ADVOCATES INTERNATIONAL

Doing Justice with Compassion

THE HEALTH CARE RIGHT OF CONSCIENCE

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I. INTRODUCTION

Today health care providers and insurers increasingly find that some health care practices implicate serious moral concerns. Social, legal and medical developments involving surgical and chemical [RU-486, Preven (the "morning after pill")] abortion, contraception, euthanasia, withdrawal of treatment or feeding on futility of treatment grounds, assisted suicide, blood transfusions, organ transplants, human subject research, sex-change surgery, embryonic stem cell research, cloning, pre-implantation genetic screening, vaccinations, autopsies and mandated health care insurance coverage laws have put health care providers, health care insurers, medical researchers and health care insurance plan participants in the vortex of some of society's most controversial moral dilemmas and "breath-taking" decisions.

At the same time, there is increasing legal and professional pressure on health care providers to put aside their moral beliefs in order to facilitate convenient access to these procedures. Deeply held moral or religious beliefs are seen as obstacles in the path of unlimited access to the new technologies for all who desire them. Health care workers are facing the possibility of their professional opportunities being limited when their moral convictions conflict with these so-called "health care mandates."

For example, Wisconsin pharmacist Neil Noesen was reprimanded by the Wisconsin Pharmacy Examining Board (WPEB) for refusing to sell contraceptives. Despite the fact that Article I, § 18 of the Wisconsin Constitution forbids the state "from any control of, or interference with, the rights of conscience," the Wisconsin Department of Regulation and Licensing initiated disciplinary proceedings against Mr. Noesen because, as a Catholic, he refused to fill the prescription or to transfer it to a pharmacy that would. The Wisconsin Department of Regulation and Licensing charged Noesen with engaging in pharmacy practice "which constitutes a danger to the health welfare, or safety of patient or public" and a refusal "to render professional services to a person because of race, color, sex, religion or age."[2] As part of its Law of Life Project, CLS' Center for Law and Religious Freedom defended Mr. Noesen in the administrative proceedings against him. The WPEB eventually found that Noesen did have a right of conscience but did not exercise it in a reasonable manner.[3] Efforts to enact a health care right of conscience act to protect pharmacists have to date failed in Wisconsin. Indeed, Wisconsin's governor in 2005 vetoed a bill that would have expanded health care rights of conscience for other health care providers.[4] Considering the failure of the legislative attempts to protect rights of conscience, judicial protection of these constitutional rights is the only remaining recourse in Wisconsin.

Mr. Noesen is not alone in his plight. In Alaska, the state supreme court has opined that private hospitals receiving state or federal funds must make their surgical suites available for the performance of elective abortions, due to their having become (according to state constitutional law) "quasi-public" institutions upon receipt of such funds. While the Court has not yet been directly presented with the question of whether religiously affiliated hospitals are encompassed by the ruling, statements in the opinion suggest that the ruling does apply to such hospitals.[5]

In Texas, a jury found a private hospital liable for an excess of $42 million for disregarding parental objections and providing life-sustaining care to an infant born after twenty-three weeks of gestation. The appellate court overruled the judgment of the trial court and the Supreme Court affirmed, holding that the hospital could not be held liable for treating the infant. The reasoning of the court was based on a narrow exception to the consent requirement for providing medical attention, but it holds in emergency situations that a hospital can provide life-sustaining care without consent of the parents. It cannot be held liable if its policies, religious or moral, require doctors to provide such treatment in emergency situations. [6]

In California, a physicians' group has been sued for violating state anti-discrimination laws due to a doctor's refusal to artificially inseminate a patient involved in a lesbian relationship. Dr. Benitez, a Christian and an employee of the group, had agreed to treat the patient for infertility; however, the doctor had clearly stated from the outset that she was unwilling to artificially inseminate the patient. The patient concurred with this plan, and the treatment began. Subsequent circumstances resulted in the patient obtaining care from other providers and ultimately conceiving and giving birth to a baby boy. Nonetheless, the patient sued Dr. Benitiez, as well as the physicians' group, for violating California law prohibiting discrimination on the basis of sexual orientation.[7] She argued that her civil right, the right not to be denied treatment because of her marital status or sexual orientation, should overshadow the

doctors' First Amendment rights to not be forced to violate their religious beliefs. After a dismissal and a remand for fact finding, the California Supreme Court held Dr. Benitiez could be liable under state law and remanded the case for trial.[8]

In January 2005, in response to the Congressional enactment of the healthcare right of conscience legislation known as the Hyde-Weldon Conscience Protection Amendment to the Consolidated Appropriations Act of 2005,[9] signed by President Bush on December 8, 2004, the Attorney General of California has sued to enjoin the Amendment in *California v. U.S.*[10] After the Attorney General was refused an injunction by the federal district court, he appealed to the 9th Circuit Court of Appeals, which remanded to decide if the attorney general had standing[11].The Ninth Circuit dismissed the case when it found the Attorney General did not have standing.[12]

In April 2005, Illinois Gov. Rod Blagojevich issued an emergency rule requiring pharmacies to accept and fill prescriptions for contraceptives and established a toll-free number for state residents to report "refusals" despite an Illinois statute[13] that protects pharmacists' rights of conscience. Completely ignoring the contravening state statute, Governor Blagojevich boldly announced: "Our regulation says that if a woman goes to a pharmacy with a prescription for birth control, the pharmacy or the pharmacists is not allowed to discriminate or to choose who he sells it to or who he doesn't sell it to…No delays, no hassles. No lectures".[14] Under the rule, which lasted 150 days, if a pharmacist refuses to fill a prescription for contraceptives, the drug store must ensure that the patient receives the prescription "promptly" -- usually by having another pharmacist fill the prescription, according to the *Los Angeles Times*. However, the policy does not require all pharmacies to stock contraceptives. According to Susan Hofer of the Illinois Department of Financial and Professional Regulation, the state agency that oversees pharmacies, if a pharmacy does carry contraceptives but refuses to fill a valid prescription, it risks losing its license. She added that over the next 150 days, the state will hold public hearings on a proposal to make the rule permanent. "When you or I walk into a pharmacy with a prescription, we have to have a strong level of confidence that we're going to walk out carrying the drugs we need," Hofer said, adding, "If the drug is in stock, it must be dispensed. End of discussion".[15]

The emergency order was issued because a pharmacist at an Osco drug store in Illinois refused to dispense emergency contraception -- which can prevent pregnancy if taken within 72 hours of sexual intercourse -- to two women, saying that they could return at a later time and ask for a different pharmacist. Osco and the American Pharmacists Association supported the pharmacist because of Illinois' "conscience clause" rule, which allows any "health care provider" or "person"[16] to refuse to perform abortion-related services on moral or religious grounds. However, Blagojevich on Friday said that under his interpretation, only physicians, not pharmacists, could invoke the clause, according to the *Chicago Sun-Times*. He added that he was "taking a stand against a growing national trend" of pharmacists who oppose abortion refusing to dispense contraceptives, the *Sun-Times* reports.[17]

In opposition to Governor Blagojevich's emergency order, pharmacist David Scimio initiated and then settled an action against the Governor and his employer, Albertsons, when Albertsons decided to accommodate its pharmacists' right to refuse to fill prescriptions that

violate their religious or moral beliefs. Shortly after Scimio filed suit, Albertsons distributed a memo to all of its Illinois pharmacists stating that it would accommodate their pharmacists' right of conscience by permitting them to refer prescriptions to which they conscientiously object to another Albertsons pharmacist or to a competitor to be filled within two hours. Scimio objected to filling prescriptions for abortifacients on religious grounds. After Albertsons agreed to accommodate Scimio and other Illinois pharmacist's conscience rights, he voluntarily dismissed the case. [18]

For more up-to-date developments on the health care right of conscience, please go the project website jointly maintained by Christian Legal Society and the Alliance Defense Fund: http://www.healthcareconscience.org/main/default.aspx.

The federal government and 49 states have enacted some type of "conscience" legislation – statutes intended to protect the right of certain health care providers to refus**e** to participate in certain defined procedures to which they have moral or religious objections.[19] (*See* **Appendix C**.) Unfortunately, nearly all of these laws are deficient in some respect. Most of them were drafted in the 1970s shortly after *Roe v. Wade* was decided in 1973 and deal only with abortion and birth control procedures. Many protect against only one or two types of health care right of conscience discrimination, and they seldom provide any remedy for violations. Some are limited to only certain types of health care provides (e.g. physicians). Moreover, although the Supreme Court has generally upheld the constitutionality of conscience clause statutes[20], the lower courts have narrowly construed these provisions to deny their protection to a wide range of health care providers in many circumstances that the statutes facially cover.[21]

Any decision made in the face of a moral dilemma will necessarily entail penalties and consequences of its own.[22] But health care providers and institutions should not be unnecessarily burdened with extrinsic and highly coercive penalties for choosing a plan of treatment or a form of health insurance which accords with their consciences. Despite this ideal, penalties for faithfulness to conscience often include monetary damages[23], loss of accreditation and governmental funding for health care institutions[24], termination[25], ostracism and demotion for health care personnel.[26] Since no one benefits in these coercive situations it would seem to be in everyone's best interests for the government to act so as to prevent or minimize these moral predicaments.[27] Yet it appears that governments at all levels are being encouraged in the opposite direction by the reproductive rights lobby.[28]

On December 19, 2008, the Department of Health and Human Services ("HHS") enacted a 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 (Dec. 18, 2008) (to be codified at 45 C.F.R., Part 88), hereinafter the "Implementing Regulation," providing that recipients of certain HHS funds may not discriminate against institutional healthcare providers or individual employees for exercising rights of conscience protected by law; that recipients of certain HHS funds must certify compliance with laws protecting healthcare provider conscience rights; and designating the HHS Office for Civil Rights as the entity to receive complaints of discrimination addressed by the existing statutes and the regulation. The Implementing Regulation took effect at midnight on January 20, 2009.

