

Spring 2014

Doctoring Discrimination in the Same-Sex Marriage Debates

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Sepper, Elizabeth (2014) "Doctoring Discrimination in the Same-Sex Marriage Debates," *Indiana Law Journal*: Vol. 89: Iss. 2, Article 5.
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Doctoring Discrimination in the Same-Sex Marriage Debates

ELIZABETH SEPPER*

As the legalization of same-sex marriage spreads across the states, some religious believers refuse to serve same-sex married couples. In the academy, a group of law and religion scholars frames these refusals as “conscientious objection” to the act of marriage. They propose “marriage conscience protection” that would allow public employees and private individuals or businesses to refuse to “facilitate” same-sex marriages. They rely on the theoretical premise that commercial actors’ objections to marriage are equivalent to doctors’ objections to controversial medical procedures. They model their proposal on medical conscience legislation, which allows doctors to refuse to perform abortions. Such legislation, they say, would dispel conflicts over same-sex marriage and lead to acceptance of gay couples’ relationships.

This Article argues that same-sex marriage objections lack the distinct and compelling features of conscientious objection recognized by law. It offers the first systemic critique of medicine as a construct for the same-sex marriage debates. It demonstrates that legislative protection of conscientious objection traditionally has been limited to life-and-death acts for which the objector has direct responsibility and further justified in medicine by ethical commitments particular to the profession—bases that are absent from the marriage context. By identifying the theoretical foundation of conscientious objection protections, this Article provides the groundwork for distinguishing between conscience claims that can be justified and those that cannot, in medicine and beyond.

This Article further contends that the experience of medical conscience legislation represents a cautionary tale, rather than the success story that marriage conscience proponents claim. Conscience protection in the medical model could actually increase conflict and entrench opposition. Ultimately, these critiques undermine the theoretical and practical foundations of “marriage conscience protection.” They suggest that antidiscrimination law, where we have traditionally balanced religion and equality, constitutes a more useful lens through which to view religious accommodation.

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* Associate Professor, Washington University School of Law. Recipient of the Southeastern Association of Law Schools 2014 best paper award. I am grateful to Kerry Abrams, Erez Aloni, Carlos Ball, Mary Anne Case, Caroline Corbin, Adrienne Davis, Deborah Dinner, Rebecca Dresser, Katie Eyer, Leslie Griffin, John Inazu, Jeremy Kessler, Adam Kolber, Douglas NeJaime, Jana Singer, and Robin Fretwell Wilson for their helpful comments. Thank you to participants in the University of Illinois College of Law Faculty Workshop, Washington University School of Law Faculty Workshop, the American Society of Law, Medicine, and Ethics Annual Conference, Emerging Family Law Scholars, and Law and Society Association Meeting. I thank Alisha Johnson, Paul Trim, and Brian Yagi for their outstanding research assistance and the staff of the *Indiana Law Journal*, especially Micah Bennett and Aaron Pettis, for their excellent editorial work.

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INTRODUCTION

“I will not injure or kill another human being,” Elliott Welsh told the draft board.¹ His objection to participating in war did not come from a “still, small voice of conscience” but rather was “so loud and insistent” that he preferred imprisonment to the Armed Forces.²

“I must be obedient to the word of God. From his own mouth he said ‘Thou shalt not kill,’” labor and delivery nurse Yvonne Shelton stated.³ She could not “participate in a procedure that would end a life” and thus refused to assist in abortions.⁴

Photographing a lesbian couple’s commitment ceremony “would disobey God and the teachings of the Bible,” the owners of Elane Photography contended.⁵ Their religious beliefs meant they could not photograph the couple’s ceremony. As a result of their refusal, they faced and lost an antidiscrimination suit.⁶

A group of law and religion scholars, including Douglas Laycock, Robin Fretwell Wilson, Thomas Berg, Carl Esbeck, and Richard Garnett, frame each of these cases as “conscientious objection.”⁷ As states enact marriage equality, these

1. *Welsh v. United States*, 398 U.S. 333, 343 (1970) (plurality opinion) (internal quotation marks omitted).

2. *Id.* at 337 (internal quotation marks omitted).

3. *Shelton v. Univ. Med. & Dentistry of N.J.*, 223 F.3d 220, 223 (3d Cir. 2000).

4. *Id.* at 223 n.2 (internal quotation marks omitted).

5. *Elane Photography, LLC v. Willock*, 284 P.3d 428, 432 (N.M. Ct. App. 2012), *aff’d*, 309 P.3d 53 (N.M. 2013).

6. *See id.* at 433.

7. *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have*

scholars, occasionally joined by others, come together to advocate for their proposed “marriage conscience protection” (MCP) statute that would allow businesses and individuals engaged in commerce to refuse to facilitate same-sex marriages.⁸ Under the proposal, religiously affiliated organizations—hospitals,

in Common, 5 NW. J.L. & SOC. POL’Y 206 (2010); Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL’Y 260 (2010); Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 103 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Douglas Laycock, *Afterword*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra*, at 189, 194–95; Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939 (2007); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL’Y 307 (2010); Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra*, at 77; Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179 (2009).

8. The only clear point of disagreement between these scholars is their support for, opposition to, or agnosticism toward same-sex marriage. Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo. & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., to Christopher G. Donovan, Conn. Speaker of the House (Apr. 20, 2009) [hereinafter Berg et al. Conn. Ltr.], *available at* <http://mirrorofjustice.blogs.com/files/letter-to-rep.-donovan-re-bill-899-04-20-09.pdf>; Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo. & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., to John Baldacci, Governor of Me. (May 1, 2009), *available at* <http://mirrorofjustice.blogs.com/files/sp-384-me-letter-to-governor.pdf>; Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo. & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., to John Lynch, Governor of N.H. (May 1, 2009) [hereinafter Berg et al. N.H. Ltr.], *available at* <http://mirrorofjustice.blogs.com/files/letter-to-gov1.-lynch-re-h.b.-436-1.pdf>; Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., to John Baldacci, Governor of Me. (Apr. 30, 2009), *available at* <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>; Letter from Douglas Laycock, Robert E. Scott Distinguished Professor of Law & Professor of Religious Studies, Univ. of V.A., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ. & Marc D. Stern to Lisa Brown, Senate Majority Leader, Wash. State Senate (Jan. 28, 2012), *available at* <http://mirrorofjustice.blogs.com/files/washington2012-me-too-brown.pdf>; Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., to Christopher G. Donovan, Conn. Speaker of the House (Apr. 21, 2009) [hereinafter Laycock Conn. Ltr.], *available at* <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/04/samesex-marriage-and-religious-liberty-issues-in-connecticut.html>; Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., Andrew Koppelman, John Paul Stevens Professor of Law, Northwestern Univ., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ. & Marc D. Stern, Acting Co-Exec. Dir., Am. Jewish Cong., to Iowa lawmakers (July 15, 2009), *available at* <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>; Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., Andrew

insurance companies, social service providers, and the like—could exclude gay

Koppelman, John Paul Stevens Professor of Law, Northwestern Univ., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ. & Marc D. Stern, Acting Co-Exec. Dir., Am. Jewish Cong., to John Lynch, Governor of N.H. (May 22, 2009), *available at* <http://mirrorofjustice.blogs.com/files/newhampshireexemptionslynch2.pdf>; Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., Andrew Koppelman, John Paul Stevens Professor of Law, Northwestern Univ., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ. & Marc D. Stern, Acting Co-Exec. Dir., Am. Jewish Cong., to David A. Paterson, Governor of N.Y. (May 8, 2009), *available at* <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, James Oberstar Professor of Law & Pub. Pol’y, Univ. of St. Thomas Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law to Brian E. Frosh, Chairman, Md. State Sen. (Jan. 30, 2012) [hereinafter Wilson et al. Md. Ltr.], *available at* <http://mirrorofjustice.blogs.com/files/maryland-letter-1.pdf>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern, Acting Co-Exec. Dir./Gen. Counsel, Am. Jewish Cong. & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, to Iowa lawmakers (July 9, 2009), *available at* <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern, Acting Co-Exec. Dir./Gen. Counsel, Am. Jewish Cong., & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, to Jamie Pedersen, Representative, Wash. State Legislature (Jan. 11, 2012), *available at* <http://mirrorofjustice.blogs.com/files/washington-followup-house-members-6239-es2.7.2012-1.pdf>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern, Acting Co-Exec. Dir./Gen. Counsel, Am. Jewish Cong. & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law to Paul A. Sarlo, N.J. Senate Judiciary Comm. Chairman (Dec. 4, 2009), *available at* <http://mirrorofjustice.blogs.com/files/12-4-2009-nj-sarlo-ssm-letter-1.pdf>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern, Acting Co-Exec. Dir./Gen. Counsel, Am. Jewish Cong. & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, to Sheldon Silver, N.Y. Assemblyman (May 8, 2009), *available at* <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/05/scholars-letter-re-ssm-and-religious-liberty.html>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, James Oberstar Professor of Law & Pub. Policy, Univ. of St. Thomas Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, to Dean G. Skelos, Senator of N.Y. (May 17, 2011) [hereinafter Wilson et al. N.Y. Ltr.], *available at* <http://www.nysun.com/files/lawprofessorsletter.pdf>.

couples from employee spousal benefits, deny them visitation privileges, and refuse to treat their marriages as valid throughout their married lives.⁹ Small retailers, rental agencies, and professionals could assert religious objections to selling goods or services to same-sex married (or marrying) couples.¹⁰ A dress shop could prevent a lesbian from saying yes to her wedding dress. A landlord could deny a same-sex married couple a home. Lawyers could refuse to prepare prenuptial

9. The proposed statutory text reads:

(a) Religious organizations protected.

... [N]o religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

(1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or

(2) solemnize any marriage; or

(3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

Wilson et al. Md. Ltr., *supra* note 8, at 3.

10. The proposed text reads:

(b) Individuals and small businesses protected.

(1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to

(A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or

(B) provide benefits to any spouse of an employee; or

(C) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

(2) Paragraph (b)(1) shall not apply if

(A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or

(B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; provided that no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person

(A) that provides services which are primarily performed by an owner of the business; or

(B) that has five or fewer employees; or (C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

Id. at 3–4 (emphasis omitted).

agreements. With MCP, gay couples could face discrimination from “I do” until death do them part.

These scholars claim “marriage conscience protection” does not break new ground, but rather is part of a long tradition of legal recognition of conscientious objection to military service, execution, and abortion.¹¹ In particular, they rely on the premise that commercial actors’ objections to same-sex marriage are equivalent to doctors’ refusals to perform controversial procedures—abortion in particular.¹² By linking abortion and same-sex marriage, MCP proponents seek to include same-sex marriage legislation within the traditional (and circumscribed) areas where law explicitly protects conscientious objection (such as serving as a soldier, participating in the death penalty, and providing controversial medical interventions).

This Article argues that same-sex marriage objections lack the distinct and compelling features of conscientious objection recognized by law. It offers the first systemic critique of the theoretical premise for extending the conscientious objector model to the same-sex marriage debates. It demonstrates that legislative protection of conscientious objection traditionally has been limited to life-and-death acts over which the objector has direct responsibility and further justified in medicine by ethical commitments particular to the profession—bases that are absent from the marriage context. The Article further contends that, even if marriage and medical conscientious objections shared a theoretical foundation, medical conscience legislation proves a poor model for protecting conscience. Legislation in its image would be unlikely to create an enduring solution to the conflict between religious objection and gay rights.

Part I describes religious objections to same-sex marriage and the scholarly debate over legislative accommodation of these objections. It shows that our legal system traditionally balances religion and equality within the antidiscrimination framework.¹³ MCP would instead treat refusal as “conscientious objection” to the act of marriage that lies beyond the scope of antidiscrimination law. Part II

11. *Id.* at 6 (citing as precedent federal laws permitting conscientious objectors to military service and “accommodating health care professionals who conscientiously object to participating in medical procedures such as abortion or sterilization”).

12. *Id.* (linking proposal to “other laws protecting the right of conscientious objection, especially in the health care context”).

13. See generally Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (2012); Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 7, at 123; Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL’Y 236 (2010); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274 (2010); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169 (2012); Mark Strasser, *On Same-Sex Marriage and Matters of Conscience*, 17 WM. & MARY J. WOMEN & L. 1 (2010); Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205 (reviewing SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 7).

establishes the MCP proposal is explicitly modeled on legislative protection of physicians' refusals to perform abortions.

Part III argues that same-sex marriage objections, as well as some recent claims in medicine, lack the distinct and compelling features of conscientious objection recognized by law. Drawing on legal and bioethical discussions, it identifies five principles justifying legal recognition of conscientious objection. The first three— involvement in the taking of life and the objector's necessity and proximity to the alleged bad act—support conscientious objection across the contexts of war, execution, and abortion. The second two—the centrality of moral reasoning to medicine and the grounding of objections in professional ethics—bolster physicians' specific claim to act on conscience. The identification of these principles constitutes a significant contribution to discussions of conscientious objection in marriage, medicine, and beyond, allowing us to distinguish those protections that are justified from those that are not. It becomes clear that objections to providing goods and services to same-sex couples do not reflect these settled bases.

Part IV contends that even if there were significant similarities between abortion and same-sex marriage objection, medical conscience legislation is a poor model, failing to safeguard conscience consistently and effectively.¹⁴ Protecting corporate "conscience" inevitably undermines individual conscience. When a business forbids serving same-sex couples, individual employees who believe all should be treated equally will be forced to violate their consciences or lose their employment.

Part V argues that the experience of medical conscience clauses nonetheless offers lessons for legislatures considering religious exemptions. Instead of providing a "live-and-let-live solution" as its advocates predict,¹⁵ the medical model seems likely to entrench opposition to gay equality and impose heavy burdens on same-sex couples.

As an increasing number of states move to legalize same-sex marriage,¹⁶ we can expect more claims of religious objection and calls for legislatures to enact marriage conscience protection. Engaging with MCP is particularly pressing because its proponents have been at the vanguard of public discourse and scholarly debate. While no state legislature has enacted their proposal in full, several have adopted narrower versions.¹⁷ Others have debated adopting MCP.¹⁸ With new challenges to state marriage bans based on the Supreme Court's decision in *United States v. Windsor*,¹⁹ the question of religious objections will only become more salient.²⁰ Ultimately, the

14. See generally Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA L. REV. 1501 (2012).

15. Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life After Prop 8*, 14 NEXUS 101, 109 (2009).

16. Adam Wollner, *The Map of Gay Marriage: Hawaii Becomes Latest to Legalize*, NPR.ORG (Nov. 13, 2013, 5:52 PM), <http://www.npr.org/blogs/itsallpolitics/2013/11/13/245001905/the-map-of-gay-marriage-hawaii-becomes-latest-to-legalize> (reporting that 2013 was "a landmark year for the gay-rights movement" with same-sex marriage legalized in Illinois, Hawaii, Delaware, Minnesota, Rhode Island, California, and New Jersey).

17. See *infra* notes 117–21 and accompanying text.

18. See *infra* notes 114–16 and accompanying text.

19. 133 S. Ct. 2675 (2013).

20. See, e.g., Complaint for Declaratory & Injunctive Relief at 1, *Jernigan v. Crane*, No.4:13-cv-00410-JLH (E.D. Ark. July 15, 2013) (challenging "the constitutionality of Arkansas's laws excluding same-gender couples from marriage and forbidding recognition

theoretical and practical critiques advanced here lend support to the argument that antidiscrimination, not conscientious objection, is the appropriate lens through which to consider any religious accommodation.

I. SAME-SEX MARRIAGE AND THE TURN TOWARD CONSCIENCE

Throughout its history, the gay rights movement has faced claims that recognizing LGBT equality would impose burdens on the religious liberty of those who object to gay sex or coupling.²¹ As today's most prominent gay rights issue, same-sex marriage has been no different.

This Part sets forth the debates over religious objection and same-sex marriage. Section A describes the expansion of marriage equality and the attendant objections from religious believers. Section B identifies a split over the appropriate legal framework for any potential accommodation of religious objectors.

A. Religious Objection to Marriage Equality

States are increasingly expanding—rather than limiting—marriage equality. Thus far, lawmakers have enacted same-sex marriage in Illinois, Hawaii, Minnesota, Delaware, Rhode Island, Maryland, Washington, New York, New Hampshire, Vermont, and the District of Columbia.²² New Jersey and California legislators also passed marriage equality acts, which were then vetoed.²³ Maine voters recently approved same-sex marriage, after initially rejecting legalization efforts by the legislature.²⁴ That is not to suggest that state engagement has been uniformly favorable

of legitimate same-gender marriages entered into in other states"); Ivey DeJesus, *Gay, Lesbian Couples File Lawsuit Challenging Pennsylvania Marriage Law*, PENN LIVE (July 9, 2013, 10:00 PM), http://www.pennlive.com/midstate/index.ssf/2013/07/same-sex_marriage_gay_marriage.html; Frank Green, *Class-Action Suit Challenges Va.'s Same-Sex Marriage Ban*, RICHMOND TIMES-DISPATCH (Aug. 1, 2013, 4:11 PM), http://www.timesdispatch.com/news/state-regional/ap/another-federal-suit-challenges-va-gay-marriage-ban/article_b8b797ea-fa88-11e2-a17c-001a4bcf6878.html; Jessie Halladay, *Couple Challenges Kentucky Law Against Gay Marriage*, USA Today (July 26, 2013, 5:26 PM), <http://www.usatoday.com/story/news/nation/2013/07/26/same-sex-marriage-kentucky/2589379>; see also Matthew Brown, *Overstock Executive Launches Campaign to Amend Utah Constitution over Religious Liberty*, DESERET NEWS (Sept. 20, 2013 1:10 PM), <http://www.deseretnews.com/article/865584444/Overstock-executive-launches-campaign-to-amend-Utah-Constitution-over-religious-liberty.html> (reporting on a new multistate campaign to exempt religious organizations, and potentially secular businesses from recognizing same-sex marriages).

21. See generally THOMAS M. MESSNER, HERITAGE FOUND., SAME SEX MARRIAGE AND THE THREAT TO RELIGIOUS LIBERTY, NO. 2201 (2008), available at <http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty>; Laycock, *supra* note 7.

22. See *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES (July 26, 2013), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

23. See, e.g., Assemb. 1, 215th Leg., 1st Ann. Sess. (N.J. 2012); Assemb. B. 19, Assemb., 2005–2006 Reg. Sess. (Cal. 2004).

24. ME. REV. STAT. ANN. tit. 19-A § 650-A (2012).

to gay rights; although sixteen states and the District of Columbia currently allow same-sex marriage,²⁵ twenty-nine states have constitutional bars against it.²⁶

Nonetheless, a remarkable change in public opinion suggests access to same-sex marriage will continue to expand. In 2011, for the first time a majority of Americans said that same-sex marriage should be legalized.²⁷ The shift has occurring rapidly, with support rising from 37% to 58% over the last decade.²⁸

Faced with potential reform, some religious adherents object that marriage equality represents a threat to their religious liberty, forcing them to participate in same-sex marriage. They describe objections that fall into three categories. The first category relates to performing or licensing marriages. With legalization of same-sex marriage, couples will require marriage licenses and officiating from public officials.²⁹ Some, like the clerks in New York and Massachusetts who resigned rather than issue marriage licenses to same-sex couples, may raise religious objections.³⁰

The second category of objections concerns goods and services for weddings. Caterers, bakers, florists, and other commercial enterprises involved in wedding ceremonies may seek to withhold their services out of religious opposition to same-sex marriage.³¹ The experience of Elane Photography, a business in New Mexico that was sued for refusing to photograph a lesbian couple's commitment ceremony, figures prominently as an example of such a conflict used by proponents of broad religious exemptions.³² Another frequently cited case is *Bernstein v. Ocean Grove Camp Meeting Ass'n*,³³ in which the Methodist ministry organization that owns the town of Ocean Grove, New Jersey, rejected a lesbian couple's request to reserve a

25. *Gay Marriage in the U.S.: A Look at States Which Allow Same-Sex Couples to Wed*, HUFFINGTON POST, Nov. 20, 2013, http://www.huffingtonpost.com/2013/11/21/gay-marriage-across-the-nation_n_4313018.html.

26. *Defining Marriage*, *supra* note 22 (Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin).

27. See Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP POLITICS (May 8, 2012), <http://www.gallup.com/poll/154529/half-americans-support-legal-gay-marriage.aspx>.

28. Same-Sex Marriage, Gay Rights—ABC News/Wash. Post Poll, Mar. 7–10, 2013, POLLINGREPORT.COM, <http://www.pollingreport.com/civil.htm>.

29. Laycock, *supra* note 7, at 194–95. Despite frequent claims that legalization of same-sex marriage will require clergy or religious organizations to perform marriages in violation of their beliefs, these concerns are unfounded. See *infra* notes 44–45 and accompanying text.

30. See, e.g., Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16 (reporting that twelve justices of the peace resigned in Massachusetts); Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES, Sept. 28, 2011, at A1 (reporting that in New York, two clerks resigned and one appointed a deputy to issue licenses by appointment for gay couples).

