Two Supreme Court cases that were actually about religious freedom

By Joseph Kip Kosek
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The case of *Burwell v. Hobby Lobby* has received extraordinary attention as a site of struggle between faith and law. The Supreme Court's decision that businesses may refuse on principle to provide contraception coverage has not been a shining hour for religious freedom. Many observers fear that the ruling will do less to protect that freedom than to expand the power of corporations.

Hobby Lobby has overshadowed two other suits this term that offered more compelling instances of conscience in action. In *United States v. Apel* and *McCullen v. Coakley*, the justices reckoned not with corporations but with individual rebels determined to share their convictions regardless of the consequences. In these cases Christian activists fought to uphold a robust tradition of free expression against a public realm increasingly hemmed in by government constraints.

The antiwar protester John Dennis Apel and the pro-life activist Eleanor McCullen would appear to represent opposite poles of the political spectrum. Left-right distinctions, though, are less important than their shared struggle of individual witness against official regulation. For reasons of faith, Apel and McCullen each refused to conform to the behavior that the law stipulated in the public arena. For those refusals, they ended up in court.

Apel, the founder of a Catholic Worker house in California, drew on Vietnam-era traditions of radical nonviolence when he threw blood on the sign for Vandenberg Air Force Base. His action recalled the tactics of the Baltimore Four, who in 1967 poured blood on draft files, thereby helping to inaugurate the Ultra-Resistance of the Catholic Left. Daniel Berrigan, a leader of that movement with his brother Philip, referred to this confrontational approach as the "fracture of good order" in the name of a higher unity.

The Ultra-Resistance would not get so far today. Vandenberg, an important site for high-tech research on the weaponization of outer space, has tight security and allows only a small "protest area" across the street for the likes of Apel. This special

zone is controlled by the base commander, who requires two weeks advance notice of any demonstration and can withdraw permission at any time. In short, civil disobedience has been bureaucratized and conformed to the measure of the state.

The Supreme Court held unanimously in February that Apel, due to his blood-throwing and subsequent arrests, could be barred even from the protest area. Chief Justice John Roberts explained in his decision that the case was about military jurisdiction, not First Amendment rights. Indeed, the military had defined the space of protest to be already within its bounds. Good order was guaranteed.

In McCullen's case in Boston, the space in question was called a "buffer zone" rather than a protest area, but the intent to circumscribe spiritual witness was similar. Her suit challenged a state law prohibiting anyone from standing within 35 feet (a distance the justices proved amusingly inept at estimating) of a facility where abortions take place. Looking every inch the grandmother she is, McCullen broke the law to talk to women entering a clinic because, in her words, "I go where the Holy Spirit leads me."

A member of Operation Rescue, McCullen is part of one of the most unexpected turns in the history of civil disobedience: its embrace by the opponents of *Roe v. Wade*. Liberals often refuse to admit that actions by pro-lifers belong in the same category with those of the civil rights and antiwar movements, but the techniques, justifications, and even weaknesses are strikingly comparable. So is the reaction of those in power. As with Apel, the law sought to put religion in a safe place, perhaps within shouting distance but not close enough to make a difference.

On June 26 the court struck down the Massachusetts buffer zone in a unanimous ruling. This time, Roberts wrote that "a painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." A public sidewalk is an important site of free speech, he explained, even if that speech is unwelcome. Still, the court suggested that a different statute more narrowly focused on safety and order might be constitutional. Given that one person's order may be another's unconscionable silencing, the vexed issue of abortion speech is far from solved.

The *Apel* and *McCullen* cases can be slotted into the tired categories of the culture wars: soldiers vs. peaceniks, feminists vs. advocates of family values. Those frames are incomplete. What the suits, and the court's divergent rulings, more clearly

reveal is the ongoing conflict between spiritual dissent of all kinds and the government’s enforcement of order. Those who admire disruptive faith might hope that it will continue to fracture the law’s designated protest areas and buffer zones.

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