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Conscience in the Workplace

C. W. Von Bergen

A current trend in employment law is that workers feel they should be protected in the exercise of their conscience—even if doing so is contrary to their employers’ wishes or to the demands of their jobs. Workers are increasingly claiming that they should be provided an unqualified legal right to refuse work activities that violate their ethical, moral, personal, or religious convictions or beliefs and this assertion has become one of the more controversial issues confronting employers. After a brief review of conscientious objection, special attention is given to such objection in medically related areas, followed by a discussion of the expansion of freedom of conscience to the general workplace.

The king of Egypt told the Hebrew midwives, one of whom was called Shiphrah and the other Puah, “when you act as midwives for the Hebrew women and see them giving birth, if it is a boy, kill him; but if it is a girl, she may live.” The midwives, however, feared God; they did not do as the king of Egypt had ordered them, but let the boys live.

—The Book of Exodus, Chapter 1, Verses 15–16

Were the Hebrew midwives justified several millennia ago in violating the law (i.e., Pharaoh’s command) and following their conscience? Likewise, in ancient Athens about 2500 years ago Sophocles examined the relationship between moral or divine law and human law in his classic play, Antigone. Antigone was ordered by Creon, King of Thebes, to leave the body of her brother unburied and outside the city walls to be eaten by vultures as punishment for his treachery. Antigone, ordinarily a loyal citizen, followed her conscience and answered in the name of her religion and her gods and buried her brother thereby defying the order of the King who subsequently sentenced her to death.

Fast forward several millennia later and we read the words of James Madison, a founding father of the United States who said that: “The Religion then of every man must be left to the convictions and conscience of every man, and it is the right of every man to exercise it as these may dictate.” Madison’s opinion regarding the sanctity of individual conscience has become a well-established American value that continues to this day.

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CONSCIENCE AND RELIGION

While there are many definitions of conscience, we will use the one included in the 1977 Illinois Health Care Right of Conscience Act because it was the first of its kind and has been cited as model legislation in the conscience area:

‘Conscience’ means a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths.”

It is not to be construed as one’s mere ideas and opinions, or whatever vagrant and morally vacuous thoughts race through one’s mind. Most definitions of conscience in the US legal context are broadly defined as including religious, moral, or ethical principles. Indeed, some authors believe that the definition between religion and conscience involve a “distinction without a difference,” while others have suggested that “the framers viewed ‘free exercise of religion’ and ‘freedom of conscience’ as virtually interchangeable concepts.” Similarly, the US Supreme Court has constructed religion broadly to include convictions that are deeply held, but not religious in any conventional sense of the term.

Thus, freedom of conscience also includes freedom of thought and religion. While some commentators have attempted to differentiate the three terms, for our purposes we will use the terms interchangeably to mean “... no compulsory intervention to prevent an adult from forming his/her own responses to moral issues.”

FREEDOM OF CONSCIENCE
IN THE INTERNATIONAL ARENA

The right to freedom of conscience is represented in all international conventions concerning human rights. For example, Article18 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations (UN) on December 10, 1948, states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

A similar formulation appears in Article 18.1 of the International Covenant on Civil and Political Rights, which was adopted and opened for signature, ratification, and accession by the UN’s General Assembly
Resolution 2200 on December 16, 1966, and entered into force in March 1976. The recognition of the right to freedom of conscience, as it appears in the UN Declaration of 1948, is quoted also in Articles 12.1 and 12.2 of the American Convention on Human Rights, which has been in legal force since 1978, and prohibits any oppression of persons as a result of their faith. Interestingly, Articles 27.1 and 27.2 of the American convention address the state’s privilege to limit some human and civil rights in case of a war or national emergency, ensuring, however, the right to freedom of conscience even in these extreme circumstances.

Also, freedom of conscience is guaranteed to everyone, with no distinction as to race or nationality, by the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969. Similarly, the Teheran Proclamation of the International Conference on Human Rights held in 1968 indicated (in Article 5) that every state is to guarantee the right to freedom of conscience without discrimination based on race, nationality, language, or political belief.

