SB
348

# Alaska State Legislature

Senator Lyda Green, Chairman
Senator Jerry Ward, Vice Chairman
Senator Jerry Mackie
Senator Mike Miller
Senator Jim Duncan

State Capitol
Room 125
Juneau, Alaska 99801
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## Senate State Affairs

**Sponsor Statement**

**SB 348**

**"An Act relating to certain rights of conscience protection for persons who directly or indirectly provide or perform health care services."**

The Alaska Constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry. Increasingly health care providers are finding that pressure to participate in certain health care practices against their consciences is robbing them of these rewards.

In Alaska, we have been careful to articulate the rights of the individual, through both the Alaska Constitution and law. In 1970, when the state legalized abortion, the legislature added AS 18.16.010, which protected hospitals and persons from being required to provide or participate in this procedure. The protection was based on an individual's moral conscience, not religious belief.

In 1972, we added the right of privacy to the Constitution to shield citizens from intrusive government information collecting. A recent court ruling under the right to privacy has removed the protection that health care providers had relied upon under state law. The court ruled that the constitutional right to obtain a certain medical procedure outweighed the statutory right of conscience. The ruling forced a hospital to allow procedures against their policy and gave the individual right of conscientious refusal only to 'direct' participants.

Indirect participants including nurses, orderlies, radiologists, and lab technicians are now particularly vulnerable to pressure because they occupy subordinate positions in the hospital/medical hierarchy and they have no constitutional right to refuse.

Their jobs may now present them with grave moral problems that rob them of the happiness and rewards of their industry. Other social and medical developments such as assisted suicide and infanticide may soon become governmental policy as well.

House Bill 348, in concert with Senate Joint Resolution 35 restores the intent of the Constitution and State law to protect the rights of conscience of health care providers. Everyday people and community institutions should not be compelled by another person's exercise of the right to privacy to act in a manner that violates their convictions of conscience.

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**Sectional Analysis**
**SB 348**

**"An Act relating tc certain rights of conscience protection for persons who directly or indirectly provide or perform health care services."**

**Section 1** adds a new chapter (Chapter 17) to Title 18 (Health, Safety and Housing):

Sec. 010 (Policy) makes the statement that it is the public policy of the state that the rights of conscience of all persons involved in providing health care are protected; describes what actions are covered; and prohibits all forms of retaliatory action for refusing to participate in an action that violates the person's conscience.

Sec. 020 (Civil rights of conscience) states that a person has a right to refuse to do certain procedures that are intended to end the life of an individual or involves an abortion; subject to AS 18.12.050.

Sec. 030 (Individual rights of conscience) states that an individual may not be required to participate in certain actions that violate the individual's religious or moral convictions and involves a procedure intended to end the life of an individual or involves abortion; that the individual may not be held civilly, criminally, or administratively liable for the individual's refusal, if certain conditions of notice are met and except as provided under AS 18.12.050; and provides a list of retaliatory actions that another person is prohibited from engaging in if an individual refuses to participate in certain actions that violate the individual's religious or moral convictions.

Sec. 040 (Institutional rights of conscience) is essentially the same as the preceding section, except that it applies to the rights of conscience of a majority of an institution's board of directors or an administrative head and the procedure is intended to end the life of an individual or involves abortion. Also allows an

institution not to admit or keep a patient who seeks a medical procedure that is against the religious or moral convictions of a majority of the board or the administrative head.

Sec. 050 (Exceptions) provides exceptions if the patient is in danger of imminent death, the success of the medical procedure requires the participation of the person asserting religious or moral objections, and the procedure would have to be performed before a replacement staff can be obtained. Does not relieve a person from paying for a medical procedure the person freely contracted for, and that was performed before the person asserted a conscientious objection. Also allows a health care institution to refuse to employ a person who objects to the type of health care services primarily or solely performed at the institution, if the person's religious or moral objections cannot be accommodated.

Sec. 060 (Remedies) provides that a person injured by a violation of this chapter may obtain an injunction and is entitled to damages of $3,000 or three times actual damages for each violation, whichever is greater, in addition to other remedies available under federal or state law.

Sec. 070 (Federal requirements not affected) states that nothing in this chapter changes, modifies, or otherwise affects requirements of 42 U.S.C. 1395cc, 42 U.S.C. 1395dd, or 42 U.S.C. 1396a (a)(57) or (58).

Sec. 080 (Definitions) provides comprehensive definitions for the phrases, "abortion," "health care institution," and "health service."

**Section 2** provides a severability clause so that if any part of the above chapter is held invalid, the remainder is not affected.

*Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.*

THE SUPREME COURT OF THE STATE OF ALASKA

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| VALLEY HOSPITAL ASSOCIATION, INC., and JAMES G. WALSH, Valley Hospital Executive Director,<br><br>Appellants,<br><br>v.<br><br>MAT-SU COALITION FOR CHOICE, DR. SUSAN LEMAGIE, and JANE DOES I-X,<br><br>Appellees. | Supreme Court No. S-7417<br><br>Superior Court No. 3PA-92-01207 CI<br><br>OPINION<br><br>[No. 4906 - November 21, 1997] |

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Dana Fabe, Judge.

Appearances: Brian J. Brundin, Brundin, Inc., Anchorage, and James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellants. Stephan H. Williams, Cooperating Attorney for the Alaska Civil Liberties Union, Anchorage, and Janet L. Crepps and Kathryn Kolbert, Center for Reproductive Law & Policy, New York, New York, for Appellees. Susan Wright Mason, Atkinson, Conway & Gagnon, Anchorage, for Amicus Curiae Alaska State Hospital and Nursing Home Association. Paul Benjamin Linton, Americans United for Life, Chicago, Illinois, and Kenneth P. Jacobus, Kenneth P. Jacobus, P.C., Anchorage, for Amici Curiae Members of the Alaska Legislature. Jeffrey M. Feldman and Susan Orlansky, Young, Sanders & Feldman, Anchorage, for Amici Curiae American College of Obstetricians and Gynecologists and American Medical Women's Association, Inc.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Fabe, Justice, not participating.]

COMPTON, Chief Justice.

## I. INTRODUCTION

Valley Hospital Association (VHA) seeks to reverse the superior court's summary judgment declaring unenforceable and permanently enjoining enforcement of its policy limiting abortion. We affirm the superior court. We hold that (1) Article I, section 22 of the Alaska Constitution encompasses reproductive rights, including abortion; (2) VHA is a quasi-public institution subject to the Alaska Constitution; (3) VHA's abortion policy is an unconstitutional restriction on the right to abortion; (4) AS 18.16.010(b, is unconstitutional to the extent it applies to quasi-public institutions; and (5) the superior court's award of attorney's fees was not an abuse of discretion.

## II. FACTS AND PROCEEDINGS

VHA is a nonprofit corporation organized under Alaska law. It owns and operates a thirty-six-bed hospital in Palmer. The hospital is licensed by the State of Alaska (State); it is the only hospital in the Matanuska-Susitna (Mat-Su) Valley. The hospital facility currently in use was rebuilt and expanded in the early 1980s, using $10.7 million in State funds and five acres of land donated by the City of Palmer. VHA is not affiliated with or operated by any religious organization. The corporation "is organized to serve public interests."

VHA's Board of Directors is divided into two boards, the Association Board and the Operating Board. The Association Board raises money and acquires property for the hospital and elects the Operating Board. The Operating Board has all the other powers and

functions of the Board of Directors, including establishing hospital policy.

VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated "general members," annually elect the Association Board.

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law.[1] VHA permitted lawful abortion procedures at its facility from 1970 until 1992.[2] In 1992 abortion opponents organized a campaign to

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[1] AS 18.16.010 provides:

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

. . . .

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

[2] In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman (continued...)

enlarge the membership of VHA. In April 1992 a larger-than-usual membership elected the Association Board, which then elected the Operating Board. In September 1992 the Operating Board enacted a new policy on abortion. The policy prohibits abortions at the hospital unless (1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest. All VHA Operating Board members supported this new policy.

The Mat-Su Coalition for Choice, Dr. Susan Lemagie, and ten unnamed women (Coalition) filed suit against VHA and its executive director, seeking declaratory and injunctive relief. The Coalition then filed a motion for a preliminary injunction against VHA's abortion policy. The superior court granted the motion.[3] Its order temporarily enjoined enforcement of VHA's new abortion policy and restored the status quo existing before the policy was enacted. The court then granted the Coalition's motion for summary

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[2](...continued)
can have a second trimester elective abortion.

[3] In its order granting the Coalition a preliminary injunction, the superior court determined that the Coalition had shown a clear probability of success in establishing the following propositions: (1) Valley Hospital is a quasi-public hospital; (2) the Alaska Constitution provides greater protection for individual rights than the United States Constitution; (3) the right to choose an abortion is a fundamental right guaranteed by article I, section 22 of the Alaska Constitution; (4) there is no compelling state interest in Valley Hospital's ban on abortions; and (5) AS 18.16.010(b) does not immunize Valley Hospital from violating Alaskans' constitutional right to reproductive choice, including abortions.

judgment[4] and permanently enjoined VHA

> 1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
>
> 2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
>
> 3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure at Valley Hospital which is not based on accepted, established medical practices or requirements with respect to such procedures.

The superior court noted that nothing in the permanent injunction required anyone affiliated with the hospital "to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so."

The superior court granted full reasonable attorney's fees in the amount of $110,000 to the Coalition in a separate order. VHA appeals the injunction, the summary judgment, and the award of attorney's fees to the Coalition.

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[4] The superior court's order granting summary judgment was

> based on the reasons articulated in the Court's earlier decision granting a preliminary injunction, the protections of the right to privacy contained in Article I, § 22 of the Alaska Constitution, and the fact that Valley Hospital is a non-sectarian, non-profit, quasi-public hospital.

(Citation omitted.)

III. DISCUSSION

A. Standard of Review

We apply our independent judgment in reviewing the questions of law presented in this appeal, adopting rules of law which are most persuasive in light of precedent, reason, and policy. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979). We review the award of attorney's fees for abuse of discretion. Bromley v. Mitchell, 902 P.2d 797, 804 (Alaska 1995). An abuse of discretion is established only where the court's determination is manifestly unreasonable. Id.

B. The Alaska Constitution Protects Reproductive Autonomy, Including the Right to Abortion, More Broadly Than Does the United States Constitution.

1. The United States Constitution

The Supreme Court's articulation of the United States Constitution's protection of reproductive rights establishes the minimum protection provided to women in Alaska.[5] This protection includes the right to an abortion. Under Roe v. Wade, 410 U.S. 113, 155 (1973), this right could be limited only where required by a compelling state interest. Id. States could regulate abortions performed before a fetus became viable only when such regulation was necessary to ensure the life and health of the mother. Id. at 163.

The compelling state interest test no longer accurately reflects federal constitutional law. Arguably, the prevailing

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[5] See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Roe v. Wade, 410 U.S. 113 (1973).

federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 833, 875 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The O'Connor plurality substituted the undue burden test for the compelling state interest test in recognition of the view that there "is a substantial state interest in potential life throughout pregnancy." Id. at 876. The following paragraphs from the joint opinion in Casey suggest the current state of federal constitutional law concerning reproductive rights:

> (a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> (b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.
>
> (c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a

> substantial obstacle to a woman seeking an abortion impose an undue burden on the right.
>
> (d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> (e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65.

505 U.S. at 878-79.

2. The Alaska Constitution

We sometimes have taken a broad view of our role in defining state constitutional rights:

> [W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (extending the constitutional right to a jury trial).[6] Thus, our

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[6] VHA interprets this language as a two-prong test which must be met before we may find a constitutional right. We did not interpret this language from Baker as VHA now urges us to do when we decided either Breese v. Smith, 501 P.2d 159 (Alaska 1972) (holding that governmental control of personal appearance is antithetical to the concept of personal liberty), or Ravin v. State, 537 P.2d 494 (Alaska 1975) (holding that privacy in the home (continued...)

articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. Id. at 401 ("[This court is] at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court.").[7]

Article I, section 22 of the Alaska Constitution provides:

> The right of the people to privacy is recognized and shall not be infringed.

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy

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[6](...continued)
is a fundamental right), although we found a right to exist under the Alaska Constitution in each of those cases.

[7] Other states have interpreted their constitutions to protect reproductive rights more extensively than does the federal constitution. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (striking down legislation restricting public funding of abortions as unconstitutional under the state's constitutional privacy guarantee); American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Cal. App. 1989) (upholding an injunction preventing implementation of restrictions on abortion rights of minors, requiring a compelling state interest before invasion of minors' privacy rights); In re T.W., 551 So. 2d 1186 (Fla. 1989) (reaffirming the right to choose to terminate a pregnancy as a fundamental state constitutional right and striking down legislation restricting abortion rights); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991) (applying a strict scrutiny standard for fundamental rights and determining that state failure to fund medically necessary abortions violated state constitution); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (extending state constitutional right to privacy beyond federal right in a custody dispute over divorced couple's frozen embryos).

and free speech with the need for an informed electorate); Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring) ("Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.").

A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is "necessary for . . . civilized life and ordered liberty." Baker, 471 P.2d at 401-02. Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language. "[D]ecisions whether to accomplish or prevent conception are among the most private and sensitive." Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 479 n.42 (Alaska 1977) (holding that a physician who specialized in contraception and abortion could not be required to disclose the names of his patients); see also Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981) (holding that abortion clinic protests cause patients to "suffer emotional distress as a result of appellants' invasion of their privacy during a particularly sensitive period"); Ravin, 537 P.2d at 502 (holding that decisions about contraception involve "significantly personal areas").

We stated in Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972), that "few things [are] more personal than one's body."[8] In Breese, a school policy regulating hair length was at issue; the regulation was held unconstitutional because the State failed to show a compelling interest that justified the policy. Id. at 170-72. Surely "few things are more personal" than a woman's control of her body, including the choice of whether and when to have children.

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to

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[8] Breese was decided before the 1972 passage of the privacy amendment now found in article I, section 22 of the Alaska Constitution. Breese relied exclusively on the inherent rights provision found in article I, section 1 of the Alaska Constitution. The Coalition argues that article I, section 1 of the Alaska Constitution protects abortion as a fundamental right. Because we hold this right is grounded in the privacy provision of the constitution, we do not address whether the right could be based solely on article I, section 1. While Breese's discussion of personal autonomy remains instructive, we choose to analyze reproductive rights under the privacy provision of our constitution, as other states have done. See, e.g., In re T.W., 551 So. 2d at 1193.

The relationship between a woman and her doctor is threatened by VHA's abortion policy, and thus privacy rights are implicated in addition to the notions of personal autonomy that were at issue in Breese. The information exchange between a woman and her doctor about the woman's health and her reproductive choices is intensely private. The reasons a doctor and patient choose a medical procedure, so long as it is legal, must not be subject to the approval of a hospital's board of directors, according to their own values.

Other privacy interests are also implicated. If a woman is unable to obtain an abortion near her home, there is an increased chance that she will have to reveal her pregnancy to others in order to arrange the necessary travel. The fact that a woman has visited a certain doctor can be intensely private, when the doctor is one who specializes in abortion services.

> become the vehicle for another human being's creation; second, when and how--this time there is no question of "whether"--one's body is to terminate its organic life.

Laurence H. Tribe, American Constitutional Law 1337-38 (2d ed. 1988). We agree that "[t]he decision whether or not to have a child is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (citing Roe, 410 U.S. at 153).

For the above reasons, we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion. The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in Roe v. Wade. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in Casey.

VHA argues that there can be no state constitutional protection for reproductive rights under article I, section 22, because the section was intended to encompass protection from unwarranted surveillance and data collection by the State and private businesses. It cannot extend beyond this "informational"

privacy.[9] To support this argument, VHA cites newspaper articles and other bills introduced contemporaneously with the adoption of article I, section 22.

The only informative legislative history consists of the privacy amendment as originally proposed.[10] The earliest form of the proposed amendment stated:

> Section 22. Right of Privacy. The right of the people to privacy in their opinions, persons, families, reputations and property is recognized and shall not be violated. Neither warrants nor writs of investigation in abrogation of privacy shall issue, except upon probable cause and upon a showing of a legitimate and pressing need, supported by oath or affirmation, particularly describing the information or data sought and the person whose privacy may be affected, and particularly setting forth the reasons for the search or investigation. The legislature shall provide for the prosecution and punishment of public officials and private parties who act in violation of this section, and shall provide civil remedies to redress and prevent such violations. The legislature shall provide for the protection and security of information available to the State to the extent necessary to protect the rights of the individual recognized in this section and shall further provide for the protection and

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[9] The Alaska State Hospital and Nursing Home Association, argues only that the "legislative" history of the amendment prevents this court from applying the privacy provision of the constitution to private parties. We have already established that proposition. See Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989).

[10] The Alaska State Hospital and Nursing Home Association argues that a summary of a House Judiciary Committee meeting during which the proposed amendment was modified is evidence that the privacy clause was intended to apply only to informational privacy. The meeting summary is largely a debate over grammar and style and provides no information which alters our interpretation of article I, section 22. See H. Jud. Comm. minutes at 318-19, 7th Leg., 1st Sess. (May 30, 1972).

security of information gathered under this section by the State.

1972 Senate Joint Resolution No. 68, 7th Leg., 2d Sess. While the initial draft of the amendment attempted to specify privacy interests to be protected, the final constitutional amendment simply protected the right of the people to privacy. The plain language of article I, section 22 is a broad protection of privacy rights. The legislative history is insufficient to limit the general language of the privacy amendment.

C. VHA's Abortion Policy Is Subject to the Provisions of the Alaska Constitution.

We previously e determined that a hospital may be a "quasi-public" institut Storrs v. Lutheran Hosps. and Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980). In Storrs, we held that a quasi-public hospital "cannot violate due process . . . in denying staff privileges."[11] Id. at 28. The hospital was quasi-public because: (1) it was the only hospital serving the community; (2) the construction of the hospital was funded in significant part by State and federal grants; and (3) over twenty-five percent of the funds received for hospital services came from governmental sources. Id. Storrs established that a quasi-public medical

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[11] One state court has rejected this application of procedural due process to private hospitals. See Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368 (Me. 1988). At least eight other states have concluded that private hospitals must follow procedural due process for physician staffing decisions. Id. at 368 n.4.

facility is bound to protect constitutional rights affected by the administration of the hospital.[12]

The elements that led us to conclude that the hospital in Storrs was quasi-public show that the hospital in this case is quasi-public; thus, the conduct of VHA qualifies as "state action," meaning that it "may be fairly treated as [the action] of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), quoted in United States Jaycees v. Richardet, 666 P.2d 1008, 1013 (Alaska 1983).

In order to determine whether the hospital operated by VHA is a quasi-public institution, we look to a number of factors, just as we did in Storrs. First, VHA has a special relationship with the State through the State's Certificate of Need program. Under this program, the State must review and approve expenditures of one million dollars or more for construction or alteration of a health care facility. AS 18.07.031. The Department of Health and Social Services determines whether to grant a Certificate of Need

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[12] VHA argues that constitutional due process was never at issue in Storrs because the hospital stipulated that Dr. Storrs was entitled to due process. We have stated, however, that Storrs was a constitutional due process case. Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 n.2 (Alaska 1992); see also Amerada Hess Pipeline Corp. v. Alaska Pub. Util. Comm'n, 711 P.2d 1170, 1180 (Alaska 1986) (relying on Storrs to find the right to an impartial decision maker basic to a guarantee of due process). Furthermore, the Storrs court would not have needed to address whether Dr. Storrs received due process were he not entitled to it. The determination that due process applied was material to the holding.

based on health care demand and resources. AS 18.07.041.[13] This program creates in VHA a type of health care monopoly. Indeed, VHA is the only hospital serving the Mat-Su Valley, just as the hospital in Storrs was the only hospital serving the Fairbanks area. The public need for medical facilities makes this sort of regulation essential. However, such monopoly privileges may not be used by VHA to limit access to lawful medical procedures for moral or religious reasons.

Second, VHA has received construction funds, land, and operating funds from the State, local, and federal governments,[14] including more than ten million dollars for construction from the State and a grant of five acres of public land from the City of Palmer.[15] Money from the city and borough came from pass-through

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[13] AS 18.07.041 provides:

> The office shall grant a sponsor a certificate of need or modify a certificate of need if the availability and quality of existing health care resources or the accessibility to those resources is less than the current or projected requirement for health services required to maintain the good health of citizens of this state.

[14] VHA's assets totaled $31.7 million as of December 31, 1993. Between 1985 and 1993, VHA provided $37.5 million in unreimbursed care. In 1991, 14.71% and 5.98% of VHA's gross receipts were from Medicare and Medicaid respectively. VHA's April 1993 Certificate of Need application to the State showed that Medicare and Medicaid receipts total approximately $3.75 million to $5.1 million for the 1990, 1991, and 1992 fiscal years. This is approximately 25% of VHA's patient revenues for those three years.

[15] The Alaska State Hospital and Nursing Home Association argues that money received under the federal Hill-Burton Act cannot be used as a basis for requiring hospitals to perform abortions. 42 U.S.C. § 300a-7(b). The record does not show that any Hill-
(continued...)

grants from the State legislature.[16] VHA is required to operate as a "public facility" under State laws governing the pass-through grants from the State to the city and borough. AS 37.05.315(a) and (c). Finally, a significant portion of the operating funds VHA receives for hospital services comes from governmental sources. We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the superior court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public.'"

VHA argues that the Storrs quasi-public criteria are limited to determining whether a hospital must afford due process in staffing determinations and should not be extended to require hospitals to protect other constitutional rights. VHA relies on language in Kiester, which discusses limitations on judicial review to avoid intruding upon a hospital's recognized expertise in evaluating medical qualifications. Kiester v. Humana Hosp. Alaska,

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[15](...continued)
Burton money was used when the facilities were rebuilt in the early 1980s.

[16] The statute allowing pass-through grants requires the municipality to agree that the facilities and services provided by the grant will be available for the use of the general public, and that the municipality will operate and maintain the facility for the practical life of the facility. AS 37.05.315(a) and (c). This is an additional indication that VHA is a quasi-public institution. See 1986 Informal Op. Att'y Gen. 1 (Apr. 8, 1982) (stating that municipality accepting funds for construction of a public facility must ensure the operation and maintenance of the facility, even if the facility will be owned and operated by a private non-profit organization); see also 1991 Informal Op. Att'y Gen. 19 (Sept. 22, 1986) (indicating that the State may have a cause of action against a city that allows a facility funded by pass-through grants to be converted to private use).

Inc., 843 P.2d 1219, 1223 (Alaska 1992). However, no medical qualification or decision is at issue here. Neither the issue whether the hospital is quasi-public, nor the issue whether the abortion policy is invalid on constitutional grounds, involves intruding on a medical decision that is within the hospital's expertise. Likewise, VHA has acknowledged that its abortion policy is not a medical policy, but one founded on "sincere moral conscience." The scope and application of the Alaska Constitution to this kind of policy presents a question of law that is within this court's expertise.

Considering all factors similar to those found persuasive in Storrs, we conclude that the hospital operated by VHA is a quasi-public hospital. Its policy concerning abortion must comply with the Alaska Constitution.

