Do Nonreligious Conscience Claims Have Merit?

EVALUATING THE SUBSTANCE BEHIND THE EXEMPTION REQUESTS OF HEALTH CARE PROFESSIONALS

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Traditional religious viewpoints have long conflicted with health care procedures such as abortion, physician-assisted suicide, and gender reassignment surgeries (GRS). However, these moral objections are often shared outside prominent religious circles. While convictions vary in their source or origin, the nonreligious conscience is a prominent force that is active in lobbyist groups and intellectual debate. This report seeks to develop tools to understand the substance of a conscience claim by looking uniquely at increasingly prevalent nonreligious objections in the health care industry. The report tests the merit of nonreligious health care exemptions philosophically and legally to determine whether nonreligious exemptions can and should exist in a pluralistic society.

I find that nonreligious health care conscience claims can be supported within a natural law framework, which provides a substantive defense of conscience and the pursuit of the natural good and adjudicates principles that weigh the moral goods in a society. With biotechnology developing at accelerated rates in the modern world, a discussion about the value of conscience and its freedom in Western society will become even more salient. It is legally and culturally crucial to develop the proper philosophical grounding and operating principles to justify the protection of a conscience claim and adjudicate contending viewpoints.

Background

To begin this task, one must first understand the two main legal protections for a conscience claim—religious and nonreligious exemptions.

Religious Exemptions. From ancient examples of Sophocles' *Antigone*, in which the titular character followed her sacred conscience regardless of human law and its consequences, to more contemporary issues of abortion and euthanasia, a religiously informed conscience claim has had a voice throughout history.[1] It was a vehement defense of the religious conscience that fueled the establishment of American colonies. It was faith in the legitimacy of the conscience that informed the American democratic experiment.[2]

Since then, after centuries of laws and policies, a great deal of ink has been spilled unpacking the philosophy and rationale behind religious exemptions. A religious exemption is an accommodation provided for individuals to be free from legal

obligation should a law conflict with their ability to exercise their religion.[3] The freedom of conscience, explicitly a religious conscience, is protected in the Constitution through the First Amendment's free exercise clause.[4] Overall, the protection of the free exercise of religion allows a person to act on his or her perceived duty to something higher.

Nonreligious Exemptions. Nonreligious people also have duties and obligations concerning the good of society. A nonreligious exemption protects the exercise of conscience that may stem from a moral or philosophical belief when it conflicts with law.[5] While atheism as a belief system does not attain explicit protected status in the Constitution, specific nonreligious conscientious objections—such as in wartime or concerning vaccines—do have a history of protection in law.[6]

Richard Arneson points out that freedom of thought and expression are generally protected in the First Amendment, further protecting a person regardless of the religiosity of his or her thought or expression.[7] Because of the First Amendment's directives, it has been common practice in policy to try to protect individuals' conscience. The US Department of Health and Human Services (HHS) recognized general conscience claims in its new "conscience clause" rolled out in May 2019, promising to "promote and protect the fundamental and unalienable rights of conscience and religious liberty."[8] Here, both conscience generally and religious liberty are labeled as unalienable rights. In this report, nonreligious conscience, its legitimacy, and the scope of nonreligious health care exemptions are the focus.

While a nonreligious health care exemption request can come in many forms, the most common examples of nonreligious conscience claims come from those who feel their duty as professionals and code of ethics conflict with legal requirements. One case that reached the courts in 1980 was *Pierce v. Ortho Pharmaceutical Corp*. A research physician refused to work on loperamide, a drug being developed by her employer, because she believed the drug violated the Hippocratic oath.[9] Due to a combination of expanding medical technology (i.e., biotechnology and stem cell research) and expanding medical requests that pertain to more than basic medical care for the sick or hurting, health care professionals are likely to make judgments regarding issues not previously encountered. While nonreligious exemption requests grow, challenges to their legitimacy will likely expand at a corresponding rate.

The Shift from Sacred to Secular. Throughout intellectual history, there has been an overriding shift from a religious-dominated concept of conscience to a reason-dominated understanding. In the ancient Greek and Roman literature of Homer and Virgil, right and wrong were revealed from divinity.[10] Nature itself cried out in pain at injustice, and concepts such as honor and purity were distinct, desirable character traits. Plato articulated a relationship between morality and divinity, arguing that the gods knit within nature natural punishments for injustice and good would be, at the very least, rewarded in the afterlife.[11] The morality plays were a genre of medieval entertainment that personified moral attributes, and their messages were greatly influenced by the church both pre- and post-Reformation.[12] In the American colonial period, individuals continued to use divine authority to inform their actions and beliefs, sometimes in a mystical way divorced from reason.[13]

The rise of a secular morality was informed largely by the dawn of the European intellectual movement in the 17th and 18th centuries—the Age of Enlightenment. At the time of the Industrial Revolution and the increase of labor outside the home, classical attachments of family and religion began to break down. English philosopher Basil Mitchell argued, in the fashion of Edmund Burke, that ties of associations such as the family and church powerfully instill practical "sensibilities" concerning morality.[14] Instead of the sole source of truth and morality stemming from a religious authority or God directly, each person is empowered to pursue truth through his or her everyday experiences and reason, drawing on self-evident truths.[15] The formative philosopher Immanuel Kant spearheaded this idea in *The Metaphysics of Morality*, arguing that morality could be derived from reason alone without starting with God's existence. Truth

could be intuitively evident through the instrument of reason.[16] This kind of intellectual thought fueled the advances of secular humanism and had the effect of advancing moral values in an explicitly nonreligious context.

Rise of Nonreligious Exemptions. In the American context, new cultural and legal precedents reflect the rise of secular morality—namely, the precedents for nonreligious exemptions concerning medical professionals, including (1) an increased use of secular arguments in morally contentious issues and (2) more explicit support for nonreligious exemption requests in federal and state legislative and judicial bodies.[17] Based on these trends, health care exemption requests are projected to come from an increasingly nonreligious pool of health care professionals in the foreseeable future.

Rise of the "Nones." One reason for this trend is the increase in those who describe themselves as nonreligious. Generally, studies show the rise of the "nones" in America—people with no religious affiliation. In one notable study, only 6 percent of Americans identified with no religious affiliation in 1991. By 2016, a quarter of Americans claimed no formal religious identity, solidifying this group as the largest "religious group" in America. Religious affiliation is no longer a quality taken for granted but is, in fact, declining.[18]

Practically, those with no religious affiliation still operate from real values and beliefs, even if those values are things such as wealth or pleasure. Thus, secular ideas of the good life have continually expanded and have become divorced from explicitly religious groundings. Particularly, convictions and beliefs concerning human rights or the value of life in general that were once held exclusively by religious populations have now been brought under the secular umbrella.

Canadian Physician-Assisted Suicide. One pertinent example from Canada shows a non-faith-based conception of morality conflicting with the legalization of physician-assisted suicide. A coalition of doctors in a nonreligious organization with nonreligious objections, Canadian Physicians for Life, has risen to the forefront of the Canadian political debate.[19] Based on medical ethics and the dictates of the Hippocratic oath, the group objects to providing or being a part of physician-assisted suicide. It has demanded that a doctor's conscience rights be protected and challenged the assertion that patients have a right to compel their doctor to kill them or refer them to be killed. While David Anderson, a conservative member of parliament, introduced a bill amending the criminal code so as not to intimidate health care professionals into taking part in this practice, the proposal did not pass.[20]

Conscientious Objectors in Wartime. As a parallel example, scholarship has noted the invasion of secular ideals, most notably involving conscientious objectors in wartime. While wartime conscientious objectors came from a particularized religious circle, now objectors have primarily secular humanitarian motivations.[21] In 1965, the Supreme Court even responded to this altered reality in *United States v. Seeger*. There, the Court expanded the understanding of religion to include a sincere and meaningful belief "occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption," to accommodate the newly formulated secular conscientious objections.[22] Following that, in *Welsh v. United States*, the Court went further, saying that "ethical and moral beliefs" could qualify as religious convictions.[23] These Court decisions concerning conscientious objectors reflected a new understanding of moral ideals possessed by secular actors.

The Secularized Argument for Vaccines. Religious exemptions also used to dominate requests for vaccine exemptions. In the past, the majority of exemption claims were made by religious sects such as traditional Dutch Protestants, who argued that whatever happened to their children was predetermined by God, and they did not want to introduce an artificial agent into their children's health.

In more contemporary times, personal beliefs and personal apprehension to vaccines make up most

exemption requests. This is partially driven by secular movements such as holistic health, which seeks to equip the body to naturally fight maladies without vaccines.[24] Disregarding the element of God's predestination, there is a mutual desire between the conscientious Christians and a more secular, holistic approach to preserve the human body's naturalness. While these two objections are similar in character, they fly under different banners.

Today, few remember the reasons for a religious exemption for vaccines.[25] This example of vaccinations demonstrates an increasing secular ownership of moral convictions over previously religiously dominated viewpoints.