On January 15, 2009, the National Family Planning and Reproductive Health Association ("NFPRHA") and a Connecticut NFPRHA member health clinic, brought an action in the United States District Court for the District of Connecticut against the Secretary of HHS, seeking a declaratory judgment that the Implementing Regulation violates the Administrative Procedures Act ("APA") and is facially unconstitutional, and seeking an injunction prohibiting its implementation and enforcement. NFPRHA Compl. ¶ 8. NFPRHA Plaintiffs claim that the Implementing Regulation suffers from a number of deficiencies, including that it violated the APA because HHS failed to respond adequately to comments in making this rule and because the underlying statutes do not authorize this rule, that HHS failed to conduct an adequate cost-benefit analysis, that the rule's requirement of religious accommodation violates the Establishment Clause, that the vagueness of the rule violates due process, and that the rule interferes with patients' right to abortion. NFPRHA Compl. ¶¶ 122-35.

On same day in the same federal district court, the state of Connecticut and two state officials, and the states of Illinois, California, New Jersey, Massachusetts, Rhode Island, and Oregon by and through their attorneys general, brought the instant action against the United States, HHS, and the Secretary of HHS, seeking a declaratory judgment that the Implementing Regulation violates the Administrative Procedures Act ("APA") and is facially unconstitutional, and seeking an injunction prohibiting its implementation and enforcement. States Compl. ¶ 8. The States claim that the Implementing Regulation suffers from a number of deficiencies, including that it violated the APA because HHS failed to respond adequately to comments in making this rule and because the underlying statutes do not authorize this rule, and that it violated the Spending Clause of the U.S. Constitution in part because of vagueness and because it is not related to the federal interest in the program receiving funding. States Compl. ¶¶ 64-100.

On the same day in the same federal district court, Planned Parenthood Federation of America and its Connecticut chapter, brought an action against the Secretary of HHS, seeking a declaratory judgment that the Implementing Regulation violates the Administrative Procedures Act ("APA") and is facially unconstitutional, and seeking an injunction prohibiting its implementation and enforcement. Planned Parenthood Compl. ¶ 4. Planned Parenthood Plaintiffs claim that the Implementing Regulation suffers from a number of deficiencies, including that it violated the APA because HHS failed to respond adequately to comments in making this rule and because the underlying statutes do not authorize this rule, that HHS failed to conduct an adequate cost-benefit analysis, that the rule's requirement of religious accommodation violates the First Amendment, that the vagueness of the rule violates due process, and that the rule interferes with patients' right to abortion. PPFA Compl. ¶¶ 110-19.

In response to these actions, Advocates International, the Alliance Defense Fund and the Center for Law and Religious Freedom have moved on behalf of various doctor, pharmacist and patient groups to intervene in these consolidated actions to defend the lawfulness of the Implementing Regulation.

When it appeared to the Obama Administration the above actions were being opposed in court by Advocates International *et al*., the Obama Administration filed it NOTICE OF PROPOSED RULEMAKING to rescind the Implementing Regulations. In opposition to this proposed agency action, citizens supporting the health care right of conscience and the Implementing Regulation have formed the FREEDOM 2 CARE COALITION (www.freedom2care.org).

II. FEDERAL LAW

For a compilation of current federal law protecting the health care right of conscience see **Appendix D**. A summary of the most important provisions is set forth below.

A. The Church Amendment

A minority of courts have held that because both public and private hospitals receive tax exemptions, below-market lease rates, and state funding under the Hill-Burton Act of 1974, they should give up their right to freedom of healthcare conscience.[29] Although the majority of courts were not persuaded by this reasoning,[30] Congress settled the matter by passing the Church Amendment to the Hill-Burton Act, which prohibits courts and public authorities from deeming mere receipt of certain federal funds adequate to require a hospital to perform any sterilization procedure or abortion if the entity objects on the basis of "religious beliefs or moral convictions."[31]

The Church Amendment has effectively prevented any further efforts to cast private health care institutions as state actors due to the receipt of certain *federal* funds, but health care entities receive public funding from other sources and are accredited by state bodies.[32] Accordingly, there is still a risk that private health care providers may be treated like state actors. Private health care facilities are particularly vulnerable in those states like Alaska with enhanced reproductive liberties.[33] Although federal reproductive rights law is now clear that even public institutions are not required to facilitate abortion as a consequence of a woman's clearly-established right to abort,[34] state courts have not been as accommodating.[35]

Health care professionals who object to certain medical procedures and practices have slightly more protection than do institutions under both state conscience clauses and federal legislation. As is true for health care institutions, the conscience clauses generally do not cover enough health care professionals and provide insufficient protection for those they do cover. The federal Church Amendment, discussed above, incorporates conscience clause protection for individual health care professionals as follows:

> *No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.*[36]

Unfortunately, courts have interpreted this federal conscience clause quite narrowly. A district court ruled that the Church Amendment does not apply to the employees of a nursing home because, although federally funded, it did not offer a "health service program."[37] Also, a California court held that the Church Amendment applies "only when the applicant must participate in acts related to the actual performance of abortions or sterilizations."[38]

Indeed, gaps in the protections of existing laws have been exploited by pro-abortion organizations, which have undertaken a nationwide campaign to require all health care providers to participate in abortion. That campaign has met with some novel success. For examples, such novel legal and administrative strategies have resulted in:

A. Forcing a private community hospital to open its doors for late-term abortions[39]

B. Denying a certificate of need to an outpatient surgical center that declined involvement in abortion, after an abortion rights group intervened in the proceeding[40]

C. Forcing a private non-sectarian hospital to leave a cost-saving consortium, because the consortium abided by a pro-life policy in its members hospitals[41]

D. Dismantling a hospital merger, after abortion advocates approached an attorney general to challenge the merger[42]

E. Pressuring a hospital to place $2 million in trust for abortions and sterilizations before allowing the hospital to consolidate[43]

F. Attempting to require a Catholic hospital to build an abortion clinic and pay for abortions[44]

G. Threatening a Catholic-operated HMO with loss of state contracts because it declines to provide abortions[45]

H. Prohibiting hospitals from ensuring that the property they sell is not used for abortions[46]

In response to these cases illustrating the gaps in the protections of existing federal laws that have been exploited by pro-abortion organizations, there is an on-going legislative effort to expand federal conscience protection.

B. The Hyde-Weldon Conscience Protection Amendment

The Hyde-Weldon Conscience Protection Amendment was introduced by Congressmen Henry Hyde (R.-Ill.) and Dave Weldon (R.-Fla.) and is part of the 2005 Health & Human Services appropriation bill. This bill was signed by President Bush on December 8, 2004. The same language was passed and signed again in 2006 as part of the Departments of Labor, Health

and Human Services, and Education, and Related Agencies Appropriations Act.[47] It is now known simply as the Weldon Amendment.

The text specifically states:

> *(1) (1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.*
> *(2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.*

Many pro-abortion organizations and leaders oppose the Weldon Amendment. The National Organization for Women (NOW) stated in a press release that "HMOs and insurance companies could refuse to provide any abortion services, information or referrals to abortion services. ... This gag makes women's bodies the property of right-wing legislators and allows insurance providers' personal and religious beliefs to dictate health care choices for women." Planned Parenthood Federation of America President Gloria Feldt stated that "The vast majority of Americans oppose allowing health care entities to deny services to women, even if those entities claim their refusal is based on religious or moral grounds."

A lack of standing has prevented legal challenges to the Weldon Amendment to be unsuccessful so far. In December 2005, the National Family Planning and Reproductive Health Association filed a lawsuit in federal court for the District of Columbia to challenge the conscience clause. The district court held that, while NFPRHA did have standing, the Weldon Amendment did not violate the First Amendment as NFPRHA claimed. NFPRHA appealed to the D.C. Circuit court that reversed the lower court by denying NFPRHA standing altogether.

On January 25th, 2005, California Attorney General Bill Lockyer filed suit to challenge the Weldon Amendment. Lockyer charges that the amendment threatens $49 billion in the 2005 health and human services appropriations bill toward California. After the case was remanded by the 9th Circuit to allow the lower court to decide if the attorney general had standing, the trial court dismissed the suit on the grounds that plaintiffs lacked standing to file the action because it had failed to show any injury in fact. The court further held that the case was not "ripe" for federal adjudication. [48]

Those who supported, and continue to support, the Weldon Amendment feel that this protects the right of conscience for those not wishing to be forced into performing abortions. Even the president "strongly supports language added by the House to ensure that health care providers are not discriminated against because they do not provide, pay for, or cover abortions."[49] Pro-life groups feel that the Hyde-Weldon law is necessary because pro-abortion

supporters have been attacking medical agencies and professionals who don't wish to perform abortions.

C. The Abortion Non-Discrimination Act

The Abortion Non-Discrimination Act of 1996 (ANDA) is another federal statute protecting the health care conscience of institutions and providers.[50] It prohibits any governmental body receiving federal financial assistance from subjecting physicians, postgraduate physician training programs (*e.g.*, residency training program), and participants in "programs of training in the health profession" to discrimination for refusing to undergo training or provide training on abortions or make arrangements therefore.[51] ANDA has proven effective in relation to its limited mission. However, Mayor Michael Bloomberg implemented a plan this year that mandates abortion training for medical students in New York City. Although the new plan has a limited exception for objection based on religious or moral grounds, it is hailed as a victory for pro-abortion advocates.[52]

D. Anti-Discrimination Legislation

Plaintiffs subject to religious discrimination due to their health care convictions may state claims for disparate treatment, harassment, and retaliation[53] under Title VII of the federal Civil Rights Act of 1964, which makes it "an unlawful employment practice" for an employer to discriminate against an employee or potential employee "because of such individual's . . . religion . . . ."[54] A 1972 amendment to Title VII clarifies the scope of religious beliefs protected as 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."[55]

In addition, plaintiffs may assert that employers have an obligation reasonably to accommodate their religious expression, but employers are required to incur no more than minimal cost to meet this expectation and need not subject their business to "undue hardship" in order to accommodate religious beliefs.[56] This "undue hardship" provision has proven very difficult to overcome. Virtually any financial loss to the employer is declared "undue hardship," making it nearly impossible for a claimant to prevail on a Title VII claim.[57]

Accordingly, the Third Circuit held that a university hospital reasonably accommodated a nurse opposed to assisting with abortions when it ceased a five-year practice of allowing her to trade assignments with other nurses when abortions were conducted and instead offered to transfer her laterally to the newborn intensive care unit (NICU) where, she alleged, children were sometimes "set aside to die." The hospital also invited her to consult with the human resources department to identify a nursing position for which she was not trained.[58] The Court was not convinced that the hospital allowed infants to perish in the NICU and said that even if it were true, the nurse failed to establish that she would have to participate in these deaths.[59]

E. Federal Anti-Discrimination Regulations

On January 20, 2009, HHS promulgated it Health Care Right of Conscience Non-Discrimination Regulations, in order to (1) educate the public and the health care industry on the obligations imposed and protections afforded by federal law; (2) work with State and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Church Amendments (42 U.S.C. § 300a-7), Public Health Service Act § 245 (42 U.S.C. § 238n), and the Weldon Amendment Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209; (3) when such compliance efforts prove unsuccessful, to enforce these nondiscrimination laws through the various Department mechanisms to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law; and (4) to otherwise take an active role in promoting open communication within the healthcare industry, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist. These regulatory actions are consistent with the Administration's current efforts to ensure that community and faith-based organizations are able to participate in federal programs on a level playing field with other organizations. More importantly, they are intended to promote compliance with federal conscience and other protections for health care personnel and entities and to ensure that recipients of federal funds are not discriminating in violation of federal law.