Thus, many countries, including the United States, have made great efforts to advance freedom of conscience in their cultures. Indeed, Jesuit scholar Richard J. Regan noted that “no culture without some idea of moral conscience has yet been discovered.” There is no question then that an individual’s conscience is something that is accorded a significant level of respect in culture and law, and that across numerous societies freedom of thought, conscience, and religion is one of the most basic of all human rights assigned special sovereignty and protection.

CONSCIENCE-PROTECTION OUTSIDE THE EMPLOYMENT CONTEXT IN THE UNITED STATES

Legislatures and courts in the United States have protected the right of conscience in areas outside the employment framework in two key areas: the first amendment and the conscientious objector to war.

The First Amendment Protection Against Coerced Expression

The Supreme Court has held that the First Amendment prevents the government from forcing individuals to voice or promote viewpoints with which they disagree. The model cases are West Virginia Board of Education v. Barnette and Wooley v. Maynard. In Barnette and Maynard, respectively, the court struck down a statute requiring a compulsory flag salute and a law requiring compulsory display
of the state motto (“Live Free or Die”) on license plates. These cases sought to protect “the sphere of intellect and spirit”\(^{22}\) and “freedom of mind.”\(^{23}\) Moreover, Chief Justice Rehnquist characterized these cases as protecting “the constitutional interest of natural persons in freedom of conscience.”\(^{24}\)

**The Conscientious Objector to War**

Another area where American society has shown sensitivity to the right of conscience is in exempting from military service those who conscientiously object. Indeed, conscientious objectors have been included in every federal statutory scheme authorizing compulsory military service in the United States since the Civil War.\(^{25}\) The statute defined religious faith as belief “in relation to a Supreme Being” and “does not include essentially political, sociological, or philosophical views or a merely personal code.”\(^{26}\) However, in cases that arose during the Vietnam War, the Supreme Court fundamentally broadened the statute to encompass non-religious conscientious objection.\(^{27}\) Seeking to avoid Establishment Clause problems, the court reversed the convictions of conscientious objectors who explicitly disavowed belief in a Supreme Being.

**CONSCIENCE-RELATED LAWS IN THE UNITED STATES**

**Federal Level**

The issue of conscience became more prominent in the 1970s when health care providers and facilities were permitted to decline services to which they were morally or ethically opposed.\(^{28}\) It began with the Supreme Court’s decision to legalize abortion in *Roe v. Wade*\(^{29}\) in 1973. Literally within weeks, in response to *Roe*, Congress quickly passed the so-called “Church amendment”—named after former Sen. Frank Church (R-ID)—as part of the Health Programs Extension Act of 1973.\(^{30}\) The amendment states that public officials may not require individuals or organizations who receive certain public funds to perform abortion or sterilization procedures or to make facilities or personnel available for the performance of such procedures if such performance “would be contrary to [the individual or entity’s] religious beliefs or moral convictions.”\(^{31}\)

This law, which remains in force today, applies to any individual or organization that receives federal financial assistance under the Public Health Service Act of 1996, the Community Mental Health Centers Act of 1963, or the Developmental Disabilities Services and Facilities Construction Act of 1970.\(^{32}\) The law further prohibits entities that receive federal funds under these statutes or under a biomedical or behavioral research program administered by the Department of
Health and Human Services from engaging in employment discrimination against doctors or other medical personnel who either perform abortion or sterilization procedures or who refuse to perform such procedures on moral or religious grounds. The amendment provides that the receipt of federal funds in various health programs will not require hospitals or individuals to participate in abortions if they object based on moral or religious convictions. It also forbids hospitals in these programs to make willingness or unwillingness to perform these procedures a condition of employment. The Church amendment is considered by many, albeit primarily in the abortion context, to be the first freedom of conscience clause.