Nonreligious Engagement Regarding the Pro-Life Movement. Since *Roe v. Wade*, the pro-life movement has increasingly integrated scientific data in its argumentation.[26] While it retains religious arguments concerning the personhood of the fetus, the movement has undoubtedly expanded its arguments to empirical data and philosophical arguments that could be more easily owned by a secular audience. Much like exemption requests for vaccines or conscientious objectors in wartime, a religious motivation is not required for pro-life activism. Groups such as Pro-Life Humanists and Secular Pro-Life have explicitly secular members and are becoming leading voices against abortion.[27]

This cultural trend is reflected in the legal statues concerning abortion. After the Supreme Court decisions of *Roe v. Wade* and *Doe v. Bolton*, Congress passed the first conscience exemption in the early 1970s called the "Church amendment." This amendment allowed individuals and entities to opt out of facilitating abortions if it was "contrary to [the individual's or an entity's] religious beliefs or moral convictions."[28] Today, many states allow health care professionals to refuse to participate in abortions on the grounds of professional conscience.[29]

General Legal Precedents for Nonreligious Conscience Objections. Other federal and state legal precedents have recognized the prominence of the secular conscience. In health care law, the Balanced Budget Act of 1997 allowed for those with Medicaid and Medicare+Choice plans to object to providing services on nonreligious moral grounds.[30] A Mississippi statute in 2005 set a trend among other states, broadening the understanding of conscience in health care to include a professional's moral or ethical concerns.[31] In Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission defined religion as "all moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[32] A key element in this definition is the strength of the conviction that is necessary to protect a nonreligious health care exemption. In conclusion, two takeaways—the growing nonreligious participation in the moral issues of the day and the expanding legal treatment of nonreligious exemptions—are significant precedents for accommodating nonreligious exemptions.

The Diversity of Nonreligious Convictions. Nonreligious conscience claims show that the moral debate is far more complex than a war between the religious and the secular. As medical demands outside traditional health care increase, those with a mere religious upbringing or those with a deep sense of morality separate from a particular religion may find certain demands unconscionable. Importantly, Alain Julian León and Rico Vitz illustrate the diversity of beliefs in the secular community, demonstrating that the religious and nonreligious communities have more in common than typically presumed.

León and Vitz point out that there are subcultures within secular circles that do not adhere to the popular mainstream creed. As an example, they cite the work and convictions of the late Adrienne Asch. Asch was a bioethics scholar, ob-gyn, and a committed feminist and atheist. While she did not object to abortion, she refused to participate in terminating a pregnancy if the fetus had been diagnosed with Down syndrome.[33] As León and Vitz write,

> In essence, the demands of her conscience in light of her conception of secularism are at odds with the demands of the dominant secular culture in light of its conception of secularism. This situation is not unique to doctors like Adrienne.[34]

Even within secularism, León and Vitz argue, there are subgroups of individuals who hold different convictions at varying degrees, just as in religious culture. Apart from a religious affiliation, the consciences of individuals remain. If there are no provisions made for nonreligious conscientious objections in health care, a nonreligious individual may claim a religious exemption as his or her only option. Because health care exemptions cited on religious reasons have better protection legally and provisionally, there are known cases of individuals citing religious reasons insincerely simply for convenience.[35] Health care exemptions may follow the predominant trends of our age, continuing to broaden their appeal from religious to nonreligious audiences.

Part I: Using Natural Law Theory to Ground Nonreligious Conscience Claims

If individuals, such as Asch, are to operate in the health care industry, their consciences should be protected. Natural law theory introduces a philosophical framework to understand the existence and substance of the conscience in religious and nonreligious conscientious objections. This section begins with the significant contribution of philosopher and theologian Thomas Aquinas.

In his work, *The Treatise of Law*, Aquinas listed natural law as a subcategory of law. A law is defined by the following qualities: an ordinance of reason, made by him who has care of the community, for the common good, and promulgated.[36] For the subcategory of natural law, Aquinas writes, "Natural law consists of principles and precepts habitually held in the Practical Intellect." A person's practical intellect holds principles and precepts of natural law in a way that allows reason to proceed. Aquinas states that the first principle of natural law is that "good should be done and sought and evil is to be avoided."[37] This first principle is the foundation of all other principles.

For Aquinas, human inclinations are always good as long as they are ordered properly with human reason and pursued virtuously.[38] Importantly, natural law thinkers argue that basic universal principles are accessible for all people without needing to refer to law or institutions. This contrasts dramatically with a Hobbesian notion that law and morality are merely a product of civil society. Instead, natural law holds that morality is discoverable apart from the establishment of a civil society or sovereign.[39] A person is capable of knowing and experiencing the consequences of right and wrong, justice and injustice, in his or her natural state. This also echoes principles of the Enlightenment, which privilege the individual intellect.

The Conscience. The conscience, or *syndersis*, can be understood as an innate, habitual disposition that reflects a proper posture toward natural law principles. Another aspect of conscience is the *conscientia*, which is "the act of applying the habit of synderesis to particulars."[40] Synderesis is an innate natural disposition of human reason that causes *conscientia*—the actualization of habits. As is consistent with Aristotle's emphasis on habit in cultivating virtue, knowledge of natural law comes through practice; it is not inherent or automatic. Natural law scholar Robert George writes,

> One's knowledge of natural law, like all knowledge, begins with experience, but it does not end or even tarry there. Knowing is an activity—an intellectual activity, to be sure, but an activity nonetheless. We all have the experience of knowing. But to know is not merely to experience. Knowing is a complex and dynamic activity. The role of experience in the activity of knowing is to supply data on which the inquiring intellect works in the cause of achieving understanding. Insights are insights into data.[41]

Because the conscience, particularly via the *conscientia*, is formed over time and practice, the conscience is not the intellect, the action of following the intellect, or law itself. As professor of law Russell Hittinger explains, the conscience is merely "an indefectible habit, of the agent intellect, that renders the knower habitually poised to understand that the 'good is to be done and pursued and evil resisted.'"[42] Humans then have a quality that George

describes as a "quality of divinity"—to know the truth and act on their conscience.[43]

Ill-Formed Conscience. While natural law explains the moral legitimacy of a conscience, it does not naively argue that all beliefs bound in a conscience are properly formed. While natural law truths are self-evident, Aquinas clarifies that natural law is not self-evident to all people. Aquinas believed that the knowledge of the universal principles arose with a natural exertion of one's uninhibited intellect. George explains that "knowledge of natural law, then, is not innate. It does not swing free of experience or of the data provided by experience. Even when it is easily achieved, practical knowledge (that is, knowledge of natural law) is an achievement."[44]

Natural law principles might not be evident to a person because of immoral actions or a lack of understanding.[45] While the *synderesis* is innate in each person, the *conscientia* must be formed through practice. Emotions can also be powerful in manipulating one's reasoning capability, and emotions can be affected by any number of experiences. While a conscience can be incorrect and certainly lead a person astray, natural law still holds that people can have well-formed consciences and often have rational reasons for their actions.[46]

A Nonreligious Conscience. Regarding the protection of a nonreligious conscience, natural law truths are explicitly accessible for all people, regardless of their religiosity. Natural law thinkers do not believe one needs special revelation to believe in God or have a conscience. This is derived from Saint Paul, who asserted that there is a law written on the hearts of all, even Gentiles who were unfamiliar with Old Testament law, and that law was "sufficient for moral accountability."[47] Based on this principle, anyone could know the natural law and align their actions accordingly.

While many natural law thinkers would attribute an intelligent, rational designer as the cause for the existence and accessibility of natural law, this explanation for natural law is not necessary. This is because the order of being (ontology) is distinct from the order of knowing (epistemology). One can know that "x" is true without knowing the ontological explanation for why it is true. George explains,

> We do not need agreement on the answer so long as we agree about the truths that give rise to the question—namely, that human beings, possessing the God-like (literally awesome) powers of reason and freedom, are bearers of a profound dignity that is protected by certain basic rights.[48]

As long as people have a fundamental obligation to live life according to the basic good, they do not necessarily have to attribute their obligation to God. Once this common basis is formed, there is space among those who agree on main things and the desire to obtain moral goods to then debate what those moral goods might be.

The Freedom of Conscience. Because humans have the capacity to reason and know truth and the responsibility to follow truth, humans have the right to pursue truth as they see fit. While humans ought not infringe on others' human rights in the exertion of their own, the very concept of human rights is also grounded on a theory of natural law. As George puts it,

> Human rights exist (or obtain) if principles of practical reason direct us to act or abstain from acting in certain ways out of respect for the well-being and the dignity of persons whose legitimate interests may be affected by what we do.[49]

Human rights demand that one recognize the objective good of another and act out of respect for that good. However, since natural law truths are not automatic, the free exchange of ideas in the public square is a natural refinement for truth. When humans are allowed to make arguments for and live out their convictions about the good, the true objective good becomes more evident. In addition, the freedom of conscience follows the principles of the American system, which does not see individuals as mere "cogs in a social wheel" or instruments of the state.[50] Individuals participate in a social, collective environment, but they are also distinct voices in the

community. This prevents a centralized state from becoming the sole voice on moral goods and coercing conformity to its view of the public good.

