Law and Public Policy to Protect Health-Care Rights of Conscience

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“Those whose consciences are at odds with the provision of some legal goods and services already have the power to avoid their dilemmas by seeking another profession and giving up their licenses.”¹

Worldwide there is a profound conflict between Catholic medical ethics and some modern medical practices. The rapidly increasing ability of medical science to dominate and manipulate physical and biological reality combined with the rise of a secular, materialistic, and utilitarian ethic has led to this modern clash of medical cultures.

Standing at the center of this clash of worldviews are Catholic health-care providers who desire to live out their vocation of professional service and care to the sick without compromising their most deeply held religious, moral, and ethical be-

¹Testimony of a Kansas representative of the National Organization of Women opposing a comprehensive right-of-conscience bill pending before the Kansas House of Representatives, 2001 KS H.B. 2491, Federal and State Affairs Committee, Kansas Legislature (March 6, 2001).
Adding to the strain of this conflict are various activist organizations promoting a hostile utilitarian worldview that sanctions, among other things, abortion on demand, physician-assisted suicide, human cloning, destructive human embryo research, in-vitro fertilization, human gene enhancement, sterilization, and artificial contraceptives.

These organizations stridently demand that all health-care workers must provide any and all procedures, services, referrals, or drugs that the modern medical establishment can conceive of and create, regardless of the principled objections of any individual health-care provider. To these organizations, freedom to choose easily becomes the freedom to coerce.

Individual requests by health-care employees to be exempt from objectionable services have led to threats of termination, demotion, transfer, economic loss, and career-ending evaluations. All too often, when these employees have held their moral ground and refused to participate in objectionable procedures, these threats have been actualized. In other cases, individuals have compromised their conscience in order to maintain their family-supporting incomes or their hard-won professional careers. An unfortunate number have simply left the profession altogether. In any case, the mental and physical strains can push health-care providers to the breaking point. What should Catholic health-care providers do? The Church, which seeks to support a culture of life, faces a similar question. Indeed, the wider community must also ask itself what it must do to promote the common good. The answer lies, at least in part, in the passage of comprehensive health-care rights-of-conscience legislation.

### The Catholic Basis for Rights-of-Conscience Legislation

The proposal that comprehensive health-care rights-of-conscience legislation be enacted is consistent with the Church’s understanding of the dignity of the human person, the intrinsic evil of certain medical procedures, services, and drugs, and also...
the nature of the human conscience. Indeed, the Church has recognized that the right to conscientiously object is itself a moral duty.

Reflecting on Scripture, tradition, and two thousand years of history, the Church has recognized that all men and women have a profound and inherent dignity, rooted in the *imago Dei*, the divine image of the Creator. Central to that human dignity is the right to life, which is why the Council fathers of Vatican II, echoed by Pope John Paul II, could repeat the Church’s constant condemnation of the destruction of human life:

> Whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia, or willful self-destruction ... are infamies indeed. They poison human society, and they do more harm to those who practice them than to those who suffer from the injury. Moreover, they are a supreme dishonor to the Creator.¹

These threats to human life, stemming from a deformed notion of human freedom and severed from an appropriate understanding of the true nature and final end of human beings, are to be opposed by all, especially those in the health-care professions, who seek to promote—not undermine—genuine human flourishing.

When these threats to human life are codified into law, the law, being contrary to reason, “ceases to be a law and becomes instead an act of violence.”² Therefore, actions such as abortion and euthanasia, being a direct assault on human dignity and a flagrant violation of human rights, “are thus 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.”³

A health-care provider, consequently, has both a right and a duty “to refuse to take part in committing an injustice” against human life. In other words, no health-care provider should “be forced to perform an action intrinsically incompatible with human dignity.” Rather, the “opportunity to refuse to take part in the phases of consultation, preparation, and execution of these acts against life should be guaranteed” to all involved with the delivery of health-care services. Thus, health-care providers, including those in training, who conscientiously object, “must be protected not only from legal penalties but also from any negative effects on the legal, disciplinary, financial, and professional plane.”⁴

Fortunately, in a free and representative democracy, the people through their elected representatives are in a position to protect the right of conscience through the passage of legislation. Sadly, as many organizations at the heart of the culture of death remind us today by their intolerance, freedom of conscience will not be honored and protected without the vigorous efforts of prudent and courageous legislators.


³Pope John Paul II, *Evangelium vitae*, n. 73, original emphasis.

⁴Ibid, n.74, emphasis added.
The Elements of Effective Rights-of-Conscience Legislation

To ensure that conscientiously objecting health-care providers are fully protected from all forms of discrimination and retaliation, an effective rights-of-conscience law on the federal or state level must include several critical elements.