D. VHA Has Not Demonstrated a Compelling State Interest Justifying Its Abortion Policy.

Since VHA is a quasi-public institution, its policies are subject to the limitations which the Alaska Constitution imposes on legislation and government regulations. Under Alaska's Constitution, there is a protected right to an abortion; and VHA's policy interferes with that right. Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest. Further, assuming the existence of such an interest, there also must be no less restrictive means by which the interest might be advanced.[17] In re A.B., 791 P.2d 615,

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[17] We have used both the compelling state interest/least (continued...)

621 (Alaska 1990) and Vogler v. Miller, 651 P.2d 1, 5 (Alaska 1981). VHA has not demonstrated a compelling state interest justifying its policy. It has not advanced any medical, safety, or other public-welfare interest to justify precluding elective abortions. VHA has stated unequivocally that its policy is a matter of conscience, and not a medical, safety, or economic issue. As VHA cannot raise a free exercise claim,[18] this does not amount to a compelling state interest.

E. Alaska Statute 18.16.010(b) Is Unconstitutional to the Extent It Applies to Quasi-Public Institutions.

VHA argues that even if the Alaska Constitution encompasses the right to an abortion, and even if the hospital is a quasi-public institution, the legislature already has addressed the issue in AS 18.16.010(b),[19] and has determined that a "hospital

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[17](...continued) restrictive means test and the legitimate state interest/close and substantial relationship test in the privacy context. See Jones v. Jennings, 788 P.2d 732, 737-38 (Alaska 1990); State v. Erickson, 574 P.2d 1 (Alaska 1978); Ravin, 537 P.2d at 504. However, "[w]here the right to privacy is manifested in terms of interests . . . squarely within personal autonomy," as here, we use the compelling state interest test. Erickson, 574 P.2d at 22, n.144.

[18] See infra note 20. Nothing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as "compelling" could violate the Establishment Clause of the First Amendment to the United States Constitution. As this point is not raised, we do not rule on it.

[19] AS 18.16.010(b) provides:

> Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion

(continued...)

may decline to offer abortions for reasons of moral conscience." VHA argues that "[c]onsistent with its previous approach to the highly-sensitive question of abortion, this Court should defer to the considered judgment of the legislature." However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action. The issue before us includes the question whether AS 18.16.010(b) is a permissible limitation on a constitutional right.

VHA has a "sincere moral belief" that elective abortion is wrong.[20] However, constitutional rights "cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 U.S. 294, 300 (1955).

The Alaska Attorney General has concluded that AS 18.16.010(b) is invalid, unless construed to be applicable only to sectarian facilities. 1978 Formal Op. Att'y Gen. No. 8 (February 10, 1978). The New Jersey Supreme Court struck down an almost identical statute:

> To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action . . . [f]or the state to frustrate [the constitutional right to a first trimester

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[19](...continued)
under this section.

[20] VHA bases its argument in part on Frank v. State, 604 P.2d 1068 (Alaska 1979), a free exercise of religion case based on the First Amendment to the United States Constitution and article I, section 4 of the Alaska Constitution. See Frank, 604 P.2d at 1070 (killing of cow moose for funeral potlatch protected as free exercise of religion). VHA is not affiliated with any religion and cannot raise a free exercise claim.

abortion] by its action would be violative of the constitutional guarantee.

Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641, 647 (N.J. 1976).

VHA argues that because the statute states that abortions may be performed only in certain situations, but that individuals and institutions may always refuse to participate in or provide them, "the legislature has determined that the ability to protect one's conscience outweighs the ability to procure an abortion." VHA has no constitutional right at issue; it has at most a statutory right. The legislature, however, may not balance statutory rights against constitutional ones, like the right to an abortion. Therefore, AS 18.16.010(b) is unconstitutional to the extent that it applies to VHA.

F. The Superior Court's Award of Attorney's Fees Was Not an Abuse of Discretion.

The superior court awarded full reasonable attorney's fees to the Coalition. The court based its decision on the factors articulated in Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990). The superior court concluded that VHA was not a public interest litigant immune from having to pay an award of attorney's fees.[21]

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[21] A party qualifies as a public interest litigant if (1) the case effectuates a strong public policy, (2) numerous people will benefit from the litigation, (3) only a private party could be expected to bring the action, and (4) the party would not have sufficient economic incentive to bring the lawsuit even if the action involved only narrow issues lacking general importance. Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 423 (Alaska 1995).

We review a trial court's determination of a litigant's public interest status under the abuse of discretion standard. Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162, 171 (Alaska 1991). "Such an abuse is regarded as present only where the trial court's decision appears to be manifestly unreasonable or motivated by an inappropriate purpose." Kenai Lumber Co., Inc. v. LeResche, 646 P.2d 215, 222 (Alaska 1982).

VHA asserts two arguments for challenging the fee award: (1) VHA is a public interest litigant;[22] and (2) VHA relied in good faith on a statute which authorized its policy.

A prevailing public interest plaintiff is normally entitled to full reasonable attorney's fees. Hunsicker v. Thompson, 717 P.2d 358, 359 (Alaska 1986). We have determined that "where both parties are individual, public interest litigants, neither should be made to bear the fees of the other, each should simply pay their own." McCormick v. Smith, 799 P.2d 287, 289 n.5 (Alaska 1990). However, VHA is not a public interest litigant. We

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[22] The Coalition argues that VHA did not challenge the superior court's determination that VHA is not a public interest litigant in its points on appeal and is barred from doing so now. Alaska Appellate Rule 204(e) provides that this court will consider only points included in the statement of points on appeal. See also Kalenka v. Taylor, 896 P.2d 222, 229 (Alaska 1995) (holding that where appellants failed to properly appeal a fee award and offered no mitigating circumstances to explain the failure, they cannot raise the issue). However, whether VHA is a public interest litigant is a legal issue that can be considered on the record before the court. See, e.g., Oceanview Homeowners Ass'n v. Quadrant Const., 680 P.2d 793, 797 (Alaska 1984). Additionally, although VHA's public interest status is not mentioned in the points on appeal, the issue of fees is raised. See Putnam v. State, 629 P.2d 35, 39 n.2 (Alaska 1980). There is no prejudice to the Coalition in considering the issue on appeal.

are not persuaded by VHA's assertion that its defense of its abortion policy is in the public interest simply because it raises constitutional issues.

We have decided one case where we determined that attorney's fees should not be awarded against a losing private party in public interest litigation, because an award might have the effect of deterring citizens from litigating issues of public concern. Whitson v. Anchorage, 632 P.2d 232, 233 (Alaska 1981). In Whitson, the defendant was an individual who had placed an initiative on the next municipal election ballot, and the plaintiff was the City of Anchorage, which had obtained a judgment finding the initiative illegal and ordering it removed from the ballot. We found it significant that Whitson would have been a traditional private party plaintiff seeking relief against the governmental entity had the city not "beat[en] him to the courthouse steps," making him the nominal defendant. Id. at 234. Had the city refused to place his initiative on the ballot, rather than doing so and then suing him to get it removed, Whitson would likely have sued the city and been the traditional private party plaintiff seeking relief against the governmental entity. Id. at 233-34. In this case VHA is not an individual raising a public interest defense against a governmental entity. Rather, VHA is a quasi-public institution whose policy has infringed a constitutional right.

VHA also cannot assert its good faith reliance on AS 18.16.010(b). As discussed above, that statute cannot

constitutionally be applied to a quasi-public hospital. _See_ Part III.D. Because VHA is not a private defendant, as it asserts, it cannot escape liability for attorney's fees by arguing that it relied in good faith on AS 18.16.010(b).

The superior court did not abuse its discretion in awarding fees to the Coalition.

IV. CONCLUSION

The superior court's summary judgment and injunction are AFFIRMED. The superior court's award of attorney's fees was not an abuse of discretion and is AFFIRMED.

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March 5, 1998

Senator Mike Miller
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Dear Senator Miller:

Your office called to my attention the federal statute regarding discrimination by government in abortion related matters, 42 USC 238n. The statute reads in relevant part:

> ". . . any State . . . government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis – (1) that entity refuses . . . to perform abortions, . . . .; (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); . . . ."

A copy of the entire section is attached.

I spoke yesterday with Vincent Ventimiglia of the Office of Senator Dan Coats, the sponsor of the 1996 amendment that is now Section 238n. He stated that the statute was designed to provide broad protection to all institutional and individual health care providers, public or private, who refuse to perform abortions. The definitions in subsection (c) used "including" as a traditional word of enlargement as in "including, but not limited to."

It appears that the Supreme Court has created a violation of the federal statute, the consequence of which is the loss of all federal funds for the State including funds for

highways, airports, welfare, education and health care. Obviously this adds another significant reason to pass SJR 35 to overturn this ill considered Supreme Court action.

Very truly yours,

Robert B. Flint

cc: Archbishop Francis T. Hurley
Senator Loren Leman
Senator Sean Parnell
Represenative Terry Martin
Doug Bruce
Gene O'Hara
Cliff Orme
Laraine Derr
Sister Kaye Belcher, S.P.
Chris Swalling
Janet Oates
James Bopp, Jr.
Sue Mason
Ken Jacobus, Esq.
Joe Hayes, Lobbyist (via fax only)

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§ 238n. Abortion-related discrimination in governmental activities regarding training and licensing of physicians

(a) In general. The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that—

(1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;

(2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or

(3) the entity attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(b) Accreditation of postgraduate physician training programs. (1) In general. In determining whether to grant a legal status to a health care entity (including a license or certificate), or to provide such entity with financial assistance, services or other benefits, the Federal Government, or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions. The government involved shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.

(2) Rules of construction. (A) In general. With respect to subclauses (I) and (II) of section 705(a)(2)(B)(i) [42 USCS § 292d(a)(2)(B)(i)(I), (II)] (relating to a program of insured loans for training in the health professions), the requirements in such subclauses regarding accredited internship or residency programs are subject to paragraph (1) of this subsection.

(B) Exceptions. This section shall not—

(i) prevent any health care entity from voluntarily electing to be trained, to train, or to arrange for training in the performance of, to perform, or to make referrals for induced abortions; or

(ii) prevent an accrediting agency or a Federal, State or local government from establishing standards of medical competency applicable only to those individuals who have voluntarily elected to perform abortions.

(c) Definitions. For purposes of this section:

(1) The term "financial assistance", with respect to a government program, includes governmental payments provided as reimbursement for carrying out health-related activities.

(2) The term "health care entity" includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.

(3) The term "postgraduate physician training program" includes a residency training program.

(July 1, 1944, ch 373, Title II, Part B, § 245, as added April 26, 1996, P. L. 104-134, Title V, § 515, 110 Stat. 1321-245; May 2, 1996, P. L. 104-140, § 1(a), 110 Stat. 1327.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Act May 2, 1996, P. L. 104-140, § 1(a), 110 Stat. 1327, inserted the heading "TITLE I—OMNIBUS APPROPRIATIONS" after the enacting clause of Act April 26, 1996, P. L. 104-134.

# Euthanasia-- "Hillary's Health Rationing"
## *Outrage in Oregon*

By a 10 to 1 vote, the 11 member Oregon Health Services Commission, a state panel, authorized the delivery of lethal prescription drugs as a "medical service" for the 340,000 low-income residents insured under the Oregon Health Plan, the state's Medicaid program. Oregon voters passed the so-called Death With Dignity Act in 1994. Wesley J. Smith, legal counsel for the International Anti-Euthanasia Task Force said, ***"This illunstrates the dishonesty of the people who pushed"*** legalizing assisted suicide. He added that, ***"No one said taxpayers would have to help kill people."*** Most private insurers, except for Catholic health plans, have said they will cover the costs of lethal prescriptions. ***"One HMO organization in Oregon has set $1,000 as the maximum it will pay hospice and home health care benefits, but they've announced they'll pay for assistance for suicide,"*** said Mr. Smith....

Note: Oregon is the first state to "topple" on the issue of killing our elderly. [Submitted by Alaska Right to Life, Interior from the *Republican National Coalition for Life*, FaxNotes, March 6, 1998. Questions? Would you like to help? Call 479-Life or 452-5538.]

***"The thief [the devil] cometh not, but for to steal, and to kill, and to destroy: I [Christ] am come that they might have life..."*** John 10:10

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# Protecting the Rights of Conscience of Health Care Providers

Lynn D. Wardle, J.D.*

## INTRODUCTION

Today health care providers increasingly find that some health care practices implicate serious moral concerns. Social, legal, and medical developments involving abortion, contraception, euthanasia, withdrawal of feeding, assisted suicide, blood transfusions, organ transplants, and autopsies have put health care providers in the vortex of some of society's most controversial moral dilemmas.[1]

Fortunately, Congress and most state legislatures have enacted "conscience clauses"—statutes intended to protect health care providers' rights to refuse to provide or participate in certain procedures to which they have moral or religious objections. Unfortunately, a careful examination of existing conscience clause laws in the United States reveals that nearly all of them are seriously deficient.

This article examines all existing conscience clauses in the United States and the need for greater protection for the rights of conscience of health care providers. Part I summarizes and analyzes current statutes protecting rights of conscience of health care providers. It reveals that most conscience clauses apply only to one or two specific kinds of medical procedures, many provisions include restrictive definitions of the health care providers covered, and few provide adequate implementing procedures and remedies.

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* Professor of Law, J. Reuben Clark Law School, Brigham Young University. The author gratefully acknowledges research assistance from James Balmforth, Kimberly Latimer, and Patrick Shen, and helpful comments and criticism from J. Stuart Showalter, Robert E. Riggs, and Mary Anne Wood.

[1] *See* Durham, Wood, & Condie, *Accommodation of Conscientious Objection to Abortion: A Case Study of the Nursing Profession*, 1982 B.Y.U. L. REV. 253, 287 n.80 (noting nurses' responses to survey indicating objections *inter alia* to participating in tubal ligations, blood transfusions, and euthanasia, as well as abortion). *See also* Davis, *Defining the Employment Rights of Medical Personnel Within the Parameters of Personal Conscience*, 3 DET. COLL. L. REV. 847, 847 (1986). *See also infra* notes 199-203 and accompanying text (objections to autopsies) & notes 180-92 and accompanying text (objections to withdrawal of feeding).

Part II reviews the cases interpreting these conscience clauses. It appears that hostile judicial interpretations have seriously diminished the scope and effectiveness of the limited protections afforded by conscience clauses.

Part III describes the absence of other statutory and constitutional protections to shelter the rights of conscience of health care providers. The gaping holes in conscience clause legislation and interpretation expose health care providers to abuses and coercion that are not adequately addressed by other statutes. Moreover, the curtailment of first amendment protection in recent years further exacerbates the vulnerability of many health care providers, especially those who identify with minority religions.

Part IV examines the evidence of widespread and growing abuses of and pressures on the rights of conscience of health care providers. Empirical research and case reports show that significant numbers of health care providers are subject to direct and indirect coercion and mistreatment. Growing pressures within the medical profession, as well as demographic and political trends in the United States, generally, manifest the potential for even greater abuses in the near future. This article concludes with a call for legislative action to provide greater protection for the rights of conscience of health care providers, offering an example of the type of comprehensive legislation that should be enacted.

To begin, a few terms require clarification. "Conscience clause" refers to any statute or regulation providing explicit protection for the rights of health care providers to decline to provide or participate in providing health services that violate their religious or moral beliefs. "Health care providers" include individuals (such as physicians, nurses, technicians, counselors, interns, students, or trainees) and institutions (such as hospitals, clinics, medical offices, medical partnerships, or corporations) that directly or indirectly provide, assist, or participate in providing health services to patients. "Health services" include medical services or procedures to diagnose, maintain, or treat a physical condition, as well as services that are intended to preserve patient health or prevent disease or undesired medical conditions. For instance, family planning services are "health services."

## I. THE INADEQUACIES OF EXISTING CONSCIENCE CLAUSE STATUTES

Forty-four states and the United States presently have some kind of statutory conscience clause.[2] Most states only have a single, narrow, conscience clause provision; but many states have enacted two or more separate

[2] The six states that do not have conscience clause provisions of any type are Alabama, Connecticut, Mississippi, New Hampshire, Vermont, and Washington. The District of Columbia has no conscience clause legislation either.



conscience clause sections.[3] Only one jurisdiction, Illinois, has enacted a comprehensive scheme of protections for the rights of conscience of health care providers.[4] These existing conscience clause statutes are described, categorized, and analyzed below.

### A. Procedures Covered

Most conscience clause statutes protect the right to refuse to participate in only one specific medical procedure—abortion. Twenty-eight states provide protection for the rights of conscience *only* in the context of abortion.[5] Additionally, nine other states cover abortion and contraception,[6] five other

[3] *See, e.g.*, ILL. ANN. STAT. ch. 38, ¶ 81-33 (Smith-Hurd 1977); *id.* ch. 111½, ¶¶ 5201-5314 (Smith-Hurd 1988); KAN. STAT. ANN. §§ 65-443, 444 (1985); LA. REV. STAT. ANN. §§ 40:1299.31, 1299.32, 1299.33 (West 1977); MICH. COMP. LAWS. ANN. §§ 333.20181 to 333.20184 & 333.20199 (West 1980); MINN. STAT. ANN. §§ 145.414, 145.42 (West 1989); NEB. REV. STAT. § 28-337 (1989); N.J. STAT. ANN. §§ 2A:65A-1,2,3 (West 1987); S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1985). Some solitary conscience clause provisions, however, are multi-part, multi-faceted provisions. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25955 (West 1984); 42 U.S.C. § 300a-7 (1988). *See also infra* note 6 and accompanying text (discussing states with separate conscience clauses for separate procedures).

[4] ILL. ANN. STAT. ch. 111½, ¶¶ 5201-5314 (Smith-Hurd 1988) (Right of Conscience Act). This act protects the rights of conscience of patients as well as providers of health care services. *See also* CAL. HEALTH & SAFETY CODE § 25955 (West 1984). The wordy patchwork of provisions that make up the federal conscience clause, 42 U.S.C. § 300a-7, has the potential to become part of a comprehensive scheme, but it applies to so few persons as to be irrelevant in many cases where it is needed.

[5] ALASKA STAT. § 18.16.010(b) (1991); ARIZ. REV. STAT. ANN. § 36-2151 (1986); CAL. HEALTH & SAFETY CODE § 25955 (West 1984); DEL. CODE ANN. tit. 24, § 1791 (1987); HAW. REV. STAT. § 453-16 (1985); IDAHO CODE § 18-612 (1987); IND. CODE ANN. § 16-10-3-2 (Burns 1990); IOWA CODE ANN. § 146.1 (West 1989); KAN. STAT. ANN. § 65-443-4 (1985); KY. REV. STAT. ANN. § 311.800 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. §§ 40:1299.31, 40:1299.32, & 40:1299.33 (West 1977); MICH. COMP. LAWS ANN. §§ 333.20181 to 333.20184 & 333.20199 (West 1980); MINN. STAT. ANN. §§ 145.414, 145.42 (West 1989); MO. ANN. STAT. § 197.032 (Vernon 1983); MONT. CODE ANN. § 50-20-111 (1991); NEB. REV. STAT. § 28-337 (1989); NEV. REV. STAT. § 632.475 (1991); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1976); N.C. GEN. STAT. § 14-45.1 (1986); N.D. CENT. CODE § 23-16-14 (1991); OHIO REV. CODE ANN. § 4731.91 (Anderson 1987 & Supp. 1991); OKLA. STAT. ANN. tit. 63, § 1-741 (West 1984); PA. STAT. ANN. tit. 18, § 3213 (1983 & Supp. 1992); S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 34-23A-12-14 (1986); TEX. REV. CIV. STAT. ANN. art. 4512.7 (West Supp. 1992); UTAH CODE ANN. § 76-7-306 (1990); VA. CODE ANN. § 18.2-75 (Michie 1988). *See also* ILL. ANN. STAT. ch. 38, ¶ 81-33 (Smith-Hurd 1977) (applicable only to abortion). Illinois also has a broader conscience clause. *See infra* note 10 and accompanying text.

[6] ARK. CODE ANN. § 20-16-601 (Michie 1991) (abortion); *id.* § 20-16-301 (Michie 1991) (contraception); COLO. REV. STAT. § 18-6-104 (1986) (abortion); *id.* §§ 25-6-102(9), 207 (1989) (contraception); FLA. STAT. ANN. § 390.001(8) (1986) (abortion); *id.* § 381.0051(6) (Supp. 1991) (contraception); GA. CODE ANN. § 16-12-142 (Michie 1988) (abortion); *id.* § 49-7-6 (Michie 1990) (contraception); ME. REV. STAT. ANN. tit. 22, §§ 1591-2 (West 1992) (abortion); *id.* § 1903(4) (contraception); OR. REV. STAT. § 435.485 (1991) (abortion); *id.* § 435.225 (contraception); TENN. CODE ANN. § 39-15-204, 205 (1991) (abortion); *id.* § 68-34-104 (1987) (contraception); W. VA. CODE § 16-2F-7 (1991) (abortion); *id.* § 16-2B-4 (1991) (contraception); WYO. STAT. §§ 35-6-105, 106 (1988) (abortion); *id.* § 42-5-101 (1988) (contraception).

states and the United States cover abortion and sterilization,[7] one state extends protection in the context of abortion, contraception, sterilization, euthanasia, and similar practices,[8] and one state's conscience clause extends to abortion, sterilization, and artificial insemination.[9] In total, 45 American jurisdictions provide at least some protection for some health care providers to decline to provide or perform some abortions, 10 states cover contraception, seven jurisdictions include sterilization, one state covers euthanasia, and one state includes artificial insemination. Only one state statute, Illinois, and two narrow sub-parts of the federal statute, appear to extend some protection for some rights of conscience in some contexts to all medical procedures.[10]

The Alaska statute, although somewhat shorter than some, is typical of most as to the procedures covered. It simply provides, in pertinent part: "Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section."[11]

The historical reason for such narrowly focused conscience clauses is apparent. Most conscience clause provisions were adopted between 1973 and 1982, when the federal courts were broadly defining a new and very controversial constitutional privacy right to abortion.[12] Concern about discrimination against individuals who, for religious or other moral reasons, objected to participating in providing abortion services led to the widespread adoption of conscience clause statutes.[13] Also, during this period, limitations on public funding and public resources to facilitate access to abortion became the focus of intense litigation, and generated debate about institutional rights of conscience.[14] Thus, the controversy that originally stimulated the enactment of conscience clauses was abortion, and most statutes responded to that specific concern, and no other.

The narrow limitation of the procedures covered is the greatest flaw in most existing conscience clause provisions. There are many different health services to which profound moral or religious objections already have been raised, including abortion, contraception, sterilization, artificial insemination, medical experimentation, provision or withdrawal of life-sustaining medical treatment, withdrawal of nutrition and hydration, and physician-assisted suicide.[15] As the range of medical technologies continues to expand and social mores change, the number of medical services involving potentially serious conflicts of conscience is certain to increase.[16] Moreover, the cultural conditions that have created the need to protect the rights of conscience of persons with "minority" religious or moral views in the health care professions are likely to increase. The growing diversities of culture and religion in America are increasing the potential for dilemmas involving conflict of moralities and intensifying the need to protect the rights of conscience of all health care providers.[17]

There is no rational justification for protecting rights of conscience in the context of just one of these morally controversial medical procedures (for example, abortion) but not others. Such restrictive protection is fundamentally inconsistent with the basic principles underlying the extension of any such protection—respect for constraints of individual conscience, care for the conscience rights of minorities, and commitment to the value (and belief in the feasibility) of accommodation. Limiting protection for rights of conscience to just one or two specific procedures that are politically significant (for example, those that bother a majority or influential minority of voters) could manifest cultural or religious oppression. Moreover, laws protecting only the right to refuse to provide or assist abortion (which many mainstream religious denominations in America oppose for moral reasons), but not the right to refuse to provide or assist autopsies, organ transplants, or blood transfusions (which some religious minorities in America oppose for moral reasons) may be applied to infringe religious liberty, equality, and religious neutrality.[18]

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[7] MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983); N.J. STAT. ANN. §§ 2A:65A-1, 2, 3 (West 1987); N.M. STAT. ANN. § 30-5-2 (Michie 1984) (abortion); *id.* § 24-8-6 (Michie 1991) (sterilization); R.I. GEN. LAWS § 23-17-11 (1989); WIS. STAT. ANN. § 140.42 (West 1989); 42 U.S.C. § 300a-7 (1988).

