

A Most Fundamental Freedom of Choice: An International Review of Conscientious Objection to Elective Abortion

Erin Whitcomb

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

A MOST FUNDAMENTAL FREEDOM OF CHOICE:

AN INTERNATIONAL REVIEW OF CONSCIENTIOUS OBJECTION TO ELECTIVE ABORTION

ERIN WHITCOMB*

At the time of being admitted as a Member of the Medical Profession: I solemnly pledge myself to consecrate my life to the service of humanity; . . . I will practice my profession with conscience and dignity; . . . I will maintain the utmost respect for human life, from the time of conception, even under threat, I will not use my medical knowledge contrary to the laws of humanity; I make these promises solemnly, freely and upon my honor.¹

-Physician's Oath, Second General Assembly of the World Medical Association

INTRODUCTION

Freedom of conscience, an internationally recognized individual right, is among the most fundamental of personal liberties.² It affords an individual the freedom to act in a manner consistent with the dictates of his or her conscience, or to *refrain from acting* where such action would violate those demands. Though freedom of conscience can be intimately related to

* J.D., June 2009, St. John's University School of Law; M.A. School Psychology, May 2006, Alfred University; B.A. Psychology, May 2004, State University of New York at Geneseo. The author is deeply grateful for the faith and support of her family, the Culhane family, and her Grandma Mary. She would also like to sincerely thank the editors and staff of St. John's Journal of Legal Commentary.

¹ *Declaration of Geneva* (1948), available at <http://www.cirp.org/library/ethics/geneva>. Adopted by the General Assembly of World Medical Association at Geneva Switzerland, September 1948.

² *R. v. Morgentaler*, 1 S.C.R. 30, 165 (1988) (Wilson, J., concurring) (“[A]n emphasis on individual conscience and individual judgment . . . lies at the heart of our democratic political tradition.”); Julie Cantor & Ken Baum, *The Limits of Conscientious Objection – May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2009 (2004) (“[T]he right to refuse to participate in acts that conflict with personal ethical, moral, or religious convictions is accepted as an essential element of a democratic society.”)

religion, it also protects decision-making that is based on moral or philosophical grounds. In some faiths, expression of conscientious dissent and abstention from proscribed practices are compulsory. For example, according to the Roman Catholic Church, “[a]bortion³ and euthanasia are . . . crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a *grave and clear obligation to oppose them by conscientious objection.*”⁴ Religious and moral mandates of this nature are leaving some health care professionals in precarious positions in contemporary medical practice, particularly when it comes to elective abortion.⁵

A health care professional’s refusal to be involved in an elective abortion procedure is generally asserted on moral, philosophical, or religious grounds, as contrary to the dictates of his or her conscience. However, it is uncommon for a conscientious objection to abortion to be raised in the absence of a concurrent assertion that every living human being possesses profound, inherent, and equal dignity, bearing in mind that human life begins at conception. Indeed, whether human life begins at conception has been resolved by the biological sciences.⁶

The issue really cannot be fudged, as people sometimes try to do by imagining that there is a dispute about whether it is really a human being who is dismembered in a dilation and curettage abortion, or whose skin is burned off in a saline abortion, or the base of whose skull is pierced and whose brains are sucked out in a dilation and extraction (or “partial birth”) abortion. That issue has long been

³ Pope John Paul II, in his encyclical *Evangelium Vitae*, defines abortion as: “[T]he deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth.” Encyclical Letter from Pope John Paul II, *Evangelium Vitae* ¶ 58 (Mar. 25, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html [hereinafter *Evangelium Vitae*].

⁴ *Id.* at ¶ 73 (emphasis added); CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 86 (1999) (Law Professor Charles Rice explains that if the law were to require a Catholic physician to perform an abortion, “the physician would be morally obliged to refuse even on pain of death.”).

⁵ An elective abortion is defined as one “without medical justification but done in a legal way.” PDR MEDICAL DICTIONARY 4 (Marjory Spraycar ed., West 1995).

⁶ Testifying before a subcommittee of the United States Senate, Professor Micheline Matthews-Roth of Harvard University Medical School explained, “it is incorrect to say that biological data cannot be decisive . . . it is scientifically correct to say that an individual human life begins at conception.” *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on the Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong., 1st Sess. 17 (1981). Dr. Watson A. Bowes of the University of Colorado Medical School testified that “the beginning of a single human life is, from a biological point of view, a simple and straightforward matter—the beginning is conception . . . This straightforward biological fact should not be distorted to serve sociological, political, or economic goals.” *Id.* at 25–26. The testimony of Professor Hymie Gordon of the Mayo Clinic added, “[b]y all the criteria of modern molecular biology, life is present from the moment of conception.” *Id.* at 13.

settled – and it was settled... by the sciences of human embryology and developmental biology.⁷

In fact, it was the perceived synonymy between abortion and wrongful death that resulted in the practice of barring abortion based on ethical grounds at the time of medicine's origin.

The original Hippocratic Oath, an ethical vow drafted around 400 B.C., was pledged by physicians practicing medicine in Ancient Greece who were influenced by the teachings of Hippocrates⁸ and ancient Pythagorean doctrine.⁹ It included the following language: "I will give no deadly medicine to anyone if asked, nor suggest any counsel; and in like manner I will not give to a woman a pessary to produce abortion."¹⁰ The organized medical profession considered abortion to be contrary to medical ethics for the next 2,500 years.¹¹

Today, the practice of elective abortion has been legalized in many parts of the world, including the United States,¹² Canada¹³ and South Africa.¹⁴ With the legalization of the procedure in these nations has come an ostensible social acceptance; however, a uniform willingness by health care professionals to perform or participate in the procedure has not followed. Complicating matters, societal and professional pressure for the medical community to provide the now legal procedure has developed. "The legalization of a procedure... creates a dynamic of expectation: tremendous pressure on health care workers to provide every legal service,

⁷ Robert P. George, *Obama and His Pro-Life Apologists*, THE PUBLIC DISCOURSE, May 29, 2009, <http://www.thepublicdiscourse.com/2009/05/214> (last visited Jan. 22, 2010).

⁸ Hippocrates has been referred to as the "Father of Medicine" and the "most important and most complete medical personality of antiquity." SCOTT J. HAMMOND, KEVIN R. HARDWICK & HOWARD L. LUBERT, CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: VOLUME II: RECONSTRUCTION TO THE PRESENT 749 (Hackett Pub. 2007).

⁹ Pythagoreans believed that "the embryo was animate from the moment of conception, and abortion meant destruction of a living being." *Id.*

¹⁰ HAMMOND ET AL., *supra* note 8, at 749.

¹¹ CANADIAN PHYSICIANS FOR LIFE, AN OPEN LETTER TO CANADA'S HEALTH MINISTER HONOURABLE ALLAN ROCK (2001), available at <http://www.physiciansforlife.ca/html/conscience/articles/openletter.html> ("For 2,500 years the medical profession rejected abortion."); RAYMOND TATALOVICH, THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA 37 (1996) ("[The AMA abortion policy] recommended that it be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child- if that be possible.")

¹² *Roe v. Wade*, 410 U.S. 113, 166 (1973) (holding Texas statute prohibiting abortion unconstitutional).

¹³ *R. v. Morgentaler*, 1 S.C.R. 30, 79 (1988) (striking down the section of the Canadian Criminal Code criminalizing abortion).

¹⁴ Choice on Termination of Pregnancy Act, No. 92 of 1996 (S. Afr.), available at <http://www.info.gov.za/acts/1996/a92-96.pdf> (repealing previous restrictions on abortion in South Africa).

regardless of their conscientious convictions.”¹⁵ Thus, where personal moral obligations become increasingly at odds with societal and professional expectations, health care providers are rendered unable to comply with one set of obligations without compromising the other.

Social efforts to resolve this deeply troubling conflict in a manner that protects individual conscience rights have not followed. In fact, the considerable societal and professional pressure to provide abortion in the wake of its legalization has actually given rise to an affirmative intolerance of conscientious objection in contemporary medicine. Those professionals who object to participating in abortion are increasingly pressured to set aside the dictates of their consciences in the name of professional duty, and are subject to discrimination,¹⁶ intimidation,¹⁷ harassment,¹⁸ expulsion from medical training,¹⁹ and even termination of employment²⁰ when they

¹⁵ Sean Murphy, Protection of Conscience Project, *Protection of Conscience: Yesterday, Today and Tomorrow*, Presentation to the Courtenay Pro-Life Society, (March 14, 2004) [hereinafter *Yesterday*], <http://www.consciencelaws.org/Conscience-Archive/Speeches/Protection-Yesterday.html>.

¹⁶ See, e.g., Moore v. British Columbia (Ministry of Social Services), 17 C.H.R.R. D/426 (Can. 1992) (finding in favor of a social services employee who was terminated for refusing to authorize an abortion for a client); see also Rob Stein, *Health Workers' 'Conscience' Rule Set to Be Voided*, WASH. POST, Feb. 28, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR20090227011104.html> (describing the Obama administration's plan to remove protections for health workers who refuse to provide care they find objectionable).

¹⁷ See, e.g., Sean Murphy, Protection of Conscience Project, *South African Nurse Denied Position*, <http://www.consciencelaws.org/Repression-Conscience/Conscience-Repression-37.html> (discussing how a nurse in South Africa was intimidated for not wanting to participate in abortions); see also Julia Duin, *N.Y. Nurse Sues After Forced to Aid Abortion*, WASH. TIMES, available at <http://www.washingtontimes.com/news/2009/jul/31/nurse-sues-after-aiding-abortion/print/> (detailing that a manager threatened a nurse with a charge of “insubordination and patient abandonment” for not wanting to participate in an abortion).

¹⁸ See *Re: Wisconsin Assembly Bill 67: Testimony Before Wisconsin Senate Committee on Health, Children, Families, Aging and Long-Term Care*, 2003 Leg., 2003-2004 Sess. (Wisc. 2003) (statement of Beth LaChance, R.N.), available at <http://www.consciencelaws.org/RepressionConscience/Conscience-Repression-31> (stating that after signing a petition conscientiously objecting to participating in abortions, Ms. LaChance and other nurses were subjected to disciplinary retaliations, false accusations, ostracism, and criticism) [hereinafter *Wisconsin Assembly*]; see also Courtney Miller, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. L. & Soc. Just. 327, 336-37 (2006) (describing Beth LaChance's ordeal to demonstrate that some practitioners are harassed for exercising their right to conscientiously object to participating in abortions).

¹⁹ See Miller, *supra* note 18, at 334 (implying the existence of discrimination by noting that the purpose of the Coats-Snowe Amendment of 1996 was to prevent only post-graduate training programs from discriminating against trainees that refuse to perform abortions); see also Paul Ranalli, M.D., *Med School 101: You Must Perform or Refer for Abortion*, 31 National Right to Life News, No. 1 (Jan. 2004), available at http://www.nrlc.org/news/2004/NRL04/med_school_101.htm (reporting that a Canadian medical school intends to deny a medical degree to a student that refused to perform or refer abortions despite the student's exceptional grades in all courses).

²⁰ See Miller, *supra* note 18, at 337-38 (telling the story of Stephanie Adamson, a pro-life emergency medical technician, who was fired for refusing to transport a patient for an elective abortion procedure); see also American Center for Law & Justice, *ACLJ Files Lawsuit Against Illinois Ambulance Service After EMT Fired for Refusing to Transport Woman to Abortion Clinic*, May 7, 2004, <http://www.aclj.org/news/read.aspx?ID=456> (announcing the lawsuit regarding the termination of

do not. Thus, it has become essential to extend meaningful statutory conscience protection to health care professionals—to more formally ensure that this vulnerable population retains the right to abstain from participation in elective abortion procedures where it would require action in a manner inconsistent with the dictates of conscience.

The cross-cultural need for conscience protection has become exceedingly apparent in recent years. “The abortion choice, the legal right which is rooted in an autonomy right, has provoked a call for a legal right to choose not to participate in abortion, echoing the same language of choice and autonomy.”²¹ Statutes enacted to protect conscience-based decision-making are known as “conscience clauses.”²² In the health care context, conscience clauses typically provide legal protection against discrimination for medical professionals who exercise conscientious refusal to provide medical services to which they have moral or religious objections.²³

This Note takes the position that statutory conscience protection is necessary across cultures to protect individual conscience rights. Health care professionals must be provided with a means to invoke meaningful conscientious objection with regard to their participation in elective abortion—including total abstention from the practice—without fear of reprisal. Many western democracies, including the United States, have some form of statutory conscience protection;²⁴ Canada, however, does not. Canada and the United States have a relatively parallel development of abortion rights yet divergent provisions of statutory conscience protection. South Africa, a democracy in its infancy, is also highly relevant to this discussion. Unlike both Canada and the United States, women in South Africa possess a *positive*, statutory right to abortion. Like Canada, South Africa does not provide conscience protection for its health care

Stephanie Adamson for refusing to transport a woman from a hospital that forbids abortions to one that performs them).