Protection of conscience laws are generally designed to reconcile “the conflict between religious health care providers who provide care in accordance with their religious beliefs and the patients who want access to medical care that these religious providers find objectionable.” These may include abortion, capital punishment, contraception, sterilization, artificial reproduction, euthanasia, assisted suicide, human experimentation, torture, etc. An adequate protection of conscience law should protect conscientious objectors from coercive hiring or employment practices, discrimination, and other forms of punishment or pressure. It generally also includes protection from civil liability. Conscience clauses, on the other hand, are usually less comprehensive than protection of conscience laws and afford varying degrees of protection for conscientious objectors. They may appear in statutes or in the policies of organizations or institutions. Those individuals who believe that people should not be forced to facilitate practices or procedures to which they object for moral reasons often refer to “conscience clauses,” while reproductive rights groups and patients’ rights advocates call such clauses “refusal clauses.” This is not a semantic difference, but a significantly different world view.

Congress enacted additional conscience legislation in the Omnibus Consolidated Rescissions and Appropriations Act of 1996. Under this law, which amended the Public Health Service Act, the federal government and state and local governments are prohibited from discriminating against health care entities that refuse to undergo abortion training, provide such training, to perform abortions, or to provide referrals for such training or abortions.

One year later, Congress again revisited the abortion conscience issue when it enacted the Balanced Budget Act of 1997. Concerned that managed care plans might seek to prevent doctors from informing patients about medical services not covered by their health plan, Congress amended the federal Medicaid and Medicare programs to prohibit managed care plans from restricting the ability of health care professionals to discuss the full range of treatment options with their patients. The legislation, however, simultaneously exempted managed
care providers under these programs from the requirement to provide, reimburse for, or provide coverage of, a counseling or referral service if the managed care plan objects to the service on moral or religious grounds. Thus, a Medicaid or Medicare managed care plan cannot prevent providers from offering abortion counseling or referral services, but it can refuse to pay providers for providing such information, although the plan must notify new and existing enrollees of such a policy if it does indeed have one.

The effect of the 1997 legislation was to extend the coverage of conscience laws beyond the individuals who provide medical care to the companies that pay for such care under the Medicaid and Medicare programs. Furthermore, the new conscience clause law is broader because it allows Medicaid- and Medicare-funded health plans to refuse to provide counseling and referral for abortion-related services, whereas earlier conscience clause laws permitted providers to opt out only of the actual provision of such services. Despite the new exemptions regarding the provision of counseling and referral or abortion related services, programs funded by Medicaid are nevertheless required to provide family planning services to their clients, either directly or through referral and payment to other providers. As a result, the 1997 provision may potentially have a broader impact than the 1973 Church amendment, both in terms of its effect on the entities that may refuse to provide abortion services and on the individuals who wish to access such services.

A conscience clause provision, also known as the Weldon amendment—named after Congressman Dave Weldon (R-FL)—was inserted into the appropriations bill for the Departments of Labor, Health and Human Services (HHS), and Education, which was eventually enacted as part of the Consolidated Appropriations Act, 2005 (and to subsequent years’ appropriations acts). This legislation provides that:

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.

Under the legislation, the definition of “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.”

Like previous law, the effect of this legislation is to prevent the federal government and state and local governments from enacting policies that require health care entities to provide or pay for certain abortion-related services. The appropriations legislation, however, greatly increases both
the number and type of health care providers and professionals who may refuse to provide abortion training or services without reprisals. For example, previous law protected only individual doctors or medical training programs that did not provide abortions or abortion training, and appeared to apply primarily in the medical education setting or to doctors in their individual practices. The new legislation, however, allows large health insurance companies and health maintenance organizations (HMOs) to refuse to provide coverage or pay for abortions. Since an HMO’s refusal to provide abortion-related services would affect a much larger number of patients than would an individual doctor’s refusal to provide such services, the new legislation may result in a denial of abortion-related services to a significantly expanded number of individuals. This legislation denies only those funds available under the Labor/HHS appropriations bill.

The primary federal law that arguably concerns conscience, albeit of the religious variety, is Title VII. Title VII covers most private and public employers with 15 or more workers, and, along with a host of other bases (e.g., race, gender, ethnicity), prohibits employment discrimination because of religion. Title VII defines religion to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” The Equal Employment Opportunity Commission (EEOC), Title VII’s chief enforcement agency, declared that it “will define religious practice to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” Although these merely provide “guidance,” and do “not carry the force of regulation,” the courts have mostly followed the EEOC’s lead.” It is more likely that many “beliefs” fit this definition of religion, including freedom of conscience.

