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## Law, Religion, and Health Care

David Orentlicher

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# Law, Religion, and Health Care

David Orentlicher\*

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## INTRODUCTION

While questions of law, religion, and health care have engaged scholars, policy makers, and the general public for decades, society continues to struggle over the conflict between patient access to care and conscience-based objections to the provision of care. To what extent can physicians, hospitals, or employers invoke their faith to deny patients access to abortion, contraception, or end-of-life care that will hasten death? What about denying fertility services to a same-sex couple? Or when can parents refuse medical care for their children because of religious belief?

In this Article, I aim to articulate an overarching framework that can address the balance between access to care and conscience-based objections to care in the full range of situations in which the conflict between access and religious conscience arises. In considering the different ways in which the conflict arises, I identify a key principle—for issues in which conscience is important, religious objections to providing care should be relevant only to the extent that there are legitimate

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nonreligious bases for refusing to provide care. Thus, for example, physicians should be able to refrain from performing abortions or from providing aid in dying<sup>1</sup> on religious grounds because one can view abortion or aid in dying as immoral on nonreligious grounds.

On the other hand, if we cannot find sufficient nonreligious reasons for objecting to the care, then religious objections are insufficient as well. For example, if principles of child abuse and neglect generally would prohibit parents from rejecting a particular medical treatment for their children, then a parent's religious beliefs would not justify an exemption from the obligation to agree to the treatment. Parental religious beliefs should not permit a parent to refuse a polio vaccine or an appendectomy for a child because there is no legitimate nonreligious reason for rejecting ordinary medical treatments that can prevent death or other serious harm to the child's health.

Are there any exceptions to the connection between religious reasons and secular reasons? Are there times when one can invoke religious beliefs even when there are no legitimate nonreligious bases for the exercise of conscience? If religious freedom is measured in secular terms, then we could easily undermine the whole idea of religious freedom.

While there can be circumstances outside of the delivery of health care for recognizing religious beliefs that do not have a secular counterpart, it is difficult to identify a situation in which a person's religious belief alone could justify the denial of beneficial care. We should not allow religious doctrine to trump a person's interests in health. In other words, even when someone has a valid free exercise interest, the state's interest in protecting the health of its citizens outweighs the religious interest.

Requiring a corresponding secular justification before recognizing a religious justification also reflects the important principle of government neutrality with respect to religion. Under the First Amendment's free exercise clause, the government may not disfavor religion, but under the First Amendment's establishment clause, the government also may not favor religion. If religious justifications were allowed in the absence of a corresponding secular justification, then religion would be singled out for preferential treatment. For example, if we think a person's conscientious objection to war should qualify as an exemption from military service, then secular moral objections should count just as much as religious objections. Indeed, one qualifies for conscientious-objector status under the U.S. military draft if one "is opposed to serving in the armed forces and/or bearing arms on the grounds of moral or religious principles."<sup>2</sup>

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1. Aid in dying is described by some observers as physician-assisted suicide. Aid in dying also can include euthanasia.

2. *Conscientious Objection and Alternative Service*, SELECTIVE SERV. SYS., <https://www.sss.gov/consobj> [<https://perma.cc/GMN7-Z24Q>] (last visited July 7, 2018). For an extended discussion of the view that secular moral views deserve the same consideration as religious moral views, see BRIAN LEITER, *WHY TOLERATE RELIGION* (2013). While secular moral views are given the same respect

## I. INVOKING RELIGIOUS OBJECTIONS TO HEALTH CARE

*A. The Convergence of the Sectarian with the Secular*

When religious objections to health care are raised, we might invoke a few considerations. For example, is the objection rooted in belief or conduct? As the Supreme Court observed in *Employment Division v. Smith*, the state may not regulate religious *belief*, but it may regulate religious *practice*.<sup>3</sup> Thus, for example, while the First Amendment prevents government from punishing religious adherents who express a belief in child sacrifice, it is permissible for the state to punish a religious adherent who practices child sacrifice.

This distinction between belief and practice makes a good deal of sense, and it appears as well in the Court's doctrine for the First Amendment's right to freedom of speech. While people generally cannot be punished because of their advocacy for unlawful conduct, they can be punished when their speech crosses the line between advocacy and action.<sup>4</sup>

This is not to say that the state can freely regulate religious practice. At some point, regulation of religious practice can too greatly interfere with religious freedom, as for example, when government requires all children to attend school until age sixteen.<sup>5</sup>

Since denials or refusals of health care would constitute conduct, rather than only expressions of religious belief, they are potentially subject to regulation as religious practice. That takes us to the question of how to distinguish between permissible and impermissible regulation of religious practice.

