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For the most part, controversy surrounding the abortion issue has focused on the characters with the leading roles in the drama: the pregnant woman, the state,[1] and to a lesser extent, the consulting physician.[2] Scant attention has been paid to the rights of the background figures and stagehands—the residents, hospital administrators, nurses, and other medical personnel who may be confronted either during their training or as professionals with difficult decisions about participation in abortions.[3] This Article explores the attitudes of the largest single subclassification of medical personnel—the nursing profession—toward such issues. Our effort has been to measure as accurately as possible the attitudes of nurses toward participation in abortion procedures;[4] to identify the areas in which the greatest practical difficulties occur, both for the nurses themselves and for those under or with whom they work;[5] and to evaluate the adequacy of existing legal protections and institutional accommodation practices in light of the findings.[6]

The empirical core of our study is based on a national survey of 705 randomly selected nurses, conducted during the fall of 1979.[7] The survey instrument elicited responses concerning basic attitudes toward abortion. It then explored the extent to which beliefs about these procedures are perceived as affecting professional opportunities and how well hospitals accommodate such beliefs. Demographic and religious preference questions were asked to enable us to analyze correlations between answers and backgrounds. The instrument also contained a number of open-ended questions aimed at obtaining more individualized responses on a number of issues.

On the whole, our study shows that hospitals do a reasona-

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1. Even the rights of the pregnant woman's husband, the father of the unborn child, and the parents of a pregnant minor have been analyzed in terms of state power delegated to these potentially interested parties. Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 69-70, 74 (1976).

2. *See* Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship,* 1978 B.Y.U. L. REV. 783.

3. For a brief discussion of the literature that has dealt with these figures, *see infra* Section I and text accompanying notes 21-49.

4. *See infra* text accompanying notes 51-90.

5. *See infra* text accompanying notes 56-90.

6. *See infra* text accompanying notes 90-440.

7. *See infra* text accompanying notes 51-56.

bly good job of accommodating nurses' religious and moral beliefs about abortion. As indicated by the data in Table 1, roughly nine of every ten nurses responding indicated that their employment opportunities, work schedules, hospital assignments, and opportunities for advancement were not affected

TABLE 1

Nurses' Perceptions of the Impact of Religious or Moral Beliefs Upon Employment Opportunities and Opportunities for Advancement.

How much have the following been affected by your religious and moral beliefs about abortion?	Unaffected %	Somewhat Influenced %	Strongly Influenced %
Assignment to a given department	89.4	4.5	6.1
Choice of a given department	86.2	4.3	9.5
Employment opportunities in hospital	90.8	4.9	4.3
Choice of employment opportunities	86.2	4.7	9.0
Hospital work schedules	90.6	4.8	4.6
Your choice of work schedules	90.0	4.9	5.1
Advancement opportunities in hospital	90.9	4.8	4.3
Choice of advancement opportunities	89.4	4.9	5.7

by their personal beliefs regarding the performance of abortions. At the same time, Table 1 shows that a distinct minority of nurses felt that several aspects of their employment were strongly influenced by their abortion-related beliefs. The two aspects of employment most strongly influenced by religious or moral beliefs regarding abortion were (1) choice of a given department, and (2) choice of employment opportunities, where 9.5% and 9.0% of the nurses, respectively, indicated such choices had been strongly influenced by their personal beliefs. Of course, since the choices in these cases typically rest with the individual, there is nothing particularly troubling about these statistics. But approximately 5% of the nurses sampled indicated that departmental assignments and advancement opportunities—matters typically controlled by the hospital administration—are strongly influenced by the nurse's moral or religious beliefs about abortion.[8]

While this proportion represents only three dozen nurses in our sample, if one extrapolates this percentage to the estimated

8. *See infra* text accompanying note 80.

one million nurses now employed in the United States,[9] one arrives at the figure of approximately 50,000 nurses throughout the United States who may perceive their assignment and promotion opportunities to be limited or at least strongly influenced by their moral and religious beliefs about abortion.

These statistics are reinforced by the responses to a question that asked how many of the answering nurses' professional colleagues have had hospital assignments and opportunities limited due to religious or moral beliefs.[10] The results are summarized in Table 2.

TABLE 2

Number of Colleagues Known to Have Had Opportunities Limited Because of Personal Religious and Moral Beliefs

Colleagues known to have had hospital opportunities limited due to religious and moral beliefs:	Religious Preference						Total Colleagues Identified (N=660)
	Catholics (N=219)		Protestants (N=376)		Other (N=65)		
No. of Colleagues:	f	%	f	%	f	%	f
One	7	3.2	8	2.1	2	3.1	17
Two	2	1.0	1	.3	1	1.5	8
Three	4	1.8	1	.3	0	0	15
Four	0	0	4	1.1	1	1.5	20
Five	0	0	1	.3	0	0	5
Six	1	.5	0	0	0	0	6
Ten	1	.5	0	0	0	0	10
Fifteen	0	0	1	.3	0	0	15
Twenty-two	1	.5	0	0	0	0	22
	16	7.5	16	4.4	4	6.1	118

Approximately 7% of Catholic nurses, 4% of Protestant nurses, and 6% of those belonging to "other" religions indicated they knew at least one other person whose opportunities within hospitals had been limited by personal beliefs. None of the nurses with "no religious preference" indicated a knowledge of colleagues whose opportunities had been limited. Therefore, those with no specific preference were omitted from this phase of the analysis of the data. Thirty-six nurses identified a total of 118 of their colleagues whose opportunities had been limited as a result of their moral and religious beliefs. Again, while these numbers

9. BUREAU OF HEALTH RESOURCES DEVELOPMENT, THE SUPPLY OF HEALTH MANPOWER: 1970 PROFILES AND PROJECTIONS TO 1990 (1975).

10. *See infra* text accompanying notes 73-90.

may seem relatively inconsequential, they tend to confirm the existence of a fairly large number of nurses throughout the country whose opportunities may have been limited due to their personal beliefs.

In short, while only a relatively small *percentage* of nurses appear to be encountering discrimination or other employment-related problems as a result of beliefs about abortion, the absolute number of personnel affected may be quite substantial. Moreover, it could be that the relatively small percentage of nurses registering discrimination on the basis of their abortion-related beliefs represents a large percentage of those who are both conscientiously opposed to abortion procedures and employed in hospitals where abortions are performed. After all, 30.9% of the nurses surveyed in our study indicated they did not have reservations about performing nontherapeutic abortions; 42.4% indicated they did not sense conflicts between their own beliefs and their hospital's policies; and in general, there was a fairly strong correlation between anti-abortion beliefs and employment in hospitals with restrictive abortion policies.[11] Thus, the fact that large percentages of nurses reported no difficulties in the accommodation of their moral and religious beliefs with respect to abortion may reflect not so much a large degree of adequate accommodation as a relatively small number of problem situations in which the need for accommodation is likely to arise.