31. See, e.g., *Cervelli v. Aloha Bed & Breakfast*, No. 11-1-3103-12 ECN, 2013 WL 1614105 (Haw. Cir. Ct. Apr. 11, 2013) (order granting summary judgment in favor of same-sex couple refused service at a bed and breakfast).

32. See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

33. No. PN34XB-03008 (N.J. Div. on Civ. Rights Dec. 29, 2008).

pavilion on the boardwalk for their civil union. Recently, numerous reports have surfaced of bakeries and dress shops refusing to serve same-sex couples.³⁴

The third category applies to acknowledging a same-sex marriage as valid and treating persons in same-sex marriages equally in employment and the delivery of goods and services. Same-sex married couples will require third parties to recognize their married status for purposes of employee benefits, insurance, hospital visitation, medical decision making, litigation, and more.³⁵ Housing similarly could be implicated, as when Yeshiva University's Albert Einstein College of Medicine faced a discrimination suit for its exclusion of unmarried couples from married student housing, which effectively discriminated against gay students.³⁶

More broadly, supporters of wide-ranging religious exemptions identify a set of commercial actors and social service providers (religiously affiliated and not) that seek to refuse to deal with same-sex couples in areas unrelated to marriage. In one case, *Butler v. Adoption Media, LLC*,³⁷ the country's largest adoption website prohibited a gay couple in a registered domestic partnership from posting a profile as prospective parents, based on a position that "it is in the best interests of infants to be placed for adoption with a married mother and father."³⁸ In a similar vein, Catholic Charities of Boston withdrew from providing adoption services, rather than continue to permit adoption by gays.³⁹ Refusals by professionals, like therapists and doctors, to offer their services to same-sex couples also are employed as examples.⁴⁰ *North Coast Women's Care Medical Group, Inc. v. San Diego*

34. See, e.g., Katie McDonough, *Oregon Baker Denies Lesbian Couple a Wedding Cake*, SALON (Feb. 4, 2013, 11:55 AM EST), http://www.salon.com/2013/02/04/oregon_baker_denies_lesbian_couple_a_wedding_cake/; Katie McDonough, *Yet Another Bakery Refuses to Make Cake for Gay Wedding*, SALON (May 15, 2013, 11:51 AM EDT), http://www.salon.com/2013/05/15/yet_another_bakery_refuses_cake_for_gay_wedding/?utm_source=feedly; Mark Meredith & Will C. Holden, *Cake Shop Says Business Booming Since Refusal to Serve Gay Couple*, FOX 31 DENVER (July 31, 2012, 8:54 AM), <http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple/>; Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner Says: "That's Illegal,"* ABC NEWS (Aug. 19, 2011), <http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333#.UZqtN7Wkrlw>; *Wedding Cake Battle Brews Between Couple, Baker*, KCCI NEWS 8 (Nov. 12, 2011, 9:37 AM CST), <http://www.kcci.com/Wedding-Cake-Battle-Brews-Between-Couple-Baker/-/9357770/7310176/-/fwbjaw/-/index.html>.

35. Laycock, *supra* note 7, at 195.

36. See *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (finding same-sex couple had sufficiently pled that such a policy violated New York City law against sexual orientation discrimination).

37. 486 F. Supp. 2d 1022 (N.D. Cal. 2007).

38. *Id.* at 1057.

39. See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOS. GLOBE, Mar. 11, 2006, at A1.

40. See Stern, *supra* note 7, at 22–24. Several cases involve denial of counseling services due to counselors' religious objections. See, e.g., *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012); *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001).

County Superior Court,⁴¹ involving a medical practice that refused to perform an intrauterine insemination for a lesbian, is often discussed.⁴²

Although many religious objectors continue to oppose marriage equality altogether, when faced with the prospect of its enactment they demand accommodation of their religious beliefs. Otherwise, across these three categories, objecting individuals and businesses could be exposed to antidiscrimination suits, restricted from government funding, or denied tax-exempt status.⁴³

At this point, it may be helpful to set the limits of the discussion of religious accommodation. First, in no instance would legalization of same-sex marriage force clergy to officiate weddings of which their religion disapproves or require houses of worship to open their doors to such weddings.⁴⁴ Given the autonomy of churches in their internal affairs protected by the Free Exercise Clause, no genuine legal dispute exists with regard to churches performing religious marriages.⁴⁵ Churches and clergy, therefore, will not be discussed here, although commercial actors affiliated with religious organizations will be considered. Second, with the issue of religious marriage off the table, it is generally agreed that the First Amendment neither prohibits nor requires exemptions to neutral and generally applicable laws.⁴⁶ The debate, therefore, has turned to whether, and how, to craft legislative exemptions for those with moral or religious objections.⁴⁷ It is in this context that legal scholars have entered the fray.

B. Antidiscrimination Exemptions or Conscientious Objection as the Legal Framework?

The scholarly literature reflects a fundamental disagreement over the legal framework for accommodating religious objection. Broadly speaking, the debate

41. 189 P.3d 959 (Cal. 2008).

42. See Berg, *supra* note 7, at 209.

43. See Severino, *supra* note 7, at 957–58 (predicting “punishment for violating antidiscrimination laws in employment, housing, public accommodations . . . due to an organization following its conscience regarding same-sex marriage”); Berg et al. N.H. Ltr., *supra* note 8, at 3.

44. Stern, *supra* note 7, at 1 (“No one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them.”).

45. Indeed, in legalizing marriage equality, legislators have reaffirmed their recognition of church autonomy in this area. For example, Vermont’s statute stipulates that it “does not require a member of the clergy authorized to solemnize a marriage . . . , and any refusal to do so shall not create any civil claim or cause of action.” VT. STAT. ANN. tit. 18, § 5144(b) (2012).

46. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990); see also *Gillette v. United States*, 401 U.S. 437, 461 (1971) (“Our cases do not at the farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.”).

47. I do not deal here with the application of state and federal Religious Freedom Restoration Acts (RFRAs). The federal RFRA does not apply to states, *City of Boerne v. Flores*, 521 U.S. 507 (1997), and, therefore, like the First Amendment, is not discussed in this context. Note also that later-enacted marriage equality or antidiscrimination legislation may supersede RFRAs.

focuses on antidiscrimination law or conscientious objector protection. With regard to race, gender, and most recently sexual orientation, our society has addressed conflicts between religion and equality through antidiscrimination law. Here too, any accommodation of religious objections would require amendments to laws prohibiting discrimination on the basis of sexual orientation in public accommodations, housing, and employment. A group of law and religion scholars, however, resists this characterization. They instead adopt the position that marriage is an exceptional act, justifying protection of conscientious objection, or so-called marriage conscience protection. They attempt to insert marriage into a tradition of conscientious objection to war, execution, and abortion. Through scholarship and advocacy, they have moved the conscientious objector framework to the forefront of debates over religious liberty and marriage equality.

On the antidiscrimination side, scholars—including William Eskridge, Douglas NeJaime, Chai Feldblum, and Taylor Flynn—argue that accommodation of religious objections to equality norms has long been analyzed under the rubric of antidiscrimination law. As Eskridge says, “There is nothing new about civil equality-religious liberty clashes.”⁴⁸ Historically, as now, religious opposition emerged in response to race, religion, or gender nondiscrimination requirements.⁴⁹ In particular, outcry around interracial marriage followed a pattern much like that of objections to same-sex marriage. Objectors contended that religious beliefs specific to marriage—not biases based on status—were at work.⁵⁰ Moreover, the same arguments now made about marriage, which describe marriage as an act rather than a status and as a question of liberty rather than equality, were repeatedly made against sexual orientation antidiscrimination laws and the decriminalization of homosexual sex.⁵¹

Despite attempts to resurrect a distinction between sexual conduct and sexual orientation status, religious resistance to same-sex marriage threatens the same antidiscrimination norms that religious objections to interracial marriage and sexual orientation discrimination laws did. In those states legalizing marriage equality, sexual orientation antidiscrimination laws already address those acts that are cited

48. William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 660 (2011).

49. See generally *id.* (noting similarities between these arguments and racial discrimination); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007) (identifying similarities between religious objections to gender and sexual orientation antidiscrimination norms).

50. See, e.g., Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2736 (2008) (“[B]oth antimiscegenation statutes and bans against same-sex marriage have been used to construct and reify essentialized and dualistic understandings of race and sex/gender.”); Greg Johnson, *We've Heard This Before: The Legacy of Interracial Marriage Bans and the Implications for Today's Marriage Equality Debates*, 34 VT. L. REV. 277, 279 (2009) (arguing that cases upholding bans on interracial marriage accepted arguments like those against same-sex marriage); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 256 (2002) (arguing that both gay and interracial couples suffered similar sexualization of their marriages).

51. See, e.g., Flynn, *supra* note 13, at 241; Gilreath, *supra* note 13, at 207.

as examples of religious objections to same-sex marriage. As NeJaime argues, “Marriage is merely one form of sexual orientation identity enactment, and religious objections to same-sex marriage are merely a subset of objections to sexual orientation equality.”⁵²

Indeed, purported objections to the act of same-sex marriage involve—almost exclusively—resistance to sexual orientation nondiscrimination obligations.⁵³ For example, the withdrawal of Catholic Charities from adoption services in Massachusetts (and calls to exempt adoption providers) stemmed from the application of sexual orientation antidiscrimination laws, well before same-sex marriage was legalized.⁵⁴ Claimed rights of employers to refuse gays spousal benefits similarly implicate antidiscrimination protections—not marriage per se. Any claimed accommodation of such objections thus comes within the purpose, structure, and message of antidiscrimination law.⁵⁵

Situating the debate within antidiscrimination law does not preclude religious exemptions. Across categories of race, sex, religion, and sexual orientation, antidiscrimination law has proved capable of balancing interests in religious liberty and equality in a nuanced way.

It should come as no surprise then that a number of scholars embrace both the antidiscrimination framework and religious exemptions.⁵⁶ For example, both William Eskridge and Martha Minow urge considering religious exemptions with regard to gender and sexual orientation antidiscrimination laws.⁵⁷ Chai Feldblum advocates for exemptions for enterprises that seek to enroll individuals who want to be inculcated with antigay beliefs (which could include schools and religious camps) and for leadership positions in social services run by religious institutions.⁵⁸ Alan Brownstein argues that the example of religious discrimination offers an appropriate solution. He proposes that where antidiscrimination law permits individuals or, more likely, institutions to discriminate on the basis of religion, so too should it exempt them from involvement with or recognition of same-sex marriage.⁵⁹

52. NeJaime, *supra* note 13, at 1169.

53. See Flynn, *supra* note 13, at 247; see also NeJaime, *supra* note 13, at 1179.

54. See *infra* Part IV.

55. See generally Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731 (2011); Feldblum, *supra* note 13; Flynn, *supra* note 13; Lupu & Tuttle, *supra* note 13, at 291–93; NeJaime, *supra* note 13; Strasser, *supra* note 13; Gilreath, *supra* note 13.

56. See, e.g., Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 131–35 (2006); NeJaime, *supra* note 13, at 1179–80.

57. Eskridge, *supra* note 48, at 715 (endorsing “Martha Minow’s suggestion that the gay-friendly state go out of its way to accommodate religion, so long as religion is willing to meet the state halfway”); Minow, *supra* note 49, at 847 (arguing for compromise from civil rights advocates to provide religious groups with “avenues for accommodation”).

58. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 121–22 (2006).

59. Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 425 (2010).

On the other side of the debate, Laycock, Wilson, Berg, Stern, Garnett, and Esbeck frame the issue in terms of conscientious objection. Some government actors and business people, they say, may “feel that they are being asked to promote or facilitate sin in a way that makes them personally responsible for the sin that ensues.”⁶⁰ Speaking in one voice in advocacy to state legislators, they assert that, “assisting with a marriage ceremony has religious significance that commercial services, like serving burgers and driving taxis, simply do not. [Those who refuse] have no objection generally to providing services, but they object to directly facilitating a marriage.”⁶¹ In this sense, objection to same-sex marriage is driven, not by the status of the couple as gay, but by objectors’ desire not to participate in an act that will threaten their own moral integrity. Same-sex marriage, these scholars say, creates “a cruel choice” for religious objectors: “your conscience or your livelihood.”⁶² At stake, says Laycock, is the “religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime.”⁶³

Based on this understanding, the Laycock-Wilson group urges the adoption of marriage conscience protection (MCP), which treats the refusal to serve same-sex couples as “conscientious objection” to the exceptional act of marriage. These scholars propose allowing refusal from public employees, religiously affiliated organizations, and small secular businesses and individuals engaged in commerce. Under MCP, none of these three categories of actors could be “penalized or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status.”⁶⁴

First, public employees or officials could refuse to provide marriage-related government services.⁶⁵ Their refusal, however, would be contingent on another

60. Laycock, *supra* note 7, at 195.

61. Wilson et al. N.Y. Ltr., *supra* note 8, at 14 (emphasis omitted); *see also* Severino, *supra* note 7, at 958 (arguing that religious organizations can “live with anti-discrimination laws” but not same-sex marriage).

62. Wilson et al. N.Y. Ltr., *supra* note 8, at 13.

63. Laycock Conn. Ltr., *supra* note 8, at 1; *see also* Berg, *supra* note 7, at 207 (“It is likely in the future that religious dissenters, organizations, and individuals, will more frequently face a Hobson’s choice between facilitating same-sex marriages against their conscience and giving up their charitable activities or small businesses.”); Wilson et al. Md. Ltr., *supra* note 8, at 9 (“Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection” to offering goods or facilities to same-sex couples.).

64. Berg et al. Conn. Letter, *supra* note 8, at 7–8.

65. The proposal reads:

[I]n the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer’s sincerely held religious beliefs.

Wilson et al. Md. Ltr., *supra* note 8, at 3–4 (emphasis in original). There is scholarly

employee being available to provide the service “without inconvenience or delay.”⁶⁶ Couples initially could be refused a license by a city clerk, but ultimately would receive one.

Second, religious organizations, including commercial actors connected to a religious organization, could refuse to solemnize a marriage; to “provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage”; and to treat as valid any marriage.⁶⁷ The definition of religious organization sweeps in all commercial activity affiliated with a religious group, including landlords, adoption agencies, insurance companies, hospitals, and employers. With regard to these religiously affiliated businesses, the proposed right to refuse is absolute. Throughout their married life, a couple could be denied adoption, social services, housing, and spousal leave and benefits.

Third, individuals and secular businesses could also refuse goods and services. While previous proposals would have exempted any business that objects,⁶⁸ the current iteration of MCP applies to businesses (1) where the owner primarily performs the services, (2) that employ five or fewer employees, or (3) that own five or fewer units of housing for rent.⁶⁹ Individuals and these small businesses could refuse to provide couples with goods and services for weddings, employee benefits for spouses, housing, and “counseling or other services that directly facilitate the perpetuation of any marriage.”⁷⁰ The term “facilitate” arguably sweeps in businesses and individuals that might be expected to acknowledge a couple’s married status or treat same-sex couples equally to opposite-sex couples at any time in their married lives. Wilson, for example, suggests carve-outs for state-funded adoption placement, spousal leave from employment, and spousal visiting privileges at hospitals as potential areas for exemption.⁷¹ Under MCP, these individuals and businesses may inconvenience and delay same-sex couples, but must yield if a party to the marriage is “unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship.”⁷²

The choice then is between MCP’s conscientious objection framework and religious accommodation within the antidiscrimination framework. It is precisely accommodation in the antidiscrimination framework that MCP proponents resist. It therefore is worth noting some ways in which MCP fundamentally diverges from

disagreement even in the marriage exceptionalism camp regarding this exemption. *See, e.g.,* Laycock, *supra* note 7, at 199 (“Government employees cannot have more than *de minimis* rights to refuse to perform their core job functions for all members of the public, and probably most courts would not even concede a *de minimis* right.”).

66. Wilson et al. Md. Ltr., *supra* note 8, at 3.

67. *Id.*

68. Stern, *supra* note 7, at 308 (admitting that the original proposal “is ambiguous on some points,” which raises questions like “are individuals who do business in corporate form protected (and, if so, what size corporations would be protected)?”).

69. See *supra* note 10 for proposed statutory text.

70. Wilson et al. Md. Ltr., *supra* note 8, at 3.

71. Wilson, *supra* note 7, at 100.

72. Wilson et al. Md. Ltr., *supra* note 8, at 3.

the approach antidiscrimination law has historically taken to balancing equality and religious liberty.⁷³

As an initial matter, the label of conscientious objection focuses on the act of marriage itself, not discrimination based on status or other law breaking.⁷⁴ It cabins the debate to the act of same-sex marriage and seeks to avoid comparisons to race or sex discrimination. In separate scholarly writing and joint advocacy, MCP proponents thus reject the view that objections to marriage are in actuality discrimination against same-sex couples.⁷⁵ They argue that same-sex marriage—in contraposition to antidiscrimination obligations—imposes unique burdens on public and private actors.⁷⁶ On this account, religious opponents of same-sex marriage are conscientious objectors refusing to cede to legal coercion. Marriage becomes an act with great moral peril. By contrast, although antidiscrimination laws vary, they share the view of exemptions as authorizing discrimination. Objectors do not assert views specific to an exceptional act of marriage; rather, they seek to discriminate against couples (or individuals) based on their status.

This initial difference leads to conclusions about the scope of acceptable exemptions. MCP in the model of medical conscientious objection is expansive. Due to its focus on marriage as a *sui generis* act, MCP extends protection across contexts and to individuals and institutions, whether secular, religiously affiliated, or public. Balancing religion and other societal values becomes irrelevant under the MCP analysis. It does not consider intimacy, alternate religious views, or, generally speaking, access to services. Unlike antidiscrimination law, MCP does not weigh the effect of individual objection on institutional interests. Objecting employees would receive a blanket exemption without any consideration of the employer's concerns, as they often do under the medical model from which MCP borrows. Large religiously affiliated commercial actors receive *carte blanche* to discriminate, irrespective of any effects on access to services.

By contrast, exemptions within antidiscrimination legislation—of any kind—have been relatively narrow.⁷⁷ Antidiscrimination law also typically does not countenance exemptions for secular businesses engaged in commerce and open to the public. The rental companies, dress shops, and limo businesses that assert objections are prototypical public accommodations, required to serve customers and treat employees without discrimination.⁷⁸ Businesses serving the public and

73. See NeJaime, *supra* note 13, at 1189–95, for a more comprehensive evaluation of sexual orientation antidiscrimination laws that MCP would affect.

74. See Eskridge, *supra* note 48, at 662 (observing that litigation seeking exemptions from sexual orientation antidiscrimination laws attempted to draw a distinction between discrimination based on conduct and status and that “religion-based discrimination against African-Americans was premised upon the same kind of thinking”).

75. See, e.g., Wilson et al. Md. Ltr., *supra* note 8, at 15 (arguing that objection “arises not from anti-gay animus, but from a sincere religious belief in traditional marriage”).

76. See *supra* note 7 for examples of scholarly writing and note 8 for joint letters.

77. See 42 U.S.C. § 3603(b) (2006) (outlining exemptions within Fair Housing Act).

78. See, e.g., Flynn, *supra* note 13, at 238 (noting “the common law’s determination that in a clash between a seller’s asserted rights or beliefs and her provision of services to a willing buyer, the burden should fall on the seller who has placed herself in the public marketplace”).

affiliated with religious organizations—like hospitals—also have nondiscrimination obligations as public accommodations.⁷⁹ And public institutions must always comply with antidiscrimination obligations.

Antidiscrimination law also balances a multitude of interests in crafting exemptions, including: the private or public character of an entity, the intimacy of relationships, the role of religious institutions, and access to commercial transactions.⁸⁰ It evaluates exemptions differently according to the context (housing or public accommodation, for example) and the institution involved. Take religious individuals. Under antidiscrimination law, clergy (and churches) and public employees are easy cases—the private or public nature is determinative.⁸¹ A public official typically cannot refuse to marry a Jew and a non-Jew, whereas a rabbi could so refuse. Religious individuals also are entitled to accommodation from their employer, provided it does not create an undue hardship for the employer.⁸²

Exemptions in the antidiscrimination model are linked to the identity of the would-be discriminator and its role in society. Thus, the commercial transactions of a business, despite any perceived religious mission, bring it within the rubric of a public accommodation subject to antidiscrimination laws.⁸³ Although some statutes authorize religiously affiliated nonprofits to discriminate in employment in favor of coadherents, they generally do so in a limited way.⁸⁴ And, to the extent exemptions exist for secular businesses, they are not justified by religion but interests in intimacy, family life, or practical burden. For instance, the Fair Housing Act

79. NeJaime, *supra* note 13, at 1192 (compiling statutes); Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1789–90 (2012) (“States that currently have such statutes generally have minimal religious exemptions These include exemptions for actual places of religious worship, the organizations they operate, and certain private organizations.”).

