustine believed that not only is having a human form necessary for being human, but so is sentiency necessary for having personhood. Similarly, Catholic priest and philosopher Thomas Aquinas held that "whatever was growingin the mother's womb early in pregnancy was not yet a real human body; hence, it could not be animated by a human soul any more than a square block of marble can already possess a human shape" (Dombrowski & Deltete, 2000, p. 43). Aquinas also had a similar philosophy to Augustine about the animation of the human soul. He believed that first, the fetus is "animated by a vegetative or a nutritive soul (*anima vegetabilis*), then by a sensitive or an animalsoul (*anima sensitiva*), finally by a rational or human soul (*anima intellectiva*)" (Dombrowski &Deltete, 2000, pp. 45-46). For both of these foundational Catholic thinkers, the fetus in its early stages is not a human person because it does not have a human form, nor is it animated by a human soul. As such, aborting a fetus in its early stages is not "evil" or "immoral."

Deltete and Dombrowski (2000) also give a scientific reasoning for why a fetus is not a human person, and consequently why abortion is not murder, "evil," or "criminal." On the basis of the common Religious Right claim that a fetus is human when it possesses a human form, this does not occur at the "moment of conception." Rather, it is not until around the third week of pregnancy that essential DNA turns a zygote into an embryo. Only at this point during the third week of pregnancy is a fetus physically existent in a human shape. However, they are not yet capable of being animated or of having sensory emotions. In order for any life to have sensory feelings, having a central nervous system is essential, but this does not form for the human fetus until the end of the second trimester. As such, at least up until the end of the second trimester, Deltete and Dombrowski (2000) claim, aborting a fetus is not immoral, murderous, "evil," or "criminal" because even if the fetus appears human, it is incapable of experiencing love, pain, joy, or sadness due to its lack of neurological pathways.

Finally, Deltete and Dombrowski (2000) provide a philosophical argument for why aborting a fetus cannot be considered "evil" by destroying a *potential* human life. For this, they claim, human identity is based on individuals' connection or "hinge"" to their past, not their future (Dombrowski & Deltete, 2000, pp. 66-67). Our identities are shaped by a host of experiences ranging from our childhoods, our friendships, our loss, and our pain. Thus, although our human form remains somewhat constant (in the sense that we are the same physical body, even if that body changes as we grow and develop), our identities are constantly shifting. A zygote, an embryo, and a fetus do not have a human form or sensory perceptions, but they also have no past with which to form an identity. Another reason why the *potential* human life claim to abortion's criminality fails is because "*actual* rights cannot be derived from any *potential* qualifications for them" (Dombrowski & Deltete, 2000, p. 71). It would be strange if I, currentlya

24 year-old at the writing of this project, began claiming a right to Medicare because I am *potentially* going to be 65 years old one day. I do not currently know that I will live to be 65, although I hope I do. Within the present moment, I cannot claim that right because whether or not I reach 65 years-old to qualify is not guaranteed. In the same way, a fetus is still forming, physically, mentally, emotionally, neurologically, and therefore does not yet have any right to life (Dombrowski & Deltete, 2000, p. 77). Abortion is not "evil" on the grounds of destroying potential human life because since a fetus has no past, nor does it have any claim to a future, it also has no identity or rights.

Morality may sometimes be subjective or contextual, but the Religious Right's rhetorical use of *complicity* fails on the "evil" criterion. Until the end of the second trimester, a fetus might appear human, but it has no central nervous system for sensory perception. Because a fetus has no past, nor does it have a present, it has no identity or claim to future rights. As such, the fetus does not suffer and does not constitute a victim, nor do the Religious Right petitioners. Finally, due to these moral and scientific reasons, *Roe v. Wade* (1973) held abortion to be legal and therefore not "criminal." Abortion and contraceptives are thus not only federally legal, but they are also legal because they are not *absolutely* immoral, thereby making the Court's implicit endorsement of the complicity argument on these grounds highly problematic.

On the Agency and Involvement Criteria

The second and third reasons why Religious Right rhetorical use of *complicity* is incorrect is because it fails to meet the intertwined criterion of agency and involvement. In simple terms, agency can be defined as the quality of being able to take action or to choose what action to take (Agency, n.). The petitioners in question from these cases may be providing funds,

but this does not constitute facilitation because they have little to no degree of agency over the individuals with uteruses whose bodies they seek to regulate. As Sepinwall notes, because the petitioner does not choose the conduct of the other person seeking an abortion or contraceptives, they cannot be responsible for it (Sepinwall, 2015, p. 1916). She notes, "The real question here is not whether an employee's decision belongs to, or is attributable to, her employer, but instead whether the employer bears some responsibility for the employee's act *even if the employers did not participate in the decision to pursue that act*" (Sepinwall, 2015, p. 1916). The answer to this question is a resounding "no." Employers and taxpayers play no role in an individual's decision to use contraceptives or have an abortion. It would be quite strange for an individual to ask their boss or a random stranger on the street for permission to receive reproductive care. Petitioners do not even have proxy agency in these situations because they have no authority to act on the behalf of the individual seeking an abortion and contraceptive access. Abortion and contraceptive use have no implication on the general public because the decision rests primarily, and often solely, between the individual and their healthcare provider.

