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Legal Briefing: Conscience Clauses and Conscientious Refusal

Thaddeus Mason Pope

Readers who learn of cases, statutes, or regulations that they would like to have reported in this column are encouraged to e-mail Thaddeus Pope at *tmpope@widener.edu*.

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ABSTRACT

This issue's "Legal Briefing" column covers legal developments pertaining to conscience clauses and conscientious refusal.[1] Not only has this topic been the subject of recent articles in this journal,[2] but it has also been the subject of numerous public and professional discussions.[3] Over the past several months, conscientious refusal disputes have had an unusually high profile not only in courthouses, but also in legislative and regulatory halls across the United States.[4]

Healthcare providers' own moral beliefs have been obstructing and are expected to increasingly obstruct patients' access to medical services. For example, some providers, on ethical or moral grounds, have denied: (1) sterilization procedures to pregnant patients, (2) pain medications in end-of-life situations, and (3) information about emergency contraception to rape victims. On the other hand, many healthcare providers have been forced to provide medical treatment that is inconsistent with their moral beliefs.

There are two fundamental types of conscientious objection laws. First, there are laws that permit healthcare workers to *refuse* providing — on ethical, moral, or religious grounds — healthcare services that they might otherwise have a legal or employer-mandated obligation to provide.[5] Second, there are laws directed at forcing healthcare workers to *provide* services to which they might have ethical, moral, or religious objections. Both types of laws are rarely comprehensive, but instead target: (1) certain types of healthcare providers, (2) specific categories of healthcare services, (3) specific patient circumstances, and (4) certain conditions under which a right or obligation is triggered. For the sake of clarity, I have grouped recent legal developments concerning conscientious refusal into eight categories:

1. Abortion: right to refuse
2. Abortion: duty to provide
3. Contraception: right to refuse
4. Contraception: duty to provide
5. Sterilization: right to refuse
6. Fertility, HIV, vaccines, counseling
7. End-of-life measures: right to refuse
8. Comprehensive laws: right to refuse.

INTRODUCTION

Sometimes healthcare providers, on the basis of a conflict with personal values, beliefs, or moral views, refuse (or want to refuse) to follow a specified course of action that has been requested by a patient or is expected by general practice guidelines.[6] Such refusals are generally legally unproblematic if the provider and patient are not in a treatment relationship. But refusing treatment to a current patient can present several types of legal risk. Often, without specific authorization, such refusal could constitute grounds for professional discipline from a licensing board, grounds for criminal prosecution, or grounds for tortuous abandonment, informed consent liability, or other malpractice liability. Moreover, because such refusals are intentional (as opposed to negligent) acts, they may not be covered by insurance.

Conscientious objection laws provide *some* protection to *some* providers who conscientiously object to *some* procedures under *some* circumstances. Exactly what grounds for refusal qualify for conscientious objection is often unclear. The scope of much protection extends beyond religion to include ethical and moral beliefs more generally.[7] Sometimes, "given the propensity of the human conscience to define its own boundaries," the scope of protection is quite broad.[8] Other times, the provider's grounds may be scrutinized either to assure that they are not hiding self-serving motives[9] or to assure that they are "deeply held" and not based "solely upon considerations of policy, pragmatics, or expediency."[10]

The equilibrium between providers' conscience rights and patients' access rights is typically maintained through the objecting providers' duty to refer the patient to other providers who do not object.[11] But many physicians report that they do not "consider themselves obligated to disclose information about or refer patients for legal but morally controversial medical procedures."[12] Moreover, some laws specifically authorize providers to object *without* attempting referral or transfer. Consequently, it is unclear whether an optimum balance has been struck between the competing goals of providers' protection and patients' access.

ABORTION: RIGHT TO REFUSE

Church Amendment

The earliest conscientious refusal laws concerned abortion.[13] In 1973, just weeks after the U.S. Supreme Court announced *Roe v. Wade*,[14] Congress enacted the Church Amendment, which prohibits courts and government agencies from requiring individuals or facilities to perform abortions or sterilizations if they have moral objections.[15] It also shields individual providers from employers' discrimination concerning their willingness to perform abortions and sterilizations.

Supreme Court Justice Harry Blackmun, author of *Roe*, observed that such clauses were "appropriate protection."[16] Indeed, when the Church Amendment was soon challenged as inconsistent with *Roe*, the U.S. Court of Appeals for the Ninth Circuit upheld the law, explaining that any constitutional right to privacy is "outweighed by the need to protect the freedom of religion of denominational hospitals."[17] After all, for some providers, to the degree that they participate in abortion procedures, such participation is moral complicity that violates their core beliefs.

The Church Amendment specifies only one penalty for its violation: a loss of federal funding. Consequently, the Church Amendment can only be enforced by the U.S. Department of Health and Human Services (DHHS). A New York court confirmed this in January 2010. Nurse Catherina Lorena Cenzon-DeCarlo declared that, as a practicing Roman Catholic, she held strong religious beliefs against abortion. But in May 2009, Mt. Sinai forced Cenzon-DeCarlo to participate in the abortion of a 22-week fetus.[18] Otherwise, Mt. Sinai would charge her with "insubordination and patient abandonment." Indeed, when Cenzon-DeCarlo later complained and pursued internal grievance procedures, Mt. Sinai reduced her shifts. But Cenzon-DeCarlo's federal lawsuit was quickly dismissed. The U.S. District Court held that even if Mt. Sinai violated the Church Amendment, that law confers no private right of action.[19] In February 2010, Cenzon-DeCarlo filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit.

Coats and Weldon Amendments

More than two decades after enacting the Church Amendment, Congress enacted additional conscience clause legislation: the Coats Amendment in 1996[20] and the Weldon Amendment in 2005.[21] These two statutes more broadly prohibit both the government and recipients of government funding from discriminating against providers who refuse to participate in any training or health service on the basis of moral convictions.[22] So, notwithstanding requirements of the Accreditation Council for Graduate Medical Education (ACGME), obstetrics/gynecology residency programs are able to be accredited, even though they might refuse to train in abortion-related services.[23]

DHHS Regulations

On 19 December 2008, the DHHS published regulations interpreting and enforcing the Church, Coats, and Weldon Amendments.[24] These regulations prohibit federal funding to health entities that do not accommodate workers who refuse to provide health services or information (including not only abortion, but also virtually any health service) because of objections on moral or religious grounds. The DHHS regulations went into effect on 20 January 2009.[25]

The attack on these regulations was both swift and broad. The attorneys general of seven states filed a lawsuit challenging the constitutionality of the regulations.[26] Legislators introduced bills to repeal the regulations.[27] And even DHHS itself announced its intent to rescind (or at least modify) the regulations and solicited public comments to inform its evaluation.[28] But notwithstanding this three-pronged attack, the regulations are still in force. Indeed, in July 2009, President Obama confirmed that he "still favors a 'robust' federal policy protecting health-care workers who have moral objections to performing some procedures."[29] Later, in his September 2009 address to Congress on healthcare reform legislation, President Obama stated that the "federal conscience laws would remain in place."[30]

Patient Protection and Affordable Care Act

On 23 March 2010, President Obama signed the Patient Protection and Affordable Care Act (PPACA).[31] This legislation provides that "qualified health plans" do not need to provide abortion coverage.[32] It further provides that no individual provider or facility may be discriminated against because of a willingness or unwillingness to perform an abortion based on religious or moral beliefs.[33] But the law is carefully qualified in several respects, by: (1) not pre-empting state law,[34] (2) not changing other federal law,[35] (3) not changing Title VII,[36] and (4) not changing EMTALA (the Emergency Medical Treatment and Active Labor Act).[37] So, for example, a conscientiously objecting provider might still be obligated to provide abortion-related services pursuant to legal obligations independent of the PPACA.