²¹ Miller, *supra* note 18, at 340.

²² Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, J. LEGAL MED. 177, 177 (1993) (defining conscience clauses as statutes that protect health care providers’ right to refuse to partake in certain procedures if they morally or religiously object to them).

²³ *Id.* at 178 (In health care, a “[c]onscience clause” refers to any statute or regulation providing explicit protection for the rights of health care providers to decline to provide or participate in providing health services that violate their religious or moral beliefs.”).

²⁴ See, e.g., Abortion Act, 1967, c. 87, § 4 (Eng.) (allowing conscientious objection to participation in abortion in England); see also Contraception, Sterilisation, and Abortion Act 1977 § 46, 1977 S.N.Z. No. 112 (stating practitioners have no obligation to perform abortions in New Zealand) see generally Protection of Conscience Project, *Countries with Protection of Conscience Laws*, <http://www.consciencelaws.org/Protection-of-Conscience-Laws.html> (identifying countries that have protection of conscience laws).

professionals. The South African experience is also particularly relevant in that a majority of its health care professionals are conscientiously unwilling to participate in elective abortion procedures, a situation that is increasingly resulting in coercion and employment discrimination.

Part I of this Note outlines the historical development of both legalized abortion and related sources of conscience protection for medical professionals in Canada, South Africa, and the United States and explains the current state of freedom of conscience for health care professionals in each nation. Part II will review and address the three most common challenges faced in the advancement and defense of statutory conscience protection: challenges to its constitutionality, calls for mandatory referral, and assertions that conscience protection for individual providers be replaced by a professional "standard of care." Part III will explore the future of freedom of conscience for health care professionals in each nation.

I. THE HISTORICAL DEVELOPMENT OF ELECTIVE ABORTION AND CONSCIENCE PROTECTION IN CANADA, SOUTH AFRICA, AND THE UNITED STATES

A. Canada

Canada first legalized abortion in 1969, pursuant to an amendment to Section 251 of its Criminal Code.²⁵ However, the only instances of abortion decriminalized at this time were those deemed necessary to protect the health or life of the mother. Seven different provisions relating to conscience protection were discussed during the legislation's drafting, but they were ultimately rejected prior to its passage.²⁶

Elective abortion was legalized by the Canadian Supreme Court's 1988 decision of *R. v. Morgentaler*.²⁷ In this case, the Court determined that the national law banning abortion was unconstitutional in its entirety. Interestingly, the court relied—in part—on the fundamental nature of conscience to liberty when rendering its decision:

²⁵ Canada Criminal Code, R.S.C. § 251, ch. C-46 (1969) (noting there is an exception to the illegality of abortions when a qualified medical practitioner performs the procedure in an accredited hospital pursuant to the approval by the therapeutic abortion committee of that hospital).

²⁶ Murphy, *supra* note 15 (stating that almost fifty amendments were put forward, seven of which were intended to guarantee the right of conscientious objection to individuals or institutions); see Canada Criminal Code, R.S.C. § 287(4), ch. C-46 (1985) (lacking any mention of conscience protection).

²⁷ 1 S.C.R. 30 (1988) (striking down a law which criminalized abortions).

The right to liberty . . . guarantees a degree of personal autonomy over important decisions intimately affecting their private lives. . . . [T]he decision whether or not to terminate a pregnancy is essentially a moral decision . . . [and] in a free and democratic society, *the conscience of the individual must be paramount to that of the state.*²⁸

However, like the United States Supreme Court in *Roe v. Wade*,²⁹ the Canadian Supreme Court did not go so far as to grant a woman a substantive right of access to abortion. While accessibility to abortion now varies provincially, since the *Morgentaler* decision the Canadian government has not imposed any national restrictions on abortion. Though Canada has yet to enact formal statutory conscience protection measures, the nation does recognize an individual right of conscience.

The Canadian Charter of Rights and Freedoms explicitly guarantees freedom of religion and conscience. It states, in pertinent part: “Whereas Canada is founded upon principles that recognize the supremacy of God³⁰ and the rule of law: (2) Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.”³¹ *R. v. Big M Drug Mart*³² is considered the seminal constitutional case in Canada regarding the nature of freedom of religion. Here, the Canadian Supreme Court struck down Sunday closing legislation due to its non-secular purpose. The Court explained:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs

²⁸ *Id.* at 37 (answering a proposed question as to whose conscience the decision to terminate a pregnancy is a matter of, and stating that the conscience of the individual is paramount to that of the state).

²⁹ 410 U.S. 113 (1973) (basing its decision on a constitutional right to privacy emanating from the Due Process Clause of the Fourteenth Amendment, also known as substantive due process).

³⁰ Commentators on the supremacy of God clause in the Canadian preamble have suggested that it “[s]hould not be understood as a creation of an expedient political calculus. Rather it should be seen to embody an essential piece of the Charter’s origins.” They further suggest a natural law influence to its inclusion. “[T]he Supremacy of God clause points to the historical sources of the rights codified in the *Charter* and affirms the fundamental principle that those substantive provisions purport to represent natural and inalienable rights that are derived from sources beyond the positivist machinations of the state.” Jonathon W. Penney & Robert J. Danay, *The Embarrassing Preamble?: Understanding the “Supremacy of God” and the Charter*, 39 U.B.C.L. REV. 287, 298-331 (2006).

³¹ Constitution Act, 1982, Schedule B to the Canada Act 1982, ch.11, § 2(a) (U.K.) [hereinafter Constitution Act].

³² 1 S.C.R. 295, 336 (1985) (interpreting section 2 of the Canadian Charter of Rights and Freedoms).

by worship and practice or by teaching and dissemination.³³

Discrimination on the basis of religion in Canada is explicitly proscribed by Section 15 of the Constitution which provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."³⁴ Additional protection against discrimination on the basis of religion is found in the Canadian Human Rights Act.³⁵ One of the most relevant cases in Canada regarding conscience protection was a discrimination action brought under this Act. In *Cecilia Moore v. BC*,³⁶ a social worker was fired upon her refusal to authorize government funding for an abortion. The human rights adjudicator in that case held the government responsible for its failure to respect the social worker's religious beliefs.³⁷ The agency was required to either provide her with an accommodation or show that an undue hardship would result.³⁸ In the light of its failure to do either, the social worker prevailed and recovered damages.³⁹

In a concurring opinion in the *Morgentaler* case,⁴⁰ Justices Beetz and Estey noted that the law could not compel hospitals to organize abortion committees "any more than it could force a physician to perform an abortion," because the decision in both instances "is, in part, one of conscience, and, in some cases, one which affects religious beliefs."⁴¹ However, the practical reality for the health care professionals of Canada would soon demonstrate otherwise. For the conscientiously unwilling Canadian health care professional, the absence of meaningful statutory conscience protection has been devastating.

In 1971, Frances Martin, a nurse in the labour-delivery unit of a

³³ *Id.*

³⁴ Constitution Act, *supra* note 31, at § 15.

³⁵ R.S.C., ch. H-6 (1985). "The purpose of this Act is to extend the laws in Canada to give effect . . . to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated . . . without being hindered in or prevented from doing so by discriminatory practices based on . . . religion." David Newman, *A Double Standard: Indians Are Not Protected Against Political Discrimination*, 32 MAN. L.J. 117, n.32 (2007) ("For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religious, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.").

³⁶ (Ministry of Soc. Serv.), [1992] 17 C.H.R.R. at D/432 (Can.).

³⁷ *See id.* at D/433.

³⁸ *See id.*

³⁹ *See id.* at D/434.

⁴⁰ 1 S.C.R. 30, 95-96 (1988).

⁴¹ *See id.* at 99.

Canadian hospital, was demoted from her nurse management position for refusing to participate in abortion procedures.⁴² Between 1977 and 1984, registered nurse Linda Bradley was denied employment at four different hospitals due to her unwillingness to assist in abortion procedures.⁴³ After finally securing employment as a nurse in another hospital, she refused to participate in the hysterectomy of a mother who was five and a half months pregnant. Bradley's employer promptly informed her that her employment was conditioned on her willingness to participate in abortions. Bradley resigned and filed a complaint with the Human Rights Tribunal in British Columbia, which found her ineligible for protection because her objection to abortion was based on morality and not religion.⁴⁴ In 1997, Catholic nurses employed at St. Joseph's Hospital were transferred to a public hospital, where participation in abortion was a condition of employment. Their resistance to participating in abortion procedures was dismissed by the hospital employer as "personal discomfort," and abstentions were not permitted.⁴⁵

Hospitals are not the only places where health care professionals' freedom of conscience rights are being violated. Some Canadian medical schools require that all students perform or refer patients for abortion.⁴⁶ An unnamed medical student at the University of Manitoba's medical school was issued a failing grade in his obstetrics and gynecology rotation when he refused to perform or refer any patient for an abortion.⁴⁷ The University supported its action by asserting that students are responsible for offering

⁴² Murphy, *supra* note 15 ("France Martin . . . in 1971, refused to assist at abortions, and was demoted from head nurse in the labour-delivery unit.")

⁴³ Sean Murphy, Protection of Conscience Project, *Nurse Denied Employment, Forced to Resign: A Two Tiered System of Civil Rights*, <http://www.consciencelaws.org/RepressionConscience/Conscience-Repression-03.html> (last visited Jan. 22, 2010) ("Langley Memorial, Peace Arch Hospital, Delta Hospital and Vancouver General had all denied her employment because she was unwilling to assist in abortions.")

⁴⁴ *Id.* ("Appealing to the British Columbia Human Rights Tribunal, Linda Bradley was told that she was not eligible for protection because her refusal was for moral and not religious reasons.")

⁴⁵ Sean Murphy, Protection of Conscience Project *Bishop Protests on Behalf of Nurses: Health Care Consolidation Generates Conflict* (1997), <http://www.consciencelaws.org/Examining-Conscience-Background/Abortion/BackAbortion03.html> (last visited Jan. 22, 2010) (discussing hospital personnel's dismissal of Catholic nurses after their resistance to participate in abortion procedures).

⁴⁶ Ranalli, *supra* note 19 (describing a Canadian medical school's requirement that students perform or refer patients for abortion services); Terry O'Neill, *Should Doctors Be Forced to Abandon Their Faith?*, W. STANDARD MAG. (2004) available at <http://www.consciencelaws.org/Repression-Conscience/Conscience-Repression-35.html> (detailing a Canadian medical school's policy mandating student participation in abortion).

⁴⁷ Ranalli, *supra* note 19 (commenting on the University of Manitoba's unnamed medical student who was issued a failing grade because he refused to perform or refer patients for abortion services); O'Neill, *supra* note 46 (explaining that an unnamed medical student was issued a failing grade as a result of his noncompliance with the medical school's abortion policy).

all treatment options to patients, and this student failed to do so.⁴⁸ The South African experience is equally troubling.

B. South Africa

Like Canada, South Africa has no formal statutory conscience clause for its health care professionals. A democracy in its infancy, South Africa first established a national Constitution in 1996. Abortion was also made legal in South Africa that year, pursuant to the enactment of the Choice of Termination of Pregnancy Act of 1996.⁴⁹ The only conscience protection for health care providers in the nation is that derived from the South African Constitution.

Section 15(1) of the South African Constitution provides "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."⁵⁰ Under section 9[1], "Everyone is equal before the law and has the right to equal protection and benefit of the law." Section 9 continues to prohibit both discrimination on the basis of religion or conscience by the state⁵¹ or by any individual person.⁵²

The leading constitutional case⁵³ in South Africa relating to this topic is *S. v. Solberg*.⁵⁴ It was the first case in which the Constitutional Court addressed the nation's freedom of religion clause. In *Solberg*, the court held that a showing of direct or indirect coercion to compel a person to act

⁴⁸ Ranalli, *supra* note 19 (stating that the unnamed medical student received a failing grade because of noncompliance with the University's policy on abortion); O'Neill, *supra* note 45 (articulating the University's policy on performing or referring abortions as the reason why an unnamed medical student received a failing grade).

⁴⁹ Choice on Termination of Pregnancy Act, 92 of 1996 (S. Afr.), available at <http://www.capegateway.gov.za/other/2004/4/a92-96.htm> (legalizing abortion in South Africa); Audrey E. Haroz, *South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women*, 30 VAND. J. TRANSNAT'L L. 863, 886-89 (1997) (discussing the passage of the Choice on Termination of Pregnancy Act which legalized abortion in South Africa).

⁵⁰ S.AFR. CONST. ch. 2, Bill of Rights §15(1), 1996, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm> (granting freedom of religion, belief and opinion to the people of South Africa).

⁵¹ *Id.* at § 9(3) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.")

⁵² *Id.* at § 9(4) "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

⁵³ Richard Cameron Blake, *Religious Freedom in Southern Africa: The Developing Jurisprudence*, 1998 B.Y.U. L. REV. 515, 550-51 (1998) (indicating the significance of *Solberg*); Michel Rosenfeld, *Tribute: Constitutional Migration and the Bounds of Comparative Analysis*, 58 N.Y.U. ANN. SURV. AM. L. 67, 76 (2001) (discussing the facts, holding, and impact of *Solberg*).