To reiterate the Lockean framework of complicity, funds for abortions and contraceptives may originate in the hands of taxpayers and employers, but once the money leaves their hands, it is no longer their property (Locke, 2003, p. 191). By extension, how that funding is used is also no longer their property. It would be odd if I received my paycheck from work, bought a car with those funds, and then my boss declared that my car was theirs because the money that was used to pay for it originated in their property. In the same way, once funding leaves taxpayers' and employers' hands, what happens with that money is no longer their property because they do not have any agency to decide how those funds should be used, if they are to be used at all. Any

subsequent act that is performed, or that could *potentially* be performed, is not their property, because that choice rests exclusively between the individual and their healthcare provider.

This connects to the next complicity criterion that is closely related to agency, which is the concept of involvement, yet a third criterion for *complicity* that Religious Right complicity claims fail to meet. The Religious Right's low degree of agency in abortion and contraceptive services also means that they have low involvement. After paying their taxes or providing the healthcare option, petitioners end their involvement in any abortion decision. Those funds are no longer their "property," and therefore how they are used is not their responsibility. Likewise, they do not go to the healthcare provider with the patient, nor do they put the birth control pills in their mouth. Again, it would be odd for an individual to ask their boss or a stranger to go to the healthcare facility with them for an abortion or contraceptives. Members of the Religious Right are thus not involved in making the decision, nor are they involved in the execution of that decision.

That being said, while in reality the Religious Right does not have agency or involvement in others' abortion and contraceptive use, they have successfully turned to the Supreme Court in order to use their state *authority* and access greater *power* and exert a larger degree of agency over people with uteruses. This is what Sepinwall calls *intentional* participation by the Religious Right and the general public in abortion and contraceptive use (Sepinwall 2015, p. 1913). Petitioners do not *have* to be involved in abortion and contraceptive services, but they have *chosen* to involve themselves, a power that the Supreme Court has unhesitatingly granted them. In weighing the U.S. Constitution's promise of separation of church and state against the freedom of religious exercise, the Supreme Court has overwhelmingly favored the latter. In doing so, the boundary of public versus private is blurred, making the very private matter of

reproductive care public, and, as a result, people with uteruses are deprived of autonomous self-government over their bodies. It is clear that Religious Right rhetorical claims to *complicity* are based on a false assumption that reproductive care is a public matter that grants them agency and involvement in others' reproductive care decisions.

The fact that the Religious Right believe that it is within their authority, their *duty* even, to leverage state power over the reproductive female bodies illustrates what scholar Susan Bordo calls the construction of fetuses as "supersubjects" and people with uteruses as mere "fetal incubators" (Bordo, 1993, p. 72). Rather than emphasizing the suffering imposed on living, breathing, conscious people with uteruses that is caused by the stripping of the reproductive agency and autonomy, Religious Right complicity claims emphasize the suffering imposed on a non-living, non-breathing, non-conscious fetus. As Bordo writes in her work *Unbearable Weight*, the U.S. legal tradition "divides the human world as Descartes divided all of reality: into conscious subjects and mere bodies (*rex extensa*) (Bordo, 1993, p. 73). By harnessing state legal power, the Religious Right elevates the personhood status of the fetus at the expense of the pregnant individual's personhood. The people with uteruses are no longer embodied subjects, but are simply disembodied subjects, whose believed obligation is to sacrifice their personhood for the fulfillment of another's (Bordo, 1993, p. 79). Thus, although the Religious Right does not have true agency and involvement in others' reproductive care decisions, they have selectively used the legal system to secure state power and make their agency and involvement a perceived reality, but they do so on behalf of the false personhood ofthe fetus at the expense of the pregnant person's.

On the "Reasonable Suspicion" Criterion

The final reason why Religious Right complicity claims fail is because their claim to "financial facilitation" does not meet the "reasonable suspicion" criterion. In regard to federal funding, healthcare, and other social programs to promote access to reproductive care, petitioners immediately jump to the conclusion that people are using these funds for abortions and contraceptives. In reality, petitioners' low agency and involvement means little reasonable suspicion. Even the term *suspicion* is inappropriate, because it paints abortion and contraceptive use as "evil," which was disproved in a previous section of this research, and not as essential healthcare for citizens' well-being. This again points to the idea of *complicity* as a snowball or slippery slope effect, but in regard to abortion and contraceptives, it is a fallacy.

