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REFUSALS OF CONSCIENCE: WHAT ARE THEY AND WHEN SHOULD THEY BE ACCOMMODATED?

Kent Greenawalt[†]

Approaching this subject as a decided nonexpert, I want to explore a number of questions about a right to conscience in respect to refusals to provide health-care services. My hope is that the questions will seem important and relevant, even if some of my tentative answers are controversial or even misguided.

It is helpful to distinguish three levels of analysis: 1) What would be an ideal scope for rights of conscience if we could put aside difficulties of administration and political feasibility? 2) What would be a desirable approach given administrative and political realities? 3) And in what rhetoric should claims of conscience be formulated when supporters address those with authority to enact legal rights?

I am assuming that at the first two levels, a theorist is aiming to be as objective and open as possible; I do not suppose that about those engaging in what I shall call public rhetoric. This can present a dilemma for a scholar who perceives an issue as complex but is strongly committed to particular outcomes, who finds herself in an influential role, and believes that effective persuasion demands oversimplification.

Let me give an example, one that starts from my particular sense of our historical tradition. The basic right of conscience regarded as critical at the Founding was the ability to develop one's religious beliefs and practice worship with co-believers free of government interference. Although Michael McConnell has made a strong case that some basic right was recognized to be exempt from the imposition of general laws not themselves directed at religion,¹ other

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1. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990).

able scholars disagree,² and insofar as one can discern their position on this precise question in relation to the Free Exercise Clause, the majority of the Supreme Court apparently agrees with those scholars.³ One thing that is clear is that John Locke, in the small amount of attention he gave to the question, saw no problem with applying general, neutral laws to those with opposed religious conviction. He suggested that a law against killing cattle could properly be enforced against those who believed they should engage in religious sacrifices of cattle.⁴ I am unaware of any suggestions that the Founders would have contemplated the government mandating how private businesses should respond to employees who decline from conscience to perform tasks that are part of their jobs.

I do not mean to imply that historical recognition of the importance of conscience is irrelevant, but some vital steps need to be filled in—namely, that the significance of freedom of conscience extends beyond what some early proponents clearly recognized, that we now see the government as a potential protector of liberty, as well as an infringer of liberty, and that with pervasive modern government involvement in the provision of services and in ordering the economy, restrictions on how private employers deal with their own workers make sense. Laws banning racial, sexual, and religious discrimination are a powerful illustration, and indeed an employer's refusal to accommodate conscience, especially religious conscience, can be regarded as one form of such discrimination.

The dilemma for someone who advocates government protection of conscience is how much of this complexity to acknowledge when one is urgently seeking reform. A simpler approach that stresses our tradition of freedom of conscience may be more effective. In any event, for the third level of analysis, rhetorical effectiveness, one might choose to simplify matters not only in respect to how rights are formulated but also in respect to their theoretical justifications.

In what follows, I will disregard two very important distinctions for our system of government. Although I am strongly opposed to

2. See, e.g., Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992).

3. I put the point in this qualified form because in the central case of *Employment Division v. Smith*, 494 U.S. 872 (1990), the main source for drawing out the views of justices on this question, the emphasis is on what is administrable, not what was historically intended. *Id.* at 880.

4. John Locke, *A Letter Concerning Toleration* (1689), reprinted in *LOCKE ON TOLERATION* 3, 25–26 (Richard Vernon ed., Michael Silverthorne trans., 2010) (1796).

the Supreme Court's ruling in *Employment Division v. Smith* that the Free Exercise Clause provides no protection against the application of typical neutral laws of general application,⁵ I shall not consider how far claims of conscience in respect to health care should be constitutionally grounded. I treat the issues as ones to be resolved by statute. I also disregard the problem of how much should be resolved by federal rather than state law.

At the first level I have suggested, the ideal scope for rights of conscience, some of the critical questions are: What classes of persons should be able to invoke a legal right? What attitude on their part should give rise to the right? Should nonreligious as well as religious claims be included? What should be the scope of the right in relation to the desires and needs of those seeking health care and the needs of institutions providing it? And what actions should the right protect against and with what remedies for violations?

The attitude that should underlie a right of conscience presents a fascinating question that could affect perceptions about what is involved, but probably has little operational significance.

