Volume 3 | Issue 1 Article 1

10-1-2013

Conscientious Objection of Health Care Providers: Lessons from the Experience of the United States

Soledad Bertelsen
Universidad de los Andes

CONSCIENTIOUS OBJECTION OF HEALTH CARE PROVIDERS: LESSONS FROM THE EXPERIENCE OF THE UNITED STATES

Soledad Bertelsen[†]

TABLE OF CONTENTS

[†]Adjunct Professor, Universidad de los Andes (Chile). J.S.D. Candidate (expected graduation 2014), Notre Dame Law School. LL.M., 2011, Harvard Law School.

INTRODUCTION

In recent years, legislation and regulations in different countries of the world have raised questions about the conscientious objection of health care providers. In Spain, the Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act of 2010 (Sexual and Reproductive Health Act)[1] recognizes the right to conscientious objection of professionals directly involved in the termination of pregnancy[2] but also expands the possibility to perform abortions in relation to previous legislation.[3] The application of the conscientious objection clause, however, leaves multiple questions open, and both the administration and the judiciary have reached different conclusions in its interpretation.[4]

The discussion about distribution of powers regarding conscientious objection is also present in the United States. In 2008, the Department of Health and Human Services (HHS) issued rules interpreting the Federal Health Care Provider Conscience Protection Statutes.[5] The HHS modified the rules in 2011, alleging that many of these norms were unnecessary because the federal statutes already included enforcement mechanisms.[6] Another example of an unresolved question concerning conscientious objection is present in the controversy created around the religious exemptions of the HHS mandate under the Affordable Health Care Act.[7]

The current uncertainty regarding the precise status of conscientious objection leads us to the present comparative study on conscientious objection in the area of health care providers. Despite the vast number of publications related to conscientious objection in the United States, these publications have not approached the issue from a foreign legal perspective. The purpose of this study is not to carry out an exhaustive survey of the American law on the subject but rather to seek some insight for the development of the institution in other countries. The study of the relevant legal norms as well as their application in specific contexts can often spark ideas or suggest approaches to

[1] Ley de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo [Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act] (B.O.E. 2010, 55) (Spain).

[2] *Id*. art. 19.2.

[3] *See id.* art. 15.

[4] For example, while the Health Care Services of Andalucía denied the right of family doctors to file conscientious objections, the courts overruled the administrative regulation, arguing that those doctors are, in fact, directly involved in the interruption of the pregnancy. *See* Marta Sánchez Esparza, *Médicos de Atención Primaria Podrán Objetar en los Casos de Aborto*, EL MUNDO (Mar. 6, 2012), http://www.elmundo.es/elmundo/2012/03/05/andalucia_malaga/1330973795.html.

[5] 45 C.F.R. § 88.5 (2009).

[6] Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9973 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88).

[7] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1303(b)(4), 124 Stat. 1029 (2010).

current problems in other jurisdictions, such as Spain.[8] The abundant number of cases, statutes, and regulations in the United States may help to answer questions, such as whether conscientious objection is implicit in the freedom of religion, which branch of government should regulate it, and whether the right to conscientious objection clashes with constitutional provisions.

Although American law has its origin in the common law system, the study of conscientious objection in the United States can still be relevant for the development of the institution in civil law countries.[9] First, the U.S. case law is one of the richest in conscientious objection cases. The diversity of material allows the subject to be developed with greater detail and precision than in other countries. Second, in the area of human rights, the similarities are larger than the differences. Because human rights are founded on the inherent dignity shared by all human beings, all members of the human family have equal and inalienable rights.[10] Finally, the essential aspects of conscientious objection cases are common to Western countries. While this study focuses the comparison mainly on Spain, the conclusions derived from it can also be helpful to other States, especially those that only have an incipient protection of conscientious objection.

With these purposes in mind, Part I of this Article summarizes the modern understanding of conscientious objection in general and why it is worthy of special protection. After studying the foundations of this institution, this Article will analyze how the different branches of government have protected conscientious objection and how this protection can be improved. Finally, the conclusions will show how the experience of the United States can help in the development of conscientious objection protection in other States.

I. CONSCIENTIOUS OBJECTION: CONCEPTS AND JUSTIFICATION

A. Concept

Conscientious objection can be defined as the request, inspired on religious or ethical convictions, of a private exemption that allows the objector to avoid an ordinary duty or to carry out an action prohibited by the law.

An objector can base his claims on religious or humanitarian ideals, as well as the ethics of his own community.[11] In contrast with the terms

[8] For an explanation regarding the purposes of comparative studies, see MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 7–12 (3d ed. 2008).

[9] For a general comparison between civil law and common law traditions, see JAMES T. MCHUGH, COMPARATIVE CONSTITUTIONAL TRADITIONS 16–20 (2002). For a comparison of Western and Eastern traditions, see GLENDON, *supra* note 8, at 4–9.

[10] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 7 (Dec. 10, 1948) (discussing equal dignity and rights for all human beings).

[11] *See* HITOMI TAKEMURA, INTERNATIONAL HUMAN RIGHT TO CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AND INDIVIDUAL DUTIES TO DISOBEY MANIFESTLY ILLEGAL ORDERS 2 (2009).

'resistance' and 'civil disobedience', conscientious objection is not always based on political reasons or a shared conception of justice.[12] As Raz points out, "civil disobedience is a political act, an attempt by the agent to change public policies [whereas] conscientious objection is a private act, designed to protect the agent from interference by public authority."[13]

The request of an exemption presupposes the conflict between a general norm and the individual conscience. This means that the norm must be currently applicable to the individual situation of the objector. The opposition made by someone who is not under the factual scenario of the statute can be characterized as a political act or an expression of public opinion but not a conscientious objection. As Bedau affirms, "the primary purpose of conscientious objection is not public education but private exemption, not political change but (to put it bluntly) personal hand-washing."[14] Many times, the objector also desires the amendment of the law, but this is only the secondary purpose of the conscientious objection.[15] Reality shows that objectors can simultaneously look for an exemption as well as for the modification of legislation. Being so, Navarro-Valls and Martínez-Torrón considered that it is more accurate to talk about two stages: the individual ethical moment, identified with conscientious objection, and the collective political moment, known as 'civil disobedience'.[16]

[12] *See* JOHN RAWLS, A THEORY OF JUSTICE 369 (1971). The term 'resistance' refers to a "forcible opposition or resistance to the government in power . . . as well as violent acts . . . aimed at dislodging those exercising political power." Kent Greenawalt, *Conscientious Objection, Civil Disobedience, and Resistance*, *in* CHRISTIANITY AND LAW: AN INTRODUCTION 105, 106 (John Witte, Jr. & Frank S. Alexander eds., 2008). According to this definition, the goal and the motivation are always political. There is an opposition to the whole of the existing legal order, or at least a relevant portion of it, but the ordinary means to change the law are inefficient or nonexistent. As a result, the people decide to use force to overthrow the government. Civil disobedience also has a political motivation but differs from resistance in several aspects. First, it does not contemplate violence as a means. Second, it has a narrower scope. It only looks for the amendment of specific laws and not for the replacement of the government, showing respect for the ordinary political process. Nevertheless, it is a requisite of civil disobedience itself that dissenters are ready to continue their opposition even when courts uphold the controversial norms. Otherwise, they would not properly face 'disobedience'. *See* Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653, 661 (1961).

[13] *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 276 (1979).

[14] Hugo Adam Bedau, *Introduction*, *in* CIVIL DISOBEDIENCE IN FOCUS 1, 7 (Hugo Adam Bedau ed., 1991).

[15] *Id.*

[16] RAFAEL NAVARRO-VALLS & JAVIER MARTÍNEZ-TORRÓN, LAS OBJECIONES DE CONCIENCIA EN EL DERECHO ESPAÑOL Y COMPARADO 11 (1997).