First, the law must sweep within its protection the largest possible number of individuals associated with the medical profession and also must include health-care institutions and payers in its protective embrace. Legally and morally, there is no difference between the right of conscience of an individual and an institution. Second, the law must define as broadly as possible the procedures to which a health-care provider may object. Third, the law must clearly define the protected right. Finally, a health-care worker must be provided with an effective legal cause of action to challenge those who would compel the violation of conscience. Since each of these elements is crucial, each will be addressed separately and in more detail.

Who Should Be Protected?

Current state and federal statutes that address the issue of health-care rights of conscience are in most instances inadequate because the protection excludes most health-care professionals, including nurses, nurse aides, pharmacists, and medical students. Unfortunately, threats or outright coercion to participate in objectionable procedures have been directed at workers across the full spectrum of medical practice.

Consequently, any comprehensive law must, at the very least, include a definition of “health-care provider” that covers any person who may be asked to participate in any way in a health-care service, such as any physician, physician’s assistant, nurse, nurses’ aide, medical assistant, hospital employee, clinic employee, nursing-home employee, pharmacist, pharmacy employee, researcher; medical or nursing school faculty, student, or employee; counselor, social worker, member of the clergy; or any professional, paraprofessional, or other person who furnishes, or assists in the furnishing of, health-care services.

Additionally, effective legislation must extend full conscience protection to private and public health-care institutions, including hospitals, ambulatory surgical centers, outpatient clinics, private physicians’ offices, university medical and nursing schools, medical training facilities, pharmacies, and nursing homes.

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Information on state statute citations, and copies of the “Current State Statutes” section of the Model Legislation and Policy Guide: Healthcare Rights of Conscience, published annually by Americans for Life, can be obtained by request to legislation@aul.org.

9See “Health Care Rights of Conscience Act: Americans United for Life Model Bill” (November 2003), Section 3(b). The entire model bill drafted by Americans United for Life can be reviewed in the appendix to this article.

10Ibid., section 3(c).
NIKAS • •LAW AND PUBLIC POLICY TO PROTECT RIGHTS OF CONSCIENCE

State Conscience Rights Protection
(September 2003)

Federal law protects the civil rights of health-care providers who conscientiously object to abortion and sterilization for individuals or institutions that receive federal funds (42 U.S.C. § 300a-7).

Only one state protects the civil rights of all health-care providers, whether individuals, institutions, or payers—public or private—who conscientiously object to participating in any health-care service: IL.

Forty-five states protect the civil rights of only certain health-care professionals and/or institutions from participating in specific procedures—usually abortion only: AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NE, NV, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WI, WV, and WY.

Four states provide no statutory protection for health-care rights of conscience: AL, MS, NH, and VT.

Figure 1. Americans United for Life, Model Legislation and Policy Guide.
Any health-care institution, public or private, no matter what its business arrangement (corporations, partnerships, associations, nonprofits, sole proprietorships, agencies, networks, and joint ventures) should also be protected from coercion and discrimination. As institutions, they reflect the conscience of their guiding boards or faith traditions.

What Practices Should Trigger Conscience Protection?

To effectively protect the right of health-care providers to practice in accord with their conscience, a right-of-conscience law must broadly encompass the types of morally objectionable health-care services that may serve as the basis for a claim of conscientious objection. While a law that expressly sets forth a discrete list of objectionable practices and drugs may appear to satisfy this need for a broad definition, such an approach is not ideal. No matter how detailed the list of problematic procedures, the dynamic nature of the modern scientific project and the ever-increasing and diverse challenges to human dignity ensure that such a law would eventually, if not immediately, be incomplete if not badly out-of-date. That is, the list of particular procedures would fail to cover the universe of morally objectionable procedures, either because of oversight by the legislative drafters (who, after all, will not necessarily be scientific experts aware of the cutting edge of all new technologies in all fields) or because novel developments simply were not (and often could not be) foreseen. The result will be a failure to protect a health-care provider’s conscience in the uncovered situation.

Rather than list specific objectionable practices, a comprehensive law should define the phases of health care broadly and then allow a health-care provider to opt out of any or all of the phases of any procedure that violate his or her conscience. This allows the health-care provider to determine whether any particular practice, procedure, service, or drug, whether established or novel, offends his or her conscience. What if health-care institutions, especially religiously affiliated institutions, have as much a right and duty to practice medicine consistent with the demands of conscience as any individual. Indeed, arguably the need for faith-based health-care institutions to claim conscience protection is greater than an individual’s, since the possibility of causing scandal is significantly greater for a large institution well known for being religiously affiliated. For example, if a Catholic hospital provided abortions and participated in destructive human embryo research, it would be very likely to cause public confusion about Church teaching that might lead many into grave moral error.