State Law

Quickly following the 1973 Church Amendment, almost every state enacted its own abortion conscience law.[38] Today, 46 states provide protection to individual providers.[39] Almost as many states provide protection to institutions. But sometimes institutional conscience protection is limited only to private or even only to religious hospitals.[40] Very few states provide conscience clause protection to insurance companies, meaning that employers and payers generally must provide coverage even for those medical services that they oppose.[41]

But over the past two years, many states have been looking to expand abortion conscience protections. For example, two New York bills propose to amend current law so that providers may not only refuse to perform or assist in abortion, but also "refuse to refer a person for such abortion, or refuse to provide information about such abortion."[42] Similar bills are pending in Illinois,[43] Florida,[44] and North Carolina.[45]

ABORTION: DUTY TO PROVIDE

While laws protecting conscientious objection to abortion are extensive, there are certainly limits to the scope of such protection. There are three notable examples. First, conduct that is only tangentially related to the actual abortion procedure is less likely to be covered by a conscience clause. Second, institutions, especially non-religious institutions, have been afforded less protection. Third, international human rights bodies have been pushing European countries to limit conscientious objection rights to ensure patients' access to abortion services.

Tangential Services

While healthcare providers need not provide abortion services themselves, there has been some uncertainty over just how far that protection reaches. A number of cases, especially from Illinois, have been brought by healthcare workers who claimed employment discrimination after they were fired for refusing to provide a service "related" to an abortion.[46]

For example, Faith Moncivaiz, a county health department employee in Illinois, was denied a promotion because she refused to translate information on abortion options into Spanish.[47] Stephanie Adamson, an Illinois emergency medical technician, was fired for refusing to drive a woman to an abortion clinic.[48] A Mrs. Spellacy, a part-time admissions clerk, was fired because she refused to type up lab and admissions forms for abortion patients.[49] And Elaine Tramm, a hospital instruments aide, was fired because she refused to clean the tools that were used to perform an abortion.[50] It is doubtful that the employers' conduct in these four cases constitutes religious discrimination in violation of state or federal laws.

Individual versus Institutional Refusal

Another example of limiting conscientious objection protection involves actions by institutions, as opposed to individual providers. In 2008, the Constitutional Court of Columbia held that conscientious refusal is a right enjoyed by human beings, not by institutions. Five separate healthcare facilities had declined to provide an abortion to a 13-year-old rape victim. The court awarded compensation to the victim, holding that hospitals whose physicians object to undertaking procedures on conscience grounds must have means to accommodate the patient.[51] The Constitutional Court also required that individual providers who invoke conscientious objection must be subject to "review." This is necessary to determine whether the objection is legitimately founded on observance of a recognized religion, as opposed to bias or invidious discrimination.

International Human Rights

International human rights bodies have expressed increasing concern that some countries' conscientious objection laws overly restrict women's access to important healthcare services. For example, in 2008, the European Court of Human Rights condemned Poland and ordered the government to pay 25,000 Euros to a severely myopic woman who was denied a therapeutic abortion and was predictably injured from childbirth.[52] A year earlier, in 2007, the parents of a severely disabled child won a judgment from the Polish Supreme Court against a physician who denied them a medically indicated prenatal genetic diagnosis.[53]

In 1999, the Committee on the Elimination of Discrimination against Women (CEDAW), a United Nations treaty monitoring body, urged, "if health service providers refuse to perform [healthcare] services based on conscientious objection, [then] measures should be introduced to ensure that women are referred to alternative health providers."[54] In 2008, the CEDAW reported to Slovakia that the committee "is deeply concerned about the regulation of the exercise of conscientious objection by health professionals with regard to sexual and reproductive health." The CEDAW recommended that Slovakia introduce measures to "ensure that women's access to health and reproductive health is not limited."[55]

CONTRACEPTION: RIGHT TO REFUSE

While almost every U.S. state protects conscientious objection with respect to abortion, far fewer protect healthcare providers' rights to refuse to provide contraception.[56] Still, legislative activity grew significantly in the mid-2000s. This growth was driven largely by the sale of emergency contraception, also known as "Plan B" or the "morning-after pill."[57] Emergency contraception works up to 72 (although most effectively up to 24) hours after unprotected sex, through stopping ovulation or through decreasing the chances of fertilization. But many providers consider emergency contraception to be an abortifacent because it can also work by preventing an already fertilized egg from implanting into the uterine lining.[58]

Louisiana

In 2005, nurse Toni Lemly informed the hospital administration at St. Tammany Parish Hospital that she objected to administering the morning-after pill because of her religious beliefs. The hospital declined several accommodations suggested by Lemly that might have enabled the facility to continue administering the pill while allowing her to abstain from dispensing it herself. Instead, St. Tammany fired Lemly from her full-time position and reduced her to part-time status, causing a reduction in her pay and the loss of employee benefits. Lemly sued the hospital in 2005. In January 2007, the court denied the hospital's motion for summary judgment.[59] In 2008, the Louisiana Supreme Court affirmed that order in favor of nurse Lemly.[60]

Missouri

In 2010, a Missouri bill was introduced that would extend conscience protection to pharmacies with respect to those drugs that might be considered abortifacients. "No licensed pharmacy in this state shall be required to perform, assist, recommend, refer to, or participate in any act or service in connection with any drug or device that is an abortifacient, including but not limited to the RU486 drug and emergency contraception such as the Plan B drug."[61]

New York

New York is considering an even broader bill that would cover even "regular" contraception. "When providing a person with any form of assistance or information about contraception or contraceptive devices (including condoms or other items that are dispensed, discussed or demonstrated as part of any program to prevent the spread of disease) is contrary to the conscience or religious beliefs of any person, he or she may refuse to provide such assistance or information, or refuse to refer a person for such assistance or information." The bill further provides that "no public or private human services or health care agency, hospital, person, firm, corporation or association shall discriminate against the person so refusing to act."[62]

Wisconsin

A few state laws (as well as the Missouri and New York bills described above) permit objecting providers to refuse not only participation, but also information and referrals concerning contraception. But the majority of states, like Wisconsin, make the right to conscientiously object conditional on helping the patient get a substitute provider.

These referral/transfer conditions were recently applied and upheld in a series of related actions in Wisconsin. In 2005, the Wisconsin Pharmacy Examining Board disciplined Kmart pharmacist Neil Noesen, a devout Roman Catholic, for refusing either to refill Amanda Renz's prescription for oral contraceptives or to transfer the prescription to Walmart.[63] In 2008, the Wisconsin Court of Appeals upheld the board's action, holding that while Noesen had the right to refuse to fill the prescription, he had engaged in "unprofessional conduct" in refusing to transfer the prescription to a different pharmacy.[64] Later, after being fired from a subsequent job, Noesen sued that employer under Title VII. But he lost that case too, because the employer had done all that was required, by offering Noesen reasonable accommodations.[65]

CONTRACEPTION: DUTY TO PROVIDE

While some laws permit conscientious refusal, others mandate providers' compliance.[66] New Jersey law, for example, bars pharmacies from refusing to fill prescriptions for drugs or medical devices based on employees' philosophical, moral, or religious objections.[67] Many other states mandate the provision of emergency contraception, especially in cases of sexual assault.[68]

Illinois

On 1 April 2005, then-Illinois Governor Rod Blagojevich filed an "Emergency Rule" that required all pharmacies to dispense contraceptives without delay upon receipt of a valid prescription.[69] Blagojevich explained, "Pharmacists — like everyone else — are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their customers."[70]

This Emergency Rule was challenged by individual pharmacists, who were suspended by Walgreens for refusing to comply with the law. The pharmacists alleged that the rule was insufficiently accommodating of their religious beliefs.[71] After a federal court held that the plaintiffs had stated valid claims, the state agreed to enforce the rule only against pharmacies, rather than against individual pharmacists.[72] But that too was challenged. In December 2008, the Illinois Supreme Court held that two pharmacies had stated valid claims under the Illinois Health Care Right of Conscience Act[73] and remanded the case for further proceedings.[74] On remand, in 2009, the trial court issued a temporary restraining order forbidding the state from forcing the plaintiff pharmacies to dispense emergency contraception.[75]

A bill now pending in the Illinois legislature would impose a duty to deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration (FDA). If that is not possible, then the bill would require the pharmacy either to return the unfilled prescription or to transmit it to a pharmacy of the patient's choice.[76]

Washington

In April 2007, the Washington State Board of Pharmacy promulgated rules requiring pharmacies to deliver all lawfully prescribed FDA-approved medications.[77] Under these rules, an individual pharmacist could refuse only if another pharmacist was available to fill the prescription. In July 2007, just before the regulations were to become effective, a pharmacy and several individual pharmacists filed a lawsuit alleging that the regulations violated their constitutional rights.