In what follows, we explore the dimensions of the accommodation and conscientious objection problems, both on the basis of prior research[12] and our own findings.[13] We then analyze the adequacy of existing legal and institutional structures for protecting the rights of those conscientiously opposed to abortion.[14] In particular, we analyze the principles mandating accommodation of religious and moral beliefs under Title VII of the Civil Rights Act of 1964,[15] and "conscience clause" legislation at the state[16] and federal[17] levels, and a number of constitutional issues that arise in connection with accommodating abortion-related

11. *See infra* text accompanying note 72.
12. *See infra* text accompanying notes 21-49.
13. *See infra* text accompanying notes 56-90.
14. *See infra* text accompanying notes 90-438.
15. *See infra* text accompanying notes 90-141.
16. *See infra* text accompanying notes 179-303.
17. *See infra* text accompanying notes 167-78.

beliefs.[18] We argue that the de minimis accommodation standards that have emerged under general Title VII law[19] are inadequate in the specific context of accommodating beliefs about abortion, and that the distinctive nature and intent of the numerous conscience clause provisions enacted over the past few years require more stringent accommodation efforts.[20]

I. THE PROBLEM SETTING

The most significant change in abortion practices in the aftermath of *Roe v. Wade*[21] is the burgeoning number of abortions performed each year. In 1973, the year in which *Roe* was decided, 744,600 legal abortions were performed in the United States.[22] The most recent statistics indicate that at least 1,550,000 were performed in 1980.[23] The increase in absolute numbers reflects, among other things, increasing accuracy of abortion statistics as a result of legalization,[24] general population growth, changing societal attitudes toward sexual activity,[25] and shifting attitudes toward the moral gravity of abortion itself.[26] But whatever the causes, the increasing volume has generated an ever growing number of situations in which a variety of medical personnel become involved either directly or indirectly in abortion procedures. This tendency may be compounded in some hospitals by economic considerations. Low occupancy rates in obstetrics departments, due to declining birth rates, coupled with the cost-efficiency of abortion procedures, may create

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18. *See infra* text accompanying notes 304-438.

19. *See infra* pp. 296-303.

20. *See infra* text accompanying notes 254-88.

21. 410 U.S. 113 (1973).

22. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 69-71 (1980).

23. Henshaw, Forrest, Sullivan & Tietze, *Abortion Services in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSP. 5, 5 (1982).

24. *See generally* Ebaugh & Haney, *Shifts in Abortion Attitudes: 1972-1978*, 42 J. MARRIAGE & FAM. 491 (1980).

25. *See generally* Hedderson, Hodgson, Bogan & Crowley, *Determinants of Abortion Attitudes in the United States in 1972*, 9 CORNELL J. SOC. REL. 261-76 (1974); McIntosh & Alston, *Review of the Polls: Acceptance of Abortion among White Catholics and Protestants, 1962 and 1975*, 16 J. FOR SCIENTIFIC STUDY OF RELIGION 295-303 (1977); Vadies & Hale, *Attitudes of Adolescent Males Toward Abortion, Contraception, and Sexuality*, 3 SOC. WORK HEALTH CARE 169 (1978).

26. Arney & Trescher, *Trends in Attitudes Toward Abortion, 1972-1975*, 8 FAM. PLAN. PERSP. 117-24 (1976); Evers & McGee, *The Trend and Pattern in Attitudes Towards Abortion in the United States, 1965-1977*, 7 SOC. INDICATORS RESEARCH 251 (1980).

financial incentives which influence hospital administrators to provide abortion services.[27] In any event, the higher volume of abortions performed gives rise to a constantly increasing number of situations in which the staffing requirements of institutions providing abortion services may collide with the conscientious beliefs of medical personnel.

Many of the potential problems that might otherwise arise are resolved automatically by a variety of self-selection mechanisms. For one thing, almost 80% of abortions are now being performed in free-standing abortion clinics.[28] Concerns about employee objections to abortion at such institutions are unlikely to arise, since individuals with conscientious objections to abortion would be unlikely to seek employment there in the first place. Second, individuals conscientiously opposed to abortion can often find work at hospitals that have policies that are similar to or congruent with their own beliefs. Third, many individuals avoid conflict by pursuing career paths or electing to work in hospital departments in which the abortion issue is unlikely to arise. For example, 13.8% of the respondents to our survey indicated that their beliefs about abortion affected their decision to work in a particular department, and 13.7% indicated that these beliefs affected their choice of employment opportunities.[29] In general, shortages of medical personnel tend to give individuals with medical training considerable flexibility in the type of work they choose to accept.

While these self-selection mechanisms vastly reduce the range of potential conflict situations, they do not totally eliminate them. Medical personnel at all levels continue to encounter some difficulties. These are no doubt least acute for physicians who have completed their training. They tend to have great personal autonomy and are relatively immune from institutional

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27. Kemp, Carp & Brady, *Abortion and the Law: The Impact on Hospital Policy of the* Roe *and* Doe *Decisions*, 1 J. HEALTH POL. POL'Y & L. 319, 325-26 (1976); Miller, *Hospital Response to the Legalization of Abortion in New York State: An Analysis of Program Innovation*, 20 J. HEALTH & SOC. BEHAV. 363, 365 (1979).

Kemp, Carp & Brady determined that "[a]pparently the low-cost, generally low-risk, high-turnover and therefore high-profit nature of first trimester abortions provided a major incentive to cost-conscious hospital administrators to initiate policy change once the Court had given its sanction to such innovation." Kemp, Carp & Brady, *supra*, at 344.

28. Henshaw, Forrest, Sullivan & Tietze, *supra* note 23, at 5.

29. *See* Table 1 *supra* at p. 256.

pressures to participate in abortions.[30] Studies of physicians' attitudes have shown that religious beliefs strongly influence whether a physician will perform abortions;[31] many will not perform abortions at all.[32] Even those physicians who do perform abortions, however, are often disturbed by their participation in the procedures.[33] Moreover, the realities of hospital practice may engender ambivalent feelings. One physician described such a situation:

> You have to become a bit schizophrenic. In one room you encourage the patient that the slight irregularity of the fetal heart is not important, everything is going well, she is going to have a nice baby, and then you shut the door and go into the next room and assure another patient on whom you just did a saline abortion, that it's fine if the heart is already irregular, she has nothing to worry about, she is *not* going to have a live baby.[34]

Medical residents, of course, feel the same conflicts experienced by private physicians, but may encounter considerably stronger pressures to participate in abortions. Although obstetrics and gynecology or family practice residents may be exempted from participation in abortions if they have moral or religious objections,[35] they may feel obligated to their departments or fellow residents to perform abortions, lest they "unfairly" increase the workloads of their peers.[36] Moreover, they may feel

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30. *See generally* Nathanson & Becker, *The Influence of Physician's Attitudes on Abortion Performance, Patient Management and Professional Fees*, 9 FAM. PLAN. PERSP. 158 (1977).

31. Nathanson & Becker, *supra* note 30, at 162; Koslowsky, Pratt & Wintrob, *Connecticut Physicians' Attitudes Toward Abortion*, 66 AM. J. PUB. HEALTH 288, 289 (1976).

32. Nathanson & Becker, *supra* note 30, at 160. For an article asserting that a physician may be required to inform a pregnant patient of the availability of abortion, see Note, *The Abortion Alternative and the Patient's Right to Know*, 1978 WASH. U.L.Q. 167.

33. One abortion technique is dilatation and extraction (D & E). D & E is performed by dilating the uterine cervix and removing the products of conception from the uterus with a vacuum aspirator, curette, or forceps. D & E procedures performed after the fourteenth week of pregnancy invariably involve the use of forceps to dismember the fetus so it can be removed from the uterus. This procedure can result in strong emotional reactions and disquietude in some doctors. Kaltreider, Goldsmith & Margolis, *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 AM. J. OBSTETRICS AND GYNECOLOGY 235, 237 (1979).

34. M. DENES, IN NECESSITY AND SORROW 67 (1976) (emphasis in original).

35. Lindheim & Cotterill, *Training in Induced Abortion by Obstetrics and Gynecology Residency Programs*, 10 FAM. PLAN. PERSP. 24, 28 (1978).