In deciding when regulation of practice is permissible, a key factor is whether the state is singling out a practice for regulation because of its religious nature, or whether the state is regulating the practice in both sectarian and secular contexts because of nonreligious concerns associated with the practice. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court struck down Hialeah, Florida's ban on animal sacrifice because the city's animal killing ordinances permitted a variety of animal slaughters and only prohibited animal killing by a particular religious denomination as part of the denomination's religious practice.<sup>6</sup> In *Smith*, on the other hand, the Court permitted Oregon to penalize peyote use in a religious setting because its prohibition of peyote use applied broadly and did not specifically target the use of drugs for religious purposes.<sup>7</sup> Under *Smith's* relatively deferential view of

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as sectarian views by the Selective Service System and under Title VII of the Civil Rights Act of 1964, other federal statutes do not treat secular moral views the same as religious beliefs. Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39, 50–66 (2002).

3. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990).

4. More specifically, if advocacy is likely to incite imminent illegal conduct, then it can be punished. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1375–76 (5th ed. 2017).

5. *See generally* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (permitting Amish families to decline high school education for their children).

6. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535–36 (1993).

7. *Smith*, 494 U.S. at 878–80.

state authority to regulate religious practice, the First Amendment right to practice one's religion does not give someone an exemption from laws that treat the secular and the sectarian equally.<sup>8</sup> Thus, if the law prohibits the denial of health care to a patient or a child because of the importance of access to care, then religious belief would not justify an exemption for a doctor or parent to withhold or refuse care.

To be sure, the *Smith* decision was controversial. Many Americans on both sides of the political spectrum felt that the Court gave insufficient regard to religious freedom.<sup>9</sup> As a result, Congress and many states responded to the Court's decision in *Smith* by giving greater protection to religious practice than provided by the First Amendment.<sup>10</sup> Under federal and state religious freedom restoration acts (RFRA), as well as many state constitutional provisions, the government is subject to a strict standard when laws interfere with religious practice even when the laws evenhandedly regulate religious and nonreligious conduct. The state must show that its regulation serves a "compelling" governmental interest and that the regulation is "the least restrictive means" for achieving the interest.<sup>11</sup>

But the greater protections do not change the balance between state authority and religious freedom in the context of denying health care to a patient. In the case of denials of health care on religious grounds, the state has a compelling interest—ensuring that patients have access to care that will promote their well-being.<sup>12</sup> As with other fundamental rights, the right to religious freedom is subject to limitation when other key interests are at stake.<sup>13</sup>

While the existence of important public interests may justify limits on religious freedom in some cases, so may they reinforce the right to religious freedom in other cases. Many religious principles have secular moral counterparts. For example, murder violates both the Ten Commandments and secular legal codes. Similarly, theft, trespass, and fraud violate both religious and nonreligious legal codes. The government has a strong interest in recognizing claims of religious conscience when analogous claims can be made based on important secular moral values. Hence, obstetricians with religious objections to abortion may refrain from performing

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8. *Id.* at 879.

9. Scott Bomboy, *What Is RFRA and Why Do We Care?*, CONST. DAILY (June 30, 2014), <https://constitutioncenter.org/blog/what-is-rfra-and-why-do-we-care/?mobr=1> [<https://perma.cc/3GXD-G73K>].

10. Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clauses*, 57 OHIO ST. L.J. 65, 66–67 (1996).

11. *See, e.g.*, 42 U.S.C.A. § 2000bb-1(b) (West 1993); 775 ILL. COMP. STAT. 35/15 (2015); VA. CODE ANN. § 57-2.02(B) (2014). There also is a federal Religious Land Use and Institutionalized Persons Act (RLUIPA) that essentially acts as a RFRA for prisoners, mental health patients, and zoning decisions. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

12. *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2012) (observing that "the Government clearly has a compelling interest in safeguarding the public health").

13. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

abortions, just as obstetricians with nonreligious objections may refrain from performing abortions.<sup>14</sup>

A final potential factor might be whether the religious objection is made by individuals or by institutions, such as hospitals or corporations. Many observers have argued that persons can practice religion, but entities cannot, and that therefore it doesn't make sense to talk about the practice of religion by an inanimate organization.<sup>15</sup> So, for example, an employer should not be able to deny access to contraception in its employee health-care plan on the ground that the company has religious objections to contraception.

In *Burwell v. Hobby Lobby Stores*, the Supreme Court rejected the individual-entity distinction,<sup>16</sup> and that makes good sense. Organizations are expected to have mission statements and be good corporate citizens. Rather than pursuing only the narrow self-interests of their entities, they should be socially conscious and promote broader public interests, such as by adopting policies that protect against climate change or by contributing to charitable causes in their communities. If we think that organizations should take important values into account in their operations, it would be wrong to allow them to pursue important secular values but not important religious values.<sup>17</sup> That would be akin to the targeting of religious practice in *Church of Lukumi Babalu Aye* rather than the neutral treatment of religion in *Smith*.