Natural Law and a Higher Governing Authority. Importantly, natural law theory grounds the legitimacy and power of conscience on the existence of moral goods. Professor of government and philosophy J. Budziszewski distinguishes and explains two different schools of moral thought. The first view is what Aquinas founded, which is a classical natural law tradition based on the existence of eternal principles of right and wrong. Humans govern themselves with the authority of a higher law. Because of this higher authority, there is a clear tie to the individual's duty to follow that authority and be faithful to his or her conscience. In contrast, there is a school of thought that legitimizes morality and conscience based on self-will and autonomy. "Autonomists" view self-rule as the very source of the law. People are sovereign over themselves and, with the assertion of their will, craft a moral code.[51]

Autonomist View of the Conscience. While the autonomist view of conscience still shows reverence for conscience, autonomists separate the source of conscience from a higher authority. Christine Korsgaard, a professor of philosophy at Harvard University, argues for Kantian ethics, showing how one's duty to oneself is primary. One's conception of morality is grounded in one's own freedom to rationalize. Importantly, when one exercises his or her moral duty, one is not obligated to do so based on a higher conception of truth. Rational people are themselves the legislators of the law.[52] Korsgaard argues, "The reflective structure of human consciousness requires . . . that you be a law to yourself. And that is the source of normativity . . . our autonomy is the source of obligation."[53] Instead of truth or knowledge being the basic good, such as with natural law theory, autonomy is. There are obligations to others, but this stems from one's own moral concept that humanity has value. The duty to one's self is the binding agent.

Thomas E. Hill Jr. adds to this claim by making the Kantian distinction that people have duties *to* themselves (not God, nature, or others) and duties *toward* others that come after.[54] Practically, each person ought to be free to live according to his or her own moral duty. In one sense, this principle of respecting one another's liberty and freedom to reason would seem to be a proper grounding for exemptions. While the two schools of natural law and autonomists seem to value moral duties, the autonomist view does not necessitate a transcendent authority apart from the self. The validity of these two schools of thought and how they do or do not ground nonreligious conscience exemptions will be explored in the following case study.

Part II: A Case Study of Surgeons Providing Gender Reassignment Surgeries

In this section, the legal precedent and philosophical grounding for nonreligious exemptions are applied to the case study of a surgeon who refuses to provide GRS. Examining GRS is fitting as this project's example for two reasons: (1) Transgender rights and GRS are increasingly relevant both legislatively and culturally,[55] and (2) conflicts between a surgeon's conscience and request for GRS are beginning to arise with large potential for future conflict, leaving a relatively open space for analysis. GRS consists of several hormonal and surgical procedures, such as sterilizations and cosmetic surgery. As data continue to be developed regarding the success and effect of GRS, there is significant dissent in the medical field regarding the ethics of such a procedure.[56] However, the stance of higher medical authorities is clear, and these portend serious implications for health care professionals.

Nonreligious Objections to GRS. Based on the growing number of religious objections to sex-change surgeries and other secular precedents concerning health care issues, it is reasonable to expect an increase in nonreligious objections to providing sex-change surgeries. Without a doubt, there is mounting legal pressure on the health care industry to accommodate GRS requests. One recent

example is in California, which enforced a law akin to the Equality Act prohibiting discrimination for the categories of "sexual orientation" and "gender identity." In this case, the American Civil Liberties Union filed suit against a Roman Catholic hospital where a transgender patient's request for surgical sterilization was refused.[57]

There is solid historical and philosophical grounding for a health care professional to refuse to perform a disfiguring or sex-change surgery. This is not a novel ethical conviction, but rather has grounding in Judeo-Christian tradition. Vitz unpacks the historical view of disfiguring surgeries, citing the 85 canons of apostles ratified in 692 AD. There, the council

> explicitly and repeatedly affirmed the sinfulness of disfiguring one's body, specifically of surgically removing one's genitals, in at least three separate canons. Canon 22 identifies a person who disfigures his body in this way as "a murderer of himself; and an enemy of God's creation."[58]

This strong language highlights the viewpoint of health care professionals influenced by Judeo-Christian thought, finding that they are destroying a naturally created organ in a sex reassignment surgery.

Some secular doctors also oppose GRS in its totality or to a degree for moral or ethical reasons. The Hippocratic oath, which nearly every doctor in America must take to enter his or her practice, asks that a doctor put the individual's needs first and "do no harm." There are doctors who, according to their medical judgment, would view the removal of a properly functioning organ as an example of harm.

One example of a less affirming view of GRS is from Canada concerning the secular psychologist Ken Zucker. As a respected psychologist working at a mental health clinic in Toronto, Zucker did not view gender-affirming treatment as the only option for gender dysphoria, especially for children. While he had recommended transition therapies for other patients, his medical ethics dictated that he be more cautious recommending that to children.[59] To support this ethic, he cited data showing that 80 percent of children who realigned with their biological sex experienced an increase in their emotional well-being as they grew into later adolescence.[60] While prominent examples of nonreligious objections to GRS are still somewhat limited, it is reasonable to believe that additional moral or philosophical objections could arise. Based on the precedent set through other morally laden health care dilemmas such as abortion and physician-assisted suicide, it shows a prevailing pattern emerging from the religious and nonreligious alike.

The Ideological Dissent. Despite the traditional viewpoint on sex-change surgeries, institutionally imposed ethics from groups such as the World Medical Association and the American Psychological Association have altered what was previously seen as a doctor's sacred duty. In the first place, a doctor is no longer seen as a trained professional with independent discernment concerning a patient's health. The title of "health care professional" has begun to be replaced by "health care provider" in popular culture, projecting a transactional image of a customer merely purchasing a product at a vending machine.[61] With this fundamental shift of how a doctor is viewed, it has affected the guidelines imposed on doctors.

The World Medical Association altered the Hippocratic oath, adding the vague but intentional line, "I will respect the autonomy and dignity of my patient." In 2015, this organization created new guidelines for physicians that defined gender incongruence as "not a medical disorder," despite many physicians openly opposing the guidelines, countering them with data and research studies.[62] Similarly, the American Psychological Association has recently taken the stance that it is "unethical" to deny a person's conception of his or herself and restore them to what, according to a particular health care professional's judgment, is a correct mental health.[63]

If doctors should find themselves in conflict with these institutional judgments, the professional implications are real and important to consider. In May 2016, the HHS under the Barack Obama administration made the Nondiscrimination in Health Programs and Activities rule. A controversial portion of

this regulation mandated that employers cover sex reassignment surgeries, even if the employer had religious objections. This provision was later struck down in *Franciscan Alliance v. Azar* by a federal court in Texas.[64]

The HHS rules included specifically that

> a provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals.[65]

Here, health care providers are required to implement their practices without discrimination, regardless of their medical judgment or ethics. In addition, a hospital can be held liable for employing a doctor who would discriminate and violate this mandate. As of May 2019, however, if a doctor were to object based on religion or morality, the Donald Trump administration has placed certain statutory conscience rights as a safeguard for these individual medical and ethical objections. These new safeguards require more government oversight and transparency from those receiving federal funds to ensure that individuals and entities' rights to "religious beliefs and moral convictions" are protected.[66]

However, these safeguards may prove only temporary, as it is reasonable to expect future unfavorable regulations toward conscience rights. In addition, legislation such as the Equality Act and Do No Harm Act challenge existing provisions by changing the law to make it illegal for a doctor to refuse a service to transgender patients based on the doctor's moral or ethical objections. These problematic laws are infused with an ideological assumption assuming that a person is inseparable from his or her gender identity.[67]

Applying a Philosophical Framework

With this as a background, I now apply the two conceptions of conscience—classical natural law theory and one Kantian autonomist view—to the case study to establish a reasoned justification for a nonreligious exemption.

Natural Law Theory. In the case of classical natural law theory, the ideal resolution would be as follows: The surgeon approaches the request with a conviction concerning her patient's good. She is free to exercise her best medical judgment, and on the grounds of her obligation to what she believes to be the natural good, she declines to perform the surgery. Because her view is based on philosophical ideas of the human person, along with existing data or long-standing tradition to inform her, she appeals to an authority (pursuit of the natural good) that transcends the state. Recognizing the moral and philosophical conviction of the individual, the state would allow the doctor to decline the procedure without threat of a discrimination lawsuit. Under such a scenario, the patient requesting the surgery may have a desire and personal belief in the good of GRS, but the patient has the ability to go elsewhere to obtain the surgery.

Autonomist Theory. On the Kantian view of moral duty espoused by Korsgaard, the doctor's self-will conflicts with the patient's autonomous will. The patient has requested a surgery she believes will benefit her personhood and dignity. Because there is purportedly nothing transcendent to the person grounding a duty or obligation, there is no criteria to determine which individual's autonomous choice ought to be respected. Instead of the surgeon appealing to a higher moral truth and making a rational argument for that objective truth, at best, all that can be claimed is that one personal choice has come into conflict with another. The doctor's autonomy and the patient's attempt to express her autonomy have come into conflict. Who is to say that the autonomy of the doctor ought to prevail over the patient?