80. *See* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (upholding a state antidiscrimination law applied to a private organization engaged in “public, quasi-commercial conduct”); *Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 16, 61 P.3d 989, 995 (maintaining that Title VII’s small business exception protects the “intimate relationships associated with small employers”); Charles McC. Mathias, Jr. & Marion Morris, *Fair Housing Legislation, Not an Easy Row to Hoe*, 4 CITYSCAPE 21, 25 (1999) (discussing the Fair Housing Act’s “Mrs. Murphy” exemption, which exempts individual homeowners with four or fewer units who do not use a real estate agent from the law).

81. Statutes typically exempt “religious organizations,” defined to include churches, synagogues, mosques, and sometimes schools. NeJaime, *supra* note 13, at 1191–92 & nn.74–83.

82. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986).

83. *See, e.g., Pines v. Tomson*, 206 Cal. Rptr. 866 (Cal. Ct. App. 1984) (holding Christian Yellow Pages publisher had business-like attributes and was a public accommodation, notwithstanding the fact that it operated under aegis of nonprofit religious corporation).

84. *See, e.g., 42 U.S.C. § 2000e-1* (2006) (exempting from “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”); *see also* NeJaime, *supra* note 13, at 1191–94.

excludes rentals in dwellings with four or fewer units when the owner lives in one of the units.⁸⁵ The concern is for the intimacy of inviting strangers into one's dwelling.⁸⁶ Similarly, some employment discrimination statutes—including several prohibiting sexual orientation discrimination⁸⁷—excuse small businesses (from two to fifteen employees) from compliance, in recognition of the cost of litigation and potential effect on family businesses.⁸⁸

Given these differences, the divide over theoretical frameworks has significant practical implications. Whether MCP or antidiscrimination prevails will determine whether we view refusals as conscientious objection or discrimination. It will influence whether a variety of interests are weighed or marriage is treated as an exceptional act. Ultimately, it may determine the survival of a large cross-section of antidiscrimination laws.

II. MEDICINE AS THE MODEL FOR MARRIAGE CONSCIENCE PROTECTION

Protection of conscientious objection has been limited, historically, to serving as a soldier in war, participating in the imposition or execution of the death penalty, and, more recently, providing abortions and other controversial medical treatments.⁸⁹ The status of conscientious objector is most closely linked to individuals opposed to military service.⁹⁰ It implies willingness to bear a heavy burden, rather than contribute to the law's immoral project.

MCP proponents seek to include same-sex marriage within this universe of protection of conscientious objection. They rely on the theoretical premise that commercial actors' objections to same-sex marriage are equivalent to doctors'

85. See 42 U.S.C. § 3607(a) (2006); see also *id.* § 2000a(b)(1) (exempting lodging for transient guests in “an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence”).

86. Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1135–37 (2010) (discussing origins of the “Mrs. Murphy exemption” to the Fair Housing Act and the focus on the intimate, personal nature of living side-by-side with boarders).

87. See JEROME HUNT, CTR. FOR AM. PROGRESS, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES (2012), available at http://www.americanprogress.org/issues/2012/06/pdf/state_nondiscrimination.pdf (listing state sexual orientation antidiscrimination statutes and their numerosity requirements, if any).

88. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 446–47 (2003) (observing intent to spare small firms the high cost of compliance); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1262–64 (2006) (observing importance of protecting personal relations within a small firm).

89. Erica J. Sutton & Ross E.G. Upshur, *Are There Different Spheres of Conscience?*, 16 J. EVALUATION CLINICAL PRAC. 338, 340 (2010) (“Conscientious objection is the phrase that consistently frames the arguments involving health care providers.”).

90. A November 1, 2013, Westlaw search of Supreme Court cases returns forty-four conscientious objection cases, thirty-six of which involve war or execution, two of which involve abortion. A search of courts of appeals decisions also results in almost exclusive reference to military service and the death penalty.

refusals to perform controversial procedures, abortions in particular. The unique structure of medical conscience legislation—which protects medical providers and facilities that refuse to provide particular controversial procedures for religious, moral, or ethical reasons—then becomes the appropriate practical model for marriage. The experience of medical legislation, MCP scholars argue, offers relevant and important lessons for the debate over marriage equality.

Robin Fretwell Wilson, the central proponent of the medical model, says, “It is difficult to ignore the parallels emerging between same-sex marriage and the recently renewed debates about the limits of conscience in healthcare.”⁹¹ Other pro-MCP scholars explicitly or implicitly adopt the medical model in their own writing.⁹² Thomas Berg, for example, says that objection to same-sex marriage “fits comfortably with the widely accepted ‘conscience clauses’ that protect refusal to participate in or directly facilitate an abortion, another specific form of conduct.”⁹³ Proposing a middle path, Ian Bartrum notes that “we might see the same-sex marriage issue as somewhat closer to the controversy over abortion, where we exempt service providers with religious objections.”⁹⁴ Opponents of MCP also have been forced to engage with this premise.⁹⁵

Wilson and other pro-exemption scholars make three links between same-sex marriage and medicine (with a focus on abortion). First and most obviously, like abortion, same-sex marriage is politically fraught and evokes religious and moral convictions. Second, marriages or weddings, like medical procedures, require performance by or involvement of third parties (such as officiants and vendors). Conflicts in this area, Wilson says, “parallel the disputes between private physicians who do not want to perform abortions, and private patients who want

91. Wilson, *supra* note 7, at 77.

92. Laycock, *supra* note 7, at 198 (“Robin Wilson proposes what seems to me a much more sensible balance: to protect the right of conscientious objectors to refuse to facilitate same-sex marriages, except where such a refusal imposes significant hardship on the same-sex couple.”); Brownstein, *supra* note 59, at 414 n.76 (observing that MCP advocates “do not necessarily press the healthcare analogy in their work but support essentially the same framework”); Geoffrey Trotter, *The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants—A Response to Professor Bruce MacDougall*, 70 SASK. L. REV. 365, 370–75 (2007) (arguing that accommodating objection to providing same-sex marriage services “is akin to conscience protections granted to doctors and nurses”).

93. Berg, *supra* note 7, at 233; see also Carmella, *supra* note 55, at 1745–49 (contending that same-sex marriage exemptions fall within the same framework as abortion and contraception); Stern, *supra* note 7, at 315 (linking abortion and marriage).

94. Ian C. Bartrum, Commentary, *Same-Sex Marriage in the Heartland: The Case for Legislative Minimalism in Crafting Religious Exemptions*, 108 MICH. L. REV. FIRST IMPRESSIONS 8, 10 (2009), <http://www.michiganlawreview.org/assets/fi/108/bartrum.pdf>.

95. See Lupu & Tuttle, *supra* note 13, at 291–93 (arguing that medical conscience legislation is not convincing precedent because of the nature of abortion, which involves the taking of human life); Strasser, *supra* note 13, at 11–19, 29–33 (describing and critiquing abortion analogy); Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, 12 ENGAGE 12, 17 (2011), http://www.fed-soc.org/doclib/20110912_WilsonSingerEngage12.2.pdf (Singer briefly addressing and rejecting medical provider analogy in debate with Wilson).

one.”⁹⁶ On this analysis, religious objectors claim only a negative right to conduct business as they see fit, whereas same-sex couples seek a positive entitlement to assistance by others.⁹⁷ Third and most significantly, MCP proponents claim that both the medical and marriage contexts involve participation in exceptional acts. For a physician, the rationale for objection purportedly is the physician’s participation or complicity in a discrete act she judges to be morally bad—not the status of the person seeking care. Indeed, medical providers are not privileged to deny care to people based on invidious discrimination.⁹⁸ With regard to marriage, florists, bakers, and caterers then can be seen as like the archetypal doctor who holds as a moral matter that abortion is killing, an immoral act from which he must absolutely abstain. Indeed, Wilson characterizes “the duty *not* to facilitate [marriage as] an absolute” for these objectors.⁹⁹

The conscientious objection framework is instrumentally valuable because it moves the discussion away from discrimination. By its nature, it focuses on a specific act. The contested act, rather than those affected by the invocation of conscience, stands at the center of any inquiry. Terming refusal to serve same-sex couples “conscientious objection” also attempts to sidestep comparisons to race, gender, or miscegenation discrimination.

The alleged theoretical equivalency between abortion and same-sex marriage leads to the Laycock-Wilson group’s legislative proposal. They seek to bring marriage under a recognized exception—namely, medical conscience legislation, which protects providers who refuse to participate in controversial medical procedures. In joint advocacy, they quote at length from medical conscience legislation.¹⁰⁰ They indicate that federal laws allowing conscientious objections to participation in military service and performance of abortions and sterilizations constitute precedent for their proposal.¹⁰¹

Medical conscience statutes were first enacted to ensure medical providers could refuse to perform or participate in abortion if it “would be contrary to [their] religious beliefs or moral convictions.”¹⁰² Later, these statutes extended virtually uniformly across states to the withholding and withdrawal of life support.¹⁰³ The stated goal was protecting medical providers’ consciences. In recent years, some states have further expanded the reach of conscience legislation to contraception

96. Wilson, *supra* note 7, at 100.

97. *See id.* at 80; Laycock, *supra* note 7, at 192 (endorsing this formulation).

98. Conscience clauses, however, may be invoked in a discriminatory way (for instance, to deny contraception to unmarried women).

99. Wilson, *supra* note 7, at 101 (emphasis in original).

100. Wilson et al. Md. Ltr., *supra* note 8, at 6 n.12.

101. *Id.* at 6.

102. 42 U.S.C. § 300a-7(b) (2006) (passed in 1973).

103. Martha S. Swartz, “Conscience Clauses” or “Unconscionable Clauses”: *Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL’Y L. & ETHICS 269, 282–83 (2006); *see, e.g.*, ALA. CODE § 22-8A-8(b) (LexisNexis 2006) (“No nurse, physician, or other health care provider may be required by law or contract in any circumstances to participate in the withholding or withdrawal of life-sustaining treatment if such person objects to so doing.”).

and fertility care.¹⁰⁴ In several states, legislation now applies not only to participating in or performing a procedure but also to giving information or referring for care.¹⁰⁵

Medical conscience legislation also applies to a wide array of medical facilities. Entire hospitals, healthcare systems, clinics, or practice groups may refuse contested treatments.¹⁰⁶ By contrast to limited exemptions in antidiscrimination laws, legislation typically does not differentiate between religious and secular, public and private, and for-profit and not-for-profit institutions.¹⁰⁷

This conscience legislation covers three distinct conflicts. First, employers must accommodate doctors and nurses who refuse to participate in certain procedures. Under pain of civil or criminal penalties,¹⁰⁸ employers may not discriminate against those who decline to provide certain treatments when making hiring, promotion, and firing decisions.¹⁰⁹ By contrast, an employer that opposes controversial procedures may require doctors and nurses to comply with restrictions on care even if they disagree with the employer. Second, providers are immunized from civil or criminal liability or professional discipline if they harm patients through their refusal.¹¹⁰ Third, the state must accept refusing individuals and institutions into government programs and extend funds to them on equal terms to those medical providers that deliver all necessary care.¹¹¹

The unique scope of conscientious objection protection in medicine makes it an appealing model for pro-MCP scholars. Unlike protection of the refusal of a draftee to fight in war or a government employee to participate in executions, medical

104. *State Policies in Brief: Refusing to Provide Health Services*, GUTTMACHER INSTITUTE (Nov. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (contraception in 13 states).

105. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.31(B) (2008) (extending to refusal to “recommend or counsel an abortion”).

106. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2154(a) (Supp. 2012); 745 ILL. COMP. STAT. 70/9 (West 2010); MISS. CODE ANN. § 41-107-7(1) (2012); WYO. STAT. ANN. § 35-22-410 (2011).

107. A handful limit institutional conscience clauses to private institutions, ARK. CODE ANN. § 20-16-304 (2005); ME. REV. STAT. ANN. tit. 22, § 1903(4) (2004); TENN. CODE ANN. § 68-34-104(5) (West 2011). Several others limit institutional conscience protections to religious institutions, N.J. STAT. ANN. § 26:2H-65 (West 2007); CAL. HEALTH & SAFETY CODE § 123420(c) (West 2012).

108. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123420 (West 2012) (violation of conscience clause a misdemeanor); 745 ILL. COMP. STAT. ANN. 30/1(c) (West 2010) (violation resulting in “civil damages equal to 3 times the amount of proved damages”).

109. *See, e.g.*, 42 U.S.C. §§ 300a-7(c), (e) (2006).

110. ARIZ. REV. STAT. ANN. § 36-3205(C)(1) (2009) (“[H]ealth care provider is not subject to criminal or civil liability or professional discipline for . . . [f]ailing to comply with a decision or a direction that violates the provider’s conscience”); N.J. STAT. ANN. § 2A:65A-3 (West 2000) (“The refusal to perform, assist in the performance of, or provide abortion services or sterilization procedures shall not constitute grounds for civil or criminal liability, disciplinary action or discriminatory treatment.”).

111. *See* 42 U.S.C. §300a-7(b) (2006) (preventing “any court or any public official or other public authority” from imposing any requirements to participate in sterilization or abortion in violation of religious or moral beliefs).

conscience legislation extends to market relationships between businesses and consumers, social services and clients, and employers and employees. It gives individuals and—in a radical departure from other conscience protection—business entities grounds to violate institutional or legal norms without consequence. Nowhere else is the burden directly imposed on individuals (patients) and private institutions (employers and health facilities), instead of on the state and public at large.¹¹² Unlike the draft context, conscientious objectors in healthcare shoulder no alternate burdens.¹¹³

The MCP proposal of Wilson, Laycock, Berg, Esbeck, Stern, and Garnett adopts this structure, exempting institutions and individuals from requirements usually imposed on public accommodations, employers, and landlords. Both public and private employers would be required to accommodate individual employees who object to same-sex marriage. Religious organizations, small businesses, and professionals would be relieved of certain obligations of nondiscrimination and would avoid legal liability. Moreover, the state would be prohibited from withholding government funding based on their refusal. The burden of MCP would fall on same-sex couples and individuals and entities supportive of same-sex marriage.

Marriage conscience protection modeled on medicine has had some traction in the political arena. In Iowa, the Religious Conscience Protection Act would have allowed individuals and businesses to discriminate against same-sex couples in delivering goods and services connected with a same-sex marriage ceremony, adoption or reproductive services, spousal benefits, and housing.¹¹⁴ New Hampshire legislators proposed amending its marriage equality act to allow any business to refuse to provide goods or services to any wedding on grounds of conscience.¹¹⁵ In both Maryland and Connecticut, some senators urged the adoption of MCP.¹¹⁶

While no state has enacted the proposal in full, several have adopted narrower versions. New York, Vermont, and New Hampshire allow religious entities to refuse to provide “services, accommodations, advantages, facilities, goods, or privileges” relating to the solemnization or celebration of a marriage.¹¹⁷ Beyond the

112. The burden of objection to the draft falls only indirectly on potential draftees through a marginally greater risk of conscription, rather than specific individuals. See Geoffrey Stone, *Civil Unions: A Response to Garnett and Laycock*, UNIV. CHI. LAW SCH. FACULTY BLOG (May 5, 2009, 11:29 PM), <http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-a-response-to-garnett-and-laycock.html>.

113. Cf. Adam J. Kolber, *Alternative Burdens on Freedom of Conscience*, 47 SAN DIEGO L. REV. 919, 930 (2010); Ronald A. Lindsay, *When to Grant Conscientious Objector Status*, AM. J. BIOETHICS, June 2007, at 25, 25–26.

114. H. Study B. 50, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

115. Kevin Landrigan, *Bill Would Let Wedding Vendors Refuse Service to Engaged Same-Sex Couples*, NASHUA TELEGRAPH (Jan. 26, 2012), <http://www.nashuatelegraph.com/newsstatenewengland/947843-227/bill-lets-some-conscientiously-object-to-gay.html>.

116. Conn. S. Debate on S.B. 899, 2009 Gen. Assemb. (Apr. 22, 2009) (statement of Sen. Michael McLachlan); Julie Bolcer, *Senate Says Yes to Marry-Land*, ADVOCATE.COM (Feb. 23, 2012, 5:35 PM), <http://www.advocate.com/news/daily-news/2012/02/23/senate-says-yes-marry-land>.

117. N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2012); N.Y. DOM. REL. LAW § 10-b

marriage ceremony, Vermont exempts fraternal organizations from providing insurance.¹¹⁸ New Hampshire permits religious organizations and their employees to decline to provide “services, accommodations, advantages, facilities, goods, or privileges . . . related to . . . the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals.”¹¹⁹ Connecticut goes a step further, ensuring that legalization of marriage for same-sex couples shall not “affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose.”¹²⁰ In recognizing civil unions, Rhode Island came closest to the MCP model. Legislators chose to allow religious organizations, including hospitals, schools, and community centers, to refuse to “treat as valid any civil union.”¹²¹ The exemption stopped short, however, of allowing private individuals or secular businesses to object to serving same-sex couples.

Wilson contends that medical conscience clauses offer a “shining lesson” of a “live-and-let-live solution” for the conflict between religious liberty and freedom to marry.¹²² Other MCP advocates agree that exemptions in the medical model would defuse much of the controversy.¹²³ They predict MCP would impose only a minor burden on same-sex couples.¹²⁴

The remainder of this Article argues that, as a theoretical matter, objections to same-sex marriage cannot be justified by reference to conscientious objection protections. Moreover, as a policy matter, the experience of medical conscience legislation serves not as a shining lesson, but as a cautionary tale.

III. THEORETICAL FOUNDATIONS OF CONSCIENTIOUS OBJECTION PROTECTION

Our legal system does not support a general proposition that “conscientious objection” excuses one from compliance with law. Individuals (and entities) are expected to follow the laws of the land or face the consequences. Although legislatures and courts often accommodate religious beliefs or practices, they have

(McKinney, WestlawNext current through L.2013, chs. 1–40); VT. STAT. ANN. tit. 9, § 4502(*l*) (Supp. 2012).

118. VT. STAT. ANN. tit. 8, § 4501(b) (Supp. 2012); tit. 9, § 4502(*l*); New Hampshire included a similar provision. N.H. REV. STAT. ANN. § 457:37(IV). (Supp. 2012).

119. N.H. REV. STAT. ANN. § 457:37(III); *see also* R.I. GEN. LAWS ANN. § 15-3-6.1(c)(2) (West, WestlawNext current through ch. 534 of the 2013 Reg. Sess.) (allowing refusals related to “the promotion of marriage through any social or religious programs or services, which violates the religious doctrine or teachings of religious organization, association or society”).

120. CT. STAT. ANN. § 46b-35b (West Supp. 2013); *see also* MINN. STAT. ANN. § 517.201(b) (West, WestlawNext current through 2013 Reg. & 1st Spec. Sess.); Act of May 14, 2013, ch. 74, § 6, 2013 Minn. Sess. Law Serv. (West).

121. R.I. GEN. LAWS § 15-3.1-5 (Supp. 2012).

122. *See* Wilson, *supra* note 15, at 109.

123. *See, e.g.*, Laycock, *supra* note 7, at 198.

124. *See infra* Part V.B.

been circumspect in recognizing conscientious objection. This Part discerns why legislative protection of conscientious objection has been limited to participation in war, execution, and particularly controversial medical procedures. It argues that our legal system traditionally has allowed “conscientious objection” only to life or death acts for which one clearly can be held responsible.¹²⁵

This Part identifies five principles that support legal recognition of conscientious objection. These principles distinguish conscience exemptions that can be justified from those that cannot, in medicine and beyond. The first three undergird conscientious objection in the contexts of war, execution, and abortion. As Section A sets out, across philosophical traditions, the necessity and proximity of the objector for the alleged bad act and the severity of the consequences of the act are central to moral responsibility. As Section B shows, two additional principles bolster physicians’ specific claim to act on conscience—the significance of ethical and moral reasoning to medicine and the anchoring of claims of conscientious objection in shared professional ethics. While any one of these principles does not suffice for legislative intervention, the first three seem most important.

Section C argues that long-standing conscientious objection protections with regard to medicine, the military, and execution are justified under these principles. Traditional “conscientious objections” involve life and death; the claim is to not harm another. The law similarly intervenes where the objector bears clear moral responsibility for the alleged bad act in terms of both causality and proximity, not when she is tangential or remote. In medicine, until recently, legislative protection has focused on those objections grounded in professional ethical obligations.

This Section provides insights into why recent claims to medical conscientious objection have been greeted by public resistance and outcry. It enables us to distinguish between first-generation conscience legislation, which focuses on physicians and nurses and is limited to a narrow range of procedures, and second-generation clauses, which broaden the actors covered (to ancillary staff like pharmacists and paramedics) or loosen the proximity requirements (to referral or information). This analysis indicates that the first generation of clauses accurately reflects the theoretical foundations of medical conscience. Some recent conscience claims in medicine and elsewhere, however, are untethered from them, raising the specter of a nation in which each individual’s conscience is king.

Section D explains that same-sex marriage objections constitute an extreme example of claims that lack the distinct and compelling features of conscientious objection recognized by law. It examines several categories of objectors, ranging from officiants to dressmakers, and marriage counselors to hospital administrators.