B. Justification of Conscientious Objection: Rooted in Freedom of Conscience

1. Jurisprudential Foundations

All definitions of conscientious objection acknowledge that the objection is an exception to a general rule. This feature makes it difficult to explain the nature of conscientious objection from the sole perspective of positive legal norms. If the law orders something because it is essential for the fundamental interests of the State, how is it possible that the same legal order allows objections to that norm? Is it reasonable to have a duty to do something and, at the same time, a right not to do it? As Dworkin points out in *Taking Rights Seriously*, many lawyers accept that morality can justify disobedience, but they believe that the law cannot because the subsistence of society depends on the enforcement of the law.[17] Thus, the question addressed in the following paragraphs will focus not on the morality but rather on the legality of conscientious objection.

Different views on the nature of conscientious exemptions exist.[18] On one hand, conscientious objection is, at times, considered a fundamental right that can be enforced in any case, even when the legislator does not recognize it explicitly.[19] Among these views, a majority considered that this fundamental right derives from the free exercise or freedom of conscience.[20] On the other hand, conscientious objection is sometimes viewed as a 'subjective right' in civil law terms.[21] In this way, it is treated as being hierarchically inferior to a fundamental right.[22] Consequently, if a conflict arises between rights, conscientious objection should yield in favor of the higher ranked right.[23] The latter position perceives the legislature as the organism better suited to balance among the different interests at stake and to decide *a priori* when such a right can be recognized by the legal order and when it cannot.[24] Other opinions consider conscientious objection only as a legal value—inferior to a formal right—that serves as a guideline to public powers, especially the legislature. In order to respect these values, the ruler can tolerate certain exemptions that conflict with the general legal rule. Nonetheless, from the point of view of the power-holder, these exemptions would be unbearable if everyone followed the

[17] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 206 (1977).

[18] *See* NAVARRO-VALLS & MARTÍNEZ-TORRÓN, *supra* note 16, at 19 (summarizing the different views on conscientious objection).

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

objectors' example.[25] In other words, conscientious objection would be a privilege—'a grace'—derived from the legislature and not a constitutional right afforded to everyone.[26] These different conceptions lead to wider or narrower protection of conscientious objection.

The following paragraphs describe the different foundations of conscientious objection in international law, foreign jurisdictions, and the United States.

2. International Law

Although traditional interpretation of international law denied that freedom of conscience and freedom of religion included a right of conscientious objection, the doctrine has changed in recent decades. Freedom of conscience consists of the liberty to believe in principles—especially ethical ones—according to which men shape their lives. Therefore, the right to believe necessarily needs to include a right to behave according to those beliefs. The purpose of conscientious objection is, precisely, to allow citizens to act according to their beliefs, even when the law contradicts them.

The recognition of conscientious objection as an international human right, rather than a simple privilege, constitutes a revolution in the sovereign approach of the States.[27] At the level of international organizations, both the United Nations (U.N.) Commission on Human Rights and the U.N. Committee on Human Rights have drafted resolutions asserting that Article 18 of the Universal Declaration on Human Rights (UDHR) and Article 18 of International Covenant on Civil and Political Rights (ICCPR) (both recognizing freedom of thought, conscience, and religion) guarantee the right to conscientious objection, at least for military service.[28] Additionally, Article 10.2 of the Charter of Fundamental Rights of the European Union guarantees the right to conscientious objection in general terms, not limited to a specific subject matter, in accordance with the national laws governing the exercise of the right.[29] The Parliamentary Assembly of the Council of Europe reaffirmed

[25] *See* Yossi Nehushtan, *Secular and Religious Conscientious Exemptions: Between Tolerance and Equality*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 243, 253 (Peter Cane et al. eds., 2008).

[26] *See* Maria Teresa Weidner, *Striking a Balance Between Faith and Freedom: Military Conscientious Objection as a Model for Pharmacist Refusal*, 11 J. GENDER RACE & JUST. 369, 373–74 (2008).

[27] *See* Emily N. Marcus, Note, *Conscientious Objection as an Emerging Human Right*, 38 VA. J. INT'L L. 507, 510 (1998).

[28] Conscientious Objection to Military Service, H.R.C. Res. 1995/83, ¶ 1, U.N. ESCOR, 51st Sess., Supp. No. 4, U.N. Doc. E/CN.4/1995/176, at 246 (Mar. 8, 1995); Conscientious Objection to Military Service, H.R.C. Res. 1993/84, ¶ 1, U.N. ESCOR, 49th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1993/122, at 251 (Mar. 10, 1993); Conscientious Objection to Military Service, H.R.C. Res. 1989/59, ¶ 1, U.N. ESCOR, 45th Sess., Supp. No. 2, U.N. Doc. E/CN.4/1989/86, at 141 (Mar. 8, 1989). For information about the evolution in the interpretation of Article 18 of the ICCPR, see Marcus, *supra* note 27, at 515–17.

[29] 2000 O.J. (C 364) 10.

the obligation of the State members to ensure in their regulations the right of conscientious objection with regard to health and medical services, linking it to the right of freedom of thought, conscience, and religion.[30]

3. Foreign Law

With respect to domestic foreign law, the case of Germany is of special interest. Article 4 of the German Basic Law recognizes the freedom of faith and of conscience.[31] Section 3 of Article 4 regulates the right to conscientious objection in the following terms: "No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law."[32] Early interpretations of the courts considered that Article 4.3 allowed the conscientious objection to military service as a whole but not the refusal to participate in war in particular circumstances.[33] Nevertheless, in the case *Germany v. N*,[34] the Federal Administrative Court of Germany (Bundesverwaltungsgericht) upheld the claim of a soldier who refused to take part in operations related to the war in Iraq, which he considered illegal and, therefore, against his beliefs. In its reasoning, the Court maintained that freedom of conscience also applies to soldiers in active service, who "can rely on their basic right of freedom of conscience, which is distinct from the constitutional right to recognition as a conscientious objector."[35] The intent of the express recognition of conscientious objection for military service was to strengthen the general right to freedom of conscience, not to restrict it.[36] Therefore, attending to the specific circumstances of the war in Iraq, the soldier should not be forced to obey the orders and should instead be offered alternative tasks unrelated to the ongoing conflict.[37] This judgment shows how the right to conscientious exemption in Germany is based on the right of freedom of conscience, independently from

[30] PARLIAMENTARY ASSEMBLY, COUNCIL OF EUR., THE RIGHT TO CONSCIENTIOUS OBJECTION IN LAWFUL MEDICAL CARE, Res. 1763 (Oct. 7, 2010), *available at* http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1763.htm.
Regarding the conscientious objection of health care providers under the European Convention on Human Rights, see Mark Campbell, *Conscientious Objection, Health Care and Article 9 of the European Convention on Human Rights*, 11 MED. L. INT'L 284, 286 (2011).

[31] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. IV (Ger.).

[32] *Id.*, sec. 3.

[33] *See* Ilja Baudisch, *Freedom of Conscience and Right to Conscientious Objection—Refusal to Obey to Military Orders—Legal Ban on the Use of Force (Article 2(4) UN Charter)—Right to State Self-Defense (Article 51 UN Charter)—Neutrality of States in Armed Conflicts*, 100 AM. J. INT'L L. 911, 915 (2006).

[34] Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 21, 2005, 120 DEUTSCHES VERWALTUNGSBLATT 1455 (2005) (Ger). The full text of the decision is available online (in German) at http://www.bverwg.de. We follow the English text and analysis of it made in Baudisch, *supra* note 33.

[35] Baudisch, *supra* note 33, at 912.

