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Do Health Providers Have 'Right to Refuse'?

'Conscience clauses' allow hospitals to opt out of abortions, other procedures

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Recent stories about pharmacists' refusal to provide contraception, and plans by President Barack Obama's administration to withdraw last-minute regulations on provider rights of conscience left behind by former President George W. Bush have put the issue of conscientious objection to health care treatment in the spotlight.

Technological advances often outpace our ability to develop ethical guidelines about how these technologies will be put to work, and the health care system must grapple with the collision between the individual rights of providers and the health care needs of patients.

Background

Almost before the ink dried on the *Roe v. Wade* decision, Congress responded in 1973 with the Church Amendment, which provides that the receipt of federal funds in various health programs does not require hospitals or individuals to participate in abortions if they object on moral or religious grounds. So-called "conscience clauses" after the Church Amendment have extended protection to other types of health care providers, and expanded the grounds on which such clauses can be invoked. The Hyde-Weldon Amendment of 2004 prohibits a government program from receiving certain federal funds if it "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." (Public Law No. 108-447, § 508(d)).

States have been even more active in the arena of provider conscience protections, and have taken widely varying approaches to addressing the problem. At present, 47 states have some sort of conscience clause legislation that protects the rights of health care providers (individuals or institutions) that refuse to provide certain procedures or services; Alabama, New Hampshire and Vermont have no such statutes. These laws vary in the types of providers covered, the nature of the procedures to which providers may object, the process that must be followed, and the permissible grounds for refusal.

The majority of state conscience clause legislation addresses abortion or abortion-related procedures. Connecticut's protection appears in the Public Health Code, and states that "no person shall be required to participate in any phase of an abortion that violates his or her judgment, philosophical, moral or religious beliefs." (Conn. Agencies Reg. § 19-13-D54) Some states (such as Arkansas, Delaware, and Florida) give an unfettered ability to individuals and institutions to opt out of any procedure that results in the "termination of a pregnancy," while other states place restrictions on the types of procedures to which providers can object or the types of institutions that can refuse to provide treatments.

More recently, states such as Arkansas, Georgia, Mississippi, and South Dakota have passed laws that explicitly give pharmacists the right to refuse to dispense drugs related to contraception, while others (California and Illinois) have passed laws mandating that pharmacies or institutions fill or dispense such prescriptions.


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Some states, including Connecticut, require hospitals or other facilities to provide the "morning after pill" to rape victims who present for treatment, as long as certain requirements are met. (See Conn. Gen. Stat. § 19a-11e (Public Act 07-24)).

A few states have expressly adopted "conscience protections" that go beyond abortion and contraception. Maryland's "conscience clause" legislation extends to artificial insemination as well as sterilization and termination of a pregnancy. States such as Indiana, Pennsylvania, Idaho and Texas provide some protections for health care providers who refuse on moral grounds to implement the instructions of patients regarding end-of-life issues.

Case Law

Several cases have addressed the intersection of providers' conscience rights and the needs of patients. In *Doe v. Bolton*, a companion case to the better-known *Roe v. Wade*, the Supreme Court reviewed a Georgia statute that, among other things, required a panel of three physicians to approve all abortions.

Speculating that the provision was to protect the hospital, rather than the woman's informed choice, the court noted in dicta that "the hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee

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has the right to refrain, for moral or religious reasons, from participating in the abortion procedure." (410 U.S. 179, 197-198 (1973)).

There have been myriad cases involving moral or religious refusals to withdraw life-sustaining treatment, from the New Jersey Supreme Court's decision in *In re Quinlan* (355 A.2d 647 (1976)), to the 2006 controversy about Terri Schiavo, the severely brain-damaged Florida woman whose husband and parents fought in court over whether she should be taken off life support.

Most cases conclude that an otherwise competent adult has the right to refuse medical intervention and life-sustaining treatment, even if the institutional and individual caregivers involved object. Many cases, however, balance the health care provider's or facility's right to conscience against the individual patient's interests, and require that the objecting provider assist in transferring the patient to another provider that will carry out the patient's wishes. (See *Brophy v. New England Sinai Hospital Inc.*, 497 N.E.2d 626,633 (Mass. 1986)). Recent cases also have imposed damages for failure to follow a patient's instructions that were contrary to the moral or ethical beliefs of the provider. In Texas, a jury imposed a $42 million verdict on a hospital for disregarding parental objections and providing life-sustaining treatment to a premature infant born after 23 weeks of gestation. On appeal, the verdict was overturned. (*Miller v. HCA*, 118 S.W.3d 758 (Tex. 2003)). And last summer, the California Supreme Court concluded that the state's anti-discrimination laws prevent physicians from refusing, on religious grounds, to provide in-vitro fertilization to same-sex couples. (*North Coast Women's Care v. Benitez*, Ct. App. 4/1 D045438).

New Federal Regulations

On Aug. 21, 2008, the Department of Health and Human Services issued a proposed regulation that would deny federal funding to any hospital, clinic, health plan or other entity that "subject[s] any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion."

An earlier draft of the regulation that was leaked to the media included language that defined abortion (for the first time in a federal law or regulation) as anything that interferes with a fertilized egg after conception. That language was deleted, but commentators said that the final regulations were broad enough to protect health care providers who decline to provide oral contraception, the "morning after" pill and other types of contraception.

Industry officials and state and federal legislators called for the rule to be withdrawn, and Connecticut Attorney General Richard Blumenthal brought suit to block its implementation. Shortly after Obama took office, the Department of Health and Human Services issued a proposal that would rescind the provider conscience regulations. Comments were due by April 9, 2009, and a final rule has not yet been issued. Until the "Rescission Proposal" is finalized, the Bush administration regulations remain in effect. ■