36. Mascovich, Behrstock, Minor & Colman, *Attitudes of Obstetric and Gynecology Residents Toward Abortion*, 119 CAL. MED. 29, 31 (1973).

some pressures to participate in order to have a "complete" medical education.[37] While some abortion techniques are used for other purposes[38] and thus can be learned in unobjectionable contexts, the existence of certification standards and guidelines that attach importance to abortion experience reinforces the concern that failure to participate in abortions will result in educational deficiencies. The *Guide for Abortion Services* promulgated by the American Public Health Association, for example, provides that "[a]bortion should be an integral part of medical school education and of residency training in obstetrics and gynecology and in family practice."[39] Similarly, there have been pressures toward requiring abortion training for physicians who wish to become board-certified obstetricians and gynecologists.[40] To date, however, no formal steps have been taken that would preclude those with conscientious beliefs against abortion from completing obstetrical and gynecological training and taking the further step of becoming board-certified without having to perform abortions.

The potential conflicts faced by nurses are perhaps greater than those faced by any other category of health professionals. Within the organizational structure of a typical hospital, nurses tend to have less autonomy than either doctors or residents. Whereas physicians tend to be self-employed, nurses are typically hospital employees subject not only to the demands and instructions of doctors but to the administrative hierarchy of the hospital as well.[41] Residents are obviously less independent than

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An OB/GYN resident in a university hospital commented, "Although my abstaining from abortions is officially tolerated by my department, I am constantly reminded that my position on abortion is a burden and a nuisance to the rest of the department and could I please 'grow up' and realize how ridiculous my position is. I am constantly receiving insinuations about my position and at times it is a bit trying, but generally I am an accepted part of the staff." Response generated by Durham, Wood & Condie survey described *infra* at text accompanying notes 50-55.

37. Lindheim & Cotterill, *supra* note 35, at 26-27.

38. For example, dilatation and curettage, commonly used method of first trimester abortion, is also used for other gynecologic surgery. OBSTETRICS AND GYNECOLOGY 236, 1139-40 (D. Danforth 3d ed. 1977). Methods of abortion involving stimulation of uterine contractions are similar in technique to amniocentesis. *Id.* at 45-47, 236, 748. Hysterectomy, while not the same as cesarean section, is technically similar. *Id.* at 691-701; C. TIETZE, INDUCED ABORTION: 1979, at 69 (1979).

39. *APHA Recommended Program Guide For Abortion Services*, 63 AM. J. PUB. HEALTH 639, 642 (1973).

40. *See generally* Lindheim & Cotterill, *supra* note 35.

41. *See generally* Kaltreider, Goldsmith & Margolis, *supra* note 33, at 235-37; Branson, *Nurses Talk About Abortion*, 72 AM. J. NURSING 106 (1972); McDermott &

physicians who have completed their training, but they tend to be viewed and treated like the independent doctors they will soon become. The consequence is that nurses are generally in a more subservient position and are thus less likely to be able to escape institutional demands running counter to their personal belief systems. At the same time, nurses as a group tend to be more conservative on the abortion issue than other medical personnel. Early studies indicated that nurses are less likely to favor abortion than are doctors or social workers.[42] Accordingly, the likelihood of finding conscientious beliefs that need to be accommodated is greater among nurses than among other medical personnel.

Numerous studies have explored the attitudes of the general population[43] and of various subgroups of the medical profession

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Char, *Abortion Repeal in Hawaii: An Unexpected Crisis in Patient Care*, 41 AM. J. ORTHOPSYCHIATRY 620 (1971).

42. Hendershot & Grimm, *Abortion Attitudes among Nurses and Social Workers*, 64 AM. J. PUB. HEALTH 438, 440 (1974); Rosen, Werley, Ager & Shea, *Health Professionals' Attitudes Toward Abortion*, 38 PUB. OPINION Q. 159, 171 (1974).

43. Balakrishnan, Ross, Allingham & Kantner, *Attitudes Toward Abortion of Married Women in Metropolitan Toronto*, 19 SOC. BIOLOGY 35 (1972) (data from a survey of 1,632 Toronto women in 1968); Clayton & Tolone, *Religiosity and Attitudes Toward Induced Abortion: An Elaboration of the Relationship*, 34 SOC. ANALYSIS 26 (1973) (data from a survey of 821 university students); Gallup, *Abortion Attitudes About same as in '75*, Washington Post, Jan. 22, 1978, at A5 (data from Gallup Poll of 1978, including responses of 1,518 adult Americans); Heimer, *Abortion Attitudes Among Catholic University Students: A Comparative Research Note*, 37 SOC. ANALYSIS 255 (1976) (data from 181 Catholic university students); National Opinion Research Center, 1971-1980 (data from the General Social Surveys conducted by the National Opinion Research Center, University of Chicago); Sell, Roghmann & Doherty, *Attitudes Toward Abortion and Prenatal Diagnosis of Fetal Abnormalities: Implications for Educational Programs*, 25 SOC. BIOLOGY 288 (1978) (data from a survey of 1,616 women from Rochester, New York in 1977); Westoff, Moore & Ryder, *The Structure of Attitudes Toward Abortion*, 47 MILLBANK MEMORIAL FUND Q. 11 (1969) (data based on the 1965 National Fertility Survey of 5,600 American women).

The National Opinion Research Center (NORC) surveys and related data are analyzed in the research of Arney & Trescher, *supra* note 26; Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 SCIENCE 540 (1971); Blake, *The Teenage Birth Control Dilemma and Public Opinion*, 180 SCIENCE 708 (1973); Ebaugh & Haney, *supra* note 24; Evers & McGee, *supra* note 26; Granberg & Granberg, *Pro-Life Versus Pro-Choice: Another Look at the Abortion Controvery in the U.S.*, 65 SOC. & SOC. RESEARCH 424 (1981); McIntosh, Alston & Alston, *The Differential Impact of Religious Preference and Church Attendance on Attitudes Toward Abortion*, 20 REV. RELIGIOUS RESEARCH 195 (1979); Petersen & Mauss, *Religion and the "Right to Life": Correlates of Opposition to Abortion*, 37 SOC. ANALYSIS 243 (1976); and Pomeroy & Landman, *American Public and Abortion in the Early Seventies*, in THE ABORTION EXPERIENCE 482 (1973). Sample sizes were approximately 1,500 each year.

The empirical results of the various surveys and studies listed above are summarized in the following table:

TABLE A

COMPARATIVE FINDINGS OF GENERAL SURVEYS REGARDING ATTITUDES TOWARD THE PERFORMANCE OF ABORTIONS UNDER VARIOUS CIRCUMSTANCES

Approval of Abortion under the Following Circumstances:	Westoff et al.	NORC				Balakrishnan et al.	Gallup			Sell et al.	Clayton & Tolone	Heimer
		'65	'72	'73	'80		1 Tri.	2 Tri.	3 Tri.			
1. Threat to mother's life		-	-	-	-	87	77	64	60	-	-	-
2. Risk of deformity	50	57	79	84	83	76	45	39	28	81	82	45
3. Pregnancy due to rape/incest*	52	59	79	83	83	75	65	38	24	93	88/73	49
4. Threat to mother's physical health	87	73	87	92	90	-	54	46	34	91	94	65
5. Threat to mother's mental health	-	-	-	-	-	67	42	31	24	-	-	-
6. Unmarried mother	13	18	43	49	48	30	60	30	8	48	62	22
7. Unwanted child	8	16	40	48	47	28	62	33	8	40	55	22
8. Economic hardship	11	22	49	53	52	50	56	28	7	41	65	22

* In most of the surveys rape was included as one of the circumstances but incest was not. The study by Clayton and Tolone did include incest, however, and the second set of figures in that column refers to the proportion of respondents approving of abortion related to incest.