In November 2007, the U.S. District Court for the Western District of Washington preliminarily enjoined the rules after finding that they likely violated the First Amendment. But in July 2009, the U.S. Court of Appeals for the Ninth Circuit reversed that decision, holding that the district court should have applied a more deferential standard of review. Since the rules were neutral, generally applicable, and did not target religious practices, preferences, or beliefs, the district court should have applied "rational basis" rather than "strict scrutiny" review.[78] In other words, the trial court should not have demanded that the law be justified by a "compelling state interest" and that it be narrowly tailored to achieve that interest. Instead, it should have upheld the law so long as it was "rationally related" to a legitimate government interest. The case is back in the U.S. District Court, and a hearing on the state's motion for summary judgment is scheduled for 23 April 2010.

Missouri

In Missouri, the proposed Birth Control Protection Act provides that "upon receipt of a valid and lawful prescription or upon a lawful request for contraception approved for over-the-counter use, a licensed pharmacy shall dispense the prescribed drug or device without delay, consistent with the normal time frame for filling any other prescription." If the prescribed drug or device is not in stock, then the pharmacy must offer the customer the option of (1) "having the pharmacy obtain the contraception under the pharmacy's standard procedures for expediting ordering of any drug or device not in stock" or (2) locating "another pharmacy of

the customer's choice or closest pharmacy that has the drug or device in stock and transfer the customer's prescription to that pharmacy."[79]

Duty to Fill Prescriptions

Illinois, Missouri, and Washington have not been the only states to enact or to explore enacting laws imposing "duty to provide" obligations on pharmacists and pharmacies.[80] For example, an Oklahoma bill requires that pharmacists "shall dispense any prescription contraceptive drug or device." And, like the Missouri bill, if the drug or device is not in stock, then the pharmacy must either order it or transfer the prescription.[81] A New York bill provides that if a product is in stock and a pharmacist employed by a pharmacy refuses, on the basis of a personal belief, to fill a valid prescription for such product, then the pharmacy must either (1) ensure that the prescription is filled by another employed pharmacist or (2) transfer the prescription.[82]

Duty to Provide Insurance Coverage

A majority of states require prescription drug coverage to include contraceptives. But many of these laws include broad conscience clauses. A number of recent state bills mandate the insurance coverage of contraceptives. Typically, these bills provide that if a plan already covers prescription drugs, then it must also cover contraceptives. Such bills are now pending in Illinois,[83] North Carolina,[84] Oklahoma,[85] Pennsylvania,[86] and South Dakota.[87]

France

In 1995, two pharmacists in the small French town of Salleboeuf were convicted of violating the Consumer Code for refusing to fill prescriptions for contraceptives. The pharmacists challenged their convictions as inconsistent with their conscience rights under Article 9 of the European Convention of Human Rights. But in 2001, the European Court of Human Rights upheld the convictions, ruling that pharmacists could manifest their religious conviction in ways other than in the "professional sphere" by refusing to fill prescriptions for contraceptives.[88] Since then, the court has continued to interpret conscience rights narrowly. For example, in late 2009, the court found no conscientious objection protection for an Armenian Jehovah's Witness who refused to perform military service.[89]

STERILIZATION: RIGHT TO REFUSE

Just as the federal Church Amendment protects conscientious objection relating to abortion, it also protects conscientious objection relating to sterilization. The Church Amendment prohibits government entities from requiring individuals or entities to perform sterilizations. And it prohibits entities from discriminating against individuals based on their willingness to perform sterilizations. But at the state level, conscience protection for sterilization is far more limited than it is for abortion. Only 16 states allow individual providers to refuse to perform sterilizations. Only 15 states permit institutions to refuse.[90]

END-OF-LIFE MEASURES: RIGHT TO REFUSE

While the bulk of legal activity on conscientious objection still concerns reproduction, there have been important recent legal developments concerning conscientious objection to end-of-life measures. Attention has been fueled, in no small part, by the November 2009 directive of the U.S. Conference of Catholic Bishops. The directive states that Roman Catholic health facilities have "an obligation to provide patients with . . . medically assisted nutrition and hydration" even when they are in "chronic and presumably irreversible conditions."[91]

State Healthcare Decisions Acts

Every state has a healthcare decisions act providing standards both for advance directives and for surrogate decision making. Almost every one of these statutes includes a provision that allows healthcare providers to refuse end-of-life treatment to which they have conscientious objections.[92] For example, 10 states have healthcare decisions statutes modeled on the Uniform Healthcare Decisions Act.[93] These statutes specify that a "healthcare provider may decline to comply with an individual instruction or healthcare decision for reasons of conscience."[94] And they give providers civil, criminal, and disciplinary immunity for exercising such a refusal.[95]

Typically, the right to refuse is conditional, such that a patient's right outweighs a provider's conscience protection[96] unless or until a patient can be transferred.[97] This is a significant limitation in the context of medical futility disputes. Indeed, it is the same limitation imposed on providers' rights to refuse life-sustaining treatment for professional reasons. The right to refuse (on either conscience or professional grounds) can often be implemented only through transferring a patient. Unless the transfer can be accomplished, there is effectively no right to refuse treatment.[98]

Patient Self-Determination Act

Recognizing the widespread implementation of conscientious objection in state law, the federal Patient Self-Determination Act states, "Nothing in this section shall be construed to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which as a matter of conscience cannot implement an advance directive."[99]

Patient Protection and Affordable Care Act

The healthcare reform legislation enacted in March 2010 provides that healthcare workers may not be discriminated against because of their refusal to provide assisted suicide, euthanasia, or mercy killing. The law defines these three interventions as excluding pain treatment and withholding or withdrawing medical interventions, including artificial nutrition and hydration.[100]

New York

On 16 March 2010, New York Governor David Patterson signed the Family Health Care Decisions Act (FHCDA). The FHCDA effects broad changes to New York law on treatment decisions for incapacitated hospital and nursing home patients.[101] The FHCDA provides that "nothing in this Article shall be construed to require . . . a healthcare provider to honor a health care decision made pursuant to this Article if (A) the decision is contrary to the individual's sincerely held religious beliefs or sincerely held moral convictions; and (B) the . . . provider [informs the decision maker and the hospital and] cooperate[s] in facilitating such transfer."[102]

A separate and still-pending New York bill provides, "when providing a person with any form of assistance or information relating to life-sustaining medical treatment is contrary to the conscience or religious beliefs of any person, he or she may refuse to provide such assistance or information, or refuse to refer a person for such assistance or information." Furthermore, "no public or private human services or health care agency, hospital, person, firm, corporation or association shall discriminate against the person so refusing to act."[103]

Washington and Oregon

Oregon's well-known Death with Dignity Act provides that no provider has any duty to participate in physician-assisted suicide.[104] The physician's only obligation is to transfer the patient's records to a new provider. When the Washington State Death with Dignity Act came into force last year, it closely copied the language in Oregon's conscience clause.[105]

Wisconsin

Most conscientious objection rights require the objecting provider to at least inform the patient about the objectionable treatment and arrange a transfer or referral. But some states have been moving toward authorizing more categorical rights to refuse.[106] For example, in 2003, both chambers of the Wisconsin Legislature passed a bill that would allow providers to ignore a patient's do-not-resuscitate (DNR) order and advance directive to forgo the use of a feeding tube.[107] But in 2004, Governor Jim Doyle vetoed the bill because it did not require providers to give a referral or even inform the patient that a certain treatment option might exist.[108] In 2005, the legislature passed very similar legislation.[109] The governor again vetoed it for substantially similar reasons. In 2006, the legislature was unable to override the veto.