Some may object that this approach allows some health-care providers the right to refuse to provide health-care services to elderly, dying, or medically dependent patients under a futile care theory. They might also request that an exception to a rights of conscience statute be drafted that, in effect, compels provision of service in such cases. The author assumes that futile care theory is morally wrong; however, forcing a health-care provider to violate his conscience, even one that is defective, undermines the very principle of freedom of conscience. Recognizing a right to refuse to provide certain services, of course, is not the same thing as recognizing the rightness of the position being asserted, as nearly any right may be misused. Safeguarding conscience is not an invitation to relativism, but simply an acknowledgment that forcing one to violate their most core beliefs is a violation of one’s basic human dignity, which itself is based on objective truth about the human person. The

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An example of such statutory language follows: “Health-care service” means any phase of patient medical care, treatment, or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction; prescribing, dispensing, or administering any device, drug, or medication; surgery; or any other care or treatment rendered by health-care providers or health-care institutions.13

Critical Elements of the Right of Conscience

In addition to defining who may assert a right of conscientious objection and what practices, procedures, services, and drugs may be objected to, an effective conscience law must contain three critical requirements: 1) an express right not to participate in objectionable medical services and procedures; 2) a grant of immunity from liability for declining to participate; and 3) a prohibition that prevents discrimination against those asserting a right of conscientious objection by a broad array of individuals, institutions, and licensing and certifying boards.

1) Express right not to participate. To be complete, legislation should expressly provide for a right “not to participate” and make clear that “no health-care provider shall be required to participate” in any health-care service that “violates his or her conscience.”14

1) Immunity from liability. Immunity from liability for exercising the right not to participate should include full immunity from all civil, criminal, or administrative sanctions and liability.

2) Prohibition of discrimination. Finally, to fully effectuate the right to conscientiously object, a law must expressly make it unlawful for any public or private person, institution, or licensing or certifying board “to discriminate” against any health-care provider “in any manner” based on a provider’s “declining to participate” in a health-care service that “violates his or her conscience.”15

Theological and philosophical issue is whether even "error" has rights. Or to put it differently, while error may have no rights, do people who are in error have rights? Thus, futile care theory can be objectively wrong, but compelling a violation of sincerely held conscience may also be wrong. Notwithstanding these concerns, however, the author is willing to further explore this issue to determine whether a provision can be drafted that honors the right of conscience while also protecting the needs of the elderly, dying, or disabled.

13See appendix, section 3(a).

14Conscience should be defined in the law to include the “religious, moral, or ethical principles” held by a health-care provider, health-care institution, or health-care payer. A complete law will also indicate that for purposes of a health-care institution’s or payer’s conscience, reference should be made to the institution’s or payer’s “existing or proposed religious, moral, or ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other relevant documents.” See, for example, appendix, section 3(h).

15The term “discrimination” should be defined as broadly as possible and should include at least the following: “termination, transfer, refusal of staff privileges, refusal of board certification, adverse administration action, demotion, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to award any grant, contract, or
Civil Remedies for Violations of the Right of Conscience

Finally, an effective law must include express provisions authorizing a health-care provider who has suffered discrimination to file a lawsuit for both civil damages and injunctive relief. Statutory damages should be awarded to any successful aggrieved party in an amount sufficient to deter discriminatory conduct, as should an award of all attorneys' fees incurred by the plaintiff health-care provider.

The law should also make clear that any damages or fees awarded are cumulative and not exclusive of other remedies afforded under any other relevant state or federal law. Any injunctive relief sought should also allow for an order reinstating a health-care provider to his or her prior job if the circumstances so warrant. The entire thrust of the remedies section of the law should be to reinforce the public policy that the right of conscience is to be protected as completely as possible and is to be treated with the highest degree of respect possible.\textsuperscript{16}

In the Image of God

Pope John Paul II proclaimed, in the seventeenth year of his pontificate, a Gospel of Life, and the right of conscience cuts to the very heart of this proclamation. Human beings, generally, and health-care providers, specifically, are not mere instruments or mindless automatons to be used to fulfill another's desire for untrammeled freedom to violate human dignity. No matter if they work in private or public hospitals, or attend a private or public educational institution to prepare them for a vocation in health care, they are "free and responsible persons" with a right to live out their personal convictions of conscience both in private life and in their public healing vocation.\textsuperscript{17}