This is not to say that corporate religious claims always should prevail. Just as individual claims of religious freedom must yield to important public interests, so must corporate religious claims. In the *Hobby Lobby* case, for example, the Court's willingness to recognize the interest of employers in not providing contraceptive coverage to their employees was contingent on the fact that the government or the employers' health insurance providers would ensure that employees had full access to contraceptives.<sup>18</sup>

In sum, the First Amendment permits government to regulate religiously-based conduct when it regulates similar nonreligious conduct, as long as the government does not target religious practice for disfavored treatment. Religious freedom statutes and state constitutional provisions provide greater protection for religious practice, but they still permit government to regulate religiously-based conduct as long as the government can invoke a sufficiently important public

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14. See, e.g., 42 U.S.C. § 300a-7(b)(1) (2000) (prohibiting mandates to perform an abortion when doing so would be contrary to the physician's "religious beliefs or moral convictions").

15. See, e.g., Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 281–82 (2015) (observing that religious liberty "is meant to protect uniquely human attributes"); see also Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1538–45 (2012) (critiquing the concept of institutional conscience).

16. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–75 (2014). The *Hobby Lobby* case involved challenges by three businesses to the contraceptive mandate under the Affordable Care Act. Regulations adopted to implement the Act required employer-provided health insurance to include coverage for contraceptives. *Id.* at 2762.

17. *Id.* at 2771.

18. *Id.* at 2760.

interest for the regulation.<sup>19</sup> As mentioned, when the law rejects religious arguments for the denial of care, it is invoking a sufficiently important governmental interest—the compelling state interest in access to health care. On the other hand, when an important secular value parallels the asserted sectarian value, the law will be more protective of religiously-based conduct.<sup>20</sup> Overall, the balance among religious values, secular values, and the public interest allows for principles of law, religion, and health care that protect both religious liberty and other important interests.

In the next few sections of this Article, I will illustrate the application of these principles to different ways in which religious belief leads to the denial of health care. I will start with the right of parents to refuse treatment for their children.

### B. Parental Refusals of Treatment for Children

Religious beliefs may lead people to reject medical treatment. For example, Jehovah's Witnesses refuse blood transfusions,<sup>21</sup> and Christian Scientists refuse a range of medical care.<sup>22</sup> Can parents refuse blood transfusions or other life-sustaining treatment for their children?

In answering that question, it is useful to begin with the right of parents to refuse unwanted medical care for themselves. On that question, the common law and constitutional doctrine come to the same conclusion: People may refuse undesired medical care, even if the care is necessary to prolong life.<sup>23</sup> The state's interest in preserving life yields to the individual's interests at stake—the common law right to accept or refuse recommended treatment (the doctrine of informed consent),<sup>24</sup> the substantive due process right to avoid unwanted bodily intrusions,<sup>25</sup> and the First Amendment right to freedom of religion.<sup>26</sup>

For example, in its cases involving the right to refuse unwanted life-sustaining medical care, the New Jersey Supreme Court has cited common law principles of informed consent,<sup>27</sup> the federal constitutional right of privacy,<sup>28</sup> and the New Jersey constitutional right of privacy.<sup>29</sup> In its life-sustaining medical care case, the U.S. Supreme Court connected common law principles of informed consent to constitutional due process rights and also discussed the importance of First Amendment rights.<sup>30</sup>

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19. See *supra* text accompanying notes 9–11.

20. See *supra* text accompanying note 14.

21. Dena S. Davis, *Does 'No' Mean 'Yes'? The Continuing Problem of Jehovah's Witnesses and Refusal of Blood Products*, SECOND OPINION, Jan. 1994, at 34.

22. Janna C. Merrick, *Spiritual Healing, Sick Kids, and the Law: Inequities in the American Health Care System*, 29 AM. J.L. & MED. 269, 271–72 (2003).

23. MARK A. HALL ET AL., HEALTH CARE LAW AND ETHICS 517–18 (9th ed. 2018).

24. *Id.*

25. *Id.*

26. *In re Brooks' Estate*, 205 N.E.2d 435 (Ill. 1965).

27. See *In re Conroy*, 486 A.2d 1209, 1221–22 (N.J. 1985).

28. *Id.* at 1222–23.

29. *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976).

30. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270, 277–79 (1990).

Importantly for purposes of this Article, the broad right to refuse treatment exists whether the reason for the refusal is based in religion or in nonreligious concerns, such as concern about the risks of treatment or a commitment to herbal medicine.<sup>31</sup> That the patient refusing treatment invokes religious reasons does not make the right any stronger than if the patient invokes nonreligious reasons.<sup>32</sup> In other words, the right to refuse treatment rests on alternative secular and sectarian constitutional grounds, and either one alone is sufficient. The religious right parallels the secular right.