Review of previous surveys of attitudes toward the performance of abortion reveal at least one common factor: the perception shared by the overwhelming majority of respondents is that abortion is not strictly a dichotomous issue in which one is either "pro-life" or "pro-abortion." There are mitigating circumstances which dramatically alter the attitudes of the vast majority of respondents. For example, the National Fertility Study investigated the reactions of 5,600 American women to six of the more common conditions under which abortions were requested. Conducted in 1965, eight years before the landmark *Roe* and *Doe* decisions regarding the legalization of abortion, 87% of this national sample concurred that abortion should be permissible if the mother's physical health is threatened by the birth of the child. Approximately half of the respondents also approved of an abortion of a fetus with a probability of a congenital abnormality or in circumstances wherein the pregnancy was due to rape.

At the other end of the continuum, however, only 13% approved of abortions performed because the mother was unwed, 8% if the child was unwanted, and 11% if the birth of the child would constitute an extreme economic hardship. Clearly there was a very pronounced distinction between physical circumstances and merely personal or social preferences.

The findings of the National Fertility Study in 1965 were very similar to those of the NORC conducted that same year. Beginning in 1972, NORC began replicating the same questions on abortion attitudes in their annual General Social Surveys. In reviewing those findings (see Table A), it is interesting to note the very substantial increases in the degree of approval for abortions between 1965 and 1972. During this period of time a number of individual states had passed laws that greatly relaxed the restrictions on the performance of abortions. Regardless of the six previously mentioned circumstances, attitudes shifted in the magnitude of from 14% to 27%. The greatest increases in positive attitudes occurred for three "social" reasons, or what Arney and Trescher, *supra* note 26, refer to as "soft" reasons: unwed mother, unwanted child, and economic hardship. Circumstances which had been approved by about one-fifth of the respondents in 1965 had now gained the support of nearly half of the general public.

Another incremental shift in approval occurred between 1972 and 1973 when Supreme Court decisions allowed a much more permissive stance toward the performance of abortions throughout the United States for any reason. The average increase between 1972 and 1973 was roughly 5% for each of the six circumstances.

Fluctuations during the years 1974 through 1979 have been almost negligible. Thus,

(including nurses)[44] toward abortion. But while the recent spate

we have included only the reported data for the 1980 NORC survey.

Two findings that do seem certain, based on congruent findings during the past eight years, are that (1) abortion attitudes have seemingly crystallized in terms of varying threshholds of approval, and (2) there still remains a large difference in the level of approval of abortions performed for health-related reasons and those performed for social reasons. In the 1980 NORC survey the "hard" reasons elicited an average of 85% approval, whereas the "soft" reasons evoked an average of 49% approval. These NORC data indicate that while 10 to 15% of the U.S. population *object* to abortions being performed under any and all circumstances, about half the population *approves* of abortion under most, if not all, circumstances.

44. Elder, *Attitudes of Senior Nursing Students Toward the 1973 Supreme Court Decision on Abortion*, 1975 J. OBSTETRICS GYNECOLOGIC & NEONATAL NURSING 47 (data based on a survey of 262 nursing students); Hendershot & Grimm, *supra* note 42, at 438 (data from survey of 158 nurses and 419 social workers); Kemp, Carp & Brady, *supra* note 27, at 319 (survey of actual hospital policies, not attitudes, as reported by 68 hospital administrators); Koslowsky, Pratt & Wintrob, *The Application of Guttman Scale Analysis to Physicians' Attitudes Regarding Abortion*, 61 J. APPLIED PSYCHOLOGY 301 (1976) (data from a survey of 65 Connecticut physicians); *What Nurses Think About Abortion*, 33 RN MAG. 40, 40-43 (June 1970) (survey of a national sample of 500 nurses); Rosen, Werley, Ager & Shea, *supra* note 42, at 166 (data from a survey of 712 nursing faculty members, 1,198 medical faculty members, and 349 social work faculty members).

The empirical results of these studies are summarized in Table B:

TABLE B

COMPARATIVE ATTITUDES OF MEDICAL AND PARA-MEDICAL PERSONNEL TOWARD THE PERFORMANCE OF ABORTIONS UNDER VARIOUS CIRCUMSTANCES

Approval of Abortion under the Following Circumstances:	Elder			Hendershot & Grimm		Rosen et al.			Koslowsky et al.	RN Magazine
						Faculty				
	1 Tri.	2 Tri.	3 Tri.	RN	SW	RN	MD	SW		
1. Threat to mother's life	-	-	-	-	-	-	-	-	77	-
2. Risk of congenital abnormality	84	68	48	55	82	-	-	-	75	86
3. Pregnancy due to rape/incest*	91	61	32	86	89	-	-	-	72	93/85
4. Threat to mother's physical health	95	88	75	92	96	85	89	89	72	84
5. Threat to mother's mental health	-	-	-	-	-	-	-	-	68	77
6. Unmarried mother	75	38	21	43	63	38	54	33	52	31
7. Unwanted child	65	28	7	25	58	57	77	80	46	-
8. Mother too old	-	-	-	-	-	-	-	-	45	-
9. Economic hardship	72	35	11	28	56	-	-	-	45	58
10. Mother too young	-	-	-	-	-	-	-	-	43	-
11. Interruption of career/education	-	-	-	-	-	-	-	-	40	-

* Most surveys included rape but not incest. The figures for the RN Magazine survey indicate responses first to rape and then to incest.

Among other things, the data in Table B seem to show that nurses' attitudes toward abortion tend on the whole to be more disapproving than the attitudes of other professional groups. For example, the Hendershot and Grimm study suggests that social workers tended to be more accepting of abortion than were nurses, with respect to all of the circumstances surveyed. Similar results were obtained in the study by Rosen, Werley, Ager, and Shea. In a study comparing attitudes of faculty and students within medical, nursing, and social work schools, they found that social workers exhibited the most ac-

of conscience clause legislation[45] reflects growing cognizance of the need to accommodate the conscientious beliefs of medical personnel opposed to abortion within work and training environments, very little empirical work has been done to ascertain how the attitudinal variables and accommodation needs interact. In fact, we are aware of only two empirical studies that address accommodation issues directly. In one of these, a survey of sixty medical schools revealed that it was possible or certain that applicants would be questioned in an interview about their abortion-related beliefs at thirty-eight (63%) of the schools, that refusal to participate in abortions would create administrative problems at thirteen (22%) of the schools, and that refusal to participate in abortions would be a negative factor in an application to two (3%) of the schools.[46] The other—a study ordered by Congress and subsequently carried out pursuant to a contract with the Department of Health, Education and Welfare[47]—found that out of 995 medical, nursing, and osteopathic schools, 58 (5.8%) may question applicants about their views on abortion, but that in only 6 (0.6%) of the schools would the views expressed affect the applicant's admission.[48] Although the authors of the HEW study noted several limitations that could affect its validity, they concluded that a small amount of overt discrimination with regard to applicants' views on abortion was taking place at medical, nursing, and osteopathic schools. The discrimination took the form of rejection of anti-abortion applicants at medical and osteopathic schools, and rejection of pro-abortion applicants at nursing schools.[49]

The prior studies, while appearing to show the existence of some relatively limited problems of discrimination and failure to

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cepting attitudes toward abortion, followed by physicians and then nurses.

45. *See infra* text accompanying notes 179-204.

46. Diamond, *Do the Medical Schools Discriminate Against Anti-Abortion Applicants?*, 43 LINACRE Q. 29, 30-31 (1976).

47. SYSTEM SCIENCES, INC., SURVEY REPORT ON MEDICAL, NURSING AND OSTEOPATHIC SCHOOL ADMISSIONS POLICY RELATING TO ABORTIONS/STERILIZATIONS (1978).