The Obama Administration has now moved to rescind these regulations on the grounds that they lack statutory authority and are not necessary. The Freedom to Care Coalition has formed to oppose the Obama Administrations efforts. See www.freedom2care.org The evidence for the need for health care right of conscience protection is set forth at http://www.freedom2care.org/docLib/20090313_needforconscienceprotection.pdf.

F. First Amendment

Faith-based health care institutions frequently ask whether they are entitled to a health care right of conscience exemption under the First Amendment. Regrettably, courts have generally found that they are not entitled to an exemption. To the contrary, a few courts have struck down exemptions they deemed to be a violation of the Establishment Clause.

1. Free Exercise Clause

In *Employment Div., Dept. of Human Resources v. Smith*, the U.S. Supreme Court held that incidental infringements on religious expression caused by neutral, generally applicable laws are subject merely to rational review (rather than strict scrutiny), unless the infringements impact "hybrid rights" or are part of a generalized system of exceptions.[60] A "hybrid right" is defined as a combination of free exercise and another constitutional right, such as free speech. Thus, private sectarian health care institutions may assert a free exercise or hybrid right not to offer medical procedures or practices they deem morally objectionable.

Unfortunately, hybrid rights arguments have rarely succeeded. Accordingly, one commentator wrote, "it seems clear that conscience exemptions from laws requiring health care providers and insurers to cover abortion, family planning, HIV prevention counseling, and infertility treatments and to honor patients' advance directives are not constitutionally required under the Free Exercise Clause."[61] CLS does not agree but concedes that a number of courts have left this impression.

Even under the pre-*Smith* "strict scrutiny" standard, the District of Maryland recently found that a Catholic hospital failed to prove Catholic orthodoxy conflicted with an accrediting body's requirement that residents receive some clinical training in abortion and sterilization procedures, but added that even if the hospital had proven a burden on its exercise of religion, the state had a compelling interest to infringe upon it.[62] The hospital did not persuade the Court that narrower means of achieving the interest existed, despite evidence that the accrediting agency did not force residents to violate their religious convictions to perform abortions and sterilizations.[63]

2. Establishment Clause

Exemptions from federal regulations are rarely deemed unconstitutional "establishments" of religion by the state. Accordingly, the Church Amendment has withstood Establishment Clause challenge.[64] However, a New Jersey court struck down a state law exempting religiously affiliated nursing homes from meeting state Certificate of Need requirements.[65] Likewise, a lower federal court struck exemptions from certain Medicare requirements for Christian Science nursing homes on the ground that the exemption allegedly unconstitutionally benefited a single, named religious sect in purported violation of the Establishment Clause.[66]

III. STATE LAWS

A. Conscience Clauses

In addition to the federal legislation, 49 states have enacted conscience clauses to protect health care providers, institutions, and/or insurance carriers. Of these, only Illinois (see **Appendix B**) and Mississippi have comprehensive statutes that protect the right of *any* health care provider (individuals, institutions, and insurance payers, whether public or private) to refuse to participate in *any* health care procedure to which he or she has a moral objection.[67] Virtually all of the other statutes are deficient in that they cover only a narrow range of procedures, they apply to limited number of health care workers, they only protect against a few types of discrimination (a statute may protect a physician from civil and criminal liability but not from employer retaliation), and they often distinguish between public and private entities.[68] Consider that:

- 11 states provide protection in the context of abortion only.[69]
- Only 6 states have statutes protecting the conscience rights of pharmacists.[70]
- Only 32 states have statutes that protect healthcare institutions in addition to individuals.[71]

- Only 12 states protect the civil rights of medical and nursing students who conscientiously object to participating in certain medical procedures.[72] [73]

For a compilation of all state conscience protection laws, see **APPENDIX C.**

Most conscience clauses were written with surgical abortion in mind and are not broad enough to cover even chemical abortion procedures, let alone more contemporary procedures such as cloning, stem cell research, or assisted suicide. These issues implicate moral concerns just as profound and serious as the surgical abortion controversy that led to the enactment of the original conscience clauses. Yet the law has not kept up with the science that has created more moral dilemmas.

State conscience clauses have been held entirely inapplicable to *public* health care institutions,[74] and to some *non-sectarian* private hospitals.[75] Furthermore, while most conscience clauses provide general protection from some forms of discrimination based on a refusal to provide or participate in the controversial service, only a minority of state conscience laws explicitly provides a civil cause of action for violation and injunctive relief.

B. Case Law and Interpretation

Even where state conscience clauses are applicable, plaintiffs have met with mixed success under them. A Washington court has held a physician's statutory right to refuse to participate in abortions did not exempt him from having to include abortion as an option when counseling patients.[76] Also, the Third Circuit suggested in *dicta* that a nurse who was dismissed when she refused to participate in abortions or accept a lateral transfer to a newborn intensive care unit where she said infants were "set aside to die," probably could not state a claim under the New Jersey conscience statute because her termination was allegedly primarily due to her unwillingness to accept a position outside her expertise.[77] A federal district court held that nurses allegedly terminated for failing to participate in abortion were time-barred when they brought their claim more than one year after the incidents transpired.[78]

However, a Montana court shifted the burden of proving why an employee was fired to the employer, who consequently had to prove that her firing was not due to her refusal to perform a sterilization procedure.[79] The court held it immaterial that the hospital was the only one in the area and the employee had previously performed the sterilization procedure to which she now objected, because, according to the court, the conscience clause allows people to undergo a change of moral convictions.[80]

In another favorable decision, a California court held that a patient could not force a physician to provide religiously objectionable care when the health care facility could transfer the patient to another provider; the court did not address what would happen in the absence of this option.[81] In a case with a mixed outcome, a Florida court held an employer had a duty *reasonably to accommodate* an employee's religious objection to participate in abortions, notwithstanding that, on its face, the Florida conscience clause suggests employers have an *absolute duty* to accommodate an employee's religious objection.[82]

In general, however, both state and federal courts have been very narrow in their interpretation of conscience clauses, even to the point of outright hostility. For example, in *Brownfield v. Daniel Freeman Marina Hospital,*[83] a worker at a Catholic hospital invoked the California conscience clause to defend his refusal to counsel a rape victim about the "morning after" pill. That statute provided that "no nonprofit hospital or clinic which is organized or operated by a religious corporation . . . or its administrative officers, employees, agents or . . . governing board shall be liable . . . for failure or refusal to perform or to permit the performance of an abortion in such facility or clinic or to provide abortion services."[84] Finding no definition of "abortion" in the statute, the court relied upon dicta in another, unrelated case to conclude that the hospital's refusal was not protected because the morning after pill did not cause abortion.[85]

Even more disturbing is the case of *Swanson v. St. John's Lutheran Hospital,*[86] involving a wrongful discharge action brought by a nurse-anesthetist who refused to participate in abortions. While the nurse prevailed in this case, two justices of the Montana Supreme Court would have denied her claim because, they said, her refusal was based upon *emotional* rather than *moral* objections.

C. End of Life Issues

Health care providers are sometimes asked to end the life of patients. Competent persons may attempt to refuse life-saving hydration and nutrition or seek to hasten their death and conservators of incompetent persons in a persistent vegetative state may seek to remove life support benefiting their wards.

In 1990, the U.S. Supreme Court assumed (without deciding) that the U.S. Constitution grants a competent person a constitutionally protected right to refuse life-saving hydration and nutrition.[87] Numerous state courts have squarely held so, as well, even where the adult has vacillated on the subject and been subject to depression.[88] State courts also frequently approve requests by conservators to remove life support from patients in a persistent vegetative state.[89] The U.S. Supreme Court approved the right of state legislatures to require clear and convincing evidence of an incompetent person's wishes in this respect (*e.g.*, through a living will or advanced directive);[90] however, many courts have approved the removal of life support based on mere record testimony some consider tenuous.[91]

The ability of health care providers to refuse to end the life of patients in persistent vegetative states is generally limited today by the providers' actual ability to transfer patients to another facility willing to accommodate the patients' request.[92] In one instance, a New Jersey court required a private sectarian hospital to remove a patient's life support, notwithstanding its contrary moral and religious objections and the fact that it arranged for another hospital to take the patient and carry out her wishes.[93] The Court went on to lecture the health care providers that their views were not sensible, too judgmental, and not really "pro-life."[94] Another New Jersey court required a private nursing home to withhold artificial feeding from a competent adult, although she might have transferred to another facility or returned home.[95] Last, a California court required physicians serving in a public hospital to remove a feeding tube from a competent adult, saying "if the right of the patient to self-determination as to his own medical

treatment is to have any meaning at all, it must be paramount to the interests of a patient's hospital and doctors. . . ."[96]

State conscience clauses are generally not applicable to end-of-life decisions.[97] Living wills or advance directive laws permitting competent adults to express their desires for treatment in the case of incompetence or chronic terminal illness have generally not been litigated.[98] Where applicable, they usually require health care providers merely to make good faith efforts to transfer a patient to another facility willing to accommodate his request.[99] Sixteen advanced directive laws include no exemption for health care providers opposed to ending life support.[100]

Only Oregon has recognized the right of a person to make a written request for medication "for the purpose of ending his of her life in a humane and dignified manner."[101] [102] Many health care providers fear that other states may soon enable patients to ask them to hasten their deaths. Oregon's statute includes a health care right of conscience exception, [103] but it remains to be seen how courts will interpret it.