Some laws provide simply that one cannot be required to participate; others are cast in terms of "moral or religious grounds," "conscience," or "conscientious objection."⁶ A person who self-consciously objects to providing a form of health care because doing so triggers painful memories or is aesthetically unpleasant does not have a moral objection or, I shall argue, a claim of conscience. In one respect, claims of conscience are a narrower category than all moral objections. A nurse who believes that elective plastic surgery wastes resources, perpetuates unhealthy denials of aging, and reflects the worst of a culture that is increasingly materialist and superficial, may have moral reasons not to participate but these do not, without more, make her assistance an act against conscience. I believe this term in its modern usage connotes something stronger,⁷ that she would disregard a deep aspect of her identity if she went along.⁸ Along this vague spectrum, "conscientious objection" may be an even stronger

5. 494 U.S. at 878–79.

6. See Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 16–33 (2010) (giving a summary of laws providing exemptions).

7. See, e.g., Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 225–33 (2009) (providing an account of the various conceptions of "conscience").

8. William Galston offers a similar account of "conscience." *Id.* at 233 (citing WILLIAM GALSTON, *THE PRACTICE OF LIBERAL PLURALISM* 67 (2005)).

term, one that seems to suggest that an individual would rather undergo (or believe that she should be willing to undergo) serious hardship rather than perform the act in question. We do not think a person is a genuine conscientious objector to military service if he thinks performing that service is preferable to spending two months in jail. We do not think that someone is a conscientious objector to jury service if she thinks doing jury duty is preferable to paying a fine of \$200.

Is it possible that objections in conscience may extend beyond moral reasons? Suppose the person with the painful memory or strong aesthetic distaste says, "This is now part of my identity. I have an objection grounded in my conscience, given who I take myself to be." This is a conceivable way to speak of conscience, one that cannot be ruled out by reference to the term's general meaning;⁹ for the purpose of a legal exemption, from ordinary responsibilities at least, nonreligious conscience is better conceived as having a moral dimension.¹⁰ How to treat an obligation believed to be owed to God that is not about morality, such as the obligation to wear a yarmulke, is a harder question.

As with moral claims in general,¹¹ all religious claims is a broader category than religious claims of conscience. A Roman Catholic druggist might have a religious objection to providing artificial means of birth control, without that objection rising to a claim of conscience.¹²

This brings us to the division between religious claims of conscience and nonreligious ones. Perhaps in order to avoid the painful question whether religious claims really should be preferred, the Supreme Court on occasion, like some scholars, has been inclined to treat all genuine claims of conscience as religious.¹³ I think this is both artificial conceptually and unnecessary to reach sound constitutional conclusions.¹⁴

9. See *id.* at 233–37 (citing the "volitional necessity" view from HARRY FRANKFURT, *THE REASONS OF LOVE* 46 (2004)).

10. See Wardle, *supra* note 6, at 27–41 (writing of conscience clauses as covering moral and religious beliefs).

11. I am counting most claims based on religious connections as moral claims that rest on religious premises.

12. In my outsider's understanding, the church has rather specific guidelines about what form of assistance to immoral acts step over the permissible line, but individual Catholics have some room to develop their own convictions of conscience about right and wrong behavior.

13. See *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

14. The latter assumption rests on the premise that other bases for equal treatment are plausible, that both the Equal Protection Clause and the religious clauses themselves sometimes point to equal treatment of religious and nonreligious conscience.

What is wrong with treating all claims of conscience as religious? First, we think of some people as nonreligious or antireligious; we cannot deny that these people could have a claim of conscience. Do we want to say that whenever they do, they have become partly religious? And what of religious people in our society? Many sincere Christians experience aspects of moral life that they perceive as only remotely connected to their religious convictions and practice. A wife who is tempted to leave her husband but is afraid she might lose custody of her children, says, "I cannot in good conscience abandon the kids. This is not a religious matter for me, but my conscience tells me that would be deeply wrong." If pressed, she might acknowledge that her faith includes notions of love and family responsibility, but in her mind and feelings, the very high priority she places on staying with her children is only remotely related to religion. Although this example raises perplexing questions about cause and effect and about what linkage to religion is needed to make a claim of conscience religious, it also helps to show the untenability of assuming that all claims of conscience are automatically religious.

I am fully aware of the difficulty of distinguishing the religious from the nonreligious, but a great many phenomena fall clearly on each side of the divide, leaving a fuzzy border in the middle.

The equality argument for treating all claims of conscience similarly is straightforward. Is there any plausible basis for religion being singled out for special treatment?

One reason, of course, is such treatment within our legal and cultural traditions.¹⁵ Another reason in regard to some kinds of claims is the difficulty of imagining a nonreligious analogue. Suppose a right were created not to participate in blood transfusions. Given a high probability of safe blood, we are hard put to imagine a non-religious claim of conscience of the same magnitude as the Jehovah's Witnesses' rejection of that practice.