Other US federal laws protect conscientious objection in a range of reproductive activities including abortion, sterilization, and contraception. Physicians, nurses, and prison employees also have a right to refuse, based on conscientious objection, to participate in any way in executions. This statute also ensures that employees in the US Department of Justice, the Federal Bureau of Prisons, or the US Marshals Service who object to capital punishment for reasons of conscience cannot be forced to participate in an execution or even in a prosecution for a capital offence.

Additionally, federal statutes and cases protecting whistleblowers (those, who believe that the public interest overrides the organization they serve, and report incidences of corrupt, unlawful, fraudulent, or harmful activity) have been construed as protecting individuals’ right to conscience. For example, in Mgmt. Info. Techs. v. Alyeska Pipeline Serv. Co., whistleblowers were described as “employees who speak out as a
matters of conscience.\textsuperscript{58} There are additional federal laws having protection of conscience provisions not listed earlier.\textsuperscript{59}

Most recently, the Bush administration announced on August 21, 2008, plans to implement a controversial regulation designed to protect doctors, nurses, and other health care workers who object to abortion from being forced to deliver service that violate their personal beliefs. The rule empowers federal health authorities to deny funding from more than 584,000 hospitals, clinics, health plans, doctor’s offices, and other entities if they do not accommodate employees who refuse to participate in care they find objectionable on personal, moral, or religious grounds.\textsuperscript{60} “People should not be forced to say or do things they believe are morally wrong. Health care workers should not be forced to provide services that violate their own conscience,”\textsuperscript{61} said Health and Human Services Secretary Mike Leavitt. Some have argued that the purpose of the proposed rule\textsuperscript{62} appeared in order to blur the line between abortion and contraception, in effect broadening the definition of abortion and restricting access to procedures fitting the new definition.\textsuperscript{63}

\textit{State Level}

The states have truly been the trendsetters for the recent expansion of conscience protection in the workplace. This has been most evident in the battle over the extent to which pharmacists may allow their religiously shaped moral judgments to narrow the range of services they offer consumers.\textsuperscript{64} Journalists and others have reported cases of individual pharmacists refusing to fill prescriptions for emergency contraceptives. Because emergency contraception can act to block implantation of a fertilized egg, people who believe in protection of human life after conception find it morally objectionable and support the right of refusal.\textsuperscript{65} The American Pharmacists Association appears to support this position and indicated that it “recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patients’ access to legally prescribed therapy without compromising the pharmacist’s right of refusal.”\textsuperscript{66}

Conversely, others have endorsed legal requirements that protect women’s access to legally prescribed prescriptions. Both sides have asked the state to enshrine collectively a particular vision of the individual’s prerogative. On one side, conscience is invoked to justify legislation that would enable individual pharmacists to refuse to fill prescriptions on moral grounds without suffering any negative repercussions, whether in the form of government penalty, employment discrimination, or third-party liability. From the opposite vantage point, conscience is invoked to justify legislation that would enable individual consumers to force pharmacists to fill any legally obtained prescription without delay or inconvenience.
Generally, state officials have responded in two ways to the refusal issue. Some have endorsed legal requirements that protect women’s access to the drugs; others have sought to protect pharmacists’ conscientious objection rights. In this and other contexts, there is disagreement over when to protect the professional’s freedom to reject on moral grounds a practice that is ordinarily required of the professional. The dispute over pharmacist refusals and workplace demands offers an opportunity to examine this issue in more detail.

By 1978—five years after the decision in *Roe v. Wade*—virtually all of the states had enacted conscience clause legislation in one form or another. Similarly, most states offer protection for religion discrimination (similar to Title VII) and procedure-specific protection in the areas of abortion, sterilization, and artificial contraception (similar to the Church Amendment). Additionally, an increased number of states have expanded into general conscience protection, although still primarily limited to health care, without any procedural restrictions. Following the Church Amendment, 47 states have “conscience clauses” on the refusal to perform abortions and, of these, 40 offer direct protection from related employment discrimination and/or recrimination.