[8] N.J. STAT. ANN. §§ 2A:65A-1, 2, 3 (West 1987) (abortion); *id.* § 30:11-9 (West 1981) (sterilization, euthanasia, contraception, and similar practices).

[9] MD. HEALTH—GEN. CODE ANN. § 20-214 (1990 & Supp. 1991).

[10] The Illinois Right of Conscience Act covers "any particular form of medical care which is contrary to the conscience . . . ." ILL. ANN. STAT. ch. 111½, ¶ 5304 (1981-82); *id.* ¶¶ 5305-5308. Illinois also has another conscience clause applicable only to abortion. ILL. ANN. STAT. ch. 38, ¶ 81-33 (Smith-Hurd 1977). One subsection of the federal statute prohibits discrimination in certain grant programs because the persons "performed or assisted in the performance of any lawful health service or research activity . . . or refused to perform or assist in the performance of any such activity." 42 U.S.C. § 300a-7(b)(2)(B) (1988), and another sub-part covers "any part of a health service program or research activity funded by the [Secretary of Health and Human Services]." *Id.* § 300a-7(e).

[11] ALASKA STAT. § 18.16.010(b) (1991).

[12] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); H.L. v. Matheson, 450 U.S. 398 (1981). *See also infra* notes 130-34.

[13] *See infra* notes 105-17 and accompanying text.

[14] *See, e.g.*, Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Harris v. McRae, 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980).

[15] *See Murder Charges Against Kevorkian Are Dismissed*, N.Y. Times, July 22, 1992, at A12 (Michigan court dismisses murder charges against Dr. Jack Kevorkian on ground that providing assistance to help women commit suicide is not a crime in Michigan).

[16] As genetic engineering processes become more sophisticated, it might be possible to "engineer" a child with extraordinary characteristics that might harm the child but might be profitable to its parents (for example, a child with a shorter life-span but greater physical or mental facilities than the ordinary population). Commercial sale of organs for transplantation may develop. Health care rationing may limit the provision of certain medical services to certain classes of patients.

[17] *See infra* notes 199-203 and accompanying text.

[18] *See, e.g.*, Yang v. Sturner, 728 F. Supp. 845, *vacated*, 750 F. Supp. 558 (D.R.I. 1990) (liability possible for performing autopsy contrary to Hmong family's religious beliefs against mutilation;

## B. Persons Protected

Most conscience clauses identify specifically (and sometimes very narrowly) the persons protected. Categorical distinctions separating protected from unprotected persons are made in many conscience clause provisions between individuals and institutions, persons directly or indirectly involved, and public or private persons. Not all conscience clauses protect all classes of persons, nor are the same protections extended, the same way, to all persons in each class.

### *1. Individuals or Institutions*

Three-fourths of the jurisdictions with conscience clauses extend at least some protection to both individuals and institutions providing health care.[19] A few, however, extend protections only to individuals, not institutions. The most common term used to describe the protected individual or institution is "person." One-half of the state conscience clauses broadly protect any "person."[20] The Delaware statute is typical. It provides, in pertinent part:

> *No person* shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of *any person* to perform or participate in these medical procedures shall not be a basis for civil liability to any person, nor a basis for any disciplinary or other recriminatory action against him.[21]

Some provisions apply only to the "individual."[22] This is arguably more restrictive than "person," because corporations and other legal institutions are "persons," for at least some purposes, but they are not "indi-

Kohn v. United States, 591 F. Supp. 568 (E.D.N.Y. 1984) (military liable for damages for unauthorized autopsy, removal of organs, and cremation of body contrary to beliefs of Jewish family); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (collecting cases regarding compulsory blood transfusions for adult Jehovah's Witnesses who object to transfusions).

[19] A listing of these statutory provisions is available from the author.

[20] *See, e.g.*, ALASKA STAT. § 18.16.010(b) (1991); ARK. CODE ANN. § 20-16-601 (Michie 1991); DEL. CODE ANN. tit. 24, § 1791 (1987); FLA. STAT. ANN. § 390.001(8) (West 1986); GA. CODE ANN. § 16-12-142 (Michie 1988); HAW. REV. STAT. § 453-16 (1985); KAN. STAT. ANN. § 65-443-4 (1985); ME. REV. STAT. ANN. tit. 22, § 1591 (West 1992); MD. HEALTH—GEN. CODE ANN. § 20-214 (1990 & Supp. 1991); MINN. STAT. ANN. §§ 145.414, 145.42 (West 1989); MONT. CODE ANN. § 50-20-111 (1991); NEB. REV. STAT. § 28-337 (1989); N.J. STAT. ANN. §§ 2A:65A-1,2,3 (West 1987); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1976); N.D. CENT. CODE § 23-16-14 (1991); OHIO REV. CODE ANN. § 4731.91 (Anderson 1987 & Supp. 1991); OKLA. STAT. ANN. tit. 63, § 1-741 (West 1984); S.D. COD. LAWS ANN. § 34-23-12 (1988); TENN. CODE ANN. § 39-15-204 (1987); VA. CODE ANN. § 18.2-75 (Michie 1988); W. VA. CODE § 16-2F-7 (1991); WYO. STAT. §§ 35-6-105, -106 (1988).

[21] DEL. CODE ANN. tit. 24, § 1791 (1987) (emphasis added).

[22] *See, e.g.*, IOWA CODE ANN. § 146.1; 42 U.S.C. § 300a-7(a).



viduals."[23] The intent to exclude institutions from coverage is evident in about one-fifth of the provisions, which provide conscience protection only for individuals.[24]

Some statutes try to list every person covered. For instance, one provision of the Illinois Right of Conscience law protects physicians and "medical personnel," which it defines as "any nurse, nurse's aid, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, medical care . . . ."[25] Likewise, the Missouri conscience clause protects every "physician or surgeon, registered nurse, practical nurse, [and] midwife . . . ."[26]

The most common term used to identify the institutions covered is "hospital." In fact, institutional conscience clause provisions in more than a dozen states provide protections to hospitals only.[27] A typical provision is the Idaho provision that "[n]othing in this act shall be deemed to require any hospital to furnish facilities or admit any patient for any abortion if, upon determination by its governing board, it elects not to do so."[28] Other conscience clauses extend protection more broadly, such as to "a hospital or other medical facility,"[29] "hospital or health care facility,"[30] "hospital, clinic, institution, or other facility,"[31] or any "medical facility."[32] Some statutes try to list every institution protected. For instance, the Illinois Right of Conscience Act covers "medical facilities," which it defines as "any public or private hospital, clinic, center, medical school, medical training

[23] In some conscience clauses, the term "person" is used in such a way as to suggest that only human beings are protected. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 112, § 12I ("A physician or any other person who is a member of or associated with the medical staff"); R.I. GEN. LAWS § 23-17-11 (same).

[24] *See, e.g.*, IND. CODE ANN. § 16-10-3-2; IOWA CODE ANN. § 146.1; MASS. GEN. LAWS ANN. ch. 112, § 12I; OR. REV. STAT. § 435.485; R.I. GEN. LAWS § 23-17-11. *See also* KAN. STAT. ANN. § 65-443.4; MD. HEALTH—GEN. CODE ANN. § 20-214 (using "person" alone).

[25] ILL. ANN. STAT. ch. 111½, ¶ 5303. Other provisions of this Act apply to "any person," *id.* ¶¶ 5305, 5308, 5309, or "any applicant." *Id.* ¶ 5307.

[26] MO. STAT. ANN. § 197.032.

[27] ALASKA STAT. § 18.16.010(b); ARK. CODE ANN. § 20-16-601; COLO. REV. STAT. § 18-6-104; DEL. CODE ANN. tit. 24, § 1791; FLA. STAT. ANN. § 390.001(8); HAW. REV. STAT. § 453-16; IDAHO CODE § 18-612; ILL. ANN. STAT. ch. 111½, ¶¶ 5201-5314; MO. ANN. STAT. § 197.032; N.J. STAT. ANN. § 30:11-9; N.D. CENT. CODE § 23-16-14; OHIO REV. CODE ANN. § 4731.91; S.D. COD. LAWS ANN. § 34-23A-12-14; TENN. CODE ANN. § 39-15-204; WIS. STAT. ANN. § 140.42.

[28] IDAHO CODE § 18-612. *See also* FLA. STAT. ANN. § 390.001(8) (provides: "Nothing in this section shall require any hospital or any person to participate in the termination of a pregnancy, nor shall any hospital or any person be liable for such refusal.").

[29] GA. CODE ANN. § 16-12-142; VA. CODE § 18.2-75. *See also* ILL. ANN. STAT. ch. 38, ¶ 81-33; MINN. STAT. ANN. § 145.414.

[30] ME. REV. STAT. ANN. tit. 22, § 1591; N.J. STAT. ANN. § 2A:65A-2; N.C. GEN. STAT. § 14-45.1(f).

[31] NEB. REV. STAT. § 28-337(1). *See also* LA. REV. STAT. ANN. § 40:1299.31C; N.M. STAT. ANN. § 24-8-6(A)(2).

[32] PA. CONS. STAT. ANN. § 3213(d).

institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location where medical care is provided to any person . . . .''[33]

## 2. *Direct-Indirect Providers*

Many conscience clauses (nearly one-half) specifically limit coverage to persons directly involved in the procedure--medical professionals.[34] The most frequently mentioned as protected are ''physicians,'' followed by ''nurses,'' and ''members of the staff'' or ''employees'' of physicians, hospitals, or other health care employers.[35] For example, the key paragraph of the Kentucky conscience clause applies to any ''physician, nurse staff member or employee of a public or private hospital or employee of a public or private health care facility . . . .''[36] This provision also demonstrates the problems with trying to identify every person covered: ambiguous drafting leaves the provision open to irrationally different possible interpretations.[37]

## 3. *Public-Private Providers*

Nearly a dozen institutional conscience clause provisions limit protection to private institutions.[38] Typical is the provision of the Montana con-

[33] ILL. ANN. STAT. ch. 111½, ¶ 5303. *See also* MICH. COMP. LAWS ANN. § 333.20181.

[34] The intent to focus protections exclusively on persons engaged in the direct provision of health care services is very apparent in the Nevada statute, which extends conscience protections to ''a registered nurse, a licensed practical nurse, a nursing assistant or any other person *employed to furnish direct personal health service to a patient* . . . .'' NEV. REV. STAT. § 632.475 (emphasis added).

[35] *See, e.g.*, ARK. CODE ANN. § 20-16-304; *id.* § 20-16-601; CAL. HEALTH & SAFETY CODE § 25955; COLO. REV. STAT. § 18-6-104; *id.* § 25-6-102; FLA. STAT. ANN. § 390.001(8); IDAHO CODE § 18-612; GA. CODE ANN. § 30-11-9; ILL. ANN. STAT. ch. 38, ¶ 81-33; *id.* ch. 111½, ¶¶ 5201-5314; IND. CODE ANN. § 16-10-3-2; KY. REV. STAT. ANN. § 311.800; LA. REV. STAT. ANN. §§ 40.1299.31, 40.1299.32, 40.1299.33; ME. REV. STAT. ANN. tit. 22, § 1591-2; MASS. GEN. LAWS ANN. ch. 112, § 12I; MICH. COMP. LAWS ANN. §§ 333.20181 to 333.20184 & 333.20199; MINN. STAT. ANN. §§ 145.414, 145.42; MO. ANN. STAT. § 197.032; NEV. REV. STAT. § 632-475; N.M. STAT. ANN. § 30-5-2; N.C. GEN. STAT. § 14-45.1; N.D. CENT. CODE § 23-16-14; OR. REV. STAT. § 435.485; PA. STAT. ANN. tit. 18, § 3213; R.I. GEN. LAWS § 23-17-11; S.C. CODE ANN. § 44-41-40; S.D. COD. LAWS ANN. §§ 34-23A-12-14; TENN. CODE ANN. § 68-34-104; *id.* § 39-15-204; TEX. REV. CIV. STAT. ANN. art. 4512.7; UTAH CODE ANN. 76-7-306; W. VA. CODE § 16-2B-4; WIS. STAT. ANN. § 140.42. Some states extend protection to both specific individuals and ''any other person.'' Nevada extends specific protection to nurses and other medical assistants but does not explicitly mention physicians. NEV. REV. STAT. § 632.475 protects ''a registered nurse, a licensed practical nurse, a nursing assistant or any other person employed to furnish direct personal health service to a patient . . . .''

[36] KY. REV. STAT. § 311.800.

[37] If the absence of commas after ''nurse'' and ''staff member'' is deemed significant, rather than just poor drafting, then the provision could be given wildly varying interpretation. It could mean that non-nurses are not covered, or are covered only if employed at non-hospitals, or are not covered unless employees of the hospital, or that ''nurses'' and other ''staff'' at non-hospital facilities are not covered.

[38] ARK. CODE ANN. § 20-16-304; CAL. HEALTH & SAFETY CODE § 25955; COLO. REV. STAT. § 25-6-102; KY. REV. STAT. ANN. § 311.800; MONT. CODE ANN. § 50-20-111; S.C. CODE ANN. § 44-41-40; TENN. CODE ANN. § 68-34-104; TEX. REV. CIV. STAT. ANN. art. 4512.7; UTAH CODE ANN. § 76-7-306; WYO. STAT. §§ 35-6-105, -106.



science clause that protects every ''private hospital or private health care facility.''[39] One paragraph of California's conscience clause statute narrows protection even further—it only protects each ''nonprofit hospital or other facility or clinic which is *organized or operated by a religious corporation or other religious organization* . . . .''[40]

At least four state conscience clause provisions deny certain protections to health care personnel working at or for public institutions. For example, sections of the Tennessee and Arkansas conscience clause statutes provide: ''No *private* institution or physician, nor any agent or employee of such institution or physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information . . . .''[41]

## 4. *The Invalidity of the Distinctions*

The individual-institutional, direct-indirect, and private-public distinctions among health care providers are largely without analytical significance for protection of rights of conscience. These classifications often are misused in existing conscience clause legislation.

### a. *Individual or Institution*

Certainly individuals and institutions are different in many ways; hospitals, clinics, and other corporate or institutional entities do not have flesh and blood, or their own individual feelings, beliefs, or consciences to protect. How can they, when they are merely fictitious creations of our own invention, artificially created and endowed with legal personality?[42] However, legal entities (including hospitals, medical associations, and other health care corporations) are organized by individuals to achieve purposes that can best be achieved by collective action, including protecting or promoting values that individuals best can express and implement by collective activity. Legal entities must have specific, government-sanctioned corporate activity. Legal entities must have specific, government-sanctioned corporate purposes—moral ends, if you will—such as rendering charitable service, relieving suffering, protecting the weak, educating the unlearned, curing the sick, or saving life. Our laws recognize the entities created for such moral purposes, consider them legal ''persons,'' and extend significant legal ben-

[39] MONT. CODE ANN. § 50-20-111. *See also* KY. REV. STAT. § 311.800(3).

[40] CAL. HEALTH & SAFETY CODE § 25955(c) (emphasis added).

[41] TENN. CODE ANN. § 68-34-104(5). *See also* COLO. REV. STAT. § 25-6-103; ME. REV. STAT. ANN. tit. 22, § 1903. *See also* ARK. STAT. ANN. § 20A-16-304(2) (''No private institution or physician, nor any agent or employee of such institution or physician, nor any employee of a public institution acting under directions of a physician'').

[42] *See generally* Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919).

efits to them (including tax exemptions, immunity from liability, and the like) when they advance certain moral goals favored by the state.

The greatest opposition to laws protecting the rights of conscience of health care institutions has come from advocates of absolute reproductive choice.[43] These writers fear (probably correctly) that if health care providers, including organizations, were entirely free to choose whether or not to provide or participate in providing elective abortion services, there would be fewer facilities in which such services would be available.[44] It seems somehow ironic that advocates of "choice" oppose the rights of hospitals and clinics to choose not to provide elective abortions.[45] More fundamentally, this argument against extending protection to organizations to follow their own moral or religious values is based on an assumption that expansion of access to facilities for elective abortions is moral, but voluntary decisions by other medical facilities or personnel to refrain from providing abortion service is immoral. The flaw, obviously, is that the very purpose of a conscience clause is to protect the rights of persons (acting individually or in association with others) to make those decisions for themselves, and to protect their decisions, even if they are unpopular.

To exclude institutional health providers from conscience clause protection is merely an indirect way of denying the conscience and morality of the individuals whose will and purposes the entities were created to effectuate.[46] Thus, to deny protection to health care institutions contradicts the central purpose of conscience clauses, which is to protect the moral sensibilities and deeply-held beliefs of the individuals who make up the institution. Moreover, it seems more than a little ironic for a state to assert that a hospital or other institution does not have a conscience, or is not entitled to express and implement that conscience, because it is not a real individual, but only an entity.[47] After all, a state is not a

[43] *See* Pilpel & Patton, *Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses*, 6 COLUM. HUMAN RTS. L. REV. 279 (1974-75).

[44] *See infra* note 231 and accompanying text.

[45] It is even more ironic when a person opposing the rights of health care institutions to assert rights of conscience is a high official of an institution (the A.C.L.U.) that has made its reputation defending rights of conscience of unpopular organizations and their members, as well as General Counsel for another institution (Planned Parenthood) that has been the leading advocate of institutional freedom of choice. *Id.* at 279 n.*. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991).

[46] "[C]orporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution." Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888). It has been said that personhood was extended to corporations to protect the interests of the stockholders. Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1641-42 (1988).

[47] When the institution is a public institution, the individual consciences behind the institutional form are those of the public. Thus, when the public has adopted a policy favoring provision of the controversial medical service, distinguishing between public institutions and the individuals that work there initially seems reasonable, because to effectuate the collective conscience rights of the public, it would be necessary for public institutions to provide the morally controversial medical services (not to have the conscience clause right to refuse to provide them), while to effectuate the conscience rights of the individual health care personnel, it would be necessary to grant conscience clause protections for individuals. However, to protect the former does not require destruction of the latter, and reasonable accommodation of public employee conscience rights balances both objectives.



human being either, but merely an entity created to express and enforce collective will.[48]

Finally, exclusion of health care institutions from laws protecting conscience can not be reconciled with other legal doctrines protecting rights of conscience. For example, to protect individual rights of conscience in the provision of health service but deny protection to collective (entity) forms of individual conduct is rather like arguing that the first amendment protects only individual speech (direct, person-to-person, natural, voice communication, or personally-written, personally-delivered letters) but not collective speech (for example, by corporations, or via television, books, or newspapers—which are collective, institutional efforts).[49]

Of course, protections for institutional rights of conscience should be tailored to the role and functions they have in the provision of controversial health services, and to the unique dilemmas they face. Nevertheless, it is improper to categorically deny health care institutions statutory protection for rights of conscience.

*b. Direct-Indirect Providers*

Many conscience clauses limit protection to persons engaged in directly providing medical treatment or medical services—the ones in the operating room, at the place of delivery of the controversial medical service itself.[50] Apparently, intake personnel (who admit the patient), records personnel (who manage the patient files), accounting personnel (who bill and collect for the procedure or service), janitorial personnel (who prepare the room for the procedure and clean it up afterwards), insurance personnel (who provide payment for the procedure), kitchen personnel (who feed the patient and the persons performing the procedure), and a myriad of other workers indirectly involved in the total enterprise of providing complete medical service are not covered.

[48] For that matter, the law is not an individual either, but a construct, a tool for enforcing the collective will (the will of the state).

[49] *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778-84 (1978) (corporations enjoy constitutional protection for political speech/contributions); N.A.A.C.P. v. Button, 371 U.S. 415, 428-31 (1963) (cooperative group activity protected by first and fourteenth amendments). *See also* Pacific Gas and Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1, 9-12 (1986) (compelling utility to send messages of public interest group is unconstitutional); Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 260-62 (1986) (political speech rights of corporation vindicate political rights of the individual members thereof).

[50] *See, e.g.*, NEV. REV. STAT. § 632.475 (protecting "a registered nurse, a licensed practical nurse, a nursing assistant or any other persons employed to furnish direct personal health services to a patient" against having "to participate *directly* in the induction or performance of an abortion").

This confined conception of the class of persons whose rights of conscience merit protection is unjustifiable. Conscience clauses are intended to protect the right not to participate in providing services that a health provider believes to be immoral.[51] One may feel morally culpable even if one is not the immediate or direct provider of an immoral act. As the authors of an earlier study of conscience clauses noted:

> [I]f the aim of the conscience clause is to protect individuals who experience work-related conflicts as a result of conscientious objections to abortion, the protection ought to be defined by reference to what the employee sees as a conflict, not by reference to what an administrative agency thinks is the legitimate scope of acceptable conflict situations.[52]

No countervailing public policy will be seriously impeded if the conscience rights of persons indirectly involved in the provision of controversial medical services are protected. Likewise, there is no compelling justification for limiting protection to health care professionals or those engaged only in the direct provision of the controversial medical service.[53]

A term frequently used in conscience clause descriptions of the covered persons is "persons." This fine, broadly inclusive term does not distinguish between professionals and nonprofessionals, or direct participants and indirect participants, or between individuals and organizations, or between public and private actors.[54] It is consistent with the most mature conception of the principle of broadly protecting conscience that underlies conscience clauses.

*c. Public-Private*

The most likely reason for legislation protecting the rights of private (but not public) institutions and personnel to decline to provide morally controversial health services is that the state has adopted a public policy to favor and provide the controversial service. Thus, it refuses to allow its publicly-supported facilities and personnel to refuse to provide the services while at the same time respecting the right of private entities and health

[51] The Illinois Right of Conscience Act describes its purpose as "to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of medical services and medical care . . . ." ILL. ANN. STAT. ch. 111½, ¶ 5302.

[52] Durham, Wood, & Condie, *supra* note 1, at 319.

[53] It bears remembering that some people in this country sincerely believe that some controversial medical procedures (for example, abortion or withdrawal of nutrition and hydration) are abhorrent, immoral, and repugnant. The right of conscientious refusal for persons who consider it immoral even to secondarily or indirectly aid and assist such procedures should be protected.

[54] Some conscience clauses list specific classes of covered individuals—health care professionals—then adds "other person" to give emphasis (primarily concerned with professionals) without exclusion. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.31; ME. REV. STAT. ANN. tit. 22, § 1591.



personnel to decline to provide such services. However, this justification for distinguishing between public and private institutions and individuals does not withstand careful scrutiny.