125. I draw a distinction here between conscientious objection and other religious accommodations. As discussed above, the model of conscientious objections has significant benefits for MCP proponents that disappear if instead exemption from antidiscrimination law is at issue.

*A. Principles of Moral Responsibility: Severity of Consequences,
Necessity, and Proximity*

Traditionally, conscientious objection is only recognized when the objector bears clear causal and proximate responsibility for an act with serious consequences, typically death. The refusals of the draftee, the executioner, and the doctor have been to their own performance of a purported killing. Their involvement is so direct that, on one account, the claim is to not commit a wrongful act him- or herself.¹²⁶ So understood, these actors bear little resemblance to same-sex marriage objectors, who are not claiming a right not to be married to a person of the same sex.

Another way to understand conscientious objection, however, is as a claim not to participate in another's wrongdoing. Another seeks to do wrong—to fight an unjust war, to execute a prisoner, or to undergo an abortion—and demands the objector's assistance. On this account, the draftee demands not to join the unjust war that is the project of the state.¹²⁷ The healthcare provider seeks to refrain from participating in the patient's project, whether abortion or withdrawal of life support.¹²⁸ So conceived, recognized conscientious objections move closer to same-sex marriage objections.¹²⁹

Of course, one does not experience a guilty conscience because another person has performed a wrongful act.¹³⁰ Although one could feel guilt for failing to advise against said act, it would be strange to say “my conscience prohibits you from doing that act.”¹³¹ Instead, each individual experiences conscience in determining the morality of his or her *own* actions.

126. Judith Lee Kissell, *Complicity and Narrative: Insight for the Healthcare Professional*, 1 MED. HEALTHCARE PHIL. 263, 264 (1998) (disputing the characterization of a doctor as complicit given “direct control over whether or not the harm finally occurs” and because “what the physician does suffices by itself to cause harm”).

127. Carl Cohen, *Conscientious Objection*, 78 ETHICS 269, 271–72 (1968) (defining objection as refusal “to co-operate with the state . . . in its war-making activities”).

128. Armand H. Matheny Antommara, *Adjudicating Rights or Analyzing Interests: Ethicists' Role in the Debate over Conscience in Clinical Practice*, 29 THEORETICAL MED. & BIOETHICS 201, 202 (2008) (“[C]linicians’ primary interest is not being complicit in an action they consider immoral”); Joseph Clint Parker, *Conscience and Collective Duties: Do Medical Professionals Have a Collective Duty to Ensure That Their Profession Provides Non-discriminatory Access to All Medical Services?*, 36 J. MED. & PHIL. 28, 46 (2011) (discussing patient as inviting doctor to participate in a collective act); Edmund D. Pellegrino, *Some Things Ought Never Be Done: Moral Absolutes in Clinical Ethics*, 26 THEORETICAL MED. & BIOETHICS 469, 481–82 (2005) (conceiving of the performance of an abortion as cooperation).

129. See Laycock, *supra* note 7, at 196 (describing same-sex marriage objections as related to “the extent to which one can facilitate, condone, cooperate with, or profit from the wrongdoing of others”).

130. James F. Childress, *Appeals to Conscience*, 89 ETHICS 315, 318–19 (1979).

131. Jeffrey Blustein, *Doing What the Patient Orders: Maintaining Integrity in the Doctor-Patient Relationship*, 7 BIOETHICS 289, 299 (1993) (discussing that conscience only judges self, not others); see COMM. ON ETHICS, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. 385, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE 2 (2007) [hereinafter ACOG], available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co385.pdf?dmc=1&ts=20130928T2352471833>.

That said, people can be held responsible or blamed for their contribution to the wrongful acts of others. The key question is thus: “When is one an accomplice in the wrongdoing of others and when must one simply accept the fact that all of us are morally fallible?”¹³² A range of philosophical traditions, associated with philosophers from Aristotle to Bernard Williams to James Childress, have engaged with this question.¹³³ While these traditions are quite complex, we need not explore their subtleties, as legislative protection of conscientious objection has only been extended where responsibility is evident. This Section draws out factors common across traditions.

Generally speaking, four factors determine whether cooperation with wrongdoing is morally justified. The American Academy of Pediatrics Committee on Bioethics summarizes,

Whether assisting someone else to perform an act that you consider immoral is wrong depends on . . . a variety of practical considerations including the seriousness of the wrong, the causal relationship between the assistance and the act, the necessity of the assistance for completing the act, and the reason for providing the assistance.¹³⁴

These factors inform a variety of perspectives.¹³⁵ The necessity and proximity of one’s assistance to the wrongful act and the seriousness of that act are balanced against one’s role and the gravity of one’s reason for cooperation.¹³⁶ Under this

132. Daniel P. Sulmasy, *What Is Conscience and Why Is Respect for It So Important?*, 29 THEORETICAL MED. & BIOETHICS 135, 141 (2008).

133. Edmund D. Pellegrino, *Societal Duty and Moral Complicity: The Physician’s Dilemma of Divided Loyalty*, 16 INT’L J.L. & PSYCHIATRY 371, 371 (1993); see also Antommaria, *supra* note 128, at 206 (“Roman Catholic moral tradition provides the most extensive analysis of the concept of cooperation.”); Noam J. Zohar, *Co-operation Despite Disagreement: From Politics to Healthcare*, 17 BIOETHICS 121, 122 (2003) (discussing Jewish tradition of ascribing responsibility).

134. Am. Acad. of Pediatrics Comm. on Bioethics, *Policy Statement—Physician Refusal to Provide Information or Treatment on the Basis of Claims of Conscience*, 124 PEDIATRICS 1689, 1690 (2009). Although many analyses begin with the question of whether the person shares the wrongdoer’s intent and joins fully in his wrongdoing, for objectors across contexts shared intent is not at issue. See Kevin Wm. Wildes, *Conscience, Referral, and Physician Assisted Suicide*, 18 J. MED. & PHIL. 323, 325–26 (1993).

135. See, e.g., RICHARD T. DE GEORGE, BUSINESS ETHICS 87–106 (3d ed. 1990) (evaluating moral responsibility contextually in relation to agent’s action, knowledge, or freedom); Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 ACAD. MGMT. REV. 366, 374–78, 380, 390–91 (1991) (developing theory that allots responsibility according to the severity of the act’s consequences, the certainty the act is moral or immoral, degree of complicity in the act, and extent of pressure); Kissell, *supra* note 126, at 264 (drawing on casuistic traditions of the common law to understand accountability for someone else’s acts); Sulmasy, *supra* note 132, at 141–42 (reviewing factors from Catholic moral philosophy used to determine whether one is an accomplice in wrongdoing).

136. James Keenan & Thomas Kopfensteiner, *The Principle of Cooperation*, HEALTH PROGRESS, Apr. 1995, at 23; William Newton, *Avoiding Cooperation with Evil: Keeping Your Nose Clean in a Dirty World*, HOMELITIC & PASTORAL REV. (Sept. 21, 2012), <http://www.hprweb.com/2012/09/avoiding-cooperation-with-evil-keeping-your-nose-clean-in->

analysis, people properly may “act for their own legitimate ends, foreseeing but not intending that their action will facilitate that wrongdoing.”¹³⁷

Our moral intuitions support this construct. The psychological literature confirms that we are most likely to assign responsibility to those who are closely connected to and the proximate cause of an act with serious consequences.¹³⁸ Moreover, people tend to attribute greater responsibility to cooperation that risks death than they do to injury or job termination.¹³⁹

The first two factors—necessity and proximity—relate to two dimensions of causality, akin to causation in fact and proximate cause. As to necessity, the question is, how necessary is one’s participation to the wrongdoer’s act?¹⁴⁰ As Daniel Sulmasy says, “The more likely that it could occur without one’s cooperation, the more justified is one’s cooperation.”¹⁴¹ As to proximity, theories of moral responsibility recognize that involvement runs on a “continuum from ‘innocent bystander’ to sole cause of the event.”¹⁴² Even if one’s act of cooperation could be said to be one in a chain of events, it may not be adequately proximate so as to render cooperation outside the pale.¹⁴³ Where the cooperator falls on the causal chain in terms of time, space, and intervening events or actors influences the analysis.¹⁴⁴ Sulmasy again adds, “The further removed one is, the more justified is one’s cooperation.”¹⁴⁵

a-dirty-world/ (balancing “the proportion between the goodness and obligatory character of the goal he is pursuing, and the gravity of the evil he is facilitating”).

137. M. Cathleen Kaveny, *Catholics as Citizens*, AMERICA, Nov. 1, 2010, at 12, 13–14.

138. See generally F. Fincham & J. Jaspars, *Attribution of Responsibility to the Self and Others in Children and Adults*, 37 J. PERSONALITY & SOC. PSYCHOL. 1589 (1979); Lee Hamilton, *Chains of Command: Responsibility Attribution in Hierarchies*, 16 J. APPLIED SOC. PSYCH. 118 (1986) (finding that attributions were highest for those who had role responsibility and causal responsibility for deaths).

139. Thomas M. Jones & Lori Versteegen Ryan, *The Link Between Ethical Judgment and Action in Organization: A Moral Approbation Approach*, 8 ORG. SCI. 663, 671 (1997).

140. Pellegrino, *supra* note 133, at 377–78 (a key consideration is “the extent to which the participant’s actions are necessary to, and/or causal of, the harm”).

141. Sulmasy, *supra* note 132, at 141.

142. Jones & Ryan, *supra* note 139, at 672.

143. Newton, *supra* note 136 (“Proximity can make a difference because, the closer the action of the cooperator is to the action of the evil-doer, the more the cooperator shares in the action of the evil-doer.”); Pellegrino, *supra* note 133, at 378 (noting that cooperation can be justified when “the participant’s actions are not necessary or causal but only remotely facilitative”).

144. See Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47, 61 (2010) (focusing on proximity to objectionable act and personal contact and observing “value in the law denying that every remote connection really amounts to significant participation”); P. Nortvedt & M. Nordhaug, *The Principle and Problem of Proximity in Ethics*, 34 J. MED. ETHICS 156, 157 (2008) (discussing proximity in spatial, temporal, and relational terms); Dennis M. Sullivan & Aaron Costerisan, *Complicity and Stem Cell Research: Countering the Utilitarian Argument*, 24 ETHICS & MED. 151, 154 (2008) (“[T]he passage of time reduces complicity to a morally repugnant act.”); Robert D. Orr, *Addressing Issues of Moral Complicity: When? Where? Why? and Other Questions*, CTR. FOR BIOETHICS & HUM. DIGNITY (May 22, 2003), <http://cbhd.org/content/addressing-issues-moral-complicity-when-where-why-and-other-questions> (arguing for importance of timing, proximity, and remoteness to material cooperation analysis).

145. Sulmasy, *supra* note 132, at 141.

Even if one's act meets the factors of necessity and proximity, various traditions agree that these factors must be balanced against the seriousness of the consequences of the wrongdoer's act. Summarizing the views of many philosophers, Velasquez observes that the seriousness of the wrong is the key consideration to be weighed against one's level of involvement and the gravity of one's reason for acting.¹⁴⁶ Moral responsibility "will clearly vary according to the severity of consequences of the act in question."¹⁴⁷ Note that the seriousness of consequences is not self-regarding. Whether objector feels injured himself is immaterial; the focus is on harm to other people.

Proportionality analysis reflects that a person's responsibility can be reduced by the importance of her reason for cooperation. The less serious the harm caused by the wrongdoer's act, the less weighty must the reason for cooperation be.¹⁴⁸ Maintaining good relations with others in one's profession may provide adequate reason.¹⁴⁹ Other mitigating factors or excuses, such as duress or legal compliance, also may relieve one of responsibility.¹⁵⁰

B. Theoretical Principles Specific to Medicine

Whereas necessity, proximity, and grave harm ground conscientious objection across contexts, medical conscientious objection rests on two additional principles—namely, the centrality of moral reasoning to medicine and the grounding of objections in professional ethics. These principles bolster physicians' specific claim to act on conscience and further limit conscience protection in the medical context.

1. Medicine as a Conscientious Profession

A number of scholars identify "professional conscience" informed by moral precepts internal to medicine as essential to medical practice.¹⁵¹ To navigate

146. MANUEL G. VELASQUEZ, *BUSINESS ETHICS: CONCEPTS AND CASES* 120–42 (7th ed. 2011) (summarizing views of many moral philosophers).

147. Jones & Ryan, *supra* note 139, at 671.

148. Sulmasy, *supra* note 132, at 141.

149. Joseph Boyle, *Radical Moral Disagreement in Contemporary Health Care: A Roman Catholic Perspective*, 19 J. MED. & PHIL. 183, 198 (1994).

150. Antommara, *supra* note 128, at 206 (discussing importance of legal requirements to analysis); Sulmasy, *supra* note 132, at 141 (discussing duress).

151. William P. Cheshire, Jr., *When Conscience Meddles with Ethics*, 27 ETHICS & MED. 139, 139 (2011) ("Conscience is at the heart of the medical profession's commitment to honesty, compassion, and taking responsibility to prevent harm."); Alan Cribb, *Integrity at Work: Managing Routine Moral Stress in Professional Roles*, 12 NURSING PHIL. 119, 122 (2011) ("[T]he ethical identity of a practitioner is partly constituted by their membership of a professional community . . ." (emphasis omitted)); David C. Thomas, *Beyond Medical Paternalism and Patient Autonomy: A Model of Physician Conscience for the Physician-Patient Relationship*, 98 ANNALS INTERNAL MED. 243, 246 (1983) (arguing in favor of professional conscience rooted in beneficence and the condition of the patient); *see also* TOM BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 33 (7th ed. 2013) (arguing conscientiousness "support[s] and promote[s] caring"); James Appleyard, *Who*

ethically complex medical questions, physicians need ethical virtues as much as they need clinical skills.¹⁵² Through training and socialization, professional ideals become integrated with personal ideals, religious and otherwise, that physicians and nurses bring to bear when they encounter patients.¹⁵³

Across diverse bioethical perspectives, the importance of conscience derives from characteristics unique to medicine, including the intimacy of healthcare relationships, the shared role in decision making, and, most fundamentally, the complexity of moral issues—all of which differentiate medicine from most other occupations. Both law and societal expectations treat the practice of medicine as not only “a distribution of a commodity” but also “a social good . . . that is uniquely defined according to moral relationships.”¹⁵⁴ In contrast to commercial transactions, relationships in healthcare are intimate and cannot be armslength.¹⁵⁵ Doctors consequently have duties to keep self-interest second to the patient’s interests. As Franklin Miller and Howard Brody say, “medical ethics can never be reduced to the ethics of marketplace encounters.”¹⁵⁶

The role of physician requires assuming some responsibility for healthcare decisions. Studies increasingly find that neither paternalism nor pure patient autonomy represents an accurate (or desirable) view of modern medical practice.¹⁵⁷ Decisions about care, instead, are often shared.¹⁵⁸ A patient, for better or worse,

Cares? The Declaration of Helsinki and ‘The Conscience of Physicians,’ 4 RES. ETHICS REV. 106, 107 (2008); Peter Bartmann, *Physician-Assisted Suicide and Euthanasia: German Protestantism, Conscience, and the Limits of Purely Ethical Reflection*, 9 CHRISTIAN BIOETHICS 203, 216 (2003) (“Physicians have a traditional *ethos* of conscience . . .” (emphasis in original)); Parker, *supra* note 128, at 39 (“[I]t is the physician’s moral stance toward his patients that protects and benefits the patient.”).

152. Piers Benn, *Conscience and Health Care Ethics*, in PRINCIPLES OF HEALTH CARE ETHICS 345, 345 (R.E. Ashcroft et al. eds., 2d ed. 2007); see also Laurence B. McCullough, *The Nature and Limits of the Physician’s Professional Responsibilities*, 9 J. MED. & PHIL. 3, 4 (2004) (describing importance of intellectual and moral integrity in medicine).

153. Edward M. Spencer, *Physician’s Conscience and HECs: Friends or Foes?*, 10 HEC F. 34, 36, 38 (1998); see Vera Dahlqvist, Sture Eriksson, Ann-Louise Glasberg, Elisabeth Lindahl, Kim Lützén, Gunilla Strandberg, Anna Söderberg, Venke Sørli & Astrid Norberg, *Development of the Perceptions of Conscience Questionnaire*, 14 NURSING ETHICS 181, 189 (2007) (physicians reporting consulting conscience in situations of uncertainty).

154. Matthew K. Wynia, Stephen R. Latham, Audiey C. Kao, Jessica W. Berg & Linda L. Emanuel, *Medical Professionalism in Society*, 341 NEW ENG. J. MEDICINE 1612, 1612 (1999).

155. Jacob M. Appel, *May Doctors Refuse Infertility Treatments to Gay Patients?*, HASTINGS CENTER REP., July–Aug. 2006, at 20, 21 (“The nature of the doctor-patient relationship is fundamentally more intimate than the sorts of interactions that occur between landlords and tenants or innkeepers and guests.”); Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 471 (2002) (arguing the doctor-patient relationship has a “deeply personal type of trust . . . paralleled only in fraternal, family, or love relationships”).

156. Franklin G. Miller & Howard Brody, *Enhancement Technologies and Professional Integrity*, AM. J. BIOETHICS, May–June 2005, at 15, 16; see also Benn, *supra* note 152, at 345 (distinguishing doctor-patient relationship from business-consumer relationship).

157. Carl E. Schneider, *Bioethics with a Human Face*, 69 IND. L.J. 1075 (1994) (arguing that the autonomy paradigm is too simplistic an approach).

158. Alexander A. Kon, Commentary, *The Shared Decision-Making Continuum*, 304 JAMA 903, 903 (2010).

cannot choose a particular medical procedure independent of the judgment of a professional.¹⁵⁹ At minimum, a doctor acts as a “counselor and guide.”¹⁶⁰

The moral complexity of medicine demands of medical providers the ability to exercise ethical judgment with sensitivity. Medical decisions often take place under conditions of considerable moral uncertainty and high stakes unseen in commercial and employment relations. Many involve multiple options with no single correct choice.¹⁶¹ “Quality of life,” for example, requires a judgment that may vary according to how each person defines a good, or sufficient, life. Indeed, moral dilemmas so inhere to healthcare that the nursing literature has developed the term “moral distress” to refer to providers feeling torn between their duties and the perceived right action.¹⁶²

One might challenge the characterization of medicine as a conscientious profession with superior entitlements to protection. Alta Charo, for example, rejects the view that the role of judgment can explain “why the physician ought to have more authority over patient choices than a candy seller has over consumer purchases.”¹⁶³ She argues that, while doctors may refuse to perform procedures, they should only do so based on medical inappropriateness, not moral approbation.¹⁶⁴ By contrast, she says, conscientious objection flies in the face of “the prevailing medical ethic . . . of universal care” and may ultimately be explained by discrimination.¹⁶⁵ As Charo notes, although a physician is expected to treat a criminal, one does not hear arguments that, by doing so, he or she becomes complicit in the criminal’s immoral acts.¹⁶⁶ On this account, physician value neutrality should be the goal.

This point is well taken and may accurately describe some objections. Two arguments, nonetheless, indicate that, on balance, medical providers have a compelling—which is not to say absolute—claim to act in accordance with

159. See Bartmann, *supra* note 151, at 217 (“A *restricted* version of the principle of patient autonomy could be put like this: The patient has only a *veto* against any offered medical treatment.” (emphasis in original)); Blustein, *supra* note 131, at 289 (predicting legitimate moral conflict between physicians and patients unless physicians become required to accommodate all patient requests); Cheshire, *supra* note 151, at 139 (noting that a patient has an unqualified right to refuse treatment, but can only demand treatment subject to physician discretion).

160. Miller & Brody, *supra* note 156, at 16; see also Bartmann, *supra* note 151, at 216 (noting that although “it is widely accepted in protestant thought that professional life . . . is *the* place where ethical responsibility is practiced[.]. . . decision making professionals like physicians” have a superior claim (emphasis in original)); Lindsay, *supra* note 113, at 26 (concluding this factor separates physicians from other occupations).

161. Jared R. Adams, Glyn Elwyn & France Légaré, *Communicating with Physicians About Medical Decisions: A Reluctance to Disagree*, 172 ARCHIVES INTERNAL MEDICINE 1184, 1184–85.

162. Ellen H. Elpern, Barbara Covert & Ruth Kleinpell, *Moral Distress of Staff Nurses in a Medical Intensive Care Unit*, 14 AM. J. CRITICAL CARE 523, 523 (2005).

163. R. Alta Charo, *Health Care Provider Refusals to Treat, Prescribe, Refer or Inform: Professionalism and Conscience*, ADVANCE, Spring 2007, at 119, 127–28.

164. *Id.* at 128.

