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A Matter of Conviction: Moral Clashes over Same-Sex Adoption

*Robin Fretwell Wilson**

I. INTRODUCTION

In 2004 Michael and Rich Butler sued Adoption.com, the largest Internet adoption site in the United States, after it refused to post their profile as prospective parents¹ for preview by expectant and placing parents.² When the Butlers asked the service why it would not post their profile, they were told that Adoption.com “allow[s] only individuals in an opposite-sex marriage to post profiles on the website.”³ Imagine the Butlers’ shock and dismay. Adoption had been open to same-sex couples in California for years.⁴ Not surprisingly, they sued, claiming the refusal violated “California’s Unruh Civil Rights Act, which prohibits businesses from discriminating against their customers on a variety of grounds.”⁵ Adoption.com argued that no laws were violated because the company is domiciled in Arizona, a state which “does not prohibit discrimination against people on the basis of marital status or sexual orientation.”⁶ The trial court that heard motions for summary judgments

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1. Henry K. Lee, *Gay Couple Barred from Adoption Site Settle Lawsuit*, S.F. CHRON., May 22, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi> (in Quick Search, type in “Couple Barred from Adoption Site” then click on “past year” link).

2. See Parent Profiles Home Page, <http://www.parentprofiles.com>.

3. *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1026 (N.D. Cal. 2007).

4. See CAL. FAM. CODE § 9000(b) (2008) (permitting second parent adoptions by registered domestic partners); CAL. FAM. CODE § 8600 (2004) (permitting “an adult” to adopt a minor child); CAL. FAM. CODE § 8548 (2004) (allowing “adoption of a child by a stepparent where one birth parent retains custody and control of the child” but not defining a stepparent as only the spouse of the child’s parent); *Sharon S. v. Super. Ct.*, 73 P.3d 554 (Cal. 2003) (permitting second-parent adoption without regard to the marital status of the prospective adoptive parents). See generally *Butler*, 486 F. Supp. 2d at 1044–45.

5. Lee, *supra* note 1. See generally *Butler*, 486 F. Supp. 2d 1022; CAL. CIV. CODE §§ 51, 51.5 (2006) (prohibiting discrimination based on sexual orientation or marital status by any business establishment).

6. Lee, *supra* note 1. See generally *Butler*, 486 F. Supp. 2d 1022. The owners of Adoption.com asserted that the Butlers’ application “was denied solely because they were not married, and that plaintiffs were treated no differently than other unmarried couples who sought to post their profiles on ParentProfiles.com. They also assert that the Adoption.com partnership cannot be liable for discrimination on the basis of marital status in connection with the October 2002 denial

in the matter concluded that fact issues existed about whether the policy amounted to impermissible sexual orientation or gender discrimination, or instead represented then-legal discrimination on the basis of marital status.⁷

The parties subsequently settled the private litigation between them. That settlement required in part that Adoption.com and related organizations would not post profiles of Californians “unless the service is made equally available to all California residents qualified to adopt.”⁸ Put to the choice to make its services available to all or to none, however, Adoption.com chose to exit the California market. Beginning May 21, 2007, it no longer posts new profiles from California. Adoption.com also promised within six months to phase out all profiles from California on its website, ParentProfiles.com.⁹ The Butlers said of the settlement, “We hope that they continue doing business in the state, but if . . . they stop doing business in the state, it’s still a victory for Californians. We’re not allowing them to profit on the back of Californians.”¹⁰

In a microcosm this case tests whether there is a duty to facilitate same-sex adoption, or conversely, a right to refrain from participating in a perfectly legal adoption. It highlights poignantly what is at stake when we require one party to assist another with a deeply personal and morally freighted matter like same-sex adoption. Clearly, some states have invited lesbians and gays to parent for a very long time—either through adoption¹¹ or assisted conception.¹² Same-sex couples have filled an

of plaintiffs’ application because the Unruh Act did not prohibit marital status discrimination against registered domestic partners until January 1, 2005.” *Id.* at 1054 (claiming the policy “was applied evenly and was not personal to plaintiffs”).

7. At the time of the refusal, California’s Unruh Civil Rights Act did not prohibit discrimination based on marital status. It has since been amended to cover sexual orientation discrimination. *See* CAL. CIV. CODE §§ 51, 51.5 (2006).

8. Transcript of Proceedings, *Butler v. Adoption Media LLC*, No. CO4-0135 PJH (JCS) (N.D. Cal. May 15, 2007), at 5.

9. *Id.* at 7.

10. *Lee, supra* note 1. In 2004 the Butlers adopted a baby girl through a California agency.

11. An estimated 65,500 adopted children live with lesbian or gay parents, who “rais[e] four percent of all adopted children in the United States.” Gary Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, URBAN INST., Mar. 27, 2007, available at <http://www.urban.org/url.cfm?ID=411437>. Many lesbian and gays adopt their partner’s biological children through second-parent adoption. *See generally* National Gay and Lesbian Task Force, Second Parent Adoption in the U.S., http://thetaskforce.org/reports_and_research/second_parent_adoption_laws (last visited April 1, 2008) (indicating that twenty-five states and the District of Columbia permit second-parent adoption, either through statute, regulation, or court decision, including Alabama, Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and the District of Columbia).

12. The field of assisted conception is largely unregulated, at least with respect to who may conceive; in this, heterosexuals and homosexuals both are tacitly invited to conceive. This absence

important hole in the lives of tens of thousands of children, as have many lesbians and gays who have adopted individually. These couples have dignitary interests in being treated like any other prospective adoptive parents, and the state and children awaiting adoption have a stake in their ability to adopt as well. On the other hand, this case shows that when an organization or individual asks not to be involved, they sometimes are put to an all-or-nothing choice. For entities like Adoption.com, the price of “saving [one’s] conscience”¹³ takes the form of a lost opportunity to profit in a particular market. For individuals the cost of vindicating one’s conscience frequently comes at the expense of one’s livelihood.

Viewed from the perspective of health law, the frequency and ferocity of these moral clashes over same-sex relationships are hardly surprising. Moral fault lines have erupted over deeply divisive healthcare procedures since *Roe v. Wade*.¹⁴ The lesson from healthcare over the last half century has been one of temperance.¹⁵ Nearly every state has carved out a space for individuals of conscience to continue in their roles without participating in acts that they find immoral. They do this with conscience clauses, usually enshrined in state legislation. Much of the insulation afforded to healthcare providers under state law, however, began with (and continues today through) federal legislation. On the heels of *Roe*, Congress prohibited courts from using the receipt of certain federal monies to force private entities to provide controversial services. Using its spending powers, Congress later directed state and local governments *not* to punish individuals and organizations for acting on their consciences by revoking their licenses or denying them other important state benefits. While conscience protections obviously respond to concerns that denominational providers and religious observers may have, they extend beyond religious objections to encompass moral and professional objections as well.¹⁶

of regulation mirrors the state’s approach to those who “reproduce naturally,” on whom “there are few restrictions.” Susan Apel, *Access to Assisted Reproductive Technologies*, 2007 EXPRESSO, at 6, available at http://works.bepress.com/susan_apel/ (click on the title) (observing that “couples and individuals are free to conceive under what many may deem deplorable circumstances: without marriage, without a partner, with the assumption of many medical risks to themselves and the future child, and even without resources, financial or other, to ensure effective childbirth and childrearing”). In this vacuum of regulation, providers decide individually whether to serve lesbian and gay adults. In one survey, 74% of fertility clinics served lesbian couples. *Id.* (citing Judy E. Stern et al., *Access to Services at Assisted Reproductive Technology Clinics: A Survey of Policies and Practices*, 184 AM. J. OBSTETRICS & GYNECOLOGY 591 (2001)).