In the above-described situation, the state has a conflict of values—it simultaneously values (1) the controversial medical service and (2) the rights of conscience of health care providers to refuse to provide the same service. The solution to the conflict, however, is not to distinguish between public-private health care providers for purposes of protecting rights of conscience. That is unprincipled from the perspective of both values; it achieves neither, and offends both.[55]

The best resolution of this kind of values dilemma is to give one value priority when they happen to conflict. In our tradition, including our basic social compact, protection for the rights of conscientious refusal to participate in morally objectionable government-valued activities has a stronger and longer claim to priority and preference than the efficient provision of morally controversial medical services.[56]

Public personnel, no less than private personnel, are entitled to protection for their rights of conscience.[57] Individuals who work for public health care institutions are certainly not less likely to encounter moral dilemmas.[58] Thus, protection of rights of conscience of private but not public health care personnel (individuals) is improper.

Excluding public institutions from conscience clause provisions protecting the right to decline to provide morally controversial medical services requires closer examination. The "persons" behind the corporate entity of a public hospital or other public health care institution, whose conscience and values are expressed and effectuated through the entity structure, are the public. If, by due process, the people of a state favor the provision of certain

[55] The public-private distinction in protecting rights of conscience of health care providers would be principled only if the state had (1) a value preference for providing the service, (2) no value preference for rights of conscience, but (3) a value preference for non-regulation of private activities. However, the latter value seems rather old-fashioned in the modern regulatory world, and it surely would come under serious attack by post-modernists who reject the distinction between private and public (at least when it limits public regulation). Moreover, the assumption that protection for rights of conscience is not a significant contemporary American value flies in the face of overwhelming evidence to the contrary, from the Bill of Rights to the conscientious objector cases to the latest debates over "privacy" and "the right to choose."

[56] It would be exceptional if the conflict between the values was more than *de minimis*.

[57] *See, e.g.*, Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) (firing public employees because of political affiliation is unconstitutional); Perry v. Sindermann, 408 U.S. 593, 596-98 (1972) (refusal to renew teacher's contract because of criticism is unconstitutional condition); Keyishian v. Board of Regents of Univ. of the State of New York, 385 U.S. 589, 597 (1967) (public employment may not be restricted by unconstitutional conditions).

[58] Rather, it is likely that personnel in public health care facilities encounter a wider array of moral dilemmas, as the kinds of financial barriers or patient self-selection that may protect some private facilities do not protect most public ones.

morally controversial procedures, it would deny the rights of conscience of the people (the public) whose representatives have adopted that policy to refuse to let them implement those values collectively (institutionally).[59]

However, a state is not just another voluntary, private association. It is a monopolistic entity, claiming the exclusive right to do certain things (for example, use deadly force to implement its decisions), and asserting the tax prerogative to take the property of all persons under its power to effectuate its decisions. Excluding public institutions from conscience clause protection would violate the conscience rights of the minority of the population who do not wish to participate in or support the services they deem morally abhorrent—an effect that contradicts the fundamental policy underlying conscience clause legislation. Disregarding the moral weight of those objections would seriously jeopardize fundamental values necessary for cohesion in the community.[60] Additionally, it would be inconsistent with the way we respect conscience rights generally.[61]

### C. Conduct Protected or Prohibited and Exceptions

Most conscience clauses are written in the form of a statutory recognition of a personal civil right to refuse to participate in or provide the morally controversial medical service.[62] Typical are the Kansas provisions,

[59] Whether it would be wise for a state to adopt a policy mandating the provision of morally controversial medical services, such as abortion, sterilization, or euthanasia, in public facilities is another matter. Dedicating public resources to provide controversial medical services that promote the private value preferences of a minority of the public, but that are morally repugnant to many others, when those services are available on the open market from private health care providers, in a time of severe public budget deficits, seems imprudent at best.

[60] It is more likely that objectors feel compelled by their consciences to refuse to accommodate the controversial service than that supporters feel that they are under moral compulsion (as distinct from permission) to provide it. *See infra* note 86 and accompanying text.

[61] For example, the establishment clause of the first amendment is one of the oldest kinds of conscience clauses. While the state power to tax and spend revenue is great, it may not be exercised in defiance of the establishment clause. Excluding public institutions from conscience clause protection because most people in the jurisdiction favor a controversial health service (such as abortion) would be like saying it is appropriate to tax everyone in a jurisdiction to support a popular religion (such as Jewish synagogues in New York or Mormon chapels in Utah), so long as no one is required to attend.

[62] Thirty-nine of the 44 states with conscience clauses, and the federal statute are in the form of personal civil rights statutes. Some provisions cover individuals only, others institutions only, and others cover both. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2151; ARK. CODE ANN. § 20-16-601; CAL. HEALTH & SAFETY CODE § 25955; COLO. REV. STAT. § 18-6-104; *id.* § 25-6-102; DEL. CODE ANN. tit. 24, § 1791; FLA. STAT. ANN. § 390.001(8); GA. CODE ANN. §§ 16-12-142, 49-7-6; IDAHO CODE § 18-612; ILL. ANN. STAT. ch. 38, ¶ 81-33; *id.* ch. 111½, ¶¶ 5201-5314; IND. CODE ANN. § 16-10-3-2; IOWA CODE ANN. § 146.1; KAN. STAT. ANN. § 65-443-4; KY. REV. STAT. ANN. § 311.800; LA. REV. STAT. ANN. §§ 40:1299.31, 40:1299.32, 40:1299.33; ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592, & 1903; MD. HEALTH—GEN. CODE ANN. § 20-214; MASS. GEN. LAWS ANN. ch. 112, § 12I; MICH. COMP. LAWS ANN. §§ 333.20181 to 333.20184 & 333.20199; MINN. STAT. ANN. §§ 145.414, 145.42; MO. ANN. STAT. § 197.032; MONT. CODE ANN. § 50-20-111; NEB. REV. STAT. § 28-337; NEV. REV. STAT. § 632.475; N.J. STAT. ANN. §§ 2A:65A-1,2,3; N.Y. CIV. RIGHTS LAW § 79-i; N.D. CENT. CODE § 23-16-14; N.M. STAT. ANN. § 30-5-2; OHIO REV. CODE ANN. § 4731.91; OKLA. STAT. ANN. tit. 63, § 1-741; OR. REV. STAT. §§ 435.485, 435.225; PA. STAT. ANN. tit. 18, § 3213; R.I. GEN. LAWS § 23-17-11; S.C. CODE ANN. § 44-41-40; S.D. COD. LAWS ANN. §§ 34-23A-12-14; TENN. CODE ANN. § 68-34-104; *id.* § 39-15-204; TEX. REV. CIV. STAT. ANN. art. 4512.7; UTAH CODE ANN. § 76-7-306; VA. CODE ANN. § 18.2-75; W. VA. CODE § 16-2B-4; WIS. STAT. ANN. § 140.42; WYO. STAT. §§ 35-6-105, -106, 42-5-101; 42 U.S.C. § 300a-7.



which declare, in pertinent part: "No person shall be required to perform or participate in [abortion],"[63] and "[n]o hospital, hospital administrator or governing board shall be required to permit [abortion] within its institution. . . ."[64] Like the Kansas provisions, most conscience clauses are phrased negatively ("no person shall be required"). While that is a time-honored way of protecting civil rights,[65] the practice of affirmatively recognizing the civil right and stating that it may not be violated is also long-established,[66] and may be preferable because it positively affirms as a civil right what may not previously have been explicitly recognized to be one.[67]

Most conscience clauses vindicate a general right to refuse, but a few provisions merely refute the narrow inference that a particular law creates a duty to provide or participate in the controversial medical service.[68] For instance, the Alaska conscience clause provides, in pertinent part: "Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section."[69] On its face, this provision merely rejects the inference that one section of the Alaska statutes regulating abortions requires participation in the provision of abortion services. It does not expressly reject the same inference if it arises from some other section of the Alaska statutes, or from some common law doctrine, or constitutional doctrine, much less recognize any affirmative civil rights protection for health care providers with conscientious objections to abortion (to say nothing of other morally controversial

[63] KAN. STAT. ANN. § 65-443.

[64] *Id.* § 65-444.

[65] *See, e.g.*, U.S. CONST. amend. V ("No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.")

[66] *See, e.g.*, *id.* amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion], or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble")

[67] *See* MONT. CODE ANN. § 50-20-111(2) ("All persons shall have the right to refuse to advise concerning, perform, assist, or participate in abortion because of religious beliefs or moral convictions."); *id.* § 50-20-111(3) ("It shall be unlawful to interfere or attempt to interfere with the right of refusal authorized by this section.").

[68] *See, e.g.*, ALASKA STAT. § 18.16.010(b); ARK. CODE ANN. § 20-16-304; COLO. REV. STAT. §§ 18-6-104, 25-6-102; FLA. STAT. ANN. § 381.0051(6); HAW. REV. STAT. § 453-16; N.M. STAT. ANN. § 24-8-6; N.J. STAT. ANN. § 30:11-9; N.C. GEN. STAT. § 14-45.1; UTAH CODE ANN. § 76-7-306; W. VA. CODE § 16-2F-7; 42 U.S.C. § 300a-7(a)(1).

[69] ALASKA STAT. § 18.16.010(b).

services) to act in accordance with their consciences. Such narrow provisions are doubly defective: they provide very little real protection for rights of conscience, yet they sound so very protective (within their little corner of defense) that they may discourage the adoption of real conscience clauses.[70]

Most conscience clauses provide explicit protection from civil liability for refusing to provide or participate in the controversial medical service.[71] Some explicitly provide exemption from criminal liability.[72]

Most conscience clauses provide general protection from some (or all) forms of discrimination based on a refusal to provide or participate in the controversial service.[73] Many specifically prohibit employment discrimination of some form or another. Some specifically prohibit firing, demoting, transferring, or refusing to hire because of refusal to provide or participate in the controversial service;[74] and some prohibit penalties, discipline, or

[70] Sadly, the key provision of the federal conscience clause is such a provision.

[71] *See* ARK. CODE ANN. § 20-16-304, *id.* § 20-16-601, CAL. HEALTH & SAFETY CODE § 25955, COLO. REV. STAT. § 25-6-102; DEL. CODE ANN. tit. 24, § 1791, FLA. STAT. ANN. § 381.0051, GA. CODE ANN. § 16-12-142; HAW. REV. STAT. § 453-16, IDAHO CODE § 18-612, ILL. ANN. STAT. ch. 38, ¶ 81-33, *id.* 111½, ¶¶ 5304, 5313; KAN. STAT. ANN. § 65-443-4, KY. REV. STAT. ANN. § 311.800; LA. REV. STAT. ANN. §§ 40:1299.31, 40:1299.32, ME. REV. STAT. ANN. tit. 22, § 1591-2, MD. HEALTH—GEN. CODE ANN. § 20-214, MASS. GEN. LAWS ANN. ch. 112, § 12I, MICH. COMP. LAWS ANN. §§ 333.20181 to 333.20183, & 333.20199, MINN. STAT. ANN. §§ 145.414, 145.42, MO. ANN. STAT. § 197.032; MONT. CODE ANN. § 50-20-111, NEB. REV. STAT. § 28-337, N.J. STAT. ANN. §§ 2A:65A-1,2,3, N.Y. CIV. RIGHTS LAW § 79-i, N.C. GEN. STAT. § 14-45.1, OHIO REV. CODE ANN. § 4731.91; OKLA. STAT. ANN. tit. 63, § 1-741, PA. STAT. ANN. tit. 18, § 3213, R.I. GEN. LAWS § 23-17-11; S.C. CODE ANN. § 44-41-40, S.D. COD. LAWS ANN. § 34-23A-13, TENN. CODE ANN. § 68-34-104; UTAH CODE ANN. § 76-7-306, VA. CODE ANN. § 18.2-75, WIS. STAT. ANN. § 140.42, WYO. STAT. §§ 35-6-105, -106.

[72] *See, e.g.*, ARK. CODE ANN. § 20-16-304, ILL. ANN. STAT. ch. 38, ¶ 81-33, *id.* ch. 111½, ¶ 5304, LA. REV. STAT. ANN. §§ 40:1299.31, 40:1299.32, 40:1299.33, MICH. COMP. LAWS ANN. §§ 333.20181 to 333.20184, & 333.20199; N.J. STAT. ANN. §§ 2A:65A-1,2,3, PA. STAT. ANN. tit. 18, § 3213, TENN. CODE ANN. § 39-15-204.

[73] *See, e.g.*, GA. CODE ANN. § 49-7-6, ILL. ANN. STAT. ch. 111½, ¶ 5201, *id.* ch. 111½, ¶¶ 5302, 5305, 5307-08, 5310-11; IND. CODE ANN. § 16-10-3-2, IOWA CODE ANN. § 146.1, KY. REV. STAT. ANN. § 311.800, LA. REV. STAT. ANN. §§ 40:1299.31, 40:1299.32, 40:1299.33, ME. REV. STAT. ANN. tit. 22, § 1591-2, MASS. GEN. LAWS ANN. ch. 112, § 12I, MICH. COMP. LAWS ANN. §§ 333.20182, 333.20184, MINN. STAT. ANN. §§ 145.414, 145.42, MO. ANN. STAT. § 197.032, MONT. CODE ANN. § 50-20-111, NEB. REV. STAT. § 28-338, N.J. STAT. ANN. §§ 2A:65A-1,2,3, N.Y. CIV. RIGHTS LAW § 79-i, N.D. CENT. CODE § 23-16-14, OR. REV. STAT. § 435.225, S.C. CODE ANN. § 44-41-40; TEX. REV. CIV. STAT. ANN. art. 4512.7, UTAH CODE ANN. § 76-7-306; W. VA. CODE § 42-5-101, WIS. STAT. ANN. § 140.42, WYO. STAT. §§ 35-6-105, -106, 42-5-101, 42 U.S.C. § 300a-7. *See also* MO. ANN. STAT. § 197.032.

[74] CAL. HEALTH & SAFETY CODE § 25955, GA. CODE ANN. § 49-7-6, ILL. ANN. STAT. ch. 111½, ¶¶ 5201, 5305, 5307, 5310; IND. CODE ANN. § 16-10-3-2, IOWA CODE ANN. § 146.1, KAN. STAT. ANN. § 65-443-4, KY. REV. STAT. ANN. § 311.800, ME. REV. STAT. ANN. tit. 22, § 1591-2; MASS. GEN. LAWS ANN. ch. 112, § 12I, MINN. STAT. ANN. § 145.42, NEB. REV. STAT. § 28-338, OR. REV. STAT. § 435.225; PA. STAT. ANN. tit. 18, § 3213, S.C. CODE ANN. § 44-41-40; S.D. COD. LAWS ANN. § 34-23A-13, TEX. REV. CIV. STAT. ANN. art. 4512.7, VA. CODE ANN. § 18.2-75, W. VA. CODE § 16-2B-4, WIS. STAT. ANN. § 140.42, WYO. STAT. §§ 35-6-105, -106, 42-5-101, 42 U.S.C. § 300a-7.



recrimination.[75] A handful of provisions prohibit denial of privileges, licenses, grants, or immunities,[76] while others prohibit conditioning, denying, or terminating any government benefit or grant because of a refusal to provide or participate in the controversial service.[77] Broad protection against all forms of employment discrimination appears to be necessary,[78] and statutes that simply pick out one or two types of employment discrimination for prohibition are deceptively inadequate.

Professional education and training is another specific focus of some conscience clauses. Discrimination in admission, acceptance, or training because of refusal to provide or participate in the controversial service is prohibited in 10 provisions.[79] The failure of most states to protect students, who are particularly vulnerable, is a glaring oversight that cannot be harmonized with the purpose and policy of conscience clauses.

Miscellaneous provisions prohibit discrimination because of a person's statement or attitude about the controversial procedure,[80] or because of a refusal to recommend or counsel the service,[81] forbid coercion,[82] and prohibit interference with the right of refusal.[83] One state provides protection against employment discrimination only if "the sole reason [for the denial of employment is] that the individual previously participated in, or ex-

[75] *See, e.g.*, ARK. CODE ANN. § 20-16-601, CAL. HEALTH & SAFETY CODE § 25955, COLO. REV. STAT. § 18-6-104, DEL. CODE ANN. tit. 24, § 1791, FLA. STAT. ANN. § 390.0011(8), GA. CODE ANN. § 16-12-142, IDAHO CODE § 18-612, ILL. ANN. STAT. ch. 38, ¶ 81-33, IND. CODE ANN. § 16-10-3-2, KY. REV. STAT. ANN. § 311.800, ME. REV. STAT. ANN. tit. 22, § 1591-2, MD. HEALTH—GEN. CODE ANN. § 20-214, MASS. GEN. LAWS ANN. ch. 112, § 12I, MICH. COMP. LAWS ANN. §§ 333.20182, 333.20199, MONT. CODE ANN. § 50-20-111, NEV. REV. STAT. § 632.475, N.J. STAT. ANN. §§ 2A:65A-1,2,3, N.M. STAT. ANN. § 30-5-2; N.C. GEN. STAT. § 14-45.1; OHIO REV. CODE ANN. § 4731.91; OKLA. STAT. ANN. tit. 63, § 1-741, PA. STAT. ANN. tit. 18, § 3213, R.I. GEN. LAWS § 23-17-11, S.C. CODE ANN. § 44-41-40; UTAH CODE ANN. § 76-7-306, W. VA. CODE § 16-2B-4, VA. CODE ANN. § 18.2-75, WIS. STAT. ANN. § 140.42, WYO. STAT. § 42-5-101.

[76] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25955, DEL. CODE ANN. tit. 24, § 1791, ILL. ANN. STAT. ch. 111½, ¶¶ 5201, 5305, 5310-11, IND. CODE ANN. § 16-10-3-2, IOWA CODE ANN. § 146.1, KAN. STAT. ANN. § 65-443-4, N.M. STAT. ANN. § 30-502, KY. REV. STAT. ANN. § 311.800, ME. REV. STAT. ANN. tit. 22, § 1591-2, MASS. GEN. LAWS ANN. ch. 112, § 12I, MONT. CODE ANN. § 50-20-111, N.J. STAT. ANN. § 30:11-9, WYO. STAT. §§ 35-6-105,6, 42 U.S.C. § 300a-7.

[77] *See, e.g.*, DEL. CODE ANN. tit. 24, § 1791, ILL. ANN. STAT. ch. 111½, ¶¶ 5308, 5310-11, KY. REV. STAT. ANN. § 311.800; LA. REV. STAT. ANN. § 40:1299.35, ME. REV. STAT. ANN. tit. 22, § 1591; MASS. GEN. LAWS ANN. ch. 112, § 12I, MO. ANN. STAT. § 197.032, MONT. CODE ANN. § 50-20-111, WIS. STAT. ANN. § 140.42, 42 U.S.C. § 300a-7.

[78] *See infra* Part II.

[79] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25955, ILL. ANN. STAT. ch. 111½, ¶ 5307, IND. CODE ANN. § 16-10-3-2; IOWA CODE ANN. § 146.1, KY. REV. STAT. ANN. § 311.800, ME. REV. STAT. ANN. tit. 22, § 1592, MASS. GEN. LAWS ANN. ch. 112, § 12I, MICH. COMP. LAWS ANN. §§ 333.20181 to 333.20184, & 333.20199, TEX. REV. CIV. STAT. ANN. art. 4512.7, WIS. STAT. ANN. § 140.42.

[80] KY. REV. STAT. § 311.800(5), TEX. REV. CIV. STAT. ANN. art. 4512.7.

[81] LA. REV. STAT. ANN. § 40:1299.31.

[82] MINN. STAT. ANN. § 145.414, 42 U.S.C. § 300a-8.

[83] MONT. CODE ANN. § 50-20-111.

pressed a willingness to participate in, [abortion].''[84] The "sole reason" language is too narrow—there is always some other excuse for the discriminatory treatment, so this provision provides little real protection against employment discrimination.

Few states protect a right of conscience to perform or participate in the controversial procedure.[85] This suggests that the refusal to participate in providing controversial medical services is generally believed to reflect more compelling moral considerations than the desire to participate in the same service. For example, it is more likely that a person will believe that he or she has a moral duty not to participate in performing or providing abortion than he or she has a moral duty to participate in performing or providing abortion.[86] This is consistent with the primary objective of conscience clauses, which is to eliminate coerced participation in medical procedures that are morally repugnant to the provider.

Most conscience clauses contain no exceptions to the prohibitions and protections provided. Of the few statutory exceptions in conscience clauses, the most common are for medical emergencies.[87] Two states provide exceptions to employment discrimination prohibitions for facilities operated exclusively to provide the controversial services,[88] or for positions in those parts of an institution where such services are provided,[89] or when the person contracted "specifically" or accepted public funds "for the sole purpose of, and specifically conditioned upon, permitting or providing that particular form of medical care."[90]

The failure of most statutes to provide exceptions for medical emergencies probably reflects the general belief that few persons will have moral or religious objections to providing such services when they are truly therapeutic procedures (in real medical emergencies), rather than elective procedures. For completeness, however, it is reasonable to provide a well-

[84] MICH. COMP. LAWS ANN. § 333.20184.

[85] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25955 ("participate in performing" or "permit the performance"); MICH. COMP. LAWS ANN. §§ 333.20184 ("participated in or expressed a willingness to participate in"); TEX. REV. CIV. STAT. ANN. art. 4512.7 ("willingness to participate in"), 42 U.S.C. § 300a-7 ("performed or assisted in the performance").

[86] While some moral perspectives allow or support abortion, few—and only in very rare cases—raise abortion to the level of moral duty. On the other hand, many moral traditions prohibit abortion.

[87] *See* CAL. HEALTH & SAFETY CODE § 25955(d); ILL. ANN. STAT. ch. 111½, ¶¶ 5306, 5309; IOWA CODE ANN. § 146.1; KAN. STAT. ANN. § 65-444; MD. HEALTH—GEN. CODE ANN. § 20-214 (Supp. 1991); NEV. REV. STAT. § 632.475; OKLA. STAT. ANN. tit. 63, § 1-741; S.C. CODE ANN. § 44-41-40; TEX. REV. CIV. STAT. ANN. art. 4512.7; *See also* KY. REV. STAT. ANN. § 311.800. Additionally, procedures to deliver a live child are excepted from coverage in Florida, FLA. STAT. ANN. § 390.001, and the right to refuse does not excuse a physician from the duty to inform patients of their medical conditions and risks in Illinois. ILL. ANN. STAT. ch. 111½, ¶ 5306.

[88] KY. REV. STAT. § 311.800; PA. CONS. STAT. ANN. § 3213.

[89] CAL. HEALTH & SAFETY CODE § 25955(a).

[90] ILL. ANN. STAT. ch. 111½, ¶ 5313(b).



drafted exception such as for life-threatening emergencies in which the controversial procedure provides the best hope of saving a patient's life.

Whether specialized facilities or positions (for example, abortion clinics or positions in such clinics) should be excluded from employment discrimination provisions is a difficult question. If such facilities are legally permitted to operate, then it seems curious to deny them the ability to refuse to hire people who find the work they do morally objectionable. On the other hand, the right to refuse to perform or participate in particular procedures should not be wholly denied to people whose moral values change after they are hired. (The reformed abortionists crusading in the anti-abortion movement provide clear evidence that such conversions actually happen.)[91] The duty of specialized facilities or employers with specialized positions should be the duty to reasonably accommodate the conscience rights of their employees to refuse to participate in providing the controversial services.