Moreover, a growing trend in state legislation involves more general “health care” clauses (Illinois, Mississippi, and Washington). For example, the Illinois statute indicates:

> It shall be unlawful for any person, public or private institution, or public official to discriminate against any person in any manner, including but not limited to, licensing, hiring, promotion, transfer, staff appointment, hospital, managed care entity, or any other privileges, because of such person’s conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience.

The Mississippi statute shields health care providers from being held “civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience,” and forbids any employment discrimination based on such exercises of conscience. In covering all health care services, the statutes in Illinois, Mississippi, and Washington go well beyond the procedure-specific laws. Other states having broad refusal clauses for health care providers include Colorado, Florida, Maine, Tennessee, Georgia, Arkansas, and South Dakota. Furthermore, refusing to include an “undue hardship” or other accommodation limit of any significance, they go further than their counterparts in Title VII or analogous state provisions on religious practice accommodation.
Even though the trend supports increased freedom of conscience for health care professionals, there are states that view the situation differently. For example, New Jersey’s 2007 law prohibits pharmacists for refusing to fill prescriptions solely on moral, religious, or ethical grounds; and California pharmacists have a duty to dispense prescriptions and can only refuse to dispense a prescription, including contraceptives, when their employer approves the refusal and the woman can still access her prescription in a timely manner. More recently, the California Supreme Court unanimously ruled that doctors may not refuse non-emergency medical treatment to gay men or lesbians for religious reasons. The court ruled that physicians’ constitutional right to the free exercise of religion does not exempt businesses that serve the public from following state law that prohibit discrimination on the basis of sexual orientation “even if compliance poses an incidental conflict with the defendants’ religious beliefs.”

The lawsuit was filed by Guadalupe Benítez, who said her doctors and their employer, a San Diego-based fertility clinic, refused her a standard fertility treatment because of her sexual orientation. The doctors, who are Christian, said that they denied the treatment because Benítez was unmarried, and that they were allowed to do so under the First Amendment’s guarantee of freedom of religion. Benítez sought the treatment in 1999 after two years of trying to conceive using an at-home insemination kit. When she informed her doctor, Christine Brody, of her sexual orientation, Brody replied that she could not perform intrauterine insemination, should it later be required. What violated Brody’s beliefs was disputed. Benítez asserted that Brody said it was her sexual orientation; Brody said she cited Benítez’s marital status.

A recent report from the Guttmacher Institute, an organization dedicated to advancing sexual and reproductive health worldwide through research, policy analysis, and public education, indicated that almost every state has a policy explicitly allowing some health care professionals or certain institutions to refuse to provide or participate in abortion, contraceptive services, or sterilization services. Even in states without explicit refusal statutes, an individual health care professional’s actions may be legally protected by statutes prohibiting discrimination against employees, based on their religious objections. While some of the institutional policies are limited to private, or even religious, health care institutions, others apply to all institutions providing health care. Highlights from this comprehensive review of state actions are provided in Exhibit 1.

CONSCIENCE IN THE GENERAL WORKPLACE

Although the significance of conscience in American culture has existed since its founding, its protection in the private workplace is a
Conscience in the Workplace

Exhibit 1. Highlights of Current State Activities Related to Refusal Laws and Clauses (Guttmacher Institute, September 1, 2008).