13. James Mills, *I Fight On, Says Christian JP Who Quit over Gay Adoption*, DAILY MAIL (UNITED KINGDOM), Oct. 22, 2007, available at http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=489125&in_page_id=1770.

14. 410 U.S. 113 (1973).

15. See *infra* Part II.

16. See Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48

This essay seeks to mine the healthcare experience after *Roe v. Wade* for the lessons it can offer in finding a live-and-let-live solution to moral clashes over same-sex adoption. It seeks to acknowledge the dilemmas facing both organizations and individuals who, as a matter of conviction, feel that they can neither support nor participate in same-sex adoptions.¹⁷ It argues that conscience clauses offer one way to navigate the recurrent but predictable collisions over same-sex adoption. This essay, however, is not about who should be permitted to adopt—nowhere does it address the merits of including lesbians and gays among potential adopters since this topic is amply explored elsewhere.¹⁸ Instead, this essay asks whether adoption agencies and other professionals should be able to decide whom they will serve.

Section II describes recent moral clashes dealing with same-sex adoption and shows that clashes occur not only between couples and recalcitrant providers but between providers and the State, as well as between providers and recalcitrant employees. Section III then charts the myriad ways in which states, after *Roe v. Wade*, have accommodated healthcare providers who are morally opposed to performing abortions and other procedures. Finally, Section IV distills from this rich experience with divisive healthcare procedures a number of guideposts for navigating moral clashes over same-sex adoption.

B.C. L. REV. 781 (2007) (noting that religious groups have long enjoyed protection from anti-discrimination statutes, although the level of protection varies with the nature of the discrimination. Discrimination involving sexual orientation by religious groups is implicitly exempt, while such groups enjoy fewer exemptions regarding gender discrimination and no exemptions regarding racial discrimination.).

17. For a more complete examination of the moral clashes hastened by same-sex marriage, see Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Anthony Picarello, Douglas Laycock, and Robin Fretwell Wilson, eds., 2008).

18. Compare Cynthia R. Mabry, *Opening Another Exit From Child Welfare for Special Needs Children—Why Some Gay Men and Lesbians Should Have the Privilege to Adopt Children in Florida*, 18 ST. THOMAS L. REV. 269 (2006) (discussing “[a]n array of evidence from the social sciences and from states permitting gay and lesbian adoption [that] demonstrate that many homosexual individuals and couples are capable of providing a healthy, loving, and supportive environment for adopted children”) and Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (disputing whether research supports a finding of harm to children reared by homosexual parents) with Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 894 (arguing on the basis of research findings for a rebuttable presumption that homosexual parenting is not in a child’s best interests) and Richard G. Wilkins, Trent Christensen, & Eric Selden, *Adult Sexual Desire and the Best Interests of the Child*, 18 ST. THOMAS L. REV. 543, 546–47 (2005) (arguing that previous studies suggesting there are “no differences” in outcomes for children raised in same-sex households are flawed and unreliable).

II. SCOPE OF CLASHES OVER SAME-SEX ADOPTION

A number of clashes have erupted over same-sex adoption in the last two years in the United States and abroad. Like the Butlers' suit, some of these clashes have taken the form of horizontal struggles—suits between prospective adoptive couples to force an individual or organization to assist them in the adoption process. A far greater share represents vertical claims between the State and a licensee or employee who asks to be exempted from assisting with same-sex adoptions or child placements.

A poignant example of a vertical claim occurred in 2007 when Catholic Charities of Massachusetts walked away from the adoption business entirely after 103 years of placing children with families in Boston.¹⁹ The organization, as a matter of policy, ceased to place children with lesbian and gay couples²⁰ in violation of state legislation prohibiting discrimination on the basis of sexual orientation.²¹ Catholic

19. Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, available at http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/ (“Catholic Charities of Boston began in 1903 as an adoption agency.”).

20. Patricia Wen & Frank Phillips, *Bishops to Oppose Adoption by Gays*, BOSTON GLOBE, Feb. 16, 2006, at A1, available at http://www.boston.com/news/local/massachusetts/articles/2006/02/16/bishops_to_oppose_adoption_by_gays/. Catholic Charities originally allowed a handful of gay and lesbian parents to adopt, although it is unclear whether the adopting parent was actively in a same-sex relationship. Compare Wen, *supra* note 19 (finding that “approximately 13 children had been placed by Catholic Charities in gay households”) with Jerry Filteau, *Catholic Charities in Boston Archdiocese to End Adoption Services*, CATHOLIC NEWS SERVICE, Mar. 13, 2006, available at <http://www.catholicnews.com/data/stories/cns/0601456.htm> (indicating that Catholic Charities “had arranged the adoption of 13 children by same-sex couples over the past 20 years”). After reports surfaced publicly regarding the organization’s placement of thirteen children with gay or lesbian parents, the state’s bishops directed Catholic agencies not to place children with gay or lesbian parents. Wen, *supra* note 19. Catholic Charities’ board previously had voted unanimously to continue the placement of children with lesbian and gay parents. *Id.* The bishops overruled the board, prompting eight members of 42-member Catholic Charities’ board to resign. Patricia Wen, *In break from Romney, Healey Raps Gay Adoption Exclusion*, BOSTON GLOBE, Mar. 3, 2006, at B4.

Originally, the bishops issued a public statement that they would seek “relief from the regulatory requirements of the Commonwealth [of Massachusetts] on this issue.” Statement of the Massachusetts Catholic Conference on Behalf of Archbishop Sean P. O’Malley (Boston), Bishop George W. Coleman (Fall River), Bishop Timothy A. McDonnell (Springfield), and Bishop Robert J. McManus (Worcester), <http://www.thebostonpilot.com/articlearchives.asp?ID=2946>. When relief was not forthcoming, however, instead of engaging in a legal battle, Catholic Charities discontinued its adoption services altogether. See *Minow*, *supra* note 16.

21. 102 MASS. CODE REGS. 1.03(1) (2007). Pursuant to the Code of Massachusetts Regulations, adoption agencies must obtain a state license and comply with section 1.03(1), which provides that “[t]he licensee shall not discriminate in providing services to children and their families on the basis of race, religion, cultural heritage, political beliefs, national origin, marital status, *sexual orientation* or disability. A statement that the program does not discriminate on these bases shall be made part of the written statement of purpose where required.” *Id.* (emphasis added). This requirement “dates back to at least 1989, when Massachusetts amended its antidiscrimination statute dealing with employment, housing, and government services to include sexual orientation as one of the forbidden grounds of discrimination.” *Minow*, *supra* note 16, at n.301.