While adults enjoy an unlimited right to refuse treatment for themselves, their right to decide is limited when exercised on behalf of their children. Parents generally have authority to make medical decisions for their children, but not to refuse care that provides great benefit.<sup>33</sup> As courts have observed, parents may make martyrs of themselves, but not of their children.<sup>34</sup> If a refusal of care would constitute child abuse or neglect, the state may prohibit the refusal.<sup>35</sup> And here too, the sectarian right parallels the secular right. It would not matter under common law or constitutional principles whether the parental refusal was based on religious or nonreligious reasons.

It is not surprising that parental rights to refuse treatment are not affected by religion. The Supreme Court has long recognized a substantive due process right of parents to make decisions about the raising of their children,<sup>36</sup> so the state needs to invoke a very strong interest to intrude on parental decision-making. If the state's interest is strong enough to outweigh parents' due process rights, it is strong enough to outweigh their free exercise rights. More specifically, the state's interest in protecting children from abuse or neglect is important enough to outweigh either a parent's child-rearing rights or the parent's religious rights. As the Supreme Court has observed, the state's interest in protecting child welfare "is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience."<sup>37</sup> Or as Erwin Chemerinsky and Michele Goodwin have

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31. In some cases, a patient will invoke both religious and nonreligious reasons. For example, in *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990), the patient objected to a blood transfusion because she was a Jehovah's Witness and also because of the risk of contracting AIDS or other communicable diseases.

32. Whether or not the patient invokes religious reasons may affect assessments of the patient's decision-making capacity. When a patient refuses medical care, we want to make sure that the refusal reflects a genuine expression of the patient's self-determination, and the kinds of reasons given by the patient are part of the assessment of decision making capacity. *See, e.g., In re Farrell*, 529 A.2d 404, 413 n.7 (N.J. 1987) (referring to the competent patient's "capacity to reason and make judgments").

33. *HALL ET AL.*, *supra* note 23, at 575.

34. *See Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *State v. Neumann*, 832 N.W.2d 560, 590 (Wis. 2013).

35. *See, e.g., MINN. STAT. ANN.* § 609.378 (West 2017) (defining as unlawful neglect of a child parental deprivation of health care).

36. *See Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

37. *Prince*, 321 U.S. at 166.



observed, the right to practice one's religion should not give one the right to inflict harm on one's children.<sup>38</sup>

And note that child abuse and neglect law has drawn a balance between parental interests and state interests that is very solicitous of parental interests, including religious interests. Courts generally do not override parental refusals of medical care unless the benefit to the child is substantial, as with antibiotics for pneumonia or surgery for appendicitis.<sup>39</sup> When the benefits are uncertain or the burdens of treatment significant, courts often will defer to parental judgment.<sup>40</sup>

In addition, if the First Amendment were to recognize a religious exemption from child abuse laws, it would raise serious establishment clause concerns. Government may not disfavor religion, but it also may not favor religion. A religious exemption from child abuse law would have the effect of the law being guided by religious doctrine.

To be sure, most states provide exemptions in their child abuse and neglect laws for parents who refuse medical treatment on religious grounds.<sup>41</sup> But courts often read the exemptions narrowly, relying on a couple of theories. First, many of the exemptions state that parents cannot be held accountable "solely" for relying on prayer, or for relying on prayer "alone," rather than on medical care, so liability can be upheld on the ground that the charges are brought because of the harm rather than because of the use of prayer.<sup>42</sup> In addition, the exemptions typically apply to child and abuse laws but not so often to other laws under which parents may be held accountable, such as involuntary manslaughter statutes.<sup>43</sup> And of course, the exemptions speak to the ability of the state to punish parents. Even if a court cannot sanction the parents, it still may order that treatment be provided to

38. Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others: Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine*, 104 GEO. L.J. 1111, 1128–29 (2014).

39. HALL ET AL., *supra* note 23, at 575.

40. *See, e.g.*, *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991) (upholding parental refusal of chemotherapy for child given the substantial risks of treatment and the less than fifty percent chance of success); *In re Nicholas E.*, 720 A.2d 562 (Me. 1998) (permitting mother to refuse aggressive antiviral drug therapy to treat HIV infection in her four-year-old son); *In re Martin F.*, 820 N.Y.S.2d 759 (Sup. Ct. 2006) (deferring to parent's refusal of antipsychotic drug for three-year-old child). Other courts will override parental decisions, as in *In re Cassandra C.*, 112 A.3d 158 (Conn. 2015) (mandating treatment for Hodgkin's lymphoma); *In re Gianelli*, 834 N.Y.S.2d 623 (Sup. Ct. 2007) (denying parents' request to withdraw ventilator from a fourteen-year-old child who had a lethal genetic disease and a life expectancy of no more than two years but who was still "aware and enjoy[ed] TV and videos").