[36] *See id.*

[37] *Id.* at 911.

any express recognition in the German Constitution or statutes, and how the judiciary can extend its application to different scenarios.[38]

Spanish law also sheds some light on the issue. The Spanish Constitution only expressly recognizes conscientious objection for the case of military service.[39] The Constitutional Court, however, justified the conscientious objection of the military in the right to freedom of conscience.[40] The Court states that "because the freedom of conscience is a realization of the freedom of thought, that the Constitution recognizes in article 16, it can be affirmed that conscientious objection is a right recognized explicitly and implicitly in Spanish Constitutional Law" without requiring an express recognition by Congress.[41]

The Constitutional Court also expanded conscientious objection protection to other scenarios beside military service. In decision 53/1985, regarding the constitutionality of the statute that decriminalized abortion in some cases, the Court observed that the right to conscientious objection

> exists and can be exercised with independence from the drafting of specific regulations. The conscientious objection is part of the content of the fundamental right to freedom of ideology, religion and worship, recognized in article 16.1 of the Constitution and, as the Court has pointed out on different occasions, the Constitution is directly applicable, especially in the field of fundamental rights.[42]

In addition, the Court recognized the right to conscientious objection in the decision 154/2002 regarding the refusal, based on religious beliefs of parents, to authorize a blood transfusion to their son[43] and in the judgments 177/1996[44] and 101/2004[45] with respect to public officials who refuse to participate in religious activities required at their work. From the decisions of the Constitutional Court, it is possible to conclude that freedom of conscience in Spain includes the right to conscientious objection. The Spanish Supreme Court, in *obiter dicta,* reaffirmed that conscientious objection formed part of the freedom recognized in Article 16 of the Constitution.[46]

The extension of this protection, however, should be examined case by case.[47] It is difficult to talk of a general right to conscientious objection in the Spanish law because the Constitutional Court expressly rejected this idea in

[38] *See id.* at 915.
[39] C.E., B.O.E. n. 311, Dec. 29, 1978, art. 30 (Spain).
[40] *See* S.T.C., Apr. 23, 1982 (S.T.C., No. 15) (Spain).
[41] *Id.*
[42] S.T.C., Apr. 11, 1985, (S.T.C., No. 53) (Spain).
[43] S.T.C., July 18, 2002 (S.T.C., No. 154) (Spain).
[44] S.T.C., Nov. 11, 1996 (S.T.C., No. 177) (Spain).
[45] S.T.C., June 2, 2004 (S.T.C., No. 101) (Spain).
[46] S.T.S., Apr. 23, 2005 (R.G.D., No. 2505) (Spain). The Tribunal Supremo is the highest court of general jurisdiction in Spain.
[47] S.T.C., Oct. 27, 1987 (S.T.C., No. 161) (Spain).

S.T.C. 161/1987.[48] In that decision, the Court stated that conscientious objection of general effects means "the right to be exempted from the fulfillment of constitutional or legal duties because of their collision with their own beliefs, it is not recognized in our law or in any law, because it would mean the denial of the same idea of State."[49]

Furthermore, the Spanish Supreme Court has recently held a stricter view of the protection of conscientious objection. It has denied that conscientious objection is a necessary element of the freedom of religion recognized in Article 16 of the Constitution or that it is a general right with its own substance.[50] This Court has also suggested that the possibility to submit conscientious objection should be narrower in the cases of legal obligation as opposed to duties established in administrative regulations.[51] Moreover, the Court affirmed that public officials—and in a special way, judges—are subject unconditionally to the rule of law, no matter if they could be replaced in their specific case or there are alternatives to avoid damaging third-party interests.[52] Finally, the Court accepted that the legislature could expand the protection of conscientious objection to new scenarios but that protection in any case would only have a legal—as opposed to constitutional—rank.[53]

4. The United States

The cited international norms and case law of Germany and Spain show that conscientious objection in those jurisdictions relies on the fundamental right to freedom of conscience. The case of the United States is quite different because its Constitution does not expressly mention freedom of conscience. Instead, the First Amendment contains two distinct religious clauses, the Free Exercise Clause and the Establishment Clause.[54] Despite the different wording, it is possible to interpret the provisions of the First Amendment as including liberty of conscience. If this is the case, conscientious objection in American law can be found a reasonable justification on this freedom.

Eighteenth-century writers from different Christian denominations agreed over some essential rights and liberties of religion, including liberty of conscience, free exercise, pluralism, equality, separationism, and disestablishment. Among the works of these writers, the term 'free exercise of religion' is often used as a synonym of 'liberty of conscience.'[55] This liberty

[48] *See id.*
[49] *Id.*
[50] *See* S.T.S., May 11, 2009 (R.G.D., No. 3059) (Spain).
[51] *See id.*
[52] *See id.*
[53] *See id.*
[54] U.S. CONST. amend. I.
[55] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488 (1990); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 405 (1996).

requires that "persons be exempt or immune from civil duties and restrictions that they could not, in good conscience, accept or obey," words that sound like a definition of conscientious objection.[56] From the history of the drafting of the Bill of Rights it seems clear that behind the religion clauses stood the idea of liberty of conscience, even if the word 'conscience' did not appear in the final version of the amendment. As Feldman explains,

> The reasons for the Senate's omission of the reference to conscience are not clear. What is certain is that the notion of liberty of conscience was not being abandoned; rather, protection of free exercise and a ban on establishment, taken together, were thought to cover all the ground required to protect the liberty of conscience. . . . No one involved in the debate over the religious clauses, or indeed anywhere in the eighteenth century American debates over state and religion, argued against liberty of conscience as a general proposition. It was the theoretical basis for both religion clauses and remained so even after the word 'conscience' disappeared from the draft language.[57]

According to Witte, the language of the final version of the First Amendment protects conscience even more, because if "Congress cannot 'prohibit' the free exercise, the public manifestation of religion, a fortiori Congress cannot 'prohibit' a person's private liberty of conscience, and the precepts embraced therein."[58] McConnell also remarks that the term 'exercise' implies action, and its inclusion in the First Amendment "makes clear that the clause protects religiously motivated conduct as well as belief."[59]

Not only scholars have given a wider interpretation to the constitutional protection of religion. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court made reference to the term 'freedom of conscience'.[60] Furthermore, in military conscientious objection cases, the Court has expressly admitted the objection based on non-religious beliefs even when the statutes that granted the exemption only mentioned 'religious training

[56] Witte, *supra* note 55, at 391–92.

[57] Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 404 (2002). *See also* McConnell, *supra* note 55, at 1488. For an opposite view on the inclusion of a constitutional right of religious exemption, see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective,* 60 GEO. WASH. L. REV. 915 (1992).

[58] Witte, *supra* note 55, at 394.

[59] McConnell, *supra* note 55. The author adds that 'religion' is broader than 'conscience' because it includes the corporate or institutional aspects of religious beliefs. *Id.* at 1490.

[60] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

and belief.' [61] This is interpreted as recognition of freedom of conscience, beyond the protection of religion.[62]

Nevertheless, the protection of conscientious objection rooted in the religious clauses is controversial. For example, in *North Coast Women's Care Medical Group., Inc. v. San Diego County*, the California Supreme Court—relying on the U.S. Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith*—held that a "religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs."[63] In other cases, the courts have upheld the plaintiff's claims. For instance, in *Stormans v. Selecky*, the court found that the rules enacted by the Washington State Board of Pharmacy requiring pharmacies to deliver all prescribed medications, including emergency contraceptives, violated the Free Exercise of Religion.[64] The challenged rules included multiple exemptions for secular conduct but did not contain exemptions for identical religiously motivated conduct.[65] They did not justify the distinction in a compelling interest of the state, and consequently, the court concluded that the rules unconstitutionally targeted religious conduct.[66]

Although *Smith* remains valid, to understand the current federal law on the subject, we also need to attend to the Religious Freedom Restoration Act of 1993 (RFRA),[67] which significantly limits the scope of the Court's decision. This statute provides that the government may substantially burden religious exercise only in "furtherance of a compelling governmental interest" and only if the burden constitutes "the least restrictive means of furthering that compelling governmental interest."[68] Despite a partial overruling in *City of Boerne v. Flores*,[69] RFRA remains valid on the exercise of powers by the federal government.[70] Therefore, under current law, it is necessary to use a case-by-case analysis to determine whether the government is allowed to forbid a religious exemption from a neutral and valid law of general

[61] Welsh v. United States, 398 U.S. 333, 348 (1970).

[62] *Id.* at 340.

[63] N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959, 966 (Cal. 2008) (emphasis added).

[64] *See* Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 934 (W.D. Wash. 2012).

[65] *See id.* at 971–73.