165. *Id.*

166. *Id.*

conscience. First, one could contend that “medicine cannot be morally neutral.”¹⁶⁷ Despite the tendency to compartmentalize scientific decisions and moral decisions in medicine, the distinction frequently falls apart on closer examination. Even questions about the value of new procedures “can be matters of conscience for the physician who wants to be a ‘good’ clinician, surgeon, healer, or counselor.”¹⁶⁸ Dr. Kyle Brothers gives the example of the seemingly straightforward clinical decision to refuse antibiotics to patients with upper respiratory infections; he points out that even such decisions place moral values on possible harms, such as the spread of antibiotic-resistant bacteria, and possible benefits to patients and the public.¹⁶⁹ Scientific decisions may not be value neutral. While doctors should never impose their own beliefs on patients, a doctor will be called upon to exercise some judgment as long as a pure autonomy model does not accurately reflect the reality of doctor-patient interaction.

Second, removing conscience from the medical enterprise could negatively affect patients. Nurses, for example, report that acting conscientiously creates positive effects, increasing their sensitivity to patient needs and encouraging them to perform morally courageous acts.¹⁷⁰ As the American College of Obstetricians and Gynecologists explains, “conscience, so conceived, . . . has a critical and useful place in the practice of medicine. In many cases, it can foster thoughtful, effective, and humane care.”¹⁷¹ Although one may be skeptical of the benefits of professional conscience to patient care, to the extent it fosters awareness of ethical issues it has value.¹⁷² As Beauchamp and Childress note, “detached fairness,” which is “suitable for some moral relationships, especially those in which persons interact as equals in a public context of impersonal justice and institutional constraints” might lead to a lack of caring or “uncaring indifference” unsuited to healthcare relationships.¹⁷³

167. Cheshire, *supra* note 151, at 139.

168. Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 *FORDHAM URB. L.J.* 221, 230 (2002).

169. Kyle B. Brothers, *Dependent Rational Providers*, 36 *J. MED. & PHIL.* 133, 139 (2011) (“We should not assume that just because a decision is routine, like the decision not to prescribe antibiotics, it is not deeply moral.”).

170. Annika Jensen & Evy Lidell, *The Influence of Conscience in Nursing*, 16 *NURSING ETHICS* 31, 35–37 (2009).

171. ACOG, *supra* note 131, at 2.

172. See generally Douglas B. White & Baruch Brody, Commentary, *Would Accommodating Some Conscientious Objections by Physicians Promote Quality in Medical Care?*, 305 *JAMA* 1804 (2011) (arguing that the debate over conscience should take account of several benefits of allowing providers to act on conscience).

173. BEAUCHAMP & CHILDRESS, *supra* note 151, at 36; see also Parker, *supra* note 128, at 38–39 (making similar point); Thomasma, *supra* note 151, at 246 (arguing that conscience resolves ethical quandaries by preserving as many values as possible); Laurie Zoloth-Dorfman & Susan B. Rubin, *Insider Trading: Conscience and Critique in Bioethics*, 10 *HEC F.* 24, 29 (1998) (discussing “dangers of complacency” and importance of conscientious objection to prevent excesses in managed care).

2. Anchoring in Professional Ethics

In addition to the importance of conscience, the principle that objections remain within the bounds of shared professional ethics further distinguishes medicine. As leading bioethical accounts agree, physicians' conscientious judgments must be rooted in shared professional norms, if they are to be respected.¹⁷⁴ Such norms include:

- 1) the prevention of disease and injury and promotion and maintenance of health;
- 2) the relief of pain and suffering caused by maladies;
- 3) the care and cure of those with a malady, and the care of those who cannot be cured; and
- 4) the avoidance of premature death and the pursuit of a peaceful death.¹⁷⁵

Intertwined with requirements that objections have a basis in professional ethics is the importance of the strength of scientific evidence supporting objections.¹⁷⁶

With this limiting principle, conflicts manifest themselves between a patient's values and the values of the profession as a whole, rather than one doctor's values.¹⁷⁷ In such cases, the profession has determined that the objected practice is ethically (and legally) acceptable for doctors to perform. Simultaneously, the professional community has allowed conscientious objection, subject to the ethical compromise that physicians inform patients of treatment options, refer for treatments they do not provide,¹⁷⁸ and do not abandon a patient already under their

174. See, e.g., HOLLY FERNANDEZ LYNCH, CONFLICTS OF CONSCIENCE IN HEALTH CARE 34 (2008) (limiting objection to "refusals grounded in values that are widely held within the profession and have even been accepted as clinical standards"); Blustein, *supra* note 131, at 312 (arguing whether refusal is permissible depends on "ethical consensus within the profession"); McCullough, *supra* note 152, at 6 ("Professional conscience concerns boundaries of behavior that no physician should cross, because to do so would be inconsistent with and undermine intellectual and moral integrity . . ."); Carolyn McLeod, *Referral in the Wake of Conscientious Objection to Abortion*, 23 HYPATIA, 30, 38 (2008) ("[P]hysicians cannot make conscientious objections in their practices that violate established norms of the profession that are morally justified"); Mark R. Wicclair, *Conscientious Objection in Medicine*, 14 BIOETHICS 205, 217 (2000) ("[A]n appeal to conscience has significant moral weight only if the core ethical values on which it is based correspond to one or more core values in medicine.").

175. Miller & Brody, *supra* note 156, at 15 (internal quotation marks omitted).

176. ACOG, *supra* note 131, at 3-4; Mark R. Wicclair, *Reasons and Healthcare Professionals' Claims of Conscience*, AM. J. BIOETHICS, June 2007, at 21, 22 ("[I]t is warranted to reject claims of conscience if they are based on demonstrably false beliefs.").

177. Angelo E. Volandes & Elmer D. Abbo, *Toward a Reconstruction of a Professional Medical Morality*, AM. J. BIOETHICS, Mar.-Apr. 2006, at 88, 89.

178. Sylvia A. Law, *Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 303-06 (1994); Ryan E. Lawrence & Farr A. Curlin, *Physicians' Beliefs About Conscience in Medicine: A National Survey*, 84 ACAD. MED. 1276, 1278 (2009) (documenting strong professional ethic of referral for services one believes morally wrong).

care.¹⁷⁹ Carolyn McLeod summarizes the benefits of conscientious objection under these conditions:

First, it helps preserve the integrity of the profession. Second, it helps maintain patient trust, since . . . confusion about what norms someone will follow can seriously inhibit trust Third, . . . [p]hysicians have agreed to follow the norms of their profession, if only by accepting the privileges that go along with membership in the profession.¹⁸⁰

Rooted in professional ethics, claims of conscientious objection, at least until recently, have not been anarchic.

Although traditional objections sound in the language of professional ethics, they also undeniably arise most frequently with regard to birth and death, those areas most intertwined with religious values.¹⁸¹ The community of coreligionists, however, does not suffice to determine the morality of a physician's actions. Given shared ethics, each physician must seek to maintain professional integrity, not only personal beliefs.¹⁸² One's fellow physicians serve as a—or perhaps the—referent moral community.¹⁸³

Admittedly, professional norms have often protected the interests of the profession, instead of the public.¹⁸⁴ Nonetheless, today our social expectations of medical professionals drive compliance with and development of the norms of the profession.¹⁸⁵ The public demands that physicians care for patients and justify their decisions within these ethical boundaries.¹⁸⁶

C. Justifying Legal Protection of Conscientious Objection

With the principles justifying protection of conscientious objection in mind, this Section evaluates conscience claims in medicine and beyond. It relies on bounded, neutral principles, not the subjective experience of each objector. These principles of necessity, proximity, and gravity of harm prevent opening the door to anarchy. When, instead, conscience claims become untethered from these recognized

179. 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 121 (2012).

180. McLeod, *supra* note 174, at 37.

181. Joel Frader & Charles L. Bosk, *The Personal Is Political, the Professional Is Not: Conscientious Objection to Obtaining/Providing/Acting on Genetic Information*, 151C AM. J. MED. GENETICS 62, 63 (2009).

182. McCullough, *supra* note 152, at 8 (“[M]anaging troubled professional or individual conscience is a day-in, day-out challenge in clinical ethics and such management often cannot avoid a residue or remainder of regret.”).

183. *See* Jones & Ryan, *supra* note 139, at 663 (discussing the importance of a referent community for moral responsibility).

184. Robert M. Veatch, *Assessing Pellegrino's Reconstruction of Medical Morality*, AM. J. BIOETHICS, Mar.–Apr. 2006, at 72, 73 (arguing that professional codes cannot serve to protect patients or maintain their trust, because they are developed without public involvement).

185. BEAUCHAMP & CHILDRESS, *supra* note 151, at 33.

186. *See id.*

foundations as has occurred in recent expansions of medical conscience legislation, they risk destabilizing our legal and medical systems.

Longstanding conscience protections clearly accord with the elements of moral responsibility. The draft, execution, abortion, and end-of-life procedures are linked to serious consequences. In each area, the traditional objector's act—firing a weapon, injecting poison, or performing a procedure—has been both proximate and necessary. In the medical context, legislators have, at least until recently, reserved protections for those objections anchored in the ethical obligations of the profession as a whole. Indeed, the involvement is so direct and the harm so grievous in the objector's view that these contexts together might be viewed as *sui generis*.¹⁸⁷

First, in these areas, conscientious objection operates by reference to an act of killing. In the context of the draft, claims of conscientious objection originated in a religious “belief that the taking of human life under any circumstance is evil.”¹⁸⁸ Even as it expanded to include objection to particular wars, conscientious objection to military service remained linked to the “performance of actions contrary to deeply held moral convictions about indiscriminate killing.”¹⁸⁹ Refusal to participate in the imposition of the death penalty similarly relates to the gravity of harm to another. Medical practice also is set apart from other commercial and professional pursuits by its life-or-death nature.

First-generation medical conscience legislation has largely mirrored conscientious objection to participation in war or imposition of the death penalty. Legislatures have not intervened in every potential conflict of conscience, but rather target those circumstances in which medical providers might otherwise be called upon to perform an act that results in death or ends the potential for life.¹⁹⁰ For a small subset of physicians, for instance, removal of life support represents impermissible harm to a patient to whom one bears specific obligations and is, in effect, a killing.¹⁹¹ Some others understand abortion to involve harm to another, in effect a killing or taking of potential life. Although people disagree over the moral

187. See, e.g., Zohar, *supra* note 133, at 133 (arguing objection to abortion as direct murder cannot serve as “a model for ‘similar’ cases, but rather a limiting case”).

188. Charles C. Moskos & John Whiteclay Chambers II, *The Secularization of Conscience*, in *THE NEW CONSCIENTIOUS OBJECTION* 3, 9 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993).

189. Jeremy Kessler, *Conscience, Coercion, and Equality in Catholic American Legal Thought 1962–1975*, at 33 (unpublished manuscript on file with the *Indiana Law Journal*) (quoting Nat'l Conference of Catholic Bishops, *Human Life in Our Day* (Nov. 15, 1968), in *III PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS* 164, ¶ 152 (Hugh J. Nolan ed., 1983)).

190. Lupu & Tuttle, *supra* note 13, at 291–92.

191. See Farr A. Curlin, Chinyere Nwodim, Jennifer L. Vance, Marshall H. Chin & John D. Lantos, *To Die, to Sleep: US Physicians' Religious and Other Objections to Physician-Assisted Suicide, Terminal Sedation, and Withdrawal of Life Support*, 25 *AM. J. HOSPICE & PALLIATIVE MED.* 112, 116–17 (2008) (reporting survey finding that five percent of physicians object to withdrawal of artificial life support (WLS) and opining “[t]hat Catholic physicians are more likely to object to WLS than Protestants may reflect Catholic doctrines prohibiting actions intended to shorten life”).

status of abortion and whether it involves a killing, as Ronald Dworkin long argued neither side can treat the other as illegitimate beyond the pale.¹⁹²

Debates over the first medical conscience clause—the Church Amendment—explicitly linked the draft and abortion in terms both of direct involvement and killing. Representative Margaret Heckler, for example, argued that “[c]onscientious objection to the taking of unborn life deserves as much consideration and respect as does conscientious objection to warfare.”¹⁹³ Throughout the 1970s, Catholic conscientious objection to war and to abortion intersected.¹⁹⁴ As discussion of abortion unfolded in the shadow of the Vietnam War, John Noonan, the leading Catholic thinker of the day, opined that “Christian opposition to genocide, to urban air raids, to the Vietnam War was no more and no less theological than the Christian opposition to abortion.”¹⁹⁵

Today, legislative protection of refusals to perform abortions and end-of-life procedures are understood to share these characteristics.¹⁹⁶ As Ira Lupu and Robert Tuttle observe, “Exemptions from mandatory provision of abortion services, like exemptions from conscription in times of war, focus specifically on those who might be forced to terminate human life.”¹⁹⁷ Indeed, advocates of broader protections have been most successful in expanding conscience protection when they employ arguments around taking of a life or potential life.¹⁹⁸ The severity of consequences of the objectionable act has been preeminent.

Second, even when the harm is severe, the law typically intercedes only if the objector is necessary to the alleged wrongful act. The soldier must pull the trigger, the executioner must flip the switch, and the doctor must perform the procedure. As a matter of moral responsibility, each functions as a primary cause of the ultimate act; it could not occur, or would occur only with great difficulty, without his involvement. Their roles are not innocent bystanders outside of the causal chain.

Third, the proximity of one’s involvement has been central to legislative protection of conscience. From the time of the Civil War, draftees could assert objections to “the bearing of arms” to be assigned noncombatant duties or to pay a

192. RONALD DWORKIN, *LIFE’S DOMINION* 68–71 (1993).

193. Kessler, *supra* note 189, at 54 (quoting AM. MED. NEWS, Mar. 12, 1973, at 15).

194. *Id.* at 59.

195. *Id.* at 54 n.235 (quoting JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 53–54 (1979)).

196. See, e.g., Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 *FORDHAM URB. L.J.* 783, 801 (2004) (arguing that protecting against “forced involvement in abortion” is consistent with excusing participation in wartime killing); Christopher Meyers & Robert D. Woods, *An Obligation to Provide Abortion Services: What Happens When Physicians Refuse?*, 22 *J. MED. ETHICS* 115, 120 n.22 (1996) (arguing both involve “life or death consequences”); Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 *EMORY L.J.* 121, 147 (2012) (linking draft, execution, and assisted suicide, noting that whether abortion is killing is contested); Huseina Sulaimanee, *Protecting the Right to Choose: Regulating Conscience Clauses in the Face of Moral Obligation*, 17 *CARDOZO J.L. & GENDER* 417, 435 (2011) (observing the argument about killing “parallels conscientious objection to war”).

197. Lupu & Tuttle, *supra* note 13, at 291.

198. *Id.* at 291–92.

fine.¹⁹⁹ Federal law excuses objections to participating in an execution or prosecuting a capital offence, rather than far-reaching objections.²⁰⁰ First-generation medical conscience legislation, relating to assisted suicide, withholding of life support, and abortion, similarly reflects this principle. Objectors are shielded to the extent they directly perform or participate in the performance of the alleged bad act. Legislation typically extends to physicians and nurses “performing,” “providing,” or “participating in” controversial procedures.²⁰¹ This recognizes the close presence of nurses and doctors to the patient and procedure. A nurse assisting a doctor in an abortion may not directly perform the procedure, but is exceptionally close and necessary to the act itself.²⁰² Both the act in question and the degree of the individual’s involvement influence the success of the claim.²⁰³

Finally, much of the debate over conscience in medicine focuses on objections plausibly rooted in the goals of medicine. Take, for example, objections surrounding end-of-life treatment. Futile treatment often gives rise to objections, with 17.9% of family medicine physicians in one study refusing to provide futile care on moral grounds.²⁰⁴ They assert a duty not to “promote the suffering of patients by the use of aggressive life-prolonging treatments.”²⁰⁵ Similarly, for some

199. LEON WHIPPLE, *THE STORY OF CIVIL LIBERTY IN THE UNITED STATES* 162 (1927). The administrative burdens on the military caused by objectors who objected to any participation in the military during wartime subsequently prompted additional exemptions for members of peace churches who would be assigned to alternate civilian service. Tara J. Carnahan, *The Quakers and Conscientious Objection*, 20 *HISTORIA* 1, 7–9 (2011) (student paper). Arguably, these exceptions go beyond direct involvement in killing. Nonetheless, the particular quality of wartime drafted service into the military may set these apart. The involuntary nature of association, uniformed service, one’s status as a combatant under international humanitarian law, and one’s service directly to the “war machine” suggest the draft presents circumstances different even than execution.

200. 18 U.S.C. § 3597(b) (2012).

201. *See, e.g.*, S.D. CODIFIED LAWS § 34-23A-13 (2011) (“perform” or “assist in the performance”); W. VA. CODE ANN. § 16-2F-7 (LexisNexis 2011) (same); *see also* Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 *J. LEGAL MED.* 177, 187 (1993) (“Many conscience clauses limit protection to persons engaged in directly providing medical treatment or medical services—the ones in the operating room, at the place of delivery of the controversial medical service itself.”).

202. Bartmann, *supra* note 151, at 216 (arguing nurses have the authority of close presence to the patient).

203. *See* Noam Zohar, *Moral Disagreement and Providing Emergency Contraception*, *AM. J. BIOETHICS*, June 2007, at 35, 36 (2007); *see also* Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 *ARIZ. L. REV.* 469, 523 (2006) (arguing that extension of pharmacist conscience legislation has been controversial because the “pharmacist is not directly administering a drug or performing a procedure” and lacks “significant patient contact”).

204. Jennifer E. Frank, *Conscientious Refusal in Family Medicine Residency Training*, 43 *FAM. MED.* 330, 332 (2011); *see also* Ryan Blum, *Conscience Rules: Implications for Care*, *HASTINGS CENTER REP.*, May–June 2011, at 49, 49 (“In a few cases providers feel so strongly about refusing to perform an intervention (for example, aggressive cardiopulmonary resuscitation of a patient dying from refractory leukemia) that they seek to invoke a right of professional conscience . . .”).

205. Volandes & Abbo, *supra* note 177, at 89.

medical providers, abortion constitutes a grievous harm in that it countermands the duty to do no harm.²⁰⁶ The anti-abortion stance thus “bears sufficient affinity to certain generally accepted core values of medicine,” whereas, for example, the withholding of pain relief during labor because the book of Genesis establishes the pain of childbirth as Eve’s punishment does not.²⁰⁷

The defenders of MCP claim objections to same-sex marriage fall within the legal tradition of conscientious objection. But the law does not tolerate every idiosyncratic objection. It rightly restricts conscientious objection protection to the draft, death penalty, abortion, and closely related contexts. Granting legal protection in this limited way reflects the reality that all people contribute to projects of others that they otherwise oppose. We pay taxes for programs we do not support. We compensate people who may use the funds to buy illegal products or donate to reprehensible causes.

By limiting the use of conscientious objection based on its distinct and compelling features, our legal system discourages moral rigidity, ensures government functioning, and prevents each person from becoming a law unto herself. So doing, we recognize that conscience claims far afield from recognized moral and ethical foundations may undermine our legal and medical systems to the detriment of all.

With the limitations of life and death, proximity, and necessity, our legal system rejects moral rigidity from its citizens. It recognizes that a too rigid position on cooperation with immoral activity can only be satisfied by withdrawing from public life, denying moral value to engagement in the world.²⁰⁸ By contrast, as Judith Kissell argues, drawing lines based on a person’s proximity and necessity to wrongdoing “prevent[s] her from spending her time and resources interminably protesting wrongdoing in society.”²⁰⁹ They keep her from “abandoning institutions, all of which sooner or later violate her principles.”²¹⁰

The treatment of conscientious objection in lawsuits and legislation reflects this concern. For example, the U.S. Supreme Court unanimously declined to grant a religious exemption from a required course “in military science and tactics” to students at the University of California because of its indirect role in military efforts.²¹¹ As Justice Cardozo stated in his concurrence, “Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state.”²¹² Objectors to the draft must perform alternate service to the state, and often the military, even though they thereby indirectly contribute to the state’s efforts.²¹³ In peacetime, citizens who

206. See Zohar, *supra* note 133, at 129 (noting that cases where compromise would not be possible do not frequently arise with regard to other medical procedures).

207. Benn, *supra* note 152, at 349.

208. Ron Hamel, *Cooperation: A Principle that Reflects Reality*, HEALTH PROGRESS, Sept–Oct. 2012, at 80, 81.

209. Kissell, *supra* note 126, at 266 (footnote omitted).

210. *Id.*

211. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934).

212. *Id.* at 267 (Cardozo, J. concurring).

213. Joseph B. Mackey, *Reclaiming the In-Service Conscientious Objection Program*:

disagree with state killing through the death penalty or police use of deadly force must continue, through taxes for example, to “support actions of the state’s agents through which innocents are left to die or are directly killed.”²¹⁴ Similarly, although it is within the causal chain and may in fact be necessary to the patient securing the procedure, referral for a procedure has not usually been considered adequately proximate to the act to justify conscientious objector protection. Legislatures have not considered translating for patients or transporting them to be so direct as to allow participants to “conscientiously object” to performing their jobs.²¹⁵ The law reasonably discourages the scrupulosity of the eggshell conscientious objector.