41. Aleksandra Sandstrom, *Most States Allow Religious Exemptions from Child Abuse and Neglect Laws*, PEW RES. CTR. (Aug. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws/> [https://perma.cc/D7Q6-4VGP].

42. *See Walker v. Superior Court*, 763 P.2d 852, 864 (Cal. 1988); *In re D.L.E.*, 645 P.2d 271, 274–75 (Colo. 1982).

43. *State v. Neumann*, 832 N.W.2d 560, 576 (Wis. 2013); *see also Hall v. State*, 493 N.E.2d 433, 435 (Ind. 1986) (holding that parents are protected from prosecution under the child neglect statute when their children suffer serious bodily injury from being treated with prayer, but are not protected from prosecution under the reckless homicide statute if their children die).

the child.<sup>44</sup> Indeed, the federal regulation that led to the adoption of the religious exemptions explicitly drew a line between holding parents liable and ensuring access to care for children. The regulation, which is no longer in effect, tied federal funding for child abuse programs to the enactment of religious exemptions.<sup>45</sup> But the regulation also stated that the exemptions “shall not preclude a court from ordering that medical services be provided to the child, where his health requires it.”<sup>46</sup> And state law exemptions typically track this requirement.<sup>47</sup>

Not punishing parents while ensuring that care is provided might seem to be a useful way to draw the balance between religious freedom and child health. Such a balance protects parents from a government that might be overzealous in its efforts to protect child welfare and is not sufficiently sensitive to First Amendment concerns. And at the same time that religious belief is protected, the power for courts to order medical services should protect the health of children. In practice, however, the judicial power to order treatment appears not to be providing adequate protection for children.<sup>48</sup>

### C. Provider Denials of Care

Just as religious rights parallel nonreligious rights of parents to refuse medical care for children, so do religious rights parallel nonreligious rights on the question whether a doctor or other provider can deny medical care to patients. In cases in which providers can deny care, the freedom to do so exists for both religious and nonreligious reasons, and in cases in which providers cannot deny care, religious justifications fail when there are not valid secular reasons for denying care.

#### 1. Abortion and Aid in Dying

Two leading examples of areas where providers can deny care are abortion and aid in dying. While the Constitution guarantees a right to abortion for pregnant women in all states,<sup>49</sup> and several states guarantee a right to aid in dying for terminally ill patients,<sup>50</sup> no doctor or hospital is required to provide abortion or aid-in-dying services.<sup>51</sup> For reasons of conscience, doctors and hospitals may decline to participate in either practice.

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44. ROGER J. R. LEVESQUE, *CHILD MALTREATMENT AND THE LAW* 75 (2008).

45. 45 C.F.R. § 1340.1–2(b)(1) (1975), cited in Wayne F. Malecha, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children*, 12 J. LEGIS. 243, 247 n.42 (1985).

46. *Id.*

47. Chemerinsky & Goodwin, *supra* note 38, at 1125–28.

48. See Seth M. Asser & Rita Swan, *Child Fatalities from Religion-Motivated Medical Neglect*, 101 PEDIATRICS 625 (1998).

49. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

50. See Ryan P. Clodfelter & Eli Y. Adashi, *The Liberty to Die: California Enacts Physician Aid-in-Dying Law*, 315 JAMA 251 (2016).

51. See CAL. HEALTH & SAFETY CODE § 443.14(e) (West 2016); COLO. REV. STAT. ANN. § 25-48-117(1) (West 2016); D.C. Code Ann. § 7-661.10(a) (West 2017); OR. REV. STAT. § 127.885(4) (2017); 18 VT. STAT. ANN. tit. 18, § 5285(A) (2013); WASH. REV. CODE § 70.245.190(1)(d) (2009); Mark

And this is true regardless of whether the reasons of conscience are rooted in religious doctrine or nonreligious morals. For either sectarian or secular reasons, many people consider abortion or aid in dying murder, and the law respects the freedom of health-care providers to refrain from practices that they view as murderous. Rights to abortion or aid in dying are rights for willing patients and willing providers. Neither patient nor physician can be forced to participate.