[66] *See id.* at 991–92. A similar problem regarding secular exemptions is found in *Morr-Fitz, Inc. v. Blagojevich*, *infra* note 154.

[67] 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

[68] *Id.* § 2000bb–1.

[69] *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Additionally, in 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA),
42 U.S.C. §§ 2000cc-2000cc-5 (2006). The statute, under the Spending and Commerce Clauses, applies the 'compelling interest' and 'least restrictive means' requirements to state legislation that restricts 'free exercise' but limited to the areas of land-use regulation and institutionalized persons. It seems unlikely to find cases of conscientious objectors under the situations covered by RLUIPA.

[70] *See Leading Cases*, 120 HARV. L. REV. 125, 343 (2006).

applicability. In the cases regulated under RFRA, the general rule is that the person has a fundamental right to freedom of conscience that can only be limited by a compelling interest and the least restrictive means.

The refusal to perform an action based on deep individual beliefs does not constitute establishment of religion. For instance, the refusal of a health care provider does not order the patient to conform to the physician's belief or moral standards. Even if the beliefs of the objector are based on religious grounds, the refusal does not force the patient to conform to the physician's belief or morality. On the contrary, it might protect the patient's conscience as well. For example, in *Ward v. Polite*, the refusal of a counselor to counsel on same-sex relations was considered by the court to protect both the freedom of conscience of the plaintiff and to avoid the imposition of the counselor's values on the client.[71] On the other hand, forcing professionals to act against their conscience seems to be closer to a violation of Free Exercise. Using a similar metaphor to the one used by the Supreme Court in relation to freedom of speech in *Tinker v. Des Moines*, it can hardly be argued that health care providers shed their constitutional rights to freedom of conscience at the hospital gate.[72]

Besides the Free Exercise Clause, some voices start to suggest that conscientious objection claims might be grounded in the Fourteenth Amendment to the Constitution.[73] The autonomy logic behind the substantive due process cases could explain why there must be a constitutional right to refuse based on conscience. As Rienzi suggests, this right would not be absolute, but the government will need to prove a sufficiently compelling interest forcing providers to act against their will and convictions.[74]

5. Lessons from a Comparative Perspective

The previous sections suggest that in international law as well as in domestic law, there is a trend to protect conscientious objection. In the case of the United States, the protection of liberty of conscience, at least of religious conscience, can be derived from the First Amendment to the Constitution. The freedom of conscience in combination with the right to free exercise of religion translates into the right to act according to one's religious beliefs. From this starting point, it is reasonable to argue that conscientious objection in the United States can be grounded in the fundamental right of freedom of conscience.

[71] Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012).

[72] The original sentence in *Tinker v. Des Moines* says: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506 (1969).

[73] *See* Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 967 (W.D. Wash. 2012); Mark 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, 54 (2011).

[74] Rienzi, *supra* note 73, at 55.

Despite the differences in the constitutional texts, some conclusions can be drawn in benefit of other legal systems. If, in the case of the United States, it is possible to interpret the Constitution as protecting conscientious objection, *a fortiori* the protection of conscientious objection can be stronger in countries that explicitly recognize in their constitutions the freedom of conscience. Looking at practical difficulties in the interpretation of the First Amendment should encourage other legal systems to avoid such conflicts by strengthening their constitutional protection of freedom of conscience. In other words, countries such as Spain and Germany should look at their constitutional protection of freedom of conscience to solve new cases of conscientious objection.

II. CONSCIENTIOUS OBJECTION OF HEALTH CARE PROVIDERS: A PUZZLE BETWEEN CONGRESS, ADMINISTRATION, AND THE JUDICIARY

When we think of professions that deal with a high level of ethical decisions, the ones in the health care area immediately come to mind. Their work touches sensitive issues dealing with the beginning and end of life, reproductive techniques, and privacy, among others. However, the evolution of the rights discourse in the last few decades seems to have created conflicts between patients' decisions and health care providers' beliefs. In this scenario, special norms regulating conscientious objection of health care providers appear to be necessary.

A. Spain

The Sexual and Reproductive Health Act introduced an express conscientious objection clause in favor of professionals directly involved in the voluntary interruption of pregnancy.[75] The statute that originally legalized abortion in Spain did not include any conscientious objection clause; the only recognition of such a right before 2010 appears in the case law of the Constitutional Court.[76] From this starting point, the Sexual and Reproductive Health Act gives a stronger protection to conscience rights by incorporating an explicit conscientious objection clause.[77] On the other hand, the wording of the exemption seems to narrow the scope of conscientious objection. Although the decision 53/1985 of the Constitutional Court suggested that the right to conscientious objection existed and could be exercised without having to draft specific regulations,[78] the new norms suggest that this right is limited to the terms of the legislation.

[75] Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act, *supra* note 1, art. 19.2.

[76] *See* B.O.E. 1985, 166 (Spain).

[77] *See* Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act, *supra* note 1, art. 19.2.

[78] *See* S.T.C., Apr. 11, 1985, (S.T.C., No. 53) (Spain).

Article 19.2 of the Sexual and Reproductive Health Act refers to health care providers "*directly involved in the voluntary interruption of pregnancy*."[79] The line between what is direct or indirect is blurry. It is not clear whether anesthetists, radiologists, midwifes, or pharmacists, among others, are directly or only indirectly involved in abortion procedures. For instance, an anesthetist could consider himself directly involved in the interruption of the pregnancy by providing his services to the woman during the proceedings and thus violating his conscience by participating in the performance of the abortion even though authorities consider that he is not.

Administrative authorities of Spain's autonomous communities issued ordinances regulating the procedure of conscientious objection.[80] Some of these regulations have tried to include exhaustive lists of professionals who can be considered directly involved in abortion and, therefore, can file conscientious objections. For instance, the original version of the regulation of the Council of Health and Social Welfare in Castilla-La Mancha excluded family doctors from the list.[81] The final version, however, omits any list of professionals.[82] Another example took place in the community of Andalucía, where the Health Service required family doctors to inform patients about abortion and refer them to professionals who could perform those procedures.[83] Courts quashed the regulation, affirming that family doctors are directly involved in the abortion process and thus are protected under the conscientious objection clause of the Sexual and Reproductive Health Act.[84]

Some regulations also added extra requirements to the exercise of the right to conscientious objection. One that has caused controversy is the creation of a registry of conscientious objectors. Professionals allege that the Sexual and Reproductive Health Act only requires a written communication of the objection to the official in charge of the respective health service and that a registry can lead to discrimination in their workplace against health care providers.[85] The Superior Tribunal of Justice, however, rejected this claim, pointing out that case-by-case communication of conscientious objection would hinder the organization and provision of the public health services.[86]

Another question that arises from the Sexual and Reproductive Health Act is how to balance the right to conscientious objection of health care

[79] Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act, *supra* note 1, art. 19.2 (emphasis added).

[80] The autonomous communities constitute the territorial division of the government in Spain, with several competencies that make them similar in many ways to states within a federal system. *See* C.E., *supra* note 39, art. 148.

[81] *See* S.T.S., Feb. 20, 2012 (R.G.D., No. 143) (Spain).

[82] *See id.*

[83] *See* Sánchez Esparza, *supra* note 4.

[84] *Id.*

[85] José Miguel Castillo Calvín, *Objeción de Conciencia en el Ejercicio Profesional*, III SIMPOSIO NACIONAL ANDOC 68–72 (2011), *available at* http://andoc.es/actas.pdf (last visited June 6, 2013). This material was provided by ANDOC (Asociación para la Defensa del Derechos a la Objeción de Conciencia).

[86] *See* S.T.S., Feb. 20, 2012, *supra* note 81, Fundamento de Derecho No. 1.

providers with the rights of patients. The Sexual and Reproductive Health Act states that conscientious objection should not undermine the access and quality of health services.[87] Furthermore, Statute 41/2002 establishes that patients have the right to information.[88] These two norms could force conscientious objectors to give information about abortion and to refer the patients to professionals that would be willing to perform them. The problem is that this form of participation would still violate the conscience of those who believe that abortion involves the killing of an innocent human being. The law, however, cannot determine the merits of differing religious precepts or the centrality of particular practices to a faith.[89] This is especially relevant considering that the Sexual and Reproductive Health Act does not recognize a right to abortion but does recognize the scenarios where abortion should not be penalized.