D. Mandated Contraceptives

Recommendations or laws requiring health care providers to counsel patients, particularly HIV-positive ones, to use condoms have been a long-standing challenge to the health care conscience rights of religious institutions committed to the principle of fidelity within marriage and abstinence outside of marriage.[104] The newest contraceptive challenge has been launched by various reproductive rights organizations interested in requiring private employers including religious organizations that offer prescription drug benefits to pay for contraceptive drug benefits including abortifacients like RU-486.[105]

Contrary to this movement, twenty-three states have enacted legislation providing some sort of conscience clause protection for providers who object to providing contraceptive services.[106] In addition, Congress passed legislation in 1997, which prevents Medicaid patients seeking family planning services from forcing a religiously-sponsored HMO to provide services or referrals in conflict with religious beliefs.[107]

However, some states have already mandated contraception coverage laws reaching employer-based/group policies, individual insurance plans and Medicaid.[108] Montana and West Virginia have passed laws requiring HMOs to provide family planning services as a part of preventative care coverage, and Hawaii and Florida require private insurers to offer coverage for contraception.[109] California and Maryland require insurers to include contraceptives in prescription drug coverage.[110] New York and Arizona have similar legislation.[111] These three states provide exemptions for religious organizations too narrow to cover any entity besides one engaged directly in proselytizing.[112]

Catholic Charities of Sacramento responded to California's state-mandated contraception policy with a multi-pronged complaint alleging violations of the state and federal free exercise clause; establishment clause; free speech clause; hybrid free exercise-free speech, free exercise-establishment, and free exercise-equal protection rights; church autonomy doctrine; and the equal protection clauses of the federal and state constitutions. The Court of Appeals affirmed the trial court's denial of declaratory and injunctive relief, because it held the law was not subject to strict

scrutiny.[113] The California Supreme Court upheld this ruling on review, finding that the law meets the "neutral and generally applicable" standard of *Smith*, that the statute's exception for narrowly-defined religious entities does not destroy neutrality or violate the Establishment Clause, and that prescription contraception coverage is not a form of protected speech. Catholic Charities appealed to the U.S. Supreme Court but their petition was recently denied by the Court.[114]

It is clear that there are narrower means of achieving any interest asserted by the State in ensuring prescription drug coverage; for example, by requiring full disclosure of plan options, "open" and "direct" access policies, or publicly subsidizing coverage options refused by religious providers.[115] One commentator refers to the first two of these options as the "best opportunity for bypassing conflicts between provider beliefs and patient needs."[116]

Notwithstanding this, at the federal level, Sen. Olympia Snowe and other lawmakers first introduced the federal Equity in Prescription Insurance and Contraceptive Act (EPICC) in 1997, which would amend the Employee Retirement Income Security Program (ERISA) and require all private insurers providing prescription drug coverage to also include coverage for prescription contraceptive methods.[117] It has been subsequently reintroduced in every congressional session since, but it has not yet been approved by the House. [118] It received increased attention in the spring of 1998, following the introduction of Viagra, due to the allegation that more insurance companies reimburse for this prescription than contraceptives.[119]

Even in the absence of a federal mandate like EPICC, a district court has held that Title VII, as amended by the Pregnancy Discrimination Act (PDA), requires private secular employers to include prescription contraceptives in comprehensive prescription drug plans on the grounds that they are used only by women and excluding them from a generally applicable benefit plan is sex discrimination in violation of Title VII of the Civil Rights Act.[120]

IV. PROPOSALS FOR IMPROVED AND INCREASED CONSCIENCE PROTECTION

Clearly, current laws are inadequate to protect the right of health care providers to practice in accordance with their moral and religious beliefs. Laws which attempt to compel people of faith to act against their conscience not only put matters of personal convenience on the same level as medically necessary treatment, they also elevate "freedom of choice" above the constitutional right of religious freedom. If religious liberty means anything, it means that government has no business compelling religious persons and institutions to act against the most fundamental beliefs of their faith.

One solution is to insert conscience clauses into contraceptive coverage laws exempting employers and employees with religious objections. Our laws are replete with reasonable accommodations of religious belief, and they fall well within the confines of the Establishment Clause.

Another option would have been the enactment of the *Religious Liberty Protection Act* (RLPA) (H.R.1691) that passed the House of Representatives in 1999 but failed in the Senate due to stiff opposition from, among other interests, the civil rights lobby. CLS led the RLPA coalition, as well as the effort to trim the bill down to become the *Religious Land Use and Institutionalized*

Persons Act of 2000 (RLUIPA) which was signed into law on September 22, 2000. RLUIPA would not apply to health care right of conscience claims, except perhaps as they are asserted by "institutionalized persons" (primarily prisoners) incarcerated in state or local institutions. [121]

Another option would be the enactment in each state of a Religious Freedom Restoration Act under state law. A RFRA Task Force of the Coalition for the Free Exercise of Religion is leading this effort.[122]

As is now being studied by HHS, another option would be promulgating a regulation that conditions federal funding on the recipient's agreement not to discriminate against the exercise of conscience by health care providers who directly or indirectly use or receive such funding.[123]

Yet another solution would be to commence litigation based on all available federal or state constitutional or statutory laws to protect the rights of conscience of those who have a religious objection to being forced to provide such coverage. The action challenging the *Women's Contraceptive Equity Act* in California for its lack of a constitutionally adequate exemption provision is an example of this solution that will have to be pursued in such cases. Despite the difficulty now presented by the fact the California and New York's highest courts have upheld such laws, action challenging such law may be considered in Arizona, North Carolina and other states where such laws are on the books bu have not yet been challenged. [124] Ultimately, in the event Congress does not enact a comprehensive health care right of conscience protection statute, the United States Supreme Court will be left to make national policy on this question. Lacking a national policy, the matter will be left to state-by-state determination in the state legislatures and courts.

The health care profession has some power to shield members by establishing clear professional protection for exercise of conscience, morals, and ethics. This should be considered before resort to legal measures. A professionally-accepted set of standards would influence not only future legislation but also perhaps judicial interpretation of existing conscience statutes. However, the medical profession has not stepped forward to affirm the conscience rights of health care providers. In fact, the prevailing view among medical professionals is that conscientious objection should be permitted as long as patients do not suffer from the denial of legally and medically indicated care. If personal values interfere, the objector should find a work setting where the conflict does not arise.

V. CONCLUSION

Modern medicine is deeply indebted to Judeo-Christianity for its development. Likewise, the original health care movement was begun by religious organizations that continue to offer a sizable percentage of health care services in this country.[125] It is especially ironic, then, that some of these same health care providers now find they cannot exercise their conscience and refuse to participate in or cooperate with certain religiously and morally objectionable medical practices and procedures. The few legal guardrails that exist to protect them are generally inadequate for the job.

Accordingly, Advocates International has joined a coalition of national organizations to draft, sponsor and enact state and federal legislation that would expand the ability of health care

providers to lawfully exercise their good conscience without being charged with unlawful discrimination, regulatory non-compliance, or violation of work rules. Among its initiatives have been the Abortion Non-Discrimination Act[126] and the Hyde-Weldon Conscience Protection Amendment to the 2005 and 2007 Labor/HHS/Education Appropriations Bills.[127] More comprehensive legislation is also under development.

Additionally, Advocates Interantioanal has announced a national litigation project in cooperation with the Christian Medical and Dental Association (CMDA) and the Alliance Defense Fund to defend the right of health care providers to exercise their good conscience in their health care and health insurance practices.[128]

If you are interested in either initiative or believe you or your organization is being discriminated against or exposed to liability of any kind because of the exercise of conscience in the health care field, please contact the Advocates International (Samuel B. Casey (703) 894-1076 or sbcasey@advocatesinternational.org). You can also register your complaint or concerns as www.freedom2care.org.

We would be delighted to assist you.

ENDNOTES FOR CLS' HEALTH CARE RIGHT OF CONSCIENCE PAPER

[1] Mr. Casey wishes to acknowledge the invaluable legal research and writing help he received from his law clerks, Katherine Diener, a second year student at Georgetown Law School, and Christina Trefzger, a first year student at Columbia Law School. He is also indebted to his other colleagues whose work largely contributed to this paper: law professors Lynn Wardle (Brigham Young University) and Teresa Stanton Collett (St.Thomas University), as well as William Saunders of Family Research Council, Frank Manion of the American Center for Law & Justice, Richard Doerflinger of the Pro-Life Secretariat of the National Conference of Catholic Bishops, Nicholas Nikas of the Bioethics Defense Fund and Clarke Forsythe of Americans United for Life. Mr. Casey's biographical information accompanies this paper at the conclusion of the endnotes

[2] Wis. Admin. Code §§ Pharmacy 10.03(2) and Pharmacy 10.03(9) (2003)

[3] In April 2005, the Wisconsin Pharmacy Examining Board (WPEB) found that Mr, Noesen did have a health care right of conscience but had not exercised it in a reasonable manner under the circumstances. They therefore decided to discipline pharmacist Neil Noesen for the manner in which he had refused to fill a prescription for a contraceptive, imposing upon him a reprimand and an obligation to pay the court costs.

Noesen is a licensed pharmacist practicing in the State of Wisconsin, and he is a devout Roman Catholic. Early in 2002, he began working as an independent contractor at a K-Mart Pharmacy in Menomonie, Wisconsin. When he started the assignment, Noesen notified K-Mart's managing pharmacist that he could not participate in filling contraception prescriptions without violating his religious beliefs. Noesen believes certain contraceptives sometimes function as "abortifacients," drugs that terminate the life of an unborn child. K-Mart agreed that Noesen would not have to fill prescription orders for contraceptives, and the manager worked out an arrangement whereby he would process these orders himself at the end of each day.