⁵⁴ *S. v. Solberg*, 1997 SACLX 1, 5-6 (S. Afr.) (noting the provisions at issue in the case may have been inconsistent with the individual's rights to freedoms).

contrary to his or her religious beliefs was sufficient to establish a violation of his or her freedom of religion.⁵⁵

Despite the legality of the procedure, conscientious objection to abortion is widespread in South Africa. A 2002 survey of South African abortion clinics reported that “[a]bortion is an emotive issue – cultural and religious values have always made it taboo – until five years ago it was a criminal offence [sic] in this country. Although the law may have changed, attitudes haven’t.”⁵⁶ Additionally, major health care unions and national surveys report that between 70-80% of all South African health care professionals are unwilling to participate in elective abortions on the basis of moral or religious objection.⁵⁷ Notably, of the twenty-seven hospitals in the Mpumalanga region, only five have staff willing to be involved in abortions.⁵⁸

The way pro-abortion forces are compelling abortion participation from an unwilling medical profession in South Africa is wholly different than that which is happening in Canada or the United States. In South Africa, pregnant women are increasingly being prescribed medications that induce chemical abortion, but they are obtaining these drugs from physicians who do not provide them with follow-up care.⁵⁹ These drugs, including Mifepristone and Misoprostol, cause spontaneous miscarriage in some cases and induce early labor in others.⁶⁰ In either event, these women are

⁵⁵ *Id.* at 99 (comparing the different types of coercion to observe certain practices).

⁵⁶ Fr. Bonaventure Turyomumazima, *No Place for Abortion in African Traditional Life – Some Reflections*, <http://www.consciencelaws.org/Examining-ConscienceBackground/Abortion/BackAbortion26.html> (last visited Apr. 20, 2010).

⁵⁷ See Doctors for Life International, *South Africa: Research Survey Needed to Pass Conscience Clause*, <http://www.consciencelaws.org/Conscience-in-Media-Notices/Conscience-Notices-02.html>, last visited Apr. 21, 2010; see also Harvey R.G. Ward, *Are State Doctors in the Western Cape Willing to Implement the Choice of Termination of Pregnancy Act of 1996? An opinion survey conducted in the Western Cape in November 1997*, <http://www.consciencelaws.org/Examining-Conscience-Background/Abortion/BackAbortion15.html>

⁵⁸ See Turyomumazima, *supra* note 55 (discussing the unwillingness of hospitals to take part in abortions); see also Jeremy Sarkin, *Patriarchy and Discrimination in Apartheid South Africa's Abortion Law*, 4 BUFF. HUM. RTS. L. REV. 141, 149-50 (1998) (discussing the effects of an unwilling medical profession on the provision of abortion in South Africa).

⁵⁹ See Murphy, Protection of Conscience Project, *Clearing Rhetorical Minefields*, March 10, 2009, <http://www.consciencelaws.org/Conscience-Archive/Documents/ClearingRhetoricalMinefields.pdf> (“This is a classic example of rising expectation colliding with reality, and it has been a problem for some time in South Africa. A survey conducted of Western Cape physicians found that almost half of them would not continue the abortion at this point.”); see also Audrey E. Haroz, *South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women*, 30 VAND. J. TRANSNAT'L L. 863, 882 (1997) (“Women also injected chemicals such as chloroxylenol or soapy solutions into their uteruses via catheters in attempts to induce abortions.”).

⁶⁰ See Murphy, *supra* note 57 (detailing the effects drugs such as Misoprostol have on pregnant women); Denise A Copelton, *Assessing the Social Impact of Mifepristone in the United States—a Pro-Choice Perspective*, 11 KAN. J.L. & PUB. POL'Y 333, 337 (2001) (explaining how drugs such as

reporting to hospital emergency rooms for medical care once the drugs have taken effect.⁶¹ Where the drug causes spontaneous miscarriage, there is no resulting conflict for the conscientiously unwilling medical professional because the woman arrives at the hospital having already delivered a dead infant or with an already deceased baby still in utero.⁶² However, where the drug is unsuccessful in causing the unborn child's death, emergency room staff members are expected to complete the abortion initiated by the drug.⁶³

A South African physician explains how this is playing out in emergency rooms across the nation: "Doctors and nurses . . . initiate abortions with Misoprostil (as is already happening to a large extent) and instruct patients to go [to a] particular facility once they start bleeding, without knowing whether pro-abortion staff is available 24 hours a day and 7 days a week to manage the patient."⁶⁴ The situation has been devastating for pro-life professionals who are compelled, in the name of emergency care, to complete abortive procedures once begun.

Sister⁶⁵ Wilhelmiën Charles was employed as a registered nurse at the Kopanong Hospital, in Vereeniging, Gauteng, South Africa beginning in 1997.⁶⁶ She became Chief Professional Nurse of the Hospital in 1999.⁶⁷ "Termination of pregnancy" (T.O.P.) abortion procedures were instituted in her ward in February of 2000.⁶⁸ Because of her Jehovah's Witness beliefs,

Mifepristone mimic miscarriage).

⁶¹ See Murphy, *supra* note 59 (discussing the practice and use of Misoprostol in South Africa); see also Ward, *supra* note 57 (describing a practice whereby women given Misoprostol to ingest at home would begin to hemorrhage and seek medical care at a hospital).

⁶² See Murphy, *supra* note 59 ("If the fetus is dead, to assist the patient raises no ethical problem for conscientious objectors, though evacuating the uterus may be distressing."); see also Harvey R. G. Ward, *Abortion Objectors: Rights and Responsibilities*, Letter to Editor, South African Medical Journal, Apr. 4, 1997, available at <http://www.consciencelaws.org/Examining-ConscienceBackground/Abortion/BackAbortion14.html#1997-04-04>, ("I think it is indefensible for an objecting doctor or nurse to refuse to see a patient arriving at hospital as a threatened, inevitable or incomplete abortion even with the knowledge that an abortion had been procured.").

⁶³ See Murphy, *supra* note 59 (noting that users of Misoprostol may present at a hospital expecting a physician to complete the abortion); see also Bola Omoniyi, *The Off-Label Use of Misoprostol*, Doctors For Life International Newsletter, http://www.doctorsforlifeinternational.com/about/newsletters/2004/nov_dec_newsletter_2004.cfm (last visited Jan. 22, 2010) (mentioning that the use of Misoprostol may place health care workers in a position where they are required to help complete an abortion).

⁶⁴ Letter from Dr. Albu Van Eeden, CEO, Doctors for Life Int'l, to Saazi Vuke, Comm. Sec'y The Portfolio Comm. on Health, *Comments on the Choice of Termination of Pregnancy Bill* (July 29, 2003), available at [http://www.doctorsforlifeinternational.com/departments/legal/submissions/DF_LreCTOP_Amendment\(2003\).doc](http://www.doctorsforlifeinternational.com/departments/legal/submissions/DF_LreCTOP_Amendment(2003).doc).

⁶⁵ Murphy, *supra* note 17 ("Registered nurses in South Africa are referred to as 'nursing sisters' and addressed as 'Sister.' The title does not imply any religious affiliation.").

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

she joined with some of her colleagues in a petition expressing their conscientious objection to participating in abortion.⁶⁹ She also wrote her own letter to the Hospital's management on February 28, 2001 stating that her faith required her to abstain from participating in the termination of pregnancy procedures.⁷⁰ In August and September of 2001, under threat of termination, she was forced by the hospital's administration to participate in abortions.⁷¹

On March 28, 2003, Sister Charles met with hospital administration to discuss her continued concerns of conscience and whether she would continue to participate in the procedures.⁷² At the meeting, there was some discussion as to whether situations involving women who present with incomplete abortions qualify as life-threatening surgical emergencies, as well as whether completing the abortion was the only treatment option available to stabilize these women.⁷³ She was told by one administrator to, "[t]ry to see it as an emergency,"⁷⁴ and that the only way to stop a woman's bleeding is to evacuate the woman's uterus.⁷⁵ The minutes of the meeting ended with another administrator stating, "Sr. Charles will scrub in for T.O.P. evacuation. T.O.P. not to be brought under discussion again."⁷⁶ Shortly thereafter, Sister Charles went on maternity leave. Upon her return work in May, 2004, she was not reinstated.⁷⁷ Alleging discrimination and retaliation, she brought a civil suit against the hospital, and her case is currently pending in the South African Labour Appeals Court.⁷⁸

C. The United States

Although the United States has statutory conscience protection, employment discrimination remains a serious concern. The first state to legalize abortion was Colorado, in 1967.⁷⁹ Abortion was nationally

⁶⁹ *Id.*

⁷⁰ Murphy, *supra* note 17 ("She noted that another nursing sister had agreed to be called out to replace her should she be on duty when such a case was referred to the theatre.").

⁷¹ *Id.* (explaining the events which took place in 2001, and then going on to detail February 19, 2003, when "Mrs. C. Jacobs ordered [Sister Charles] to assist with an abortion for a patient who arrived during her night shift).

⁷² *Id.* (referring to the meeting where the theater staff discussed termination of pregnancies).

⁷³ *Id.* (discussing incomplete abortions).

⁷⁴ *Id.*

⁷⁵ Murphy, *supra* note 17 (noting the only treatment available to a bleeding woman).

⁷⁶ *Id.*

⁷⁷ *Id.* (explaining that the hospital staff ignored Sister Charles requests for reinstatement and her requests for written justification of her termination.)

⁷⁸ *Id.* ("It is reported that, after a delay of two years, Sister Charles has been granted leave to take her case against the Health Department to the Labour Appeals Court.").

⁷⁹ John F. Merz, Catherine A. Jackson & Jacob A. Klerman, *A Review of Abortion Policy: Legality,*

legalized in 1973 following the Supreme Court's decision in *Roe v. Wade*.⁸⁰ The *Roe* Court determined that elective abortion in the United States is a *negative* constitutional right and this remains the case even in light of the Court's subsequent decision in *Planned Parenthood v. Casey*.⁸¹ Instead of conferring an affirmative "right to an abortion" upon women, the Constitution forbids the state from interfering in the woman's "right to choose" whether to terminate her pregnancy.⁸² If the right to an abortion were deemed a *positive* constitutional right, the government would be obligated to provide access to the procedure. As it stands, however, the state is not responsible for ensuring that abortion-on-demand is readily accessible to all women in the United States.⁸³

Unlike Canada and South Africa, the United States has a long history of statutory conscience protection. In 1973, the Public Health Service Act,⁸⁴ also known as the "Church Amendment,"⁸⁵ was enacted. The bill was quickly passed by Congress as a response to the Supreme Court's decision in *Roe*.⁸⁶ Protecting both hospitals and individuals, the Act states that those receiving health care related federal funding are safeguarded from being required to participate in abortion procedures where moral or religious objections to those procedures are raised.⁸⁷ The Act further

Medicaid Funding, and Parental Involvement, 1967-1994, 17 WOMEN'S RTS. L. REP. 1, 17 (1995) (stating that Colorado was the first state to liberalize its abortion laws in 1967); *Yesterday, supra* note 15 (discussing the history of abortion in the United States).

⁸⁰ 410 U.S. 113 (1973), *overruled in part by* *Gonzales v. Carhart*, 550 U.S. 124 (2007) and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

⁸¹ *Casey*, 505 U.S. at 876-78 (1992) (allowing state interference with abortion prior to viability provided it does not result in an undue burden).

⁸² *See id.* at 874 (quoting *Maier v. Roe*, 432 U.S. 464, 473-74 (1977)).

⁸³ *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); *see also Poelker v. Doe*, 432 U.S. 519, 521 (1977) ("we find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publically financed hospital services or childbirth without providing corresponding services for nontherapeutic abortions.").

⁸⁴ 42 U.S.C. § 300a-7 (1973).

⁸⁵ The amendment is named for Frank Church, the bill's sponsor. Maureen Kramlich, *Urban Law Journal Special Series: The Current State of Abortion Law and Reproductive Rights: The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 FORDHAM URB. L. J. 783, 789 (2004).

⁸⁶ 410 U.S. 113 (1973); *see* Marcia M. Boumi & Dana Sussman, *Emergency Contraception: Law, Policy and Practice*, 7 CONN. PUB. INT. L.J. 157, 179 (2008) (noting that the "Church Amendment" was the federal government's response to the decision in *Roe*).