It is not surprising that an organization would change policies mid-stream or that an

Charities approached counsel to seek an exemption from the statute, only to be informed the next day by then Governor of Massachusetts, Mitt Romney, that any exemption would have to come from the legislature or through a judicial ruling.²² Rather than bending to the State's will, Catholic Charities simply folded up shop and, in the summer of 2006, stopped placing children for adoption in Massachusetts.²³ This struggle over whether adoption agencies must serve all who ask or get out of the adoption business is eerily reminiscent of the choice facing agencies in the UK, which have been told to serve same-sex couples or lose all public funding.²⁴

Vertical claims are not limited just to facilities; they encompass individuals as well. For individuals, who presumably will encounter a far greater share of these clashes, the cost of honoring one's convictions frequently comes at the expense of one's job. In 2002 Norah Ellis and Dawn Jackson, "highly regarded" social workers with the Sefton Council Social Services Department in England, were threatened with dismissal if they did not relent in their opposition to working with same-sex couples.²⁵ Their hesitance, based on their "Christian faith," surfaced in informal conversations over coffee with one of their superiors.²⁶ "The pair, who [had] more than 50 years of experience between them were told that they faced dismissal as their attitudes contravened the council's objective of 'promoting social inclusion, equality of access and opportunity.'"²⁷ A protracted battle followed, Ellis and Jackson threatened litigation, and the Council backed down. Despite the Council's retreat, the two ultimately sought employment elsewhere.²⁸

organization's leadership would veto an existing practice when it comes to their attention. With individuals abrupt reversals may signal the strength of the conscientious objection. With organizations it is harder to know what to make of policy reversals. Once the decision not to place children with same-sex couples was made, however, the question of an exemption arose.

22. Patricia Wen, *Bishops Dealt Setback in Pursuit of Gay Adoption Exemption*, BOSTON GLOBE, Feb. 17, 2006, at B3, available at <http://www.boston.com/news/local/> (in Local Search, type in Bishops Dealt Setback). *But see* Patricia Wen & Frank Phillips, *Romney Shifts on Adoption by Gays*, BOSTON GLOBE, Mar. 1, 2006, at B1, available at <http://boston.com/news/local/> (in "Local Search" type in "Romney Shift on Adoption") (noting that the governor "signaled new openness" to consider the bishops' request).

23. Wen, *supra* note 19.

24. Patrick Wintour, Will Woodward & Stephen Bates, *Catholic Agencies Given Deadline to Comply on Same-Sex Adoptions*, GUARDIAN UNLIMITED, Jan. 30, 2007, available at <http://www.guardian.co.uk/politics/2007/jan/30/children.religion>.

25. David Harrison, *Christian Care Workers Forced out for Opposing Gay Adoptions*, TELEGRAPH, Oct. 5, 2003, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/05/11/nadopt11.xml&sSheet=/news/2003/05/11/ixhome.html>.

26. *Id.*

27. *Id.*

28. *Id.*

In Great Britain resignations and threats of forced expulsion occur regularly. Great Britain has adopted several acts in the last few years that together make it possible for same-sex couples to enter civil partnerships and to adopt.²⁹ In October of 2007, Vincent and Pauline Matherick, two “devoted foster parents with an unblemished record of caring for almost 30 vulnerable children,” resigned after being asked “to sign a contract that would require them to discuss same-sex relationships with children as young as 11, and tell them that gay partnerships were just as acceptable as heterosexual marriages.”³⁰ The Matherick’s balked, saying they have “never discriminated against anybody but [they] cannot preach the benefits of homosexuality when [they believe] it is against the word of God.”³¹ The eleven-year-old boy who has lived with the Mathericks for two years will be placed with new foster parents.³²

And the list of resignations and expulsions goes on. Andrew McClintock, a Justice of the Peace in the UK for fifteen years, resigned after he asked to sit out of adoption cases “involving homosexual applicants.”³³ The Department of Constitutional Affairs denied his request.³⁴ McClintock believes “he was forced to step down” because presiding over such adoptions would “require him to set aside his deeply held belief that children should only be brought up by heterosexual parents.”³⁵ These resignations sent shockwaves through other professional communities. Trying to get in front of the mandate to comply or lose one’s job, physicians in Great Britain are now campaigning for a religious exemption for those who are uncomfortable serving as references for same-sex couples.³⁶

29. Civil Partnership Act, 2004, c. 33 (Eng.); Adoption and Children Act, 2002, c. 38 (Eng.); Equality Act, 2006, c. 3 (Eng.).

30. James Mill, *Foster Child To Be Taken Away Because Christian Couple Refuse to Teach Him about Homosexuality*, DAILY MAIL, Oct. 23, 2007, available at http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=489285&in_page_id=1770. (noting they “could also be required to take teenagers to gay association meetings.”)

31. *Id.*

32. *Id.* In Derby, England, the Derby City Council rejected as “unsuitable” a couple who had previously fostered over 15 children. The couple, Eunce and Owen Jones, charge that the Council rejected their application “because of their Christian beliefs.” When asked “about what we would do if the children asked about homosexuality,” Mrs. Jones indicated that “she and her husband believed homosexuality was wrong. ‘I would not lie, but, on the other hand, I did not feel it was at all appropriate for children under ten. However, I am a Bible-believing Christian, and would want to tell them what the Bible says.’” *Id.*

33. Mills, *supra* note 13.

34. *Id.*

35. *Id.*

36. Sarah Womack, *GP Seeks Opt-Out in Gay Adoption Cases*, TELEGRAPH.CO.UK, June 2, 2007, available at <http://www.telegraph.co.uk> (in “Search” function type “GP seeks opt-out” and then click on article); Sarah Womack, *UK Doctors Seek Opt-Out in Gay Adoption Cases*, LONDON TELEGRAPH, July 2, 2007.

Tensions over same-sex adoption parallel the clashes arising in an almost limitless number of contexts after the legal recognition of same-sex relationships. In New Jersey, a same-sex couple filed a civil rights complaint against the Ocean Grove Camp Meeting Association, a Methodist ministry, for denying their request to hold a civil union ceremony in the group's boardwalk pavilion.³⁷ The New Jersey Department of Environmental Protection later denied a tax-exemption to the group under New Jersey's Green Acres program.³⁸ In Manitoba, Canada, twelve officials empowered to perform marriage ceremonies "quit because they refused to perform same-sex marriages as required by [provincial law]."³⁹ In February of 2007, a seventy-year-old marriage commissioner in Saskatchewan who refused to marry a homosexual couple, citing his religious beliefs, was investigated by the Saskatchewan Human Rights tribunal.⁴⁰ In California an unmarried lesbian woman sued

37. See Jill P. Capuzzo, *Church Group Complains of Pressure Over Civil Unions*, N.Y. TIMES, Aug. 14, 2007, at B4. In response to the couple's civil rights complaint, Ocean Grove filed suit in federal court seeking a declaratory judgment of their rights under the First Amendment. *Id.*

38. John Jalsevac, *U.S. Christian Camp Loses Tax-Exempt Status over Same-Sex Civil-Union Ceremony*, LIFESITE NEWS, Sept. 19, 2007, available at <http://www.lifesite.net/ldn/2007/sep/07091902.html> (reporting that the New Jersey Department of Environmental Protection stripped the Ocean Grove Camp Meeting Association of its "tax-exempt status for part of its property"). The tax-exemption arose under New Jersey's "Green Acres" program, which is "designed to encourage the use of privately owned lands for public recreation and conservation." Capuzzo, *supra* note 37 (emphasis added). In this sense, the state conditioned the property tax exemption on public access. In contrast, at least one commentator argues that all tax-exemptions received by an organization should be revoked or denied if that organization will not serve same-sex couples (even tax-exemptions that flow from an organization's charitable status). See Jonah M. Knobler, Letter to the Editor, *Mass. Should Revoke Church's Tax-Exempt Status*, HARVARD CRIMSON, Mar. 17, 2006 (discussing the revocation of tax-exemption for private adoption agencies who refuse to serve same-sex couples). One homosexual advocacy group believes the Ocean Grove decision "doesn't go far enough" and may press for "a bigger victory . . . by having the entire tax-exemption removed." Jalsevac, *supra* note 38.