In July 2002, on a day Noesen was the only pharmacist on duty, a young woman asked him to refill her birth control prescription. Pursuant to his arrangement with the managing pharmacist, Noesen informed the woman that his religious convictions prevented him from filling the prescription. The woman called the K-Mart store manager, who told her that the managing pharmacist would fill the prescription when he returned to the pharmacy.

When the manager's return was delayed and Noesen refused to transfer the prescription to a pharmacy that would fill the prescription that day, the young woman responded by filing a complaint with the Wisconsin Department of Regulation and Licensing. The Department charged Noesen with engaging in a pharmacy practice "which constitutes a danger to the health welfare, or safety of patient or public," reasoning that Noesen's adherence to his religious conscience constituted a threat to patients and the public. The Wisconsin Pharmacy Examining Board then began disciplinary proceedings against Noesen, and decided in April 2005 to discipline Noesen for refusing to fill the birth control prescription.

The Christian Legal Society's Center for Law & Religious Freedom, the Alliance Defense Fund, and Krystal Williams-Oby of Madison, Wisconsin represented Neil Noesen in the administrative proceedings before the WPEB. The Alliance Defense Fund generously supported the Center's work on this case. CLS was not involved in the appeal of the WPEB's decision.

[4] On June 14, 2005, the Wisconsin Assembly on Tuesday approved 60-33 a bill (AB 207) that would have expanded conscience clause protections for health care workers who object to performing certain medical services because of their moral or religious beliefs. Current Wisconsin law protects healthcare providers from being forced to participate in abortion or sterilization procedures. The bill would have expanded the protections to pharmacists, who currently are not covered by state law. Wisconsin Gov. Jim Doyle (D) vetoed the bill on Octoer 14, 2005 and a veto-override attempt failed on June 5, 2006. (sourced from *Kaiser Daily Reproductive Health Reports*, June 16, 2005 and http://www.legis.state.wi.us/2005/data/AB207hst.html)

[5] Valley Hospital Association. Inc. v. Matsu Coalition for Choice, 948 P.2d 963 (Alaska 1997).

[6] Miller v. HCA, 118 S.W.3d 758 (Tex. 2003).

[7] Benitez v. North Coast Women's Medical Care Group, 131 Cal.Rptr.2d 364-367 (2003). See Peter Y. Hong, Lesbian Sues Over Doctor's Refusal to Help, Seattle Times, Feb. 25, 2003, available http://seattletimes.nwsource.com.

[8] The original trial court dismissed the case, finding that it was subject to the Employee Retirement Income Security Act ("ERISA") since the medical care was to be administered pursuant to an employer-provided health care plan. It held that ERISA preempted the state's Unruh Act, which had an antidiscrimination requirement on which Benitez's claim was based, thus not subjecting the doctors to that requirement. The intermediate appellate court reversed the decision, however, because ERISA was not meant to preempt state-law claims of discrimination in the provision of medical care. On remand, the trial court held for Benitez arguing that since Unruh applies, the doctors are subject to its antidiscrimination requirement because it is neutral and generally applicable according to *Smith*. The California appeals court reversed holding that since the doctors discriminated on the basis of marital status and Unruh did not protect against marital status discrimination at the time, the doctors did not violate the law. The California Supreme Court granted review, and reversed holding that Dr. Benitez could be held liable and remanded the case to the lowers courts for further proceedings..

[9] P.L. 108-447 (H.R. 4818)

[10] State of Cal. V. U.S.

[11] 450 F. 3d 436

[12] California ex rel. Lockyer v. U.S. District Court Opinion: F.Supp.2d, 2006 WL 1646102 (2006)

[13] 745 Ill. Comp. Stat. Ann. 70/1 – 70/14 (2000); 720 Ill. Comp. Stat. Ann. 510/13 (2000); 745 Ill. Comp. Stat. Ann. 70/7; 745 Ill. Comp. Stat. Ann. 70/5.

[14] Davey, *New York Times*, 4/2

[15] Simon, *Los Angeles Times*, 4/2

[16] 745 Ill. Comp. Stat. Ann. 70/1 – 70/14 (2000); 720 Ill. Comp. Stat. Ann. 510/13 (2000); 745 Ill. Comp. Stat. Ann. 70/7; 745 Ill. Comp. Stat. Ann. 70/5.

[17] Pallasch, *Chicago Sun-Times*, 4/2

[18] The Christian Legal Society's Center for Law & Religious Freedom, the Alliance Defense Fund, Americans United for Life, and the Chicago law firm Mauck and Baker represented David Scimio. The Alliance Defense Fund generously funded CLS's work on this case.

On May 26, 2005, the American Center for Law & Justice (ACLJ) filed an amended lawsuit in the Circuit Court of the Seventh Judicial Circuit in Springfield, Illinois adding the names of four pharmacists to the two plaintiffs represented in the April filing. The ACLJ already represented Peggy Pace, who works in Glen Carbon, and John Menges, who works in Collinsville. The ACLJ now also represents Gaylord Richard Quayle of Belleville, Amanda Varner of Carbondale, Jim Lynch who works in southern Illinois, and Michael Melvin who works in Carbondale. The lawsuit contends all six pharmacists are opposed to dispensing the morning-after pill and/or "Plan B" medication because of their religious, moral, and ethical beliefs. The pharmacists believe the drugs are abortion producing medications. The lawsuit contends that the Governor's emergency amendment is unenforceable because it violates the Illinois Health Care Right of Conscience Act which makes it unlawful for any public official to discriminate or punish any person who refuses to "participate in any way in any particular form of health care

services contrary to his or her conscience." The suit also charges the emergency amendment violates the Illinois Religious Freedom Restoration Act, the Illinois Human Rights Act, and Title VII of the Civil Rights Act of 1964. The suit requests the court grant an injunction preventing the measure from being enforced and asks the court to declare the directive unenforceable and null and void. The District Court in Illinois denied a motion to dismiss made by the governor in September 2006. (*Menges v. Blagojevich* 451 F.Supp.2d 992 (2006).

[19] Lynn D. Wardle, Protecting the Rights of Conscience of Health Care Providers, 14 J. Legal Med. 177, 178-79 (1993).

[20] *See generally* Doe v. Bolton, 410 U.S.179, 197 (1973); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir 1974).

[21] For example, in Brownfield v. Daniel Freeman Marina Hospital, 256 Cal. Rptr. 240 (Cal. Ct. App. 1989), the court construed the conscience statute narrowly when it held that estrogen pregnancy prophylaxis was not the same thing as abortion and, therefore, the conscience provision offered the hospital no protection. Id. at 245. Similarly, in Spellacy v Tri-County Hospital, 918 Emp. Prac. Dec. (CCH ¶8871) (Pa. Ct. C.P. Del. Cty.), aff'd, 395 A.2d 998 (Pa. Super. Ct. 1978), the court determined that a law protecting one's moral beliefs and conscience only applied to those forced to be directly involved with abortion, and not those peripherally affected. These cases demonstrate the sad fact that only minimal judicial respect is shown for precepts of conscience. An additional problem exists for the protection of health care institutions. Some of the conscience provisions apply only to individuals and, therefore, provide no shelter to the moral principles of institutions, like hospitals, corporate employers and health care insurers. Another limitation is that these laws are sometimes construed as applying only to private religious institutions and not private secular hospitals. See Wolfe v. Schroering, 541 F.2d 523, 527 (6th Cir. 1976). This forces health care workers to forego opportunities to work at public and secular institutions in order to protect their rights of conscience. Therefore, it seems that the existing conscience provisions provide such little protection, and are so easily subject to adverse interpretation, that new federal and state legislation is needed to sufficiently protect rights of conscience. For a more detailed legal memorandum on the case law see, The Health Care Right of Conscience on the Christian Legal Society's web site at: www.clsnet.org.

[22] See, e.g., Edward R. Grant & Clarke D. Forsythe, The Plight of the Last Friend: Legal Issues For Physicians and Nurses In Providing Nutrition and Hydration, 2 ISSUES L. & MED. 277, 292 (1987) (relating the five possible courses of action for nurses who are ordered to withhold treatment from an infant). An example is the firing of nurse Jill Stanek on August 31, 2001. Ms Stanek was fired by her employer, Christ Medical Center in Oak Lawn, Illinois. Ms Stanek has been an outspoken critic of the hospital's practice of leaving babies on the operating table to die after induced-labor abortions. The hospital states that Ms. Stanek's firing is unrelated to the expression of her conscience. Ms. Stanek is telling the press, "I will continue to speak out on behalf of babies who were aborted alive at Christ….I'll continue to do what I can to stop abortions there." See Daily Southtown News, September 2, 2001, www.dailysouthtown.com/southtown/dsindex/02-ds6.htm

[23] Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 244 (Cal. Ct. App. 1989) (finding that prophylaxis was not "abortion" within the meaning of law protecting religious hospitals for failing to provide abortions).

[24] See, e.g., St. Agnes Hosp. v. Riddick, 748 F. Supp. 319 (D. Md. 1990).

[25] See Spellacy v. Tri-County Hosp., 18 Empl. Prac. Dec. (CCH) ¶ 8871 (Pa. Ct. C.P. Del. Cty.) (upholding termination of employment of hospital admission clerk for refusal to admit abortion patients), aff'd, 395, A.2d 998 (Pa. Super. Ct. 1978). See also Diaz v. Riverside County. In 1999, nurse Michelle Diaz was fired by her employer, the Riverside Neighborhood Health Center, after she told her supervisor that her deeply held religious beliefs prevented her from distributing medication (the "morning after pill") designed to end pregnancies because she believed she would be participating in an abortion. On May 24, 2002, a federal jury in California found that Riverside County violated the constitutional rights of a nurse who was fired from her job after she refused to dispense medication known as a "morning-after" pill designed to end pregnancies. Following a four-day trial in federal court, the jury found the county was guilty on all three counts presented: violated her First Amendment rights of free speech; violated her rights of freedom of religion; and, failed to reasonably accommodate her religious

beliefs. The jury also awarded damages totaling more than $47,000 - including $19,000 in damages for back pay, and more than $28,000 in damages for emotional distress.

[26] See, e.g., Kenny v. Ambulatory Ctr. of Miami, Inc., 400 So.2d 1262, 1263 (Fla. Dist. Ct. App. 1981) (stating that nurse who refused to assist in abortions was asked to resign and was placed on part-time status resulting in a loss of fringe benefits).