It is undeniable that the Sexual and Reproductive Health Act is ambiguous about what constitutes access and quality of health services. It would be a task for the judiciary and the administration to interpret these terms and harmonize them with the right to freedom of conscience. The decision of the court of Andalucía already recognized that the right to conscientious objection involves the right to refuse giving information and referring patients.[90] It will be interesting to see how the highest courts resolve cases involving the regulation of this issue.

In relation to the enforcement mechanisms of the right to conscientious objection, there are at least two available proceedings. A person can file a complaint before specialized tribunals for administrative litigation (*Contencioso Administrativo*) against administrative regulations and reach the Superior Tribunal of Justice through appeal mechanisms.[91] Additionally, the Constitution contemplates a special proceeding before the Constitutional Court known as *amparo*, which protects certain constitutional rights, including

[87] Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act, *supra* note 1, art. 19.2.

[88] Autonomy of the Patient and the Rights and Obligations with Regard to Information and Clinical Documentation, 40126-40132 (B.O.E. 2002, 274) (Spain).

[89] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990). In the case of the United States, there has been controversy regarding state statutes that accept conscientious objection of health care providers but require the referral of the patient to someone willing to perform the action required by the patient. This has also been the position of the American College of Obstetrics and Gynecology (ACOG). *See* ACOG COMMITTEE, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE, ACOG COMMITTEE OPINION NO. 385 (Nov. 2007), *available at* http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Ethics/The_Limits_of_Conscientious_Refusal_in_Reproductive_Medicine. The problem with mandatory referrals is that, in most of cases, the moral beliefs of the objector prevent him from participating in any way in the act that he considers prohibited. The rejection to refer to other professionals is related to his own action.

[90] *See* Sánchez Esparza, *supra* note 4.

[91] *Administrative Justice in Europe: Report for Spain*, par. 55, ASS'N OF THE COUNCILS OF STATE & SUPREME ADMIN. JURISDICTIONS OF THE EUR. UNION [ACA EUROPE], http://www.juradmin.eu/en/eurtour/i/countries/spain/spain_en.pdf (last visited June 6, 2013).

freedom of conscience.[92] Although the study of the specific procedures exceeds the purposes of this Article, it is interesting to have this information in mind when the analysis moves towards the study of the protection of conscientious objection in the United States.

After this brief description of the protection of conscientious objection of health care providers in Spain, many questions remain. One especially relevant to us is the question of distribution of powers: Who is better suited to regulate conscientious objection? It is reasonable to consider that implementation of conscientious objection requires some procedures and interpretation beyond the terms of Article 19.2 of the Sexual and Reproductive Health Act. In fact, the Act establishes in its preamble that the recognized right to conscientious objection requires further development by the law.[93] This same disposition of the preamble, however, can be used to argue that it is Congress—*la ley*—and not the administration that is called to develop that complementary regulation. This can be supported by Article 53.1 of the Constitution of Spain, which states that only the law, which in any case must respect the essential content, could regulate the exercise of the constitutional rights and freedoms.[94] So far, it has been the local administration of the autonomous communities that has had an active role in these regulations.[95] This fact leads us to ask whether these regulations should come from a central or a local level, a subject related to federalism. Finally, the role of the judiciary in the interpretation process remains in question.

While it is still too early to conclude how things will develop in Spain after the Sexual and Reproductive Health Act, the study of the situation in the United States—a country with somewhat similar problems and a long history of conscientious objection—can shed some light and experience on how things could turn out.

B. The United States

1. Federal Health Care Provider Conscience Protection Statutes

Since the 1970s, the United States has recognized special protection of conscientious objection for health care providers, especially under the group of statutes known as the "Federal Health Care Provider Conscience Protection

[92] C.E., *supra* note 39, art. 53(2).

[93] Sexual and Reproductive Health and Voluntary Interruption of Pregnancy Act, *supra* note 1, pmbl.

[94] C.E., *supra* note 39, art. 53.1.

[95] For information on the regulations and case law within autonomous communities, see María Cebriá García, *Objeción de Conciencia del Personal Sanitario y Reformas Legislativas en España*, 27 REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIÁSTICO DEL ESTADO 1 (2011).

Statutes." This conglomerate of statutes includes the 'Church Amendment,' Section 245 of the Public Health Service Act, and the 'Weldon Amendment.'[96]

After the 1973 Supreme Court decision in *Roe v. Wade*,[97] some federal courts interpreted that 'state actors'—including hospitals that receive public funds—have the obligation to perform sterilization and abortion procedures. Examples of these interpretations are the decisions in *Doe v. Hale Hospital* (Massachusetts)[98] and *Doe v. Charleston Area Medical Center, Inc.* (West Virginia).[99] However, *Roe v. Wade* remarks that neither physicians nor hospitals shall be required to perform an abortion against their moral principles.[100]

In the same year that *Roe v. Wade* was decided, Congress reacted to this controversy by enacting the first "Church Amendment."[101] This statute protects health care providers from discrimination by recipients of federal funds on the basis of their refusal to perform or participate in any lawful health service or research activity, based on their religious or moral beliefs.[102] In 2011, the HHS described the purpose of the statute in a narrow way, explaining that its objective was "to make clear that receipt of federal funds did not require the recipients of such funds to perform *abortions or sterilizations*."[103]

[96] The 'Church Amendment' (42 U.S.C. § 300a-7 (2006)) was enacted in 1973. Section 245 of the Public Health Service Act (42 U.S.C. § 238n (2006)) was enacted in 1996. The 'Weldon Amendment' (Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat 3034 (2010)) was originally adopted in 2005 and then reincorporated in each subsequent appropriation act. Other federal statutes that protect conscientious objection of health care providers are the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1303(b)(4), 124 Stat. 1029 (2010); the Civil Rights Restoration Act of 1987, Chapter 38 (20 U.S.C. § 1688 (2006)); and 42 U.S.C. § 300a-8 (2006).

[97] Roe v. Wade, 410 U.S. 113 (1973).

[98] Doe v. Hale Hosp., 500 F.2d 144 (1st Cir. 1974).

[99] Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638 (4th Cir. 1975).

[100] 410 U.S. at 143. The Court, in footnote 38, quotes the proceedings of the American Medical Association House of Delegates 220: "Neither physician, hospital, nor hospital personnel shall be compelled to perform any act violative of personally-held moral principles." In addition, in *Doe v. Bolton*, decided the same day as *Roe*, the Supreme Court tacitly approved the conscience clause in a Georgia statute that prescribes that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure." Doe v. Bolton, 410 U.S. 179, 197–98 (1973). *See also* Rachel White-Domain, *Making Rules and Unmaking Choice: Federal Conscience Clauses, the Provider Conscience Regulation, and the War on Reproductive Freedom*, 59 DEPAUL L. REV. 1249, 1253 (2010).

[101] 42 U.S.C. § 300a-7 (2006). The act is named for Frank Church, who proposed the amendment.

[102] *See* Denise M. Burke & Anna Franzonello, *Healthcare Rights of Conscience: A Survey of Federal and State Law*, *in* DEFENDING LIFE 2012: BUILDING A CULTURE OF LIFE, DECONSTRUCTING THE ABORTION INDUSTRY 547, 663 (2012) [hereinafter Burke & Franzonello, *Survey*], *available at* http://www.aul.org/wp-content/uploads/2012/04/survey-fed-state-law.pdf (a publication of Americans United for Life).

[103] Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9969 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88) (emphasis added).