39. Bill Graveland, *Alberta Allowing Same-Sex Marriage but Adding Protection to Opponents*, CANADIAN PRESS, July 12, 2005, available at <http://www.recorder.ca/cp/National/050712/n071251A.html>.

In addition to voluntary resignations, terminations have also occurred. In the Netherlands, a registrar was dismissed after refusing for religious reasons to solemnize the wedding of a same-sex couple, but was later reinstated by the Commissie Gelijke Behandeling, which enforces that country's General Equal Treatment Act. EU Network Opinion No. 4-2005. As the Commissie explained, insufficient reasons supported the refusal to renew the registrar's contract since "other public servants were prepared to celebrate same-sex marriages." *Id.*

40. Memory McLeod, *Knights of Columbus Aid Commissioners Who Won't Perform Gay Weddings: Service Club Pledges Support*, THE LEADER-POST, Apr. 17, 2007, available at <http://www.canada.com/reginaleaderpost/news/sports/story.html?id=ab7789c1-5988-421d-bd3b-lade424e87b1>. Although the commissioner is not a government employee and receives no pay from the government, the complainant asked the tribunal to order him to pay her client \$5000 in compensation; the tribunal has yet to issue its decision. *Id.*

Similar questions arise in states that recognize civil unions. See *infra* (discussing a New Jersey Attorney General opinion that requires a public official who elects to be available generally for the purpose of solemnizing marriages, to also be available generally to solemnize civil unions).

doctors who refused to artificially inseminate her.⁴¹

This litigation around same-sex marriage and same-sex adoption will crop up with even greater frequency unless and until society openly confronts the competing interests it raises. As the next Section explains, moral clashes over abortion also took on great urgency after *Roe v. Wade* and were resolved in a variety of ways.

III. RESOLVING MORAL CLASHES AFTER *ROE*

While *Roe* and *Griswold v. Connecticut*⁴² established very strong rights for women and couples to have access to abortion and contraceptives, their effect is limited because they established only the right of non-interference by the *state* in these decisions.⁴³ Neither decision forced anyone to perform an abortion or provide contraceptives. Despite that crucial limitation, abortion and family planning advocates worked strenuously over several decades to extend these limited, non-interference rights into positive entitlements to the assistance of others in effecting one's private choice.

This attempt to force providers into the abortion business took two distinct forms: (1) attempts to force *facilities* to provide those services; and (2) claims brought against *individual providers* to force them to facilitate or participate in abortions, as well as sterilizations or other procedures.

A. *Protecting Facilities and Individuals from Suits by Patients*

Consider first the efforts to force facilities to offer abortions. Here, the receipt of public benefits or federal funds was the bludgeon of choice for converting abortion from a negative right into a positive entitlement to the assistance of others. In *Taylor v. St. Vincent's Hospital*, decided

41. *Refusal to Artificially Inseminate "Unmarried" Lesbian*, 47 NURSING LAW'S REGAN REP. 7 (2005). In this high-profile case heard by the California Supreme Court, specialists at North Coast Women's Health Center balked at artificially inseminating an existing patient of the practice, a lesbian woman, allegedly because of her sexual orientation. *N. Coast Women's Care Med. Group, Inc. v. Super. Ct. of San Diego County*, 137 Cal. App. 4th 781 (2006). Benitez's doctors defended their refusal on religious grounds, claiming free exercise of religion as an affirmative defense. Benitez brought a motion to dismiss the defense, which the trial court granted. The appeals court reversed, concluding that there was a triable issue of fact as to whether the physicians' religiously motivated refusal was based solely on Benitez's marital status—a permissible grounds for refusal at the time—or whether it was based on her sexual orientation, in whole or in part. *Id.*

42. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

43. Maureen K Bailey, *Contraceptive Insurance Mandates and Catholic Charities v. Super. Ct. of Sacramento: Towards a New Understanding of Women's Health*, 9 TEX. REV. L. & POL. 367, 370–71 (2005) (stating that the rights established in *Roe v. Wade* and *Griswold v. Connecticut* are negative rights).

shortly before the U.S. Supreme Court's decision in *Roe*, a United States District Court in Montana enjoined a private, nonprofit, charitable hospital in Billings, Montana from refusing to perform a tubal ligation on a patient after the birth of her child by Caesarian section.⁴⁴ In *Taylor v. St. Vincent's Hospital*, the hospital prohibited Mrs. Taylor's physician from surgically sterilizing her during the delivery of her baby.⁴⁵ Mrs. Taylor brought suit under 42 U.S.C. § 1983, which prohibits entities acting under color of state law from subjecting "any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."⁴⁶ In denying the hospital's motion to dismiss for lack of jurisdiction, "the court stated that 'the fact that the [hospital received federal construction fund monies] is alone sufficient to support an assumption of jurisdiction . . .'"⁴⁷ The hospital's tax immunity and state license also established, in the court's view, a connection between the hospital and the state sufficient to support jurisdiction.⁴⁸

This receipt-of-public-benefits argument had considerable success until Congress stepped in with the primogenitor of healthcare conscience clauses, the Church Amendment.⁴⁹ The Church Amendment prohibits a

44. 369 F. Supp. 948, 950 (D. Mont. 1973) (noting the court's injunction, which was ordered Oct. 27, 1972).

45. *Id.* at 949.

46. 42 U.S.C. § 1983 (2000).

47. See H.R. REP. NO. 93-227 (1973), as reprinted in 1973 U.S.C.C.A.N. 1464, 1473 (discussing the preliminary injunction granted by the District Court of Montana in *Taylor*). The hospital received Hill-Burton funds, which were made available to hospitals to modernize and construct medical facilities. Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443, 78 Stat. 447 (codified at 42 U.S.C. § 291 (2000)).

48. See H.R. REP. NO. 93-227, at 1473 (describing the district court's finding of "two other factors . . . that established a connection between the hospital and the State sufficient to support jurisdiction").

49. 42 U.S.C.A. § 300a-7 (West 2003). The Church Amendment appears in Section 401 of the Health Programs Extension Act, which President Nixon signed into law in June of 1973. Pub. L. No. 93-45, 87 Stat. 91, 95. The Church Amendment provided that:

(b) The receipt of any grant, contract, loan, or loan guarantee under the [act that created the Hill-Burton funds and other acts] by any individual or entity does not authorize any court or any public official or public authority to require—

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if [it] would be contrary to his religious beliefs or moral convictions; or

(2) Such entity to—

(A) make its facilities available for the performance of any sterilization procedure or abortion if [it] is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for [such services] if [their performance] would be contrary to the religious beliefs or moral convictions of such personnel.

Legislative accommodations outside healthcare date back to 1950s and "program[s] of

court from using receipt of certain federal monies as the basis for making an individual or institution perform an abortion or sterilization contrary to their “religious beliefs or moral convictions.”⁵⁰ In effect, the Church Amendment does not allow federal monies to be used to bootstrap a private, not-for-profit hospital into a state actor for purposes of dictating the kinds of services that they must provide.

Like many of the conscience clauses that have followed, the Church Amendment protects both individual providers *and* facilities from compelled participation. Importantly, it provides protection not only in the “horizontal relationship” between the patient and individual facility or provider, but also in the “vertical relationships” between individual providers and their employers or facilities. Thus, the Church Amendment provides that individuals cannot be punished by facilities—either for performing a lawful abortion outside the facility or refusing to perform one inside the facility—if abortion is against that individual’s religious beliefs or moral convictions.⁵¹

Despite the Church Amendment, litigation premised on receipt of public benefits continued for several years. The Church Amendment, however, figured prominently in the push back of that litigation. For example, the United States Court of Appeals for the Ninth Circuit in *Chrisman v. Sister of St. Joseph of Peace*—confronting nearly the same facts as in *Taylor*—said that the Church Amendment “was clearly intended by Congress to prevent such suits as the one advanced” by the patient.⁵² The Court summarily dismissed the suit for lack of jurisdiction.⁵³

‘released time’ religious instruction operated by the New York public schools,” which the United States Supreme Court upheld against an Establishment Clause challenge. See Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: the Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 101–02 (2007).