## D. Type of Protections and Remedies

As noted above, most conscience clauses take the form of narrow right-to-refuse civil rights statutes,[92] though only one state, Illinois, has adopted a comprehensive civil rights act addressing the issue.[93] Some conscience clauses explicitly provide a civil cause of action for violation,[94] though an implied civil cause of action presumably would be found in the absence of such provisions.[95] A few explicitly provide for injunctive relief.[96] Two separate provisions in Illinois provide treble damages (including minimum damages of $2,000 and $2,500, respectively), and one provides for recovery of attorney's fees.[97] Pennsylvania also provides that $5,000 in punitive damages may be recovered.[98] At least one state provides for rein-

[91] B.N. NATHANSON, ABORTING AMERICA (1979) (former head of abortion clinic and founder of National Association for Reform of Abortion Laws now opposes abortion); Loth, *Views on Abortion Collide at Republican Platform Hearing*, Boston Globe, May 27, 1992, at National Foreign 1 (Carol Everett, former operator of abortion clinic now anti-abortion advocate). *See also* Durham, Wood, & Condie, *supra* note 1, at 324-27 (survey of nurses shows some change views about procedures such as abortion). *See also infra* notes 141-43 and accompanying text (*Swanson* case, veteran nurse changes moral views after participating in very difficult abortion).

[92] *See supra* note 62 and accompanying text.

[93] ILL. ANN. STAT. ch. 111½, ¶¶ 5301-5314.

[94] *See, e.g.*, ILL. ANN. STAT. ch. 111½, ¶ 5201, 5312; IND. CODE ANN. § 16-10-3-2; MO. ANN. STAT. § 197.032; MONT. CODE ANN. § 50-20-111; OHIO REV. CODE ANN. § 4731.91; PA. STAT. ANN. tit. 18, § 3213(d); S.C. CODE ANN. § 44-41-40(c); TEX. REV. CIV. STAT. ANN. art. 4512.7(4).

[95] *See generally* Cort v. Ash, 422 U.S. 66 (1975) (four-part test for implied cause of action). Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975) (illustrates that the federal conscience clause creates an implicit private cause of action).

[96] *See, e.g.*, MONT. CODE ANN. § 50-20-111(3); NEV. REV. STAT. § 632.480; TEX. REV. CIV. STAT. ANN. art. 4512.7(4).

[97] ILL. ANN. STAT. ch. 111½, ¶¶ 5201, 5312.

[98] PA. CONS. STAT. ANN. § 3213.

statement with back pay plus ten percent (10%) interest.[99] Overall, the existing conscience clauses manifest an appalling absence of attention to effectuating the rights of conscience, and to remedies.

General enforcement provisions applicable to the entire section or Act of which a conscience clause is a part include revocation of licenses for violations,[100] and criminal (usually misdemeanor) penalties.[101] Illinois also has a statement of public policy that adds strength and context to its Right of Conscience Act.[102]

Most conscience clauses are codified in the "Health" chapters of the statutes, but in about one-fifth of the states they have been codified in the criminal provisions of the code (mostly in the parts or chapters dealing with abortion).[103]

Creation of a cause of action, providing statutory minimum damages, and either multiple damages or punitive damages, plus attorneys fees, would be sufficient protections for rights of conscience. Criminal penalties might underscore the message but would be largely unnecessary.[104]

### E. Grounds for Protection

Surprisingly, more than one-third of the jurisdictions that have conscience clauses do not specify the grounds for conscientious objection.[105] For example, relevant provisions of the Ohio law provide:

> (A) No private hospital, private hospital director, or governing board of a private hospital is required to permit an abortion.
> (B) No public hospital, public hospital director, or governing board of a public hospital is required to permit an abortion.

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[99] TEX. REV. CIV. STAT. ANN. art. 4512.7.

[100] NEV. REV. STAT. § 632.500(2).

[101] *See* ALASKA STAT. § 18.16.010(c); CAL. HEALTH & SAFETY CODE § 25955; FLA. STAT. ANN. § 390.001(10); MICH. COMP. LAWS ANN. § 333.20199; NEV. REV. STAT. §§ 632.475, 632.500; N.Y. CIV. RIGHTS LAW § 79(i)(1); 42 U.S.C. § 300a-8.

[102] ILL. ANN. STAT. ch. 111½, ¶ 5302.

[103] *See, e.g.*, COLO. REV. STAT. § 18-6-104; IDAHO CODE § 18-612; ILL. ANN. STAT. ch. 38, § 81-33; NEB. REV. STAT. § 28-337; N.M. STAT. ANN. § 30-5-2; N.C. GEN. STAT. § 14-45.1; PA. CONS. STAT. ANN. § 3213; VA. CODE § 18.2-75.

[104] No reported case involving criminal prosecution for alleged violation of a conscience clause has been located.

[105] *See, e.g.*, ALASKA STAT. § 18.16.010(b); ARK. CODE ANN. § 20-16-601; DEL. CODE ANN. tit. 24, § 1791; HAW. REV. STAT. § 453-16; KAN. STAT. ANN. § 65-443-4; LA. REV. STAT. ANN. §§ 40.1299.31, 40.1299.32, 40.1299.33; ME. REV. STAT. ANN. tit. 22, §§ 1591-2; MD. HEALTH—GEN. CODE ANN. § 20-214; MINN. STAT. ANN. §§ 145.414, 145.42; NEB. REV. STAT. § 28-337; N.J. STAT. ANN. §§ 2A:65A-1,2,3; N.D. CENT. CODE § 23-16-14; OHIO REV. CODE ANN. § 4731.91; OKLA. STAT. ANN. tit. 63, § 1-741; OR. REV. STAT. § 435.485; PA. STAT. ANN. tit. 18, § 3213; S.C. CODE ANN. § 44-41-10; S.D. COD. LAWS ANN. § 34-23A-12-14; TENN. CODE ANN. § 39-15-204; TEX. REV. CIV. STAT. ANN. art. 4512.7; W. VA. CODE § 16-2F-7; WYO. STAT. §§ 35-6-105, -106.



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>
> (D) No person is required to perform or participate in medical procedures which result in abortion . . . .[106]

Statutes like this irrefutab'y assume that any refusal to provide, perform, or participate in abort' will be based on conscientious objection. Some other statutes only make s assumption in the case of institutional refusals. The distinction is illustrated by the Arizona statute, a fairly typical enactment, which provides:

> No hospital is required to admit any patient for the purpose of performing an abortion. A physician, or any other [medical staff] person or any employee . . . who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical or surgical procedures which will result in the abortion.[107]

Pursuant to this statute, the institution is permitted to deny admission of a patient who seeks an abortion, without having to state that the reason for the denial is a matter of conscience. On the other hand, the statute limits the protection for an individual's right to refuse to those who express "an objection . . . on moral or religious grounds." Perhaps the drafters were wary that employees might abuse the right to refuse to participate in abortions if it were unrestricted. For example, some might refuse because they want to take that afternoon off, or might simply prefer less demanding work (objecting to the difficulty or amount of work, not the moral aspect of the work).[108]

A few statutes protect the right to refuse for any reason, or without explanation.[109] However, most conscience clauses only protect refusals based on moral or religious grounds,[110] ethical, moral, or religious

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[106] OHIO REV. CODE ANN. § 4731.91.

[107] ARIZ. REV. STAT. § 36-2151.

[108] It seems anomalous to assume that corporations and other institutions would only decline to provide morally controversial services for reasons of conscience (but not reasons of profit, efficiency, and the like) and that individual physicians, nurses, and other health care personnel would be more likely to decline to provide the same procedures for nonmoral/nonreligious reasons. However, the decision about corporate admission will be made by a board of directors (at the policy level) or administrative staff (applying the policy to particular patients), whereas individual employee or professional decisions about nonparticipation will be made mostly by the actual health service providers (for example, physicians, nurses, medical technicians). Does the distinction reflect lawmakers' greater trust of the integrity of administrators and others removed from the actual service delivery arena than of the integrity of persons who actually encounter the moral dilemmas while engaged in delivery of health care services? More likely, it reflects the avoidance of determining who would certify the reason for refusal on behalf of the institution.

[109] *See, e.g.*, LA. REV. STAT. ANN. §§ 40:1299.31, 40:1299.33; MINN. STAT. ANN. §§ 145.414; W. VA. Code § 16-2F-7.

[110] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2151; COLO. REV. STAT. § 18-6-104; FLA. STAT. ANN. §

grounds,[111] religious or conscientious objections,[112] or just conscientious objections,[113] and prevent having to act against conscience,[114] against conscience or religious belief,[115] or contrary to stated ethical policy (of an institution).[116]

Limiting the right to refuse to provide or participate in providing controversial medical service to cases in which the refusal is based on some strong moral or religious objection is consistent with the purpose of conscience clauses. If courts will not be stingy or radical in determining when a person is acting on the basis of conscience,[117] then there should be no practical difficulty with such standards. This approach also relieves the state of having to draft a list of procedures that create serious moral dilemmas. Such lists (like the current statutes limited to protecting rights of conscience in the abortion context) usually reflect the moral concerns of the majority, or of powerful minorities, whereas the rights of conscience of unpopular minorities and dissenters especially should be protected by civil rights laws.

### F. Steps Required to Obtain Protections

Most conscience clauses do not require any particular steps to be taken to invoke protection, other than the implied necessity of the protected person to actually object or to refuse to perform the covered acts. A few statutes explicitly require the person to "state" the objection.[118] Oral expression of one's objection would suffice under these provisions. Other statutes require the person wishing protection of conscience to state an objection in writing.[119] A few institutional conscience clauses have special requirements,

390.001(8), GA. CODE ANN. § 16-12-142, IDAHO CODE § 18-612, IOWA CODE ANN. § 146.1; KY. REV. STAT. ANN. § 311.800, MASS. GEN. LAWS ANN. ch. 112, § 12I, MONT. CODE ANN. § 50-20-111; N.M. STAT. ANN. §§ 30-5-2, 24-8-6; R.I. GEN. LAWS § 23-17-11, UTAH CODE ANN. § 76-7-306; WIS. STAT. ANN. § 140.42, 42 U.S.C. § 300a-7. *See also* FLA. STAT. ANN. § 381.0051; GA. CODE ANN. § 49-7-6, W. VA. CODE § 16-24-4 (moral grounds only), OR. REV. STAT. § 435.485 (personal or religious beliefs).

[111] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25955; IND. CODE ANN. § 16-10-3-2; MICH. COMP. LAWS ANN. §§ 333.20182, 333.20199; MO. ANN. STAT. § 197.032, NEV. REV. STAT. § 632-475; N.C. GEN. STAT. § 14-45.1; VA. CODE ANN. § 18.2-75.

[112] ARK. CODE ANN. § 20-16-304; COLO. REV. STAT. § 25-6-102; TENN. CODE ANN. § 68-34-104.

[113] MASS. GEN. LAWS ANN. ch. 112, § 12I.

[114] ILL. ANN. STAT. ch. 38, ¶ 81-33, *id.* ch. 111½, ¶¶ 5305-5308, PA. STAT. ANN. tit. 18, § 3213(d).

[115] N.Y. CIV. RIGHTS LAW § 79-i, N.M. STAT. ANN. § 30-5-2.

[116] KY. REV. STAT. ANN. § 311.800, MO. ANN. STAT. § 197.032. *See also* N.J. STAT. ANN. § 30:11-9 (dogmatic or moral beliefs of any well-established religious body).

[117] *See infra* notes 143-44 and accompanying text (case).

[118] *See, e.g.*, FLA. STAT. ANN. § 390.001(8), MICH. COMP. LAWS ANN. §§ 333.20182 to 333.20183; N.C. GEN. STAT. § 14-45.1; OR. REV. STAT. § 435.485; UTAH CODE ANN. § 76-7-306.

[119] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2151; CAL. HEALTH & SAFETY CODE § 25955; COLO. REV. STAT. § 18-6-104; GA. CODE ANN. § 16-12-142; IDAHO CODE § 18-612; ILL. ANN. STAT. ch. 38, ¶ 81-33, KY. REV. STAT. ANN. § 311.800; MASS. GEN. LAWS ANN. ch. 112, § 12I; MONT. CODE ANN. § 50-20-111; NEV. REV. STAT. § 632-475; N.Y. CIV. RIGHTS LAW § 79-i; OR. REV. STAT.



such as mandating a formal institutional policy declaring the refusal position,[120] posting notices of the policy of refusal,[121] or informing patients of the institutional policy.[122]

The requirement that an individual state in writing his or her objection is harmless, but probably serves no purpose. If there were significant exposure for the employer in the absence of such documented conscientious objection, then it would make sense merely as a matter of documentation. Likewise, if there were likely to be some question after the fact about the reason for the refusal, and there were other significant incentives to refuse for nonconscientious objection reasons, then requiring a written objection would make sense as a matter of preserving the evidence. But neither of these situations exists, and there is no reason why a clear oral expression of refusal on grounds of conscience should not suffice.

On the other hand, two implementing requirements should be adopted. First, individuals should be required to object in a timely fashion (within a reasonable time after being asked or assigned to participate in or provide that service). That would reduce the burden on others of accommodating the conscientious objection. Likewise, institutions should be required either to adopt a refusal policy and post notice of it, or to give prompt notice of refusal to a specific request. Again, that would reduce the burden on others of accommodating the conscience of the institution.

## II. CONSCIENCE CLAUSES IN THE COURTS

The failure of most conscience clause statutes to provide more than token protection for the rights of conscience of health care providers is compounded by the unsympathetic manner in which most courts have interpreted them. Many courts view conscience clauses with disfavor and make no effort to interpret them in light of the protective policies that underlie the provisions.

### A. Hostile Interpretations

Strict interpretation of the statutory language is the ordinary rule in cases involving conscience clauses. Thus, one California court interpreted the federal conscience clause to protect only persons directly and immediately involved in performing abortion. In *Erzinger v. Regents of University of California*, the California appellate court noted:

§ 435.225, R.I. GEN. LAWS § 23-17-11, S.C. CODE ANN. § 44-41-50, VA. CODE ANN. § 18.2-75, WIS. STAT. ANN. § 140.42.

[120] S.D. CODIFIED LAWS ANN. § 34-23A-12-14.

[121] CAL. HEALTH & SAFETY CODE § 25955.

[122] NEB. REV. STAT. § 28-337. *See also* FLA. STAT. ANN. § 765-308 (transfer of patient).

> The crucial words [in the federal conscience clause] are "performance of abortions or sterilizations." The proscription only applies when the applicant must participate in acts related to the actual performance of abortions or sterilizations. Indirect or remote connection with abortions or sterilizations are not within the terms of the statute.[123]

Likewise, in *Spellacy v. Tri-County Hospital*,[124] a Pennsylvania court held that a part-time admissions clerk who claimed that she was fired by the hospital as a result of her refusal to participate in the admission procedures of abortion patients was not protected by the state's conscience clause because her position was one of mere "ancillary" or "clerical" assistance.[125]

Some courts have stretched to find that a particular procedure was not covered by a conscience clause. In one California case,[126] a rape victim sued a Catholic hospital because it refused to provide her with information about the "morning after pill," which operates to block fertilization (contraceptive) and to prevent implantation (abortifacient). The court declined to apply the California conscience clause, which protects hospitals' rights to refuse to provide abortion services.[127] Finding no definition of "abortion" in the statute, the court made no effort to discern legislative intent (specifically, regarding the morning after pill, or generally, regarding protecting conscience rights of health care providers). The court also made no effort to interpret the statute in light of the policy underlying the statute or to determine, as a matter of judicial notice, whether the morning after pill was understood by the medical community or the Catholic medical community to cause abortion. Instead, citing dicta in another case suggesting that at least one federal court[128] did not consider the morning after pill to be an abortifacient, the California court summarily concluded that the hospital's refusal was not protected because the morning after pill did not cause abortion.[129]

Many courts excessively restrict the institutions protected by conscience clauses. The Supreme Court of the United States set the example in

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[123] 137 Cal. App. 3d 389, 394, 187 Cal. Rptr. 164, 168 (1982). The court held that 42 U.S.C. § 300a-7 did not apply to prevent a university from requiring students to participate in a comprehensive health insurance program, which included benefits for persons desiring abortions or sterilizations.

[124] 18 Empl. Prac. Dec. (CCH) ¶ 8871 (Pa. C.P. De. Cty.), *aff'd*, 395 A.2d 998 (Pa. 1978).

[125] *Id.* at 5605 (relying on administrative regulations interpreting the conscience clause). Alternatively, the court found that the hospital had met its duty to accommodate because it had offered her four other jobs, all of which she had declined. "There came a time in the *Spellacy* situation when the plaintiff had simply rejected one too many reasonable accommodation offers, and her employer could not be expected to continue generating new ones." Durham, Wood, & Condie, *supra* note 1, at 318-19.

[126] Brownfield v. Daniel Freeman Marina Hosp., 208 Cal. App. 3d 405, 256 Cal. Rptr. 240 (1989).

[127] CAL. HEALTH & SAFETY CODE § 25955.

[128] McRae v. Matthews, 421 F. Supp. 533 (E.D.N.Y. 1976), *rev'd on other grounds sub nom.* Harris v. McRae, 448 U.S. 297 (1980). The court also cited dicta from another case.

[129] *Brownfield*, 256 Cal. Rptr. at 245.



*Doe v. Bolton*,[130] the companion case to *Roe v. Wade*.[131] In *Bolton*, the constitutionality of certain provisions of Georgia's abortion law (based on the Model Penal Code) was at issue. The Georgia law contained both institutional and individual conscience protections. The institutional conscience clause provided that "[n]othing in this section shall require a hospital to admit any patient . . . for the purpose of performing an abortion . . . ."[132] Without any basis in the statutory language, any examination of legislative intent, or any case authority, Justice Blackmun narrowed the statute and limited the kinds of institutions protected, declaring: "These provisions *obviously* are in the statute in order to afford appropriate protection to the individual and to the *denominational* hospital."[133] Three years later, the New Jersey Supreme Court followed suit and interpreted its state conscience clause, which facially protected all hospitals, in a manner that did not protect nonsectarian nonprofit (for example, private nondenominational) hospitals.[134]

Of course, some statutes protect such a limited category of persons or procedures that a court need not wrestle with the language at all to deny that some institutions are protected. Thus, in *Doe v. Hale Hospital*,[135] the federal appeals court noted that the Massachusetts institutional conscience clause explicitly applies only to "privately controlled hospitals," and did not extend protection to the public hospital that was sued because it would not admit patients for first-trimester elective abortions. Another court highlighted the narrowness of the federal conscience clause, which applies only to participants in particular federal programs. In *Gray by Gray v. Romeo*,[136] a federal court held that employees of a health care institution did not have any federal protection for refusing to participate in the court-ordered withdrawal of a feeding tube and life support system from a patient, because the

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[130] 410 U.S. 179 (1973).

[131] 410 U.S. 113 (1973).

[132] GA. CRIM. CODE § 26-1202, *quoted in Bolton*, 410 U.S. at 205.

[133] *Bolton*, 410 U.S. at 197-98 (emphasis added).

[134] Doe v. Bridgeton Hosp. Ass'n, Inc., 71 N.J. 478, 366 A.2d 641, 647 (1976). The court reasoned that the conscience clause would violate the doctrine of abortion privacy if applied to any other hospitals. After the Supreme Court of the United States ruled that public hospitals may decline altogether to provide elective abortions, the Bridgeton Hospital Association asked the New Jersey courts to reconsider. But the New Jersey courts rejected the hospital's application. Doe v. Bridgeton Hosp. Ass'n, Inc., 160 N.J. Super. 266, 270, 389 A.2d 526, 528 (1978). In light of the further emphasis by the U.S. Supreme Court that public institutions need not fund abortion, *see infra* notes 177-79 and accompanying text, it is obvious that the rationale for the New Jersey interpretation is without merit. Of course, that does not mean the New Jersey courts would change their interpretation.

[135] 500 F.2d 144 (1st Cir. 1974). In this case, the policy of a public hospital that totally prohibited elective abortions was found to violate the privacy rights of women who wanted first trimester abortions.

[136] 697 F. Supp. 580, 590 (D.R.I. 1988).

federal conscience clause only applies to participants in federal health service programs.

Other courts have rejected claims that refusals to participate in or provide certain morally controversial services are covered by conscience clauses because the conscience clauses explicitly cover one or two specific procedures not including the procedure at issue. Thus, after holding that the conservator of a patient in a permanently vegetative state could obtain judicial authorization to have the gastro-intestinal tube disconnected, a New York appellate court rejected the claim of the nursing home caring for the patient that it had a statutory right not to participate in withdrawing the tube because state law only protected a refusal to participate in abortion or sterilization.[137] Likewise, a federal court held that Rhode Island's conscience clause did not protect the right of a health care facility to refuse on moral or religious grounds to participate in withdrawal of life-sustaining measures for a patient in a persistent vegetative state because the statute only protected refusal to participate in sterilizations or abortions.[138] These decisions, correctly interpreting the narrow conscience clause statutes, underscore the inadequacy of current conscience clauses that protect conscience rights only in the context of one or two specific procedures.

Some courts have even been hostile to finding that the refusal to participate in a controversial medical procedure is based on moral grounds. This is illustrated by the decision of the Fourth Circuit United States Court of Appeals in *Doe v. Charleston Area Medical Center*.[139] A woman filed suit to have the policy of a private hospital (CAMC) prohibiting abortions except when necessary to save a mother's life declared unconstitutional. CAMC invoked the protection of the federal conscience clause, 42 U.S.C. § 300a-7, which covers hospitals that decline to provide abortions on religious or moral grounds. The President of CAMC noted that the hospital's policy reflected West Virginia law, and CAMC's lawyers argued that the law was historically based on a moral position (for example, the morality underlying the long-standing West Virginia prohibition against elective abortions). The district court dismissed the complaint finding no state action, but the court of appeals reversed, holding that CAMC's evidence "falls short" of showing that the policy was based on moral grounds.[140]

[137] Elbaum by Elbaum v. Grace Plaza of Great Neck, Inc., 148 App. Div. 2d 244, 255, 544 N.Y.S 2d 840, 847 (1989).

On this point, we note that the defendants' reliance on 42 U.S.C. § 300a-7 and [New York] Civil Rights Law § 79-i, in support of their position that they cannot be compelled to participate in the cessation of nutrition and hydration to a patient, is misplaced since those statutes concern the right to decline to perform requested sterilization and abortion procedures

[138] Gray by Gray v. Romeo, 697 F. Supp. 580, 590 (D.R.I. 1988) ("The statute is clearly limited to procedures involving abortion and sterilization."). *See also* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (right to refuse to participate in abortion does not immunize physician's failure to impart information about likelihood of child being born with serious birth defects)

[139] 529 F.2d 638 (4th Cir. 1975).