The Church Amendment Statute prohibits any public authority to require an individual—as a condition of a grant, contract, loan, or loan guarantee—to perform or assist in a sterilization procedure or abortion if these actions are contrary to his religious beliefs or moral convictions.[104] In the case of entities, the act bans the requirement of providing personnel or facilities for the performance of any sterilization procedure or abortion if the performance of such procedure is prohibited by the entity on the basis of its religious beliefs or moral convictions.[105] Additionally, the act prohibits discrimination in employment conditions or concession of grants among personnel and institutions, based on their availability or non-availability to perform lawful sterilization procedures or abortion.[106] Furthermore, the document prescribes that no individual

> shall be required to perform or assist in the performance of any part of a health service program or a research activity funded in whole or in part . . . by the Secretary of Health and Human Services, if the . . . activity would be contrary to his religious beliefs or moral convictions.[107]

Finally, the statute prohibits the entities financed by federal funds from discriminating "against applicants for training or study because of [the] refusal of [an] applicant to participate on religious or moral grounds."[108]

Complementing the 'Church Amendment,' the Public Health Service Act of 1996 regulates abortion-related discrimination in governmental activities regarding the training and licensing of physicians.[109] In general terms, the Act provides that the federal government, and any state or local government that receives federal funds, may not discriminate against any health care entity on the basis of entity refusal to undergo or provide training in the performance of induced abortions, especially in relation to the accreditation of postgraduate physician training programs.[110]

Moreover, in 2005, an amendment inserted in the Consolidated Appropriations Act gave more detailed conscience protection to health care givers. The provisions have been reproduced in the Appropriations Acts of every year since. The norms are known as the Weldon Amendment.[111] The amendment not only bans discrimination itself—as the Public Health Service Act does—but also cuts funding for those agencies, programs, or governments that actually discriminate.[112] Another important difference is that it defines the

[104] 42 U.S.C. § 300a-7(b).
[105] *Id.*
[106] *Id.* § 300a–7(c).
[107] *Id.* § 300a–7(d).
[108] *Id.* § 300a–7(e).
[109] *Id.* § 238n.
[110] *Id.* § 238n(a), (b).
[111] Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034 (2010). The name derives from the Congressman who sponsored the amendment, Dave Weldon.
[112] *Id.*

term 'health care entity' as including not only individuals and hospitals but also maintenance organization and health insurance plans.[113] It ends with a general clause that includes "any other kind of health care facility, organization, or plan."[114]

In addition to these three statutes, we find the Affordable Care Act of 2010, which also includes norms concerning conscience protection. Section 1303(b)(4) of the Act establishes that "[n]o qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions."[115]

There are important differences between these statutes and the Spanish law analyzed in the previous section. The Federal Health Care Provider Conscience Protection Statutes focus on the non-discrimination aspect of conscientious objection rather than on the positive action of the professional who wants to file a conscientious objection claim. They presuppose that the individual can present his objection, but they go further by protecting the individual from the consequences that his objection could have. Addressing the problem of discrimination in a more explicit way in the Spanish statute would help protect objectors from the dangers that they see in certain administrative measures such as the creation of the registry of conscientious objectors.

2. Regulations of the Department of Health and Human Services

Although the Federal Health Care Provider Conscience Protection Statutes do not require promulgation of regulations to be interpreted or enforced, in 2008, the HHS issued regulations under the title "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law."[116] This regulation entrusted the Office for Civil Rights (OCR) of the HHS with responsibilities for the enforcement of the analyzed statutes.[117] The regulation also provided norms related to the purposes of the statutory provisions, how to understand the terms of the statutes, the applicability of the same regulation, and requirements and prohibitions.[118] It also added a special requirement that "all recipients of Departmental funds had to submit written certification that they would operate in compliance with the provider conscience statutes."[119]

[113] *Id.*
[114] *Id.*
[115] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, Sec. 1303(b)(4), 124 Stat. 1029 (2010).
[116] 45 C.F.R. § 88.5 (2009).
[117] *See id.*
[118] *See id.*
[119] *Id.*

The objective of this requirement was to create awareness about the rights and obligations created by the Federal Health Care Provider Conscience Protection Statutes.[120]

Controversy arose very soon. Those who were against the 2008 HHS Rules considered them unnecessary because the statutes already provided enough mechanisms of enforcement. Moreover, the regulation was seen as a threat to patient rights and informed consent.[121] Additionally, opponents criticized the increase of administrative costs that was involved. Finally, in February of 2011, the HHS partially rescinded the 2008 Rules with the aim of clarifying ambiguities.[122] The new version states—in similar terms as the 2008 version—that the purpose of the regulation is to provide for the enforcement of the Federal Health Care Provider Conscience Protection Statutes.[123] Nevertheless, it eliminates the second paragraph of former Section 88.1, which provided that "consistent with this objective to protect the conscience rights of health care entities/entities, the provisions in [Federal Health Care Provider Conscience Protection Statutes], and the implementing regulations contained in this Part are to be interpreted and implemented broadly to effectuate their protective purposes."[124]

The new version also eliminates the reference to definitions, applicability, and requirements, including the certification requirement.[125] It keeps the OCR as the entity in charge of receiving complaints based on the Federal Health Care Provider Conscience Protection Statutes.[126] Nevertheless, it somehow weakens the complaints mechanism by changing the language from "to receive complaints of *discrimination and coercion* based on the health care conscience protection statutes and this *regulation*"[127] to the words "to

[120] *See id.*

[121] *See* Denise M. Burke & Anna Franzonello, *A Primer on Protecting Healthcare Freedom of Conscience*, *in* DEFENDING LIFE 2012: BUILDING A CULTURE OF LIFE, DECONSTRUCTING THE ABORTION INDUSTRY 555, 555–563 (2012) [hereinafter Burke & Franzonello, *Primer*], *available at* http://www.aul.org/wp-content/uploads/2012/04/primer-protecting-freedom-conscience.pdf (last visited June 6, 2013). Conscientious objection should not affect a patient's rights for several reasons. First, the laws protecting health care providers' conscience refusals do not prevent the patient to go to another professional who is willing to provide the service or to perform the requested procedure. Second, conscience protections "do not interfere with existing medical malpractice standards." *Id.* at 561. It is true that every time that we are talking about rights, there can be abuses. For example, it is not permissible that a pharmacist refuses to sell syringes to a diabetic, based on the presumption that the client is going to use it for drug purposes. Weidner, *supra* note 26, at 390. However, abuses can also emerge in the field of secular exemptions such as allowing pharmacies to decline to stock a drug because it is expensive, difficult to store, or requires an additional paperwork burden. If situations like those occur, general rules of liability should be applicable.

[122] Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9973 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88).

[123] *See* C.F.R. § 88.1 (2011).

[124] *Id.*

[125] *See id.*

[126] *See* C.F.R. § 88.6 (2011).

[127] *Id.* (emphasis added).

receive complaints based on the Federal health care provider conscience protection statutes."[128]

The rescission of the 2008 Rules has been criticized by freedom of religion defense groups, who lament that the new regulation undermines the position of conscientious objectors. Experts of the Becket Fund for Religious Liberty argue that the previous rules "offered detailed definitions and concrete examples to help health-care professionals and institutions know exactly what was protected. . . . Instead, the revised rule now says that 'individual investigations will provide the best means of answering questions about the application of the statutes in particular circumstances.'"[129] The HHS now believes that "the approach of a case-by-case investigation and, if necessary, enforcement, will best enable the Department to deal with any perceived conflicts within concrete situations."[130]

The conflict between the 2008 Rules and the 2011 version brings up, again, the question of the role of regulations in the interpretation of conscientious objection statutes. Both the 2011 HHS Rules and the regulations of the autonomous communities in Spain follow the trend to limit the scope of conscientious objectors rights. Although it is difficult to draw a line between what is interpretation and what is limitation, it is important to keep in mind that administrative rules should not limit constitutional rights. If conscientious objection is grounded in freedom of conscience, then the administration has to be especially careful in its regulation. The different versions of the HHS rules might serve as an example of the discretionary power of administrative regulations. From the American experience, other countries can learn of the importance of control mechanisms.

3. Finding a Remedy: The Private Right of Action Problem

One of the criticisms made regarding the drafting of the 2008 Rules was that the regulations were unnecessary because the statutes already provided enough enforcement mechanisms.[131] Nevertheless, case law seems to refute this supposition.