What if there are nonreligious analogues? One might think the government's relation to implicit truth claims differs. A typical religious objection offers a claim of truth about how people really should act. Since the government does well to steer clear of the truth of religious premises that it is not in a good position to evaluate with confidence,¹⁶

15. The legal tradition must obviously include the language of the religion clauses.

16. Paul Horwitz develops this position in the draft of a book to be published by Oxford University Press. PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (forthcoming 2011) (on file with the Ave Maria Law Review).

accommodation is appealing.¹⁷ Some nonreligious claims of conscience may offer no claim about general truth, just an assertion about what feels right to an individual. And if a person does rely on a nonreligious general moral judgment, one may think the government has a more solid basis to impose the judgment of the rest of society than with a religious claim. This may seem particularly true if a claim of conscience depends on an assessment that is contrary to convincing empirical evidence, as when careful studies are at odds with the opinion of some parents that particular vaccinations are highly dangerous for their children.¹⁸

A different basis for possible differentiation concerns what is at stake. *Perhaps* religious objectors usually perceive that more is at stake, including their eternal welfare. This sense of magnitude of impairment might be related to what a claimant would be willing to sacrifice to avoid doing a wrongful act. In both respects, a huge amount depends on a religion's particular theology, as well as a claimant's personal psychology. The nonreligious claimant may respond that for her *more* is at stake than for those who believe God generously forgives all confessed sins.

A final basis for differentiation that takes us to the second level, and administrability, is potential fraud. If people have a strong motivation to receive an exemption (as do draftees in wartime), identifying the sincerity of a religious claimant may be simpler than evaluating a nonreligious one. Of course, if people have little incentive to make a claim *unless* they possess a genuinely strong objection, the fraud concern disappears.

Two strong reasons *not* to limit a privilege to religious claims are the desirability of avoiding political controversy over giving religion a special place and eliminating any need for those evaluating claims to decide just which ones are religious.

Given the practical realities of administrability and the desirability of minimizing political controversy, I believe rights of conscience for individuals not to participate in health-care services should be formulated in terms that are not limited to religion. But that leaves open a serious question about arguments in favor of such rights. Both

17. Of course, the government does implicitly reject many relevant truth claims of religions, such as the desirability of pacifism, but nonetheless the sense that many decent members of society hold a different opinion on untestable grounds is a basis not to compel them to act contrary to conscience.

18. This illustration, I recognize, falls outside the scope of my topic and falls inside the somewhat related domain of conscience claims to refuse medical treatment.

because the basis for an exemption is often particularly strong for religious claimants and because such exemptions are most strongly supported by our traditions, it would be mistaken to cast arguments for rights of conscience only in terms of broader conceptions of conscience. Further, in many areas of the country, the rhetoric in favor of refusals of conscience may be most effective if it emphasizes religion.

My tentative opinion is that institutional rights to refuse health care should be limited to religious organizations and facilities that are linked to them. Almost all institutional providers of health care, if not all, have substantial discretion as to what services to offer. If a legislature, administrative agency, or quasi-public supervisory body, has determined that a service is so important all institutions should provide it, an exception for religious enterprises that view the service as deeply immoral and contrary to God's will makes sense; but I do not perceive reasons that are nearly as convincing for those who have created and oversee nonreligious institutions. Defending this perception is not simple, but it may arise from a sense that religious organizations are fundamental entities independent of the state, something that is not true about most nonreligious organizations created for providing services such as health care.

Our inquiry into various ways in which claims might be categorized raises a more general point about virtually all possible conscience claims not to provide health care. What is at stake in individual instances is less momentous than for exemptions from a military draft. Draft boards examined the bona fides of individual claimants, but such examinations will be rare in respect to health care. A person who asserts a privilege not to participate may well suffer embarrassment and inconvenience, influencing negatively the respect of bosses and coworkers and their chances of advancement (whatever protection the law formally grants); but if a health-care worker is willing to assert an undoubted legal right, he is very unlikely to be refused on the basis that he is insincere altogether or has mistakenly identified a modest moral objection as a claim of conscience. It will be a rare occasion on which some administration will try to plumb the depths of a claimant's moral sensibility. All this strongly suggests that in practice the exact wording of a conscience clause in respect to a claimant's necessary conviction may not matter much, beyond sending a message about how far the state is bending itself and is requiring private employers to bend.

What may be said against any legal recognitions of claims of conscience not to provide health care? We may divide arguments into

those opposed in principle to such concessions and those that insist on the importance of providing benefits to those seeking health care.

The most straightforward principled objection is that individuals who choose to work for the government or to be licensed in lines of work for which licenses are designed to protect and serve the public should be willing to do what public need calls for, not to select among services they choose to provide. Thus, doctors, nurses, druggists, and others should not be privileged to opt out. A similar objection can be made in respect to institutions that wish to decline providing important services.