The same bias is reflected in the dissenting opinion of two Montana Supreme Court justices in *Swanson v. St. John's Lutheran Hospital*.[141] That case involved a wrongful discharge action brought by a nurse-anesthetist who had worked at a hospital for eight years. She had performed more than two dozen sterilizations, but after participating in one particularly shocking and gruesome abortion, she informed her supervisor that she would not participate in any more sterilizations. The hospital administrator tried to change her mind, referred her to her priest, and called the priest to ask him to counsel her to change her mind. She remained fixed in her decision, and the next day was fired by the hospital administrator. She brought suit under Montana's conscience clause, which protects the rights of individuals to refuse on moral or religious grounds to perform sterilizations, and prohibits employment discrimination based on such refusals. After a harrowing encounter with a hostile Montana trial court, she ultimately prevailed in the Montana Supreme Court.[142] However, two of the Montana Supreme Court justices would have denied her claim on the basis that her reasons for refusing to participate in any more sterilizations were emotional rather than moral.[143]

Of course, not all persons seeking relief under conscience clauses will have valid claims for protection of rights of conscience. Indicative of the difficulty of the issue is an Illinois court ruling that the broad Illinois Right

[140] *Id.* at 642 n.7. Moreover, the federal statute at the time only provided that receipt of federal funds could not be the basis for a finding of "state action," and the fact that CAMC admitted that its policy was based on state law constituted an independent and sufficient basis for finding the hospital's abortion policy to be based on "state action." *Id.* at 643.

[141] 597 P.2d 702 (Mont. 1979).

[142] *See infra* notes 145-57 and accompanying text. *See also* Swanson v. St. Johns Lutheran Hosp., 615 P.2d 883 (Mont. 1980) (affirming award of $11,950.86 to Nurse Swanson, and affirming rejection of her claim for punitive or future damages for lack of evidence).

[143] *Swanson*, 597 P.2d at 714-15. The hospital administrator obviously perceived the nurse's decision to be based on religious/moral grounds, and treated it as such, contacting the nurse's priest in an effort to have him influence her to drop her objections. The dissenters failed to explain the distinction between "emotional" and "moral" grounds. Are they really mutually exclusive categories? The court's bias against conscience clause rights is evident.

By contrast, in a case interpreting a conscience clause that protects physicians from employment discrimination because they have performed abortions or sterilizations, a pair of federal courts did not require any evidence about the moral or religious basis for a physician's practice or sterilizations. *See* Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975). There appears to be at least a hint of anti-Catholic, anti-prolife bias in the way the conscience clauses have been interpreted. *See also In re* Requena, 517 A.2d 886, 891 (N.J. Super. Ch. 1986) (lecturing medical center that unwillingness to participate in withdrawal of life-support food/hydration systems was not "pro-life," and requiring the hospital to participate in the withdrawal over its and staff's moral objections). *See infra* notes 151 & 183-89 and accompanying text.

of Conscience Act did not protect a nurse who was discharged when she refused (or was slow) to evict a bedridden patient from the hospital, even though her action was allegedly based on ethical concerns, because the statute only protects sincerely held moral convictions "arising from what are traditionally characterized as religious beliefs."[144] Obviously, some line must be drawn, some workable and judicially enforceable definition of what is "moral" or "religious" is needed. But the unreasonably hostile and restrictive interpretations used in *CAMC* and suggested by the dissenters in *Swanson* should be repudiated.

Causation is another point of potentially restrictive interpretation. Indeed, that was the dispositive point in *St. Agnes Hospital of the City of Baltimore v. Riddick.*[145] A Catholic hospital brought suit against a hospital accreditation association that withdrew accreditation based on the hospital's failure to meet accreditation standards in a number of areas including adequacy of training in family planning programs (which includes sterilization and abortion training). The hospital's strict interpretation of the ethical standards of Catholic hospitals (so as to forbid residents in its programs to participate in sterilizations and abortions even while on rotation at other hospitals) was determined to be based on a sincere religious belief, protected under the Maryland conscience clause. Thus, initially, the federal district court denied the defendant's motion to dismiss the complaint, rejecting the defendant's argument that withdrawal of accreditation was not "discipline or other recrimination" prohibited by the state conscience clause.[146]

However, after trial, the court entered judgment for the defendants because the hospital failed to prove that the withdrawal of accreditation was due to the hospital's refusal to provide extensive abortion and sterilization training. Rather, the court found that the withdrawal of accreditation was due to other factors, including inadequate provision for training in oncology, endocrinology, bracotherapy, and numerous other programs, that the association had called to the hospital's attention for many years.[147] Without necessarily impugning the decision of the court in *St. Agnes Hospital,*[148] it

[144] Free v. Holy Cross Hosp., 505 N.E.2d 1188 (Ill. App. 1987). In this case, the court of appeals attempted not to narrow unduly the language of the conscience clause. It noted: "Nowhere in her complaint is it alleged that a refusal to follow the hospital's order would conflict with her moral convictions arising from what are traditionally characterized as religious beliefs." *Id.* at 1190. However, the court's limitation of the protection to those moral grounds that "are traditionally characterized as religious beliefs" might exclude from protection the rights of persons who do not hold "traditional" religious beliefs.

[145] 748 F. Supp. 319 (D. Md. 1990).

[146] St. Agnes Hosp. v. Riddick, 668 F. Supp. 478, 483 (D. Md. 1987).

[147] *St. Agnes Hosp.*, 748 F. Supp. at 343.

[148] In fact, the district court entered a preliminary injunction protecting the hospital; the injunction remained in effect for nearly four years while the case was in litigation. *Id.* at 341.



must be noted that causation is fact-sensitive and provides ample room for the biases of trial courts to come into play in a manner that could undermine the protection of conscience clauses,[149] and that prochoice organizations have been very active in trying to motivate healthcare training accreditation agencies to require more physicians to receive training in abortion.[150]

### B. Cases Protecting Individual Rights of Conscience

There have been three notable cases interpreting and applying conscience clauses liberally and properly to protect the conscience rights of individual health care providers. The first, *Watkins v. Mercy Medical Center,*[151] involved the federal conscience clause. Dr. Watkins had been given staff privileges at Mercy Medical Center, a Catholic hospital in Nampa, Idaho. The hospital subscribes to the Ethical and Religious Directives for Catholic Healthcare Facilities (Directives), which forbid staff to perform elective abortions or sterilizations in any hospital. When Dr. Watkins applied for reappointment to the staff, but wrote in an exclusion to the Directives on his application, he was denied reappointment to the staff. He then sued the hospital in federal court alleging that the Directives constituted state action that denied his civil rights.

The district court concluded that the hospital was not a "state actor," and denied the physician's claim that he had a right to perform abortions or sterilizations at Mercy Medical Center. The court interpreted the federal conscience clause generously:

> The legislation is aimed at protecting the religious rights of both the hospital and the staff. The hospital can prohibit the staff from performing sterilization procedures or abortions in the hospital, but it cannot require its staff to adhere to the religious or moral beliefs which support the hospital's policy as a condition of employment or extension of privileges.[152]

To force the hospital to provide facilities for Dr. Watkins to perform sterilizations "would violate the religious rights of the hospital."[153] The district court noted, however, that Dr. Watkins was free to perform sterilizations elsewhere.

The court of appeals affirmed and clarified that to the extent the Directives prohibited Dr. Watkins from performing abortions elsewhere,

[149] *See Swanson*, 597 P.2d at 702 (discussed *infra* notes 141-43 and accompanying text).

[150] *See infra* note 229 and accompanying text.

[151] 364 F. Supp. 799 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).

[152] *Watkins*, 364 F. Supp. at 803.

[153] *Id.*

they violated 42 U.S.C. § 300a-7(b)(1)(B).[154] Dr. Watkins' attempt to force the hospital to let him perform sterilizations on its premises was astutely rejected, while at the same time the court vindicated his individual rights of conscience protected by the statute.[155]

In *Swanson v. St. John's Lutheran Hospital*,[156] the Montana trial court ruled against the nurse's conscience clause claim, imposing a number of nonstatutory conditions on the conscience clause protections. In a thorough opinion, the Montana Supreme Court reversed. The trial court's conclusion that the plaintiff had not been a really valuable employee was irrelevant to enforcement of her rights under the conscience clause. The fact that she had participated previously in the same kind of sterilization procedures in which she now refused to participate was not dispositive; the conscience clause allows people to undergo a change of moral convictions and gives absolute protections to their moral convictions, whether consistent or not. The inconvenience to the hospital was irrelevant, because the Montana conscience clause guaranteed an unqualified right to refuse. The Montana statute requires the individual to put an objection in writing if requested, but because that request was never made, the failure of Ms. Swanson to write her objection was irrelevant. Nor was the nurse's refusal untimely; the delay of which the hospital complained was caused in part by the hospital adminis-

[154] This part of the federal conscience clause provides:

> (1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services Facilities Construction Act . . . may—
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> * * *
>
> (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
>
> because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

42 U.S.C. § 300a-7(c)(1).

[155] The one flaw in these two opinions is the failure to consider whether Dr. Watkins was acting "because of his religious beliefs or moral convictions respecting sterilization procedures." 42 U.S.C. § 300a-7(c)(1)(B). The motivation of Dr. Watkins was never explored.

The federal conscience clause could be interpreted in a way that creates a double standard that could violate first amendment or equal protection guarantees. Section 300a-7(c)(1)(B) prohibits employment discrimination against health care providers who refuse to perform abortions or sterilizations because that "would be contrary to [their] religious beliefs or moral convictions," whereas providers who perform abortions or sterilizations "because of their religious beliefs or moral convictions respecting sterilization procedures or abortions" are protected. If the statute were interpreted as requiring a stricter standard of moral motivation for providers who refuse to perform these procedures than for providers who perform them, then a serious constitutional discrepancy would exist.

[156] 597 P.2d 702 (Mont. 1979). *See supra* notes 141-43 and accompanying text.



trator's attempt to dissuade her. The court noted that once an individual health care provider has established that her discharge was in substantial part because of her moral-based refusal to perform the procedure, the defendant has the burden of proof to establish that it would have fired her wholly apart from that reason. The Montana Supreme Court's opinion in *Swanson* is the most careful interpretation of a conscience clause provision to date, and the most consistent with its underlying policies.[157]

A Florida appellate court also reasonably awarded damages to a nurse under a state conscience clause in *Kenny v. Ambulatory Centre of Miami, Florida, Inc.*[158] A nurse who refused to participate in abortions was asked to resign, threatened with firing, harassed, and finally was demoted from full-time to part-time. She sued for reinstatement, lost wages, compensatory and punitive damages, and attorneys fees under the Florida conscience clause. The trial court ruled for the clinic, accepting the clinic's argument that there were financial reasons for her reduction in time and status. The court of appeals reversed. The financial problems of the clinic did not mask the animus motivating the demotion. While the Florida statute did not mandate an absolute duty to accommodate moral actions at all costs,[159] it did require "reasonable accommodation," and the clinic had failed to show that it could not reasonably accommodate this nurse by adjusting her schedule.[160]

These three cases demonstrate the kind of fair and reasonable method of construction that can be given to conscience clauses.[161] Other courts have suggested in dicta that conscience clauses should be construed reasonably so as to afford genuine protection to the rights of health care workers.[162]

[157] Likewise, the Montana Supreme Court's subsequent interpretation of the conscience clause as permitting claims for punitive damages but affirming the rejection of Nurse Swanson's claim for punitive damages for want of proof was supported by a credible and reasonable opinion. *Swanson*, 615 P.2d at 883.

[158] 400 So. 2d 1262 (Fla. App. 1981).

[159] This interpretation seems to fly in the face of the absolute language of the statute. While the interpretation of the Florida court was not fatal or outrageous, the federal precedents relied upon by the court interpreted a federal statute that is quite different from the Florida statute, and the straightforward construction of similar language by the Montana Supreme Court clearly reflects better interpretation.

[160] *Kenny*, 400 So. 2d at 1266. The procedure to which the nurse objected constituted only 10%, at most, of the work done at the clinic, so the clinic could have accommodated her objections. *Id.*

[161] It is troubling, however, that in both the Montana and Florida cases, the trial courts were so hostile to the claims. And the Florida court's adoption of a "reasonable accommodation" standard, in the face of a statute granting an unqualified (absolute) right, has been criticized. *See* Davis, *supra* note 1, at 863.

[162] *See, e.g.*, Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 312 (9th Cir. 1974); Doe v. Hale Hosp., 500 F.2d 144, 147 (1st Cir. 1974). *See also* Doe v. Poelker, 515 F.2d 541, 546 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977). Ironically, in the last two cases, the federal appellate courts erroneously held that the institutional conscience clause provision was unconstitutional.

## C. Hostile Review of Institutional Conscience Clauses

Many courts have been unsympathetic to statutes protecting the conscience rights of institutions, and have interpreted institutional conscience clause protections grudgingly or have invalidated them.

### *1. Private Hospitals as State Actors*

In November of 1972, a United States district court in Billings, Montana issued an injunction forbidding a Catholic hospital to deny the use of its facilities to a physician who wanted to perform a sterilization on a patient there. The suit to enjoin the hospital was brought under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, which provide redress for deprivation of civil rights under color of state law. The district court ruled that because the hospital had received public funds under the federal Hill-Burton Act, the hospital was a "state actor" for purposes of those civil rights statutes. The court also suggested that other factors supported its conclusion that the Catholic hospital was a "state actor" for purposes of those statutes.

The following year, in direct response to that ruling, Congress passed the Church Amendment, which is the basic and original provision of the federal conscience clause, 42 U.S.C. § 300a-7, intended to prohibit a court or a public official from using receipt of federal grants or assistance under three specific acts,[163] as a basis for requiring any individual or institution to perform or assist in performing abortions or sterilizations, if such would be contrary to religious or moral beliefs.[164]

In adopting the Church Amendment, Congress initially declined to take a position on the substantive question of whether private hospitals, which for other reasons might be deemed state actors, should be under a duty to perform abortions or sterilizations.[165] The "conscience" solution initially adopted by Congress did not immunize private institutions that, for reasons of conscience, refused to provide facilities for abortions or sterilizations, but only said that one specific factor (receipt of funds under three specific programs) was not to be counted in determining whether they were state actors. Congress initially avoided the question whether institutions and individuals generally ought to have a statutory civil right to refuse to participate in abortions and sterilizations.[166]

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[163] The three acts are: The Public Health Service Act, the Community Mental Health Centers Act, and, the Developmental Disabilities Services and Facilities Construction Act.

[164] 1973 U.S. CODE CONG. & ADMIN. NEWS 1465, 1473.

[165] *Id.* at 1473. "State action" apparently was then more a question of opinion than it is now.

[166] Section 401(c) of the Church Amendment initially provided limited protection against employment discrimination because of refusal to participate in abortion or sterilization, but this protection did not extend to health care workers generally—only to those employed by institutions receiving funds under a few, specified federal programs. A year later, Congress expanded the scope of protection for individual conscience rights to include any moral objection (not just abortion and sterilization) and to include employees at any institution funded through the Secretary of Health, Education, and Welfare. While this broadened the legal protection, it still fell far short of being a civil rights statute and still fails to protect the rights of all health care workers. 42 U.S.C. § 300a-7(c)(2).



Even this limited federal protection was unpopular with some legal commentators.[167] However, the courts received it well. Since the adoption of the Church Amendment, in most cases in which nonpublic hospitals have been sued by parties seeking to override the hospitals' policies against providing facilities for abortion or sterilization, most courts have concluded that the nonpublic hospital was not a "state actor."[168]

### *2. The Rights of Private Institutions Not to Provide Abortions*

Many cases have noted that private hospitals constitutionally are free to decline to perform abortions.[169] In the early years, there was even dicta about the first amendment or other constitutional protection for private (at least denominational) hospitals to refuse to provide abortions services.[170] However, several doctrines emerged to transform some private hospitals into public hospitals. Some cases suggested that not all private hospitals are free to refuse to perform abortions on moral grounds (only denominational hospitals).[171] In a few cases, despite the Church Amendment, courts found private hospitals to be state actors based on other considerations. For example, the Fourth Circuit concluded that a private hospital with abortion-restricting policies was a state actor[172] because the policies were based on the pre-*Roe* state laws restricting abortion and received some state funding.

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[167] *See generally* Pilpel & Patton, *supra* note 43, at 286-305; Casenote, 54 N. CARO. L. REV. 1307 (1976); Casenote, 62 GEO. L.J. 1783 (1974).

[168] Greco v. Orange Memorial Hosp. Corp., 374 F. Supp. 227 (E.D. Tex. 1974), *aff'd*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973), *aff'd*, 490 F.2d 81 (5th Cir. 1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976); Jones v. Eastern Maine Medical Center, 448 F. Supp. 1156 (D. Maine 1978). *See generally* Annotation, *Action of Private Hospital as State Action Under 42 USCS § 1983 or Fourteenth Amendment*, 42 A.L.R. Fed. 463 (1979); Annotation, *Provision of Family Planning Services Under Title X of Public Health Service Act and Implementing Regulations*, 71 A.L.R. Fed. 961 (1985). *But see* Doe v. Charleston Area Medical Center, 529 F.2d 638, 642 (4th Cir. 1975). *See also* Stern, *Abortion Conscience Clauses*, 11 COLUM. J.L. & SOC. PROBS. 571, 602-12 (1975); Cronin, *Private Hospitals that Receive Public Funds Under the Hill-Burton Program: The State Action Implications*, 12 N. ENG. L. REV. 525, 534-565 (1977); Durham, Wood, & Condie, *supra* note 1, at 357-60 & 367-68.

[169] *See, e.g.*, *Chrisman*, 506 F.2d at 312; *Bellin Memorial Hosp.*, 479 F.2d at 760; *Greco*, 374 F. Supp. at 233; *Jones*, 448 F. Supp. at 1159.

[170] *See, e.g.*, *Chrisman*, 506 F.2d at 312; *Taylor*, 523 F.2d at 77; *Watkins*, 364 F. Supp. at 803.

[171] *See supra* notes 133-34 and accompanying text. Logically, it would seem that the same principles of choice or privacy that create the supposed rights of some people to obtain or perform abortions would also protect the rights of others to refuse to submit to or participate in abortions, but the politics of the abortion controversy are such that the privacy doctrine has never been entirely consistent or principled.

[172] *See supra* notes 139-40 and accompanying text.

Most significantly, some courts held private hospitals to be state actors because they were the only (state-approved) hospitals in a given geographic area.[173]

### *3. The Tenuous Constitutional Duty of Public Institutions to Repress Conscience Rights*

Finding that a hospital is a "state actor" is only the first step toward depriving a hospital of the right to refuse to perform abortions. The second step consists of holding that such public institutions legally may not decline to provide abortions. The preliminary predicate for that holding is the doctrine enunciated in *Roe v. Wade*,[174] that pregnant women have a fundamental constitutional right of privacy that includes the right to have an abortion without government proscription or interference. The corollary extended by some courts is the notion that denial of access to public hospitals (or private hospitals deemed to be public hospitals) constitutes an unconstitutional state burden on the right of abortion privacy.

Many federal courts initially accepted this line of argument and invalidated public hospital policies and public funding restrictions excluding elective abortions.[175] Other courts ruled that conscience clauses protecting the right of public hospitals to refuse to provide facilities for elective abortions were invalid.[176] However, only four years after the Supreme Court decided *Roe v. Wade*, the Supreme Court decided a major case in which it emphatically held that public hospitals could constitutionally decline to provide elective abortions.[177] That was the first of multiple rounds of litigation in the Supreme Court, and the beginning of an unbroken line of seven

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[173] *See infra* notes 245-47 and accompanying text.

[174] 410 U.S. 113 (1973).

[175] *See, e.g.*, Doe v. Hale Hosp., 500 F.2d 144, 147 (1st Cir. 1974); Doe v. Charleston Area Medical Center, 529 F.2d 638, 644-45 (4th Cir. 1975); Nyberg v. City of Virginia, 495 F.2d 1343-44 (8th Cir. 1974); Orr v. Koefoot, 377 F. Supp. 673, 675, 687 (D. Neb. 1974); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974); Doe v. Poelker, 515 F.2d 541, 546 (6th Cir. 1975), *rev'd*, 432 U.S. 519 (1977). *But see* State *ex rel.* Wisconsin Health Facilities Auth. v. Lindner, 280 N.W.2d 773 (Wis. 1979). *See generally* L. D. WARDLE, THE ABORTION PRIVACY DOCTRINE 215-82 (1981).

[176] Doe v. Hale Hosp., 500 F.2d 144, 147 (1st Cir. 1974); Hodgson v. Anderson, 378 F. Supp. 1008, 1018 (D. Minn. 1974), *aff'd*, 542 F.2d 1350, 1356 (8th Cir. 1976); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973); Doe v. Bridgeton Hosp. Assoc., Inc., 366 A.2d 641 (N.J. 1976), *reaff'd*, 389 A.2d 526 (N.J. Super. 1978) (after 1977 Supreme Court abortion decisions, New Jersey court continued to hold that U.S. Constitution prohibits application to public hospitals of state conscience clause right to refuse to perform abortions); Roe v. Arizona Bd. of Regents, 534 P.2d 285 (Ariz. App. 1975).

[177] The first round of Supreme Court cases involving public funding or public provision of abortion services was decided in 1977. In a trio of cases, the Court upheld state and federal restrictions of public funding of nontherapeutic abortions or the use of public facilities for elective abortions. In Maher v. Roe, 432 U.S. 464 (1977), the Supreme Court upheld a Connecticut regulation limiting public assistance for abortions (but not childbirth) to those certified to be "medically or psychiatrically necessary," holding that funding restrictions do not violate the right of privacy and are rationally related to legitimate state interests in preserving prenatal life. In a companion case, Beal



cases upholding all challenged public funding and public facility abortion restrictions.[178]

The Supreme Court cases repeatedly and emphatically have held that public institutions are not required to facilitate abortion, or provide accommodations, equipment, funding, personnel, or services for abortion, and may affirmatively try to persuade pregnant women to choose childbirth over abortion. Thus, despite some early, lower court decisions to the contrary, it is clear beyond dispute that there is no constitutional law requirement to exclude public (or private-deemed-public) institutions from the protection of state conscience clauses.[179]

### *4. The Duty of Health Care Institutions to Assist in Withdrawal of Life-Support*

One of the most ominous developments to threaten the conscience rights of health care providers is a line of cases involving withdrawal of

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v. Doe, 432 U.S. 438 (1977), the Court upheld a Pennsylvania regulation providing state funds only for therapeutic abortions. The Court rejected the argument that the state law was inconsistent with Title XIX of the Social Security Act (Medicaid). The Court interpreted Title XIX as neither requiring nor forbidding participating states to subsidize elective abortions. In Poelker v. Doe, 432 U.S. 519 (1977), the Court upheld the policy of a city-funded hospital restricting the performance of elective abortions on the grounds that the public entity could opt to use its scarce resources to encourage childbirth rather than perform abortion.

[178] In 1980, the Supreme Court decided two more cases confirming that public funding of abortion is not required by the constitution. In Harris v. McRae, 448 U.S. 297 (1980) and Williams v. Zbaraz, 448 U.S. 358 (1980), the Court upheld the congressional Hyde Amendments, and state counterparts, which prohibited the expenditure of funds to pay for abortions except when necessary to preserve the life of the mother (and in some years, to preserve her health or in cases of rape or incest). Arguments that these funding restrictions violated the establishment clause, the due process clause, and the equal protection clause were rejected and the prior analyses in *Maher*, *Poelker*, and *Beal*, were reaffirmed. Also, the argument that Title XIX requires participating states to subsidize "medically necessary" abortions, even though the Hyde Amendment prohibits federal reimbursement, was rejected.

Nine years later, in Webster v. Reproductive Health Center, Inc., 492 U.S. 490 (1989), the Supreme Court upheld four provisions of a Missouri abortion law that had been invalidated by a federal court of appeals and district court. The Missouri statute included provisions prohibiting the expenditure of public funds, the use of public facilities, or public employees to perform or encourage abortions not necessary to save the life of the mother. All of these were upheld. The Court emphasized that a state is not required to become or remain involved in the abortion business, and may restrict the use of public resources.