Thus, for example, in New Jersey, a “refusal to perform . . . or provide abortion services . . . shall not constitute grounds for civil or criminal liability, disciplinary action or discriminatory treatment.”<sup>52</sup> And under the Church Amendment, Congress has stated that receipt of federal funds “does not authorize any court or any public official” to require an individual to perform abortions or a facility to make its facilities for abortions if doing so “would be contrary to . . . religious beliefs or moral convictions.”<sup>53</sup> Similarly, under Oregon’s Death with Dignity Act, “[n]o health care provider shall be under any [legal] duty . . . to participate in the provision . . . of medication to end [a patient’s] life.”<sup>54</sup> In none of these statutory provisions does the law qualify its protections on the basis of religion. Whether for secular or sectarian reasons, physicians may refuse to participate in abortion or aid in dying.<sup>55</sup>

It is not surprising that religious freedom would parallel secular freedom. Religious law and secular law reflect common values in many areas, not only with laws against murder, but also with laws against robbery, assault, trespass, or fraud. Religious law seeks to promote fundamental values, and so does secular law. Accordingly, providers of health care with religious objections to abortion or aid in dying can appeal to their religious beliefs, but they don’t have to do so.

While it is clear that physicians, hospitals, or other providers can refuse to participate in abortion or aid in dying, it is not clear where the line should be drawn between participation and nonparticipation. A doctor who performs an abortion is a participant, as is the clinic or hospital where the abortion is performed. But what of the pharmacist who fills prescriptions for a pregnant woman so she can use the drugs mifepristone and misoprostol for a medical abortion? Similarly, a physician who writes a prescription for a lethal dose of a drug participates in aid in dying, but what of the pharmacist who fills the prescription? What level of involvement makes a physician or other provider of care morally complicit in abortion or aid in dying?

As with other line-drawing questions in law, the line between participation and nonparticipation is difficult to define. People can facilitate and thereby be complicit

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L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1, 30–35 (2011).

52. N.J. REV. STAT. § 2A:65A–3 (2017).

53. 42 U.S.C. § 300a-7(b)(1)–(2) (2012).

54. OR. REV. STAT. 127.885(4) (2017).

55. Sepper, *supra* note 15, at 1549–50. For additional discussion of statutory provisions that recognize exercises of conscience, see *id.* at 1509–14; Lynn D. Wardle, *Protection of Health-Care Providers’ Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1 (2010).

in an action in many ways and at different levels of involvement. At some point, the connection becomes so tenuous that complicity is no longer present. But there is no clear distinction between participation and nonparticipation, and reasonable people can disagree as to where the line lies. Thus, for example, some states require pharmacies to fill prescriptions for abortion medications even when the owner of the pharmacy objects to abortion while other states allow pharmacies or pharmacists to not fill prescriptions for abortion medications when they have moral objections to abortion.<sup>56</sup>

Nevertheless, the line between participation and nonparticipation should be the same whether objections to abortion or aid in dying are rooted in religious or nonreligious morals. Degrees of complicity do not vary because one has sectarian rather than secular reasons for viewing abortion or aid in dying as murder.

Moreover, there is an important benefit if questions such as the degree of complicity for religious belief can be judged in secular terms. It is difficult for a judge to assess the sincerity of a religious belief or the legitimacy of a religious belief. Analyzing complicity in secular terms allows a court to give due regard to religious beliefs without having to make religious judgments.<sup>57</sup>

## 2. Fertility Services

Abortion and aid in dying illustrate health-care services where both secular and sectarian objections are important enough to overcome the individual interest in access to care. There also are health-care services for which neither secular nor sectarian objections outweigh the interest in access to health care, and for these health services too, the sectarian parallels the secular. Taking account of religious belief should not change the analysis.

For example, cases have arisen in which a same-sex couple wants to have a child, seeks care from a physician who provides assisted-reproduction services, and the physician refuses to provide care on the ground that children should be raised by a father and mother. While physicians ordinarily are free to choose their patients, antidiscrimination statutes prohibit some reasons for refusing to provide care. So, for example, a physician cannot refuse to provide care because of the patient's race

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56. R. Alta Charo, *The Celestial Fire of Conscience — Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471, 2472 (2005). Some of the laws apply to prescriptions in general, while others are limited to abortion, contraception, and/or aid in dying. *See, e.g.*, MISS. CODE ANN. §§ 41-41-203, -215 (2017) (allowing health care providers, including health care facilities, not to comply with a patient's medication choices); S.D. CODIFIED LAWS § 36-11-70 (2018) (allowing pharmacists not to fill prescriptions for medications that will be used for abortion or aid in dying).

57. Judges often end up making unfair distinctions among different religious claims, giving greater weight to claims made by adherents to mainstream religions. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2587 (2015). Courts also may be unduly deferential to claims based on religion. Samuel J. Levine, *A Critique of Hobby Lobby and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 31 (2015).

or sex.<sup>58</sup> And in some states, a physician cannot refuse to provide care on account of a patient's sexual orientation.<sup>59</sup> When a fertility specialist who objects to procreation by same-sex couples is subject to an antidiscrimination statute, the physician might claim that the statutory duty to treat violates the First Amendment right to religious freedom.