As a knock-down argument, this fails. Individuals should not be effectively barred from entire lines of work, or from government employment, for which they are otherwise admirably suited, if they cannot bring themselves to perform a small percentage of the typical tasks *and* if excusing them carries virtually no cost in the provision of services. If only a small percentage of doctors and nurses are needed to perform sterilizations, and some people called to these vocations cannot conscientiously participate, why not let them decline?

This conclusion is strengthened if one starts from the premise that institutions qualified to perform the relevant services can themselves be selective. If we put aside life-saving medical procedures and avoidance of medical malpractice (as performing some operations without blood transfusions), hospitals can commonly decline to perform operations private patients might desire, including abortions, sterilizations, and elective plastic surgery.¹⁹ If the institutions can be selective in this way, why should not medical practitioners? One answer is that individuals have chosen to work for an employer and, therefore, may fairly be expected to do all the employer asks. But if accommodating conscience is important, the government reasonably insists on it. Title VII's requirement of "reasonabl[e] accommodat[ion]" to religious observance, if the employer can do that without "undue hardship," already embodies this principle.²⁰ If the employer wants all its workers to attend prayer meetings, give customers a verbal Christian message in December, or work without head coverings, it cannot insist that those with religious objections do so. Regrettably, the Supreme Court has interpreted this language in Title VII, which

19. The freedom of hospitals follows from the absence of laws that require them to provide particular services. The similar freedom of pharmacies in respect to providing particular drugs is noted in Robin Fretwell Wilson, *Essay: The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 52-54 (2008).

20. 42 U.S.C. § 2000e(j) (2006).

may itself reach some refusals to provide health-care services, to have very little bite.²¹ An explicit right of conscience for health-care workers imposed on private employers would extend protection, but it is not fundamentally different in principle.

The reasons not to insist on individuals providing services when they believe that would be deeply wrong apply to institutions, so long as institutional choice will not thwart individuals obtaining those services. (However, as I have noted, I doubt that the reasons are strong enough to provide a legal right of conscience for non-religious institutions.)

If the argument in regard to those who work for the government or are licensed in vocations that benefit the public is not decisive against a right of conscience, I believe that it does carry some weight that the individual worker's claim is somewhat weaker if she has undertaken by choice to perform a public service understood in a certain way.

Four notable variations involve the percentage of a job that is involved, expectations, calling, and public attitudes. The first two of these are obvious. The higher the proportion of his usual tasks to which a worker objects, the weaker his claim that he should be given a legal right to decline. A player who, like the Olympian hero of *Chariots of Fire*, cannot participate in sports events on Sunday, does not belong in the National Football League, even though every team occasionally plays on another day. The point about expectations concerns what an individual reasonably perceived were the dimensions of her job when she trained for it. When I was going to law school, performing abortions was still criminal in nearly every state. Someone in nursing school would not have expected that she would be called on to assist abortions. Reasonable belief about what a job entails is one measure of whether refusals of conscience should be protected.

The point about calling is more subtle, complex, and debatable. Speaking generally, some jobs require special talents and are of a nature that individuals feel called upon to perform them. My sister Ann felt called to be a minister; my daughter Sarah felt called to work with young children. Many people find themselves in jobs without any special sense that they are suited for them by talent or inclination. I doubt if many persons feel called to be cashiers at checkout counters.

21. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74–76, 84–85 (1977) (stating that requiring an employer to bear more than a *de minimis* cost in order to accommodate an employee's religious holiday observances is an undue hardship).

Generalizations about this are extremely hazardous, and, absent empirical data, are bound to reflect all sorts of conscious and unconscious prejudices. But to bring us within the realm of the relevant, I would guess that a higher percentage of doctors and nurses have a sense of calling than do lawyers, secretaries, and druggists and that more druggists have a sense of calling than the personnel who hand drugs to customers in large urban drugstores. A well-designed empirical inquiry might show that my intuitions are way off the mark. In any event, I think that the greater the sense of calling the more unfortunate it is if individuals are required to do work that offends conscience. It is regrettable for individuals deeply drawn to a vocation to feel barred from doing work through which, typically, they want to serve others; it is also regrettable for society to lose highly motivated performers. Again, this seems to me to have more application to doctors and nurses than to druggists, but I would welcome any reasons to shift that appraisal.