- Forty-six states allow some health care providers to refuse to provide abortion services.
  - All of these states permit individual health care providers to refuse to provide abortion services.
  - Forty-three states allow health care institutions to refuse to provide abortion services, 15 limit the exemption to private health care institutions, and one state allows only religious health care entities to refuse to provide such care.
- Thirteen states allow some health care providers to refuse to provide services related to contraception.
  - Eight states allow individual health care providers to refuse to provide services related to contraception.
  - Four states explicitly permit pharmacists to refuse to dispense contraceptives. (Five additional states have broad refusal clauses that do not specifically include pharmacists, but may apply to them.)
  - One state explicitly permits pharmacies to refuse to dispense contraceptives.
  - Four states have broad refusal clauses that do not specifically include pharmacies, but may apply to them.
  - Nine states allow health care institutions to refuse to provide services related to contraception; six states limit the exemption to private entities.
- Seventeen states allow some health care providers to refuse to provide sterilization services.
  - Sixteen states allow individual health care providers to refuse to provide sterilization services.
  - Fifteen states allow health care institutions to refuse to provide sterilization services; four limit the exemption to private entities.

new and rising phenomenon. While such statutes at both the federal and state levels have been primarily limited to the health care arena today, there is little question that their expansion in the future will be to the larger workplace. There is a growing trend in employment law that employees should be protected in the exercise of their consciences (notwithstanding the California Supreme Court’s recent ruling)—even if such exercise is contrary to their employers’ wishes or the demands of their jobs. This rapidly expanding and intensifying conflict centers on
the role that religious faith should play in the provision of goods in our society. While the conscientious objection controversy continues in the health care field (see Exhibit 2), it has expanded to other workers (see Exhibit 3) seeking exemptions from requirements to perform actions that violate their moral integrity. Indeed, the conflict about conscience clauses may represent “the latest struggle with regard to religion in America” and is rapidly becoming one of the more controversial issues confronting employers. The objection to the work may be based on religious beliefs founded on the tenets or beliefs of a church, sect, denomination, or other religious group, or on ethical, philosophical, or moral grounds and requires employers to accommodate the religious needs of their workers as mandated by the Civil Rights Act of 1964.

**CONCLUSION**

Freedom of conscience has been seen as “an essential element of a democratic society,” including the United States. The oft-quoted

Exhibit 2. Scenarios Involving Health Care Workers Who Object to Work That Is in Opposition to Their Conscience

- A health care professional refuses to fill prescriptions from medical products and treatments resulting from stem cell research when they are introduced into the market.
- A physician refuses to discuss, provide information, or refer patients for medical interventions to which he or she has moral objections.
- A pharmacist refuses to fill a prescription for antibiotics because it came from a facility that provides abortion medications.
- A gynecologist declines to prescribe birth control pills.
- A pharmacist refuses to fill prescriptions for “morning-after” pills, saying that dispensing the medications violates his or her personal moral or religious beliefs.
- A physician refuses requests for Viagra from unmarried men.
- A health-related professional declines to participate in physician-assisted suicide.
- An ambulance driver refuses to transport a patient for an abortion.
- Fertility specialists rebuff a gay woman seeking artificial insemination.
- A pharmacist job applicant refuses to sell condoms due to his religious beliefs and is not hired.
words of the late Chief Justice Charles Evans Hughes summarize the position well: “In the forum of conscience, duty to a moral power higher than the state has always been maintained.” Americans are generally supportive of efforts to accommodate the bona fide religious, moral, and conscience beliefs of workers, as would be expected of a nation built by generations of immigrants often seeking to escape persecution.

Freedom of conscience is a particularly contentious issue in America since the United States is a highly individualistic society that emphasizes personal freedom and choice leading to claims of absolute rights across a myriad of issues including reproduction, religious, and work-related matters. One effect of such intense individualism is that restrictions on individual freedom be limited. Persons should be entitled to exercise their freedom of conscience just so long as those individual decisions do not impinge on the freedom of others. Balance is necessary but difficult to achieve. America is filled with claims for the rights of

Exhibit 3. Scenarios Involving Non-Medically Related Employees in the General Workplace Who Have Objected to Work That Is in Opposition to Their Conscience