In such cases, the First Amendment argument should fail, and the statutory protection should prevail, as held by the California Supreme Court.<sup>60</sup> One's freedom of religion should not grant an exemption from the duty not to discriminate when treating patients.

And this makes good sense. These cases are unlike the refusals to perform an abortion or provide aid in dying in that there is no legitimate secular basis for denying fertility services to same-sex couples, or at least not a reason that is important enough to outweigh the couple's fundamental interest in having and raising children, as well as the couple's fundamental interest in being treated equally by others.<sup>61</sup> Objections to the raising of children by same-sex couples are rooted in a belief that children should be raised by a mother and father or in moral disapproval of homosexuality,<sup>62</sup> but neither reason is sufficient. Children raised by same-sex couples fare well in terms of their educational achievement and psychological well-being. They do as well as children raised by opposite-sex couples.<sup>63</sup> And as the Supreme Court has recognized, moral disapproval alone is not a sufficient basis for overriding important individual interests.<sup>64</sup>

So the denial of fertility services is another example of a denial of medical care where the analysis for sectarian reasons parallels the analysis for secular reasons. For both religious and nonreligious objectors to the provision of services, the objections

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58. Sandra H. Johnson, *The ACA's Provision on Nondiscrimination Takes Shape*, HASTINGS CTR. REP., Sept/Oct. 2016, at 5.

59. One can argue that discrimination on the basis of sexual orientation constitutes discrimination on the basis of sex. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2016) (holding that discrimination on the basis of sexual orientation constitutes discrimination on the basis of sex for purposes of Title VI of the Civil Rights Act of 1964, which bans discrimination in employment). If that argument gains acceptance, then protections against discrimination would exist widely.

60. *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 189 P.3d 959 (Cal. 2008) (rejecting a religious belief exception to California's prohibition of discrimination on the basis of sexual orientation). In a Minnesota case, however, the court did not apply the state's anti-discrimination statute. *Court Order, Beatty v. Erhard*, No. PI 95-4965 (D. Minn. Sept. 13, 1995), *discussed in* Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 207-12 (1996).

61. Nejaime & Siegel, *supra* note 57, at 2588.

62. Lynn D. Wardle, *Preference for Marital-Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 377-80, 384-85 (2005). Arguments against parenting by same-sex couples also rested on the importance for children of being raised by married rather than unmarried couples, *id.* at 369-77, but the legalization of same-sex marriage has addressed that concern.

63. Wendy D. Manning, Marshal Neal Fetto & Esther Lamidi, *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief*, 33 POPULATION RES. & POL'Y REV. 485 (2014).

64. *Lawrence v. Texas*, 539 U.S. 558, 571, 577-78 (2003).

rest on misunderstandings of childrearing or in moral disapproval, and as indicated, such objections do not justify overriding a couple's important interests in having children and being treated equally.

While I have focused on fertility services because that is where cases have arisen in recent years, the analysis would be the same for other kinds of medical care. A person's interest in receiving health care is too important to let it be blocked by the moral disapproval of physicians or other providers of health care.

### III. WHEN LAW SHOULD RESPECT THE SECTARIAN THAT DIVERGES FROM THE SECULAR

I have argued that religious objections to health care should be respected to the extent that secular objections to care are respected and that doing so permits the state to give due protection to both sectarian belief and the public's well-being. While that may seem to make religious freedom irrelevant, it does not. Religious freedom is a fundamental right, but even fundamental rights can be limited on behalf of important interests.<sup>65</sup> The connection between secular and sectarian values says more about the importance of health care than about the importance of religious freedom.

Outside of the delivery of health care, there are times when one's religious beliefs should be given special consideration. Two important circumstances involve activities that have intrinsic religious significance or activities for which there are not important public interests at stake.

#### *A. Activities with Intrinsic Religious Significance*

Religious belief may deserve special consideration for activities that have intrinsic religious significance. For example, the impetus to enactment of religious freedom restoration acts came from Oregon's penalties for peyote use during religious services.<sup>66</sup> Similarly, when alcoholic beverages were banned during the Prohibition Era, an exception was made for sacramental wine.<sup>67</sup> In the public's view, it is important to ensure that traditional religious practice with controlled substances be permitted even when controlled substance use is not permitted for secular reasons.

The intrinsic religious significance principle not only ensures that people can engage in activities that otherwise would be forbidden. It also applies when a person does not want to participate in an activity that has religious significance because the activity violates the person's religious scruples. For example, a minister may refuse

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65. Thus, for example, states may invoke their interest in potential life to prohibit abortion once the fetus is viable. *Planned Parenthood v. Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *see also supra* text accompanying note 13.

66. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 874 (1990).