⁸⁷ The Public Health Service Act, 42 U.S.C. § 300a-7(b) (2006). The first conscience provision of the Church Amendment provides that "[t]he receipt of any grant, contract, loan or loan guarantee under [certain statutes implemented by the Department of Health and Human Services] by any individual or entity does not authorize any court or any public official or other public authority to require" (1) the individual to perform or assist in a sterilization procedure or an abortion if it would be contrary to his/her religious beliefs; (2) the entity to make its facilities available for sterilization procedures or abortions, if the performance of those procedures is prohibited by the entity on the basis of religious

prohibits hospitals from making a person's willingness to perform abortions a condition of his or her employment.⁸⁸ Shortly after the passage of the Church Amendment, forty-seven states enacted some form of conscience protection for health care providers, prohibiting their forced involvement in abortion procedures.⁸⁹

Other congressional conscience protection measures followed; however, most were limited to specific federal programs.⁹⁰ Successful challenges to existing federal conscience protections were brought on the contention that the language in these statutes describing "health care entities" protected only individuals and not institutions.⁹¹ For example, the Coats-Snowe Amendment of 1996⁹² was enacted to protect medical training programs and other "health care entities" that object to participating or training in the performance of abortions by barring government discrimination.⁹³ However, the Act's protections have been interpreted by subsequent court decisions "to apply only for training programs, not to the hospitals, HMOs," or other providers.⁹⁴ In response to these challenges, the Abortion

belief; or (3) the entity to provide personnel for the performance or assistance in sterilization or abortion procedures, if it would be contrary to the religious beliefs of such personnel. *Id.*

⁸⁸ *Id.* at (c)(1)(A) (prohibiting hospitals from discriminating "in the employment, promotion or termination of employment of any physician or health care personnel" that performed or assisted or refused to perform or assist in the lawful sterilization or abortion procedures because it would be contrary to his religious beliefs or moral convictions). *Id.*

⁸⁹ See American Center for Law & Justice, *Defending the Federal Conscience Clause Law on Abortion*, <http://www.aclj.org/News/Readwr.aspx?ID=1152> (last visited Jan. 22, 2010). Only eight states fail to extend this protection to cases involving the life of the mother or emergencies. *Id.* Nearly all of these states enacted their conscience protection provisions within five years of the Supreme Court's decision in *Roe*. See RACHEL BENSON GOLD, THE GUTTMACHER INSTITUTE, CONSCIENCE MAKES A COMEBACK IN THE AGE OF MANAGED CARE 1 (1998), available at <http://www.guttmacher.org/pubs/tgr/01/1/gr010101.html>.

⁹⁰ See, e.g., The Danforth Amendment to the Civil Rights Restoration Act, 20 U.S.C. § 1688 (2006). This Act prohibited construing Title IX of the Education Amendments of 1972 as requiring educational institutions to provide or pay for any benefits related to abortion. *Id.* Though not relating specifically to abortion, Congress enacted another conscience protection measure in 1994 providing protection for employees from compelled participation in the federal prosecutions or executions where such participation is contrary to their moral or religious convictions. 18 U.S.C. § 3597(b) (2006).

⁹¹ See, e.g., *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 973 (Alaska 1997) (holding that a private community hospital's abortion-limiting policy was unenforceable); see also 2003 Cal. Adv. Legis. Serv. 65 (Deering) (demonstrating that under a California state law, hospitals were prohibited from conditioning the sale of their real property on the buyer's agreement that the property not be used for termination of pregnancy procedures).

⁹² Coats-Snowe Amendment, 42 U.S.C. § 238n(a) (2000) (barring government discrimination against a health care entity on that basis that "the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions").

⁹³ *Id.*

⁹⁴ Patricia Coll, *U.S. House Passes Bill to Protect Pro-Life Health Care Providers*, NAT'L RIGHT TO LIFE NEWS, Oct. 2, 2002, available at <http://www.nrlc.org/Federal/LegUpdates/HousepassesANDA.html>.

Non-Discrimination Act⁹⁵ (ANDA) was drafted in 2002 to prohibit state discrimination against any health care provider objecting to participation in abortion. The measure failed to pass in the Senate prior to the end of the Congressional term.⁹⁶ The following session, a more expansive ANDA was introduced; but when advocates of the legislation were confronted with resistance once again in passing the measure,⁹⁷ they found a different way to achieve its passage. A new ANDA was successfully incorporated as part of the omnibus spending bill for the year 2005 and became known as the Hyde-Weldon Conscience Protection Amendment.⁹⁸

The Hyde-Weldon Conscience Protection Amendment⁹⁹ represented significant progress in securing health care professionals' rights of conscientious objection. It affords protection by denying funding to recipients of government grants that engage in discrimination against institutions or individuals exercising conscientious objection regarding their own participation in abortion. The Amendment provides, in relevant part:

“[n]one 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, or refer for abortions.¹⁰⁰

By explicitly defining “health care entity,” to include an “individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or

⁹⁵ See Abortion Non-Discrimination Act of 2002, H.R. 4691, 107th Cong. (2002) (prohibiting “certain abortion-related discrimination in governmental activities”).

⁹⁶ See Jody Feder, Cong. Res. Serv., *The History and Effect of Abortion Conscience Clause Laws 4* (2005) (stating that the bill sought to expand the definition of “health care provider,” and stalled in the Senate); see also *H.R. 4691: Abortion Non-Discrimination Act of 2002 1* (2002), available at, <http://www.govtrack.us/congress/bill.xpd?bill=h107-4691> (explaining that the bill passed in the House of Representatives and failed to pass in the Senate).

⁹⁷ See Feder, Cong. Res. Serv., *The History and Effect of Abortion Conscience Clause Laws 4* (2005) (stating that “[a]fter [the bill] stalled in the House and Senate . . . a similar conscience clause provision was inserted into the appropriations bill for the Departments of Labor, Health and Human Services (HHS), and Education.”); see also *What Happened in the 108th Congress, 2nd Session?*, EAGLE FORUM NEWS 1-2 (2005), available at, <http://www.eagleforum.org/alert/2005/108thCongress-session2.html> (indicating that two Representatives re-introduced the bill during the second session).

⁹⁸ See e.g. Lynn Vincent, *License Not to Kill*, WORLD MAG., Dec. 4, 2004, at 11 (noting that the bill was named after its sponsors, Representative Henry Hyde of Illinois and Representative Dave Weldon of Florida, a practicing physician prior to his tenure in the House of Representatives).

⁹⁹ Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3163 (2004).

¹⁰⁰ Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004).

any other kind of health care facility, organization, or plan,”¹⁰¹ this legislation was successful in closing some of the loopholes in the federal law exposed by challenges to prior conscience protection legislation. It serves to ensure health care professionals and providers may operate free from government coercion.

The First Amendment of the United States Constitution provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁰² Unlike Canada and South Africa, an enumerated right to “freedom of conscience” does not appear anywhere in the American Constitution. Though a formal reference to “conscience” was included in multiple drafts of the document, it was not included in the final version—though its influence upon both religion clauses remained.¹⁰³ Constitutional recognition of “freedom of conscience” has more formally appeared in the jurisprudence of the Supreme Court.¹⁰⁴

Additional employment discrimination protection is available in the United States under Title VII of the Civil Rights Act.¹⁰⁵ It is a statute similar to the Canadian Human Rights Act, as previously discussed in the *Moore* case. The employment discrimination provision of Title VII does offer some protection for employees raising conscientious objection, but only to the extent that the objection is based upon *religious* beliefs. The protection afforded by Title VII is also limited in that an employer’s duty to provide reasonable accommodation is relieved by a showing that any accommodation would impose an “undue hardship.”¹⁰⁶ Such a showing may be easily made in cases where *any* participation in an elective abortion procedure is objectionable to an employee, rendering Title VII of little help to the conscientiously unwilling health care professional.

Consider the case of Emergency Medical Technician Stephanie Adamson of Illinois, who was promptly fired upon her refusal to transfer a patient, in a non-emergency situation, from a hospital to an abortion clinic

¹⁰¹ Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 508(d)(2), 118 Stat. 2809, 3163 (2004).

¹⁰² U.S. Const. amend I.

¹⁰³ Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 404 (2002) (explaining that conscience remained the basis for both religion clauses “even after the word ‘conscience’ disappeared from the draft language.”).

¹⁰⁴ See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (making specific mention of “constitutionally protected freedom of conscience”).

¹⁰⁵ See generally 42 U.S.C. § 2000e (2000).

¹⁰⁶ The Supreme Court has explained that an “undue hardship” is one that imposes a greater than de minimis cost or imposition upon the employer’s business, including co-workers. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, n.15 (1977).

so the patient could receive an elective abortion.¹⁰⁷ Adamson's pending lawsuit against her employer alleges both Title VII employment discrimination and violation of the Illinois Health Care Right of Conscience Act.¹⁰⁸

There is also the case of Beth LaChance, a registered nurse at Waukesha Memorial Hospital in Wisconsin. In her testimony before a Wisconsin Senate Committee, LaChance described the discrimination she endured and the premature end to her own career. She described being subjected to "an onslaught of disciplinary reprimands, retaliation, criticism, and ostracism" after she expressed dissent to her hospital's plan to conduct "induced labor abortions."¹⁰⁹ She later implored the state legislature to create a meaningful remedy for similarly situated professionals. "Employees who exercise their right of conscientious dissent, therefore, need remedies to support their dissent; lest their dissent should merely sound a prelude to their farewell."¹¹⁰

More recently, in May of 2009, registered nurse Catherina Cenzone-DeCarlo was forced to assist in the dismemberment abortion of a live 22-week-old preborn child.¹¹¹ Despite her longstanding religious objection to participating in abortions, including a written form on file with the hospital documenting her conscientious objection, DeCarlo was told that if she did not participate in the case, she would be brought up on charges of "insubordination and patient abandonment."¹¹² Faced with these consequences and their professional ramifications, she acceded to the demands of her supervisor and participated in the dismemberment abortion under protest.¹¹³ Following the procedure, she was told she would no longer be eligible for the on-call shifts she had been working unless she would agree, in writing, to assist in abortions when the hospital deemed

¹⁰⁷ *Ambulance Attendant Fired: ACLJ Files Lawsuit Against Illinois Ambulance Service* (May 7, 2004), <http://www.consciencelaws.org/Repression-Conscience/Conscience-Repression-34.html> (last visited Jan. 22, 2010).

¹⁰⁸ *Id.*

¹⁰⁹ "This type of abortion can be performed different ways, but the goal always is to cause a pregnant woman's cervix to open so that she will deliver a premature baby who dies during the birth process or soon afterward." *The Born-Alive Infants Protection Act: Hearing Before The House Judiciary Committee Subcommittee On The Constitution On H.R. 4292* (2000) (prepared testimony of Jill L. Stanek, RN).

¹¹⁰ *Wisconsin Assembly, supra* note 18.

¹¹¹ Verified Complaint of Petitioner at ¶ 1, *Cenzone-DeCarlo v. Mount Sinai Hosp.*, Case No. 09-cv-03120 (E.D.N.Y. 2009) (pleading for relief due to alleged coercion by the defendant on the plaintiff to assist in an abortion) [hereinafter "Cenzone-DeCarlo"].

¹¹² *Id.* at ¶ 97.

¹¹³ *Id.* at ¶ 103.

them “emergencies.”¹¹⁴ Such a requirement blatantly violates the Church Amendment,¹¹⁵ and DeCarlo refused.¹¹⁶ In her pending lawsuit, DeCarlo is seeking a declaratory judgment stating that the hospital is in violation of the Church Amendment and an injunction ordering the hospital to honor her objections and refrain from retaliation against her.¹¹⁷

On August 21, 2008, the U.S. Department of Health and Human Services announced proposed regulations regarding conscience protection aimed at increasing both health care employee and employer awareness.¹¹⁸ In addition to promoting compliance with the current federal laws, these regulations created a means by which employees could enforce existing laws.¹¹⁹ To that end, the Health and Human Services’ Office for Civil Rights was designated in the proposed regulations, as the appropriate venue for aggrieved employees to file complaints.¹²⁰ However, in November of 2008, then President-elect Barack Obama promised to rescind the new regulations.¹²¹ Making good on that promise, President Obama has taken

¹¹⁴ *Id.* at ¶ 145.

¹¹⁵ *Id.* at ¶ 146 (stating that the hospital’s requirement violates 42 U.S.C. § 300a-7(c)).

¹¹⁶ Cenzon-DeCarlo, *supra* note 111, at ¶ 147 (stating that Mrs. DeCarlo refused to sign the statement).

¹¹⁷ *Id.* at ¶ ¶A–B (requesting a declaratory judgment finding that the hospital has violated and continues to violate the Church Amendment).

¹¹⁸ Cardinal Rigali of Philadelphia aptly described the relative inefficiency of existing conscience protection laws in the absence of regulations raising awareness: “Relatively few policymakers or health care personnel are even aware that these laws exist, which means that some institutions may be violating them without even knowing it, and others who are victims of discrimination may not know that they have legal recourse.” Dennis Sadowski, *Conscience Protections for Health Care Workers Welcomed*, THE TIDINGS, available at <http://www.the-tidings.com/2008/082908/health.htm>.