Finally, in the 1991 case of Rust v. Sullivan, 111 S. Ct. 1759 (1991), the Court upheld the Title X regulations enacted by the Secretary of Health and Human Services in 1988, which prohibited recipients of federal family planning funds from counselling, referring for, encouraging, or promoting abortion, and required family planning fund recipients to be financially and physically separate from abortion providers.

Thus, the Supreme court has upheld every restriction on the use of public funds, public facilities, and personnel for the performance of abortions that has come before it.

[179] *See* L. D. WARDLE, *supra* note 175, at 215-82. In Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), the Court emphasized that the burden of distance from an abortion provider, even though it raises the cost, inconvenience, and delay for abortion, is not unconstitutional. *Id.* at 2825 (O'Connor, Kennedy, & Souter); *id.* at 2688 (Rehnquist, White, Scalia, & Thomas).

life-support systems or feeding/hydration tubes. At least four courts recently have ordered health care facilities (and in some cases their employees) who opposed the withdrawal of artificial means of feeding on religious and moral grounds to discontinue feeding patients and to provide medical and nursing care to support what the institutions and individuals involved believe to be the active starvation of their patients.

For example, in *Matter of Jobes*,[180] the New Jersey Supreme Court held that the representative of an incompetent patient could vicariously exercise the patient's right to order withdrawal of the feeding/hydration tube. The court further required the private nursing home that was opposing the order not to transfer the patient but to allow the tube-withdrawal to occur in its facilities and to provide the necessary services to support and facilitate the successful (lethal) completion of that procedure. The state supreme court was apprised of the religious and moral opposition of the nursing home and its employees, but it summarily decreed that their conscience rights were inferior and subordinate to the vicarious rights of the patient and her family. In a feeble attempt to provide some basis in equity for this order, the court noted that the nursing home had not informed the patient's family of its policy against nonwithdrawal, and that it would be "extremely difficult" to find another nursing home that would accept the patient under these terminal circumstances.[181]

Both rationalizations are transparent and unpersuasive. It did not appear that the patient's family ever asked what the policy of the nursing home was. Moreover, it was never explained why the burden of compliance should fall on those health care providers whose consciences would be trammeled. No evidence was offered that withdrawal of feeding tubes is the standard practice in the nursing home industry in New Jersey, and there was no factual basis for the court's implied assumption that blind compliance with such terminal decisions is the professional norm or expectation. Moreover, shortly after the New Jersey Supreme Court's decision, another nursing home came forward and advised the court that it was ready and willing to accept the patient under the circumstances, and the family and guardian advised the court that they were ready to effect the transfer if the court vacated its order. Notwithstanding its direct reliance on the supposed absence of such an alternative, the New Jersey Supreme

[180] 529 A.2d 434, 450-51 (N.J. 1987).

[181] The court held:

> We recognize that our decision will be burdensome for some of the nursing home personnel. Nevertheless, in view of the immense hardship that would fall on Mrs. Jobes and her family if she were forced out of the nursing home, we are compelled to impose it for her continued care.

*Id.* at 450.



Court summarily denied the motion for reconsideration without any explanation.[182]

Likewise, in the case of *In re Requena*,[183] the issue was whether St. Clare's/Riverside Medical Center must comply with a patient's wishes to have an artificial feeding tube withdrawn without having to go elsewhere to do it. The appellate court noted that if a reasonably convenient and suitable alternative health care facility were available, then the hospital would not have to accommodate the withdrawal, which it considered immoral.[184] The hospital produced evidence that such a facility, only 17 miles away, was willing to receive the patient. Nevertheless, the trial court ordered the hospital to facilitate the tube-withdrawal rather than effect transfer, and the appellate court affirmed, reasoning that "[t]he subverting of hospital policy and offending the sensibilities of hospital administration and staff were reasonably determined . . . to be subordinate to the psychological harm to be visited upon Mrs. Requena at this time."[185] In other words, the fact that the patient had been in that hospital for some time and wanted to stay there while she died gave the patient a right to do so, even though it would violate the moral convictions of the hospital and staff to facilitate her suicide-by-tube-withdrawal. Again, the court tried to make the health care provider appear responsible for its own dilemma, because the patient "had no notice of St. Clare's policy against withholding artificial feeding or fluid."[186] Again, the court's excuse failed because there was no indication that the patient had ever inquired. More importantly, one wonders whether anyone who enters a hospital with a name like "St. Clare's" is not already on notice that *perhaps* the institution might have some religious qualms about such a controversial matter as withdrawing nutrition and hydration from a patient.

Not to be outdone by the New Jersey courts, the New York appellate court in *Elbaum by Elbaum v. Grace Plaza of Great Neck, Inc.*,[187] reversed a trial court that had found insufficient evidence that a comatose patient would have desired the withdrawal of the tube and proceeded to order the nursing home, over its strong moral objections, to "comply with Mrs. Elbaum's wishes" if it could not find another facility that would take the

[182] Apparently, the New Jersey Supreme Court was bent on punishing the nursing home and its personnel for making the patient's family go to the trouble to get a court order by requiring them to participate in the very act they had opposed as immoral. It seems to be meant as a warning to other "do-gooders" who might interfere with the efforts of families of comatose patients to terminate lives not worth living.

[183] 517 A.2d 886 (N.J. Super.), *aff'd*, 517 A.2d 869 (N.J. App. 1986).

[184] *Id.* at 870.

[185] *Id.*

[186] *Id.*

[187] 544 N.Y.S.2d 840 (App. Div. 1989).

[illegible]atient under those circumstances.[188] This court, too, tried to make an eq-[illegible]itable argument for disregarding the rights of conscience of the institution. When the patient was placed at the Grace nursing home, the court reasoned, "the Elbaum family had no reason to believe" that the nursing home would [illegible] at a request to participate in withholding nutrition and hydration from the patient until she died. Once again, however, there was no evidence that the patient's family made any inquiry.[189]

Like the New Jersey courts, the New York appellate court boldly [illegible]sisted that the rights of conscience of health care providers are inferior and [illegible]ordinate to, and under the complete control of, the wishes and conve-[illegible]ence of their patients and their patients' families. The court rationalized:

> [I]f the patient's [or surrogate's] right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession. . . . [T]he interest in preserving the perceived ethical integrity of Grace Plaza is outweighed by Mrs. Elbaum's [guardian's] wishes in declining nutrition and hydration under these circum-[illegible]tances.[190]

Were this radical doctrine to become the law of the land, health care [illegible]censes would be little more than badges of moral slavery. The courts have [illegible] to adequately explain why the rights of conscience of health care [illegible]viders must be subordinated to the surrogate-exercised right of a coma-[illegible] patient (or the self-asserted right of a conscious patient, for that matter) [illegible] receive a controversial procedure or service in a particular place or from [illegible]ticular medical personnel. Indeed, the proposition appears to be self-[illegible]ntradicting, if notions of autonomy or respect for individual self-[illegible]termination or personal dignity have any relevance.

Other courts have conditionally provided that, if another facility will [illegible] accept a patient for the purpose of facilitating and supporting the with-[illegible]awal of life support systems, then the institution in which the patient is [illegible]cated at the time the order authorizing withdrawal of nutrition and hydra-

[188] [illegible] at 548. In this case, however, the judge not only gave the facility 10 days to find another nursing home, but noted that the staff of the current nursing home would not have to participate, but the [illegible] "must permit a physician selected by the Elbaums to carry out Mrs. Elbaum's wishes at the facility." *Id.*

[189] [illegible], the name of the nursing home should have alerted the patient's family to possible religious [illegible] and opposition to the withdrawal of nutrition and hydration. *See* Ephesians 2:5, 8.

[190] [illegible], 544 N.Y.S.2d at 847. Mrs. Elbaum was transferred to a Manhattan hospice in August 1989 [illegible] the feeding tube was removed. Her family refused to pay Grace Plaza the $100,000 her care cost [illegible] the family sued to obtain the right to remove the feeding tube. The trial court rejected the nursing home's suit to recover those expenses, but an appellate court panel reversed, ruling that because Mrs. Elbaum had not left a living will or proxy, the nursing home was obligated to continue her care and treatment until a court ruled otherwise, and her family was liable for those expenses. [illegible], *In Long Island Right-to-Die Battle, Court Finds Family Liable for a Patient's Care*, N.Y. Times, Sept. 24, 1992, at B6.



tion is obtained must facilitate that service, despite its (or its employees') strong moral objections.[191] These cases underscore the need for broader conscience clause protection, as virtually none of the existing conscience clauses cover the procedures depicted in these dilemmas.[192] At least one state has made a small effort to provide such protection, but much more is needed.[193]

## III. THE ABSENCE OF OTHER LEGAL PROTECTION FOR RIGHTS OF CONSCIENCE

### A. The Withering of Constitutional Protections for Rights of Conscience

In the early years of the abortion debate, there was some talk about first amendment or other constitutional protection for private (at least denomi-

[191] Gray by Gray v. Romeo, 697 F. Supp. 580, 591 (D.R.I. 1988). *See also* Delio v. Westchester County Medical Center, 516 N.Y.S.2d 677 (App. Div. 1987) ("The Medical Center should be directed to either assist in the discontinuance of treatment or to take whatever steps are reasonably necessary to assist in the conservatee's transfer to a suitable facility or to his home where his wishes may be effected."). By providing for transfer to the patient's home, as one alternative, this court clearly gave the greatest protection for the conscience rights of the health care providers. *See also* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1145, 225 Cal. Rptr. 297, 306 (1986) (public hospital has duty to facilitate client's wishes to die).

[192] A draft of the proposed Health-Care Decision Act, considered by the National Conference of Commissioners on Uniform State Laws, would require the health care provider (including institutions and the attending physician) who might be unwilling to carry out the health-care decision of a patient or patient's surrogate (including the decision to withdraw life-support equipment, or withdraw nutrition and hydration) to assume the responsibility to transfer the patient, or, if that cannot be accomplished, to honor the request of the patient or go to court to obtain judicial permission not to honor the patient's wishes. National Conference of Commissioners on Uniform State Laws, Draft Health-Care Decisions Act, §§ 6, 12 (July 30-Aug. 6, 1992). Nothing in the proposed Act provides a substantive basis for the court to grant permission to a health care provider not to honor the patient's wishes, despite moral or religious objections of the health care provider. The proposed Act contains no conscience clause.

[193] In 1992, the Florida legislature enacted a provision governing transfer of patients subject to non-treatment or withdrawal declarations by patients or their surrogates, permitting the health care provider to refuse to comply with the directive and authorizing transfer of the patient only if the patient is not in emergency condition, the provider gave written notice to the patient of its restrictive ethical or moral beliefs at the time of admission, the health care provider assumes the cost of the transfer, and the transfer occurs within seven days. FLA. STAT. ANN. § 765.308 (Supp. 1992). This provision takes a step in the right direction of clarifying standards and providing some means of protection of the rights of conscience of health care providers. However, it provides inadequate protection. For instance, the requirement that the hospital pay for the transfer is inconsistent with the written notice at the time of admission; at the very least, these two provisions should be alternatives. Absolute protection for the rights of health care personnel should be explicitly guaranteed. The statutory language should be reversed to create a strong presumption that no institutional health care provider is obligated to assist or facilitate any treatment that is contrary to the moral or religious values of the provider, subject to the right of patients to recover damages for nontreatment, avoidable expenses, suffering, and inconvenience if the provider fails to give either timely prior notice or immediate responsive refusal and opportunity for transfer without medical prejudice. That would establish a clear general standard as well as balance and protect the rights of conscience of health providers as well as the right of patients to fair treatment and reasonable accommodation.

national) hospitals to refuse to provide abortions.[194] Logically, the same protection would have applied to other morally controversial procedures, as well. However, recent changes in the judicial interpretation of the "free exercise" clause of the first amendment have all but obliterated the shelter of the first amendment for health care providers who would refuse on moral or religious grounds to participate in a medical procedure.

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[195] the United States Supreme Court substantially curtailed the judicial protection afforded to rights of conscience. The case involved the denial of unemployment benefits to members of the Native American Church who were fired from their jobs for using illegal drugs (peyote). Although the individuals claimed to be using the peyote as part of their religious rites, the Court held that the denial of benefits did not violate the free exercise clause of the first amendment. Instead of applying the traditional "compelling interest" test of strict judicial scrutiny,[196] the Court proposed a new, lower standard of protection for freedom of religion. Justice Scalia's opinion for the Court reasoned that so long as government regulations or statutes are "laws of general applicability" which do not discriminate against any specific religion, or against religions generally, the laws will be sustained if rationally related to legitimate governmental interests, despite any incidental burden they may have on religious freedom.[197]

*Smith* effected a major revision in first amendment doctrine. Under the *Smith* rule, federal, state, and local governments may curtail or violate religious practices, no matter how sincerely-held or essential to the religious beliefs of the individual, so long as the government acts uniformly to religious and nonreligious activities, and without specific intent to discriminate against religion. Many commentators have criticized the *Smith* doctrine for its insensitivity to and virtual abandonment of the religious liberties of political minorities.[198]

Under *Smith*, neither patients nor health care providers can expect courts to extend any first amendment protection against laws, judicial doctrines, or government policies (including public hospital policies) that incidentally violate their strong religious or moral beliefs. For instance, in at least two cases, religious objections to autopsies have been overridden

[194] *See, e.g.*, *Chrisman*, 506 F.2d at 312; *Taylor*, 523 F.2d at 77; *Watkins*, 364 F. Supp. at 803.
[195] 494 U.S. 872 (1990).
[196] *See generally* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).
[197] *Smith*, 494 U.S. at 888. "[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling government interest . . . ." *Id.* at 886 n.3.
[198] *See, e.g.*, Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 850-54 (1992); Gordon, *Free Exercise on the Mountain Top*, 79 CAL. L. REV. 91 (1991).



under the *Smith* doctrine. In *Yang v. Sturner*,[199] the Hmong family of a deceased young man upon whom an unauthorized autopsy had been performed claimed that the medical examiner violated their religious beliefs against mutilation of the corpse. Initially, the court granted summary judgment to the Yangs, finding no compelling state interest in the circumstances of the case to override the free exercise rights of the plaintiffs.[200] After the Supreme Court decided *Smith*, however, the district court withdrew its earlier opinion and dismissed the plaintiffs' complaint because "under *Smith* [the court] can no longer rule that the infringement rises to a constitutional level."[201] Likewise, in *Montgomery v. County of Clinton*,[202] another federal court ruled that, under *Smith*, the first amendment provided no protection for a Jewish couple whose personal religious beliefs prohibited autopsies, when their son was killed in a high speed automobile crash and a law of general applicability authorized the performance of an autopsy under those circumstances.[203]

If the free exercise clause of the first amendment provides no protection for the rights of conscience of patients against a generally applicable medical practice, policy, or regulation, then it does not protect the rights of conscience of health care providers, either. Thus, under the *Smith* doctrine, the wellspring of legal protection for rights of conscience has vaporized; all that remains is the mirage.[204]

## B. The Lack of Other Adequate Legal Protection for Rights of Conscience of Health Care Providers

The only other source of potentially significant legal protection for the rights of conscience of health care providers is Title VII of the federal Civil Rights Act of 1964, which prohibits discrimination on the basis of religion.[205] The Act makes it "an unlawful employment practice" for an em-

[199] 728 F. Supp. 845 (D.R.I. 1990), *prior opinion withdrawn and complaint dismissed*, 750 F. Supp. 558 (D.R.I. 1990).
[200] *Id.* at 855-57. The plaintiffs' 23-year-old son died in his sleep from unknown causes; investigation into possible drug use led to the autopsy.
[201] Yang v. Sturner, 750 F. Supp. 558, 560 (D.R.I. 1990).
[202] 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991).
[203] "There is no contention that the laws under which the autopsy was authorized are other than generally applicable and religion-neutral. . . . It follows by implication of *Employment Division* [v. *Smith*] that defendants' actions need only to have been reasonably related to a legitimate governmental objective." *Id.* at 1259.
[204] The proposed Religious Freedom Restoration Act, H.R. 2797, 102d Cong. (1992) would provide basic federal statutory protection for exercising rights of conscience by restoring the compelling state interest standard of review for laws infringing upon rights of conscience. But it would only apply to protect against governmental restrictions; it would not apply to private actors.
[205] 42 U.S.C. §§ 2000e(e) to 2000e-17 (1988). One commentator identifies at least two other sources of potential protection, but each of them is of questionable value. Davis, *supra* note 1, at 848-51 (a collective bargaining agreement may provide protection, but may not; and some states provide a

ployer to discriminate against an employee or potential employee "because of such individual's . . . religion . . . ."[206] A 1972 amendment expanded and clarified the scope of religious beliefs protected, including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[207] Thus, the Act has the potential to provide significant civil rights protection for health care employees who are fired, demoted, penalized, or otherwise incur employment discrimination because of their refusal to perform services that violated their religious or moral convictions.[208]

However, in practice, Title VII has provided limited and uneven protection for the rights of conscience of health care workers. Some courts have been grudging in their application of Title VII to health care employees disciplined because of their opposition to abortion.[209] Moreover, the courts have interpreted Title VII to require only minimal accommodation by employers.[210] As the authors of the leading law review article on the subject observed, the practical significance of Title VII for the rights of conscience of health care workers "has been seriously eroded by the Supreme Court's holding that employers have only a *de minimis* obligation under Title VII to accommodate the religious beliefs of their employees."[211]

Perhaps the weakness of Title VII is due in part to its generic nature. It covers not just discrimination on account of religion but many other types of discrimination, necessitating some sacrifice in effectiveness in any specific context so that any interpretation of the Act works in all contexts.[212] In any event, it is clear that Title VII provides inadequate protection for the

"public policy exception" to the "terminable at will" doctrine, but in many of these biomedical dilemmas, the public policy is not clear). Moreover, these doctrines only protect employees, not institutional health care providers.

[206] 42 U.S.C. § 2000e-2).

[207] *Id.* § 2000e(j).

[208] *See* Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981) (IRS attorney denied promotion because of refusal to review tax exemption applications submitted by abortion clinics has Title VII claim).

[209] *See* Ravenstahl v. Thomas Jefferson Hosp., 37 Fair Empl. Prac. Cas (BNA) 568 (E.D. Pa. 1985) (Catholic nun, a registered nurse, transferred and deprived of valuable experience because of her statements against abortion to physicians and patients, who was allowed to keep former position on condition she keep quiet, and given back wages, was denied further recovery; gag order did not violate Title VII).

[210] *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 64 (1977). *See generally* Durham, Wood, & Condie, *supra* note 1, at 296-303.

[211] Durham, Wood, & Condie, *supra* note 1, at 290. *See* Spellacy v. Tri-County Hosp., 18 Empl. Prac. Dec. (CCH) ¶ 8871 (Pa. Ct. C.P. Del. Cty.), *aff'd*, 395 A.2d 998 (Pa. Super. 1978), Kenny v. Ambulatory Centre of Miami, Florida, Inc., 400 So. 2d 1262 (Fla. App. 1981), discussed *supra* notes 124 and 158 and accompanying text.

[212] The Act also prohibits discrimination on the basis of race, color, sex, and national origin.



rights of conscience of health care workers.[213] Moreover, Title VII does not protect any conscience rights of institutional health care providers; it only protects the conscience rights of "individuals," not institutions. Thus, Title VII provides inadequate protection for the rights of conscience of health care providers generally.

## IV. EXISTING ABUSES AND THE POTENTIAL FOR GREATER ABUSES OF THE RIGHTS OF CONSCIENCE OF HEALTH CARE PROVIDERS

The conscience clause cases described above illustrate the range of abuses of rights of conscience of health care providers that have come to light in formal, reported litigation.[214] Already, this is a serious, if little noticed, civil rights problem. In addition, the foreshadows of three ominous future developments add urgency to the need to adopt adequate legal protections for the rights of conscience of health care providers. In the medical profession, increasing pressures are mounting for mandatory abortion training. Demographically, the aging of the "baby boom" generation will create a host of financial pressures on rights of conscience. Politically, the growing calls for health care reform by the federal government portend even greater pressures on the rights of conscience of health care providers.

### A. Evidence of the Present Serious Abuses of Rights of Conscience of Health Care Providers

The reported cases uncover a wide range and significant number of violations of the rights of conscience of health care providers. These include threats, harassment, transfer, demotion, and firing of nurses who refuse to participate in sterilizations or abortions,[215] mandatory insurance subsidization of elective abortion,[216] civil liability for private hospitals that refuse to provide unrestricted abortion services,[217] institutional liability resulting from refusal to provide abortifacients to victims of sexual assault,[218] and

[213] *See* Durham, Wood, & Condie, *supra* note 1, at 306 ("From the perspective of a nurse conscientiously opposed to abortion, Title VII protections are likely to be substantially less significant than those afforded under applicable conscience clause legislation."). Regrettably, conscience clauses have not lived up to their promise, either.

[214] Of course, not all complaints that are filed in trial courts yield published opinions. Most civil suits settle without trial, and of those cases that go to trial, many are not appealed to a court the opinions of which are published.

[215] *See, e.g.*, *supra* note 158 and accompanying text (*Kenny*), *supra* notes 141 & 156 and accompanying text (*Swanson*).

[216] *See supra* note 123 and accompanying text (*Erzinger*).

[217] *See supra* note 139 and accompanying text (*CAMC*).

[218] *See supra* note 129 and accompanying text (*Brownfield*).

government orders that health care facilities support and carry out directives to withdraw feeding.[219]

The reported cases revealing abuse and coercion of rights of conscience of health care providers show only the tip of the iceberg. A landmark empirical study of nurses' attitudes about and difficulties encountered because of personal objection to abortion and other medical procedures revealed that approximately five percent of the nurses sampled (which, if extrapolated, would amount to approximately 50,000 nurses in the United States) believed that their assignment and promotion opportunities may be limited by their moral and religious beliefs about abortion.[220] The nurses in this sample "identified a total of 103 definite cases in which nurses had either been dismissed or had their opportunities limited because of moral beliefs. . . . [F]ifty-seven cases were identified in which the nurses' beliefs about abortion had cost them opportunities for promotion or sustained employment."[221] Moreover,

> [a]pproximately 7% of Catholic nurses, 4% of Protestant nurses, and 6% of those belonging to 'other' religions indicated they knew at least one other person whose opportunities with hospitals had been limited by personal beliefs . . . . Thirty-six nurses [in the national sample] identified a total of 118 of their colleagues who had been limited as a result of their moral and religious beliefs.[222]

Nurses and many other health care workers are particularly vulnerable to pressure because they occupy subordinate positions in the hospital/medical hierarchy. Even more vulnerable in some ways are students in nursing, paraprofessional, and medical training programs. For instance, even medical residents in obstetrics and gynecology or family practice "may feel obligated to their departments or fellow residents to perform abortions" or "to have a 'complete' medical education."[223] Likewise, there is evidence that some medical schools have considered refusal to participate as a

[219] *See supra* Part II C 4.

[220] Durham, Wood, & Condie, *supra* note 1, at 257, 287.

[221] *Id.* at 287.

[222] *Id.* at 258. Again, if extrapolated, this would represent approximately tens of thousands of nurses who have been victims of employment discrimination because of their religious or moral beliefs. *Id.* at 258.