50. 42 U.S.C.A. § 300a-7 (West 2003).

51. The Church Amendment provided that:

- (c) No entity which receives [certain grant, contract, loan, or loan guarantees] may—
- (1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
 - (2) discriminate in the extension of . . . privileges to [them], because he performed . . . a lawful sterilization procedure or abortion, [or] refused to perform [one due to] his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

42 U.S.C.A. § 300a-7 (West 2003).

52. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 309–10 (9th Cir. 1974).

53. *Id.* at 310.

B. Protecting Providers from Coercion by the Government

Just as the receipt of public benefits may be used as a wedge by private parties to force participation, it can similarly be used by governments to coerce hospitals and individuals to provide certain services. This, too, happened after *Roe*. The kinds of benefits that governments threatened to take off the table because of collisions over abortion included not only state-level tax-exemptions and property tax-exemptions, but also licensure, certification, and the ability to open a facility or emergency room to the public.⁵⁴ Congress responded to this threat at the hands of the government with a number of successive pieces of legislation designed to protect individuals from government coercion. For example, in 1996 Danforth Amendment, Congress prohibited federal, state, and local governments from discriminating against healthcare entities that refuse to: (1) undergo abortion training, (2) provide such training, (3) perform abortions, or (4) provide referrals for training or abortions.⁵⁵ None of these could be denied federal financial assistance, or more importantly, licensure or certification that they would have received from the state had they otherwise agreed to perform these controversial services.⁵⁶ This protection was not limited to refusals for religious or moral reasons; it extended to refusals for any reason.

Congress put teeth into the insulation from government coercion in 2004 with the Weldon Amendment. Tucked into appropriations bills beginning in 2004,⁵⁷ the Weldon Amendment is tied to significant sums of money. Indeed, it is the proverbial six-hundred-pound gorilla. California alone stands to lose \$49 billion in federal funds if it impermissibly discriminates.⁵⁸

54. Wilson, *supra* note 17.

55. 42 U.S.C. § 238n(a)(1) (2000).

56. 42 U.S.C. § 238n (2000).

57. Dep'ts of Labor, Health & Hum. Servs., and Educ., and Related Agencies Appropriations Act of 2004, Pub. L. No. 108-447, § 507, 118 Stat. 2809, 3163 (2004); Pub. L. No. 109-149, § 507, 119 Stat. 2833, 2879 (2005).

Over time Congress has expanded the scope of covered services in its conscience clauses, allowing providers to opt out of not only abortion and sterilization services but also out of providing counseling and referral for such services. For instance, in 1988, the Danforth Amendment of the Civil Rights Restoration Act of 1987 extended conscience protections to include "abortion-related services." Pub. L. No. 100-259, § 909, 28 Stat. 28, 29 (codified at 20 U.S.C. 1688) (providing that the receipt of monies under Title IX, which prohibits sex discrimination in federally-funded education programs, may not be construed to require an individual or entity to provide or pay for abortion-related services).

58. Bob Egelko, *California Suit Hits Antiabortion Amendment*, S.F. CHRON., Jan. 26, 2005, at B3. States are challenging the constitutionality of the Weldon Amendment on the grounds that "the vague and sweeping nature of the Clause has the potential to dramatically curb women's access to reproductive health care information and services." Press Release, National Family Planning and Reproductive Health Association, *available at* <http://web.archive.org/web/20041225081812/>

The Weldon Amendment provides that no federal agency or program, or state or local government, may receive any of the specified funds if “[it] subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”⁵⁹ Importantly, there are exceptions for rape, incest, and life-threatening pregnancies: governments that make healthcare providers perform abortions in these cases do *not* risk their federal funds.⁶⁰

The Weldon Amendment also broadened significantly the kind of entities that receive the conscience protection. Under the Weldon Amendment, a “‘health care entity’ includes an individual physician or other healthcare professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of healthcare facility, organization, or plan.”⁶¹

C. State Conscience Protections

Before healthcare providers received explicit legislative accommodations, those who refused to perform controversial services did so at great risk to themselves. Thus, individual physicians and pharmacists have been disciplined, dismissed, sued, and retaliated against for not going along, either with employer demands or patient demands, with participating in abortions or other services.⁶² Like

www.nfprha.org/media/index.asp?ID=32 (last accessed April 1, 2008). These challenges have been unsuccessful to date. *See, e.g.*, Nat’l Family Planning and Reprod. Health Ass’n, Inc. v. Gonzales, 391 F. Supp. 2d 200 (D.D.C. 2005) (refusing to enjoin the Weldon Amendment preliminarily on grounds that the Weldon Amendment was not unconstitutionally vague, did not violate the free speech rights of family planning services providers, and did not impermissibly delegate legislative power to an executive agency) *vacated on other grounds and remanded by* National Family Planning and Reproductive Health Ass’n, Inc. v. Gonzales, 468 F.3d 826 (D.C.Cir. 2006).

59. Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163; Pub. L. No. 109-149, § 508(d)(1), 119 Stat. 2833, 2879–80.

60. Pub. L. No. 108-447, § 508(a) provides that:

The limitations established in the preceding section shall not apply to an abortion—(1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

61. *Id.* § 508(d)(2).

62. Firings and other disciplinary actions against pharmacists who refuse to provide emergency contraceptives have dominated the news in recent years. *See, e.g.*, Rob Stein, *For Some, There is No Choice*, WASH. POST, July 16, 2006, at A06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/15/AR2006071500790.html>; Leah Thorsen, *Druggists Suspended in Debate over Pill*, ST. LOUIS POST-DISPATCH, Nov. 30, 2005, at A1

Congress, state legislatures also enacted conscience clauses after *Roe* to insulate providers from these harsh penalties. This subsection explores the rich diversity of those approaches.

1. *Boundaries of state conscience protections*

While nearly all states have enacted conscience clauses, states calibrate the interests of patients and providers in very different ways. Indeed, a quick review of state conscience clauses demonstrates the range of protection available to individuals and institutions. Three states, Alabama, New Hampshire, and Vermont, provide no protection for conscientious objectors. Others give providers an unfettered ability to opt out. Eighteen states allow any hospital or person *not* to participate in abortion procedures; eleven of these provide explicit statutory protection against liability to individual providers, facilities or both.⁶³

Other states limit the objector's ability to opt out. Some permit an objection only if the invoker "shows proof" or states the reasons for objecting in writing.⁶⁴ For example, California does not "require a

(reporting that Walgreens placed four Illinois pharmacists in the St. Louis area on unpaid leave for refusing to fill prescriptions for emergency contraception in violation of a rule imposed by Illinois Governor Rod Blagojevich in April of 2005 that requires Illinois pharmacies that sell contraceptives approved by the FDA to fill prescriptions for emergency birth control); Marilyn Gardner, *Pharmacist's Moral Beliefs vs. Women's Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11, available at <http://www.csmonitor.com/2004/0426/p11s01-usju.html> (reporting that a K-Mart pharmacist faced disciplinary hearings in Wisconsin after refusing to fill or transfer a woman's prescription for birth-control pills on the basis of the pharmacist's religious beliefs).