A final variation concerns public attitudes. If the community is deeply divided over whether a form of health care involves a serious wrong, there is a powerful argument that no individual or institution should be required to provide it. Over the last half-century that has been the case with elective abortion. It is hardly surprising that the vast majority of rights of conscience initially established by state legislatures have concerned abortion,²² a practice which many of the legislators themselves undoubtedly thought was sinful. If a claim of conscience is idiosyncratic, and even seems bizarre to most members of the community, any public need to accommodate is weakened. Ironically, however, it may be in just such circumstances that a legal right might be most significant, since individuals holding the unpopular opinion may find it particularly hard to discover employers who share that opinion or are willing to accommodate it. Needless to say, there is a vast intermediate terrain in which a moral opinion has some wider support but an overwhelming majority rejects it. I believe objections to the "morning after pill," artificial birth control, voluntary sterilization, and assisted reproduction all fall into this intermediate category.

Related both to the point about calling and to public attitudes is the degree of involvement with the practice that is deemed immoral. That a nurse should not have to participate in abortions that she

22. See Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1705-11 (1999).

regards as the murder of a human being seems quite different from the involvement of pharmacy employees with the morning after pill and Plan B, whose use may be thought to involve a kind of abortion, depending on what is understood as the point of conception. The pharmacy orders the pills; a druggist pours the requisite number from a big bottle into a smaller bottle and hands that bottle to a clerk, who in turn hands it to the customer. A cashier rings up the charge. Should each of these workers be able to refuse to participate? There comes a point at which an individual's involvement is so remote, a right to refuse seems excessive. A possible counter to this analysis is that very few will claim a right when their involvement is remote, and that accommodating those whose claim of conscience is honest is harmless and desirable.

A second argument of principle against a right of conscience is much vaguer and rests on an empirical assumption that is probably impossible to establish. We live in a society that has become increasingly individual over time, with citizens encouraged to seek what is best for themselves. In one sense, a right of conscience is a counter, focusing as it does on perceived obligation, not self-satisfaction. But the right is strongly individualistic, crediting the individual's conviction against the general perception of what is socially desirable. One might think that creating a legal right, especially a broad one not limited to religious conviction, will contribute to an unhealthy sense that each individual judges for herself, giving little or no weight to a sense of community and to prevailing opinions within the society about what is needed.

The more direct practical arguments against a right involve the competing interests of those seeking health care. How those interests should be evaluated affects whether any legal rights make sense, to whom such rights should extend, and how such rights should be formulated. It is vital that individuals not forego valuable health services that they want and need. Here the crucial issues are about degree of need and how broadly to understand or extend "forego." Of course, no one thinks it is all right if life-saving services are denied; but what of facelifts? These services are definitely wanted by some, but are not needed in any strict sense. Perhaps the perceived need of services should figure to a degree in designing rights of conscience, but partly for reasons of practical administrability, whatever legitimate services people want should be regarded as ones that should actually be available to them.

Troubling questions arise over the recipient's avoidance of inconvenience and embarrassment. Suppose the only drugstore in a village has two pharmacists who alternate at work. One who objects to providing all drugs related to birth control works from 3 p.m. to 10 p.m. every day. Mary, who has been prescribed the pill, works in a factory from 8 a.m. to 4 p.m. She could drive thirty miles to the next town in the evening or be excused from work during a period in the morning, but either option is considerably more inconvenient than going in the early evening to the local pharmacy.²³ Should we worry about her inconvenience? I am inclined to think that for this example, substantial inconvenience should be the test—that consumers should not have to undergo substantial inconvenience to satisfy a state-created legal right of conscience. On the other hand, if Mary was still able to get an abortion, an inconvenience of this magnitude should not override the conviction of nurses that their participation assists in murder.

Imagine a different scenario in the drugstore. There are two druggists at one time. Mary hands her prescription to the objector. He announces, "I'm sorry I don't aid anyone who is engaging in birth control, but I'll hand your prescription to my colleague." Especially in a small town, such an interchange, overheard by others, could be highly embarrassing for Mary. I am inclined to think that a right of conscience should not be vindicated when the result would be acute embarrassment for the person seeking health care. Still, the employer who has an objecting worker should have a responsibility to try to arrange matters so that such embarrassment is avoided, and ordinarily that should be possible.