¹¹⁹ See DEPARTMENT OF HEALTH & HUMAN SERVICES, ENSURING THAT DEPARTMENT OF HEALTH AND HUMAN SERVICE FUNDS DO NOT SUPPORT COERCIVE OR DISCRIMINATORY POLICIES OR PRACTICES IN VIOLATION OF FEDERAL LAW, available at <http://www.hhs.gov/news/press/2008pres/08/20080821reg.pdf> (listing, among other things, that Department regulations are necessary in order to enforce nondiscrimination laws through “various Department mechanisms” when compliance efforts prove unsuccessful); see also Press Release, Department of Health & Human Services, HHS Issues Final Regulation to Protect Health Care Providers from Discrimination, available at <http://www.hhs.gov/news/press/2008pres/12/20081218a.html> (noting that comments in the Department of Health and Human Services regulation “consistently bore out the necessity of the regulation to implement the statutes enacted by Congress”).

¹²⁰ See DEPARTMENT OF HEALTH & HUMAN SERVICES, ENSURING THAT DEPARTMENT OF HEALTH AND HUMAN SERVICE FUNDS DO NOT SUPPORT COERCIVE OR DISCRIMINATORY POLICIES OR PRACTICES IN VIOLATION OF FEDERAL LAW, available at <http://www.hhs.gov/news/press/2008pres/08/20080821reg.pdf> (“The Office for Civil Rights of the Department of Health and Human Services has been designated to receive complaints of discrimination based on the nondiscrimination statutes and this proposed regulation.”); see also Senator Tom Coburn, M.D., Amendment 828 – Protecting Patients and Health Care Providers from Government Health Care Coercion, available at http://coburn.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=53e73716-b6f9-44e3-b673-7511fac5e7ba.pdf (noting the 2009 Department of Health and Human Services rule, which clarified protections for Americans serving in the health care field, was appropriately enforced by the HHS Office of Civil Rights).

¹²¹ See Melinda Henneberger, *Lose-Lose on Abortion: Obama’s Threat to Catholic Hospitals and Their Very Serious Counterthreat*, SLATE, Nov. 24, 2008, <http://www.slate.com/id/2205326/>

steps to remove them.¹²² This rescission, coupled with the erosion of conscience protection aggressively pursued by the proposed Freedom of Choice Act,¹²³ signals a very precarious era for American health care professionals' freedom of conscience rights.

II. COMMON CHALLENGES TO CONSCIENCE PROTECTION: CONSTITUTIONALITY, MANDATORY REFERRAL, AND THE PROFESSIONAL "STANDARD OF CARE"

The legitimate value of freedom of conscience protection for health care professionals regarding participation in elective abortion outweighs the concerns and challenges raised against it across nations. Opponents of the statutory conscience clauses in the United States often contend that they are unconstitutional. Cross-cultural opposition to conscience protection is raised on the basis that all health care professionals should be, at the very least, required to refer for abortions. In Canada and the United States, opponents of conscience protection assert that individual conscience rights should be replaced by a "standard of care" set by the medical profession. None of these contentions are persuasive.

A. Constitutionality

The American federal conscience protection measures are constitutional. Those enacted thus far have been valid exercises of Congress' spending power, under Article 1, Section 8 of the Constitution.¹²⁴ Other legislative measures, enacted pursuant to the spending power, that advance the government's legitimate interest in promoting childbirth over abortion have passed constitutional muster, as expressly affirmed by the Supreme Court in *Rust v. Sullivan*.¹²⁵ In that case, the Court explained that when

(explaining that Obama promised to rescind the Health and Human Services Regulation in the event the Bush administration was successful in implementing it.); see also Stein, *supra* note 16, (reflecting on Obama's intention to rescind Health and Human Services Regulation).

¹²² Matthew Berger, *Obama Moves to Rescind 'Conscience Clause' for Healthcare Workers*, PRESBYTERIAN NEWS SERVICE, Mar. 2, 2009, available at <https://www.pcusa.org/pcnews/2009/09158.htm> (recognizing the White House Office of Management and Budget's plan to review the regulation as the "first step towards reversing it"); Rob Stein, *supra* note 16 (noting the Obama administration's "move to rescind" broad new job protections for health workers who refuse to provide care they find objectionable).

¹²³ H.R. 1964, S. 1173, 110th Cong. (1997) (barring all government interference with a woman's right to choose to bear child or terminate a pregnancy).

¹²⁴ U.S. CONST. art I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for . . . the general Welfare of the United States[.]").

¹²⁵ 500 U.S. 173 (1991). Citing the case of *Maier v. Roe*, 432 U.S. 464 (1977), the Court recognized the legitimate government preference of childbirth over abortion even prior to the *Rust*

“government appropriates public funds to establish a program, it is entitled to define the limits of that program.”¹²⁶ When enacting legislation, there is a presumption that Congress will not act beyond its authority under the Constitution.¹²⁷ This presumption is overcome only by a clear showing that Congress has exceeded its authority.¹²⁸ Given the deference extended to Congress in terms of its spending clause power in conjunction with the Court’s acknowledgment in *Rust* that such legislation may promote a childbirth alternative to abortion, it is unlikely that a constitutionality challenge would prevail on the basis that federal conscience protection laws are an impermissible exercise of Congressional authority.

Additionally, there is no constitutional conflict between conscience protection and abortion rights in the United States. While the situation necessarily involves the rights of two individuals, the result is not an irreconcilable conflict requiring the forfeiture of either individual’s right. To be clear, the rights involved in this case would be a woman’s constitutional right to be free from governmental interference when deciding whether or not to terminate a pregnancy and a health care professional’s statutory right to be free from governmental interference when deciding whether or not to participate in an abortion procedure that implicates conscience. In light of their respective interests against governmental interference, it does not necessarily follow that one should prevail over another. Perhaps the most telling support for this supposition comes from the Court’s decision in *Doe v. Bolton*,¹²⁹ a case decided the very same day as *Roe v. Wade*.¹³⁰ In *Doe*, the conscience clause portion of Georgia’s abortion statute was upheld, though other provisions were struck down. The conscience clause in the statute read: “a physician or any other

decision. See *Poelker v. Doe*, 432 U.S. 519, 521 (1977). This Court also cited to *Maher* to uphold a city’s “policy decision” to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions. 432 U.S. 464 (1977).

¹²⁶ *Rust*, 500 U.S. at 194.

¹²⁷ *United States v. Harris*, 106 U.S. 629, 635 (1883) (“Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power.”); see *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973) (“The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.”).

¹²⁸ *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“[W]e invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”); *McConnell v. FEC*, 540 U.S. 93, 187 (2003) (“respect owed to coordinate branches ‘demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.’” (quoting *Morrison*, 529 U.S. at 607).

¹²⁹ 410 U.S. 179 (1973) (upholding a state conscience clause while invalidating the other provisions of an abortion statute).

¹³⁰ 410 U.S. 113 (1973) (holding an abortion statute unconstitutional as interfering with a woman’s right to privacy).

employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.”¹³¹ Explaining its approval of the inclusion of the conscience clause provision in the abortion statute, the Court noted in *Doe*:

[A] hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.¹³²

In *Roe*, the court also cited with approval a resolution of the American Medical Association that stated no “physician, hospital, nor hospital personnel” shall be required to violate “personally-held moral principles.”¹³³

Federal conscience clauses do not violate the Establishment Clause. In *Lemon v. Kurtzman*,¹³⁴ the Supreme Court articulated the requirements for a statute to survive an Establishment Clause challenge. “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”¹³⁵ The conscience clauses enacted by Congress have a secular purpose in that they protect conscientious dissenters who object on moral as well as religious grounds. They give no preference to religion. Their primary effect is to protect individual freedom of conscience, not to advance or inhibit religion. A statute does not violate the Establishment Clause just because it “happens to coincide or harmonize with the tenets of some or all religions.”¹³⁶ Finally, conscience clauses do not foster an excessive entanglement between government and religion because they do not result in an appearance of government endorsement of religion.¹³⁷

¹³¹ *Doe*, 410 U.S. at 197–98 (1973).

¹³² *Id.*

¹³³ *Roe*, 410 U.S. at 143, n.38 (1973).

¹³⁴ 403 U.S. 602 (1971) (articulating the elements a statute must meet so as not to conflict with the Establishment Clause of the First Amendment of the Constitution).

¹³⁵ *Id.* at 612–13.

¹³⁶ *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

¹³⁷ *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (“we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city’s display actually conveyed . . . The meaning of a statement to its audience depends both on the intention of the speaker and on the ‘objective’ meaning of the statement in the community.”); *County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (“The *Establishment Clause*, at the very least,

It is also important to consider that Congress has passed conscience protections for other populations who find themselves in ethically vexed circumstances. In 1994, it enacted a federal measure providing protection for employees against compelled participation in federal prosecutions or executions where such participation is contrary to their moral or religious convictions.¹³⁸ The Supreme Court has also clarified conscientious objection in the military context, so those who are sincerely morally opposed to participating in war are protected from being compelled to do so.¹³⁹ This conscience protection encompasses more than religious objection, including non-religious moral or philosophical convictions as well.¹⁴⁰

B. Mandatory Referral

Health care professionals are now being called upon in the United States, Canada, and South Africa to make referrals for abortions.¹⁴¹ However, conscience clauses should protect against any compelled participation in elective abortion, whether it be direct or indirect. This necessarily includes referral because, for many health care professionals, compelling a professional to refer a woman for an abortion evokes the identical concerns of conscience raised by direct involvement in the procedure. Though mandatory referral is a commonly suggested conscience clause

prohibits the government from appearing to take a position on questions of religious belief”).

¹³⁸ 18 U.S.C. § 3597(b) (1994) (indicating that employees “of any State department of corrections, the United States Department of Justice, the Federal Bureau of Prisons, or the United States Marshals Service, and no employee providing services to [those entities]” can be forced to be part of a prosecution if it goes against their moral or religious beliefs); *Roane v. Holder*, 607 F. Supp. 2d 216, 227-28 (D.C. 2009) (dismissing a claim against one of the defendants, Dr. Webster, because he exercised his right not to participate in a federal execution under 18 U.S.C. § 3597(b)).

¹³⁹ See *Gillette v. U.S.*, 401 U.S. 437, 447 (1971) (holding that Congress intended to exempt those who oppose participating in all war); see also *Witmer v. U.S.*, 348 U.S. 375, 381 (1955) (considering the importance of a registrant’s sincerity in his or her objection to participating in war).

¹⁴⁰ See *U.S. v. Seeger*, 380 U.S. 163, 184-85 (1965) (“Local boards and courts in this sense are not free to reject beliefs because they consider them ‘incomprehensible.’ Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.”); see also *Welsh v. U.S.*, 398 U.S. 333, 339 (1970) (“[T]he central consideration in determining whether the registrant’s beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant’s life.”).

¹⁴¹ See Sylvia A. Law, *Silent No More: Physicians’ Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 282 (1995) (asserting that a physician has the obligation, as dictated by “principles of medical malpractice” to “make referrals for medical services that the treating physician is unable or unwilling to provide”); see also BARBARA B. CRANE & CHARLOTTE E. HORD SMITH, MILLENNIUM PROJECT, ACCESS TO SAFE ABORTION: AN ESSENTIAL STRATEGY FOR ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS TO IMPROVE MATERNAL HEALTH, PROMOTE GENDER EQUALITY, AND REDUCE POVERTY (2006), http://www.unmillenniumproject.org/documents/Crane_and_Hord-Smith-final.pdf (promoting abortion reform in order to protect the rights of women around the globe).

“compromise,” it simply creates an artificial zone of proximity for determining what constitutes permissible violations of conscience for others. This is, in reality, no compromise at all.

“From the vantage point of primary doctors, to knowingly carry out a consultation to another practitioner who they anticipate will proceed in a way the primary doctors feel is damaging, is to be complicit in harm.”¹⁴² Recognizing the same referral concerns, the Canadian Medical Association has recognized that “a doctor who refers a patient for a procedure he believes to be wrong, [believes himself or herself to be] morally just as culpable as the doctor who performs the procedure.”¹⁴³ In South Africa, there was a mandatory referral clause in the draft abortion law in 1996, which would have required a conscientiously unwilling doctor or nurse to refer a patient to a doctor or nurse willing to perform abortions; however, due in large part to the pressure of pro-life medical associations in that nation, it was removed prior to the bill’s passage.¹⁴⁴

Another call for compulsory referral has come from an American professional association. In November of 2007, the American College of Obstetricians and Gynecologists’ Committee on Ethics released an opinion titled *The Limits of Conscientious Refusal in Reproductive Medicine*. While the Committee acknowledges the “deep divisions regarding the moral acceptability of pregnancy termination”¹⁴⁵ in the modern medical community, it argues that conscientious refusal “should be weighed in the context of other values critical to the ethical provision of health care.”¹⁴⁶ It also characterizes mandatory referral as an appropriate “compromise,” framing it as a benign alternative for medical professionals raising conscientious objection. The Committee even goes so far as to assume for itself a position of moral authority. “Referral to another provider need not be conceptualized as a repudiation or compromise of one’s own values, but

¹⁴² S.J. Genuis, *Dismembering the Ethical Physician*, 82 POSTGRADUATE MED. J. 233, 234 (2006) [hereinafter Genuis].