48. *Id.* at 13-16. This figure is based on the responses from the surveyed *schools*. The study's approach to eliciting information about perceived discrimination from affected individuals was limited to the publishing of a notice in the Federal Register, *id.* at 6, and arranging to have the General Secretary of the U.S. Catholic Conference encourage Catholic bishops to inform H.E.W. of "any specific incidents of discrimination that have come to your attention." *Id.* at 7. Not surprisingly, this approach yielded a hopelessly inadequate number of individual responses: only 15 individuals provided input. *Id.* at 19-20.

49. *Id.* at 26.

accommodate, were not well designed to explore the nature of the needed accommodation from the point of view of the persons whose beliefs need to be accommodated. The prior studies in effect, asked various institutions whether they were doing a good job accommodating (i.e., avoiding discrimination against) those with conscientious objections to abortion. Not surprisingly, the institutions responded that they were. Our study, in contrast, elicited information directly from individuals likely to be affected by inadequate accommodations. More importantly, our study was structured to make it possible to ascertain which facets of the complex abortion issue were most likely to raise significant accommodation problems. With this background, let us turn to the study itself.

II. METHODOLOGY

A. Sample and Data Collection

In order to draw a representative sample of nurses, we attempted to procure a mailing list of all members of two national professional nursing organizations. Before releasing such lists, however, each organization required a review of the survey instrument used in our study. In both instances, the respective organization declined to provide us with the requested list due to sensitivity of the topic under investigation. Our next alternative was to acquire a mailing list of nurses who subscribe to one of the leading nursing journals. Through this avenue we acquired a list of 5,000 randomly selected nurses living throughout the United States.

From this master list we drew two random subsamples of 1,200 and 1,495, respectively. The first subsample was employed for the pretest of the questionnaire. After extensive revision, we mailed a 98-item questionnaire to the final randomly selected sample of 1,495 nurses. A second flight of the same questionnaire was sent a few weeks later to all nonrespondents.[50] This procedure elicited a total of 705 returns for a response rate of 47.3%. Due to the occupational and educational homogeneity of our sample, we consider the inferences drawn from the data to be very representative of nurses in general. The wide range of responses to the abortion attitudinal scale leads us to believe

50. We decided not to send reminder letters to nonrespondents. The experience from the pretest indicated that, given the sensitive content of the questionnaire, such letters tended to generate more heat than light.

that we were successful in eliciting the entire continuum of attitudinal responses.

B. The Questionnaire

1. Abortion attitudes

An extensive review of the literature revealed nearly a dozen studies that have analyzed the abortion attitude data obtained from the National Opinion Research Center (NORC) General Social Surveys conducted in 1965 and on an annual basis since 1972.[51] The NORC surveys have included six circumstances under which abortions might conceivably be performed: (1) risk of congenital deformity, (2) pregnancy as the result of rape, (3) threat to the mother's health, (4) unmarried mother, (5) unwanted child, and (6) economic hardship. To these six items, the Koslowsky study added five additional abortion circumstances in a 1976 study of physicians' attitudes.[52] These additional items included: (1) threat to the mother's life, (2) threat to the mental health of the mother, (3) mother is too old, (4) mother is too young, and (5) birth of a child would interrupt a career or education of the mother. Elder's 1975 survey of nursing students[53] and Gallup's 1978 survey of adult Americans[54] further differentiated circumstances sometimes leading to abortion by trichotomizing their items into three different trimesters of gestation.

Our scale consisted of a synthesis of the aforementioned scales including a modification of the NORC and Koslowsky items. We divided the item relating to congenital deformity into two items, severe abnormalities and moderate abnormalities. We thus arrived at an attitudinal scale in which respondents were asked to indicate whether women should be able to choose to have an abortion under twelve different circumstances during

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51. W. Arney & W. Trescher, *supra* note 26, at 117; Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 SCIENCE 540 (1971); Blake, *Elective Abortion and Our Reluctant Citizenry: Research on Public Opinion in the United States*, in The Abortion Experience 447 (1973); Ebaugh & Haney, *supra* note 24; Evers & McGee, *supra* note 26; Granberg & Granberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, 12 FAM. PLAN. PERSP. 250 (1980); McIntosh & Alston, *supra* note 25; McIntosh, Alston & Alston, *supra* note 43; Petersen & Mauss, *supra* note 43; Pomeroy & Landman, *supra* note 43.

52. Koslowsky, Pratt & Wintrob, *supra* note 44, at 302.

53. Elder, *supra* note 44, at 47.

54. Gallup, *supra* note 43.

each of three different trimesters. Responses were scored yes=1 and no=0. Thus, a score of 36 indicates approval under any circumstances during any trimester, whereas a score of 0 indicates absolute opposition to abortion for any reason during any trimester.

A scalogram analysis of these items revealed a Guttman coefficient of reproducibility of .95 for the first trimester items, .94 for the second trimester, .95 for the third trimester, and .95 for the total scale.[55] These coefficients represent a high degree of consistency and predictability of responses. That is, given the knowledge of a given respondent's score, one can quite accurately predict which items were either endorsed or rejected by the respondent.

2. Demographic variables.

Conventional items relating to age, sex, marital status, occupational position, religious preference, and perceived importance of religion were included in the instrument.

3. Perceptions of pressure to perform abortions

These perceptions were measured by three seven-point scale items, ranging from "strongly disagree" to "strongly agree." This scale included items such as "My hospital's policies allow a great deal of latitude if one isn't comfortable assisting in some or all abortions." Four additional items measured the degree of pressure nurses received from the hospital administration, doctors, other nurses, and patients insisting on abortions. These seven-point responses ranged from "no pressure" to "extreme pressure."[55.5]

The converse of the previous items was also included to determine the degree to which nurses were ever discouraged from participating in abortions by administrators, doctors, nurses, and patients.

4. Hospital accommodation of nurses' preferences and beliefs

Accommodation of nurses' beliefs was measured by three

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55. The figures are nearly identical to the scalogram analysis of physicians' attitudes toward abortion conducted by Koslowsky, Pratt, and Wintrob. They arrived at a coefficient of reproducibility of 0.96 using the eleven items discussed previously.

55.5. *See infra* note 139.

items relating to schedules, grievances, and policy changes and by eight additional items eliciting the degree to which assignments, work schedules, and advancement opportunities had been affected by one's personal moral beliefs regarding abortion. Responses on the seven-point scale items ranged from "unaffected" to "strongly influenced."

III. Survey Findings

A. Abortion Attitudes

As previously mentioned, we measured the attitudes of nurses toward abortion with a thirty-six-item scale consisting of twelve different circumstances during each of three trimesters. The results are summarized in Table 3. Although 91.1% of all abortions are performed during the first trimester of gestation,[56] a sizeable proportion is still performed during the second trimester. We were reminded by a number of respondents that third trimester abortions are really premature births. Notwithstanding this fact, there are still some abortions performed during the last trimester, generally due to life threatening circumstances.[57]

Whenever one conducts a survey dealing with emotionally-laden attitudes, one is justifiably concerned that one will receive a self-selective response from those holding views on only one end of the continuum. In this respect, we were reasonably confident of our results, since they indicated responses representative of points along the entire continuum of abortion attitudes with approximately 11% opposed to all abortions regardless of the circumstances and 5% approving of abortion under any conditions. Between these extremes, our results indicated that for the overwhelming majority of nurses the abortion issue cannot be neatly dichotomized into anti-abortion and pro-abortion positions.

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56. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 69-71 (1980).