To force a human being bearing God's image to violate his or her conscience is to dishonor his or her Creator and to dishonor the healing professions. Moreover, it is to destroy the very essence of what makes health-care providers capable of freely giving of themselves for the good of the patient. It is, as C.S. Lewis observed in another context, to "remove the organ and demand the function; ... [to] castrate and bid the geldings be fruitful."\textsuperscript{18} Only by respecting and protecting the personal or institutional conscience can the healing balm of care be nourished in the human heart and offered as a gift for the good of others.\textsuperscript{19}

\textsuperscript{16}See appendix, section 7.
\textsuperscript{17}Pope John Paul II, \textit{Evangelium vitae}, n. 3.
Section 1. Title

This Act may be known and cited as the “Health Care Rights of Conscience Act.”

Section 2. Legislative Findings and Purposes

(a) It is the public policy of [insert State] to respect and protect the fundamental right of conscience of all individuals who provide health-care services.

(b) Without comprehensive protection, health-care rights of conscience may be violated in various ways, such as harassment, demotion, salary reduction, transfer, termination, loss of staffing privileges, denial of aid or benefits, and refusal to license or refusal to certify.

(c) It is the purpose of this Act to protect as a basic civil right the right of all health-care providers, institutions, and payers to decline to counsel, advise, pay for, provide, perform, assist, or participate in providing or performing health-care services that violate their consciences. Such health-care services may include, but are not limited to, abortion, artificial birth control, artificial insemination, assisted reproduction, human cloning, euthanasia, human embryonic stem cell research, fetal experimentation, physician-assisted suicide, and sterilization.

(d) Accordingly, it is the purpose of this Act to prohibit all forms of discrimination, disqualification, coercion, disability, or liability upon such health-care providers, institutions, and payers that decline to perform any health-care service that violates their conscience.

Section 3. Definitions

(a) “Health-care service” means any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction; prescribing, dispensing, or administering any device, drug, or medication; surgery; or any other care or treatment rendered by health-care providers or health-care institutions.

(b) “Health-care provider” means any individual who may be asked to participate in any way in a health-care service, including, but not limited to, a physician, physician’s assistant, nurse, nurses’ aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher; medical or nursing school faculty, student, or employee; counselor, social worker, or any professional or paraprofessional; or any other person who furnishes, or assists in the furnishing of, health-care services.

(c) “Health-care institution” means any public or private organization, corporation, partnership, sole proprietorship, association, agency, network, joint
venture, or other entity that is involved in providing health-care services, including but not limited to, hospitals, clinics, medical centers, ambulatory surgical centers, private physicians’ offices, pharmacies, nursing homes, university medical schools and nursing schools, medical training facilities, or other institutions or locations wherein health-care services are provided to any person.

(d) “Health-care payer” means any entity or employer that contracts for, pays for, or arranges for the payment of, in whole or in part, any health-care service or product, including, but not limited to, health maintenance organizations, health plans, insurance companies, or management services organizations.

(e) “Employer” means any individual or entity that pays for or provides health benefits or health insurance coverage as a benefit to its employees, whether through a third party, a health maintenance organization, a program of self-insurance, or some other means.

(f) “Participate” in a health-care service means to counsel, advise, provide, perform, assist in, refer for, admit for purposes of providing, or participate in providing any health-care service or any form of such service.

(g) “Pay” or “payment” means provide compensation for, contract for, or otherwise arrange for the making of due return for goods or services, in whole or in part.

(h) “Conscience” means the religious, moral, or ethical principles held by a health-care provider, the health-care institution, or health-care payer. For purposes of this Act, a health-care institution or health-care payer’s conscience shall be determined by reference to its existing or proposed religious, moral, or ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other relevant documents.

Section 4. Rights of Conscience of Health-Care Providers

(a) Rights of Conscience. A health-care provider has the right not to participate, and no health-care provider shall be required to participate, in a health-care service that violates his or her conscience.

(b) Immunity from Liability. No health-care provider shall be civilly, criminally, or administratively liable for declining to participate in a health-care service that violates his or her conscience.

(c) Discrimination. It shall be unlawful for any person, health-care provider, health-care institution, public or private institution, public official, or any board which certifies competency in medical specialties to discriminate against any health-care provider in any manner based on his or her declining to participate in a health-care service that violates his or her conscience. For purposes of this Act, discrimination includes, but is not limited to, termination, transfer, refusal of staff privileges, refusal of board certification, adverse administrative action, demotion, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to award any
grant, contract, or other program, refusal to provide residency training opportunities, or any other penalty, or disciplinary or retaliatory action.