[27] Robert M. Veatch & Carol M. Spicer, Medically Futile Care: The Role of the Physician In Setting Limits, 18 AM. J.L. & MED. 15, 24 (1992). "No rational patient would want unnecessarily to have a physician providing care who feels that his or her moral conscience is being violated." Id. Jeffrey Blustein & Alan R. Fleischman, The Pro-Life Maternal-Fetal Medicine Debate: A Problem of Integrity, 25 HASTINGS CTR. REP. 22, 22 (1995):"If the physician has moral responsibility for actions and recommendations to patients, how can we expect professional practice to require the physician to set aside deeply held religious or moral convictions in the conduct of professional life? It would constitute an assault on physician integrity to require moral accountability and yet insist on value neutrality." Id.

[28] For example, California [Cal. Health & Saf. Code § 1367.25(b)(1); Insurance Code § 10123.196(d)(1)], Arizona [(ARS § 20-1057.08) mandating that all employers who provide insurance coverage for medical prescriptions must also provide coverage for contraceptive and abortifacient medicines] and New York [Women's Health And Wellness Act (S.7657/A.11723)] recently became the 18th, 19th and 20th states to *mandate* that all health insurance plans provide coverage for contraceptives. The New York and California enactments were all challenged in court and each was found to be constitutional. Catholic Charities of Sacramento, Inc. v. Superior Court 32 Cal. 4th 527(2004). Catholic Charities of Diocese of Albany v. Serio 28 A. D. 3d 115 (2006).

Similar legislation was introduced in nearly every state in 1999 and the federal counterpart, the proposed *Equity in Prescription Insurance and Contraceptive Coverage Act* "EPICC"-S.1396 (Snowe), H.R.2727 (Greenwood) has been re-introduced in the 108th (H.R. 2727.IH, S. 1396.IS), 109th (H.R. 4651.IH, S. 1214.IS) and the 110th (H.R. 2412.IH) Congresses with bi-partisan co-sponsors. This mandate forces employers--even religious employers--to pay for such coverage, even when doing so violates the religious teachings of the employers or the religious or moral conscience of the employees. Although the bill has been introduced for several years in a row without being passed, women's rights activists are ever insistent. For example, Gloria Feldt, executive director of Planned Parenthood, considers this issue to be "PPFA's No. 1 legislative issue." Feldt also has said, "I think there's a big groundswell right now… it's an idea whose time has come –it's past time. When it comes to health insurance, men have been getting a better deal." (ABC News.com Article by Geraldine Sealey, June 19, 2002, *Who Pays for the Pill - Women See Progress in Getting Birth Control Covered by Health Insurance.*)

[29] See, e.g., Doe v. Charleston Area Medical Center, 529 F.2d 638 (4th Cir. 1975) (overturning ban on abortions by nonsectarian hospital except to save the life of the mother); Bridgeton, 366 A.2d at 643 (overturning nonsectarian hospital's ban on "non-therapeutic" abortions); Valley Hosp. Assn. v. Mat-Su Coalition for Choice, 948 P.2d at 968(overturning nonsectarian hospital's ban on abortion unless there is documentation by one or more physicians that the fetus has a condition that is incompatible with life, the mother's life is threatened, or the pregnancy is a result of rape or incest). See also McCabe v. Nassau County Medical Center, 453 F.2d 698, 704 (2d Cir. 1971) (treating decision to forbid sterilization of doctors and administrators who worked for public hospital as state action, although stating that most other decisions by them should not be treated as under color of state law);.Sams v. Ohio Valley General Hospital Association, 413 F.2d 826, 828 (4th Cir. 1969) (holding in case unrelated to reproductive rights, "Substantial federal moneys invited and flowing into the defendant hospitals under the Hill-Burton Act entail, in return, obligations of observance of Federal constitutional mandates."); O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140, 1142 (6th Cir. 1973) (finding state action sufficient for plaintiffs to state a claim for denial of due process and equal protection when physicians were not allowed on nonsectarian hospital staff for unstated reasons); Meredith v. Allen County War Memorial Hospital Com'n, 397 F.2d 33, 35 (6th Cir. 1968) (physician stated Section 1983 claim unrelated to reproductive rights against nonsectarian hospital). Cf. Chrisman, 506 F.2d at 314 (hospital not in a dominant monopoly position); Taylor, 523 F.2d at 78 (citing Ham v. Holy Rosary Hospital, 529 P.2d 361 (Montana 1974) (actual monopoly of sectarian hospital in obstetrical services irrelevant)); Allen, 361 F.Supp. at 1214 (other hospitals in the vicinity, but plaintiff unable to access them in traction).

[30] See, e.g., Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973) (upholding nonsectarian hospital's ban on abortions except in the event of a serious threat to the health or life of the mother or where delivery could result in an infant with grave and irreparable physical deformity or mental retardation, or if the pregnancy has resulted from legally established rape or incest); Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir. 1975), cert. den'd, 423 U.S. 1000 (1975) (upholding nonsectarian hospital's ban on "non-therapeutic" abortions); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974) (upholding sectarian hospital's refusal to sterilize woman); Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975), cert. den'd, 424 U.S. 948 (1976)(upholding sectarian hospital's refusal to sterilize woman); Watkins v. Mercy Medical Center, F.2d 894 (9th Cir. 1975) (upholding sectarian hospital's ban on certain sterilizations and "abortion procedures"); Allen v. Sisters of St. Joseph, 361 F.Supp. 1212 (N.D. Tex. 1973), aff'd, 490 F.2d 81 (5th Cir. 1974) (upholding sectarian hospital's refusal to sterilize woman); Jones v. Eastern Maine Medical Center, 448 F.Supp. 1156 (D. Maine 1978) (upholding nonsectarian hospital's ban on "elective non-therapeutic" abortions).

[31] 42 U.S.C.A. § 300a-7(c)(1) (1974) (applies to entities receiving a grant, contract, loan or loan guarantee under the Public Health Service Act (42 U.S.C.A. § 201), Community Mental Health Centers Act (42 U.S.C.A. § 2689), or the Developmental Disabilities Services and Facilities Construction Act (42 U.S.C.A. § 6000)).

[32] See Katherine A. White, Note, Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights, 51 Stan. L. Rev. 1703, 1733 (1999).

[33] See, e.g., Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973) (upholding nonsectarian hospital's ban on abortions except in the event of a serious threat to the health or life of the mother or where delivery could result in an infant with grave and irreparable physical deformity or mental retardation, or if the pregnancy has resulted from legally established rape or incest); Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir. 1975), cert. den'd, 423 U.S. 1000 (1975) (upholding nonsectarian hospital's ban on "non-therapeutic" abortions); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974) (upholding sectarian hospital's refusal to sterilize woman); Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975) (upholding sectarian hospital's refusal to sterilize woman); Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975) (upholding sectarian hospital's ban on certain sterilizations and "abortion procedures"); Allen v. Sisters of St. Joseph, 361 F.Supp. 1212 (N.D. Tex. 1973), aff'd, 490 F.2d 81 (5th Cir. 1974) (upholding sectarian hospital's refusal to sterilize woman); Jones v. Eastern Maine Medical Center, 448 F.Supp. 1156 (D. Maine 1978) (upholding nonsectarian hospital's ban on "elective non-therapeutic" abortions).

[34] See Poelker v. Doe, 432 U.S. 519 (1977) (upholding the policy of a city-funded hospital restricting the performance of elective abortions on the grounds the public entity could opt to use its scarce resources to encourage childbirth rather than perform abortion); Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992) (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).

[35] See, e.g., Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 968 (Alaska 1997).

[36] *Id*. § 300a-7(d) (emphasis added).

[37] Romeo, 697 F.Supp, at 590 & n.6.

[38] Erzinger v. Regents of Univ. of California, 137 Cal.App.3d 389, 394, 187 Cal.Rptr. 164, 168 (1982), *cert. den'd*, 462 U.S. 1133 (1983) (Church Amendment did not apply to prevent a university from requiring students to participate in a comprehensive health insurance program including benefits for persons desiring abortions or sterilizations).

[39] *See* Valley Hospital Ass'n. v. Mat-Su Coalition for Choice, 948 P.2d 963 (Alaska 1997)

[40] See State of Connecticut Office of Health care Access Final Decision in Roy Bebe, M.D., Hartford Hospital, John Dempsey Hospital et al., Docket No. 96-547 (September 29, 1997)

[41] *See* "City, Bayfront Settle Suit," Wes Allison, *St. Petersburg Times*, April 11, 2001, pg.1.A.

[42] See New Hampshire Attorney General's Report on Optima Health, March 10, 1998, www.state.nh.us/nhdoj/Charitable/optimal.html.

[43] See "Merger Pits Care and Doctrine," Steve Chambers, *The Star Ledger*, May 16, 1999, page 1.

[44] *See* In the Matter of Allegheny Hospitals, New Jersey and Zurbrugg Health Foundation, Superior Court of New Jersey, Civil Division, Burlington County, Docket No. BUR-L-3541-98, Hearing Transcript, October 24, 2002.

[45] *See* "N.Y. Insurance denies Access to Reproductive Healthcare," *Womensenews*, Jan 31, 2002 at womensnews.org/article.cfm/dyn/aid/801 (accessed 09/09/03).

[46] *See* Senate Bill 932, 2003-2004 Leg. Sess. (Ca. 2003)

[47] Pub. L. 108-447. 118 Stat. 2809. Tit. V, § 508(d).

[48] A copy of the federal court's opinion in *State of California v. the United States of America* (N.D.CA., March 18, 2008) can be found at http://www.clsnet.org/clrfPages/litigation/2008-03-18_Opinion.pdf.

[49]Lifenews.com. "House Protects Health Care Providers on Abortion, Senate will Battle. http://www.lifenews.com/nat983.html. November 20, 2004. last accessed July, 2007.

[50] 42 U.S.C.A. § 238n(a) (1996) ("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.) (emphasis added).

[51] Id. § 238n(c) (defines "health care entity" as "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.")

[52] EMC Frontline Pregnancy Center, "NYC Leads New Effort to Train MDs in Abortions." http://www.emcfrontline.org/story.php?id=2. Last accessed July 6, 2007.