Some states explicitly protect the decision of a pharmacist or pharmacy to refuse to stock or dispense emergency contraceptives, following the traditional model of protecting a right of conscientious refusal. These include Arkansas, Georgia, Mississippi, and South Dakota. See David A. Hyman & Robin Fretwell Wilson, *Health Care Regulation: The Year in Review*, The Searle Center Annual Review of Regulation, May 4, 2007, at 4, available at http://www.law.northwestern.edu/searlecenter/papers/Hyman_Wilson_Annual_Rev_Final.pdf. However, "more states have mandated the provision of emergency contraceptives, either by statute, executive order, or pharmacy board regulation." *Id.* Over twenty states are still considering what action, if any, to take. *Id.*

63. See ARK. CODE ANN. § 20-16-601(a) (2005); CONN. AGENCIES REGS. § 19-13-D54(f) (2005); DEL. CODE ANN. tit. 24, § 1791 (2005); FLA. STAT. ANN. § 390.0111(8) (West 2002); HAW. REV. STAT. ANN. § 453-16(d) (LexisNexis 2005); IND. CODE ANN. § 16-34-1-4 (LexisNexis 1993); IOWA CODE ANN. § 146.1 (West 2005); KAN. STAT. ANN. § 65-443 (2002); ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592 (2004); MICH. COMP. LAWS ANN. § 333.20181 (West 2001); MINN. STAT. ANN. § 145.414 (West 2005); MO. ANN. STAT. § 197.032 (West 2004); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2003); N.C. GEN. STAT. § 14-45.1(e), (f) (2005); N.D. CENT. CODE § 23-16-14 (2002); OHIO REV. CODE ANN. § 4731.91 (LexisNexis 2003); 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000); S.D. CODIFIED LAWS § 34- 23A-11 (1994); S.D. CODIFIED LAWS § 34- 23A-12 (1994); TENN. CODE ANN. § 39-15-204 (2003); WYO. STAT. ANN. § 35-6-106 (2005). Of these, Arkansas, Delaware, Kansas, Maine, Michigan, Minnesota, Missouri, New Mexico, North Carolina, Pennsylvania, and Wyoming give explicit statutory protection against liability to individuals, hospitals, or both.

64. See ARIZ. REV. STAT. ANN. § 36-2151 (2003); COLO. REV. STAT. ANN. § 18-6-104 (West

physician [or other healthcare provider] to directly participate in the induction or performance of an abortion if [that person] has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the abortion.”⁶⁵

Some states only require conscientious objectors to provide notice to the patient beforehand.⁶⁶ Pennsylvania is one such state, allowing objections to abortion or sterilization “made freely available and conspicuously posted for public inspection.”⁶⁷

Some conscience clauses simply mimic the protection afforded by the Church Amendment. Wisconsin requires no individual or entity to participate in or make its facilities available for abortion contrary to religious beliefs or moral convictions because of “the receipt of any grant, contract, loan or loan guarantee under any state or federal law.”⁶⁸ But many of these clauses also shield providers from punishment at the hands of the state and local government, as the Weldon Amendment does.⁶⁹ For instance, in Montana, “[the] refusal by any hospital or health care facility or person [to provide advice] shall not be grounds for loss of any privileges or immunities . . . or for the loss of any public benefits.”⁷⁰

2. *Contests between individual providers and their employers*

Similar to the Church Amendment, many state conscience clauses address an individual’s risk of coercion by her employer. Some even prohibit employers from asking prospective employees about refusals to participate. Any public or private employer in Illinois cannot “orally question . . . any applicant . . . on account of the applicant’s refusal to . . . participate in any way in any form of health care services contrary to his

2004); GA. CODE ANN. § 16-12-142 (2003); IDAHO CODE ANN. § 18-612 (2004); 720 ILL. COMP. STAT. ANN. 510/13 (West 2003); KY. REV. STAT. ANN. § 311.800(4) (West 2005); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2003); MONT. CODE ANN. § 50-20-111 (2005); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992); 43 PA. CONS. STAT. ANN. § 955.2 (West 1991); VA. CODE ANN. § 18.2-75 (2004); R.I. GEN. LAWS § 23-17-11 (1996) (providing an exception for scheduled abortions only).

65. CAL. HEALTH & SAFETY CODE § 123420(a) (West 1996).

66. See CAL. HEALTH & SAFETY CODE § 123420(c) (West 1996); NEB. REV. STAT. § 28-337 (1995); OR. REV. STAT. § 435.475(1) (2003); OR. REV. STAT. § 435.485(2) (2003) (allowing physicians to refuse to give patients information about an abortion, but the physician must let the patient know about the refusal).

67. 16 PA. CODE §§ 51.31–51.32 (2005).

68. WIS. STAT. ANN. § 253.09(4) (West 2004).

69. See LA. REV. STAT. ANN. § 40:1299.33(C) (2001); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2003); MO. ANN. STAT. § 197.032(2) (West 2004).

70. MONT. CODE ANN. § 50-20-111 (2005).

or her conscience” on an application form.⁷¹

Other states recognize that individual refusal can place a burden on an employer. In these states, employees hired for the *express purpose* of performing a specific service are not exempted, nor are employees who work for facilities that exclusively provide abortions.⁷² In Kentucky if a healthcare facility is not “operated exclusively for the purpose of performing abortions,” it may not discriminate against a person for refusing to participate in an abortion procedure.⁷³

Other states limit this encroachment on individual consciences to situations in which employers will experience an undue hardship as a result.⁷⁴ For example, Missouri allows for lawful discrimination against a person who refuses to participate in an abortion if, in accommodating that refusal, it poses a hardship on the business or enterprise.⁷⁵

Importantly, these clauses sometimes accommodate matters of conscience in both directions. Take, for example, the “renegade” physician who performs abortions outside a Catholic hospital but wants privileges within it. This physician may be concerned about being denied privileges at the Catholic hospital. California has solved this dilemma by providing that a person associated with a medical facility that does not permit abortion “may not be subject to any penalty or discipline on account of the person’s participation in the performance of an abortion” in another facility.⁷⁶

The right to refuse has been extended by some states to include grounds other than religion or morality. For example, Pennsylvania provides that no facility can be made to permit an abortion “contrary to its stated ethical policy” and allows individuals the right to refuse on “professional grounds.”⁷⁷ Some states, such as Indiana, limit the ability to refuse only to denominational hospitals.⁷⁸ Others have expanded the

71. 745 ILL. COMP. STAT. ANN. 70/7 (West 2002).

72. See 745 ILL. COMP. STAT. ANN. 70/13 (West 2002); 18 PA. CONS. STAT. ANN. § 3213 (West 2000).

73. KY. REV. STAT. ANN. § 311.800 (5)(c) (West 2005).

74. See 16 PA. CODE § 51.51 (2000) (allowing a facility that provides abortions to seek a temporary exemption to the conscience clause protections).

75. MO. ANN. STAT. § 188.105 (West 2004).

76. CAL. HEALTH & SAFETY CODE § 123420 (West 1996); see also MICH. COMP. LAWS ANN. § 333.20184 (West 2001); TEX. OCC. CODE ANN. § 103.002 (b) (Vernon 2004).

77. 43 PA. CONS. STAT. ANN. § 955.2 (West 1991). Compare *id.* with N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992).