- A worker balks at participating in the production of military weapons.
- A Baptist law enforcement official refuses to work at casinos.
- A Catholic police officer is unwilling to protect and guard abortion clinics.
- An IRS employee refuses to handle applications for tax-exempt status submitted by organizations supporting abortion.
- A Jehovah’s Witness wait person refuses to sing happy birthday to guests at a restaurant.
- Prison employees are unwilling to participate in executions.
- Muslim taxi cab drivers refuse to pick up passengers at an airport carrying alcohol or travelers having dogs, including service dogs.
- Muslim grocery store cashiers refuse to scan pork products such as bacon.
- A transportation worker objects to driving a bus with an advertisement for a gay magazine aimed at the gay, lesbian, bisexual, and transgendered community that is displayed on the back of some city buses because the ad offends her religious beliefs about homosexuality.
- A technician refuses to provide help to a client that manufactures violent computer-software games.
airline passengers, smokers, non-smokers, obese persons, AIDS victims, and immigrants, just to name a few, and when those rights conflict with others’ rights, difficulties surface.

The wave of state and federal laws and bills supporting conscience protection for medical personnel are increasingly covering all health care services—not only abortion, and this has created counterclaims challenging the idea that health-related professionals may deny legally and medically permitted therapeutic interventions, particularly if their objections are personal and religious. This controversy has become particularly acute with one researcher arguing that “a doctor’s conscience has little place in the delivery of modern medical care,” and that “if people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors,” and that they “can escape this burden by merely taking another job.” However, the defendant in Barnett could have attended a private school and the defendant in Maynard could have moved to another state. The question is not whether the compulsory activity can be escaped. The question is whether Americans deem it proper to put a person in the position of leaving his or her job or violating his or her conscience.

Although such laws make reference to “conscience,” most define that term in a virtually boundless fashion to include religion, moral, or ethical principles and convictions. Such a broad definition may bring the freedom of conscious debate clearly within the protection of Title VII and its prohibition of religious discrimination. Additionally, if the Bush administration’s newly proposed abortion bill becomes law, the federal regulation may trump the recent ruling of the California Supreme Court in Benítez and once again support health care workers’ right to conscientiously object to performing certain non-essential, elective medical procedures that conflict with the providers’ religious and moral beliefs.

It appears that one development after another has challenged the values of those advocating freedom of conscience in medicine: treatments using fetal tissue; the RU-486 abortion pill; the morning-after pill; fertility clinics discarding thousands of excess embryos; a looming wave of therapies derived from embryonic stem cells; and physician-assisted suicide and euthanasia. For instance, a health care worker could refuse for moral reasons to remove a breathing tube from a terminally ill patient or, conversely, to insert such a tube in the first place.

It also seems that end of life issues and conscientious objections may come under increased scrutiny. In June of 1997, the Supreme Court held that assisted suicide is not a constitutionally protected right and that its legality is left up to the states. Currently, Oregon is the only state that approves of physician-assisted suicide with medical personnel permitted to opt out from participating in such activities. Nevertheless,
experience from the Netherlands and Belgium, where euthanasia is legal, portends difficulties. Since late 2003, general practitioners in Belgium who are unwilling to perform euthanasia and are opposed to it have faced demands that they help patients find physicians willing to provide the service. Proponents of assisted suicide argue that mandatory referral for euthanasia is required because of respect for patient autonomy, the paradigm of “shared decision making,” and the fact that euthanasia is a legal “treatment option.” Opponents feel that participation in such referrals is complicity in immoral behavior: “That’s like saying, ‘I don’t kill people myself but let me tell you about the guy down the street who does.’” If (or when) more states legalize physician-assisted suicide, there will undoubtedly be different legislation that will test the concept of freedom of conscience.

To be sure, such dilemmas are not always easy, and there is no doubting that important interests are at stake, including both employee conscience and the interest of employers in providing relevant, legal service (not to mention the customers they serve). And yet, the current trend is to provide an unqualified right to refuse—no questions asked, no dialogue required, and no opportunity for potentially deeper personal or institutional growth through a candid confrontation of values.

The conscience trend presents an unprecedented challenge to employers. In light of the blanket nature of the relevant exemptions to perform, as well as the broad definitions of conscience that are offered both in existing law and in pending legislation, there is no question that employers will face an increasingly serious challenge regarding how they choose to conduct their business. Indeed, as one commentator noted, “this issue is the San Andreas Fault of our culture.”