New Mexico

Sometimes providers claim a conscience right when they actually have non-conscience-based reasons for refusing treatment. In the early 2000s, the New Mexico Orthopedic Surgery Center had patients sign a consent form acknowledging that the center would not honor their advance directive. The center claimed that this was for reasons of conscience. But it produced no policy or mission statement substantiating any such a commitment. In February 2006, the center dropped its waiver policy in settlement of a lawsuit filed by the American Civil Liberties Union on behalf of Harold Folley.[110]

United Kingdom

The General Medical Council (GMC) is the regulatory agency that licenses and registers physicians in the U.K. In May 2010, the GMC published *Treatment and Care towards the End of Life: Good Practice in Decision Making.* This "Guidance," which takes effect on 1 July 2010, requires that providers with conscientious objections comply with decisions to continue or stop treatment until a transfer has been arranged.[111]

FERTILITY, HIV, VACCINES, COUNSELING

In contrast to abortion, contraception, and end-of-life measures, there have been substantially fewer legal developments concerning conscientious objection to other medical interventions.[112] For example, general obligations to provide sexually transmitted disease (STD) and HIV (human immunodeficiency virus) counseling typically include no conscience exception.[113] But there is concern that providers may increasingly refuse to provide other healthcare services.

For example, some may not recommend chicken pox or rubella vaccinations because they were originally produced using fetal tissue cultures.[114] Animal rights supporters may refuse to provide xenotransplantation.[115] Some providers may refuse to provide terminal sedation.[116] Others may refuse to perform male circumcision.[117] A few may refuse to provide genetic screening because of the risk of abortion. Some may decline to fill a prescription for an AIDS (acquired immunodeficiency syndrome) drug, claiming that the patient has practiced an "immoral" life-style.[118] And others may refuse to provide therapies that were developed with embryonic stem cells.[119]

Fertility Treatments

In San Diego, physicians refused to provide Guadalupe Benitez with certain fertility treatments. Their moral and religious opposition derived not (as in the case of most conscientious objection) from the nature of the procedure itself. They had no problem with providing fertility treatments. Instead, the providers' objections were patient-specific. They did not want to provide the treatments to Benitez because she was a single woman and a lesbian.[120]

In 2008, the California Supreme Court held that the physicians' First Amendment rights to free speech and free exercise of religion did not exempt them from complying with the state's civil rights act. The court held that California's Unruh Civil Rights Act[121] furthered a compelling interest in ensuring full and equal

access to medical treatment irrespective of sexual orientation, and that there were no less-restrictive means to achieve that goal. In late 2009, the parties settled the lawsuit for an undisclosed sum.[122]

Counseling

In March 2010, the U.S. District Court in Detroit denied a motion for summary judgment by Eastern Michigan University (EMU) in a lawsuit brought by a former graduate counseling student, Julea Ward. In 2009, EMU dismissed Ward from its counseling program for expressing her Christian beliefs opposing homosexual conduct.[123] Ward alleged that, in violation of her First Amendment rights, EMU officials retaliated against her for expressing her religious beliefs.

COMPREHENSIVE LAWS: RIGHT TO REFUSE

Most conscientious refusal laws are limited to specific types of providers and to specific types of procedures. But some are broad enough to cover many or all types of services.[124] Mississippi's Health Care Rights of Conscience Act, for example, covers "any phase of patient medical care, treatment or procedure," including referral and counseling.[125] Furthermore, the act applies to all types of health service providers, as well as to payers and institutions. Other states have been developing similar legislation.

Idaho

In March 2010, Idaho enacted a new law that extends conscience protection to any healthcare worker refusing, on moral grounds, to "counsel, advise, perform, dispense, assist in or refer" someone for a healthcare service.[126] "Healthcare service" is broadly defined as including "abortion, dispensation of an abortifacient drug, human embryonic stem cell research, treatment regimens utilizing human embryonic stem cells, human embryo cloning or end of life treatment and care." Moreover, the healthcare worker is not professionally obligated to help the individual find another provider, except in life-threatening situations.

Louisiana

In 2009, the Louisiana legislature enacted a measure designed to protect all types of healthcare workers to refuse services based on their religious beliefs or moral convictions. Covered services include "abortion, dispensation of abortifacient drugs, human embryonic stem cell research, human embryo cloning, euthanasia, or physician-assisted suicide."[127] But healthcare facilities must have sufficient staff to provide patient care in the event that an employee declines to participate in any healthcare service that violates his or her conscience.

Oklahoma

In April 2010, Oklahoma enacted its Freedom of Conscience Act. This statute permits any provider or facility to refuse to "perform, practice, engage in, assist in, recommend, counsel in favor of, make referrals for, prescribe, dispense, or administer drugs or devices or otherwise promote or encourage" certain healthcare services.[128] Those services include (1) abortion, (2) procedures related to destruction of an in vitro human embryo, (3) procedures on a fetus in an artificial womb that is not related to the beneficial treatment of the fetus, (4) procedures involving fetal tissue or organs that come from a source other than a stillbirth or miscarriage, and (5) procedures that cause the death of an individual by assisted suicide, euthanasia, or mercy killing.

Washington

A Washington bill proposes similarly broad conscience protection. "No physician or health care personnel . . . shall be civilly or criminally liable . . . by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer, or participate in any way in any particular form of health care service that is contrary to the conscience of such physician or health care personnel."[129]

Europe

The European Parliament has recommended that its member states ensure that conscientiously objecting providers refer patients to non-objecting providers.[130] In the other branch of the European Union legislature, the Council of Europe, some members moved that member states develop oversight frameworks for conscientious objection, to ensure that women are referred to equivalent practitioners in a timely manner.[131] The Committee on Equal Opportunities for Women and Men held an "exchange of views" in October and November 2009. It plans to consider the report in June 2010.[132]

CONCLUSION

Several U.S. states (and many nations) are taking dramatically different approaches to conscience clauses and conscientious objection. Some jurisdictions mandate the participation of healthcare providers. Several impose a categorical duty to provide treatment. Some mandate participation only when no other provider is available. In contrast, other jurisdictions authorize conscientious objection, usually so long as the provider makes a transfer or referral. But some jurisdictions categorically authorize refusal with no strings attached. Moreover, all of the above laws not only vary materially, but also are in a state of flux.

In short, conscientious objection is still an unsettled area of bioethics. And it remains very active as the U.S. Congress, U.S. state legislatures, agencies, courts, professional associations, and the broader society struggle to strike the best balance between providers' rights and patients' rights. No solution will totally satisfy everyone. But while burdens on a patient's access and a provider's conscience cannot be eliminated, they can and should be mitigated, to the extent possible.

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NOTES

1. The concept of "conscientious objection" dates at least to the 1948 Universal Declaration of Human Rights. Article 18 states, "Everyone has the right to freedom of thought, conscience, and religion. . . ." *http://www.un.org/en/documents/udhr/index/shtml*, accessed 17 April 2010.

2. F.A. Chervenak and L.B. McCullough, "Professional Responsibility and Individual Conscience: Protecting the Informed Consent Process from Impermissible Bias," *The Journal of Clinical Ethics* 19, no. 1 (Spring 2008): 24.