Section 5. Rights of Conscience of Health-Care Institutions

(a) Rights of Conscience. A health-care institution has the right not to participate, and no health-care institution shall be required to participate, in a health-care service that violates its conscience.

(b) Immunity from Liability. A health-care institution that declines to provide or participate in a health-care service that violates its conscience shall not be civilly, criminally, or administratively liable if the institution provides a consent form to be signed by a patient before admission to the institution stating that it reserves the right to decline to provide or participate in health-care services that violate its conscience.

(c) Discrimination. It shall be unlawful for any person, public or private institution, or public official to discriminate against any health-care institution, or any person, association, corporation, or other entity attempting to establish a new health-care institution or operating an existing health-care institution, in any manner, including, but not limited to, any denial, deprivation, or disqualification with respect to licensure; any aid, assistance, benefit, or privilege, including staff privileges; or any authorization, including authorization to create, expand, improve, acquire, or affiliate or merge with any health-care institution, because such health-care institution, or person, association, or corporation planning, proposing, or operating a health-care institution, declines to participate in a health-care service which violates the health-care institution’s conscience.

(d) Denial of Aid or Benefit. It shall be unlawful for any public official, agency, institution, or entity to deny any form of aid, assistance, grants, or benefits, or in any other manner to coerce, disqualify, or discriminate against any person, association, corporation, or other entity attempting to establish a new health-care institution or operating an existing health-care institution because the existing or proposed health-care institution declines to participate in a health-care service contrary to the health-care institution’s conscience.

Section 6. Rights of Conscience of Health-Care Payers

(a) Rights of Conscience. A health-care payer has the right to decline to pay, and no health-care payer shall be required to pay for or arrange for the payment of any health-care service or product that violates its conscience.

(b) Immunity from Liability. No health-care payer and no person, association, corporation, or other entity that owns, operates, supervises, or manages a health-care payer shall be civilly or criminally liable by reason of the health-care payer’s declining to pay for or arrange for the payment of any health-care service that violates its conscience.

(c) Discrimination. It shall be unlawful for any person, public or private institution, or public official to discriminate against any health-care payer or any person, association, corporation, or other entity (i) attempting to es-
establish a new health-care payer or (ii) operating an existing health-care payer, in any manner, including but not limited to, any denial, deprivation, or disqualification with respect to licensure, aid, assistance, benefit, privilege, or authorization, including, but not limited to, any authorization to create, expand, improve, acquire, or affiliate or merge with any health-care payer, because a health-care payer or a person, association, corporation, or other entity planning, proposing, or operating a health-care payer declines to pay for or arrange for the payment of any health-care service that violates its conscience.

(d) Denial of Aid or Benefits. It shall be unlawful for any public official, agency, institution, or entity to deny any form of aid, assistance, grants, or benefits, or in any other manner to coerce, disqualify, or discriminate against any health-care payer or any person, association, corporation, or other entity attempting to establish a new health-care payer or operating an existing health-care payer because the existing or proposed health-care payer declines to pay for, or arrange for the payment of, any health-care service that is contrary to its conscience.

Section 7. Civil Remedies

(a) A civil action for damages or injunctive relief, or both, may be brought for the violation of any provision of this Act. It shall not be a defense to any claim arising out of the violation of this Act that such violation was necessary to prevent additional burden or expense on any other health-care provider, health-care institution, individual, or patient.

(b) Damage Remedies. Any individual, association, corporation, entity, or health-care institution injured by any public or private individual, association, agency, entity, or corporation by reason of any conduct prohibited by this Act may commence a civil action. Upon finding a violation of this Act, the aggrieved party shall be entitled to recover threefold the actual damages, including pain and suffering, sustained by such individual, association, corporation, entity, or health-care institution, the costs of the action, and reasonable attorney’s fees; but in no case shall recovery be less than $5,000 for each violation in addition to costs of the action and reasonable attorney’s fees. These damage remedies shall be cumulative, and not exclusive of other remedies afforded under any other state or federal law.

(c) Injunctive Remedies. The court in such civil action may award injunctive relief, including, but not limited to, ordering reinstatement of a health-care provider to his or her prior job position.

Section 8. Severability

The provisions of the Act are declared to be severable, and if any provision, word, phrase, or clause of the Act or the application thereof to any person shall be held invalid, such invalidity shall not affect the validity of the remaining portions of this Act.

Section 9. Effective Date

This Act takes effect within [insert number of days] days of its enactment.