[53] *See* CLS white paper, entitled "Employee Expression in the Private Workplace."

[54] 42 U.S.C.A. § 2000(e-2).

[55] *Id*. § 2000e(j).

[56] *Id*. See also TWA v. Hardison, 432 U.S. 63 (1977).

[57] For at least the last five Congresses, a broad spectrum of the religious community, led by the American Jewish Committee (AJC), has sought to enact the so-called " Workplace Religious Freedom Act" seeking "to restore to Title VII of the Civil Rights Act of 1964 (as emended in 1972) the original congressional intent that required employers to "reasonably accommodate" the religious practices of employees insofar as doing so did not impose an "undue hardship upon the employer. Because a series of "federal court opinions have essentially read this protection out of the law. The proponents of the Act are trying to remedy the problem that too many Americans are being force to choose between their career and their conscience. On March 9, 2007, the Act was again introduced in the House (H.R. 1431) and has been referred to the House Education and Labor Subcommittee on Health, Employment Labor and Pensions. While CLS and many other religious liberty proponents support the Act, the passage of the Act appears doubtful. Historically, the Act has been strongly opposed by labor and management. Moreover, it has become clear whether the Act would even provide reliable protection for the exercise of the healthcare right of conscience insofar as its lead proponent (AJC) now claims that the Act's "requirement that an employee cannot

receive an accommodation which interferes with the performance of a job's "essential functions" also protects third parties against adverse affects, especially in the health services context.

[58] *See* Shelton v. Univ. of Medicine & Dentistry of New Jersey, 223 F.3d 220, n. 11, 227 (3rd Cir. 2000). *See also* Spellacy, 18 Empl Prac. Dec. at *4-*5 (admissions clerk requested a change of shift to avoid admitting abortion patients, but Pennsylvania court held that hospital need only offer her a different position).

[59] Shelton, 223 F.3d at 226.

[60] 494 U.S. 872, 881 (1990).

[61] White, *supra* note 16, at 1733. Regrettably, the commentator added that even under the pre-*Smith* standard a health care provider would not be entitled to freedom of conscience because "providers objecting to legislative coverage mandates could go into another line of work. . . ." Id.

[62] St. Agnes, 748 F.Supp. at 328-31.

[63] *Id*. at 330.

[64] Chrisman, 506 F.2d at 311 (Church Amendment solely preserves government neutrality in the face of religious differences).

[65] New Jersey Ass'n of Health Care Facilities v. State, 665 A.2d 399, 400 (N.J. Super. Ct. Law Div. 1995) (striking exemption from certificates of need for facilities where at least 65% of bed capacity was filed by members of the religious organization sponsoring the facility).

[66] Children's Healthcare Is a Legal Duty, Inc. v. Vladeck, 938 F.Supp. 1466, 1486-87 (D. Minn. 1996), *cert. den'd*, 532 U.S. 957 (2001) (striking 42 U.S.C. § 1395x(e); 42 U.S.C. § 1395x(y)(1); 42 U.S.C. § 1320c-11; 42 U.S.C. § 1396a(a); 42 U.S.C. § 1396g(e)(1); 42 C.F.R. § 466.1; 42 C.F.R. § 431.610(b); 42 C.F.R. § 440.155(b)(1); 42 C.F.R. § 440.170(b); 42 C.F.R. § 440.170(c); 42 C.F.R. § 442.12(b); 42 C.F.R. § 456.251; 42 C.F.R. § 456.351; 42 C.F.R. § 456.601; 42 C.F.R. § 431.701).

[67] 745 ILL. COMP. STAT. ANN. 70/1-70/14 (2000); 720 ILL. COMP. STAT. ANN. 510/13 (2000). The text of the statute is found at **APPENDIX B**. Miss. Code Ann. §41-41-215; Miss. code ann. §41-107 (2004).

[68] Wardle, *supra* note 1, at.4.

[69] Alaska, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah.

[70] South Dakota, Arkansas, California, Georgia, Illinois and Mississippi. In Wisconsin, the Christian Legal Society's Center for Law and Religious Freedom is currently seeking to establish state and federal constitutional right of a pharmacist to refuse to act on contraceptive prescriptions in violation of his religious beliefs.

[71] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin..

[72] California, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Pennsylvania, Texas, Wisconsin.

[73] See Americans United For Life, *Health Care Rights of Conscience Act*, September 2003, Appendix C.

[74] *See e.g.*, Doe v. Hale Hospital, 500 F.2d 144, 147 & n.2 (1st Cir, 1974), *cert. den'd*, 420 U.S. 907 (1975) (holding unconstitutional a public hospital's policy refusing elective abortions and treating state conscience clause as applicable solely to "privately controlled" hospitals); Doe v. Mundy, 378 F.Supp. 731 n.3 (E.D. Wis. 1974) (holding unconstitutional a public hospital's policy refusing elective abortions and treating state conscience clause as merely "permissive"; "[I]t does not provide a mandatory statewide regulatory scheme."). *See also* Nyberg v. City of Virginia, 667 F.2d 754 (8th Cir. 1982), *cert. den'd*, 462 U.S. 1125 (1983) (city could not prohibit staff physicians from performing abortions for paying patients at the sole hospital in the community).

[75] Doe v. Bolton, 410 U.S.179, 197-98 (1973) (interpreting GA. CRIM. CODE § 26-1202); Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 972 (Alaska 1997) (interpreting AS § 18.16.010(b)); Doe v. Bridgeton Hosp. Ass'n Inc., 71 N.J. 478, 366 A.2d 641, 647 at 490-491 (1976), *cert. den'd.* 433 U.S. 914 (1977) (interpreting N.J.S.A. § 2A:65A-1 *et seq*.).

[76] Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (en banc).

[77] *See* Shelton v. Univ. of Medicine & Dentistry of New Jersey, 223 F.3d 220 (3rd Cir. 2000).

[78] Michael v. Sentara Health System, 939 F.Supp. 1220, 1230 (E.D.Va. 1996).

[79] Swanson v. St. John's Lutheran Hosp., 597 P.2d 702, 709 (Mont. 1979). *See also* Swanson v. St. John's 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).

[80] Swanson, 615 P.2d at 709.

[81] Morrison v. Abramovice, 253 Cal.Rptr. 530, 531 (Ct. App. 1988).

[82] Kenny v. Ambulatory Centre of Miami, Florida, Inc., 400 So.2d 1262 (Fla.App. 1981). *Cf.* Swanson, 615 P.2d at 709 (treating the state conscience clause as an absolute prohibition).

[83] 256 Cal. Rptr. 240 (Cal. App. 1989).

[84]Cal. Health & Safety Code § 25955k. This statute has been revised and recodified Cal. Health & Safety Code 123420 (2001) without substantive change.

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

[86] 597 P.2d 702 (1979).

[87] Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278-79 (1990) (adding that the right may be "inferred from our prior precedent").

[88] Bartling v. Glendale Adventist Medical Center, 163 Cal.App.3d 186, 209 Cal.Rptr. 220 (Cal.App. Div. 5 1984) (several nurses reported instance in which the ventilator tube accidentally detached and the patient "signaled frantically for them to reconnect it" and the patient also made several statements to his doctors and nurses to the effect that he wanted to live). For cases where vacillation was not discussed, *see* In re Requena, 213 N.J. Super. 475, 517 A.2d 886 (N.J. Super. 1986); Bouvia v. Superior Court, 179 Cal.App.3d 1127, 225 Cal.Rptr. 297 (Cal.App. Div. 2 1986).

[89] Gray by Gray v. Romeo, 697 F.Supp. 580, 590-91 (D.R.I. 1988); Elbaum by Elbaum v. Grace Plaza of Great Neck, Inc., 148 App.Div.2d 244, 255, 544 N.Y.S.2d 840, 847 (1989); Delio v. Westchester Cty. Med. Ctr., 516 N.Y.S.2d 677, 693-94 (N.Y.App.Div. 1987); Brophy v. New England Sinai Hospital, Inc., 497 N.E.2d 626 (Mass. 1986); In re Quinlan, 355 A.2d 647, 671-72 (N.J. 1976); In re Conroy, 486 A.2d 1209 (N.J. 1985); In the Matter of Jobes, 529 A.2d 434 (N.J. 1987).

[89] Cruzan, 497 U.S. at 280.

[90] *Id*.

[91] *See, e.g*., Gray, 697 F.Supp. at 583 ("Mr Gray states that on one occasion Mrs. Gray required that he promise not to keep her alive by artificial means should she ever be in a circumstance similar to Karen Ann Quinlan. The same sentiments were also expressed to him on other occasions by his wife. Her sister-in-law . . . states that Mrs. Gray discussed the plight of Karen Ann Quinlan and was critical of the fact that she was fed artificially and said that she would not want a respirator or a feeding tube if she were in the same circumstances.")

[92] Bartling, 209 Cal.Rptr. at 225 (requiring Seventh Day Adventist hospital to remove life support against its religious convictions when hospital was not successful in attempting to transfer the patient; "[I]f the right of the patient to self-determination as to his own medical treatment is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors."); Elbaum, 148 App.Div.2d at 255 (requiring private nursing home

to remove life support against its moral convictions unless the patient could be transferred to a suitable nursing care facility which would accede to conservator's request); Gray, 697 F.Supp. at 590-91 (requiring private nursing home to remove life support against its moral or religious convictions unless the patient could be "promptly transferred to a health care facility that will respect her wishes"); Brophy, 497 N.E.2d at 440-41 (hospital could refuse to remove patient's feeding tube where hospital was willing to transfer patient to an alternative facility); Delio, 516 N.Y.S.2d at 693-94 ("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 effectuated.").

[93] Requena, 517 A.2d at 480.

[94] *Id*. at 486-87.

[95] In the Matter of Jobes, 529 A.2d at 425-26 ("[W]e 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 on it for her continued care.")

[96] Bouvia, 225 Cal.Rptr. at 304.