67. Volstead Act, ch. 85, tit. II, sec. 3, 41 Stat. 305 (1920); Jack S. Blocker, Jr., *Did Prohibition Really Work?: Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233, 237 (2006).

to officiate at a same-sex wedding that would be prohibited by the minister's religion. Even though moral disapproval alone is not a basis for a physician to deny fertility services to a same-sex couple, the minister's moral disapproval alone is sufficient to justify a refusal to officiate at a wedding or to provide other religious services.

Of course, there is much debate about what it means to participate in a religious activity such as a wedding. While a consensus seems to exist that ministers participate when they officiate at a wedding and that the electric utility does not participate when it provides power to the wedding hall, people disagree about wedding photographers, florists, caterers, and musicians. Some providers of wedding services draw a distinction between providing their services to a same-sex couple for nonreligious events, such as birthday parties or holiday receptions, and providing their services for a wedding, which they see as a religious activity that is inconsistent with their religious beliefs.<sup>68</sup> In response to these providers, others do not see the provision of services as akin to participating in a religious activity. It appeared that the Supreme Court would provide greater clarity on where the law should draw the line between participation and nonparticipation when it was asked to decide whether a bakery can refuse to create a wedding cake for a same-sex wedding.<sup>69</sup> However, the Court decided the case on narrow procedural grounds leaving for a later day the larger questions in the case.<sup>70</sup>

While the intrinsic religious significance principle is important, it does not change the analysis for denials of health care on religious grounds. Since providing health-care services does not involve participating in a religious activity, the freedom to not participate in religious activity would not justify a doctor's refusal to provide health care or a parent's rejection of health care for a child.

Similar to the principle that religious beliefs should be given special consideration in the context of religious activity is the principle that religious beliefs should be given special consideration in the internal operations of a house of worship. Religious liberty would be greatly threatened if government could interfere with the governance decisions of a church, synagogue, or mosque. Thus, for example, courts will not invoke antidiscrimination statutes to interfere with the decision of a church to fire a pastor (the "ministerial exception").<sup>71</sup>

But as with activities with intrinsic religious significance, protection for the internal operations of a house of worship does not affect the analysis for denials of health care. The delivery of health care is not a feature of the internal operations of a house of worship.

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68. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276–77 (Colo. App. 2015); *Elane Photography v. Willock*, 309 P.3d 53, 61 (N.M. 2013).

69. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

70. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (reversing the state civil rights commission's finding against the bakery because the commission's "treatment of [the] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs" of the baker).

71. *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012).

*B. Activities that Don't Compromise Important Public Interests*

As discussed, religious values have the same effect as secular values as a basis for objecting to the delivery of health care because of the importance of health care. Similarly, religious belief no more than secular belief should qualify as an exemption to the requirements of antidiscrimination law because of the importance of equality.

But there are many settings in which religious practice does not conflict with an important public interest. Consider, for example, the case of *Holt v. Hobbs*.<sup>72</sup> In that case, a Muslim prisoner challenged a prison rule that prevented him from growing a half-inch beard in accordance with his religious beliefs. While the Department of Correction invoked the important interests in prison safety and security to justify its facial-hair policy, it could not show that its beard ban actually served the asserted interests.<sup>73</sup> Wearing a half-inch beard would not compromise the safety or security of the prison. Hence, the U.S. Supreme Court concluded that the ban violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).<sup>74</sup>

In another case, Old Order Amish defendants were charged with violations of a traffic safety regulation. Under Minnesota law, slow-moving vehicles were required to display a fluorescent orange-red triangle when being driven on the state's public highways.<sup>75</sup> The Amish objected on the ground that their religion prohibited the display of "loud colors" and "worldly symbols."<sup>76</sup> Relying on the Minnesota Constitution's religious freedom provision, the Minnesota Supreme Court held that the Amish's alternative safety measures for their horse-drawn buggies—silver reflective tape and lighted red lanterns—were adequate substitutes for the fluorescent triangles.<sup>77</sup> As with the prison beard case, recognizing a religious exemption did not jeopardize public welfare, so religious beliefs could be given greater consideration than secular beliefs.

#### CONCLUSION

It may seem surprising that consideration of religion should not change the analysis on the question whether doctors may deny care to patients or parents may refuse care for their children. The right to practice one's religion is a core constitutional right.

But there are other key considerations as well. The First Amendment's establishment clause prohibits government from favoring religion. More importantly, all constitutional rights must yield when very important public interests are at stake, as is the case with health care. When balancing all of the equities

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72. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015).

73. *Id.* at 863–65.

74. *Id.* at 867.

75. *State v. Hershberger*, 444 N.W.2d 282, 284 (Minn. 1989).

76. *Id.*

77. *See State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).



involved with access to health care, the role of religious values should parallel the role of secular values.