From a pragmatic perspective, restricting conscientious objection protection also ensures the efficacy of government. For example, when confronting taxpayers’ conscientious objection to participating in the Vietnam War through financing, the Ninth Circuit reasoned that “the ability of the government to function could be impaired or even destroyed” by such claims.²¹⁶ The importance of ensuring the exemptions do not swallow the rule similarly influenced the Supreme Court’s rejection of an employer’s challenge to participation in the social security system. The Court noted that “[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would ‘radically restrict the operating latitude of the legislature.’”²¹⁷ The religious and moral pluralism of the United States invites any number of potential objections. In the words of the Ninth Circuit, “There are few, if any, governmental activities to which some person or group might not object on religious grounds.”²¹⁸ By contrast, the focus of longstanding conscientious objection protections on killing suggests that such legislation “reflects the specific moral character of the act, rather than a more general deference to the subjective demands of conscience.”²¹⁹

This analysis suggests that more expansive medical conscience legislation cannot be justified as analogous to objection to war or abortion. It does not share the key characteristics of traditional conscience protections. Some legislation now concerns procedures far removed from death or permanent injury, like assisted reproduction.²²⁰ A few encompass individuals distant in time, locale, and association from the alleged bad act, such as a surgical aide instructed to clean

Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection, ARMY LAW., Aug. 2008, at 31, 46 (discussing alternative service program for conscientious objectors that requires “appropriate civilian work contributing to the national health, safety, or interest”).

214. Zohar, *supra* note 133, at 127.

215. *Adamson v. Superior Ambulance Serv.*, No. 1:04-CV-3247 (N.D. Ill. May 7, 2004); *see also* Steven Kreytak, *Bus Driver Says Religious Views Led to Firing: Man Refused to Take Clients to Planned Parenthood Clinic*, AUSTIN-AM. STATESMAN (Jul. 16, 2010, 8:49 PM), <http://www.statesman.com/news/local/bus-driver-says-religious-views-led-to-firing-807732.html>.

216. *Autenrieth v. Cullen*, 418 F.2d 586, 588–89 (9th Cir. 1969).

217. *United States v. Lee*, 455 U.S. 252, 259 (1982) (citations omitted) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

218. *Autenrieth*, 418 F.2d at 589.

219. Lupu & Tuttle, *supra* note 13, at 292.

220. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 20-214 (LexisNexis 2009).

instruments used in abortions.²²¹ Such individuals do not play the role of counselor and only become involved after the patient and physician have made a decision. Others, such as pharmacists, are not privy to relevant information. Their involvement is often mediate and remote, rather than immediate and proximate.²²² As bioethicist Ronald Lindsay notes, “The notion that such healthcare workers are responsible for the healthcare decisions of others is untenable”²²³ Finally, three states broadly allow medical providers to decline to participate in, refer for, or give information about *any healthcare service*—a far cry from what professional ethics support.²²⁴

Ultimately, conscience claims unjustified by accepted and limited moral foundations invite “conscience creep” in which all resistance to regulation becomes acceptable.²²⁵ They allow anarchy, where any individual can win exemption free of the weighty bases demanded for military, death penalty, and medical objections. In the words of the Supreme Court, they “would . . . make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”²²⁶ Such unjustified claims devalue the meaning of conscientious objection itself. They seek to overturn a system that acknowledges that although the law—like conscience—can be wrong, each citizen is obliged to obey it so long as “one sincerely and conscientiously thinks that his society, on balance, is a just one.”²²⁷

The principles here explain why proponents of conscience legislation have been less successful with this more expansive legislation than they have with abortion and end-of-life treatments. These principles allow us to more rigorously scrutinize future claims of conscience in medicine and, now, in response to same-sex marriage.

221. *Tramm v. Porter Mem’l Hosp.*, No. H 87-355, 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 21, 1989) (issuing summary judgment in favor of the aide); *see also* *Moncivaiz vs. Dekalb*, No. 03 C 50226, 2004 U.S. Dist. LEXIS 3997 (N.D. Ill. Mar. 12, 2004) (secretary unwilling to translate options that include abortion); Maria Gallagher, *Fired EMT Sues After Refusing to Transport Woman for Abortion*, LIFE NEWS.COM (May 11, 2004, 9:00 AM), <http://www.lifenews.com/nat503.html>.

222. Newton, *supra* note 136.

223. Lindsay, *supra* note 113, at 26; *see also* B.M. Dickens & R.J. Cook, *The Scope and Limits of Conscientious Objection*, 71 INT’L J. GYNECOLOGY & OBSTETRICS 71, 75 (2000) (administrators “are not instrumental or complicit in health care decisions”).

224. *See* 745 ILL. COMP. STAT. § 70/4 (West 2010); MISS. CODE ANN. § 41-107-5(3) (West 2009); WASH. REV. CODE ANN. § 48.43.065(2)(a) (West 2008). Recent amendments to federal law allow individuals to refuse “to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part” by the federal government based on “his religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(d) (2006).

225. Julie D. Cantor, *Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1485 (2009) (using the term “conscience creep” to describe the phenomenon in the healthcare field).

226. *Reynolds v. United States*, 98 U.S. 145, 167 (1879).

227. Kenneth R. Seeskin, *Genuine Appeals to Conscience*, 12 J. VALUE INQUIRY 296, 298 (1978).

D. Unjustified Conscientious Objection to Same-Sex Marriage

Claims of conscientious objection to same-sex marriage lie far afield from the distinct and compelling features of conscientious objection traditionally recognized by law. Objections to same-sex marriage do not implicate life and death. Although marriage objectors claim that their involvement renders them morally responsible for the act of same-sex marriage to a degree they cannot live with, their involvement is generally not necessary or proximate to the marriage. Providing goods, benefits, and services as one normally does lacks the moral complexity of medicine. Nor typically does objection occur in an environment of professional ethical constraints.

To spin out this thesis, this Section applies these principles along several categories of objectors from officiants to dressmakers, and marriage counselors to hospital administrators. MCP would cover them broadly, encompassing recognition of couples' married status for purposes of benefits or services and "facilitation" of the perpetuation of marriage through the delivery of services. Although this Section concentrates on individual objectors, reserving for the next Part the particular problems of institutional objections, it addresses the objection to recognizing or facilitating the perpetuation of same-sex marriage more generally.

First and most obviously, objectors to same-sex marriage cannot identify a harm equivalent to the military or medical contexts. At most, they might claim some diffuse harm to the institution of marriage.²²⁸ The fact that marriage, as opposed to death or bodily harm, is the ultimate consequence indicates that cooperation might be justified by the proportionate reason of continuing in one's profession or acting as a law-abiding citizen.²²⁹ Legal duties of nondiscrimination would further mitigate the cooperator's responsibility.²³⁰

Second, by and large, the same-sex marriage context lacks the moral complexity and connection to shared ethics that medical conscientious objection requires. The standard bearers of marriage objection—photographers, florists, and landlords—operate as they ordinarily do and do not base their objections in any shared ethics (nor indeed do their occupations have such commitments). For such objectors, it is virtually impossible to think of what might substitute for ethical duties like "do no harm" or "relieve suffering." To the extent that one could imagine duties, like "sell only quality products," they bear no relevance to marriage.

228. See, e.g., George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 599 (1999) ("[V]alidation of gay marriage would not cause direct, proximate harm, but it would damage society by degrading the way we see and relate to others."); see also Carlos A. Ball, *The Proper Role of Morality in State Policies on Sexual Orientation and Intimate Relationships*, 35 N.Y.U. REV. L. & SOC. CHANGE 81, 94 (2011) (observing that opponents "have not offered proof that the relationships of heterosexual married couples in those jurisdictions have been affected or changed by the recognition of same-sex marriages").

229. See Armand H. Matheny Antommara, *Conscientious Objection in Clinical Practice: Notice, Informed Consent, Referral, and Emergency Treatment*, 9 AVE MARIA L. REV. 81, 85 (2011).

230. See Antommara, *supra* note 128, at 206 (noting legal constraints influence evaluation of responsibility).

That said, because MCP applies to all individuals, some objectors could belong to professions characterized by moral complexity and shared ethics (including medicine). The requirement that objections originate in professional ethics themselves, however, seems absent from the marriage context. Whereas doctors cite their obligation to preserve life to refuse assisted suicide, those who decline to perform IVF for lesbian couples cannot anchor their refusal in professional ethics. Notwithstanding physicians' ability to choose their patients, such refusals of care cannot be framed as a requirement of professional ethics. Indeed, medical ethics prohibit such acts as impermissible discrimination.²³¹ Similarly, if a tax or family law attorney objected to serving gay married couples, he or she would be hard pressed to identify the ethical norm supporting the objection.

Third and most significantly, virtually all objections to marriage founder on the requirements of causal and proximate responsibility for the act of marriage. MCP covers objections that run from after-the-fact recognition to observation to performance. Laycock himself admits that many are "transactions well removed from the wedding and not involving explicit reference to the marriage."²³² Undoubtedly, some same-sex marriage objectors removed in time and space with little to no causal connection to the wedding will believe they bear moral responsibility for the marriage. Nonetheless, their objections do not satisfy the bases for conscientious objection.

Again, retailers providing goods and services for the solemnization and celebration of a wedding prove easy cases. Cake, music, and flowers undoubtedly enhance a wedding celebration, but they are not necessary either to it or to the marriage. Unlike the medical context, the involvement of objecting vendors cannot be said to have caused the marriage in any way. A couple could wed with or without floral arrangements. Although such retailers may be proximate in time and space (a photographer, for instance, will be at the ceremony), they lack any causative role. To the degree they are involved, their participation is analogous to that of a bystander.

Other retail services may be in the causal chain but quite remote. Consider the limo company that transports one of the fiancés to the wedding or the venue that rents the couple an event space. Both may be necessary to the occurrence of the marriage. Their participation, however, is attenuated. It does not suffice for the marriage to occur and is mediated by multiple intervening actors, including the officiant and the couple themselves. To return momentarily to the medical analogy, such cooperation is even less direct and more remote than referral for or information about an abortion—neither of which is typically excused as

231. *AMA Code of Medical Ethics Opinion 10.05 - Potential Patients*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1005.page> ("Physicians cannot refuse to care for patients based on race, gender, sexual orientation, or any other criteria that would constitute invidious discrimination . . ."). Like physicians, other professionals generally have the ability to choose clients and limit the issues they will handle and simultaneously bear duties of nondiscrimination through public accommodations laws or ethical codes, sometimes reinforced by licensing requirements.

232. Laycock, *supra* note 7, at 195 (proceeding to argue that the distance reduces the burden on the couple's ability to marry).

conscientious objection.²³³ These vendors' involvement in the marriage approaches that of store clerks in over-the-counter sales of emergency contraception, which is so attenuated as to "preclude[] justifiable claims that such participation amounts to immoral cooperation."²³⁴

After the wedding celebration, MCP extends to a number of situations that are remote from and without any causal link to the marriage. These include allowing religiously affiliated businesses to refuse to treat a marriage as valid, presumably for housing, benefits, visitation, etc., and small secular businesses and individuals to deny married couples spousal benefits and rental housing. If the wedding is analogized to the event of the contested medical procedure, the ongoing status of married is akin to treating a person differently for the entirety of their lives based on whether they had received an abortion, emergency contraception, or other contested service—claims not permitted under traditional conscientious objection law.

One could argue that benefits, recognition, and access to housing constitute incentives to marry. The connection, however, is both remote and unlikely to lead to any specific marriage. By the time these entities encounter the couple, the marriage is a *fait accompli*. Denying a couple equal treatment decades after their marriage will not undo it.

Nor can any endorsement of the specific marriage be implied, because the cooperator's act (baking cake or providing health insurance) is distinct from the act of the "wrongdoer" and is not itself wrong. Presumably, the objectors have good reason to believe that their normal engagement in their occupation is morally sound. The fact that their activity relates to a gay marriage does not change its moral character. For those retailers in the causal chain, the act of cooperation is not unlike the centuries-old example of the servant carrying a letter to his master's lover, which is "morally indifferent and not like the object of his master's illicit action, that is, adultery."²³⁵ Given the attenuated nature of involvement, with regard to benefits, for example, courts have reasoned that requiring recipients of city funds to extend the same health and fringe benefits to employees with domestic partners as to employees with spouses does not demand they endorse those relationships.²³⁶

Individual counselors and others who "directly facilitate the perpetuation of any marriage,"²³⁷ as MCP calls it, at first glance appear to be closer cases. Like medicine, counseling requires intimacy and subjects therapists to ethical constraints. Counselors also have a more robust claim to proximity and perhaps causation. The couple likely intends it to foster, if not cause, the survival of their relationship.

233. See *supra* notes 178–79.

234. Antommaria, *supra* note 128, at 210.

235. Keenan & Kopfensteiner, *supra* note 136, at 25.

236. *E.g.*, Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp. 2d 77, 95 (D. Me. 2004) ("Providing benefits to domestic partners does not represent an endorsement of non-family relationships any more than providing benefits to unmarried pregnant women represents an endorsement of single parenthood."); see also Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 89 (2004) (holding that insurance coverage "leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them").

237. Wilson et al. Md. Ltr., *supra* note 8, at 3.

Nonetheless, the causal link is anemic. The counselor does not perform the marriage nor is she necessary to it. Moreover, MCP presumes the couple will already be wed, such that the counseling will be remote in time and space from the marriage. The counselor's participation does not suffice either for the existence or perpetuation of the marriage. Finally, professional ethics require counselors and social workers to be nondirective.²³⁸ Unlike doctors, they need not act in a client's best interest or share decisions; "[t]heir dilemma may be eased in that, being nondirective, they have no complicity in what they believe to be patients' moral errors."²³⁹

Granting a license and officiating a marriage come closer to the direct and proximate involvement exempted by medical conscience clauses. Both are central to the marriage, and the officiant is as proximate as a cooperator could possibly be to the act. That these are the only objections that overlap with any principles underlying traditional conscientious objection regimes helps explain why legislators have been most receptive to these objections. They have often carved out exemptions for individuals who might have to perform marriages to which they object.²⁴⁰ Indeed, as Lupu and Tuttle indicate, if MCP proponents limited their advocacy to solemnization of a same-sex marriage, the abortion analogy might become stronger.²⁴¹ Note, however, that the objection still lacks the serious consequences that underpin the abortion context.

Marriage conscience protection radically departs from the limiting principles that serve as the foundation of conscientious objector protection in medicine and the military. It shares little in common with our nation's tradition of protecting conscientious objection. Instead, it seeks to excuse from compliance with the law objectors who play little to no causal role in the alleged wrongdoing, are often distant from it, and operate in a context where any harm to others is theoretical, rather than potentially fatal.

IV. MEDICINE AS A FLAWED MODEL FOR SAFEGUARDING CONSCIENCE

The analogy to conscientious objection in the medical model is inapt, and accommodation under antidiscrimination law traditionally rejects the broad and absolute exemptions sought here. Still, one might argue that religious freedom is a superior value to equality and that, even if objections do not rise to the level of conscientious objection, wide-ranging exemptions should be enacted to protect religious freedom.

Marriage conscience protection in the medical model, however, would not only fail to protect but actively undermine religious freedom. As this Part shows, MCP replicates two major flaws of the medical model to the detriment of conscience.²⁴² First, as Section A demonstrates, protecting institutional interest in the name of

238. Dickens & Cook, *supra* note 223, at 75.

239. *Id.*

240. *See supra* notes 117–21 and accompanying text.

241. Lupu & Tuttle, *supra* note 13, at 292–93.

242. As I have argued in previous work, the asymmetrical protection of conscience in medicine sets up new conflicts of conscience even as it resolves others. *See generally* Sepper, *supra* note 14.

corporate conscience is at odds with the exercise of individual conscience. Authorizing a business to demand that its employees adhere to a moral perspective quashes their ability to live out their own convictions. As Section B discusses, recognizing this inherent tension unearths a second, related problem: conscience protection in the medical model takes a one-sided view of religion and morality. People of conscience and institutions on the pro-marriage-equality side of the moral divide go unnoticed, even as marriage conscience protection imposes significant burdens on them.

A. Tension Between Individual Conscience and Corporate Interest

The most radical aspect of marriage conscience protection lies in its extension to claims of conscience by secular and religiously affiliated businesses engaged in commerce, allowing them to avoid their nondiscrimination obligations. In so doing, MCP relies on the assumption that artificial, legal entities have and experience something like the individual human's capacity for conscience. Yet, its proponents have failed to offer a robust theoretical defense of institutional conscience or to consider the implications of prioritizing institutional interest for individual conscience.

The concept of conscience for artificial entities is more difficult than MCP proponents acknowledge. Conscience is a distinctly human capacity generally referring to our "human knowledge of right and wrong, and thus encompasses our moral consciousness, process of moral decision making, and settled moral judgments or decisions."²⁴³ Corporations lack these distinctly human characteristics. Whereas an individual makes conscientious judgments that define "the central moral core of her character,"²⁴⁴ corporations are defined by a profit motive that is so detached from moral reasoning that discussion still proceeds as to whether businesses are *morally responsible* for their actions—let alone entitled to moral rights.²⁴⁵

Although, as I have argued elsewhere, discussing institutional interests in terms of "conscience" is not theoretically convincing,²⁴⁶ institutional interests may lie in

243. Darlene Fozard Weaver, *Conscience: Rightly Formed and Otherwise*, COMMONWEAL, Sept. 23, 2005, at 10, 11; see also Douglas Langston, *Medieval Theories of Conscience*, STAN. ENCYCLOPEDIA PHILOSOPHY (May 5, 2006), <http://plato.stanford.edu/archives/sum2006/entries/conscience-medieval/> (noting that the medieval view "regard[ed] human beings as capable of knowing in general what ought to be done and applying this knowledge through conscience to particular decisions about action").

244. Dan W. Brock, *Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated to Do What, and Why?*, 29 THEORETICAL MED. & BIOETHICS 187, 189 (2008); see also Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 935 (2005) (asserting that the most plausible rationale for respecting conscience is that it is central to personhood).

245. See, e.g., Rogene A. Buchholz & Sandra B. Rosenthal, *Integrating Ethics All the Way Through: The Issue of Moral Agency Reconsidered*, 66 J. BUS. ETHICS 233 (2006); Geoff Moore, *Corporate Moral Agency: Review and Implications*, 21 J. BUS. ETHICS 329 (1999) (both summarizing debates).

246. Sepper, *supra* note 14, at 1539–45.

the value of allowing individuals to associate with one another. When and how these interests should overcome individual conscience, however, is vigorously contested.²⁴⁷ One need not settle this debate to appreciate that the institutional interest, whatever it may be, inherently stands in tension with the individual exercise of conscience.

Take the religious organizations that the MCP proposal would cover. These include universities, hospitals, social services, daycare centers, and adoption agencies, many of which are large employers and service providers. For example, religious hospitals, which could deny couples visitation under MCP, account for approximately one in five hospital beds in the United States.²⁴⁸ Catholic hospitals alone employ nearly 800,000 people.²⁴⁹ MCP would free these powerful institutions to discriminate in employment, housing, admissions, and provision of goods and services to the public.

Because organizations are rarely monolithic, protecting institutional positions on moral issues means imposing them on individual humans (be they consumers or employees). Individuals often become associated with employers or vendors for reasons other than shared moral positions. One cannot assume they all share moral convictions and that institutional policy reflects each individual. In large organizations, in particular, individuals hold a plurality of beliefs.

The experience of Catholic Charities of Boston, which is often invoked by MCP proponents, provides a case in point.²⁵⁰ Over two decades, under a contract with the state foster system, Catholic Charities placed 720 children, thirteen of them with gay foster parents.²⁵¹ After a journalist revealed these adoptions had taken place, the board of Catholic Charities unanimously affirmed its commitment to continuing such adoptions.²⁵² The bishops subsequently overturned the decision, prompting seven board members to resign in protest.²⁵³ Among them was board chairman and

247. Compare Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009) (contending that religious entities, among other institutions, are First Amendment institutions whose own norms can substitute for government regulation), with Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013) (expressing skepticism about religious institutionalism and arguing that individual rights of conscience sufficiently protect First Amendment values).

248. LOIS UTTLEY & RONNIE PAWELKO, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY-SPONSORED HOSPITALS IN THE UNITED STATES (2002), http://www.mergerwatch.org/storage/pdf-files/bp_no_strings_hilights.pdf. Catholic healthcare alone accounts for 14.9%. CATHOLIC HEALTH ASS'N OF THE U.S., CATHOLIC HEALTH CARE IN THE UNITED STATES (2013), http://www.chausa.org/docs/default-source/general-files/mini_profile-pdf.

249. CATHOLIC HEALTH ASS'N OF THE U.S., THE CATHOLIC HEALTH ASSOCIATION ADVOCACY AGENDA 2011–2012 (112TH CONGRESS) (manuscript on file with the *Indiana Law Journal*).