[223] *Id.* at 261-62. The authors of this landmark study received this revealing response to their survey from an OB/GYN resident in a university hospital:

> Although my abstaining from abortions is officially tolerated by my department, I am constantly reminded that my position on abortion is a burden and a nuisance to the rest of the department and could I please "grow up" and realize how ridiculous my position is. I am constantly receiving insinuations about my position and at times it is a bit trying, but generally I am an accepted part of the staff.

*Id.* at 262 n.36.



negative factor in the admission process.[224] As noted below, these pressures are growing.

The aforementioned studies focused on conscience conflicts arising out of abortion. It is reasonable to suppose that if the studies were broadened to include sterilizations, withdrawal of nutrition and hydration, termination of life-support systems, autopsies, organ transplantation, and various forms of medical experimentation, the extent of the problem would assume even larger dimension. Moreover, while the extent of intrusion upon the conscience rights of health care institutions has never been studied, the case law indicates that serious moral conflicts are sometimes brushed aside or cavalierly disregarded by judges or other authorities imposing their own moral preferences upon health care institutions and the dozens or hundreds of individuals whose values they represent.

### B. Pressures on the Medical Profession to Compel Abortion Training

The prospect of even greater coercion of medical students and interns is raised by recent, insistent calls from prochoice groups that prospective physicians be required to learn how to perform abortions in order to obtain their license or certification in obstetrics or gynecology. Abortion training is already mandatory in more than one-third of the certified ob/gyn residency programs, and optional in most others.[225] However, prochoice advocates, anxious to see that convenient access to abortion is available everywhere, have been calling for mandatory training in all ob/gyn training hospitals.[226]

Thus, in 1978, the research arm of the largest abortion provider in the United States (Planned Parenthood) published an article decrying as inadequate the voluntary and optional training in abortion in ob/gyn teaching programs in the United States. The article quoted the then-Secretary-Treasurer of the Residency Review Committee for Obstetrics and Gynecology as saying that some ob/gyn training programs

> have been placed on probation [and] . . . had had their accreditations withdrawn [or] . . . withheld because of their inability to meet the standards listed in the

[224] Diamond, *Do the Medical Schools Discriminate Against Anti-Abortion Applicants?*, 43 LINACRE Q. 29, 30-31 (1976). Durham, Wood, & Condie also cite a study of the Department of Health, Education and Welfare in which, despite severe methodological defects biased against finding discrimination, there was some evidence of potential discrimination in admission to medical schools. Durham, Wood, & Condie, *supra* note 1, at 266 n.47.

[225] NATIONAL ABORTION FEDERATION & AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, WHO WILL PROVIDE ABORTIONS 8, 25-26 (Oct. 1990) (in one half of the 72% of ob/gyn programs offering abortion training, it is optional).

[226] *See, e.g.*, Lindheim & Cotterill, *Training in Induced Abortion by Obstetrics and Gynecology Residency Programs*, 10 FAM. PLANNING PERSPECTIVES 24 (1978); Darney, Landy, MacPherson, & Sweet, *Abortion Training in U.S. Obstetrics and Gynecology Residency Programs*, 19 FAM. PLANNING PERSPECTIVES 38 (1987); Henshaw & Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 FAM. PLANNING PERSPECTIVES 75 (1990).

> *Essentials of Approved Residencies*. . . . He added that accredited programs are always expected to offer training in basic areas like abortion and that *a program not covering abortion would be considered "unacceptable."*[227]

Nine years later the same organization published another, stronger call for more extensive, stricter abortion training programs.[228]

Similarly, since 1973, the American Public Hospital Association's (APHA) *Recommended Program Guide for Abortion Services* states that abortion "should be an integral part of medical school education and of residency training in obstetrics and gynecology."[229] In 1992, the APHA adopted another resolution calling for "all residency training programs in obstetrics and gynecology [to] promote the integration of abortion care as a *required* component of residency training."[230] While this does not exclude the possibility of exceptions for conscientious objection, the APHA proposal chills the rights of conscience of medical school students and residents.

In 1990, a symposium of the National Abortion Federation and the American College of Obstetricians and Gynecologists (ACOG) recommended that abortion care be made "a *required component* of ob/gyn residency training" for both accreditation of the hospital and for board examination of the physician.[231] Since ACOG is one of three organizations that sets residency program accreditation requirements for all accredited ob/gyn programs,[232] the risk to rights of conscience of medical students and ob/gyn residents is not merely speculative.[233]

## C. The Financial Pressures of an Aging Population

The aging of the American population (especially the inexorable maturation and physical deterioration of the "baby boom" generation) guarantees that substantially increased demands will be put upon the American health care system, including greater financial pressures. Between 1985 and 2030, the 65-plus population in the United States is expected to double.[234]

[227] Lindheim & Cotterill, *supra* note 226, at 26-27 (emphasis added).

[228] *See* Darney, Landy, MacPherson, & Sweet, *supra* note 226, at 38-42.

[229] *APHA Recommended Program Guide for Abortion Services*, 63 AM. J. PUB. HEALTH 639, 642 (1973).

[230] AMERICAN PUBLIC HEALTH ASSOCIATION, RESOLUTION NO. 9117, ACCESS TO ABORTION: ENSURING THE AVAILABILITY OF QUALIFIED PRACTITIONERS ¶ 5 (1992) (emphasis added).

[231] *Id.* at 6 (recommendation 1). The report also recommended that "physician attitudes" about abortion be addressed in the medical school or residency programs. *Id.* (recommendation 3).

[232] ACCREDITATION COUNCIL FOR GRADUATE MEDICAL EDUCATION, DIRECTORY OF GRADUATE MEDICAL EDUCATION PROGRAMS, 1992-1993, at 10, 17.

[233] By special requirements adopted July 1, 1991, the Accreditation Council for Graduate Medical Education requires "training in induced abortion" for ob/gyn residents. However, a resident may be exempted "for religious or moral reasons" from actually doing the procedure. Letter from Paul O'Connor, dated December 16, 1992.

[234] *Aging America: Trends and Projections*, S. REP. NO. 80, 101st Cong. 2d Sess. 3 (1990). In 1980, the percentage of the population aged 65 and above was 11%. By 2030, this group will constitute 23% of the population, according to U.S. Census Bureau projections. *Id.* at 5.



By 2040, the number of persons 85-or-older will grow from one percent to five percent of the population.[235] The over-65 age group places the greatest burdens on health care resources. Already, persons over 65, approximately one-eighth of the population, account for over one-third of the country's total personal health care expenditures.[236] Between 1981 and 2000, expenditures on health care for the aged are expected to grow from $80 billion to $200 billion.[237] As the population ages, the percentage of public and private resources that must be allocated for health care will increase. In 1988, federal spending on health care for the elderly was 3.2% of the gross national product; this is projected to increase to 4.0% in the year 2000, and to 7.5% by the year 2040.[238] Moreover, with the declining birthrate and the aging of the large baby boom generation cohorts, the ratio of worker-aged citizens (18–64) to dependent-aged population (under 18 and over 64) will decrease, meaning that tax pressures on the workers will be even greater.[239]

The aging of the population will increase the demand for health services, which in turn will increase the number of cases in which there is potential for abuses of the rights of conscience of health care providers (particularly if those rights are placed in conflict with the demands of patients and their representatives for morally sensitive "treatments"—such as withdrawal of life support systems). It also will increase the financial pressures on the health care industry. In times of such pressures, nonmonetary factors such as rights of conscience of individual and institutional health care providers (particularly the unpopular or unorthodox) are all-too-easily sacrificed to the exigencies of the moment.

## D. The Political Pressures of Health Care Reform

The increasing cost of health care in America has made health care reform a leading political issue in the 1990s. While many different plans have been proposed, common to all of them is an increase in the federal government's role in providing health care. At present, the only federal statutory protection for rights of conscience of health care providers, the "Church Amendment," covers participants in just a few federal programs, and is sorely inadequate.[240] Superimposing a major expansion of federal government involvement in (and control over) the delivery of health care

[235] D. CALLAHAN, SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY 20 (1987).

[236] *Id.* at 101.

[237] *Id.* at 20.

[238] *Aging America*, *supra* note 234, at 129, Table 6-2. *See also* D. CALLAHAN, *supra* note 235, at 225 (By the year 2040, pension and health care programs will consume 15.5% of the GNP and 64% of the federal budget).

[239] *Aging America*, *supra* note 234, at 11.

[240] *See supra* notes 163-68 and accompanying text.

services (for example, through funding requirements and restrictions) upon the existing inadequate legal protections for the rights of conscience of health care providers would almost certainly lead to widespread abuses.

Some type of legislation to reform health care delivery in the United States is likely to be enacted soon. It is unclear just what effect the adoption of national health care reforms may have on the rights of conscience of health care providers, but they could substantially impair the rights of conscience of health care providers.

None of the current crop of health care reform proposals contains any conscience clause. It is possible that the proposed federal health care reforms might be interpreted to preempt state conscience clauses. While the amount of federal governmental control over health care delivery varies from plan to plan, all involve some form of governmental subsidy for low-income individuals, and federal funding could provide a window for the government to exercise control of the services that health care providers must or must not be willing to perform to be eligible for government funding. Additionally, some proposals would have health care plans administered by the federal government, which could provide further basis for overriding state conscience clauses.[241]

The potential for federal preemption and effective repeal of state conscience clauses comes not just from health care reform proposals. For instance, as originally introduced, the Freedom of Choice Act, purportedly designed to codify *Roe v. Wade* by prohibiting state laws that might impede access to abortion, would have overturned most states' conscience clauses.[242] Thus, on June 30, 1992, when the House Judicial Committee was marking up the bill, Rep. Sensenbrenner offered an amendment to provide that "nothing in this Act would prevent a State from permitting a health care provider to decline to perform or to assist in the performance of an abortion that offended the moral or religious beliefs of that provider."[243]

The Sensenbrenner amendment was intended to protect and preserve all state conscience clauses. However, the Committee rejected the Sensenbrenner amendment and adopted a substitute amendment offered by Rep. Kopetski, providing: "Nothing in this Act shall be construed to prevent *a State* from protecting unwilling *individuals* from having to participate in the performance of abortions to which they are conscientiously opposed."[244] The next day, the Senate Labor and Human Resources Committee also approved the Freedom of Choice Bill with the Kopetski amendment.[245] The Senate sponsor's official explanation of the legal effect of the Freedom of Choice Act, as so amended, clearly shows that it was intended to overturn state conscience clauses protecting even private institutions from having to provide facilities for elective abortions.

> [A] state could not enact legislation which would have the effect of denying access to abortion for women. Thus, it could not enact legislation which would preclude all hospitals, public *and private*, from providing abortion services or bar the use of a public facility for an abortion paid for by the patient and provided by a private physician, for example, *in localities where such a facility is the only available facility for such services*.[246]

Clearly, the proposed Freedom of Choice Act would have overturned all state conscience clauses that protect institutional rights of conscience, significantly repealed a long-established principle of the *Roe* doctrine,[247] and required many private (even religious) hospitals to provide elective abortions services.[248]

[241] For instance, it is not inconceivable that the federal agency supervising the federal health plan would adopt a list of procedures which may be funded (as Oregon already has), and could require as a condition for eligibility for federal reimbursement that physicians agree to perform all procedures on the list that they are competent to perform. Or federal regulations could require participating physicians or institutions to agree to withdraw any treatment upon the request of a patient receiving federally funded treatment, thereby requiring participating physicians and institutions to agree to assist in what some consider to be immoral (for example, mercy killing or suicide). State conscience clauses that otherwise might protect the right to refuse to participate in morally objectionable medical services could be deemed inconsistent with and preempted by such federal regulations, or others. *See generally* Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190 (1983); Campbell v. Hussey, 368 U.S. 297 (1961).

[242] H.R.25, S.25, 102d Cong., 2d Sess. (1992).

[243] A copy is available from the author.

[244] *Id.* (emphasis added). This language is severely inadequate (even as a limited conscience clause directed solely to abortion) for several reasons. First, it is not a conscience clause, but only grants permission for states to enact or retain certain limited conscience clause provisions. Second, it excludes entirely protections for health care institutions; thus, it would invalidate all state conscience clause protections for institutions. Third, it is limited to provisions protecting individuals from having to "participate in the performance" of abortions, which may be construed as protecting only persons directly participating in the actual performance of the abortion procedure, and possibly excluding personnel such as counselors, orderlies, nurses, and janitors who might be required to assist in the preparation for or follow-up after the abortion.

[245] *See* 138 Cong. Rec. S9028 (daily ed. June 25, 1992).

[246] *Id.* (written outline of effects of S 25 inserted in remarks of Sen. Cranston) (emphasis added).

[247] While the Freedom of Choice Act has been presented as a "mere codification" of *Roe v. Wade*, in this area it clearly goes far beyond even the most extreme Supreme Court interpretation and application of *Roe*. It would effectively overturn more than one half-dozen Supreme Court cases that have consistently rejected the argument that because a private (or public) hospital is the only medical facility in a given area where abortions (or late abortions, or a particular type of abortion procedure) might be performed, the *Roe* doctrine requires the hospital to allow abortions to be performed on its premises. *See supra* note 173 and accompanying text.

[248] Former U.S. Attorney General Barr noted:

> Although the revised bill would permit States to protect the rights of unwilling individuals to refrain from performing abortions, the bill does not permit *institutions* to refuse to perform abortions. Thus, a hospital whose board or sponsoring organization was opposed to abortions could nevertheless be held liable for refusing to perform them. Indeed, the bill could now be read to require institutions to hire willing individuals in order to provide abortion services. Similarly, although the Senate bill has been amended to allow a state to refuse to pay for abortions, section 3(b)(2), nothing in that provision or any other part of the bill appears to

Without conscience clauses in the reforms, or preexisting in federal law and unmodified by the reforms, the effects of proposed health care reforms on existing conscience clauses can only be hypothesized. Two things, however, are abundantly clear: current health care reform proposals ignore this issue, and the more the federal government becomes involved in providing health care, the greater the need for broad and comprehensive federal conscience clause protections.

## CONCLUSION

The current patchwork of state and federal conscience clause laws are well-intentioned but obviously and profoundly inadequate. While laudable as pioneering efforts, they are already seriously out-of-date. Virtually all are too narrow, cover too few health care providers, in too few situations, are too easily circumvented, and provide inadequate remedies and procedures to be effective. The deficiencies of these statutes have been compounded by the grudging interpretation given such provisions by many courts. Such judicial hostility underscores the need for clearer, stronger statutory protections. The cases and empirical research shows that there are many and serious abuses of rights of conscience of health care providers, and there are ominous signs of pressures building that pose even greater threats in the near future.

The rights of conscience of health care providers will be in serious jeopardy until lawmakers enact comprehensive civil rights legislation protecting those rights. It is time for responsible lawmakers and advisory bodies, such as the National Conference of Commissioners on Uniform State Laws to address this problem by drafting comprehensive conscience clause legislation. It is time for Congress to address the issue in a coherent, studied manner, and to adopt a comprehensive "civil rights" conscience clause.

To stimulate serious consideration of the matter and to provide a baseline or foundation from which to begin the work of drafting appropriate legislation, a sample legislative proposal is attached hereto as an Appendix. The conscience clause proposed therein, or similar legislation, could alleviate most abuses of rights of conscience of health providers. Certainly that is a goal worth pursuing and a task worth beginning.

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permit a state to deny the use of a state facility to a woman who was willing to pay for the abortion. The bill might even be construed to *require* the states to provide facilities for abortions where private facilities are unavailable.

Letter from William P. Barr, Attorney General, to Hon. Edward M. Kennedy, Chairman, Committee on Labor and Human Resources (July 1, 1992) (emphasis added). When it appeared that the bill might not even pass in Congress, thus foiling efforts to force the President to veto the bill shortly before the 1992 election, the Democratic leadership shelved the bill. *See* Rovner, *Democrats Fail to Make Good on Freedom of Choice Act*, 50 CONG. Q. WKLY. REP. 2360 (1992).



## APPENDIX

## A PROPOSAL FOR COMPREHENSIVE CONSCIENCE CLAUSE LEGISLATION

### Health Care Providers' Rights of Conscience Protection Act

### Section 1: Policy and Purposes

It is the public policy of [Jurisdiction] to respect and protect the rights of conscience of all persons who are involved in providing health services. It is the purpose of this Act to protect as a basic civil right the right of all persons to refuse to counsel, advise, pay for, provide, perform, assist, or participate in directly or indirectly providing or performing health services that violate such persons' religious or moral convictions; and to prohibit all forms of discrimination, disqualification, coercion, disability, or liability upon such persons by reason of such refusal.

### Section 2: Definitions

(a) "Health care institution" means any public or private corporation, partnership, association, organization agency or other legal entity that is involved in providing health services, including, without limitation, hospitals, clinics, physician's offices, medical schools, nursing schools, other health service training institutions or facilities, insurance organizations, and financing organizations.

(b) "Health care provider" means any health care institution and any individual involved directly or indirectly in providing health services.

(c) "Health services" means any phase or type of health including but not limited to testing, diagnosis, prognosis, research, counseling, therapy, treatment, family planning, referral, prescription, medication, or surgery intended for the physical, emotional or mental well-being of individuals, and any necessary support services performed at health care institutions or by health professionals, paraprofessionals, pharmacists, their staff or employees.

(d) "Individual" means any human being or group of human beings.

(e) "Medical emergency procedure" means any health service necessary to save the life of a human being in any stage or condition of existence from imminent death, requiring for its success the immediate assistance of a person asserting religious or moral objections, that must be performed before a replacement for the objecting person can be obtained or reasonably could have been obtained.

(f) "Person" includes all juridical persons, including but not limited to all public and private individuals, institutions, entities, organizations, associations, and agencies.

(g) "Religious or moral convictions" means the religious or moral mandates sincerely believed by an individual, and the policies adopted by the governing body of a health care institution that are based on sincerely held religious or moral mandates.

Section 3: Civil Rights of Conscience

(a) All persons have the right not to counsel, advise, pay for, provide, perform, assist, or participate in directly or indirectly providing or performing health services that violate their religious or moral convictions.

(b) No person shall be required to counsel, advise, pay for, provide, perform, assist, or participate directly or indirectly in providing or performing health services that violate his or her or its religious or moral convictions.

Section 4: Individual Rights of Conscience

(a) No individual shall be required to counsel, advise, pay for, provide, assist, or participate directly or indirectly in providing health services that violate his or her religious or moral convictions.

(b) No individual shall be civilly, criminally, or administratively liable to any person for any refusal, to counsel, advise, pay for, provide, assist, or participate directly or indirectly in providing or performing health services that violate his or her religious or moral conviction if

(i) prior to the request or assignment he or she notified the person making the request or assignment of his or her general refusal and, if asked, certified such general refusal in writing, or

(ii) he or she notified the person making the request or assignment of his or her refusal within 24 hours after being asked or assigned.

(c) No person shall discriminate against, penalize, discipline, or retaliate against any individual in employment, privileges, benefits, remuneration, promotion, termination of employment; or in eligibility for, admission to, renewal or participation in, or graduation from any educational, study, or training program; or in any grant, contract, or other program because of his or her refusal or unwillingness to counsel, advise, pay for, provide, perform, assist, or participate directly or indirectly in providing or performing health services that violate his or her religious or moral convictions.

Section 5: Institutional Rights of Conscience

(a) No health care institution shall be required to recommend, advise, pay for, provide, assist, perform, or participate in providing or performing (including, without limitation, to admit for the purpose of providing, provide facilities, equipment, or personnel for, or maintain as a patient for) any health service that violates its religious or moral convictions.



(b) No health care institution shall be civilly, criminally, or administratively liable to any person for any such refusal if

(i) the institution posted notice of its refusal policy in plain sight in the admission area(s) of the institution prior to the request or assignment, or

(ii) the institution notified the person requesting such health service of its refusal within 24 hours of the request, and there has been no irreversible change in the circumstances of the patient or person making the request or assignment during the time between making the request and the institution's refusal that would render it unjust for the institution to refuse the request or assignment.

(c) No person shall discriminate or retaliate against any health care institution in any grant, contract, or program because of its refusal to counsel, advise, pay for, provide, perform, assist, or participate in providing or performing health services that violate its religious or moral convictions.

Section 6: Exceptions

(a) The foregoing provisions do not apply to medical emergency procedures.

(b) Nothing herein shall relieve any person from liability to pay for a health service for which he, she or it freely and knowingly contracted to pay, which was performed before a timely conscientious objection was asserted, or from liability to pay lawful taxes.

(c) Any health care institution or department or division thereof established for the sole or primary purpose of providing specific health services to which some individuals may object may exclude persons who object to such services from employment in a position for which the performance of such services is a necessary and substantial responsibility, if such person's moral or conscience rights cannot be reasonably accommodated by diligent effort.

Section 7: Action for Violation of Rights of Conscience

(a) Any person injured by any behavior, act, or omission prohibited in this Act shall recover three-fold the actual damages sustained (but in no case shall the recovery be less than $3,000 damages for each violation), plus costs and reasonable attorney's fees.

(b) Any person threatened with injury or injured by any other person by reason of action prohibited in this Act may obtain an injunction against the illegal activity, plus costs and reasonable attorney's fees.

(c) These remedies shall be cumulative and not exclusive of other remedies afforded under any other federal or state law.

Section 8: Respect for Rights of Conscience [federal]

(a) On or before [date], the Secretary of Health and Human Services shall adopt such regulations as will ensure the protection of the rights of conscience of health care providers by and in all public agencies, entities, institutions, contracts, grants, and publically-funded programs.

(b) No rule or regulation shall impair or delay any person who believes that his or her or its rights under this Act have been threatened or violated from bringing an action in any state or federal court, except that reasonable methods of alternative dispute resolution which postpone or delay proceedings by not more than 45 days may be required.

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# ON A DECISION-MAKING PARADIGM OF MEDICAL INFORMED CONSENT

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## INTRODUCTION

The doctrine of medical informed consent is embedded firmly in American jurisprudence, now forming a recognized basis for physician liability in the 50 States and the District of Columbia.[1] The expansion of the legal recognition of patients' rights and the evolution of the informed consent doctrine has accompanied an overhaul of the ethics of medical practice. Nonetheless, informed consent law promotes more objectives than may be explained solely by medical ethics. To study and better understand the informed consent doctrine, the goals of the doctrine are identified and the efficacy of the law in attaining these goals studied. Four goals of the doctrine may be posited: (1) an ethical goal, in which the law promotes patient autonomy; (2) a decision-making goal, in which the law promotes the ability of patients to make medical decisions; (3) a regulatory goal, in which the law attempts to control physicians' disclosure practices; and, (4) a compensatory goal, in which the common law functions as a mechanism to provide monetary compensation for injuries. The law of informed consent fulfills completely the objectives of none of these models, instead manifesting a compromise because of tensions among them. This article proposes that directing the informed consent inquiry to the adequacy of information to support patient decision-making will result in a significant improvement in the ability of the law to promote all of these objectives.

To understand the conflict among objectives and the efficacy of the law in attaining them, this article begins by describing the legal action for a claimed lack of informed consent to medical care, then briefly analyzes the

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[1] Merz & Fischhoff, *Informed Consent Does Not Mean Rational Consent: Cognitive Limitations on Decision-Making*, 11 J. LEGAL MED. 321 (1990) (presenting a recent review of the status of the law throughout the United States).