In addition to concerns about individual recipients are ones about operating burdens for providers. Can an employer accede to consciences without undue administrative burdens, burdens that will eventuate in higher costs for those who receive and insure health care? That will depend greatly on individual circumstances. One example of real inconvenience involved a hospital that could get a substitute for a nurse-anesthetist only by bringing in someone from

23. Wilson, *supra* note 19, at 52-54, provides a much fuller account of what realistically is the degree of inconvenience if a local pharmacy refuses to carry a drug. In the balance she carefully strikes, I do not think she would regard a round trip of 60 miles as too severe an inconvenience.

fifty-five miles away who was available only when her regular job schedule did not conflict.²⁴

Where does all this leave me? In principle, I believe a legal right of conscience is appropriate for many forms of health care for which potential individual providers have objections in conscience. But such a right should, for most matters, not seriously interfere with the provision of health care in a manner that is reasonably convenient and avoids great embarrassment. To make my present sense more concrete, I will share my reaction to some of the litigated instances that have attracted the attention of scholars in the field. I will then consider the comparative merits of a broad, general approach to one that focuses on particular subjects.

There is a double risk in focusing on individual situations as a basis for how general rules should be formulated. One may forget other relevant factors not present in the particular instance; even if that does not happen, there is a tendency to give undue importance to what seems most salient in the instance that is staring one in the face.²⁵ My brief response to various factual settings here is not meant to suggest specific formulations that are desirable; the aims are only to reveal my own sense of how interests should be balanced and to inform a discussion of how to approach the question of formulations. Those with sharply variant perceptions about how claims of conscience should be weighed against consumer interests and convenience of administration may see the formulation problem in quite different ways.

*Swanson v. St. John's Lutheran Hospital*²⁶ raises the question of the kind of objection that is needed. As a nurse-anesthetist, Ms. Swanson had participated in numerous sterilizations; after a disturbing experience with a dilation and curettage, she refused to perform any tubal ligations.²⁷ The Montana Supreme Court sustained her claim that her discharge was unlawful under state law;²⁸ but two of the five justices, relying on her sudden change of view, some expressed inconsistencies, and the illogic of her refusing to participate in a

24. *Swanson v. St. John's Lutheran Hosp.*, 597 P.2d 702, 709–10 (Mont. 1979) (holding that the inconvenience was irrelevant under the state statute).

25. Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases 27* (Univ. of Va. Sch. of Law John M. Olin Law & Econ. Research Paper Series, Paper No. 2009-09), available at <http://ssrn.com/abstract=1446897>.

26. 597 P.2d at 702, 709.

27. *Id.* at 704–05.

28. *Id.* at 711.

simple sterilization because of a bad experience with a form of abortion, regarded her upset as “physical and emotional,” not based on the statute’s required “religious beliefs or moral convictions.”²⁹ Courts should not be in the business of assessing the rationality of beliefs and of how triggering events generate those beliefs.³⁰ It is enough that a person now believes that participation is morally wrong or contrary to her religious beliefs.³¹ This conclusion does mean that the line between such convictions and mere emotional or aesthetic aversion is thin, but the test is the actual convictions of a claimant.

Some cases involve the edges of actual and desirable protection. In *Spellacy v. Tri-County Hospital*,³² a part-time admissions clerk whose job involved various personal contacts with admitted patients told her supervisor that her religious beliefs precluded her from admitting patients for abortions.³³ After the hospital relieved her of any personal contact with abortion patients, she for a time continued to type up their lab and admission forms.³⁴ But she then decided she did not want to do any admission procedures for them.³⁵ She refused alternative jobs the hospital offered her.³⁶ So long as there is no significant personal contact with the patients, I do not think everyone remotely connected to patients, including those who type their forms, make their beds, dish out their meals, and clean their rooms, should have a right of conscience to refuse based on the procedure the patient undergoes. The tie to the objectionable practice is too remote. (Although Title VII may cover such instances if religious observance is involved, the employer can meet its obligations by making modest efforts to accommodate, as the hospital did here.) When significant personal contact is required, a genuine objector may believe (or feel) she cannot be civil to someone setting out to commit a terrible sin. Perhaps protection should kick in at that stage.

Another issue about “edges” involved a claim by a university student not to be assessed fees that went in part for abortions. In

29. *Id.* at 711–15.

30. This conclusion fits that of the Supreme Court’s approach to a free exercise claim for unemployment compensation in *Thomas v. Review Board*, 450 U.S. 707, 714–15 (1981).

31. This sentence both reflects my judgment and is implied by the Supreme Court’s decision in *Thomas*. *Id.* at 715–16.

32. Equity No. 77-1788, 1978 WL 3437 (Pa. Ct. Com. Pl. Mar. 23, 1978).

33. *Id.* at *1.

34. *Id.* at *2.

35. *Id.*

36. *Id.* at *2–*3.