The Conflict of Autonomies. In one sense, the lack of a higher aim toward the good cripples the autonomist view by removing from the doctor any real grounds to object (or for the patient to impose on the doctor). The American Medical Association encourages the doctor to defer to the good of the patient, arguing,

> The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.[68]

In this code of ethics, "welfare" is the operative and essential term. For the doctor to even know a patient's welfare, the doctor needs knowledge that is higher than the patient. With Korsgaard's interpretation of the Kantian framework, "The only person 'in a position' to give that law is the self-commanding self."[69] According to Korsgaard, people can only make a normative claim, at the very least authoritatively, for themselves. Under this view, it would be hard to argue that another agent—the doctor—knows better than the patient does for what is good for her. After all, the patient could claim to know how welfare looks for her better than a doctor does who only determines the doctor's own good. The situation arguably demands a higher authority for there to be a reasoned justification for the doctor to be exempt from the law or to even act on the good of the patient. Here, the autonomist view simply cannot provide this higher authority. It cannot ground the authoritative role of the doctor or provide for a rationale for exemptions.

Even if a doctor's claim to autonomy were somehow protected in an autonomist framework—forcing the patient to seek care elsewhere—an allowance for all autonomous claims in health care unleashes a potential proliferation of citizens who can decide their own standards, even if proven harmful to others. Based on a natural law framework, the highest duty a person has is to pursue the truth and act on it. Of course, not everyone can act unfettered on their view of the truth in a society governed by the rule of law. If everyone acted on any whim, society would become lawless. The concern becomes, as Chief Justice Morrison Waite said in the majority opinion in *Reynolds v. United State*s, "every citizen . . . become a law unto himself."[70] America's constitutional freedom requires order, and as Chief Justice Warren Burger cautioned in *Wisconsin v. Yoder*: "The very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[71] If a governing law is allowed to stand, the autonomist framework cannot provide a stable ground for exemptions. Thus, pure autonomy as a governing principle either cannot philosophically ground an exemption or leads to an arguably unworkable system involving an endless proliferation of exemptions. The system requires a sort of objective standard to remedy these effects.[72]

The Current Standard for Conscience Claims. It seems that when two autonomous claims come into conflict, one inevitably is seen as possessing more value or at least one party is seen as receiving more harm. If one were to say that both autonomies should be respected and that the patient ought to go elsewhere for service, this would bring, at the very least, a financial inconvenience to the patient and communicate clear legitimacy to the doctor's right not to provide the service. However, in reality, it is not the doctor's right but the patient's claim that is more often defended in academic and political circles.

Particularly under scrutiny today is a doctor's conscience claim based on religious dictates. Most rhetoric surrounding a religious conscience claims today garners the label "bigoted" or "discriminatory." Conceivably, secular doctors with conscientious objections to provide a given procedure may be called traitors to their kind or ignorantly attached to a bigoted "traditional view." It is often asserted that the patient's dignity is putatively harmed by the doctor's autonomous choice, but rarely is the doctor's dignity discussed. Regardless of these claims' merits, many of which will be discussed in detail later, these determinations require a value judgment. One conscience is obviously seen as worthier than the other, and it is the patient's conscience that has more protections.

The Content of the Moral Claim. This ideological battle demonstrates that in the pursuit of honoring and protecting a sense of autonomy, the state must consider the claims of autonomy based on some measure that can be reasonably articulated and defended.

As legal scholar Robert Vischer points out, the pursuit of autonomy under the law still requires the state to "supply autonomy's content with normative claims."[73] In the example of GRS, depending on which side one defends, there is a "right" attributed to that individual. To defend the doctor, one would have to say that the doctor has a right to refuse the patient. Or one could say that a patient has a right to this service at that medical facility. One cannot avoid attributing a right to someone, but on what basis does one give that right? It arguably must be based on the claim's *content*. Either the doctor is a reasoned agent who can supply procedures and operations as he or she sees fit or the patient is an agent who is entitled to the procedure he or she demands.

With GRS, one autonomous choice consistently is seen as weightier than the other. Despite the law's desire to be a neutral arbiter between two claims of autonomy, this neutrality is simply not manifested in today's marketplace. The governing authority (i.e., judicial bodies) seems to give the upper hand to the patient's viewpoint and request of service, affirming their independent moral authority or "right" as higher than the doctor's. It seems natural that conscience claims will be substantive and have real consequences—either consequences on the patient, physician, or both. As it relates to health care, it is not a strong cultural impulse that should determine the worth of one autonomy over another in a conflict of interests. This project calls for a clear, justified system to be developed to determine claims' merits.

Classical natural law theory can offer a solution to the seemingly intractable conflict between doctor and patient by providing a basis for the nonreligious conscience claim and weighing that against the fundamental goods of health, pursuit of truth, and the common good. In classical natural law, autonomy itself is not the fundamental good. Instead, there is a higher good and duty one has to pursue (i.e., truth) that informs a doctor's conception of that patient's welfare. Even when patients express a view of their welfare that is sincerely held, a doctor has grounds to disagree with this conception and refuse service. Importantly, as long as the common pursuit for a higher truth is acknowledged, a doctor's moral or ethical qualm can be protected, regardless of whether there is a religious or nonreligious origin. The exact outworking of this resolution is discussed next, when I outline the principles for health care policy.

Part III: Principles for Health Care Policy

This section discusses principles for judges, administrative staff, and policymakers to use when evaluating the merit of nonreligious exemptions for health care professionals. These principles are specifically applied to the case study of GRS, and the section ends with additional guidance for medical associations and future philosophical questions for legislators and the public to consider. The basic contention of this third part is that, while conscience claims are strong moral claims, they can be overridden by the proper balancing of rights. For instance, a basic good such as the pursuit of truth may be overridden for a higher good of life or a collection of higher goods—the lives of the whole community.

When nonreligious conscience claims conflict with a law of general application, some line of reasoning must emerge to determine its legitimacy. The following tests justified exemptions allowed through existing HHS policy and informs future debates on the worthiness of exemptions. Importantly, these tests attempt to accommodate the outlier examples in health care in a way that can respect people making different judgments without undermining the entire system based on the rule of law.

Throughout American history, the Supreme Court has wielded a number of tests to weigh the existence of a conscience claim (particularly religious) with the necessity of law. Among them is the strict scrutiny test placed on the government to adjudicate the merits of any constitutional imposition on free exercise rights. Such a standard was employed by the Court in *Sherbert v. Verner* and *Wisconsin v. Yoder*. Controversially in *Employment Division v. Smith*, the strict scrutiny standard was abandoned and replaced with a much lower bar for governmental action affecting religious free exercise: the rational basis standard. While these legal tests are evaluated and considered,

the following principles are uniquely derived from the natural law basis of this report.

I argue that (1) nonreligious and religious conscience claims ought to be protected by the same standard, (2) this standard ought to be a reasonability standard that accounts for the claim's origin and content, and (3) the conscience claim ought to be submitted to a balancing test, in which the state weighs the severity of the cost a health care professional places on the patient and public. After establishing these principles, this section concludes by addressing additional concerns and counterarguments. Before diving into the principles, it is important to establish the necessary content of a moral claim. With a limit on moral claims as a backdrop, the first and second principles are then taken together under the principle of "reasonability."

Limitations on Moral Claims. Currently, not every moral claim qualifies for an exemption. Existing boundaries naturally provide order to an increasing number of exemption requests coming from a widening plurality of moral and religious circles. The Hippocratic oath and other medical codes exist to provide additional constraints on the whims of health care professionals to protect life. In addition, federal statutes prohibit any doctor from discriminating on an individual's race, color, national origin, age, disability, and sex.[74]

Criteria for Limitations. If a governing body does draw lines specifying which exemptions are considered legitimately moral, it seems inescapable that a legitimate moral purpose for an exemption must be defined. A moral claim should not be a belief that comes from self-interest. Such a claim is arguably based on mere preference, not morality. Rather, when one appeals to his or her conscience—whether he or she refuses to participate in a service because of faith, philosophy, or moral code—this conscience ought to be protected so long as it makes reasoned arguments based on a demonstrated search for the truth, anchored in something higher than one's self.

Reasonability as a Standard for Religious and Nonreligious Claims.[75] If the highest duty a human has is to the natural good and his or her understanding of it, this understanding must be articulated clearly. Reason is defined as "the power of the mind to think, understand, and form judgments by a process of logic."[76] This means thinking must be processed by a form of logic, providing a blueprint of steps by which others can evaluate a claim.

A nonreligious actor can appeal to a philosophical or ethical argument for the objective good. For instance, in *Thomas v. Review Board*, Christopher Eisgruber and Lawrence Sager point out that a nonreligious argument for pacifism could easily be made by a "secular" plaintiff just as much as a religious one. This is because, apart from religion, a court can comprehend the high moral stakes and dilemma behind taking life in war.[77] To be clear, this reasonability standard is not about whether one person judges the other to be correct or accurate in his or her conclusion of the truth.[78] Instead, when evaluating a conscience claim, the question ought to be asked: Could a reasonable person hold this position?