¹⁴³ *The Abortion Law and Your Rights*, Doctors For Life International, www.doctorsforlifeinternational.com/departments/legal/YourrightsonAbortion.doc (last accessed April 22, 2010).

¹⁴⁴ See Marion Stevens & Makhosazana Xaba, *Choice on Termination of Pregnancy Act 1996: Republic of South Africa*, 5 REPROD. HEALTH MATTERS 116, 116 (1997) (detailing the Choice on Termination of Pregnancy Bill); see also Sean Murphy, *South Africa Changes Abortion Law*, Protection of Conscience Project,, <http://www.consciencelaws.org/Examining-Conscience-Background/Abortion/BackAbortion14.html> (discussing the problems involved in compelling conscientious objectors to participate in abortions).

¹⁴⁵ *The Limits of Conscientious Refusal in Reproductive Medicine*, American College of Obstetricians and Gynecologists, Committee on Ethics Opinion 385, November 2007, available at http://www.acog.org/from_home/publications/ethics/co385.pdf.

¹⁴⁶ *Id.*

instead seen as an acknowledgment of both the widespread and thoughtful disagreement among physicians and society at large and the moral sincerity of others with whom one disagrees.”¹⁴⁷ Again, this bold declaration by the association is an inappropriate and illegitimate attempt to define the contours of conscience for its membership.

Conflict for individual health care professionals remains, of course, where the demands of conscience forbid all forms of participation in abortion. Catholic Bishop John Myers explains, from the perspective of the Roman Catholic Church: “One materially cooperates in another’s wrongdoing when one’s acts help to make that wrongdoing possible although one does not intend that wrongdoing. Material cooperation in abortion takes place . . . where one’s actions – although motivated by another purpose – nevertheless help to make an abortion possible.”¹⁴⁸ Referral, in so far as it helps to make an abortion possible, amounts to material cooperation in abortion.

The push for mandatory referral serves an additional purpose for those who altogether object to conscientious protection. Those who oppose conscience protection measures view conscientious dissent as a subversive threat to abortion rights, and believe that requiring affirmative cooperation with abortion is an effective way to contain opposition to it. This phenomenon has been described as “the coercion of conscience.”¹⁴⁹ Law Professor Teresa Collette explains: “It’s not sufficient anymore that we tolerate the existence of activities that we may find contrary to the dignity of the human person or the common good. Now, we are forced to cooperate with them. It is a deeply disturbing pattern.”¹⁵⁰ Requiring conscientious dissenters to affirmatively act in a cooperative manner with socially endorsed behavior is nothing novel. As President Abraham Lincoln explained,

[C]ease to call [it] wrong, and join them in calling it right. And this must be done thoroughly . . . in acts as well as in words. Silence will not be tolerated. We must place ourselves avowedly with them. . . . The whole atmosphere must be disinfected from the taint of opposition to [it] before they will

¹⁴⁷ *Id.*

¹⁴⁸ Rice, *supra* note 4, at 87.

¹⁴⁹ Terry O’Neill, *Do it Anyway, More and More Canadian Workers are Being Compelled to Violate Their Own Beliefs*, THE REPORT, Aug. 20, 2001 (describing the serious conflict that results from having to cooperate with activities viewed by the individual as immoral).

¹⁵⁰ *Id.*

cease to believe that all of their troubles proceed from us.¹⁵¹

Though President Lincoln was referring to slavery and the perceived subversive threat that the Abolitionist movement posed to the Anti-Abolitionist movement, a clear parallel can be drawn to the contemporary movement to require conscientious dissenters to affirmatively participate in abortion procedures.

C. Professional "Standard of Care"

Compelling health care professionals to participate in elective abortion is never legitimate, even when framed as a professional duty. "Nothing in medicine, its Codes of Conduct or medical ethics, gives a 'trump right' to a patient seeking a particular medical service that involves vexed ethical questions."¹⁵²

Some have gone so far as to suggest that conscientious objectors are altogether unfit to practice medicine. Canadian Medical Professors R.J. Cook and B.M. Dickens declare: "Physicians who feel entitled to subordinate their patient's desire for well-being to the service of their own personal morality or conscience should not practise [sic] clinical medicine."¹⁵³ It has been noted by Canadian physicians that those professionals with pro-life views are being driven from the practice of medicine.¹⁵⁴ Fortunately, the nation's professional medical community does not agree with the view that the conscientiously unwilling physician has no place in contemporary Canadian medicine. The Canadian Medical Association's own Code of Conduct maintains that physicians are under no professional duty to provide or refer for an abortion. It additionally asserts, "[a] physician should not be compelled to participate in the termination of a pregnancy."¹⁵⁵

Additionally, though not binding on any nation, The International Code of Medical Ethics provides: "A doctor must always bear in mind the

¹⁵¹ 5 GREAT DEBATES IN AMERICAN HISTORY 262 (Marion Mills Miller ed., Current Lit. Publishing Co., 1913).

¹⁵² Iain T. Benson, *Eternal Vigilance is the Price of Conscience Protection: The Freedom of Conscience in Relation to "Health"*, CENTRE FOR CULTURAL RENEWAL, CENTREBLOG VOL. 21, Mar. 19, 2004, <http://www.consciencelaws.org/Examining-Conscience-Legal/Legal20.htm>.

¹⁵³ R.J. Cook & B.M. Dickens, *In Response*, 26 J. OBSTETRICS GYNECOLOGY CANADA 112, 112 (2004).

¹⁵⁴ See O'Neill, *supra* note 149, at 21 (suggesting that doctors with pro-life views are being forced to leave the field of medicine); see also Lea Singh, *The Silencing of Our Doctors*, NAT'L POST (Can.), Aug. 27, 2008, available at <http://www.nationalpost.com/story.html?id=751026> (discussing the recent movement towards discouraging doctors from expressing personal judgments about beliefs).

¹⁵⁵ CANADIAN MEDICAL ASSOCIATION, CMA POLICY ON INDUCED ABORTION (1988), available at <http://policybase.cma.ca/PolicyPDF/PD88-06.pdf>.

importance of preserving human life from conception. Therapeutic abortion may only be performed if the conscience of the doctor and the national laws permit.”¹⁵⁶

The American Civil Liberties Union (“ACLU”) is actively calling for its own understanding of the medical profession’s “standard of care” to be uniformly imposed on providers, supplanting conscientious objection altogether.¹⁵⁷ Acknowledging that it cannot promote compelled participation in abortion on constitutional grounds, as access to abortion is not recognized as a positive constitutional right, the ACLU alternatively asserts that the entire range of legal medical services must be offered by all professionals to all patients as part of a professional “standard of care.”¹⁵⁸

However, a broad professional ethical standard simply does not offer meaningful conscience protection. It is, in fact, morally coercive in its attempt to dictate a uniform, collective conscience by which all professionals are duty-bound. “The dogmatic claim that ‘secular ethics’ or ‘the ethics of the profession’ are morally neutral is to be rejected not only as a fiction, but . . . as ‘bad faith authoritarianism’ . . . a dishonest way of advancing a moral view by pretending to have no moral view.”¹⁵⁹ It altogether fails in protecting the consciences of individual health care professionals.

Most importantly, legal immunity or professional cohesion may be of little comfort to a health care professional forced to make irrevocable moral concessions or to act in violation of his or her faith. The true potential for harm flowing from a failure to allow for individual conscientious refusal was fully realized not long ago, during the Holocaust of Nazi Germany.¹⁶⁰ “Transcripts of the Nuremberg trials expose what is possible when

¹⁵⁶ FRANZ STEINER VERLAG, TWENTIETH CENTURY ETHICS OF HUMAN SUBJECTS RESEARCH: HISTORICAL PERSPECTIVES ON VALUES, PRACTICES AND REGULATIONS 201 (Volker Roelcke & Giovanni Maio eds., John Hopkins Univ. Press 2004).

¹⁵⁷ See Kramlich, *supra* note 85, at 786-87 (explaining the ACLU’s position regarding health care providers who decline involvement in abortion).

¹⁵⁸ See *id.* at 787-88 (stating that the ACLU considers those that provide health care to be engaging in a wholly secular project not worthy of conscience protection).

¹⁵⁹ Sean Murphy, Protection of Conscience Project, *Freedom of Conscience and the Needs of the Patient*, (Nov. 2001), <http://www.consciencelaws.org/Examining-Conscience-Ethical/Ethical23.html> (explaining the importance of freedom of conscience in health care).

¹⁶⁰ Raymond J. de Souza, *Thinly Disguised Totalitarianism*, 142 FIRST THINGS 9, 11-12 (2004) available at <http://www.orthodoxytoday.org/articles4/deSouzaGayMarriage.php>. There is an inverse relationship between religious liberty and totalitarianism:

Religious liberty means that there are areas where the state may not go. It means that the state may not coerce consciences. A democracy that loses its respect for religious liberty has lost its respect for limited government. Such a democracy, infected by the totalitarian impulse, may continue to wear the guise of democracy while heading in the opposite direction.

professionals follow the defined legal system, community standards, political commands, and dictates of the ruling medical authorities of the day.”¹⁶¹ It was immediately following this egregious display of human brutality, operating, in large part, as legal and legitimate medical research, that the Second Assembly of the World Medical Association met and drafted the Physician’s Oath with which this note began. It has a haunting resonance. Simply stated, professional duty is never an adequate justification for the coercion of conscience, especially when health care professionals are confronted with perceived violations of the laws of humanity.¹⁶²

When the definitions of “health” become vague and technological developments more ethically vexed, what might be considered routine for some people may be anathema to others who function with different presuppositions. *The solution cannot be to force free thinking people with a variety of beliefs to toe the inflexible line.*¹⁶³

The history of medical ethics also counsels in favor of individual conscience protection for providers. The Hippocratic Oath is a powerful tradition of ancient origin and its contribution to contemporary professional standards, as well as its relevance to conscientious objection to abortion, is clear: “This covenantal pledge, previously considered to be ‘the immutable bedrock of medical ethics,’ embodies the philosophy . . . that human life is inviolable at any stage from in-utero existence to natural death, and that the *primum non nocere* (first, do no harm)¹⁶⁴ is a critical premise of medical practice.”¹⁶⁵ While nearly all medical students in the United States and

¹⁶¹ Genuis, *supra* note 142, at 233 (referencing E. Pellegrino); *The Nazi Doctors and Nuremberg: Some Moral Lessons Revisited*, 127 ANNALS INTERNAL MED. 307, 307-08 (1997) (describing historic lessons as an important backdrop to the proposition that, “Medical power is too great to be left unregulated, but is also too great to be enslaved by government, however benign the government’s intentions might be.”).

¹⁶² See, e.g., *Evangelium Vitae*, *supra* note 3, at ¶ 58. (“The moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder . . . The one eliminated is a human being at the very beginning of life. No one more absolutely *innocent* could be imagined.”).

¹⁶³ Iain T. Benson, “Autonomy”, “Justice” and the Legal Requirement to Accommodate the Conscience and Religious Beliefs of Professionals in Health Care, (March 2001) available at <http://www.consciencelaws.org/Examining-Conscience-Legal/Legal04.html> (emphasis added).

¹⁶⁴ Genuis, *supra* note 142, at 233 (“First, do no harm” is a widely recognized phrase relating to the practice of medicine; however it is not found in the Hippocratic Oath. It is from a passage in Hippocrates’ *Epidemics*: “Declare the past, diagnose the present, foretell the future; practice these acts. As to diseases, make a habit of two things – to help, or at least to do no harm.” HIPPOCRATES, EPIDEMICS, Bk. 1, Sect. XI. 165 (W.H.S. Jones 1923)); see Simon Mills, *What does the Hippocratic oath mean?*, IRISH MED. TIMES, Apr. 24, 2009, http://www.imt.ie/opinion/2009/04/what_does_the_hippocratic_oath.html (noting that “do no harm” is not found in the Hippocratic Oath).

¹⁶⁵ Genuis, *supra* note 142, at 233 (discussing ethical distress experienced by physicians when they

Canada recite a variation of the Oath today,¹⁶⁶ just 43 percent still administer an oath requiring students to be accountable for their actions and only 8 percent retain the provision forbidding abortion.¹⁶⁷ Despite depreciation of the Oath, there seems to remain an “innate recognition by conscientious physicians that they are engaged in something more than commerce, industry or mere contracts for service.”¹⁶⁸ Many individuals drawn to the practice of medicine often arrive with a desire to help, a desire to heal, a desire to promote, protect and prolong human life. Thus, for those that believe an elective abortion results in the destruction of innocent human life,¹⁶⁹ the procedure is rationally antithetical to the practice of medicine.