Yet this need not be. While American courts and legislatures have historically shown themselves solicitous of the conscience of employees, the protection is minimal when compared with that provided in Germany. The German Constitution contains a provision providing for freedom of conscience. This provision has been construed to permit all employees to decline to perform a task they deem incompatible with their conscience. It should be noted that Germany may be particularly sensitive to a right of conscience because its history of individuals following orders blindly has a malicious resonance. The determination is left to the employee, who may not be discharged because of its exercise.

While this broad right of conscience in the German Constitution can pose difficulties of implementation with judges wrestling with a “reasonable” conscience justifying a refusal to do certain work and an “unreasonable” conscience deemed irrelevant, it has hardly wreaked havoc on Germany’s economy or society. Indeed, Germany has not suffered because all employees have a right of conscience, just as America has not suffered because of respect for the conscience of
citizens in assorted situations. Our society has shown sensitivity to the call of individual conscience. We respect the conscience of draftees who oppose war, physicians who oppose abortion, employees who oppose their superiors’ misconduct, and citizens who oppose government dogma (e.g., on license plates and in the classroom).

NOTES


5. Illinois Health Care Right of Conscience Act, 745 ILCS 70/1, at Section 3(e).


7. Id. at 912.


12. Id.


16. Office of the High Commissioner for Human Rights (1968), Proclamation of Teheran, proclaimed by the International Conference on Human Rights at Teheran on 13 May
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19. Id.


23. Id.


26. Id.

27. Supra, n.8.


31. 42 U.S.C. § 300a-7(b).


33. 42 U.S.C. § 300a-7(c).


42. 42 U.S.C. § 1396d(a)(4)(C).


44. Id.

45. Id.

46. Id.


49. 29 C.F.R. § 1605.1.


51. Id. at 28.

52. Public Health Service Act 42 U.S.C. § 300a-7(b); 42 U.S.C. § 300a-7(c); 42 U.S.C. § 300a-7(e); 42 U.S.C. § 238n; Legal Services Corporation on Abortion 42 U.S.C. § 2996f(b); Protecting Health Care Entities that Decline to Perform or Refer for Abortions for Any Reason (1996) 42 USC § 238n; Neutrality With Respect to Abortion 20 U.S.C. § 1688.

53. Public Health Service Act 42 U.S.C. § 300a-7(b); 42 U.S.C. § 300a-7(c); 42 U.S.C. § 300a-7(e).


55. See Refusal to Participate in Executions or in Prosecution of a Capital Crime, 18 U.S.C. § 3597(b).

56. Id.

57. 151 FRD 478, 481 (DDC 1993).

58. Id. at 481.


61. Id.


73. Id.

74. Supra, n.28.


76. North Coast Women’s Care Medical Care Group, Inc., et al. v. San Diego County Superior Court (Guadalupe T. Benítez), Case number: S142892, decided August 19, 2008.


80. Supra, n.69, at 235.

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85. Employment Development Department, “Conscientious Objection Based on Religious, Ethical, Moral, or Philosophical Beliefs,” http://www.edd.ca.gov/UIBDG/Voluntary_Quit_VQ_90.htm (last visited August 7, 2008).

86. 42 U.S.C. § 2000e(j); Commission Guidelines, 29 C.F.R. § 1605.2(b).

87. See, e.g., Pharmacists for Life International, http://www.pfli.org/. This organization has already announced its opposition to dispensing drugs they believe might be used for physician-assisted suicide and to embryonic stem cell research. It is possible, though not yet clear, that some pharmacists may find medical treatments that result from embryonic stem cell research objectionable, and refuse to dispense them.


91. Supra, n.64.


94. Supra, n.95.

95. Id.


107. Supra, n.68, at 143–144.


113. Id. at 297.

114. Supra, n.81, at 327.

115. Supra, n.69, at 235.


117. Id.


121. Supra, n.64.

122. Supra, n.69.

123. Supra, n.95.
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126. Supra, n.80, at 311.

127. Supra, n.104.