As a part of reasonability, there must also be a tie between the moral claim and the individual's action or inaction. It cannot simply be that someone requests an exemption from engaging in combat due to the belief that education is a human right. This rule requiring a tie between the claim and action or inaction has implications for an individual who may request a religious exemption or nonreligious exemption or no real demonstrated tie to a reasonable moral claim.

The Rationale Behind Reasonability in a Pluralistic Society. In a pluralistic society, many differing viewpoints about the natural good can conflict with one another. When one viewpoint is inscribed into law and the counter viewpoint is held as an individual's sacred or essential duty, this makes eventual adjudication necessary. In pursuit of a resolution, reason is the only common ascertainable standard human beings have. Although imperfect human beings reason differently, they all strive for some version of the truth.[79] The rule of law requires a standard at minimum *approximate* to truth, not arbitrary. This challenge was addressed in the Constitution, which was built on

people applying reason to specific instances and contexts. However, because not one institution or person can be trusted completely, checks and balances were created. The ultimate aim is to have a system in which enough people can weigh in to approximate the truth.

Authority as a Test of Reasonability. Another layer to reasonability that must be examined when considering the legitimacy of exemptions is whether the person making the request is truly reacting to an obligation higher than the state. Exemptions to the law do not and should not derive from claims of autonomy; they stem from a claim of duty to something that is higher than the state. For humans, the highest duty is to find the natural good and act on it. For a religious person, this would manifest in a citizen who is forced to choose between loyalty to the state and God.

For the nonreligious person, the claim of the good must originate from a higher duty. Tom Farr, former director of the State Department's Office of International Religious Freedom and president at the Religious Freedom Institute, argues that the conscience of those who are nonreligious should be protected "so long as it is ordered to the truth about man and society, which is to say that conscience drives action that accords with natural reason."[80] Overall, the conscience claim ought to be evaluated by whether there is a higher authority or body of knowledge informing it. While a legitimate belief could be held without this authority, one with a mere desire and not duty could not be exempted while still maintaining the rule of law.

Categories of Nonreligious Conscience Claims. From this principle, it is useful to draw a distinction between a moral or philosophical objection and a personal belief objection. Unlike a moral or philosophical objection, a personal belief exemption is a preference that does not come from a history of thought or an articulate argument for the good. In the eyes of legislators or the courts, this would not be seen in the same light or with the same favor as a moral or philosophical objection because it lacks the higher authority to justify the exemption.

Reasonability as Applied to GRS. Religious people appeal to several sources of reason and authority. First, they could appeal to an authority from church doctrine or a holy text. On this basis, a health care professional might not want to actively participate in GRS. In addition, a religious or nonreligious individual could appeal to a body of literature making philosophical and psychological arguments about the harm of GRS to an individual. The nonreligious Zucker is an example of someone who would be protected because his conviction is based on data and medical expertise.[81] In a way, he is arguably making science—an honest pursuit of truth—his highest authority to inform his duty to serve his patient.

Severity Standard. Conceivably, a person could have a reasonable conviction that conflicted with a statute that is necessary to maintain the public good. In the Supreme Court, the rule of law would be upheld as long as there is substantial reason to burden an individual's conscience. This chapter argues that a form of this test can be substantiated via a natural law framework. Because there are other goods and consciences to protect in society, health care professionals' ethical or philosophical conscience claim cannot be protected if the cost of their act is too severe on society or another individual to be justified. The severity test tries to approximate something true about the obligations a state has to its citizens and the fundamental obligations people have to one another. The balancing of interests can be better understood and applied in the following health care scenarios.

As a note, these examples are not discussed to see which interest is more morally praiseworthy, as both parties are not requesting exemptions. Instead, it is to ensure that the basic livelihood of the individual, as shown in the existing legal limitations, would not be jeopardized if the doctor were to refuse.

Severity Outweighs Exemption Claim. In one real-life situation involving a nurse with a terminally ill patient, the scales of severity are very much in the patient's favor. *Free v. Holy Cross Hospital* was an Illinois case in which a nurse refused to dialyze a

terminally ill patient because she found it an unethical and unwise use of medical resources.[82] On one hand, one would have to evaluate the rationale behind this ethic before it could be admitted as a reasonably moral belief. Beyond that, this instance nicely highlights the severity of the nurse's claim as compared to the cost of the patient. If the nurse is compelled as a part of her job to provide care to the terminally ill patient, she is—at worst—unwisely using hospital resources. However, if she does not offer this care, a patient's life will be jeopardized. The severity of this cost seems far weightier than the cost if the nurse is correct.[83]

Equally High Severity. One other instance highlights a precarious situation of life and death when a medical professional or institution believes they are upholding their commitment to life. There have been reported cases of Catholic hospitals possessing institutional prohibitions against terminating a pregnancy, even when the mother's life is at stake.[84] The rationale behind this policy is an unwillingness to end the life of a baby in the womb under any condition, which has traditional and philosophical underpinnings.

Of course, a life (i.e., the mother's) is also at stake if this determination is wrong. For those who would not side with the hospital's policy, they ought to know this to receive care at another facility that will better align with their philosophy. In this instance, it would be incumbent on the hospital or the health care professional to provide a clear outline of expected protocols to the patient receiving care.

Vaccine Case as Model. Vaccination is an example of a service that a patient may believe to be to his or her betterment, but a doctor may disagree and view it as harmful and, thus, immoral to participate in.[85] This can be used as a parallel model for GRS. If a doctor's conscience precludes him or her from administering vaccines, this could endanger the patient by exposing the patient to diseases.

However, the doctor's concerns about administering the vaccines arguably come from a body of thought and data showing harm to a patient if the vaccine was administered. If doctors—informed by their ethical standards—can show a burden on their conscience, it would seem that the relatively minimal inconvenience imposed on the patient having to go elsewhere for a vaccine (given the widespread accessibility of vaccines) ought to entail that the doctor be protected from administering the vaccine.

Vulnerability Theory Applied to GRS. When applying this severity test to GRS, one needs to weigh the cost of the patient not being served and his or her welfare compared to the health care professional who objects to providing the procedure. Martha Fineman proposes the "vulnerability theory" as a way to navigate the severity of a patient's harm by a refusal.[86] While she applies this solely to reproductive rights, current legislation uses similar verbiage in the arguments for access to GRS, arguing that there is true psychological damage to a patient's dignity in being refused by a doctor.[87]

In one sense, this argument presumes that a patient's welfare is not served without the surgery or that a patient is suffering dignitary harm. As has already been demonstrated, this argument assumes a version of the good of a person and his or her intrinsic makeup by using words such as "welfare" or "dignity." This interpretation could be countered by rational arguments and long-standing tradition, so, at the very least, it cannot be assumed by default.

Secondly, if the doctor's moral claim is reasonable, it must be weighed against the potential psychological harm on the patient. If the state does not allow a doctor to refuse an operation because of the physiological effect it will have on a patient, this becomes a slippery slope with no clear limiting principle. Views that undergird exemptions tend to be minority views, and they are moral views. The moral content of these views naturally upsets someone who might hold something counter, particularly when it leaves the theoretical and becomes experiential, pertaining to a particular lifestyle. When the state allows a conscientious objector to stay out of combat, it is not outweighed by the lack of support (loss of morale) or vulnerability that other willing fighters will feel as a result.

Additionally, the possibility of depression, anxiety disorders, and substance abuse among transgender individuals—things that are weighable—are not proven to be greatly alleviated through GRS.[88] Furthermore, the psychological hurt that comes from being unaffirmed by one's doctor could be mitigated through internalizing policies in health care. If a patient were to request GRS, the primary doctor or hospital could refer to a physician who was willing to provide the service to alleviate the face-to-face refusal.

Beyond that, however, it is worth considering how much psychological trauma is incurred when a wide supply of treatment is otherwise available. In the end, the psychological harm of the patient alone in having to find another professional to perform the surgery should not preclude the legitimacy of alternative judgments in the medical field and the exemption claim by the health care professional in question.

Vulnerability of Geography. Another aspect of the vulnerability argument pertains to the geographical distance of travel and financial burden on a patient after being refused. Indeed, it is naive to assume that all patients can obtain care easily within their living confines or have the ease to travel where they would like. It is, without doubt, a potential inconvenience.

However, in this instance, the imposition on the patient is not severely unique from any other good that a patient may struggle to obtain in a rural community. For instance, parents may find that a given school district does not provide what they would deem a good education for their children—a resource that is widely recognized as good and imperative. An individual also may struggle to obtain other health care goods, such as an understocked pharmacy that does not provide the needed medicine. If the individual notified the pharmacy that it did not have a product the individual desired, the pharmacy may certainly begin providing that product to satisfy the patient and retain business. However, it is not incumbent on the pharmacy to provide it.

In this instance, it does not pertain to the individual's life; it is not an individual's right to have any product within close proximity. Ultimately, the argument pertaining to the financial inconvenience and barrier of a rural environment is real, but it is not especially unique to any other service.[89] If the service were to become more scarce or completely inaccessible, the government would have to evaluate if it is a fundamental public good—such as food supply or a vaccine.