3. Particularly useful resources tracking this issue include (1) the National Women's Law Center, *http://www.nwlc.org*, accessed 17 April 2010; (2) NARAL Pro-Choice America, *http://www.prochoiceamerica.org/choice-action-center/in_your_state/bill-tracker*, accessed 17 April 2010; (3) the Guttmacher Institute, *http://www.guttmacher.org/statecenter*, accessed 17 April 2010; (4) the National Conference of State Legislatures, *http://www.ncsl.org*, accessed 17 April 2010; (5) the Protection of Conscience Project, *http://www.consciencelaws.org*, accessed 17 April 2010; and (6) Americans United for Life, *Defending Life 2009*, ed. D.M. Burke (Washington, D.C.: Americans United for Life, 2009). Two thorough legal treatments of the issue are: R.K. Vischer, *Conscience in the Common Good: Reclaiming the Space Between Person and State* (New York: Cambridge University Press, 2010); H.F. Lynch, *Conflicts of Conscience in Health Care: An Institutional Compromise* (Boston: MIT Press, 2008). A source that examines the health impact of conscientious objection is National Health Law Program, *Health Care Refusals: Undermining Quality Care for Women* (Los Angeles: NHeLP, 2010).

4. The focus of this article is on the conscience rights of healthcare *providers*. Outside its scope are new issues concerning the conscience rights of *patients*, such as the right to refuse vaccinations or the right to

decline "minimum essential coverage." N. Berlinger, "Conscience Clauses, Health Care Providers, and Parents," in *From Birth to Death and Bench to Clinic: The Healthcare Briefing Book for Journalists, Policymakers, and Campaigns* (Garrison, N.Y.: Hastings Center, 2007): 35-40; H.R. 3590 (2009) §§ 1501 & 10106, *codified at* 26 *U.S.C.* § 5000A(d)(2)(A). Also outside the scope of this article is analysis of the legality of morally controversial medical interventions. The focus is on the ability of an individual provider to refuse a legal medical service.

5. Most laws protect "negative claims of conscience," in that they authorize healthcare providers to *refuse* to provide a service that might otherwise be required. Conscience clause laws rarely protect "positive claims of conscience," in that they do not authorize providers to *provide* services that would otherwise be prohibited. M.R. Wicclair, "Negative and Positive Claims of Conscience," *Cambridge Quarterly of Healthcare Ethics* 18 (2009): 14. But this distinction can be ambiguous due to problems of individuation. For example, a Roman Catholic facility might refuse to withdraw a feeding tube. But that refusal could also be characterized as the affirmative provision of treatment.

6. N.T. Morton & K.W. Kirkwood, "Conscience and Conscientious Objection of Health Care Professionals Refocusing the Issue," *HEC Forum* 21, no. 4 (2009): 351.

7. This is the definition used by the U.S. Equal Employment Opportunity Commission (EEOC). 29 *C.F.R.* § 1605.1 ("the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.").

8. *Swanson v. St. John's Lutheran Hospital*, 597 P.2d 702 (Mont. 1979).

9. Committee on Bioethics, "Physician Refusal to Provide Information or Treatment on the Basis of Claims of Conscience," *Pediatrics* 124, no. 6 (2009): 1689.

10. *Welsh v. United States*, 398 U.S. 333, 342-43 (1970). Courts have found that mere personal preference is not sufficient. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980); *Free v. Holy Cross Hospital*, 505 N.E.2d 1188 (Ill. App. 1987).

11. Joint Commission, *2010 Comprehensive Accreditation Manual for Hospitals: the Official Handbook* (Oak Ridge, Ill.: Joint Commission, 2010), § HR-01.01.01; B.M. Dickens, "Conscientious Objection and Professionalism," *Expert Reviews in Obstetrics and Gynecology* 4, no. 2 (2009): 97. Dickens contrasts the International Covenant on Civil and Political Rights Article 18(1), that grants the "freedom of thought, conscience and religion," with Article 18(3) that subjects such freedom "to such limitations as . . . are necessary to protect public safety . . . or the fundamental rights and freedoms of others." B.M. Dickens, "Legal Protection and Limits of Conscientious Objection: When Conscientious Objection Is Unethical," *Medicine and Law* 28 (2009): 337. Unless a conscience clause permits, physicians typically have a duty not only to refer but also to provide informed consent. For example, an objecting provider may be obligated to disclose the risks from not having an abortion. *Thomas v. Abdul-Malak*, No. 02-1374 (W.D. Pa. 29 July 2004).

12. R.E. Lawrence and F.A. Curlin, "Physicians' Beliefs about Conscience in Medicine: A National Survey," *Academic Medicine* 84 (2009): 1276; D.B. Stulberg et al., "Religious Hospitals and Primary Care Physicians: Conflicts over Policies for Patient Care," *Journal of General Internal Medicine* (published online 6 April 2010): DOI 10.1007/s11606-010-1326-6.

13. Other federal laws also provide for conscientious objection. Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodations available for the religious practices of an employee unless doing so would create an undue burden in the workplace. 42 *U.S.C.* § 2000e-2. For example, it was sufficient that a hospital offered an emergency room nurse (objecting to emergency obstetrical procedures) a position in the neonatal intensive care unit, even if it was not a position that she wanted. *Shelton v. University of Medicine*, 223 F.3d 220 (3d Cir. 2000). It was sufficient that a hospital allowed a staff pharmacist to trade some, but not all, requested shifts because the hospital demonstrated that further accommodation would create an "undue hardship." *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982). In contrast, a Florida pharmacy failed to establish that accommodations for an Orthodox Jewish pharmacist would constitute an undue hardship. *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999). Similarly, a

Southern California jury awarded Michelle Diaz $50,000 after she was fired from a public health clinic for refusing to dispense emergency contraception. *Diaz v. County of Riverside Health Services*, No. 5:00-CV-00-936-VAP-SGL (C.D. Cal., 24 May 2002).

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

15. 42 *U.S.C.* 300a-7.

16. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973).

17. The bill's sponsor, Senator Frank Church (Idaho-D), was reacting not only to *Roe* but also to a federal court decision ordering a Roman Catholic facility to permit the use of its facilities to perform sterilizations. *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948 (D. Mont. 1973), aff'd 523 F.2d 75 (9th Cir. 1975).

18. *Cenzon-DeCarlo v. Mt. Sinai Hospital*, No. 09-CV-3120 RJD, 2010 WL 169485 (E.D.N.Y., 15 January 2010).

19. Notwithstanding the judgment of the U.S. District Court, Cenzon De-Carlo may still pursue other remedies that she is afforded under state law or under other federal statutes.

20. The Coats Amendment is also known as section 245 of the Public Health Services Act, 42 *U.S.C.* § 238n. It prohibits discrimination against individuals and entities that "refuse[] 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."

21. Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 508 (2009) (prohibiting federal funding to programs that discriminate against individuals or entities that do "not provide, pay for, provide coverage of, or refer for abortions"). The same language has been included in every appropriations bill since 2005. See, e.g., Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d), 118 Stat. 2809, 3163 (2004); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007).

22. The Weldon Amendment survived at least two court challenges. *Lockyer v. United States*, No. C-05-00328-JSW (N.D. Cal. 18 March 2008); *National Family Planning & Reproductive Health Ass'n v. Gonzales*, No. 04-CV-02148, 391 F. Supp. 2d 200 (D.D.C. 2005), *aff'd* 373 U.S. App. 346 (D.C. Cir. 2006). Other federal legislation: (1) protects state and federal corrections employees from participating in capital punishment, 18 *U.S.C.* § 3597(b); (2) prohibits requiring a Medicaid managed-care plan or a Medicare Choice plan to provide counseling or referral services if the organization objects on moral or religious grounds, 42 *U.S.C.* § 1396u-2, 42 *U.S.C.* § 1395w-22(j)(3)(B); and (3) prohibits requiring providers in the Federal Employees Health Benefit Plan from discussing treatment options inconsistent with their ethical, moral, or religious beliefs, 48 *C.F.R.* § 1609.7001(c)(7).