78. IND. CODE ANN. § 16-34-1-3 (LexisNexis 1993); see also IOWA CODE ANN. § 146.2 (West 2005); KY. REV. STAT. ANN. § 311.800 (3) (West 2005); N.J. STAT. ANN. § 2A: 65A-2 (West 2000) (case law limits application of the statutory exemption to denominational hospitals); OR. REV. STAT. § 435.475(3) (2003); S.C. CODE ANN. § 44-41-40 (2002); TEX. OCC. CODE ANN. § 103.004 (Vernon 2004); UTAH CODE ANN. § 76-7-306 (2003); WASH. REV. CODE ANN. § 9.02.150 (West 2003); WYO. STAT. ANN. § 35-6-105 (2005).

right to refuse even to insurers and other healthcare entities.⁷⁹ Minnesota does not require any “health plan company . . . or health care cooperative . . . to provide coverage for an abortion.”⁸⁰

3. *The possibility of hardships for patients*

The ability to opt out raises the possibility of hardships for patients. This possibility has factored into how much insulation many states provide.⁸¹ Patently forcing people to act against their consciences when a hardship will not occur needlessly treads on their moral or religious beliefs with no countervailing gain. On the other hand, patients need access to services, especially in emergencies. Balancing both interests, some states limit the ability to refuse only to non-emergencies.⁸² Nevada does this, for example, by not requiring a “hospital or other medical facility . . . which is not operated by the state or a local government or an agency of either . . . to permit the use of its facilities for the induction or performance of an abortion, except in a medical emergency.”⁸³

A number of commentators—worried about access to needed services—go one step further and argue that an invoker should only be allowed to object when she does not pose a “road block” to the patient’s ability to access the desired service from another provider. They argue that providers should facilitate the patient’s ability to get the service from another provider.⁸⁴ At least one jurisdiction explicitly rejects such a duty, however. A licensed hospital in Maryland “may not be required to

79. See MO. ANN. STAT. § 376.1199(1) (West 2002).

80. MINN. STAT. ANN. § 145.414 (West 2005).

81. Critics of conscience clauses lament that in many rural and traditionally conservative areas, the next closest pharmacy or hospital is miles away and not easily accessible. Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider “Conscience,” Patient Needs*, THE GUTTMACHER REPORT, Aug. 2004, available at <http://www.guttmacher.org/pubs/tgr/07/3/gr070301.pdf>.

Recognizing that access issues are the dark underside of conscience clauses, some professional pharmacy groups believe we should do more to direct patients to willing providers. The American Pharmaceutical Association “recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patient access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal.” AMERICAN PHARMACISTS ASSOCIATION, 2004 HOUSE OF DELEGATES, REPORT OF THE POLICY REVIEW COMMITTEE, available at http://www.aphanet.org/AM/Template.cfm?Section=Search§ion=About_APhA1&template=/CM/ContentDisplay.cfm&ContentFileID=224.

82. See MO. ANN. STAT. § 376.1199(1) (West 2002); S.C. CODE ANN. §§ 44-41-40, -50 (2002); TEX. OCC. CODE ANN. § 103.004 (Vernon 2004).

83. NEV. REV. STAT. ANN. § 449.191 (LexisNexis 2004).

84. Commentators in the New England Journal of Medicine’s Sounding Board have urged that the objecting pharmacist should be required to find a willing provider. Julie Kantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2008–12 (2004).

permit, within the hospital, the performance of any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy; or to refer to any source for these medical procedures.”⁸⁵

Significantly, protections for conscience need not come at the expense of access. In addition to hardship exceptions, information-forcing rules—that is, rules that require refusing parties to direct patients to others who will perform the service—allow protection for matters of conscience without sacrificing access. States have capitalized on this approach with emergency contraceptives. For example, Illinois requires pharmacies that do not carry emergency contraceptives to post a sign directing patients to others that do.⁸⁶

In sum, states have structured legislative accommodations in different ways to provide greater or lesser protection for persons who object to performing a service.

IV. NAVIGATING MORAL CLASHES OVER SAME-SEX ADOPTION

The parallels between the clashes over abortion and same-sex adoption are so striking that policymakers would be remiss not to draw on the abortion experience in deciding how to approach same-sex adoption. What can policymakers distill from our nearly half century of experience with deeply divisive healthcare procedures? This Section offers four primary guideposts: first, legislatures need to prevent adoption agencies and professionals from exiting the market; second, legislatures need to step in to curb litigation; third, reasonable limitations should be placed on exemptions to avoid predictable hardships to same-sex couples; and fourth, providing an exemption only if a hardship will not result best respects the interests of parties on both sides of this moral divide.

A. Preventing Exodus From the Market

Faced with the inability to opt-out, agencies and professionals have already left the adoption market. It bears repeating that providers are not captives of the state and need not continue to provide services. When put to an all-or-nothing choice, many have chosen nothing. Conscience clauses offer states one way to avoid such high stakes. The uncertainty created by a failure to speak clearly here hurts not only providers but prospective adopters as well, both homosexual and heterosexual. As the

85. See MD. CODE ANN., HEALTH-GEN. § 20-214(b)(1)(i)–(ii) (Lexis Nexis 2005).

86. See 68 Ill. Admin. Code 1330.91(k) (2006).

number of providers in the market shrinks, so too does the number of children that can reasonably be placed.

Indeed, failing to act can only impose additional hardships on children awaiting adoption. The exodus of Catholic Charities from Massachusetts' adoption market demonstrates this risk most poignantly. Catholic Charities placed more than 720 children for adoption over the span of two decades, many of them the hardest to place children.⁸⁷ The agency's exit forced other agencies to absorb the placement of those children and may have lengthened the waiting time for children. The Boston Globe predicted that after Catholic Charities' departure, "[f]oster children could face longer waits in an already backlogged system, and specialists say other agencies will have to scramble to pick up the Catholic Charities' caseload. Whether they can replace its network of seasoned, caring social workers is another question."⁸⁸ One placement agency director called the outcome "a shame because it is certainly going to mean that fewer children from foster care are going to find permanent homes."⁸⁹ In this all-or-nothing gambit, Catholic Charities lost, prospective adoptive parents lost, and so did many children in Massachusetts.⁹⁰ Driving providers from the market who may have been able to continue in their roles with a legislative exemption impoverishes the whole enterprise.

Many will chafe at the idea that in a liberal democracy the state would accommodate religious or moral concerns over same-sex adoption, which is itself a deeply personal matter. Yet as Professor Minow observes, accommodating religious groups promotes certain liberal values.⁹¹ For example, without accommodation, we might see a strangling of religion by the state. Moreover, suppressing one set of religious ideas may be offensive to all Americans who view themselves as religious; this "united front" needs to be considered when society decides whether and how much accommodation to give.⁹²

As the next subsection explains, if legislatures fail to candidly resolve this moral clash through legislation, the boundaries of any right to refrain will necessarily be resolved—slowly and expensively—in suit after suit.

87. See Michael Levenson, *Workers Rush to Fill Void Left by Boston Agency's Decision*, BOSTON GLOBE, Mar. 11, 2006, available at http://www.boston.com/news/local/articles/2006/03/11/workers_rush_to_fill_void_left_by_boston_agencys_decision/.