III. THE FUTURE OF CONSCIENCE PROTECTION IN CANADA, SOUTH AFRICA, AND THE UNITED STATES AND INTERNATIONAL SOURCES OF SUPPORT

A. Canada

Although Canada has yet to enact statutory conscience protection for its health care professionals, comprehensive conscience legislation has been proposed and is ripe for consideration in the Canadian legislature. Maurice Vellacott, a member of the House of Commons of Canada, has proposed Bill C-357. It penalizes discriminatory behavior on the part of employers, providing, in relevant part:

Every one is guilty of an offence punishable on summary conviction who, being an employer or the agent of an

are caught in difficult clinical situations that demand ethical decision making, particularly when their preferred action may contravene the expectations of patients and established authorities).

¹⁶⁶ E.D. Pellegrino, *Professional Codes* in *METHODS IN MEDICAL ETHICS* 80-87 (Oxford Univ. Press 2001) (“Here, I wish to call attention to the curious fact that, as depreciation of the Oath has intensified, its use at commencement exercises has become virtually universal in US and Canadian medical schools.”); Robyn B. Nicoll, *Long-Term Care Insurance and Genetic Discrimination – Get it While You’re Young and Ignorant: An Examination of Current Discriminatory Problems in Long-Term Care Insurance Through the Use of Genetic Information*, 13 *ALB. L.J. SCI. & TECH.* 751, 758 (2007) (“Medical students traditionally recite and abide by the Hippocratic Oath as a ‘rite of passage into the medical profession.’”).

¹⁶⁷ Just one medical school still used the text of the original Hippocratic Oath at the time this survey was conducted in 1993. Robert D. Orr & Norman Pang, *A Review of 20th Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993*, 8 *J. CLINICAL ETHICS* 377, 377-88 (1997).

¹⁶⁸ Edmund D. Pellegrino, *Medical Commencement Oaths: Shards of a Fractured Myth, or Seeds of Hope Against a Dispiriting Future?*, 176 *MED. J. AUSTR.* 99, 99 (2002).

¹⁶⁹ “[B]eliefs about the non-personal status of the fetus [sic] and its religious insignificance are simply irrelevant to the person who views an unborn human being as a sacred entity worthy of being considered as a rights bearer.” Benson, *supra* note 163.

employer, (a) refuses to employ a health care practitioner, (b) refuses to advance or promote a qualified health care practitioner, or (c) dismisses, or threatens to dismiss, a health care practitioner from employment, because the health care practitioner is, or is believed to be, unwilling to take part, directly or in an advisory capacity, in any medical procedure that offends a tenet of the practitioner's religion, or the belief of the practitioner that human life is inviolable.¹⁷⁰

This bill should be enacted without delay.

B. South Africa

The widespread use of chemical abortion in South Africa has left its health care professionals in an even more precarious position than their Canadian and American counterparts. They are in dire need of meaningful statutory conscience protection. Doctors For Life, an international pro-life organization serving over 1000 professional members in South Africa, has actively lobbied the legislature to secure this protection. However, it has been unsuccessful thus far. Most recently, the organization failed in its attempt to have a freedom of conscience measure included in the Abortion Amendment Bill, passed in South Africa in 2008.¹⁷¹ Additionally, Judge Dennis Davis of the nation's Labor Appeals Court has asked the Minister of Health to clarify a health care provider's conscientious refusal rights, but his request has gone unanswered.¹⁷²

The South African experience is also relevant to international efforts to

¹⁷⁰ Bill C-537, The House of Commons of Canada, 2nd Session, 39th Parliament, 56-57 Elizabeth II, 2007-2008, available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3429427&file=4>.

¹⁷¹ See Press Release, Doctors For Life International, Freedom of Conscience for Health Care Professionals Once Again Denied at Coming Thursday's Re-Vote On the Abortion Amendment Bill (Jan. 14, 2008), available at http://www.doctorsforlifeinternational.com/about/media/releases/abortion/2008/2008-01-14_freedom_of_conscience.cfm (citing the South African Government's failure to permit a conscience clause for health professionals with respect to participation in abortion); see also Wyndham Hartley, *South Africa: MPs Pass Abortion Bill By Due Date*, Jan. 18, 2008, available at <http://allafrica.com/stories/200801180289.html> (noting Member of Parliament Mike Waters' concern that South Africa's abortion bill does not allow conscientious objection by medical staff).

¹⁷² See Press Release, Doctors For Life International, Freedom of Conscience for Health Care Professionals Once Again Denied at Coming Thursday's Re-Vote On the Abortion Amendment Bill (Jan. 14, 2008), available at http://www.doctorsforlifeinternational.com/about/media/releases/abortion/2008/2008-01-14_freedom_of_conscience.cfm (proposing that the South African Members of Parliament should "not pass the Abortion Amendment Bill until clear provision is made for health professionals to exercise their constitutional right to freedom of conscience"); see also Hilary White, *South African Nurse Continues Fight for Right to Opt Out of Abortions* (June 25, 2007), available at <http://www.lifesitenews.com/ldn/2007/jun/07062507.html> (discussing a South African senior nurse's lawsuit which alleges that she was barred from working in her hospital position because she objected to abortion on religious grounds).

compel liberalization of abortion in other nations. The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁷³ is being increasingly used to condemn nations that have not yet legalized abortion or those with more restrictions on the practice.¹⁷⁴ It is critical that the consciences of those health care professionals implicated be taken into consideration to ensure that there are a sufficient number of willing providers, so no professional would be compelled to participate in abortion against his or her will. It is nothing short of irresponsible to do otherwise, especially in nations where structural support for administration of the practice is lacking, as the particularly burdensome experience in South Africa emphatically counsels.¹⁷⁵

C. The United States

The Freedom of Choice Act (FOCA), if enacted, would provide women with a positive, statutory right to an abortion in the United States. The most recent version of the Act, nullifying virtually all federal and state restrictions on abortion prior to fetal viability, was drafted and introduced in response to the Supreme Court's 2007 decision in *Gonzales v. Carhart*.¹⁷⁶ In *Gonzales*, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003.¹⁷⁷ Section 6 of the proposed FOCA indicates that the statute "applies to every Federal . . . statute. . . adopted. . . before, on, or after" the date FOCA is enacted."¹⁷⁸ This language would very likely strike down the Partial-Birth Abortion Ban Act, as well as the other federal statutes restricting abortion.

¹⁷³ United Nations Convention on the Elimination of All Forms of Discrimination Against Women, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> ("[A]dopted in 1979 by the UN General Assembly, [CEDEW] is often described as an international bill of rights for women.")

¹⁷⁴ See Ioana Ardelean, *An Omnibus Sampling of International Efforts to Force Abortion on Reluctant Nations*, Sept. 4, 2008, available at http://culture-of-life.org/index2.php?option=com_content&do_pdf=1&id=497 (arguing that recent targets of criticism by the CEDAW because of their pro-life laws have included Mexico, Columbia, and Ireland); see, e.g., Hilary White, *CEDAW Demands Northern Ireland Drop Abortion Law*, July 31, 2008, <http://www.lifesitenews.com/ldn/2008/jul/08073113/html> (announcing a report issued by CEDAW which demands that Northern Ireland "drop its legal protections for unborn children").

¹⁷⁵ See Dolores Dooley, *Conscientious Refusal to Assist with Abortion*, 309 BRITISH MED. J. 622, 622-23 (Sept. 12, 1994) (stating that prior to a country drafting abortion legislation, "a prudent government will consider in advance how it will find enough health care professionals who will in good conscience assist in abortions. In too many countries a law permits abortion and requires health professionals to implement this law but little or no attention has been given the basic principle of respecting conscientious refusal.")

¹⁷⁶ 550 U.S. 124 (2007) (holding that the Partial-Birth Abortion Act of 2003 did not violate the Constitution).

¹⁷⁷ 18 U.S.C. § 1531 (Nov. 5, 2003).

¹⁷⁸ S. 1173, 110th Cong. § 6 (2007); H.R. 1964, 110th Cong. § 6 (2007).

FOCA's effect would go well beyond overturning most legislation restricting abortion in this country. It would also ensure state provided access to the procedure. "The clear legal *effect* of FOCA would be to require government funding and provision of facilities for abortion, on terms sufficient so as not to be found to 'discriminate against the exercise' of abortion rights."¹⁷⁹ Section 4, the core of the proposed FOCA, provides:

a) Statement of Policy - It is the policy of the United States that every woman has the fundamental right to choose to bear a child, to terminate a pregnancy prior to fetal viability, or to terminate a pregnancy after fetal viability when necessary to protect the life or health of the woman.

b) Prohibition of Interference-A government may not-

(1) deny or interfere with a woman's right to choose-

(A) to bear a child;

(B) to terminate a pregnancy prior to viability; or

(C) to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman; or

(2) discriminate against the exercise of the rights set forth in paragraph (1) in the regulation or provision of benefits, facilities, services, or information

c) Civil Action - An individual aggrieved by a violation of this section may obtain appropriate relief (including relief against a government) in a civil action.¹⁸⁰

Legislation that promotes a childbirth alternative to abortion, like that upheld by the Court in *Rust*, will not survive FOCA, as it will be viewed as "discriminatory" under the Act.

FOCA's legal effects are clear. FOCA would invalidate nearly every state and federal law bearing on, or attempting to influence, the exercise of a choice of abortion. FOCA would invalidate nearly every state or federal law substantively disfavoring abortion in the provision of benefits, services, and information. FOCA would invalidate nearly every state or

¹⁷⁹ Michael Stokes Paulsen, *The Legal Consequences of the Freedom of Choice Act*, MORAL ACCOUNTABILITY, Feb. 3, 2009, available at <http://www.moralaccountability.com/2009/02/03/the-legal-consequences-of-the-freedom-of-choice-act/>.

¹⁸⁰ S. 1173, 110th Cong. § 4 (2007); H.R. 1964, 110th Cong. § 4 (2007).

federal law protecting the conscience of medical workers or religious hospitals from participating in abortion. FOCA would likely invalidate nearly any state law prohibiting partial birth abortion. And FOCA would entrench abortion rights against further meaningful legal challenge.¹⁸¹

Though the Act clearly presents a myriad of legal consequences, this discussion will be limited to FOCA's effect on existing statutory conscience protection. Disturbingly, the current version of the bill does not contain the language included in previous drafts that permitted regulations protecting conscience, indicating hostility to the protection of freedom of conscience for health care professionals.¹⁸² To the extent that conscientious objection is viewed as "interfering" with a woman's right to choose, those professionals working in public—or publicly funded—hospitals will be stripped of their conscience protections and be required by the law to provide abortions.¹⁸³ Legal scholars have predicted that FOCA will invalidate conscience protection statutes in 46 states.¹⁸⁴

The Court's decision in *Casey*¹⁸⁵ provides the current standard for legislation that restricts abortion. However, FOCA will replace the *Casey* standard with much more restrictive standard against which all regulations relating to abortion will be reviewed. In that case, the Court clarified that both the states and the federal government may still legislate to restrict or deter abortion unless such legislation would place an "undue burden" on the woman's choice. An "undue" burden is defined as a "substantial obstacle in the path" of a woman obtaining an abortion.¹⁸⁶ Many state and federal restrictions have been permitted following *Casey*, including parental notification laws and mandatory waiting periods. Laws that "do

¹⁸¹ Paulsen, *supra* note 179.

¹⁸² See National Right to Life, *The "Freedom for Partial-Birth Abortionists Act" -- Pro-Abortion Lawmakers Propose "FOCA" to Invalidate All Limits on Abortion*, Apr. 25, 2007, available at <http://www.nrlc.org/FOCA/LawmakersProposeFOCA.html> (citing the laws that would be invalidated by the Freedom of Choice Act); see also, Connie Hair, *The Facts About the Freedom of Choice Act (FOCA)*, 65 HUM. EVENTS S1, S1-S4 (2009) (discussing the risks to conscience rights that the Freedom of Choice Act would have).

¹⁸³ Paulsen, *supra* note 179 ("[L]aws that could be said to 'interfere' with abortion choice, such as requirements that an ultrasound be performed, and presented to the mother, prior to any abortion . . . would appear to be invalid under FOCA."); Ben Arnoldy, *Catholic Groups Fear Abortion Rights Bill*, CHRISTIAN SCI. MONITOR, Dec. 5, 2008, available at <http://www.csmonitor.com/2008/1205/p03s03-ussc.html> ("Some say FOCA is so broad it would also imperil 'conscience clauses' that protect hospitals and doctors who refuse to perform abortions because of their convictions.").

¹⁸⁴ Henneberger, *supra* note 121 (noting that "many believe" that FOCA would invalidate state conscience laws); Paulsen, *supra* note 179 (predicting that FOCA "would almost certainly" invalidate state conscience laws).

¹⁸⁵ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁸⁶ *Id.* at 878.

no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn”¹⁸⁷ do not rise to the level of an undue burden.¹⁸⁸ Conscience clauses have never been found to constitute an undue burden on a woman’s decision to obtain an abortion.