57. *See* Wood & Hawkins, *State Regulation of Late Abortion and the Physician's Duty of Care to the Viable Fetus*, 45 Mo. L. Rev. 394, 396-400 (1980).

TABLE 3

Nurses' Attitudes toward the Performance of Abortions in Response to Twelve Different Circumstances During Each Trimester of Pregnancy

Circumstances under which Abortion is Performed	% Agreeing that Abortion is Justifiable (N=705)		
	Trimester		
	First	Second	Third
1. Mother's Life Threatened	89.2	77.3	55.3
2. Forcible Rape or Incest	85.8	55.2	18.9
3. Threat of Severe Congenital Abnormality	80.6	67.9	41.1
4. Mother's Physical Health Threatened	80.7	64.0	37.4
5. Threat of Moderate Congenital Abnormality	67.9	47.1	19.6
6. Mother's Mental Health Threatened	71.5	44.8	18.7
7. Mother is Unmarried	59.7	30.1	7.7
8. Child is Unwanted	62.3	33.2	7.9
9. Financially Unable to Support Child	55.7	28.2	6.7
10. Mother is Too Old	60.9	32.8	9.2
11. Mother is Too Young	63.8	36.5	10.4
12. Interruption of Education or Career	47.9	23.4	5.4

Some researchers have divided the circumstances under which abortions are performed into "hard" reasons, which include extenuating physical circumstances, and "soft" reasons, which involve more optional circumstances.[58] The comparative data in Table 4 point to the fact that the respondents in our sample held views somewhat less accepting of abortion than Elder's sample of nursing students, but considerably more accepting than Gallup's sample of adult Americans. Elder found, for example, that 90% of the nursing students were supportive of abortions performed during the first trimester for "hard" reasons.[59] Our respondents indicated an average of 82% support under similar circumstances in contrast to 57% for Gallup's

58. *See, e.g.*, Arney & Trescher, *supra* note 26; Evers & McGee, *supra* note 26; Pomeroy & Landman, *supra* note 43.

59. Elder, *supra* note 44, at 59.

sample.[60] In Elder's study of nursing students, "soft" reasons elicited 71% support,[61] compared to 59% in our study, and 16% for Gallup.[62] It is well to mention that Gallup included only one "soft" reason, that being economic hardship, so comparisons across all three studies are by no means based on identical items.

1. First trimester

In addition to differences based on "hard" versus "soft" reasons, respondents in each survey showed differing views depending on the timing of the abortion. In terms of overall average levels of support during the first trimester, Elder's respondents indicated an average of 80% support,[63] Gallup indicated 50% support[64] and our study indicated 69% support for any reason during the first trimester. This latter figure is nearly identical to the average of 67% support for six reasons included in the NORC survey of 1980.[65] Here again, comparisons are not identical because the NORC data do not include the trimester during which abortions are performed. This crucial difference helps explain the much lower level of permissiveness found in the Gallup study.

Our study indicates that during the first trimester of gestation a majority of nurses approve of mothers' seeking an abortion under each of the specified circumstances, except for an interruption of one's education or career. This latter reason elicited only 47.9% approval. On the other hand, 89% of the nurses felt that abortions should be permitted during the first trimester if the mother's life is threatened. Four of every five nurses favored allowing abortions in circumstances involving congenital abnormalities, pregnancy due to rape or incest, or a threat to the mother's health. Between 56% and 72% of the respondents felt abortions should be permitted under less compelling circumstances.

Many of those supportive of first trimester abortions explained their support in written comments. One nurse shared her perspective in the following terms: "I have seen too many

60. Gallup, *supra* note 43.
61. Elder, *supra* note 44, at 59.
62. Gallup, *supra* note 43.
63. Elder, *supra* note 44, at 59.
64. Gallup, *supra* note 43.
65. Granberg & Granberg, *supra* note 52.

TABLE 4

Comparative Surveys of Attitudes Toward The Performance of Abortions
Under Various Circumstances During Each Trimester

% Approving Abortion under the following circumstances:*	Elder[1] (1975)			Gallup[2] (1978)			Durham, Wood and Condie		
	1 Tri.	2 Tri.	3 Tri.	1 Tri.	2 Tri.	3 Tri.	1 Tri.	2 Tri.	3 Tri.
"Hard" Reasons									
1. Threat to mother's life	—	—	—	77	64	60	89	77	55
2. Risk of congenital abnormality	84	68	48	45	39	28	81	68	48
3. Pregnancy due to rape or incest	91	61	32	65	38	24	86	55	19
4. Threat to mother's physical health	95	88	75	54	46	34	81	64	37
5. Threat to mother's mental health	—	—	—	42	31	24	72	45	19
"Soft" Reasons									
6. Unmarried Mother	75	38	21	—	—	—	60	30	8
7. Unwanted child	65	28	7	—	—	—	62	33	8
8. Economic hardship	72	35	11	16	9	6	56	28	7
Mean for "hard" reasons:	40	72	52	57	44	34	82	62	36
Mean for "soft" reasons:	71	34	13	16	9	6	59	30	8
Grand Mean:	80	53	33	50	38	29	81	50	30

* The wording was not identical in all three surveys, nor were all the circumstances identical. For example, Elder considers rape but not incest and Durham et al. dichotomized congenital abnormality into both "severe" and "moderate"; the figures for severe deformity are reported here.

[1] Data based on a survey of 262 nursing students.

[2] Gallup poll of 1,518 adult Americans, reported in the *Washington Post*, 22 January, 1978, p. A5.

unwanted babies. Quality of life is of prime importance." Another supportive nurse shared similar views: "I don't feel any woman wants an abortion, but there are situations in which a child would be born to a life of hell, or the mother's life so affected by a child that she would abuse or kill an innocent being. Perhaps I have seen too many abused children." Other accepting nurses indicated that they would prefer to help perform abortions within the safe and sanitary environment of a hospital or clinic rather than run the risk of having expectant women seek abortions elsewhere. Still another nurse said, "As you can see from my answers, I am a strong proponent of a woman's right to choose to have an abortion for whatever reason, and it is not up to me to make any judgments about her decision." Reflecting some of the emotional tensions in abortion attitudes, one nurse expressed her reasons for favoring abortions as follows:

> It hurts me deeply to see these young girls go through nine months and a delivery and then give a child up for adoption that they have obviously become attached to.
>
> On the other hand, I have seen innumerable 15 year-olds keep their infants and cannot relate to them (sic) except in a childish fashion as if they were dolls. I have a hard time believing they will be able to offer the child a healthy home environment even with a supporting mother in the picture.

A number of recurrent themes were discernible in the written comments of those who were generally opposed to abortion. Said one nurse: "to me, abortion is a 'convenience' to those who are just too proud to admit they have made a mistake." Another nurse remarked: "I worked for a short time in the OR [Operating Room] and assisted in some early abortions. . . . I was myself pregnant at the time and found these procedures repulsive." Still another wrote: "I want to help bring life into the world, not destroy it." Yet another said, "I feel that abortion is the willful taking of a life and wrong at any stage of pregnancy." One of the most intense responses came from a clinical nurse specialist in pediatrics who said, "Our own American Holocaust has just begun. I hope we realize it before it is too late."