Concerns Addressed. Finally, I offer some overarching responses to potential concerns that may arise from my argument. Chiefly, I address the challenge that allowing a wide variety of nonreligious exemptions would encourage discrimination against individuals, such as transgender patients in the case of GRS.

Discrimination Concerns with GRS Conscience Objections. Currently, if a doctor refuses to provide a sterilization procedure for a transgender patient that would otherwise be provided to a cisgender patient, it could be viewed as an unlawful discriminatory act.[90] This does, of course, depend on how the various medical and legal bodies formulate their patient antidiscrimination rules to define sex and gender.

With the recent spate of cases in which the Supreme Court expanded Title VII protections involving "sex" to include gay and transgender individuals, the impact on future legal questions involving cases pertaining to GRS is now an open question.[91] It may make refusal to perform GRS a more difficult prospect. However, a rebuttal against the claim that any refusal to perform GRS is discriminatory is that unless transgender patients are being discriminated against in other ways—refusal of care for disease or sickness—a refusal to provide GRS does not discriminate against the person but is an ethical or moral judgment against the requested procedure.

In health care, the doctor makes determinations based on the person and his or her judgment of their state regularly. It is far too simplistic to say that one cannot be refused an operation based on an aspect of identity, especially when identity is something evolving or physiological. It is conceivable that a doctor would prescribe a different solution for a person depending on his or her personal history or his or her view of the relevant state of mind. For instance, the health insurance discrimination policy of Blue Shield

of California prohibits treating patients differently based on "gender, gender identity, sexual orientation," and "age."[92]

However, some doctors have objected to providing vasectomies to young men or hysterectomies to young women based on their age.[93] As some young single individuals request the procedure out of convenience, some doctors fear they might regret it or that it could harm their future quality of life.[94] Beyond being simply imprudent, the doctor could see it as immoral to remove any natural reproductive capacity from a human body at such a young age. Although this view is not as widely held as the objections surrounding GRS, it seems initially reasonable that this refusal based on the patient's youth and mental state ought to be allowed. Later, as the individual ages, the professional's judgment may also change. This case is also distinctly different from a doctor refusing an older person care because of age, jeopardizing the life in question.

Because of the particularized judgments required in a health care professional's role, the law should delineate between complex components of one's identity and the operation performed. A doctor ought to be able to refuse certain operations—such as hormonal treatment or cosmetic surgery—if there is a reasonable conscience objection concerning the operation's intent or the effect it will have on the particular patient. It should not be considered primarily as a doctor discriminating against a person's identity but rather an alternative judgment regarding the service that patient requests for his or her condition.

The Privileged Status of Religious Claims. Because of the intrinsic nature of religion—an adherence to a higher source or power—a religious claim may more consistently fit a criteria of reasonability and authority over a secular claim that does not as explicitly rest in a higher being. Constitutional law scholar and former federal circuit judge Michael McConnell writes,

> In any particular context, religion may appear to be analogous to some other aspect of human activity—to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that combines all of these aspects. . . . Thus, a rigid insistence that religion be treated the same as "nonreligion," or the same as a secular analog, is pointless and incoherent.[95]

Religion uniquely combines all facets of human activity in a way that nonreligion cannot. More often than not, a religious conscience claim is informed by a long-standing doctrine, or at least follows tradition. Thus, the religious exemption will, in this sense, be "privileged" or "singled out" because a religious person will usually ask for an exception for something that is in accord with faith or traditional doctrine.[96]

Secular agents, who have a nonreligious conscience claim, are likely to operate from an ethical or moral framework that is often bereft of an acknowledged authoritative text or traditional teaching. For this reason, nonreligious conscience claims are likely subject to a higher level of scrutiny.[97] This is not because these exemptions are any less legitimate. In fact, a vaccine exemption request based on well-founded data could be just as legitimate as a religiously based exemption request or potentially stronger than an ill-informed religious one. However, the case for the secular agent's authority above the state is not as obvious without a strong argument for the agent's higher duty to the natural good.

Further Guidance for Continued Study. The preceding analysis is created in light of legal precedent and the necessity of exemptions, and it assumes an increasingly hostile environment toward conscientious objections of all stripes from health care professionals. However, analysis done by legal advocate Paul Coleman and other scholars raise questions about how involved the state should be in morally contentious issues. Coleman questions whether exemptions truly solve problems, as exemptions are inherently narrow and limited, failing to apply to every case in which a citizen has a fundamental obligation to religious or ethical beliefs.

Avoiding Legislation That Requires Exemptions. These exemptions also tend to narrow over time through legislative amendments or judicial interpretation, as the receivers of the exemptions are viewed negatively as discriminatory agents to be tolerated.[98] It could maximize freedom for most beliefs if legislators refrained from creating laws on morally contested issues. In the end, the ideal solution for exemptions may be to avoid making laws that require exemptions.[99]

Determining Fundamental Health Care Rights. The state should not refrain from all moral statements, as there are laws—such as employment discrimination laws—that serve a necessary purpose for the public good. This guidance calls on the state to identify the fundamental public goods it wishes to protect and be selective about anything outside those fundamental goods. A natural law framework is also crucial for deciphering issues that are within the public good. As an example, the Department of State formed a Commission on Unalienable Rights in July 2019, which operates as a council of advisers to the secretary regarding human rights. This commission helps formulate the fundamental human rights that ought to be protected—natural rights of life, liberty, and the pursuit of happiness.[100] This work to decipher the content of human rights to make better policy is an excellent model for the work legislators should engage in to determine the necessary public goods in health care.

Steps for Medical Associations and Institutions. Medical associations, as shown earlier, frequently make firm statements and set policy guidelines for health care professionals or hospitals that often represent a progressive ideology. This does not maximize freedom for health care professionals who may have religious or nonreligious objections, and it does not give proper credence to the complexities of situations health care professionals face.[101] While a proper guiding philosophy such as the Hippocratic oath is clearly needed to protect life and ensure a basic patient-doctor trust, medical associations should refrain from anything more that constrains a doctor's or institution's medical judgment. Patients ought to select a doctor, surgeon, or hospital because of their confidence and alignment with that individual or entity. Given that, medical associations could require doctors or hospitals to disclose their policies so the patient is fully aware and can consent to this care.

This report largely explores the protection of an individual's conscience. However, hospitals and broader institutions that employ health care professionals also will have their own policies regarding health care practices. They may give varying levels of freedom for the individual consciences within their purview. A relevant and fruitful study would explore to what extent these religious and nonreligious institutions should be allowed to create policy that conflicts with law. It seems that these institutions should be treated as individuals in obtaining a religious or nonreligious exemption, passing the reasonability and severity test to show why they have the authority to be exempted.

Changing the Ideology Surrounding the Autonomous Individual. The final two recommended steps go beyond government action and relate to the individual's education. In the educational system, the truth about autonomy and its limitations for the individual ought to be taught. A renewed understanding of liberty as an ordered liberty could go a long way to improving discussions surrounding conscience claims and avoiding the impasse created by the autonomist view. In addition, when morality is discussed, sharp distinctions ought to be made between morality and preference. In light of this study, curriculum could be formulated to teach a perspective that can ground a pluralistic society and safeguard a human's highest duty.

The Moral Character of a Society Is Key. Admittedly, there are limitations to the work of a legal structure, since ideology and philosophical commitments will always influence how judges and lawmakers use tests of "reasonability" and "severity." If judges must rule on what amounts to a fundamental public good and a reasonable view of the natural good (especially when there is no unanimous view in America), they will inevitably impose their own ideology to a certain

extent or at least their interpretation of America's founding principles. Thus, it remains important for intellectual leaders to influence hearts and minds so that society can, as much as possible, share a right understanding of the natural good.

Conclusion

In light of current moral divides and contentions, it is imperative to maintain the rule of law while allowing for an increasing plurality of beliefs. This report aims to provide a framework by which to differentiate between belief and conscience, preference and duty, and crucial societal harm and the natural costs of dissent. A conversation about nonreligious conscience claims also brings to light the complexity of convictions and the true convictions that remain among the rise of the religious "nones." Evolving thoughts on health care topics of abortion, physician-assisted suicide, vaccines, and GRS all have implications on nonreligious stakeholders. A nonreligious conscience exemption can best be substantiated through a natural law philosophy, as it grounds the existence of a conscience that pursues something higher than one's self. It is a health care professional's duty to something higher—an objective good—that forms his or her duty to the patient. The merit of a nonreligious conscience forces governing institutions and the public to expand the scope of its understanding of conviction—not as something infused by mysticism or an exclusive association, but rather, a belief informed by reason and authority. The legal system ought to treat conscience exemption requests accordingly, armed with the appropriate limitations and principles.

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Notes

1. Sophocles, *Antigone* (New York: Cambridge University Press, 2003).

2. Rich Plasterer, "Liberty of Conscience and the Founder's Vision of American Freedom," Juicy Ecunmenism, October 26, 2018, https://juicyecumenism.com/2018/10/26/liberty-of-conscience/.