In *Cenzon–DeCarlo v. Mount Sinai Hospital*,[132] the U.S. Court of Appeals for the Second Circuit held that the Church Amendment did not confer a private right of action to enforce the statute. The case refers to Ms.

[128] Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9973 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88).

[129] Joan Frawley Desmond, *Obama Rescinds Bush-Era Conscience Regs*, NATIONAL CATHOLIC REGISTER (Feb. 23, 2011), http://www.ncregister.com/daily-news/obama-rescinds-bush-era-conscience-regs/%20-%20blogComments (internal quotation marks omitted) (citing Eric Kniffin, Legal Counsel for the Becket Fund for Religious Liberty).

[130] Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. at 9969.

[131] *Id.* at 9971.

[132] Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695 (2d Cir. 2010).

Cenzon-DeCarlo, a nurse, who was compelled to participate in a late-term abortion and was subsequently coerced into signing a form indicating her readiness to participate in future emergency abortions.[133] As the court's opinion in *Cenzon-DeCarlo* observes, the Church Amendment does not confer an explicit private right of action.[134] It is true that federal courts have, in the past, implied rights of actions from statutes that do not expressly recognize them but only where there is "explicit evidence of Congressional intent."[135] The other Federal Health Care Provider Conscience Protection Statutes do not help either, because of their limited scope; the Public Health Service Act of 1996 refers specifically to training programs of physicians whereas the Weldon Amendment is limited by its funding nature.

Besides the mentioned federal statutes, health care providers could use other general norms, such as Title VII of the Civil Rights Act, to protect their conscience rights. These norms prohibit discrimination against any employee in the terms and conditions of employment based on religious beliefs.[136] From the study of Title VII case law, however, it seems difficult for health care providers to obtain a remedy under these provisions. The Civil Rights Act considers that the employer can be exempted from the obligations of the statute if he demonstrates that he is unable to reasonably accommodate an employee or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[137]

In cases involving health care providers, the interpretation of the courts has been especially narrow. For example, the case law seems to make a distinction between the protection of conscience of private employees and the one of 'public protectors', such as police, firefighters and public health care providers, giving the latter group a very narrow safeguard under Title VII.[138] Courts have affirmed that conscience beliefs of professionals of the public area should defer in favor of the state interest involved in the performance of their

[133] *Id.* at 696.
[134] *Id.* at 697.
[135] *Id.*
[136] *See e.g.*, 42 U.S.C. § 2000e (West 2011).
[137] 42 U.S.C. § 2000e (j) (West 2011).
[138] In *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 228 (3d Cir. 2000), the Circuit Court stated that "it would seem unremarkable that public protectors such as police and firefighters must be neutral in providing their services. We would include public health care providers among such public protectors. Although we do not interpret Title VII to require a presumption of undue burden, we believe public trust and confidence requires that a public hospital's health care practitioners—with professional ethical obligations to care for the sick and injured—will provide treatment in time of emergency." Another case related to abortion under Title VII of the Civil Rights Act, but outside the health care providers field, is *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998). Mr. Rodriguez was a policeman who requested to be exempted from assignments to protect abortion clinics based on his religious belief. The court considered it a reasonable accommodation to offer the officer a transfer to a district that did not have an abortion clinic. The court stated that the city fulfills the obligations under Title VII by providing at least one reasonable accommodation. Regarding the status of public protectors, see Judge Posner's concurring opinion in the case.

work.[139] This interpretation is too restrictive. The law protects conscientious objections of other professions related to public interests. One example is the protection of the conscientious objection of military professionals who have a contractual relation with the Armed Forces.[140] Although this profession is closely related to the public interest of national security, the legal system still protects their conscience objections, accommodating their duties to non-combatant service. As in these cases, it should be possible to make accommodations when other public interests, such as public health, are involved.[141]

Taking all this into account, it seems clear that conscience refusal in the health care field is not overprotected by federal law. In this scenario, administrative regulations could still have a role to play, such as the regulation of the disputes resolution mechanism before the OCR. Whereas complaints mechanisms at the administrative level, in terms of procedural economy, are probably the fastest way to resolve conscientious objection disputes, it is fundamental to keep open a judicial instance of review that can correct the arbitrariness of political decisions of the administration. A mixed model can help, on one hand, to avoid the overflowing of workload of the judiciary and, on the other hand, to guarantee effective remedies, addressing the problems and fears of both the Spanish and American systems.

4. State Statutes

At the state level, legislatures have also enacted statutes recognizing conscience exemptions in relation to reproductive services. Forty-six states have enacted statutes allowing certain health care providers to refuse participating in abortion practices.[142] Most of them extend the refusal provisions to institutions, although only fifteen recognize them in relation to private institutions; in the case of California, recognition is limited to religious institutions.[143] Only Louisiana and Mississippi provide protection for all

[139] *See e.g.*, *Shelton*, 223 F.3d 220.

[140] *See* DEP'T OF DEF., INSTRUCTION: CONSCIENTIOUS OBJECTORS, No. 1300.06 (2007).

[141] Despite the restrictive interpretation of the courts, Title VII is useful for the protection of health care providers in other aspects. Some authors affirm that physicians, nurses, and pharmacists belong to professions that involve a high level of decision-making and, consequently, they have waived their right to perform certain activities based on personal reasons alone. *See* Weidner, *supra* note 26, at 396. Nevertheless, the Supreme Court has been clear that under Title VII of the Civil Rights Act, there cannot be a prospective waiver of rights. Alexander v. Gardener-Denver Co., 415 U.S. 36, 51 (1974). It has also been suggested that a property-based analysis of health care providers' rights will help to show the injustice behind the prohibition to exercise the profession to conscientious objectors. *See generally* Michael A. Fragoso, Note, *Taking Conscience Seriously or Seriously Taking Conscience?: Obstetricians, Specialty Boards, and the Takings Clause*, 86 NOTRE DAME L. REV. 1687 (2011).

[142] GUTTMACHER INST., STATE POLICIES IN BRIEF, REFUSING TO PROVIDE HEALTH SERVICES, *available at* http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (last updated June 1, 2013).

[143] *Id.*

health care providers and for all health care procedures and services.[144] The States that do not provide any protection are Alabama, New Hampshire, and Vermont.[145]

Seventeen states have also enacted statutes allowing individual providers exemptions in the cases of sterilization, and sixteen extend the protection to institutions.[146] Some states have also regulated the health care provider's objection to provide contraceptive services.[147] Even in the states where there is no explicit provision for conscientious refusals, non-discriminatory labor statutes can, at least theoretically, protect health care providers, banning discrimination based on religious beliefs.

In order to have an accurate idea of the current law at the state level, it is also necessary to examine judicial decisions interpreting these provisions. In *Valley Hospital Association v. Mat-Su Coalition for Choice*, the Supreme Court of Alaska declared that the refusal statute that allowed hospitals to decline to provide abortions based on conscience reasons was unconstitutional because it involved a violation of the woman's fundamental right to abortion grounded in the right to privacy of the Constitution of Alaska.[148] Therefore, restrictions can only be justified by a compelling state interest and where there are not less restrictive means to achieve the objective.[149]

Other courts have given a broader protection to conscientious objection. The Florida District Court of Appeal (Third District) decided to apply the 'reasonable accommodations and undue burden test' of Title VII of the Civil Rights Act, although the state statute did not require it. In *Kenny v. Ambulatory Centre of Miami, Florida, Inc.*, Florida courts found that additional efforts to accommodate a nurse's religious beliefs of not participating in abortion procedures did not constitute undue hardship in those circumstances.[150]

State courts have interpreted statutes as including a broader protection of conscience, not limited to religious beliefs. One example is the Supreme Court of Montana in *Swanson v. St. John's Lutheran Hospital*, where Swanson, a nurse-anesthetist, refused to participate in a sterilization procedure based on her conscience beliefs, although she had assisted in other sterilizations before.[151] The court determined that the statute did not allow distinction between religious or moral beliefs largely upheld or recently acquired.[152] In