2. *Second trimester*

The threshold for approval dropped considerably with respect to abortions performed during the second trimester. Consensus among written comments of the respondents seemed to

be that except in cases involving congenital abnormalities detectable only after the first trimester or a threat to the mother's life and health, most women submitting to abortions after the first trimester could and should have made that decision much earlier. Even nurses who were very supportive of abortions performed during the first trimester were often irritated with those submitting to abortions during a later period. One nurse expressed these representative feelings: "I also do not have as much patience . . . with a woman who . . . takes 4-6 months to 'make up' her mind." Another nurse shared similar sentiments: "I personally feel a patient should have a right to make a decision about an abortion for herself, but she should do this within the first three months." Still another nurse shared these views: "I do believe in the free choice by women to elect to terminate a pregnancy *only* in the *first* trimester. In fact, I had an abortion myself for non-therapeutic reasons and have coped very well with this decision. I do have two children, so it was *not* an easy decision to make!" In view of such comments, it is not surprising that during the second trimester the number of factors under which a majority of nurses felt abortion to be justified declined to four: threat to mother's life, forcible rape or incest, severe congenital deformity, and mother's physical health.

3. *Third trimester*

Upon reaching the third trimester, there is only one circumstance which elicits approval from a majority of nurses: a threat to the mother's life (55.3% approval). Indicative of the pervasive feeling that potential abortion patients should make their decisions early in their pregnancy, "forcible rape or incest" was the second most compelling reason for obtaining an abortion during the first trimester but only the fifth most urgent reason in the final trimester. The implication is rather clear that if the decision is not made during the first twelve weeks, nurses believe the patient should not later interrupt her pregnancy for any but the most urgent health reasons.

B. Age and Abortion Attitudes

The average age of respondents in our study was 32.6, with ten respondents age 60 or older, and nine age 22 or younger. As

the Cutler study[66] contends, there is a generally held assumption that there is a strong positive correlation between aging and conservatism. At least with regard to attitudes toward abortion, this was not the case among our sample of nurses. The correlation between age and attitude scores on our abortion scale was −.03, a nearly random relationship. This finding is congruent with the Cutler group's analysis of the relationship between age and attitudes toward abortion among the general public.[67] These researchers conducted a secondary analysis of seven NORC General Social Surveys conducted between 1965 and 1977 and concluded "that statistically significant differences between the [age] cohorts appeared at none of the seven time points covered in the study."[68]

C. *Religious Beliefs and Abortion Attitudes*

A plethora of studies have been conducted contrasting the attitudes of Catholics and Protestants toward abortion.[69] However, only recently have differences between Protestant denominations been considered[70] and the relationship of religiosity and abortion attitudes been studied.[71] In our study we analyzed separately Catholics, Jews, members of five major Protestant denominations, and those with no religious preference or without denominational affiliations.[72] Respondents belonging to smaller

66. Cutler, Lentz, Muha & Riter, *Aging and Conservatism: Cohort Changes in Attitudes about Legalized Abortion*, 35 J. GERONTOLOGY 115 (1980).

67. *Id.* at 121.

68. *Id.*

69. *See, e.g.*, Baker, Epstein, & Forth, *Matters of Life and Death: Social, Political, and Religious Correlates of Attitudes on Abortion*, 9 AM. POL. Q. 89 (1981); Tedrow & Mahoney, *Trends in Attitudes Toward Abortion: 1972-1976*, 43 PUB. OPINION Q. 181 (1979).

70. *See, e.g.*, Ebaugh & Haney, *supra* note 24; McIntosh, Alston & Alston, *supra* note 43; Petersen & Mauss, *supra* note 43.

71. Baker, Epstein & Forth, *supra* note 69, at 97-98.

72. This latter category, consisting of 43 respondents, is not to be ignored in a study of the relationship between religious and moral beliefs and the performance of abortion. A number of nurses indicated disillusionment with "organized religion" but held rather firm beliefs about moral issues. Vernon contends that the use of the independent label to categorize those with no strong political preference "does not mean that one is apolitical or has no political convictions." By implication, he asserts that it is erroneous to assume that religious "independents" are areligious, amoral or lacking in religious convictions. One pediatric staff nurse illustrated this point: "My belief in God and Christ are *very* important, not necessarily so are my ties to my specific religion." Others expressed disappointment with specific religious organizations, but contended that they had strong, personal moral beliefs. Vernon, *The Religious 'Nones': a Neglected Category*, 7 J. SCI. STUDY RELIGION 219, 219 (1968).

Protestant churches were included with "Protestants," and those preferring not to be labeled Protestant, including members of fundamentalist groups, were classified in one general category of "other" religions. Our questionnaire also included questions to ascertain perceived importance of religion.[73]

1. Impact of religious preference

Our data indicate that, congruent with previous studies of the impact of religious preference upon abortion attitudes, Catholics are, indeed, more opposed to abortion than are persons affiliated with other religious groups. However, it is well to note that, when disregarding the impact of perceived importance of religion, Catholics *approved* of abortions performed during the first trimester for slightly more than half of the twelve circumstances in question. Catholics were followed in relative order of opposition by members of smaller Protestant denominations, those of other fundamentalist religions, and by Lutherans, Presbyterians, and Baptists. Those most accepting of abortion were Episcopalians, members of the Jewish faith, Methodists, and those expressing no religious preference. But even this last group had a first trimester mean score of 10.8, indicating reservations about abortions performed for at least one of the twelve reasons.

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73. Although Ebaugh and Haney rightly point to the fact that "frequency of church attendance is routinely used in social science research as a measure of religious involvement," *see* Ebaugh & Haney, *supra* note 24, at 498-99, we chose to focus upon an alternative measure of so-called religiosity, namely, *perceived importance of religion.* Our reason for analyzing the influence of perceived importance rather than frequency of church attendance was twofold. First, as members of a functionally indispensable profession, many nurses are often required to work evenings, holidays, and weekends, even when such shifts are not their ideal preference. Thus, an analysis of the frequency of church attendance might include those who can attend and do so, those who could attend but don't, those who would attend if they could (but they can't), and those required to work but who wouldn't attend church even if it were possible. Second, we concur with Luckmann that although frequency of church attendance is a conventional measure of religiosity, "it is entirely impermissible to base interpretations of the presence or absence of religion *tout court* upon such statistics." T. LUCKMAN, THE INVISIBLE RELIGION: THE PROBLEM OF RELIGION IN MODERN SOCIETY 25 (1967). "[A] certain level of subjective reflection and choice determines the formation of individual religiosity." *Id.* at 99. A number of respondents commented that although they had no formal denominational affiliation or did not frequent their respective churches, they held some strong moral and religious convictions. In light of these factors, we measured religiosity in terms of perceived importance of religion ranging on a five-point scale from "extremely important" to "not at all important." However, for the sake of bringing the analysis of variance models into a somewhat greater balance with regard to response frequencies, we collapsed the "not too important" category with the "not at all important" category.

TABLE 5

One-Way Analysis of Variance of The Impact of Religious Preference Upon Attitudes Toward Abortion

Religious Preference:	N	Mean Abortion Attitude Scores: First Trim.	Second Trim.	Third Trim.	Grand Mean
Catholic	201	6.5	3.8	1.7	11.8
Protestant[a]	82	8.5	6.7	2.4	16.6
Other[b]	36	8.2	5.7	3.0	16.7
Lutheran	52	9.3	5.9	3.0	18.2
Presbyterian	47	9.9	6.4	2.9	19.1
Baptist	56	9.4	7.3	3.1	19.8
Episcopalian	23	10.3	7.1	2.9	19.9
Jewish	17	10.6	7.8	2.1	20.3
Methodist	80	10.6	7.2	3.3	21.5
No Preference[c]	43	10.8	8.0	3.7	22.3
F Probability =		.0000	.0000	.0028	.0000

[a]"Protestant" included those specifying a particular Protestant denomination whose membership is relatively smaller than those included in this table by name.

[b]"Other" refers to other religious groups who do not perceive themselves to be Protestant. Many of these are considered to be fundamentalist religions.