23. A.M. Foster et al., "Educational and Legislative Initiatives Affecting Residency Training in Abortion," *Journal of the American Medical Association* 290, no. 13 (2003): 1777.

24. DHHS, "Proposed Rule: Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," 73 *Fed. Reg.* 50,274 (26 August 2008).

25. DHHS, "Final Rule: Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," 73 *Fed. Reg.* 78,072 (19 December 2008).

26. *Connecticut v. United States*, No. 3:09-CV-00054-RNC (D. Conn. filed 15 January 2009); *National Family Planning & Reproductive Health Association v. Leavitt*, No. 3:09-CV-00055-RFD (D. Conn. filed 15 January 2009); *Planned Parenthood of America, Inc. v. Leavitt*, No. 3:09-CV-00057-RNC (D. Conn. filed 15 January 2009).

27. Protecting Patients and Health Care Act of 2009, H.R. 570, 111th Cong. (2009); Midnight Rule Act, H.R. 34, 111th Cong. (2009). In the previous congressional session, Senator Hilary Clinton (New York-D) introduced the Protecting Patients and Health Care Act, S.20, 110th Cong. (2008). A companion bill was introduced in the House. H.R. 7310, 110th Cong. (2008).

28. DHHS, "Proposed Rule: Rescission of the Regulation Entitled 'Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of

Federal Law'; Proposal," 74 *Fed. Reg.* 10,207 (10 March 2009).

29. J. Salmon, "Obama Reaches out before Vatican Trip," *Washington Post*, 3 July 2009.

30. "Remarks by the President to a Joint Session of Congress on Health Care," 9 September 2009, *http://www.whitehouse.gov/the-press-office/remarks-president-a-joint-session-congress-health-care*, accessed 17 April 2010.

31. H.R. 3590 (2009), *enacted as* Pub. L. No. 111-148 (2010).

32. H.R. 3590 § 1303(a)(1)(A).

33. H.R. 3590 § 1303(a)(3). An Executive Order issued at the same time as the passage of H.R. 3590 states: "Under the Act, longstanding Federal laws to protect conscience (such as the Church Amendment, 42 *U.S.C.* 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." Executive Order No. 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," 75 *Fed. Reg.* 15,599 (24 March 2010).

34. H.R. 3590 § 1303(b)(1).

35. H.R. 3590 § 1303(b)(2).

36. H.R. 3590 § 1303(b)(3).

37. H.R. 3590 § 1303(c).

38. See, e.g., Alaska Stat. § 18.16.010(b); Ariz. Rev. Stat. § 36-2151; Ark. Code § 20-16-304; Cal. Health & Safety Code § 123420; Colo. Rev. Stat. § 18-6-104; Conn. State Agencies Regs. § 19-13-D54 (public health code); Del. Code tit. 24, § 1791; Fla. Stat. § 390.0111; Idaho Code Ann. § 18-612; 720 Ill. Comp. Stat. § 510/13; Mass. Gen. Laws ch.112 § 12I; N.J. Stat. Ann. §§ 25:65A-1 & 25:65A-2. The only states without protection are Alabama, Vermont, and New Hampshire. But New Hampshire now has a bill providing that "no medical personnel or medical facility, nor any employee, agent, or student thereof, shall be required against his or her or its conscience to aid, abet, or facilitate performance or an abortion or dispensing of an abortifacient." N.H. H.B. 1662 (2010) (Seidel).

39. Guttmacher Institute, "State Policies in Brief: Refusing to Provide Health Services," April 2010, *http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf*, accessed 17 April 2010. Individual providers are protected in every state except Alabama, New Hampshire, Vermont, and West Virginia. But the laws in the other 46 states are hardly uniform. They vary, for example, in terms of what notice the provider must give to an employer or patient.

40. Every state that provides a conscience refusal right to an individual provider also provides such a right to an institution, except Connecticut, New York, and Rhode Island. Guttmacher Institute, ibid. Traditionally, private secular hospitals have seldom been accorded institutional conscience rights. *Doe v. Bridgeton Hospital Association*, 366 A.2d 641 (N.J. 1976); *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997).

41. 305 Ill. Comp. Stat.§5/5-16.3(a); N.D. Cent. Code § 14-02.4-15.1; Tex. Ins. Code § 20A.09(m); Wash. Rev. Code § 48.43.065(2)(a).

42. N.Y. A.B. 2935 (2009) (Benjamin); N.Y. S.B. 4898 (2009) (Aubertine).

43. Ill. H.B. 2354, 96th Gen. Assembly (2009) (Currie) (conscience rights but with conditions of providing notice, disclosing options, and assisting in obtaining care). The Reproductive Health and Access Act prevents government interference, but would make no change to the Health Care Right of Conscience Act. Ill. H.B. 6205, 96th Gen. Assembly (2010) (Currie).

44. Florida H.B. 1096 (2010) (Van Zant) (proposing Fla. Stat. 390.01117(10))

45. N.C. H.B. 432 (2009) (Hilton) (extending protection from physicians to other healthcare providers); N.C. H.B. 432 (2009) (Hilton) (covering pharmacists and relating to the prescription of drugs that result in abortion which could include Plan B).

46. An extreme example of pushing the boundaries of conscience protection is a lawsuit in which students complained that their student fees were being used to subsidize abortion. *Erzinger v. Regents of the*

University of California, 187 Cal. Rptr. 164 (Cal. App. 1982).

47. *Moncivaiz v. DeKalb County Health Dept.*, No. 03-CV 50226, 2004 WL 539994 (N.D. Ill., 21 April 2004). The parties stipulated to dismiss after the trial court granted the defendants' motion to dismiss most of the claims. The county agreed to pay $40,000 without admitting to liability. "Woman Settles Discrimination Case against County Health Department," *AP Alert*, 27 May 2004.

48. *Adamson v. Superior Ambulance Service*, No. 04-CV-3247 (N.D. Ill., 17 January 2007) (dismissal).

49. *Spellacy v. Tri-County Hospital*, Equity No. 77-1788, 1978 WL 3437 (Pa. Com. Pl., 23 March 1978).

50. *Tramm v. Porte Memorial Hosp*., No. H-87-355 (N.D. Ind., 22 December 1989). While the court held that Tramm's duties fell outside the scope of the abortion conscience clause, it also held that she proved the ambulance company subjected her to an adverse employment action on the basis of her religious beliefs.

51. Decision T-209 of 2008 (Constitutional Court of Columbia); R.J. Cook et al., "Healthcare Responsibilities and Conscientious Objection," *International Journal of Gynecology and Obstetrics* 104 (2009): 249.

52. *Tysiac v. Poland*, No. 5410/03, ECHR 2007-IV.

53. A. Bodnar, "Case-law Concerning the Availability of Services for Terminating Pregnancy in Poland," in W. Nowicka, *Reproductive Rights in Poland: The Effects of the Anti-Abortion Law* (Warsaw: Federation for Women and Family Planning, 2008).

54. United Nations, Committee on the Elimination of Discrimination against Women, "General Recommendation No. 24, Article 12: Women and Health," A/54/38 (20th Session 1999).