250. See Maggie Gallagher, *Banned in Boston*, WKLY. STANDARD, May 15, 2006, at 20; Robin Wilson, Op-Ed., *Protection for All in Same-Sex Marriage*, L.A. TIMES, May 3, 2009, at A39.

251. Wen, *supra* note 39.

252. Patricia Wen, *Seven Quit Charity over Policy of Bishops*, BOS. GLOBE, Mar. 2, 2006, at A1.

253. *Id.*

devout Catholic, Peter Meade, who stated that his conscience prevented him from endorsing a morally wrong policy of discrimination.²⁵⁴

As this example shows, even when individuals within an organization concur on general principles, disagreement may emerge in concrete circumstances. For the board members, the central moral goal of Catholic Charities was helping children in need. To the extent disapproval of certain family structures was a commitment, it could cede to the primary aim.²⁵⁵ The bishops, however, disagreed, and—in this case—their views prevailed. In other religious organizations, the moral beliefs of administrators, board members, or employees might determine the course of the organization. In any case, allowing one group to represent the “conscience” of the organization suggests only some individuals’ moral convictions count.

Disjunction between individual convictions seems particularly likely in the religiously affiliated businesses and secular employers that are at the heart of the MCP proposal. Most commercial providers—religiously affiliated or not—will be unlikely to send a clear anti-marriage equality message to potential employees, associates, and customers. The central moral goal (and message) of many religious organizations will be delivering services, whether to the needy as charitable mission or to paying customers as revenue generation. It would be difficult to categorize the message of the nursing homes, clinics, food banks, shelters, universities, and commercial entities associated with religious groups as anti-same-sex marriage.

Of course, some organizations do unite employees and customers who share particular values. One of the most compelling arguments for protecting the institutional interest of medical facilities lies in the value some patients ascribe to religiously sensitive care. In the vulnerable state of illness, infirmity, or dying, some patients will want to be treated within facilities that reflect their religious or moral values.²⁵⁶ Likewise, in some subcategory of religious organizations, like-minded adherents might associate around an anti-marriage equality message. One could imagine small schools, summer camps, or marriage counseling centers devoted to religious doctrine that manifest these attributes. At best, however, the existence of such entities counsels toward accommodating organizations with a religious mission that primarily serve and employ coadherents in the model of antidiscrimination law.²⁵⁷

What about secular small businesses covered by marriage conscience protection? Smaller businesses may bring together employees who share convictions and seek to carry them out in the workplace. They may involve closer

254. Peter Meade, Op-Ed., *Conscience Wins Out for This Catholic*, BOS. HERALD, Mar. 2, 2006, at 31.

255. See Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays*, BOS. GLOBE, Oct. 22, 2005, at A1 (noting similar claims by the director of San Francisco’s Catholic Charities).

256. See SUSAN POLNIASZEK, EDITH G. WALSH & JOSHUA M. WIENER, U.S. DEP’T OF HEALTH & HUMAN SERV., *HOSPITALIZATIONS OF NURSING HOME RESIDENTS: BACKGROUND AND OPTIONS* 8 (2011).

257. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 395 (1987) (arguing for allowing a religious institution to “utilize its membership criteria as employment criteria”).

(and sometimes family) relationships between employer and employees. For a few businesses, a generalized position on moral issues may be clear to potential employees and customers. A bookstore that only sells evangelical literature is more likely to attract evangelicals as employees and consumers.

Nonetheless, small secular businesses also involve people—consumers, employees, or owners—who could be expected to disagree over moral issues. Few attract employees and customers with their moral message. As a general rule, commercial businesses open to the public to deliver flowers or bake wedding cakes select employees based on their skills and experience, not their religious training. Customers typically choose to contract for these goods based on quality, not similarity between the owner’s moral code and their own.

As is commonly recognized in antidiscrimination doctrine, the profit motive makes any moral mission secondary at best.²⁵⁸ Indeed, when the basic business model is, for example, a bakery, a message of rejection of “same-sex marriage” may be lost to the consumer altogether. This is especially likely here because, according to MCP proponents, the business would be required to serve gays without discrimination, unless they were engaged or married.²⁵⁹

Ultimately, protecting institutional interest, whether of large religious organizations or small secular businesses, risks undermining the consciences of employees and consumers. It relies on the shaky supposition that corporations have consciences to set up a regime that inherently conflicts with the exercise of individual conscience. The asserted interest in religious freedom works to suppress the religious freedom of individuals within these institutions and, as we shall see, of organizations committed to same-sex marriage as a moral or religious matter.

B. Undermining Conscience on the Pro–Marriage Equality Side

The MCP proposal reproduces a second flaw of medical conscience legislation—its failure to grant that conscience exists on both sides of the moral divide. Medical conscience legislation safeguards a single moral position in the abortion (or end-of-life) debates. How providers will be treated depends entirely on the content of their consciences, not on the sincerity or depth of their commitment to the conscientious position. Yet, conscience equally may compel providers to deliver a controversial treatment to a patient in need.²⁶⁰

Nor does the medical legislation acknowledge the interests of institutions committed to performing controversial procedures (like Planned Parenthood). They must accommodate individuals who violate institutional norms by refusing to

258. See George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 Ky. L.J. 553, 572 (2007) (noting that legislatures and courts refuse for-profit firms religious exemptions from antidiscrimination laws).

259. See Wilson et al. Md. Ltr., *supra* note 8, at 5 (explaining that the authors’ proposed legislation would provide protection to businesses that refused to provide services to same-sex couples only when the refusal “related to a marriage, solemnizing a marriage, or being forced to treat a marriage as valid”); see also Stern, *supra* note 7, at 37 (providing the example that the Hilton family, even if they morally objected to same-sex marriage, would not be allowed to refuse a hotel room to a same-sex couple).

260. See Sepper, *supra* note 14, at 1532–39.

perform such procedures. By contrast, when an institution refuses to deliver legal, necessary care, the law does recognize a concept of “institutional conscience.”²⁶¹ These asymmetries render the legislation both ineffective and incoherent; it sporadically protects conscience and simultaneously sets up new conflicts of conscience.

Marriage conscience protection would replicate these asymmetries. In every workplace that accepts same-sex marriage as moral, individuals who reject it may defy institutional commitments. Religious organizations and businesses of all sizes that support gay rights would be required to accommodate dissenting individuals. By contrast, at least in small and religiously affiliated businesses, individuals who believe same-sex marriage to be morally permissible or required would have to comply with employers’ policies of refusal. And entities that reject gay rights would be free to hire and fire employees who refuse to follow their policies.

Compare two cases sometimes criticized by exemption proponents as typical of the problems faced by religious objectors (although both concern employment discrimination, rather than marriage).²⁶² In the first, *Peterson v. Hewlett-Packard Co.*,²⁶³ an employee of Hewlett-Packard (HP) was dismissed for repeatedly violating the company’s harassment policy. After HP displayed posters—one of which featured a gay employee—for its diversity campaign, Peterson posted scriptural passages calling for death for a man who lies with mankind, due to what he described as a religious duty “to expose evil when confronted with sin.”²⁶⁴ The Court of Appeals for the Ninth Circuit held that HP was required to accommodate Peterson, but he had repeatedly rebuffed its attempts to do so. The court rejected the view that Peterson’s proposals, which would either allow him to continue to harass his fellow employees or exclude sexual orientation from the diversity program, were reasonable.²⁶⁵ The logic of marriage conscience protection (putting aside the size limitation in the current version of the proposal) would demand the opposite result, resolving the employer-employee conflict in Peterson’s favor.

The second case, *State ex rel. McClure v. Sports & Health Club, Inc.*,²⁶⁶ flips the roles of employer-employee. A chain of for-profit sports clubs argued that the owners’ religious beliefs required discriminatory employment practices. It cited biblical prohibitions on working with “unbelievers” as support for restricting managerial positions to Christians and refusing to hire devout non-Christians.²⁶⁷ The Minnesota Supreme Court rejected the club’s defense. This time, the approach of marriage conscience protection would suggest that the business, unlike HP, should have been permitted to maintain its identity and impose institutional norms on employees and applicants.²⁶⁸

261. *See id.* at 1547–53 (detailing the asymmetries in legislative treatment of conscience).

262. *See, e.g.,* Stern, *supra* note 7, at 25, 39, 51 (identifying these cases as among those “in which the law requires an institution or a person to act in ways that are reasonably understood to relate to the same-sex marriage itself”).

263. 358 F.3d 599 (9th Cir. 2004).

264. *Id.* at 600–02.

265. *Id.* at 607–08.

266. 370 N.W.2d 844 (Minn. 1985) (en banc).

267. *Id.* at 846–47.

268. *See Severino, supra* note 7, at 960 (criticizing outcome in *McClure*).

As these cases show, the approach taken by MCP advocates would not consistently protect either individual conscience or institutional interest. The consciences of individuals whose moral or religious beliefs support same-sex marriage fall by the wayside. Under MCP, refusing businesses could demand that their employees, irrespective of their conscientious beliefs, refuse services, goods, or recognition of status to same-sex couples. If, however, allowing individuals to follow their consciences in commercial activity is an interest worth preserving, it is unclear why individual conscience should not be prioritized uniformly. Shouldn't employees who support same-sex marriage based on their moral convictions be entitled to accommodation by objecting employers?

Likewise, under MCP, the interests of a pro-gay rights company in setting policy or bringing together like-minded individuals would be rendered null. Despite their commitments, employers—including religiously affiliated organizations—would be prevented from discriminating against objectors to same-sex marriage and could not refuse to serve them, provide them spousal benefits, or acknowledge their marriages as valid. The individual objector could interfere with the institutional position—or the company's very ability to comply with the law. This is in sharp contrast to the deference to "institutional conscience" that MCP grants similarly situated objecting institutions.

The MCP proposal thus would generate new conflicts between commercial interest and human conscience, even as it resolves others. For example, an employer's instructions to deny services to gay couples might cause a crisis of conscience for an employee deeply committed to equality. This moral precept could be founded in religious conviction, even the biblical injunction to "love your neighbor as yourself." Turning the couple away could be expected to result in a guilty conscience. Violating the employer's policy, on the other hand, might cause the employee to lose her job.

As with abortion, the asymmetries flow from a cramped vision of conscience. The very framing of refusal as "conscientious objection" turns a blind eye to the range of conscientious positions. It seeks to establish opposition to same-sex marriage as *the* religious or moral position.

With regard to same-sex marriage, moral and religious beliefs in the United States are far more varied—and increasingly more supportive of such marriages—than the MCP proposal acknowledges. The very presentation of the issue of same-sex marriage as "Gay Rights versus Religious Freedom," as Flynn argues, "ignores that many religious faiths support same-sex marriage as a matter of theology [and] that many gay people are members of religious faiths."²⁶⁹ Consider, for example, the ministers who faced criminal charges for conducting same-sex marriages or the public officials who granted marriage licenses because they determined it to be right.²⁷⁰ As law and society have come to recognize the rights of gays, religious doctrine has followed, with many religious groups growing more

269. Flynn, *supra* note 13, at 237 (internal quotation marks omitted).

270. See Thomas Crampton, *Two Ministers Are Charged in Gay Nuptials*, N.Y. TIMES, Mar. 16, 2004, at B1; see also Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1793 (2005) (explaining that plaintiffs in the first same-sex marriage case held deep religious beliefs and that Catholic priest they consulted opined that Christ would be open to their union).

accepting of gays.²⁷¹ Given a plurality of religious beliefs, protecting conscience may not support exemptions in the way MCP proponents assume.

V. POLICY LESSONS FROM MEDICINE

MCP proponents claim that the medical model offers an effective way to reduce conflict in the marketplace and public life. Authorizing conscientious objections, they predict, will have little effect on gay couples. Few objectors will take advantage of marriage conscience protection and those who do will eventually leave the market.

This Part argues that the experience of conscience legislation in medicine suggests these salutary effects may not be forthcoming. As Sections A and B show, one could equally anticipate that MCP will prolong strife and impose hefty burdens on same-sex couples.

A. Conflict Reduction Rationale

A benefit of MCP, proponents claim, is its ability to defuse conflict. Laycock, for instance, forewarns that “[r]efusing exemptions to such religious dissenters will politically empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive.”²⁷² He predicts, “[p]ut religious exemptions in the bill, and at a stroke, you take away one of the opponents’ strongest arguments.”²⁷³ What follows is the good-for-gays argument that MCP will not only reduce civil strife, but also lead to more rapid acceptance of gay families.²⁷⁴ In short order, MCP advocates say, exemptions will become unnecessary.²⁷⁵

Two objections come to mind. First and most obviously, any increased acceptance of gay families would result not from religious exemptions, but from marriage equality itself. In Massachusetts and Iowa, public opposition dropped quickly following court decisions in favor of marriage equality.²⁷⁶ Contrary to predictions, a flood of objections did not result nor did the debate grow more heated.²⁷⁷

271. Eskridge, *supra* note 48, at 710–16 (describing shifts in religious teachings in light of legal acceptance of gays).

272. Laycock Conn. Ltr., *supra* note 8, at 2.

273. *Id.*

274. *See id.* (“It is obviously better for the traditional religious believers; on a few moments’ reflection, it is also better for the same-sex couples.”).

275. *See* Stern, *supra* note 7, at 308 (“[T]here are probably far fewer people around who would invoke such exemptions than is generally thought. And, given the poll data, there will be even fewer as older people move off the commercial scene.” (footnote omitted)).

276. Press Release, Public Policy Polling, Gay Marriage Has 2:1 Support in MA (Sept. 23, 2011), available at http://www.publicpolicypolling.com/pdf/2011/PPP_Release_MA_0923.pdf; Press Release, Public Policy Polling, Iowans Up on Gay Marriage and Branstad (Aug. 26, 2011), available at http://www.publicpolicypolling.com/pdf/PPP_Release_IA_0826.pdf.

277. Patrick J. Egan & Nathaniel Persily, *Court Decisions and Trends in Support for Same-Sex Marriage*, POLLING REP., Aug. 17, 2009, at 1, 6.

Second, the medical model suggests that exemptions, in and of themselves, do not reduce conflict. The abortion debate cannot be said to have dissipated. Nor, indeed, has conscience legislation resolved clashes between patients, providers, and institutions. Today, one in five doctors in a religiously affiliated health facility reports experiencing conflicts between religious restrictions and their duties to their patients.²⁷⁸ As one might expect, obstetrician-gynecologists experience even higher rates of conflict.²⁷⁹ Patients and providers frequently organize against hospital mergers that threaten access to reproductive and end-of-life care.²⁸⁰ In several states, medical associations also have lobbied against wide-ranging conscience bills.²⁸¹ In others, challenges have been mounted against conscience clauses that impede healthcare.²⁸²

Over time, conscience legislation may have simply shifted litigation. Today, it is refusing healthcare providers and auxiliary staff, like paramedics, who sue their employers.²⁸³ The volume of litigation, as with willing

278. Debra B. Stulberg, Ryan E. Lawrence, Jason Shattuck & Farr A. Curlin, *Religious Hospitals and Primary Care Physicians: Conflicts over Policies for Patient Care*, 25 J. GEN. INTERNAL MED. 725, 727 (2010); see also Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 136 (2003) (reporting that an Illinois Catholic hospital asked a doctor who performed abortions elsewhere to resign as chief of the Department of Obstetrics-Gynecology).

279. Thirty-seven percent of obstetrician-gynecologists who practice in religiously affiliated institutions (and over half of those in Catholic institutions) reported conflicts. Debra B. Stulberg, Annie M. Dude, Irma Dahlquist & Farr A. Curlin, *Obstetrician-Gynecologists, Religious Institutions, and Conflicts Regarding Patient Care Policies*, 207 AM. J. OBSTETRICS & GYNECOLOGY 73.e1, 73.e4 (2012).

280. See MERGER WATCH, PROPOSED HOSPITAL MERGERS BLOCKED BY COMMUNITY ACTION (2005), available at http://www.mergerwatch.org/storage/pdf-files/ch_proposal_blocked.pdf (listing blocked mergers across the country); Karen Heller, *Anger at Abington Hospital*, PHILA. INQUIRER, July 8, 2012, at A02 (describing staff and patient backlash to a merger that would eliminate abortion services).

281. Martha Stoddard, *Conscience Bill Running Out of Time: Protections for Health Providers Need Study, Ashford Says*, OMAHA WORLD-HERALD, Mar. 9, 2012, at 01B (detailing professional societies' opposition to Nebraska conscience bill); Andis Robeznieks, *Battle of the Conscience Clause: When Practitioners Say No*, AM. MED. NEWS (Apr. 11, 2005), <http://www.ama-assn.org/amednews/2005/04/11/prsa0411.htm> (noting that Michigan and Wisconsin medical societies opposed conscience bills).

282. *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 970-72 (Alaska 1997); *Doe v. Bridgeton Hosp. Ass'n*, 366 A.2d 641, 642-43 (N.J. 1976). Both cases held that the state conscience legislation did not extend to secular hospitals. See also *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006) (challenging federal conscience clause that prohibits federal grant recipients from discriminating against individuals or entities that refuse to provide abortions); *California v. United States*, No. C 05-00328 JSW, 2008 WL 744840 (N.D. Cal. Mar. 18, 2008) (challenging federal conscience clause as potentially conflicting with hospital legal duties to provide or refer for life- or health-preserving abortions).

283. See, e.g., *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010); *Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 05-2137, 2006 WL 1582454 (C.D. Ill. June 6, 2006); *Kenny v. Ambulatory Ctr. of Miami*, 400 So. 2d 1262 (Fla. Dist. Ct. App. 1981); *Swanson v.*

providers,²⁸⁴ remains small, likely because healthcare facilities tend to resolve conflicts through internal processes.²⁸⁵

Granting a conscience exemption may not only shift conflicts, but also intensify future claims to exemptions.²⁸⁶ In the medical arena, the past fifteen years have seen ever-more vociferous demands from objectors. Pharmacist conscience legislation, once unheard of, has spread.²⁸⁷ In some states, payers, such as employers and insurance companies, have successfully attained the ability to impose moral beliefs on insureds.²⁸⁸ Most recently, the Affordable Care Act's requirement that insurance plans cover contraception has provoked claims of conscientious objection from businesses ranging from Catholic-affiliated hospitals to for-profit construction companies.²⁸⁹

One might reasonably suggest that abortion is and will remain more fraught than same-sex marriage. Certainly, the rapid rise in public support for marriage equality seems to indicate so. That said, in the 1960s and 1970s, public opinion also steadily increased to favor legal abortion.²⁹⁰ As is relevant to marriage equality, increasing

St. John's Lutheran Hosp., 597 P.2d 702 (Mont. 1979); *Larson v. Albany Med. Ctr.*, 676 N.Y.S.2d 293 (N.Y. App. Div. 1998); see also Thaddeus Mason Pope, *Legal Briefing: Conscience Clauses and Conscientious Refusal*, 21 J. CLINICAL ETHICS 163, 166 (2010) (reporting a 2005 Louisiana case denying summary judgment to a hospital that fired a nurse who refused to administer emergency contraception); Seth Augenstein, *Nurses' Abortion Suit Asks: At What Point Is Assisting Facilitating? RNs at UMDNJ Objected to Taking Part in Procedure*, STAR-LEDGER, Nov. 15, 2011, at 025; Gallagher, *supra* note 221.

284. See, e.g., *Doe v. Ceci*, 517 F.2d 1203 (7th Cir. 1975) (requiring county hospitals to make facilities available to doctors to perform abortions); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 310–12 (9th Cir. 1974) (documenting several actions to compel denominational hospitals to perform tubal ligations); *McCabe v. Nassau Cnty. Med. Ctr.*, 453 F.2d 698, 702 n.7 (2d Cir. 1971) (noting three similar lawsuits in New York); *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948, 949 (D. Mont. 1973) (regarding tubal ligation).

285. See *Shelton v. Univ. of Med. & Dentistry*, 223 F.3d 220, 223 (3d Cir. 2000) (noting hospital repeatedly offered other positions to a labor and delivery nurse); *Grant v. Fairview Hosp. & Healthcare Servs.*, No. Civ. 02-4232JNEJGL, 2004 WL 326694, at *1 (D. Minn. Feb. 18, 2004) (discussing fact that hospital proposed allowing an ultrasound technician to opt out of examining women contemplating abortion and to leave the room if any fetal anomalies became apparent, but he rejected any accommodation that prevented him from lecturing patients on religion).

286. See Strasser, *supra* note 13, at 29 (indicating that expanding conscience legislation to procedures beyond abortion suggests “exemptions for those not wishing to promote same-sex marriage might well expand”).

287. See generally Catherine Grealis, Note, *Religion in the Pharmacy: A Balanced Approach to Pharmacists' Right to Refuse to Provide Plan B*, 97 GEO. L.J. 1715 (2009) (describing history of adoption of pharmacists' conscience legislation).