88. *Id.*

89. *Id.*

90. *Id.*

91. Minow, *supra* note 16.

92. *Id.*

B. *Curbing Litigation*

Just as the recognition of abortion rights after *Roe* ushered in a wave of litigation, so will same-sex adoption *if* legislatures fail to decide *ex ante* whether there is a duty to assist, or, conversely, a right to refrain. Indeed, the Introduction to this essay suggests that we are now seeing the leading edge of litigation designed to resolve these competing claims.⁹³

Legislatures can deflect a torrent of litigation by deciding these questions now, as they ultimately did with fractious healthcare services. Indeed, conscience clauses figured prominently after *Roe* in turning back later waves of suits pressing the same arguments rejected by the Church Amendment.⁹⁴

C. *The Need for Reasonable Limitations on Exemptions*

One pivotal question states must address regarding same-sex adoption is whether a legislative exemption would erect a significant barrier to a same-sex couple's ability to adopt. This is especially important since many states have invited same-sex couples to parent, either through adoption or assisted conception. Here, our experience with emergency contraceptives shows that permitting conscientious refusals need not bar access to adoption. Instead, information-forcing rules could direct prospective parents to willing providers.

In deciding whether to give conscience protections, states should consider a number of subsidiary questions:⁹⁵ What impact would a legislative exemption have on same-sex couples seeking to adopt? Specifically, what percentage of the market of prospective adopters are

93. There is a long history of litigation between secularists and religious institutions when the later fulfills a traditional state role, as with education, adoption, and other social services. *See generally* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (outlining a history of important litigation defining the boundaries of the First Amendment Separation Clause).

94. For instance, in *Chrisman v. Sisters of St. Joseph of Peace*, a married woman sued for a writ of mandamus and injunction against a private, nonprofit hospital that refused to do a tubal ligation for her. 506 F.2d 308 (9th Cir. 1974). She alleged that the hospital acted under color of state law since it received Hill-Burton construction funds, enjoyed some state tax-exemption, and was generally under state regulation. *Id.* at 310. In affirming the district court's dismissal, the United States Court of Appeals for the Ninth Circuit noted that "this argument has been seriously limited by [Congress's] action" in the Church Amendment, which "was clearly intended by Congress to prevent suits such as that advanced by Appellant." *Id.*

95. It is worth noting that Federal legislation introduced by Representative Barney Frank and others to end discrimination on the basis of sexual orientation includes a religious exemption. *See, e.g.*, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 6 (2007) (exempting "any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief").

same-sex couples? What percentage of adoption agencies are likely to object to serving them? Will other adoption agencies fill their needs? Here it is worth noting anecdotally that some adoptions agencies explicitly advertise themselves as gay- and lesbian-friendly sites.⁹⁶

States should also explore what impact this approach would have on children awaiting adoption. States should assess, among other things, what would happen under an all-or-nothing regime. Specifically, if the state rejects conscience protections, will objecting agencies exit the market? If so, how many kids would they have placed and how many of these would be picked up by other agencies in the void left behind by their exit? Will the time frame for their placement lengthen as agencies depart the market? Do the exiting agencies serve the hardest-to-place children?

In deciding how to proceed, legislatures should critically evaluate the variety of approaches taken with respect to healthcare services. Some legislative accommodations, like the Church Amendment, insulate providers from suits by patients and from coercion by employers or facilities. Some, like the Weldon Amendment, insulate providers from coercion by the government itself. Conscience clauses can also exempt institutional providers *and* individual providers, but need not do both. Thus, a state could exempt individual workers but not agencies, or it could exempt only agencies, in which case it likely would not need to exempt individual workers. Professor Minow argues that states should be loath to hand out exemptions to both organizations and individuals. As she explains, “each additional exemption curtails the application of the overarching norm—and civil rights laws as a result can be too easily and thoroughly undermined.”⁹⁷ As the next subsection explains, states should examine in particular the possibility that any conscience protection will create hardships for same-sex couples wishing to adopt.

D. The Prospect of Hardships

States calibrate in very different ways the competing interests of providers and those seeking a service. Some endorse complete unfettered discretion to refuse; others carefully circumscribe the circumstances in which providers can refuse. Many states provide an exemption only when it poses no hardship to the individual requesting the service—in effect respecting religious and moral objections when no one would

96. See, e.g., Independent Adoption Center, <http://www.adoptionhelp.org>; A Child’s Waiting, http://www.achildswaiting.com/adoptive_parents/adoption_questions/; Open Adoption, <http://www.openadopt.org/index.php>; Adopt a Special Kid, <http://www.aask.org/>.

97. Minow, *supra* note 16.

otherwise lose. For some, a “hardship” rule for exemptions presents a lose-lose scenario: objectors will still be offended by facilitating same-sex adoptions in cases of hardship, and same-sex couples will find cold comfort in the fact that they receive equal access, but only when a hardship would otherwise result. It may be, however, the best we can hope for in a pluralistic society that prizes both religious liberty and the desire to parent.

States considering a hardship approach with respect to same-sex adoption should ask a number of questions: (1) How many different agencies in the state can facilitate an adoption, and how many would exercise an exemption? (2) Do adoption agencies now segment the market, helping some prospective adopters but not others (for example, a Muslim adoption agency placing Muslim children with Muslim families)? (3) How likely is it that every adoption agency in a given area will assert a moral objection?⁹⁸ In such instances, these foreseeable denials would clearly pose a hardship for the couple.

(4) Will the ability to opt out bar access by same-sex couples to adoption altogether? Here, states should consider the role of Internet adoption sites. They should also consider the ease or difficulty of adopting across state lines, which some states discourage. States should also consider whether prospective adopters will lose the ability to adopt infants or other children they would see as desirable, including children to whom they may have developed an emotional attachment. To the extent that the couple cannot easily adopt outside their home state, and no one will serve them within the state, allowing for conscientious objections without addressing hardships is tantamount to prohibiting a couple from adopting.

(5) Will same-sex couples experience hardships other than a lack of access? It seems possible that hardships may result in particular cases as well as systemically. Consider an agency that begins to serve an individual whom they later learn is in a same-sex relationship, and only then does the agency balk. Or consider an individual caseworker who asks to be exempted from assisting a same-sex couple but drags her feet or otherwise acts as a roadblock when other caseworkers would gladly serve the clients’ needs. Here, states may want to tie an exemption to a duty to transfer the case and step aside. A transfer may be the only equitable solution when the couple has sunk a lot of time and money into

98. Despite the possibility of hardship, locales in which every agency or nearly every agency will claim a moral objection should not occur very often. A number of adoption agencies now offer services to same-sex couples and advertise themselves explicitly as gay and lesbian friendly sites. *See, e.g.*, Independent Adoption Center, <http://www.adoptionhelp.org>; A Child’s Waiting, http://www.achildswaiting.com/adoptive_parents/adoption_questions/; Open Adoption, <http://www.openadopt.org/index.php>; Adopt a Special Kid, <http://www.aask.org/>.

an adoption in the form of agency fees or the cost of a home study—not to mention their emotional investment.

V. CONCLUSION

The question posed by moral clashes over same-sex adoption is not whether same-sex couples should parent—clearly same-sex couples are now parenting—but whether private adoption agencies may help some but not all prospective parents. Deciding when, if ever, it is acceptable for providers to refrain from facilitating an adoption will stave off a wave of litigation and years of uncertainty. For this reason alone, new legislation resolving the question is warranted. But addressing this matter of conviction forthrightly serves another end as well: ensuring that providers of adoption placement and other services continue in their important roles. Left with all-or-nothing choices, many providers have chosen nothing.

Far from offering only black-and-white, all-or-nothing outcomes, conscience clauses permit states to accommodate both the interests of those who want a service *and* those who have moral objections to providing it. With information-forcing rules and hardship provisions, states can preserve the dignitary and parenting interests of same-sex couples without reflexively dismissing the religious or moral objections of providers.