[144] *See* Burke & Franzonello, *Survey*, *supra* note 102, at 552.
[145] *Id.*
[146] *See* GUTTMACHER INST., *supra* note 142.
[147] For statistical data, see *id.* *See also* Natalie Langlois, *Life-Sustaining Treatment Law: A Model for Balancing A Woman's Reproductive Rights with a Pharmacist's Conscientious Objection*, 47 B.C. L. REV. 815, 827 (2006).
[148] *See* Valley Hosp. Ass'n, v. Mat-Su Coal. for Choice, 948 P.2d 963, 968 (Alaska 1997).
[149] *See id.*
[150] *See* Kenny v. Ambulatory Ctr. of Miami, Fla., Inc., 400 So. 2d 1262, 1266–67 (Fla. Dist. Ct. App. 1981).
[151] *See* Swanson v. St. John's Lutheran Hosp., 597 P.2d 702 (Mont. 1979).
[152] *Id.* at 709.

the words of the court, "[t]he right given by the statute is unqualified, irrespective of past participation."[153]

The recent decision of the Circuit Court of the Seventh Judicial Circuit of Illinois in *Morr-Fitz Inc. v. Blagojevich* is of special interest.[154] In this case, the court declared invalid an administrative rule[155] that requires pharmacists to participate in sales of drugs, including emergency contraceptives. The court established that the rule violates the Illinois Health Care Right of Conscience Act.[156] In the opinion of the court, the plain language of the statute makes clear that pharmacies and pharmacists are covered by the legislation.[157] Additionally, the rule violated the First Amendment's Free Exercise Clause of the U.S. Constitution because it is neither neutral nor generally applicable.[158] The intent of the rule, as the evidence showed, was to stop pharmacies and pharmacist sale refusals based on religious grounds.[159] Nevertheless, the rule allowed non-compliance based on secular reasons, such as "common sense business" reasons, other than religion.[160] The court determined that this distinction between business reasons and religious ones showed a Free Exercise violation "because the Rule is neither neutral nor generally applicable."[161] The law is subject to the compelling interest test under the Free Exercise Clause,[162] and it fails because first, the government did not prove that this prohibition constitutes the less restrictive means, and second, the distinction between "common sense business" reasons and religious reasons contradicts "the government's compelling interest argument."[163]

As it has been shown, almost every state has some conscience protection legislation. Conscientious objection protection is still limited, as most of the current statutes only refer to sterilization procedures and abortion without covering other procedures to which one might object under religious or moral beliefs. Examples include contraceptives, abortifacients, decisions about assisted suicide and euthanasia, biotechnologies, and research including human cloning and destruction of embryonic stem cells.[164] In most cases, the statutes do not include general definitions of "health care providers", although some of

[153] *Id.*

[154] Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495 (Ill. Cir. Ct. Apr. 5, 2011) (slip opinion).

[155] ILL. ADMIN. CODE tit. 68, § 1330.500(e)–(h) (Westlaw 2013).

[156] 745 ILL. COMP. STAT. 70/1 (Westlaw 2013).

[157] *Morr-Fitz, Inc.*, No. 2005-CH-000495, at 5. The Healthcare Right of Conscience Act defines 'health care personnel' as meaning "any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services." 745 ILL. COMP. STAT. 70/3(c) (Westlaw 2013).

[158] *Morr-Fitz, Inc.*, No. 2005-CH-000495, at 6–7.

[159] *Id.* at 2.

[160] *Id.*

[161] *Id.* at 6.

[162] The court relied on the U.S. Supreme Court decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[163] *Morr-Fitz, Inc.*, No. 2005-CH-000495, at 6.

[164] *See* Burke & Franzonello, *Survey*, *supra* note 102, at 560.

them refer to pharmacies or pharmacists whereas others can be read in a broader way. As a consequence, the statutes exclude from protection professionals or payers who object to support activities that violate their conscience.[165] The lack of clear definitions gives a broader scope for limitations by administrative authorities and by the judiciary.

Despite these deficiencies, the statutes are valuable tools for the protection of conscientious refusals. Especially helpful are the ones that grant health care providers a right of action against those who discriminate or force them to act against their conscience, complementing the federal legislation and regulation in the field.[166] Nevertheless, they do not necessarily give an answer to all conscientious objection concerns. Promoting state law that supplements the general protection of federal law can serve as a model that can be applied to other federal systems. Although the powers of the autonomous communities in Spain are not as extensive as the ones of the states in the United States, for these purposes, it is possible to consider Spain as a federal system.[167] The state statutes can shed light on the definitions and enforcement mechanisms that can be included in this type of norm.

III. CONCLUSION

Scholars and legal systems at the international and domestic levels have recognized the protection of conscientious objection. The problem arises when we question the rationale behind this protection.

International human rights have widely guaranteed freedom of conscience, including the protection of conscientious objection in specific matters. At the national level, countries such as Spain and Germany recognize conscientious objection in relation to freedom of religious clauses but only for cases involving military service. The judiciary, however, has expanded this constitutional protection to other subject matters. Nevertheless, the recognition of a general constitutional right to conscientious objection is still contested. The case of the United States is slightly different. Although the First Amendment of the Constitution does not explicitly recognize the freedom of conscience and conscientious objection, this Article tries to prove that these rights could be included in the Free Exercise Clause. The American difficulties in this area should encourage States with explicit recognition of freedom of conscience to strengthen this protection in order to resolve new conscientious objection cases. The recognition of constitutional foundations is especially relevant when dealing with conflicts between conscientious

[165] *Id.*

[166] Some of the state statutes that have these kinds of provisions are Indiana, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas. *See Protection of Conscience Laws: United States: Federal Laws and Regulations*, THE PROTECTION OF CONSCIENCE PROJECT, http://www.consciencelaws.org/laws/usa/law-usa-01.html (last visited June 6, 2013).

[167] *See* C.E., *supra* note 39, arts. 148–49.

objection and other rights or public interests. The Fourteenth Amendment foundation for conscientious objection can be developed under the fundamental right to respect for private and family life present in several foreign countries' constitutions and international treaties.

One of the fields where new cases are constantly arising is the area of health care providers. Although it is possible to imagine conscience problems in all types of jobs, it is also true that many controversies that come to mind are related to the medical field. Activities in this area are constantly in contact with fundamental values, such as life, sexuality, and health. Many different religious tenets or ethical principles deal in one way or another with these topics. As a result, professionals in these fields, precisely because of their work, are more exposed to conscience problems and, therefore, need special protection of their right to freedom of conscience. In Spain, it was the central legislature that gave the basic norm regarding the issue whereas the local legislation, administrative regulations, and judicial interpretation are still maturing. The complex multilevel protection of the United States can shed some light for further developments in other countries.

The Federal Health Care Provider Conscience Protection Statutes' focus on non-discrimination aspects of conscientious objection can be developed through local legislation in Spain. The statutes of autonomous communities can also complement the protection of general legislation by giving broad definitions and enforcement mechanisms. Nevertheless, the experience of some state statutes in the United States and administrative norms also shows that regulations can end up restricting the right to conscientious objection excessively. Therefore, a mixed model that includes administrative regulations proceedings can be helpful to avoid the overflow of the judiciary, provided there is always some judicial mechanism available to correct possible arbitrariness of the administration. In other words, it is essential that an adequate mechanism of judicial review of both regulations and legislation is available.

The endless scenarios where conscientious objection can be invoked make it impossible for the legislature to anticipate all types of cases, calling for an active role of the judiciary. The case law regarding the American Federal Statutes reminds us that general protection remains incomplete unless an express right of action is given. In those cases, it would be the task of the judiciary to give an adequate interpretation of the norms when dealing with conflicts between the rights of the workers and other public interests. The use of general, non-discriminatory norms and labor law, such as Title VII of the Civil Rights Act, can give complementary protection to health care providers. The same can be said of general actions protecting fundamental rights. It is especially relevant that judges take into account the close link between conscientious objection and the constitutional protection of freedom of conscience.