288. See *State Policies in Brief: Insurance Coverage of Contraceptives*, GUTTMACHER INSTITUTE (Nov. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

289. *Catholic Diocese of Biloxi, Inc. v. Sebelius*, No. 1:12CV158-HSO-RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012) (dismissing suit filed by Catholic hospital); *Korte v. U.S. Dep't Health & Human Servs.*, 912 F. Supp. 2d 735 (S.D. Ill. 2012) (denying for-profit construction company's conscience claim). In a forthcoming paper, I refer to this development as “Free Exercise Lochnerism,” which revives business attacks on the regulatory state through religious liberty arguments.

290. Judith Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 SCIENCE

popular support for abortion reform and legislative initiatives were themselves the catalyst for controversy.²⁹¹

I do not intend to suggest that marriage equality will follow an identical path. Even the most favorable view of abortion sees it as a neutral medical procedure. Marriage, by contrast, is cause for celebration. Nonetheless, the experience of medical conscience legislation should give gay rights advocates and their allies in state legislatures pause, especially given the recent movement to allow conscientious objection to contraceptive coverage, despite overwhelming public support for and use of contraception.

While it is possible that some states will legalize same-sex marriage more quickly if wide-ranging exemptions are included, such exemptions may also entrench opposition and lead to a permanent state of inequality between opposite- and same-sex couples. The experience of medical conscience legislation edifies. The pre-*Roe* era acknowledged the diversity of religious views on the moral status of the fetus and the moral agency of women seeking abortion.²⁹² Religious support of abortion rights was highly visible, with Protestant clergy tending to back reform and even help women access abortions.²⁹³ Conscience and religion were accepted bases for a pro-choice position. Today, by contrast, conscience and religion are presumed to mean antichoice. The archetypal doctor driven by conscience to refuse his patient's requests is cemented in the public mind. Thus, members of Congress suggest allowing hospitals to let pregnant women die in the name of conscience, without any countervailing conscience claim from women or their doctors.²⁹⁴ Employers challenge requirements that insurance plans include contraception on grounds of conscience.²⁹⁵ Lost is the recognition that religious and moral beliefs exist on both sides.

540 (1971); Judith Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 *POPULATION & DEV. R.* 45, 49 (1977).

291. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028, 2077 (2011).

292. In a challenge to the Hyde Amendment's prohibition on Medicaid funding for abortion, for example, the trial court held that a woman's decision to terminate her pregnancy is a conscientious one and may be "exercised in conformity with religious belief and teaching protected by the First Amendment." *McRae v. Califano*, 491 F. Supp. 630, 742 (E.D.N.Y. 1980); Rhonda Copelon & Sylvia A. Law, *Nearly Allied to Her Right "to Be"—Medicaid Funding for Abortion: The Story of Harris v. McRae*, in *WOMEN AND THE LAW STORIES* 207, 229–30 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (noting testimony from Protestant, Conservative and Reform Judaism, and Baptist clergy in support of legal abortion, and opposition from Southern Baptist Convention, Catholic Church, and Orthodox Judaism).

293. Greenhouse & Siegel, *supra* note 291, at 2048.

294. See Respect for Rights of Conscience Act of 2011, S. 1467, 112th Cong. (2011) ("Nothing in this title (or any amendment made by this title) [which includes the Emergency Medical Treatment and Labor Act that requires hospitals to stabilize emergency conditions] shall be construed to require an individual or institutional health care provider, or authorize a health plan to require a provider, to provide, participate in, or refer for a specific item or service contrary to the provider's religious beliefs or moral convictions.").

295. See *Catholic Diocese of Biloxi, Inc. v. Sebelius*, No. 1:12CV158-HSO-RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012); *Korte v. U.S. Dep't Health & Human Servs.*, 912 F. Supp. 2d 735 (S.D. Ill. 2012).

Similarly, one should question assumptions that opposition to same-sex marriage will be short-lived and exemptions eventually repealed. Exemptions may survive even if the public no longer supports them.²⁹⁶ This may be particularly likely with regard to gay rights; empirical studies demonstrate that, across states, incongruence between public support and policy works to their detriment.²⁹⁷ For example, despite majority support in every state (except Utah) for preventing sexual orientation discrimination in employment and housing,²⁹⁸ only twenty-one states have enacted such statutes.²⁹⁹ In part, this incongruence is attributable to “[p]owerful conservative religious interest groups [that] strongly affect gay rights policy at the expense of majoritarian congruence.”³⁰⁰ There is reason to think that these interest groups will not be satisfied with even ample “marriage conscience protection” and will, in the end, seek to shape the law to their vision of society.³⁰¹

B. Burden on Same-Sex Couples

Despite anticipating widespread objections in the absence of MCP,³⁰² scholars also predict that its existence will impose little burden on same-sex couples. They make two intertwined claims: that few businesses or individuals will take advantage of marriage conscience protection,³⁰³ and that burdens on same-sex couples will not be onerous.³⁰⁴

296. Such incongruence may exist with regard to institutional restrictions on medical care. Patricia Miller, *Religion, Reproductive Health and Access to Services*, CONSCIENCE, Summer 2000, at 2, 7 (reporting that eighty-five percent of women surveyed said that Catholic hospitals that receive government funds should permit doctors to provide any legal, medically sound service).

297. Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 383 (2009).

298. *Id.* at 373 tbl.1.

299. *Non-discrimination Laws: State by State Information*, ACLU (Sept. 21, 2011), <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>; *Statewide Employment Laws and Policies*, HUM. RTS. CAMPAIGN (July 22, 2013), http://www.hrc.org/files/assets/resources/employment_laws_072013.pdf; *Statewide Housing Laws and Policies*, HUM. RTS. CAMPAIGN (June 19, 2013), http://www.hrc.org/files/assets/resources/housing_laws_062013.pdf.

300. Lax & Phillips, *supra* note 297, at 383.

301. See Greenhouse & Siegel, *supra* note 291, at 2048–49 (noting that, regarding the abortion, the Catholic Church “was prepared to enter the political arena to ensure that the law continued to reflect Church teachings”).

302. Berg et al. N.H. Ltr., *supra* note 8, at 4 (“[T]he volume of new litigation will be immense. And religious liberty advocates can also be expected to sue state and local governments for implementing, or even considering implementing [marriage equality].”).

303. Berg, *supra* note 7, at 212 (opining that conflicts will be rare); Laycock Conn. Ltr., *supra* note 8, at 2 (“The number of people who assert their right to conscientious objection will be small in the beginning, and it will gradually decline to insignificance . . .”).

304. Wilson & Singer, *supra* note 95, at 13 (predicting that with regard to retailers “the hardships are likely to be fewer” because there are many options and “the service that is being denied . . . is not nearly as important as denying a person’s access to the legal status of marriage”); Laycock Conn. Ltr., *supra* note 8, at 2 (“Exemptions for religious conscientious objectors will not burden same-sex couples.”).

The medical model suggests these empirical judgments should be viewed with skepticism. Medical conscience legislation has contributed to a legal landscape of decreased access to abortion. It encourages refusal from providers who hold no strong moral or religious objections to abortion, because it does not require them to establish the sincerity of their beliefs or assume alternate burdens.³⁰⁵ Indeed, eighty-six percent of OB/GYNs never provide abortion,³⁰⁶ although only seven percent of them are opposed to it in all instances.³⁰⁷ Allowing institutional refusal also can generate refusal disproportionate to individual physicians' moral judgments. For example, at least sixteen percent of hospitals prohibit tubal ligations, although few physicians object to performing them.³⁰⁸ The burden on patients can be weighty.³⁰⁹

In the same-sex marriage context, predicting how frequent objections will be is no easy task. One should hesitate, however, to draw conclusions from the number we see now. These may be low precisely because discrimination based on sexual orientation, whether religion based or not, remains legal in approximately half the states.³¹⁰ Today's legal refusal of services, benefits, or housing could be tomorrow's discrimination lawsuit—or, under MCP, acceptable objection. If in fact it is the act of marriage, rather than the status of the person, that offends certain religious people, refusals actually should increase as same-sex couples gain access to marriage.

As with controversial medical procedures, MCP could be expected to permit objections that are not strongly held or sincere. Lynn Wardle identifies one example that seems undermotivated: of twenty-four San Diego county clerks who claimed religious objections to same-sex marriage, eighteen withdrew their objections rather than be reassigned from issuing marriage licenses.³¹¹ Under MCP, all twenty-four would be accommodated.

305. Meyers & Woods, *supra* note 196, at 118 (indicating that medical conscience legislation leads to opportunistic refusals to provide abortion).

306. Debra B. Stulberg, Annie M. Dude, Irma Dahlquist & Farr A. Curlin, *Abortion Provision Among Practicing Obstetrician-Gynecologists*, 118 OBSTETRICS & GYNECOLOGY 609, 609 (2011).

307. See Lisa H. Harris, Alexandra Cooper, Kenneth A. Rasinski, Farr A. Curlin & Anne Drapkin Lyerly, *Obstetrician-Gynecologists' Objections to and Willingness to Help Patients Obtain an Abortion*, 118 OBSTETRICS & GYNECOLOGY 905, 905 (2011).

308. R.E. Lawrence, K.A. Rasinski, J.D. Yoon & F.A. Curlin, *Factors Influencing Physicians' Advice About Female Sterilization in USA: A National Survey*, 26 HUM. REPROD. 106, 109 (2011) (finding that virtually all ob-gyns provide tubal ligations and ninety-one percent would perform even where they disagreed with the decision to undergo sterilization).

309. See Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States, 2001*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, 18 (2003) (reporting that many hospitals only allow abortions in extraordinary cases of fetal anomaly or severe maternal health risks); Richard Florida, *The Geography of Abortion*, ATLANTIC CITIES (Jun. 11, 2012), <http://www.theatlanticcities.com/politics/2012/06/geography-abortion/1711/> (noting that eighty-seven percent of counties lack an abortion provider).

310. See sources cited *supra* note 299.

311. Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, 12 J.L. & FAM. STUD. 315, 339–40 (2010).

Even assuming few individuals would object, the enactment of institutional exemptions inevitably would burden same-sex couples. Consider, for example, that in Washington, which recently legalized marriage equality, more than thirty percent of patient admissions are to Catholic hospitals.³¹² Many religiously affiliated organizations are formidable economic actors. There are 900 religiously affiliated colleges and universities, with 1.7 million students.³¹³ Under MCP, they could deny recognition of couples' marital status for housing, benefits, emergency contacts, and so forth.

Denial of services by small businesses might also have widespread impact. Exemption proponents predict that the market will solve any access problems. But many gay couples live in areas with small markets; according to the 2000 census, same-sex partner households exist in 99.3% of all U.S. counties.³¹⁴ In communities where there is large-scale opposition, these predictions rely on brave store owners willing to take considerable personal and financial risk. Laycock suggests that stores self-identify as willing or refusing by posting signs in the windows; then "same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago."³¹⁵ But this notion discounts the collective action problem that public accommodations laws solve. MCP, moreover, dampens the ability of supportive businesses and religious organizations to make a clear statement in favor of marriage equality, precisely because they must accommodate employees unwilling to serve same-sex couples.

Of course, any evaluation of the burden of conscience legislation on same-sex couples depends on how one defines "burden." MCP proponents describe denial of access to services and to marriage itself as "mere inconvenience," whereas "[r]equiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree."³¹⁶ They argue that this weightier burden should only be imposed on a small business where there would be a "substantial hardship" on same-sex couples (MCP would never impose this burden on religiously affiliated objecting businesses, irrespective of the consequences of the denial).³¹⁷

To be sure, when the burden is presented as, for example, having to buy a wedding dress at one store instead of another, it seems insubstantial. But this perspective understates the harms. Failure to issue a marriage license or perform a marriage could delay or deny a couple's union. Even with regard to mundane transactions, not all goods and services are fungible in terms of quality and price,

312. CATHOLIC HEALTH ASS'N OF THE U.S., *supra* note 248.

313. *Profile of Post-Secondary Education*, COUNCIL CHRISTIAN COLLEGES & U., http://www.cccu.org/filefolder/Profile_US_Post-Secondary_Education-updated2010.pdf.

314. James G. Pawelski, Ellen C. Perrin, Jane M. Foy, Carole E. Allen, James E. Crawford, Mark Del Monte, Miriam Kaufman, Jonathan D. Klein, Karen Smith, Sarah Springer, J. Lane Tanner & Dennis L. Vickers, *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 349, 351 (2006).

315. Laycock, *supra* note 7, at 198, 200.

316. *Id.* at 198.

317. Wilson et al. N.Y. Ltr., *supra* note 8, at 14.

despite what MCP advocates seem to assume.³¹⁸ Reserving a room at a bed and breakfast or ordering tablecloths for an anniversary party, for example, could cost same-sex couples additional time, money, or both. With denial of spousal benefits permitted under MCP, substantial out-of-pocket expenses accrue.³¹⁹ Gay couples denied benefits would spend an additional \$28,595 to \$211,993 in health costs and lose up to \$32,253 in pension income.³²⁰

Even when denied non-urgent commercial transactions, couples would suffer significant dignitary and psychological damage.³²¹ Being discriminated against is a serious harm in its own right irrespective of the importance of the good sought in commerce. For this reason, no serious argument exists that the Civil Rights Act should not apply to theaters and restaurants, because movies and dinners out are not urgent or essential. Same-sex couples would face uncertainty as to where they can seek goods or services, feel humiliated by scrutiny and judgment that are not normally part of a commercial transaction, and lose trust in public and private institutions. A lesser burden would fall on opposite-sex couples, who would also endure inquiries into their private relationships. Finally, as NeJaime argues, MCP fails to appreciate “the profound connection between same-sex relationships and lesbian and gay identity” and thus does not “address how it burdens status, or the enactment of sexual orientation identity.”³²²

The proposed marriage conscience protection instead works to send gay identity and relationships back into the closet. A lesbian could purchase a wedding dress from an objecting shop by pretending to marry a man, or to buy it for a nonwedding party. A gay man could visit his husband in the hospital by identifying as a relative. A couple could live together as “roommates.”

One reasonably could object that burdens would still be higher in the medical context because doctors are gatekeepers to healthcare in a way that the average business is not. Charo observes that, because licensing creates a monopoly on

318. Brownstein, *supra* note 59, at 418–419.

319. *Id.* at 418.

320. Tara Siegel Bernard & Rob Lieber, *The Costs of Being a Gay Couple Run Higher*, N.Y. TIMES, Oct. 3, 2009, at A1.

321. *See, e.g.*, Gilbert Herdt & Robert Kertzner, *I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 SEXUALITY RES. & SOC. POL'Y 33, 43–44 (2006) (concluding legal obstacles to marriage equality prevent same-sex couples from enjoying the physical and mental health benefits of marriage); Richard G. Wight, Allen J. LeBlanc & M.V. Lee Badgett, *Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey*, 103 AM. J. PUB. HEALTH 339, 339 (2013) (“Being in a legally recognized same-sex relationship, marriage in particular, appeared to diminish mental health differentials between heterosexuals and lesbian, gay, and bisexual persons.”); *see also* Brief of the Am. Psychological Ass’n, the Am. Med. Ass’n, the Am. Acad. of Pediatrics, the Cal. Med. Ass’n, the Am. Psychiatric Ass’n, the Am. Ass’n for Marriage & Family Therapy, the Nat’l Ass’n of Soc. Workers & Its Cal. Chapter & the Cal. Psychological Ass’n as Amici Curiae on the Merits in Support of Affirmance at 36, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (“By devaluing and delegitimizing the relationships that constitute the very core of a homosexual orientation, Proposition 8 compounds and perpetuates the stigma historically attached to homosexuality.”).

322. NeJaime, *supra* note 13, at 1228–29.

medical services, “[t]he situation is not one in which a free market of products, suppliers and buyers seek one another out without constraint.”³²³ Instead, when doctors and pharmacists refuse to serve them, “patients have nowhere to turn,”³²⁴ a situation that is exacerbated in emergencies. Given the lack of barriers and emergency situations, one could expect the market to work with regard to ordinary goods and services.

It does not follow, however, that the burden of MCP would be insubstantial. Like medical legislation, MCP applies to licensed professionals, such as counselors, and to monopoly-like institutions, such as hospitals, adoption agencies, and social service providers. It extends to a variety of private, public, and quasi-public entities and all individual employees in a state.

In practice, conscientious objection protection could represent a more significant encumbrance on marriage than on medical procedures, because the central purpose of legalizing marriage between same-sex couples is the recognition of that marriage by third parties. As Mary Anne Case argues, marriage today is “thin,” allowing married couples to live together, have sex, procreate, or differentiate their roles—or not—“while still having their commitment to one another recognized by third parties including the state.”³²⁵ Marriage forms the mechanism through which employers deliver benefits, businesses give deals, and the government distributes public funds.³²⁶ It provides a rule that reduces the need to inquire more deeply into the parties’ relationship.³²⁷ Thus, as Case says, civil marriage’s “principal legal function, at least while the relationship is ongoing, may not be to structure relations between the members of the marital couple, but instead to structure their relations with third parties.”³²⁸

The importance of third-party recognition sharply differentiates same-sex marriage from controversial medical procedures. No procedure provides a status that third parties must (or do) use in order to allocate benefits or privileges. By contrast, what same-sex couples arguably seek is not just flowers or pensions, but recognition of their status as married. Whereas obligations to provide reproductive healthcare can be discharged by other individuals without impeding the patient’s objective,³²⁹ the duty not to discriminate cannot be fulfilled by anyone else.

323. Charo, *supra* note 163, at 129.

324. *Id.*

325. Case, *supra* note 270, at 1765.

326. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, *as reprinted in* CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 683, 686 (William B. Rubenstein, Carlos A. Ball & Jane S. Schacter eds., 3d ed. 2008).

327. *See* Case, *supra* note 270, at 1783 (“Among the chief functions civil marriage today serves is as a series of reciprocal default designations—I designate you, my spouse, and you designate me, at least as a default, as the answer to a wide variety of questions from ‘Who shall make decisions in the event of incapacity?’ to ‘Who shall determine the disposal of the body on death?’”).

328. *Id.* at 1781.

329. *Cf.* Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1401–03 (2010) (arguing that removing state restrictions on controversial procedures should be sufficient to ensure access).

Private law cannot substitute for this recognition.³³⁰ A same-sex couple may establish some rights and responsibilities without state recognition of their relationship.³³¹ But they cannot contract to receive tax and social security benefits or public pensions, to be appointed as guardian of an incompetent partner, or to sue for the wrongful death of a partner.³³² They cannot access family healthcare plans, discounted family rates, hospital visitation privileges, medical decision making, and family housing. In theory, a couple might contract around this lack of recognition, but, even in theory, the transaction costs would be inordinately high. In practice, couples are unlikely to be able to predict every third party they will encounter.

Even if parties that refused to recognize a couple's married status were few and far between, under MCP each same-sex couple would face, as now, significant barriers to full respect for their status as married. Third-party recognition would no longer be automatic. Decades after marrying, couples could still be denied recognition of their relationships.

CONCLUSION

Medicine is not like marriage. The centrality of ethical and moral questions to medicine sets it apart from business transactions. The physician is close to and responsible for the contested act; the same cannot be said for the wedding vendors, social services providers, and individuals to whom marriage conscience protection would apply. Nor is medical conscience legislation a promising model for protecting conscience or reducing conflict. If transferred to same-sex marriage objections, it would only create new conflicts of conscience.

Without the medical analogy, marriage conscience protection loses its theoretical and practical underpinnings. One is left to consider values of religion and equality within the antidiscrimination framework, as our legal system has historically done. Without the rubric of conscientious objection, exemption proponents must engage with the status of those discriminated against and explain why such accommodations would not apply equally to race, sex, and religious discrimination. They must justify doing away with the longstanding separation between religious and secular institutions and confront a framework that requires balancing instead of absolute freedom for objectors. Narrow exemptions that vary across contexts of housing, employment, and public accommodation discrimination would be considered. Exemptions as broad as their MCP proposal are unlikely to succeed, as Laycock's comment that "same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago" should suggest.³³³

Beyond the context of marriage, this Article's identification of the principles justifying protection of conscientious objection provides the groundwork for

330. Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 *CARDOZO L. REV.* 1261, 1270 (2006).

331. Case, *supra* note 270, at 1783.

332. Ryan Nishimoto, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage*, 23 *B.C. THIRD WORLD L.J.* 379, 390 (2003) (book review).

333. Laycock, *supra* note 7, at 200.

distinguishing between permissible and impermissible claims for conscientious objection. As invocations of “conscientious objection” spread to bus drivers³³⁴ and supermarket cashiers,³³⁵ these principles provide a theoretical bulwark to shore up the slippery slope of conscience.

334. See Steven Kreytak, *Bus Driver Says Religious Views Led to Firing*, AUSTIN AM. STATESMAN, July 17, 2010, at B01.

335. See Chris Serres & Matt McKinney, *Target Is Transferring Cashiers Who Avoid Pork; Some Somali Muslims Say the Retailer Is Overreacting to Customer Criticism*, STAR TRIB. (Minneapolis), Mar. 17, 2007, at 1A.