Take the argument presented in *Hobby Lobby* (2014), for instance. In this case, the petitioners start with the premise that the Contraceptive Mandate of the Affordable Care Act requires employers to provide a healthcare plan that covers contraceptives without cost-sharing. This is a true statement. This initial premise is followed by a second premise, which is that abortion falls under contraceptive care. Under the language of the Contraceptive Mandate, this is a true statement. However, these two premises are followed by the false conclusion that the Contraceptive Mandate means that any healthcare plan that covers contraceptives is going to be used *only* for abortions or "abortifacients," and *only* for the purposes of ending pregnancies. A similar fallacy forms the basis for policies like the Hyde Amendment, with the initial premises being that if federal funds go toward public health programs and facilities, and that program or facility includes abortion services (such as Planned Parenthood), then *everyone* will seek *only* abortion services from those programs or facilities *only* to end pregnancies.

Following this slippery slope logic, Religious Right complicity claims fail the "reasonable suspicion" criterion on three counts. The first is that because taxpayers and

employers have no agency or involvement in others' reproductive care, they have no way of knowing whether citizens or employees are getting abortions or "abortifacients" or not. Employers could provide a healthcare plan that covers abortion and contraceptives, but they have no way of knowing how many of their employees are using that insurance coverage, if any. As such, individuals who claim complicity due to their financial facilitation are disproven because there is no "reasonable suspicion" that those funds are even being used.

The second count on which the "reasonable suspicion" criterion is not met in Religious Right complicity claims is that taxpayers and employers have no reasonable suspicion *why* an individual might be using contraceptives or seeking an abortion, if they are. As mentioned in the introduction to this paper, there are many uses for contraceptives outside of ending pregnancy, including regulating menstruation, preventing ovarian and uterine cancers, treating endometriosis, and treating gender dysphoria. An individual might be seeking an abortion because pregnancy is a threat to their physical health, or they are not in a financially stable position to raise a child once it is born. Because of their low agency and involvement in an individual's reproductive care, a stranger or an employer cannot possibly know why that individual is seeking that care.

The third and final count for "reasonable suspicion" that Religious Right complicity claims fail to meet is that even if federal funding or a healthcare plan for reproductive care *are* being used, taxpayers and employers have no way of knowing that they are being used *specifically* for abortion and contraceptives. For instance, in regard to the Hyde Amendment and Planned Parenthood, Planned Parenthood does perform abortions and provide birth control, but these are not their *only* services. Planned Parenthood also provides general health care; HIV services; gender-affirming treatment like hormone therapy; STD testing, treatment, and

vaccinations; fertility testing; pregnancy testing; cancer screenings; sexual dysfunction treatment; and sexual education (Our Services). Taxpayers and employers cannot consider themselves to be complicit in financially facilitating abortion and contraceptives because that is not necessarily what their finances are going toward.

Because Religious Right complicity claimants have a low degree of agency and involvement in others' reproductive decisions, they also do not have any "reasonable suspicion"*if* their finances are being used, *why* they are being used, or *how* they are being used.

VII. Conclusions

The current COVID-19 pandemic is not our only public health crisis; so, too, is the U.S.'s failure to protect access to reproductive care for its 166.7 million people with uteruses (Ranking By Population (Female) All Countries in North America.) As this project exposes, the public health emergency of reproductive care is no accident: It is the result of a pattern of gendered regulation and neglect by our nation's political institutions through their implicit acceptance of Religious Right anti-choice complicity claims. Our society does not view people with uteruses as autonomous beings, but rather as disembodied subjects requiring parental-like supervision by both the state and the general public. This is especially true when females engage, or at least are perceived to engage, in non-monogamous, non-marital, and/or non-procreative sexual behaviors.

Religious Right anti-choice claims are based on the belief that through taxes and healthcare, states and citizens are financially facilitating abortions, and thereby participating in the evil, criminal act of killing a fetus. Their financial facilitation is perceived as the first in a chain of events that directly leads to destroying a human life, or a potential human life. There are no intermediary steps, nor are there alternative endings. The Supreme Court's acceptance of anti-

choice complicity claims institutionalizes the belief that abortion and contraceptives are immoral acts, and gives citizens state agency, authority, and power to influence reproductive care outcomes on behalf of the false personhood of a fetus. In doing so, people with uteruses are reduced to disembodied subjects whose personhood is subordinated for the fulfillment of another's.

This study lays the foundation for how U.S. legal institutions might create boundaries around *complicity* to better evaluate Religious Right anti-choice complicity claims and balance freedoms to religious exercise and reproductive care. This includes the criteria of "evil," agency, involvement, and "reasonable suspicion," which I have demonstrated Religious Right anti-choice complicity claims to fail on all four counts. However, more research is necessary to determine exactly what the legal boundaries of *complicity* should be. This will become increasingly apparent as more and more Religious Right anti-choice complicity claims are brought before the Supreme Court, particularly in the wake of *Hobby Lobby* (2014) and *Little Sisters of the Poor* (2020). The state control of female reproduction is full of moral, biological, legal, and political conflicts and contradictions that need to continue to be addressed because every body, my own included, has a stake.

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