3. This was formulated from the definition of exemption. Lexico, "Exemption," https://www.lexico.com/en/definition/exemption.

4. James Madison describes it as an "inalienable right" to practice religion as one sees fit. Charles Haynes, "Why Claims of Conscience Matter," Freedom Forum Institute, March 9, 2012, https://www.freedomforuminstitute.org/2012/03/09/why-claims-of-conscience-matter/.

5. The categories of nonreligious and religious exemptions can be helpful as they delineate the nature of the primary authority that grounds one's objection. In some cases, there could be a level of crossover between the two categories. Conceivably, a nonreligious person could appeal to a Judeo-Christian tradition to bolster his or her claim, arguing for the reasonability of the traditional ethic. However, he or she could not appeal to the Judeo-Christian tradition for a religious exemption since he or she is not asking for it based on religion. In contrast, a religious person could apply for a religious or nonreligious exemption depending on the demands of his or her religion and how it relates to his or her request. A religious person could use arguments of data and science that are not explicitly religious to showcase the reasonability of the exemption request. One person's religion may not address a certain issue but still find it ethically problematic; thus a religious person requests a nonreligious exemption. However, it may be that the religious person sees the arguments for science and data as an extension of his or her religious beliefs. For instance, Christians believe in intelligent design, so they could appeal to biology in their argument for a religious exemption and could view going against the scientific evidence, or biological design, as a burden on religious exercise. In this instance, they would apply for a religious exemption.

6. Legally and constitutionally, it has been largely assumed (though not without rebuttal) that if one respects exercise of religion per the First Amendment, one must also respect those who choose to refrain from exercising religion completely or to a lesser degree. Suzanna Sherry, "Lee v. Weisman: Paradox Redux," *Supreme Court Review* 123, no. 1 (1992): 134, https://scholarship.law.vanderbilt.edu/faculty-publications/332/. In contrast, Michael McConnell argues that the framers were intentional in *only* their protection of freedom of religion, not a secular conscience. Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 1 (1989): 1409, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12614&context=journal_articles. This would mean that one is not compelled to sing at church or pray in a public setting. The First Amendment then protects those who choose not to engage in religion, but it does not explicitly provide a protection for action deriving from atheism or secularism itself. An example of unprotected actions based on atheism might be if a person wanted an exemption from complying with a company policy on wearing jewelry because it was mandated in an atheistic code of conduct or if that person were to consume illegal drugs and appeal to an atheist source to justify their actions.

7. Richard J. Arneson, "2010 Editors' Symposium: Against Freedom of Conscience," *San Diego Law Review* 47, no. 1 (Fall 2010): 1015, https://advance-lexis-com.ezproxy.biola.edu/api/document?collection=analytical-materials&id=urn:contentItem:51W5-8000-00CW-F0BR-00000-00&context=1516831.

8. US Department of Health and Human Services, "HHS Announces Final Conscience Rule Protecting Health Care Entities and Individuals," May 2, 2019, https://www.hhs.gov/about/news/2019/05/02/hhs-announces-final-conscience-rule-protecting-health-care-entities-and-individuals.html.

9. The Hippocratic oath is one of the oldest binding oaths in history and held sacred by health care professionals. Interestingly, the Hippocratic oath is generally understood as an oath a health care professional makes to a divine figure, but in this example, it was held and defended by an atheist. "In purity and according to *divine* law will I carry out my life and my art." (Emphasis added.) The New Jersey Supreme Court ruled that she could not recover damages for her termination differently because of her medical ethics. "Chaos would result if a single doctor engaged in research were allowed to determine, according to his or her individual conscience, whether a project should continue. . . . An employee at will who refuses to work for an employer in answer to a call of conscience should

recognize that other employees and their employer might heed a different call." *Pierce v. Ortho Pharmaceutical Corp*, 84 N.J. 58 (1980), https://law.justia.com/cases/new-jersey/supreme-court/1980/84-n-j-58-0.html.

10. Albeit morality was often conflicting and fallible from the ancient gods, the gods did inflict punishment and enforced a standard of behavior.

11. Plato, *Phaedo* (Oxford: Clarendon Press, 1911).

12. Rainer Pineas, "The English Morality Play as a Weapon of Religious Controversy," *Studies in English Literature, 1500–1900* 2, no. 2 (1962): 157–80, https://www.jstor.org/stable/449497?seq=1.

13. Examples of a mystical supernatural influence can be seen in the hysteria of the Salem witch trials. Thomas S. Kidd, *American Colonial History: Clashing Cultures and Faiths* (London: Yale University Press, 2016).

14. Basil Mithcell, *Morality: Religious and Secular—the Dilemma of the Traditional Conscience* (New York: Oxford University Press), 12.

15. This Lockean notion of self-evident truths was then adopted in the American experiment. M. Zuchert, "Self-Evident Truth and the Declaration of Independence," *Review of Politics* 49, no. 3 (1987): 319–39.

16. Mithcell, *Morality*, 16, https://www.jstor.org/stable/1407839?seq=1.

17. Nonreligious conscience claims have long been considered legitimate in law, particularly as it relates to health care. This reflects the respect that is often paid to health care professionals' judgment and an acknowledgement that this freedom is necessary for them to do their work well.

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21. Charles Moskos and J. W. Chambers, *The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press 1993), 6–8.

22. *United States v. Seeger*, 380 U.S. 163 (1965).

23. Moskos and Chambers, *The New Conscientious Objection*, 14.

24. Roland Pierik, "On Religious and Secular Exemptions: A Case Study of Childhood Vaccination Waivers," *Ethnicities* 17, no. 2 (2017): 220–41, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5428064/.

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28. Maxine Harrington, "The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs," *Florida State University Law Review* 34, no. 3 (2007): 4, https://ir.law.fsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1169&context=lr.

29. Harrington, "The Ever-Expanding Health Care Conscience Clause," 798.

30. Sarah Stephens, "Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare," *Yale Journal of Law and Feminism* 29, no. 1 (2017): 99, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1374&context=yjlf.

31. Harrington, "The Ever-Expanding Health Care Conscience Clause," 786.

32. However, in practice, the courts generally applied Title VII to forms of religion. Harrington, "The Ever-Expanding Health Care Conscience Clause," 796.

33. Mark Leach, "'Any/Particular' Critique of Disability Selective Abortion: Remembering Adrienne Asch," Down Syndrome Prenatal Testing, November 25, 2013, https://www.downsyndromeprenataltesting.com/anyparticular-critique-of-disability-selective-abortion-remembering-adrienne-asch/.

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35. CBS News, "Parents Fake Religion to Avoid Vaccines," October 17, 2007, https://www.cbsnews.com/news/parents-fake-religion-to-avoid-vaccines/.

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38. Aquinas, "De Essentia Legis Concerning the Essence of Law," 250.

39. Paul DeHart, "The First Amendment Didn't Separate Church and State—Christianity Did," Public Discourse, April 25, 2018, https://www.thepublicdiscourse.com/2018/04/21381/.

40. J. Buddesweski, "Companion to the Commentary," *Underground Thomist* 142, https://undergroundthomist.org/sites/default/files/related-documents/Companion-to-the-Commentary-FINAL.pdf.

41. Robert P. George, *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, NC: ISI Books, 2000), 74.

42. Russell Hittinger, "Examination of Conscience," First Things, January 2009, https://www.firstthings.com/article/2009/01/004-examination-of-conscience.

43. George, *Conscience and Its Enemies*, 79.

44. George, *Conscience and Its Enemies*, 75.

45. Aquinas, "De Essentia Legis Concerning the Essence of Law," 246.

46. George, *Conscience and Its Enemies*, 81.

47. Here, George references Romans 2:15. George, *Conscience and Its Enemies*, 83.

48. George, *Conscience and Its Enemies*, 84.

49. George, *Conscience and Its Enemies*, 77.

50. George, *Conscience and Its Enemies*, 93.

51. "Autonomists" is a term applied in many different contexts and can take on different meanings accordingly. J. Budziszewski, *Commentary on Thomas Aquinas's Treatise on Law* (New York: Cambridge University Press, 2014), 137.

52. There are many differing applications of Kantanian philosophy. However, Christine Korsgaard represents a valid interpretation, a culturally relevant angle, and helpful contrast of philosophy for this chapter. Christine Korsgaard, *The Sources of Normativity*, ed. Onora O'Neill (New York: Cambridge University Press, 1996), 5.

53. Korsgaard, *The Sources of Normativity*, 104.

54. Lara Denis, "Kant's Metaphysics of Morals" (New York: Cambridge University Press, 2010), 244.

55. Legislative proposals such as the Do No Harm Act and Equality Act are some recent examples of legislation that threatens to remove religious protections. Katrina Trinko, "A Pediatrician Explains How 'Dangerous' Equality Act Would Force Doctors to 'Do Harm,'" *Daily Signal*, May 10, 2019, https://www.dailysignal.com/2019/05/10/a-pediatrician-explains-how-dangerous-equality-act-would-force-doctors-to-do-harm/.