Erzinger v. Regents of the University of California,³⁷ a California Court of Appeals rejected the claim. The United States Supreme Court has consistently refused to sustain claims that paying particular taxes that contravene religious convictions is a violation of free exercise rights.³⁸ I think this is a realm in which a kind of imaginative accommodation may be desirable. Let those opposed in conscience to paying certain taxes pay the amount owed plus an extra amount to some other valuable endeavor. Suppose student fees are \$500 per year, and 1% of those fees go to abortions. An objecting student might be allowed to pay \$495 in fees and \$50 to an independent university fund, or pay no fees but \$750 to the independent fund. But such ingenious strategies should be up to the universities or those who supervise them, not part of a right of conscience specifically related to health care.

One powerful argument against limitations on who can claim rights of conscience is that those remotely connected to procedures to which they object will perceive plenty of disadvantages in asserting their claims, whatever the law itself says, and thus the kind of cutoff I have suggested will only serve to harm those few who have genuinely serious claims. The factual premise of this argument is probably true in general, although it may not apply to the university student who seeks to make a public statement and whose vocational status is not at risk.

Nevertheless, I believe there is some value in the law denying that every remote connection really amounts to significant participation. Further, the acceptability of rights of conscience for members of the public may be partially undercut if they sense that weird, implausible claims are being vindicated.

The most difficult questions concern what patients and consumers should be expected to sacrifice.³⁹ In *Brownfield v. Daniel Freeman Marina Hospital*,⁴⁰ the police had brought a rape victim to a Catholic hospital's emergency room. She acknowledged that she was told both that she should see her doctor within two days and that the hospital did not provide morning after pill treatment.⁴¹ She said she was not told that the effective use of that treatment was limited to seventy-two

37. 185 Cal. Rptr. 791 (Ct. App. 1982), *vacated*, 187 Cal. Rptr. 164 (Ct. App. 1982).

38. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982).

39. *See Wilson, supra* note 19, at 52–55 (providing a nuanced and detailed treatment of competing considerations, in respect to recent controversies over extending conscience protections).

40. 256 Cal. Rptr. 240, 242 (Ct. App. 1989).

41. *Id.*

hours after intercourse.⁴² I assume that a high percentage of raped women would wish to take some form of emergency contraceptive, and that many of those will have no idea about the temporal limit on effective use. Certainly for a rape victim who does not choose a particular hospital, I think more needs to be done in terms of informing (whether members of the hospital itself do so or offer to put her in direct touch with someone else willing to give full advice) than was done in this instance. Neither an institutional nor an individual right of conscience should prevail over a patient's interest of this strength.

I am inclined to think the same outcome is appropriate for one who voluntarily chooses a Catholic hospital, *unless* there are other available facilities, the patient is in a physical condition to shift hospitals, and the hospital makes clear before admission that it eschews a form of treatment the patient might well desire. For this purpose, a printed and signed form should not be enough—many of us do not read these carefully in calm situations, and more cannot be expected of someone who has just been raped. A clear, specific oral communication should be required.

Somewhat separate from how a right of conscience should bear on provision and information about emergency contraceptives is the issue of whether they should count as a form of abortion if the law gives a right of conscience restricted to abortion. The answer is no. Without question, some religious groups and individuals do believe these often constitute a form of abortion.⁴³ But whether one focuses on original understanding, in either its textualist or intentionalist variation, or on present understanding, most legislators and citizens do not think of the morning after pill as abortion.⁴⁴ The terms defining the subjects to which a right of conscience extends should be understood as are other statutory terms, not according to the individual refuser's particular conception or that of his religious group.

Another issue that poses a difficult adjustment of competing claims is the withdrawal of life-sustaining treatment at the request of a patient or his family in circumstances when most doctors would regard such a withdrawal as appropriate, if the institution at which the patient is staying has a religious objection to such treatment, or

42. *Id.* at 242–44.

43. U.S. CONF. OF CATHOLIC BISHOPS, MARRIED LOVE AND THE GIFT OF LIFE 8–9 (2006), <http://www.usccb.org/laity/marriage/MarriedLove.pdf>.

44. See U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE ON WOMEN'S HEALTH, EMERGENCY CONTRACEPTION 3 (2009), <http://www.womenshealth.gov/faq/emergency-contraception.pdf>.

some doctors or nurses have a moral objection to it.⁴⁵ An individual doctor's or nurse's objection should be accommodated if that will not significantly affect options available for the patient. The harder issue here is posed by institutional objections. If other facilities are available and the institution has made its policy clear at the time of admission—again in something much stronger than a written form—it should be able to adhere to that policy. Any contention that it is up to the patient or his family to inquire at the time of admission is weak; we cannot expect those involved in an emotionally charged admission to a hospital or nursing home to be thinking about what should be done if the extreme contingency that might lead to withdrawal arises. Suppose an adequate warning has not been given and the patient cannot be moved elsewhere. The facility and its personnel should not be required to participate, but they should be required to allow outside doctors to enter the facility to carry out the wishes of the patient or his family. My present sense is that this should be required even if transferring the patient to another facility is practical. For me, this is a very close question, but I believe that for a patient and/or his family members, such a transfer would exact a considerable emotional cost. And the institution has the ability to require the transfer *if* it makes its policy clear in advance.