Under FOCA, existing state and federal legislation that attempts to influence the abortion choice, in favor of a childbirth alternative, would likely be struck down as an *interference* with the abortion choice. FOCA’s language makes clear that the state’s denial or interference with abortion need not rise to the level of a “substantial obstacle” to be prohibited. Due to FOCA’s explicit expression that it will apply to all of the federal statutes adopted before it, all current federal restrictions on abortion will be reviewed against the FOCA standard and to the extent they are determined to “interfere” with an abortion choice, they will be struck down.

Calls for mandatory professional provision of abortion services in the United States are coming loudly from abortion providers like Planned Parenthood. On a recent National Public Radio Program, a planned parenthood attorney stated, “If you are unwilling to provide a legal healthcare procedure, you have no business being a doctor.”¹⁸⁹ If Planned Parenthood had its way, conscientiously objecting employees would be unable to obtain an exemption to a mandatory provision law. Pursuant to the current Supreme Court’s jurisprudence, if such a law was indeed valid,¹⁹⁰ it would be very difficult for a conscientious objector to obtain a religious exemption.

While it has been long held that individuals are not required to forfeit their First Amendment right as a condition of government employment,¹⁹¹ Free Exercise rights in the workplace have been limited in recent years.¹⁹² The high water mark for employees acting in accordance with sincerely held religious beliefs was the Supreme Court’s decision in *Sherbert v.*

¹⁸⁷ *Id.* at 877.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Some have called into question the constitutionality of the proposed FOCA.. See Cathleen Kaveny, *Bad Law*, COMMONWEAL, Jan. 30, 2009, available at http://www.commonwealmagazine.org/article.php?id_article=2423.

¹⁹¹ *Pickering v. Bd. of Educ. of High Sch. Dist. 205, Ill.*, 391 U.S. 563, 574 (1968) (holding that a teacher’s exercise of his right to speak on issues of public importance may not be the basis for his termination); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74-75 (1990) (deciding that an employment opportunity cannot be denied based on a person’s exercise of her First Amendment rights).

¹⁹² *Lumpkin v. Mayor of San Francisco*, 109 F.3d 1498, 1500 (9th Cir. 1997) (upholding San Francisco’s dismissal of a reverend for condemning homosexuality in public); *Daniels v. City of Arlington*, 246 F.3d 500, 507 (5th Cir. 2001) (determining that firing a police officer who wore a cross did not violate the First Amendment).

Verner.¹⁹³ In that case, the Court held that the state must demonstrate a compelling governmental interest before denying unemployment compensation to an individual who was fired because his or her job conflicted with the requirements of his or her religion.¹⁹⁴ The Court explained that the denial of these benefits was an unconstitutional burden on Free Exercise rights. Under *Sherbert*, when a person holds a sincere religious belief, and government is imposing a substantial burden on the person's ability to act in accordance with that belief, the government must come forward and demonstrate that its action is in furtherance of a compelling state interest. It must also prove that its action is the least restrictive means available to achieve that interest.¹⁹⁵

This analysis was changed dramatically by the Supreme Court's 1990 decision in *Employment Division v. Smith*.¹⁹⁶ In that case, the Court held that a state could deny unemployment benefits to a person who used an illegal drug in violation of state law, although the drug was used for religious purposes. The Court in *Smith* explained, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹⁹⁷ However, facial neutrality itself is not enough, and strict scrutiny will still be applied where government action is found to have a discriminatory intent.

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The *Free Exercise Clause* protects against government hostility which is masked as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."¹⁹⁸

Clearly, where a law compelling the participation of all health care professionals in abortion procedures satisfies the neutral and general applicability requirements of the *Smith* test, it is unlikely that health care professionals could obtain an exemption. However, one commentator

¹⁹³ 374 U.S. 398 (1963).

¹⁹⁴ *Id.* at 409-10 (citation omitted).

¹⁹⁵ *Id.* at 407.

¹⁹⁶ 494 U.S. 872 (1990).

¹⁹⁷ *Id.* at 879 (citation omitted).

¹⁹⁸ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

suggests that even a neutral law of general applicability would not necessarily qualify as a valid law in the abortion context. “[I]f the state were to compel a health care provider to kill or to engage in acts that the provider regards as killing, such compulsion may be so objectionable that it takes on constitutional dimensions, such that protections against this injustice are ‘implicit in the concept of ordered liberty.’”¹⁹⁹ The Supreme Court has struck down statutes that take on such constitutional import.²⁰⁰

The recent experience of Washington state pharmacists sheds light on the reality of compulsory provision regulations for health care professionals. In 2007, the Washington State Board of Pharmacy instituted a regulation requiring pharmacists to fill all legal prescriptions, including the “Plan B” emergency contraceptive and abortifacient.²⁰¹ This regulation failed to include a conscience protection measure. Two individual pharmacists and a pharmacy owner, in the case of *Stormans v. Selecky*,²⁰² brought an action alleging the regulation would force them to violate their religious beliefs. They argue that, while ostensibly neutral, the Board of Pharmacy’s regulation was discriminatory in its purpose in that it was adopted *solely* to compel the compliance of those with religious objection to dispensing abortifacients. A federal district court issued a preliminary injunction preventing the regulations from taking effect until the constitutional issues raised by the case were decided.²⁰³ In May of 2007, The Ninth Circuit Court of Appeals denied a stay of the injunction²⁰⁴ and the case is pending. The Board of Pharmacy regulation will only be struck down if the pharmacist plaintiffs are able to show that the regulation is not facially neutral or that the State of Washington was discriminatory in its purpose when instituting the regulation compelling the dispensation of all legal prescriptions. Conscientiously unwilling professionals and hospitals

¹⁹⁹ Kramlich, *supra* note 85, at 798 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)).

²⁰⁰ *See, e.g.*, *Palko*, 302 U.S. at 325 (finding some rights to be so fundamental that no state may legislate to abridge those rights but concluding that none of those rights were implicated by a state statute allowing appeal by the state in criminal cases); *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003) (holding state law unconstitutional because it violated fundamental liberties).

²⁰¹ Elizabeth Gerber, *Emergency Contraception: Legal Consequences of Medical Classification*, 36 J.L. MED. & ETHICS 428, 428 (2008) (discussing the holding, rationale, and consequences of the District Court’s decision in *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007)).

²⁰² 524 F. Supp. 2d at 1248, *stay denied by* 526 F.3d 406 (9th Cir. 2008), *vacated*, 571 F.3d 960 (9th Cir. 2009) (enjoining a state law that required pharmacies and pharmacists to provide “Plan B” contraceptives to individuals without also providing pharmacists the ability to refuse on religious or moral grounds).

²⁰³ *Id.* at 1266.

²⁰⁴ *Stormans, Inc.*, 526 F.3d at 409, *vacated*, 571 F.3d 960 (denying stay application pending appeal because appellants failed to show they would face irreparable harm if injunction were not lifted).

are uncertain how they would respond to compelled abortion participation. Under no circumstance may Catholic hospitals provide abortions.²⁰⁵ Operating over a third of the hospitals in the country, many of them in high-need, low-income areas,²⁰⁶ the Roman Catholic Church sees only two options following the passage of FOCA: closure of its hospitals or civil disobedience.²⁰⁷ “If Catholic hospitals were required by federal law to perform abortions, we’d have to close [them],” said Bishop Thomas Paprocki of Chicago explained to a recent gathering of over 300 Church leaders.²⁰⁸ Others in the Church feel that civil disobedience is the better alternative. Commentator Ed Morrissey explains, “Some of the bishops in the church want to use an incremental approach to FOCA rather than the final option of shutdowns. They favor a civil-disobedience approach, daring the government to come after them for refusing to perform abortions. That keeps the hospitals open and their consciences clear.”²⁰⁹ However, the tremendous civil liability the Church would be opening itself up to by electing the civil disobedience alternative may, in reality, make hospital closure the only real choice. To avoid these very troubling consequences, language of conscience protection must be included in the Freedom of Choice Act itself. Subsequently, the conscience protecting regulations enacted late in 2009, in the process of being revoked by President Obama, should be revisited and reestablished.

Laws and regulations requiring the affirmative participation of medical professionals in abortion procedures do not currently exist in Canada, South Africa or the United States. However, the practical reality in these nations remains deeply troubling. Indeed, as the varied experiences of

²⁰⁵ *Evangelium Vitae*, *supra* note 3, at ¶ 73 (“Abortion and euthanasia are thus crimes which no human law can legitimize.”). See Tanya Watterud, *When Society Abandons God’s Law, It Abandons Humanity*, Catholic Action, Nov. 13 2008, http://www.catholicaction.org/our_bishops_speak/when-society-abandons-gods-law-it-abandons-humanity.html (“Abortion is an intrinsic evil, which means that in no circumstances is it permitted nor may it ever be supported, even as a means to a good end.” (quoting Bishop Samuel J. Aquila)).

²⁰⁶ Ed Morrissey, *Will FOCA Force the Catholic Church Out of Healthcare?*, HOT AIR, Mar. 6, 2009, <http://hotair.com/archives/2009/03/06/will-foca-force-the-catholic-church-out-of-healthcare/> [hereinafter Morrissey] (noting that the catholic church provides 600 hospitals nationwide serving mostly needy areas); Claude Cartaginese, *Fox News: “Freedom of Choice Act” Means Goodbye to Catholic Hospitals*, July 27, 2009, available at <http://newsrealblog.com/2009/07/27/fox-news-freedom-of-choice-act-means-goodbye-to-catholic-hospitals/> [hereinafter *Goodbye to Catholic Hospitals*] (stating that the catholic hospitals are generally located in low-income areas and fulfill a great social need by serving the poorest members of society).

²⁰⁷ Morrissey, *supra* note 207 (arguing that some bishops favor a civil-disobedience approach); see *Goodbye to Catholic Hospitals*, *supra* note 207 (discussing the inevitable closure of more than 1,000 Catholic hospitals).

²⁰⁸ Manya Brachear, *Catholic Bishops Plan to Forcefully Confront Obama*, CHICAGO TRIBUNE, Nov. 11, 2008, available at <http://archives.chicagotribune.com/2008/nov/11/health/chi-081111bishops>.

²⁰⁹ Morrissey, *supra* note 207.

conscientiously objecting professionals in all three nations demonstrates, the absence of meaningful conscience clause protection can be so grave that it becomes the functional equivalent of affirmative conscientious compulsion.

CONCLUSION

American President Thomas Jefferson once explained, “[t]he price of freedom is eternal vigilance.”²¹⁰ He also warned, “It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others.”²¹¹ As this Note demonstrates, even in constitutional democracies that have provided their people with broad, enumerated individual liberties, the threat of erosion of rights is ever-present. No rights, even those that seem most fundamental—like freedom of conscience—are immune. They must be avidly protected and defended.

The individual choice guaranteed by statutory conscience protection demonstrates respect for the autonomy of health care providers, promotes the integrity of the medical profession,²¹² and protects the rights of healthcare professionals without compromising those of patients. Failure to protect individual conscience rights will be devastating to any democratic society.²¹³

The absence of a statute compelling health care professionals’ participation in abortion is irrelevant to those in functionally equivalent circumstances, just as the cases of registered nurse Sister Charles in South Africa, American nurse Catherina Cenzon-DeCarlo, and the unnamed Canadian medical student remind us. Health care professionals who are discriminated against on the basis of their conscientious unwillingness to participate in elective abortion procedures must not be left without a remedy. South Africa and Canada should enact statutory conscience protection measures without delay. Similarly, the statutory and regulatory conscience protection established thus far in the United States must be

²¹⁰ Thomas Jefferson, Quote DB, <http://www.quotedb.com/quotes/2283> (last visited Jan. 31, 2010).

²¹¹ HENRY STEPHENS RANDALL, *THE LIFE OF THOMAS JEFFERSON* 556 (Volume III, 1871).

²¹² See generally Tom C. W. Lin, *Treating an Unhealthy Conscience: A Prescription for Medical Conscience Clauses*, 31 VT. L. REV. 105 (2006). The following are the broad professional benefits to the medical profession achieved by conscience protection: “(1) they give more meaning and accountability to medicine and science; (2) they promote a culture of life within society; and (3) they promote a respect for the autonomy of health care providers.” *Id.* at 117. See also Genuis, *supra* note 142, at 237. Professionalism is diminished when health providers are forced to “divorce their beliefs and values.” *Id.*

²¹³ Genuis, *supra* note 142, at 237 (“[a]ny influence that diminishes the personal ethics of physicians only perpetuates a decline in medical professionalism and ethical behavior.”).

vigilantly protected from erosion.

A *matter of choice* for one person should not result in a *matter of compulsion* for another, particularly where the matter is one of such significant moral or religious import. The “freedom to choose” so often associated with elective abortion must be extended to medical professionals who would choose to follow the dictates of their own consciences in abstaining from a practice, which, in their view, is hostile to the ethical obligations of the practice of medicine and violates the profound and inherent dignity of the human person.