55. CEDAW, "Concluding Observations to Slovakia," CEDAW /C/SVK/CO/4, paras. 28-29, 2008, *http://www2. ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SVK. CO.4.pdf*, accessed 17 April 2010. CEDAW had earlier issued similar recommendations to Croatia, Italy, and Poland. CEDAW, "Concluding Observations to Croatia," A/53/38, paras. 80-119, 14 May 1998, *http://www. unhchr.ch/tbs/doc.nsf/(Symbol)/f3bf31e8f207a44280256664004 ae43a?Opendocument*, accessed 17 April 2010; CEDAW, "Concluding Observations to Italy," A/52/38/Rev.1, Part II, paras.322-364, 8 December 1997, *http://www.unhchr. ch/tbs/doc.nsf/(Symbol)/39a6156c5dbe455380 25650000 5a9aa0?Opendocument*, accessed 17 April 2010; CEDAW, "Concluding Observations to Poland," C/POL/CO/6, 2 February 2007, *http://www.unhchr.ch/tbs/doc.nsf/898586b 1dc7b4043c1256a450044f331/799a794c841033bcc12572 a4003ca978/$FILE/N0724380.pdf*, accessed 17 April 2010.

56. Some contraceptive conscience clause statutes are broad. See, e.g., Ark. Code Ann. 20-16-304(4), Ariz. Stat. Ann. § 36-2154(B); Miss. Code Ann. § 41-107-3, S.D. Codified Laws § 36-11-70. Other statutes are more specific and conditional. See, e.g., Colo. Rev. Stat § 25-6-102, Fla. Stat. § 381.0051, Me. Rev. Stat. tit. 22, § 1903, Tenn. Code Ann. § 68-34-104. California, for example, requires that the worker provide notice. Cal. Bus. & Prof. Code § 733(b)(3). Some apply only to individual pharmacists. See, e.g., 49 Pa. Code § 27.103. Conscientious objection rights are also afforded by the "comprehensive laws" described below. In addition, they are afforded by pharmacy board regulations. See, e.g., Del. Code tit. 24, § 2500(3.1.2.4); Ga. Comp. R. & Regs. § 480-5-.03.

57. FDA, "Plan B: Questions and Answers," 14 December 2006, *http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109783.htm*, accessed 17 April 2010.

58. Emergency contraception is available without a prescription. But, like cigarettes, contraceptives are held behind the counter due to age restrictions. Emergency contraception is distinct from mifeprex (also known as mifepristone or RU-486), which is used to end an early pregnancy. Mifeprex is supplied directly to physicians and not to pharmacies. FDA, "Mifeprex Questions and Answers," 24 February 2010, h*ttp://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationfor PatientsandProviders/ucm111328.htm*, accessed 17 April 2010.

59. *Lemly v. St. Tammany Parrish Hospital District No. 1*, No. 2005-12411 (22nd Jud. Dist. Ct, La., 15 December 2006) (Order denying defendant's motion for summary judgment).

60. *Lemly v. St. Tammany Parish Hospital District No. 1*, 8 So. 3d 588 (La. 2009).

61. Mo. H.B. 1365, 95th Gen. Assembly, 2nd Sess. (2010) (Emery).

62. N.Y. A.B. 2935 (2009) (Benjamin); N.Y. S.B. 4898 (2009) (Aubertine).

63. In the Matter of the Disciplinary Proceedings Against Neil T.Noesen, LS-0310091-PHM (Wis. Pharmacy Examining Bd. 2004).

64. *Noesen v. Wisconsin Department of Regulation and Licensing, Pharmacy Examining Board*, 751 N.W.2d 385 (Wis. App. 2008).

65. *Noesen v. Medical Staffing Network, Inc*., 232 Fed. Appx. 581 (7th Cir. 2007). Healthcare workers must work with their employers to resolve conscientious objection conflicts. See, e.g., *Shelton v. University of Medicine and Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000).

66. Cal. Health & Safety Code § 1374.55; Cal. Ins. Code § 10119.6; Conn. Gen. Stat. §§ 19a-112e, 38a-471(f), 38a-503e & 38a-530e; Conn. Ag. Op. 2006-004 (2 March 2006); Haw. Rev. Stat. § 431:10A-116.6; 215 Ill. Cons. Stat. § 5/356z.4; Md. Health-Gen. Code § 19-701; Mont. Code Ann. § 33-31-102, R.I. Code §§ 27-18-30 & 27-41-33; Va Code Ann. § 38:2-2407.5; W. Va. Code Ann. § 33-25A-2; *Catholic Charities et al. v. Serio et al*., No. 8229-02 (N.Y. Sup. Ct., Albany County, 25 November 2003).

67. N.J. S.B. 1195 (2006), codified as N.J. Stat. Ann. § 45:14-67.1. Sometimes mandates apply to pharmacies. See, e.g., Cal. Bus. & Prof. Code § 733; Wis. Stat. Ann. § 450.095. Sometimes mandates apply to individual pharmacists. See, e.g., Nev. Admin. Code § 639.753; Me. Code § 02-392.

68. Cal. Penal Code § 13823.11(e) & (g)(4); Colo. Rev. Stat. § 25-3-110; 410; 410 Ill. Cons. Stat. § 70/2.2; Ill. Admin Code tit. 77, § 545; Mass. Gen. Laws ch. 111 § 70E; N.J. Stat. Ann. § 26:2H-12.6c; S.C. Code Ann. § 16-3-1350. The "Compassionate Assistance for Rape Emergencies (CARE) Act" would require the facility that provides emergency care to sexual assault victims to inform about emergency contraception and provide on request. Mo. S.B. 696 (2010) (Wright-Jones); Mo. H.B. 1914 (2010) (Oxford). Similar bills have been introduced in Congress. S. 21, 111th Cong., 1st Sess. (2009) (Reid, R-Nev.); H.R. 463, 111th Cong., 1st Sess. (2009) (Slaughter, R-N.Y.).

69. "Press Release: State Commission Gives Permanent Approval to Gov. Blagojevich's Emergency Rule Protecting Illinois Women's Right to Birth Control: Governor Applauds Timely JCAR Action," Illinois Office of the Governor, 16 August 2005. The emergency amendment became a permanent administrative rule on 25 August 2005. 68 Ill. Adm. Code § 1330.91(j).

70. "Press Release: STATEMENT FROM GOV. ROD BLAGOJEVICH In response to lawsuit filed by Pat Robertson's American Center for Law and Justice challenging Governor's Emergency Rule for Pharmacies," Illinois Office of the Governor, 13 April 2005, *http://www.illinois.gov/PressReleases*, accessed 17 April 2010.

71. *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006). The individual pharmacists in the federal case also filed state court actions against Walgreens. Other individual pharmacists also challenged their employers' enforcement of the state rule. *Vandersand v. Wal Mart Stores, Inc*., 525 F. Supp. 2d 1052 (C.D. Ill. 2007); *Nead v. Board of Trustees of Eastern Illinois University*, No. 05-2137, 2006 WL 1582454 (C.D. Ill. 2006).

72. J. Peres, "Morning After Pill Decision Reached," *Chicago Tribune*, 11 October 2007.

73. 745 Ill. Comp. Stat. 70/1 et seq.

74. *Morr-Fitz v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008).

75. "Illinois Can't Force Dispensing 'Morning-After' Pill," *Chicago Tribune*, 6 April 2009.

76. Ill. S.B. 2552, 96th Gen. Assembly (2010) (Martinez).

77. Wash. Admin. Code §§ 246-863-095 & 246-869-101.

78. *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

79. Mo. S.B. 696, 95th Gen. Assembly, 2nd Sess. (2010) (Wright-Jones); Mo. H.B. 1961, 95th Gen. Assembly, 2nd Sess. (Newman).

80. In 2008, California Assembly Member Nava introduced a bill that would require pharmacists to fill all legal prescriptions regardless of moral objections. Cal. A.B. 67 (2008) (Nava). While the bill is still pending, it has been amended to now address an unrelated issue.

81. Okla. S.B. 264, 52nd Legis. (2009) (Wilson).

82. N.Y. A.B. 8949 (2009) (Lifton); N.Y. S.B. 1521 (2009) (Duane).

83. 215 Ill. Cons. Stat. 5/356z.4.