When the right claimed against an institution is by a doctor to perform an operation to which the institution objects, such as sterilization, the right balance is that the institution can forbid doctors regularly using its facilities from routinely performing such operations, but cannot base its decisions about a doctor on the doctor's expressed views or on what the doctor does outside the facility.

In respect to merger of facilities, much depends on availability. If a merged institution will be the dominant facility in a community, the facility to which most people will go, it is regrettable if forms of health care once available become unavailable because of the religious convictions of one of the partners.

There are roughly three possible approaches to the way a right of conscience may be formulated: 1) courts are left to apply a general standard; 2) specific legislative resolutions for particular subjects; and 3) delegation to an administrative or quasi-governmental body to work out appropriate resolutions. Let us put aside for the moment political considerations about what strategy promises legislative action.

45. See White, *supra* note 22, at 1721–24.

I was initially drawn to a general standard of the sort proposed by Lynn Wardle.⁴⁶ We have an exemplar of such a standard in the Religious Freedom Restoration Act (“RFRA”),⁴⁷ adopted after the Supreme Court decided *Employment Division v. Smith*.⁴⁸ According to RFRA, “Government shall not substantially burden a person’s exercise of religion” unless it does so in furtherance of a “compelling . . . interest” and uses “the least restrictive means.”⁴⁹ The Supreme Court held the act invalid as applied to the states,⁵⁰ but a number of states have adopted their own similar provisions, and others use a similar test in applying their own state free exercise clauses.⁵¹

Four points are worth noting. Such a statute does in principle protect some religious rights of conscience for health-care workers, those employed by the federal government or relevant states, and those otherwise required by law to perform particular services. The required “compelling interest” has never been as powerful as is needed to justify restrictions on freedom of expression.⁵² Exactly what will count as a sufficient interests depends considerably on the level at which an interest is framed. The government has a compelling interest in providing health care, but it may not have a compelling interest in avoiding some inconvenience for the consumers of health care.⁵³ Although “substantial burden” and “compelling interest-least restrictive means” are cast as independent measures, courts inevitably do a kind of balance, considering the government’s interest in conjunction with the degree of burden.⁵⁴

States can, like Washington,⁵⁵ use such an approach specifically for health care, extending protection to cover those who work for private employers. The problem, as I now view it, is that the relevant considerations are so complex that those who are called to accommodate will have difficulty knowing when they need to do so, and courts will be hard put to reach persuasive, consistent results. Were

46. See Wardle, *supra* note 6, at 19–26.

47. 42 U.S.C. § 2000bb (2000).

48. 494 U.S. 872 (1990).

49. 42 U.S.C. § 2000bb-1(a)–(b) (2000).

50. *City of Boerne v. Flores*, 521 U.S. 507, 534–36 (1997).

51. See 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 201–02 (2006).

52. *Id.* at 214–15.

53. See *id.* at 215–16.

54. *Id.* at 217.

55. See Wardle, *supra* note 6, at 45–46.

one to favor more absolute rights of conscience than I have suggested, both these problems would be reduced.⁵⁶

Were legislators to put in the effort, there is much to be said for specific legislative resolutions for various forms of health care. Legislators might set up an expert panel to recommend areas to which a right of conscience would extend and to suggest formulations of the rights and their limits. When such rights are in place, it might be desirable to have a small expert administrative board as an intermediary between individual disputants and courts, a board that would provide the initial review when employers and claimants cannot agree about the applicability of a claimed right of conscience.

Political recommendations about how to proceed must depend partly on political feasibility. It is unrealistic to think legislators will spend much time worrying about a few fringe or bizarre claims that have little general appeal. A general standard might better achieve desirable coverage by implicitly embracing such claims along with those that have wider support. But given the desire of many people to get health care as conveniently as possible, perhaps a broad standard will frighten legislators, who might respond more favorably to claims limited to particular areas, as they have in respect to abortion. Since attitudes and social conditions vary widely within the United States, I doubt whether any one strategy is politically most promising for all states in which advocates seek a broadening of rights of conscience.

56. *Id.* at 2 (“[H]ealth-care providers’ rights of conscience have been and can be fully protected while patient access to services is accommodated but only if there is full commitment to protecting, not sacrificing or giving nominal respect for, rights of conscience.”).