[97] *See, e.g*., Gray, 697 F.Supp. at 590 (defendants unsuccessfully argued that the principle underlying Rhode Island's state conscience clause dealing with abortion and sterilization should protect their right not to remove life support from a patient in a persistent vegetative state); Elbaum, 148 A.D.2d at 255-56 ("[D]efendants' reliance on 42 U.S.C. § 300a-7 and Civil Rights Law § 79-I, in support of their position that they cannot be compelled to participate in 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 based upon moral or religious convictions.")

[98] Kathleen M. Boozang, Deciding the Fate of Religious Hospitals in the Emerging Health Care Market, 31 HOUS. L. REV. 1429, 1454-56 (1995).

[99] *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-580a (West 1997); NEV. REV. STAT. ANN. § 449.628 (Michie 1996). Congress indicated in federal house report language that federal funding is no excuse for failing to exempt health care providers from exemptions to advance directive laws. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. I, § 104, 110 Stat. 2105, 2161-63, codified at 42 U.S.C.A. § 604a; H.R. Rep. No. 104-651 (1996), available in 1996 U.S.C.C.A.N. 2183 ("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 . . . which as a matter of conscience cannot implement an advance directive.")

[100] *Id*. at 1456 n.100.

[101] *See* O.R.S. § 127.805.

[102] *See* Oregon v. Ashcroft, 192 F.Supp.2d 1077 (D.Or. 2002) (State received injunction preventing enforcement of Attorney General directive indicating that physicians who assist suicide of terminally ill patients would be violating the federal Controlled Substances Act). This decision was affirmed by the 9th Circuit and the United States Supreme Court, 126 S. Ct. 904.

[103] O.R.S. § 127.885(4) ("No health care provider shall be under any duty, whether by contract, by statute, or by any other legal requirement to participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner.") O.R.S. § 127.800 § 1.01(6) defines "health care provider" as "a person licensed, certified or otherwise authorized or permitted by the law of this state to administer health care or dispense medication in the ordinary course of business or practice of a profession, and includes a health care facility."

[104] Boozang, *supra* note 68, at 1772-73 (*citing, e.g*., N.Y. PUB. HEALTH LAW § 2781(5) (McKinney 1993).

[105] *See* Cover My Pills: Fair Access to Contraception, Get the Facts (last visited Aug. 20, 2002) *at* http://www.covermypills.org/facts/states.asp (no longer accessible).

[106] See Appendix C for state statutes dealing with contraception.

[107] *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. IV, § 1852(j)(3), 111 Stat. 251, 295-97, 42 U.S.C.A. § 1395w-22 (permitting Medicaid and Medicare managed care plans to refuse to provide any health care service to which they object on religious or moral grounds). The legislative history for the act adds as follows: "If the managed care provider with which a beneficiary is enrolled is unwilling or unable to provide a particular service (such as a full range of nondirective counseling, referral, and services for reproductive health care), the State must treat such a service as having been 'carved out' of its contract with the organization and take positive steps to ensure that the service is truly available without burden to beneficiaries through another system or provider and that the beneficiaries know of this availability.".

[108] *See e.g,* .CAL INS. CODE § 10123.96 (West 1999); DEL. CODE ANN. tit. 18 § 3559 (1975); IOWA CODE ANN. § 514C.19 (West 2000); MD. CODE ANN.[Ins.] § 15-826 (1998); VA. CODE ANN. § 32.2-3407.5:1 (Michie 1997); VT. STAT. ANN. tit. 8 § 4099c (1999).

[109] *See e.g.* Haw. Rev. Stat. Ann § § 431:10A-116.6, 432:1-604.5 (Michie 1998); Mont. Code Ann. § 33-31-102(2)(h)(iv) (1997); Mont. Admin. R. § 6.6.2508(2)(d) (1998); W. Va. Code § 33-25A-2(1), (11) (1996 & Supp. 1998) (requiring insurance companies to offer employers the option of contraceptive coverage; *see also* National Abortion Rights Action League, Analysis of Key Findings (last visited Jan. 23, 1998) *at* http://www.naral.org/publications/whod98keyfindings.html (no longer accessible).

[110] CAL. HEALTH & SAF.CODE § 1367.25 (1999); Md. Code Ann., Ins. § 15-826 (1998)

[111] *See e.g.* Women's Health and Wellness Act, Act No.11723, 2002 N.Y. Leg. (to be codified at N.Y. INS. LAW § § 3221(1)(k), 4322). A.R.S §20-1057.08.

[112] *See e.g.,* Women's Health and Wellness Act, S. 7657/A.11723 (2002)) (defining an exempt "religious employer" as an entity for which the following is true: (i) the inculcation of religious values is the purpose of the entity, (ii) the entity primarily employs persons who share the religious tenets of the entity; (iii) the entity serves primarily persons who share the religious tenets of the entity, and (iv) the entity is a nonprofit organization as described in section 6033(a)(2)(a)(i) or (iii) of the internal revenue code of 1986, as amended.") Women's Heath and Wellness Act, Act. No. 11723, 2000 N.Y. Legislature (to be codified at N.Y. INS. LAW § § 3221 (1)(k), 4322).

[113] Catholic Charities of Sacramento, Inc. v. Superior Court, 109 Cal.Rptr.2d 176 (Cal.App. Div. 3 2001), review pending (holding statute a neutral, generally applicable law which only incidentally burdens religion, finding no hybrid right claim or hostility toward religion, and holding the church autonomy doctrine inapplicable).

[114] A similar challenge to an identical mandatory contraceptive insurance coverage statute in New York has been commenced and is still pending at the federal court level. Catholic Charities of Diocese of Albany v. Serio 28 A. D. 3d 115 (2006).

[115] New York already requires disclosure of coverage to patients receiving Medicaid. *See* N.Y. SOC. SERV. LAW § 364-j(5)(e) (McKinney Supp. 1999) (requiring Medicaid plans to fully inform recipients of provided services). New York also has enacted a "direct access law" applicable to both Medicaid and commercial managed care plans, which allows patients to obtain services directly from willing providers in a plan without referrals from a primary care provider, *see* N.Y. PUB. HEALTH LAW § 4406-b(1) (McKinney Supp. 1999), and has enacted a "open" access policy that allows Medicaid subscribers to obtain family planning services from any provider who accepts Medicaid, regardless of managed care provider contracts, *see* N.Y. SOC. SERV. LAW § 364-j(4)(a)(iii)(c) (McKinney Supp. 1999) (policy covers family planning, cervical and breast cancer screening, STD testing and treatment, voluntary sterilization, abortion, and HIV counseling and testing. The state reimburses providers on a fee-for-service basis when patients use Medicaid providers outside their managed care plans.) For an open access federal law applicable to Medicaid, see 42 U.S.C. § 1396a(23) (1994) (requiring that a state plan for medical assistance "provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution . . . or person, qualified to perform the service . . . and (B) an enrollment of an individual . . . in . . . [a Medicaid managed care organization] . . . shall not restrict the choice of the qualified person from whom the individual may receive services. . . .")

[116] White, *supra* note 33, at 1747.

[117] See H.R. 2174, 105th Cong. (1997); S. 766, 105th Cong. (1997).

[118] See EQUITY IN PRESCRIPTION INSURANCE AND CONTRACEPTIVE COVERAGE ACT OF 2007 (Introduced in House)[H.R.2412] and Title III of the PREVENTION FIRST ACT (Introduced in Senate[S.21] and the House [H.R.819]. See also Megan Colleen Roth, Note, *Rocking the Cradle with Erickson v. Bartell Drug Co.: Contraceptive Insurance Coverage Takes a Step Forward.* 70 UMKC L. REV. 781, 792 (2002).

[119] See *Insurers Criticized for Covering Viagra and not the Pill*, BOSTON GLOBE, May 13, 1998, at A8.

[120] Erickson v. Bartell Drug Co., 141 F.Supp.2d 1266 (W.D. Wash. 2001).

[121] The federal *Religious Freedom Restoration Act*, 42 U.S.C.§§ 2000bb *et seq*. (1994), still applies to the federal government, but has been declared unconstitutional insofar as it applies to state and local government. *City of Boerne v. Flores*, 521, U.S. 507 (1997). A health care right of conscience claim could be brought against federal agency action under federal RFRA.

[122] In some states, this option may be questioned by pro-life proponents who are concerned that a court would deem the right to mandated contraceptive coverage a "religious right" that no state has a compelling interest to substantially burden. To our knowledge no proponent of mandated contraceptive coverage has ever made this argument nor are there any court decisions to support it. For further information on the State RFRA laws see a helpful booklet put out by the Religious Organizations practice at the law firm of Sidley and Austin: http://www.sidley.com/db30/cgi-bin/pubs/State%20RFRA%20book%20v4%204.12.05.pdf.

[123] See discussion at Section II.E. supra.

[124] In addition to Arizona, North Carolina may be another state where a test case to challenge **Session Law 1999-231** (*An Act to Insure that Insurers that Provide Health Insurance Coverage for Prescription Drugs or Outpatient Services Provide Coverage for Prescribed Contraceptive Drugs and Devices and Outpatient Contraceptive Services*) may be in order. The Act only specially exempts the prescription of RU-486 (or its equivalent) and the drug marketed as Preven (or its equivalent). As is the case in California, the law provides an overly narrow "conscience" organizational exemption which only applies where all four of these requirements are met: (1) the organization is organized and operated for religious purposes; (2) the organization is exempt from taxation under IRC § 501(c)(3); (3) the inculcation of religious values is one of its primary purposes; (4) it employs primarily persons who share the religious tenets of the organization. Alternatively, a legislative amendment expanding the health care right of conscience may be attempted. For further information of the situation in North Carolina, please contact CLS member attorney Paul Stam, Stam Fordham & Danchi, 106 Holleman Street, Apex, NC 27502, telephone: 919-362-8873; e-mail: Paulbstam@cs.com or Betty Wickham, *LifeTree*, Telephone: 919-787-5434.

[125] Heather Rae Skeeles, Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?, 60 Wash & Lee L. Rev. 1007, 1011 (2003) (stating that "Catholic hospitals constitute the largest group of health care providers in the United States.").

[126] Abortion Non-Discrimination Act of 2002, H.R. 4691, 107th Cong. (2002).

[127] The Hyde Conscience Protection Amendment is described on page 5-6 above.

[128] For more information on this litigation project see http://www.healthcareconscience.org/main/default.aspx.