84. N.C. H.B. 397 (2009) (Hilton).

85. Okla. S.B. 495, 52nd Legis., 2nd Sess. (2009) (Rice).

86. Pa. S.B. 406 (2009) (Leach).

87. S.D. H.B. 1156, 85th Sess. (2010) (Cutler).

88. *Pichon and Sajous v. France*, No. 49853/99, ECHR 2001-X.

89. *Bayatyan v. Armenia*, No. 23459/03, ECHR 2009.

90. Guttmacher, see note 39 above.

91. U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 5th edition, 7 November 2009, *http://www.usccb.org/meetings/2009Fall/docs/ERDs_5th_ed_091118_FINAL.pdf*, accessed 17 April 2010.

92. E.g., 20 Pa. Cons. Stat. § 5424.

93. N.M. Stat. Ann. §§ 24-7A-1 to -18; Me. Rev. Stat. Ann. §§ 5-801 to -817; Del. Code Ann. tit. 16 §§ 2501 to 2518; Ala. Code §§ 22-8A-1 to -13; Miss. Code Ann. §§ 41-41-201 to -229; Calif. Prob. Code §§ 4600 to 4806; Hawaii Rev. Stat. §§ 327E-1 to -16; Tenn. Code Ann. §§ 68-11-1801 to -1815; Alaska Stat. § 13.52; Wyo. Stat. §§ 35-22-401 to -416.

95. E.g., 16 Del. Code § 2508(e).

95. E.g., 16 Del. Code § 2510(a)(5).

96. *Bartling v. Superior Court*, 209 Cal. Rptr. 220 (1984); *In re Requena*, 517 A.2d 869 (N.J. Super A.D. 1986); *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988); *Elbaum v. Grace Plaza of Great Neck*, 544 N.Y.S.2d 840 (N.Y. App. Div. 1989); *In re Jobes*, 529 A.2d 434 (N.J. 1987). While some providers consider even a referral as complicity in the morally prohibited conduct, traditionally the provider has had to at least advise the patient. *Hummel v. Reiss*, 589 A.2d 1041 (N.J. Super. A.D. 1991); *Harbeson v. Parke-Davis*, 656 P.2d 483 (Wash. 1983).

97. *In re Morrison*, 206 Cal. App. 3d 304 (1988); *Brophy v. New England Sinai Hospital*, 497 N.E.2d 626 (Mass. 1986); *Delio v. Westchester County Medical Center*, 516 N.Y.S.2d 677 (N.Y. App. Div. 1987).

98. In some states, providers can refuse life-sustaining treatment after just *attempting* to transfer the patient. See, e.g., Cal. Prob. Code § 4736; Tex. Health & Safety Code 166.046; Va. Code § 54.1-2990.

99. 42 *U.S.C.* § 1396a(w)(3); 42 *C.F.R.* § 489.102(c)(2).

100. H.R. 3590 (2009) § 1553.

101. N.Y. A.B. 7729D (2009) (Gottfried); N.Y. S.B. 3164B (Duane), codified at N.Y. Pub. Health Law §§ 2994A to 2994U and §§ 2994AA to 2994GG.

102. N.Y. Pub. Health Law § 2994N. A hospital can also make conscientious objections if it has a "formally adopted policy" based on religious beliefs or moral convictions "central to the facility's operating principles."

103. N.Y. A.B. 2935 (2009) (Benjamin); N.Y. S.B. 4898 (2009) (Aubertine).

104. Ore. Rev. Stat. § 127.885(4).

105. Rev. Code Wash. § 70.245.190(d).

106. Miss. Code Ann. § 41-107-3.

107. Wis. A.B. 67 (2003) (Hundertmark).

108. Jim Doyle, Governor of Wisconsin, "Veto Message," 14 October 2005, *http://www.wiawh.org/media/documents/pdf/bills/AB207%20Veto%20Message.pdf*, accessed 17 April 2010.

109. Wis. A.B. 207 (2005) (Hundertmark).

110. ACLU, "Following ACLU of New Mexico Lawsuit, Surgical Center Agrees to Honor Patients' End-of-Life Wishes," 2 February 2006, *http://www.aclu.org/technology-and-liberty/following-aclu-new-mexico-lawsuit-surgical-center-agrees-honor-patients-end*, accessed 23 June 2010.

111. Guidance ¶ 79, *http://www.gmc-uk/static/documents/content/End_of_life.pdf*, accessed 23 June 2010.

112. Many of these other interventions would be covered by the "comprehensive laws" discussed below.

113. Colo. Rev. Stat. § 25-4-1405; Ind. Code § 16-41-14-10; N.Y. Pub. Health Law § 2781.

114. R. Stein, "Health Workers' Choice Debated," *Washington Post*, 30 January 2006, A01; Pontifical Academy for Life, "Moral Reflections on Vaccines Prepared from Cells Developed from Aborted Human Fetuses," *National Catholic Bioethics Quarterly* 6, no. 3 (2006): 541.

115. G.L. Francione, "Xenografts and Animal Rights," *Transplantation Proceedings* 22, no. 3 (1990): 1044.

116. F. Curlin et al., "Religion, Conscience, and Controversial Clinical Practices," *New England Journal of Medicine* 356, no. 6 (2007): 593.

117. British Medical Association, "The Law and Ethics of Male Circumcision: Guidance for Doctors," *Journal of Medical Ethics* 30, no. 3 (2004): 259.

118. M.N. Harrington, "The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle between Professional Duties and Moral Beliefs," *Florida State University Law Review* 34, no. 3 (2007): 779, 800.

119. R.A. Charo, "Health Care Provider Refusals to Treat, Prescribe, Refer, or Inform: Professionalism and Conscience," *Advance: Journal of the American Constitution Society* 1, no. 1 (2007): 119. Other patient-specific objections might include refusing to dispense erectile dysfunction drugs for convicted sex offenders. E.W. Evans, "Conscientious Objection: A Pharmacist's Right or Professional Negligence?" *American Journal of Health Systems Pharmacy* 64 (2007): 139.

120. *Benitez v. North Coast Women's Care Medical Group*, 44 Cal. 4th 1145 (2008).

121. Cal. Civil Code §§ 51-53.

122. G. Moran, "Lesbian's Suit over Procedure Is Settled," *San Diego Union Tribune*, 30 September 2009.

123. *Ward v. Board of Control of Eastern Michigan University*, No. 09-CV-11237, 2010 WL 1141605 (E.D. Mich., 24 March 2010). In a similar earlier case with a private employer, the court found that accommodating the counselor's aversion to certain topics was not required because it would constitute an undue burden. *Bruff v. Northern Mississippi Health Services*, 244 F.3d 495 (5th Cir. 2001).

124. Ariz. Rev. Stat. § 36-3205.

125. Miss. Code § 41-107-3.

126. Idaho S.B. 1353, 60th Legis., 2nd Sess. (2010) (Winder), codified at Idaho Code § 18-611.

127. La. H.B. 517 (2009), enacted as Act 372, codified at La. Rev. Stat. § 40:1299.35.9 (healthcare workers must [1] provide notice to employer and patient and [2] provide care legally required in emergency).

128. Okla. S.B. 1891, 52nd Legis., 2nd Sess. (2010) (Lamb), codified at Okla. Stat. tit. 63 § 1-728a.

129. Wash. H.B. 1687 (2010) (Shea).

130. European Union, European Parliament, "Resolution on Sexual and Reproductive Health and Rights," 2001.2128 (INI), 6 June 2002, A5-0223/2002, p. 9.

131. Parliamentary Assembly, Motion for Resolution: "Women's Access to Lawful Medical Care: the Problem of Unregulated Use of Conscientious Objection," Doc. 11757, 14 October 2008.

132. "Women's Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection," Motion 11757, Reference No. 3516, 26 January 2009, *http://assembly.coe.int/Main.asp?link=/committee/DocRef/SOC_E.htm*, accessed 17 April 2010.