56. Ryan Anderson, *When Harry Became Sally* (New York: Encounter Books, 2018), 17, 101.

57. Daniel Avery, "Court Rules Transgender Man Can Sue Hospital That Canceled His Hysterectomy," *Newsweek*, September 2019, https://www.newsweek.com/transgender-man-sue-hospital-evan-minton-1460664.

58. León and Vitz, "Minding the 'Unbridgeable Gap,'" 155.

59. Anderson, *When Harry Became Sally*, 22.

60. Kenneth Zucker also underpins his argument with more philosophical and social arguments about the natural development of a

child and importance of healthy family dynamics. Kenneth Zucker, "The 2020s: The Next Decade for the *Archives of Sexual Behavior*," *Archives of Sexual Behavior* 49, no. 1 (2020): 1–12, https://link.springer.com/article/10.1007/s10508-020-01627-9.

61. David Stevens (former president of Christmas Medical and Dental Association), phone interview with the author, October 23, 2019.

62. Anderson, *When Harry Became Sally*, 95.

63. Anderson, *When Harry Became Sally*, 143.

64. Nicole Russell, "Federal Court Strikes Back Against Obama Mandate Forcing Doctors to Perform Sex Reassignment Surgeries," *Washington Examiner*, October 17, 2019, https://www.washingtonexaminer.com/opinion/federal-court-strikes-back-against-obama-mandate-forcing-doctors-to-perform-sex-reassignment-surgeries.

65. US Department of Health and Human Services, "Nondiscrimination in Health Programs and Activities," *Federal Register* 81 (May 18, 2016): 31455.

66. US Department of Health and Human Services, Office of Civil Rights, Office of the Secretary, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf. The Department of Health and Human Services announced on June 12, 2020, a new rule rejecting the inclusion of sexual orientation as part of the civil rights statute. US Department of Health and Human Services, "HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs," June 12, 2020, https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html.

67. Katrina Trinko, "A Pediatrician Explains How 'Dangerous' Equality Act Would Force Doctors to 'Do Harm,'" *Daily Signal*, May 10, 2019, https://www.dailysignal.com/2019/05/10/a-pediatrician-explains-how-dangerous-equality-act-would-force-doctors-to-do-harm/.

68. American Medical Association, "AMA Code of Medical Ethics Opinions on Patient-Physician Relationships," 2016, https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/code-of-medical-ethics-chapter-1.pdf.

69. Korsgaard, "The Sources of Normativity," 173.

70. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

71. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

72. There is a valid and well-researched concern surrounding the proliferation of exemptions, particularly if nonreligious exemptions are allowed to flourish. Maxine Harrington identifies the problems that can arise from the complete allowance of each doctor doing as he or she deems best. Francis Boucher pushes back by arguing that the concerns around a proliferation of exemptions is exaggerated, as (1) values of individuals often shift with cultural trends and (2) there will always be people willing to provide services that have demand. Thus far, this seems to have been proven true for contentious procedures such as abortion or gender reassignment surgeries. If this is true, it allows each professional to consistently act within his or her judgment without too many overarching regulations. Importantly, proliferation as an argument is valid in the sense that not all exemptions can necessarily be accommodated. Since conscientious objectors in wartime have become protected consistently, there have always been enough men or women to fight for the common good that those with sincerely held conscientious objections could be accommodated. But this is not limitless, which this proliferation argument rightly recognizes. If there is a public good that the state recognizes, it can only accommodate exemptions from this good so long as other resources are accessible. Harrington, "The Ever-Expanding Health Care Conscience Clause."

73. Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (New York: Cambridge University Press, 2010), 247.

74. US Department of Health and Human Services, "Section 1557 of the Affordable Care Act," https://www.hhs.gov/civil-rights/for-individuals/section-1557/summary/index.html.

75. This should not be confused with the reasonable basis standard applied in courts.

76. Lexico, "Reason," https://www.lexico.com/en/definition/reason.

77. Christopher Eisbruger and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," *University of Chicago Law Review* 61, no. 1 (1994): 1292, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4849&context=uclrev.

78. In that sense, this test would align with the decision of the Supreme Court in *Thomas vs. Review Board* that issues of the conscience are not determined as true or false by the state.

79. While modern philosophy investigates different ways that human reason divorced from traditional understandings, it does not deny that reason still exists.

80. Georgetown University, Berkley Center, "Question 3: Non-Religious Moral Claims," https://berkleycenter.georgetown.edu/essays/question-3-non-religious-moral-claims.

81. It is also conceivable that a secular Ken Zucker could make arguments for the reasonability of his conscience based on Judeo-Christian tradition and beliefs. While he does not align with those belief systems, it would add weight to his argument for substance and authoritative sources behind his belief. This would, of course, bring into question the quality of sincerity behind one's belief. However, the sincerely held belief test is not grounded in reasonability and is far more subjective. It seems one indicator of the sincerity of one's belief is how well he or she can articulate the source and authority behind their belief.

82. *Free v. Holy Cross Hosp.*, 505 N.E.2d 1188, 1189 (Ill. App. Ct. 1987).

83. Beyond that, if the nurse's claim is allowed to stand, she is violating the existing Hippocratic oath to provide service for the life of the patient. The whole medical profession is predicated on providing treatment, not deciding who is worth providing treatment for. If every health care professional was allowed to decide who was worthy of treatment, the system would not hold up. Because of the nurse's lack of willingness to provide service, a stipulated part of her role, she walks the line of being unreasonable in her claim.

84. Stephens, "Freedom from Religion," 106.

85. Although it is more often the case that parents object to vaccinations, there are cases of doctors opposed to administering vaccines.

86. Importantly, Martha Fineman adds other layers to the argument concerning inequalities. She would likely contest that it is not a simple scale of the patient's inconvenience versus the doctor's conscience. She argues for an existing inequality in the patient compared to a privileged position of the doctor that would greatly enhance the patient's vulnerability and the need for the health care professional to acquiesce to the request for overall societal equality. This argument is based on deep-rooted philosophical arguments about the human person and institutional justice, and it requires greater analysis than this chapter allows. Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism* 20, no. 1 (2008): 8.

87. Human Rights Campaign, "Do No Harm Act," March 2, 2020, https://www.hrc.org/resources/do-no-harm-act.

88. Anderson, *When Harry Became Sally*, 93.

89. Analysis about access to services in a rural community was inspired from a conversation with David Steven from the Christian Medical and Dental Association. David Steven (CEO emeritus, Christian Medical and Dental Association), in conversation with the author, October 2019.

90. The Affordable Care Act prohibits discrimination based on gender identity. Katie Keith, "HHS Proposes to Strip Gender Identity, Language Access Protections from ACA Anti-Discrimination Rule," HealthAffairs, May 25, 2019, https://www.healthaffairs.org/do/10.1377/hblog20190525.831858/full/.

91. See *Bostock v. Clayton County*, 590 US_ (2020); *Altitude Express Inc v. Zarda* (2020); and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (2020).

92. Blue Shield of California, "Notice About Nondiscrimination and Accessibility Requirements," https://www.blueshieldca.com/bsca/bsc/wcm/connect/employer/employer_contents_en/nondiscrimination/nondiscrimination%20notice.

93. Julie Deardoff, "Doctors Reluctant to Give Young Women Permanent Birth Control," *Chicago Tribune*, May 13, 2014, https://www.chicagotribune.com/lifestyles/ct-xpm-2014-05-13-ct-met-sterilization-denied-20140513-story.html.

94. Alexia Elejalde-Ruiz, "Young, Single Men Choosing Vasectomies," *Chicago Tribune*, December 24, 2009, https://www.chicagotribune.com/sns-health-men-choosing-vasectomies-story.html.

95. Michael W. McConnell, "The Problem of Singling Out Religion," *DePaul Law Review* 50, no. 1 (Fall 2000), https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1580&context=law-review.

96. It is plausible that religious actors could desire an exemption from providing an acceptable service according to their traditional teaching. In that case, if their request is not connected to an authoritative body of knowledge or reasoning, there is no special exemption purely based on their personal religiosity.

97. Mark Navin, "Prioritizing Religion in Vaccine Exemption Policies" (working paper, Bowling Green Workshop in Applied Ethics and Public Policy, Bowling Green, OH, 2015), 3, https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/philosophy/documents/conferences/2015%20Religious%20Exemptions/Navin.pdf.

98. Paul Coleman, "Anti-Discrimination 'Equality' Law Exemptions Do Not Lead to Fairness for All: An International Perspective," Public Discourse, April 2, 2019, https://www.thepublicdiscourse.com/2019/04/50721/.

99. Georgetown University, Berkley Center, "Question 3: Non-Religious Moral Claims."

100. Roger Pilon, "Making Sense of the State Department's New Commission on Unalienable Rights," Cato Institute, June 13, 2019, https://www.cato.org/publications/commentary/making-sense-state-departments-new-commission-unalienable-rights.

101. It can also create unnecessary complications for the federal government if large medical associations have narrow parameters. In the case of a proposed American Psychological Association policy from 1991 to 2001, the federal government could not allow the policy because it conflicted with their duty in the First Amendment to protect religious exercise, as the policy would have created an undue burden on religious individuals.