[c]"No Preference" includes those affiliated with nondenominational religions.

[d]*Grand Mean* does not exactly equal the sum of the means of each of the three trimesters due to the effects of rounding and variation of response rates to both the religiosity item and the 36 abortion attitude items.

Both the level of approval and the range between the most resistant and approving religious groups declined considerably upon reaching the second and third trimesters. Catholic endorsement of abortion during the second trimester dropped to an average 3.8 allowable circumstances, in contrast to those with no religious preference, who approved of an average of eight circumstances but had strong reservations regarding the remaining four circumstances. In the third trimester, the approval of abortion waned to a mean score of 1.7 for Catholics and 3.7 for those with no religious preference.

2. *Impact of perceived importance of religion*

The data in Table 6 reveal a rather consistent inverse monotonic relationship between perceived importance of religion

and mean abortion scores. That is to say, with one possible exception, approval of abortion increases as the importance of religion decreases. The one exception occurs for third trimester scores, in which those perceiving religion to be "quite important" and "somewhat important" share a mean score of 2.5. In all other cases, approval scores increase as religious importance declines. Regardless of the trimester, a one-way analysis of variance indicated significant attitude differences between those perceiving religion to be of greater or lesser importance in their respective personal lives.[74]

TABLE 6

One-Way Analysis of Variance of the Impact of the Perceived Importance of Religion Upon Abortion Attitudes

Mean Abortion Attitude Scores	Perceived Importance of Religion				F Prob.
	Ext. Imp.	Quite Imp.	Some Imp.	Not Imp.	
First Trimester	6.1	8.9	10.0	11.2	.0000
Second Trimester	4.0	5.5	6.7	8.8	.0000
Third Trimester	1.8	2.5	2.5	4.0	.0000
Grand Mean*	11.5	16.7	18.8	23.8	.0000
N	191	201	139	94	

**Grand Mean* does not exactly equal the sum of the means of each of the three trimesters due to the effects of rounding and variation of response rates to both the religiosity item and the 36 abortion attitude items.

Again, in this context, it is well to note the impact that trimesters have upon attitudes. For example, among those who perceive religion to be extremely important, the average response indicated an endorsement of first trimester abortion under fully half of the twelve possible circumstances. However, by the third trimester an average of fewer than two circumstances were viewed as justification for abortions. At the other end of the religiosity continuum, those perceiving religion to be "not important" approved of abortions performed in the first trimester for eleven of the twelve circumstances. (Abortions performed to avoid the interruption of one's education or career

74. Variations in acceptance levels of abortions performed in later trimesters relate at least in part to differences in the theological doctrines of various denominations with respect to the beginning of human life. Some contend that human life begins at conception, others with the quickening of the fetus, and still others at birth. *See* Baker, Epstein & Forth, *supra* note 69, at 98.

TABLE 7

Two-Way Analysis of Variance of Abortion Attitude Scores, Controlling for Religious Preference and Perceived Importance of Religion

Source of Variation	Sum of Squares	df	Mean Square	F	Prob.	eta*
First Trimester						
Main Effects						
Relig. Pref.	732.2	9	81.4	6.36	.000	.30
Import. of Relig.	237.7	3	79.2	6.19	.000	.18
Two-Way Interaction	345.6	26**	13.3	1.04	.411	
Error	7492.1	586	12.8			
Second Trimester						
Main Effects						
Relig. Pref.	575.9	9	64.0	3.92	.000	.25
Import. of Relig.	148.4	3	49.5	3.03	.029	.07
Two-Way Interaction	562.7	26	21.6	1.33	.131	
Error	8860.2	543	16.3			
Third Trimester						
Main Effects						
Relig. Pref.	157.4	9	17.5	1.70	.087	.06
Import. of Relig.	59.7	3	19.9	1.93	.124	.06
Two-Way Interaction	265.8	26	10.2	.99	.477	
Error	5287.9	513	10.3			
Total Scores						
Main Effects						
Relig. Pref.	3629.2	9	403.2	4.99	.000	.29
Import. of Relig.	1046.3	3	348.8	4.32	.005	.16
Two-Way Interaction	1748.9	26	67.3	.83	.705	
Error	40,214.4	498	80.8			

*Eta, or correlation ratio, has potential values ranging from 1.0 (perfect positive relationship) to −1.0 (perfect inverse relationship). A totally random association is indicated by an eta value of 0.0.
**In a conventional balanced design with equal frequencies in all cells, the degrees of freedom would be equal to (r-1) (c-1), however, the RUMMAGE program for two-way analysis of variance for unbalanced designs (see note 76) conservatively drops one degree of freedom for each vacuous cell. In this study none of those with "no religious preference" perceived religion to be "extremely important." Thus, df = 26 instead of 27.

elicited approval by less than half, 47.9%, of the total sample.) By the third trimester the range between "extremely important" and "not important" had shrunk considerably, with those respondents perceiving religion to be "not important" endorsing an average of only 4 of the 12 circumstances.

When one considers all three trimesters, total scores ranged from 11.5 at the "extremely important" end of the continuum to 23.8 for those perceiving religion to be "not important."

3. *Joint impact of religiosity and religious preference*

After analyzing the separate influences of religiosity and religious preference upon abortion attitudes, we were interested in determining the joint impact of these two variables. We conducted a two-way analysis of variance to assess the independent main effects of the two respective independent variables while simultaneously assessing the two-way interactions among these variables.[75] The data in Table 7 tend to confirm the general conclusion of McIntosh, Alston, and Alston "that as participation in a religious group increases, attitudes toward abortion tend to become more negative regardless of the general character of the group to which the person belongs."[76] As indicated by the data in Table 7,[77] both religious preference and perceived importance of religion were statistically significant factors during the first trimester. However, the latter seemed to exert the greater influence upon abortion attitudes. During the second trimester, religious preference was still very significant, whereas the influence of perceived importance of religion began to wane somewhat. As one would anticipate from the mean scores presented in previous tables, the differences among respondents in the third trimester declined dramatically as the attitudes of "accepting" respondents became more closely aligned with those most opposed to abortion. When one considers total abortion scores regardless of trimester, religious preference again elicits greater significant differences among respondents than does perceived importance of religion, although both variables were statistically significant.

When one considers both of these religious factors jointly, it

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75. Significant critical F-ratios were beyond the .0001 level of probability.

76. McIntosh, Alston, & Alston, *supra* note 43, at 205. The classic design for a two-way analysis of variance assumes that there is an equal number of cases in all cells. W. HAYS, STATISTICS FOR PSYCHOLOGISTS 385-86 (1963). It can be readily determined from the numbers in the previous tables, however, that this assumption cannot be met due to gross inequalities in the number of respondents belonging to various religions and also inequalities in the numbers perceiving religion to be of varying degrees of importance. Therefore, we used a recently developed RUMMAGE computer program developed by Bryce, Scott, and Carter to accommodate unbalanced models without distorting the assumptions of homogeneous variance among subclasses. Bryce, Scott & Carter, *Estimation and Hypothesis Testing in Linear Models*, A9 COM. STATISTICS - THEORY METHODS 131 (1981).

77. The correlation ratio (eta) for religious preference and abortion attitude was .29 and for importance of religion was .16. The correlation ratio is a measure of the association of the independent variables (religious preference and importance of religion) and the dependent variable (abortion attitudes). Etas approaching .30 indicate moderate correlations, whereas an eta of only .16 indicates a rather weak relationship.

is interesting to note the shrinking range in attitude scores, largely a function of the fact that as religion declines in importance the differences between denominations also disappear. For example, Catholics who perceived religion to be "extremely important" had an average score of 7.2. Catholics who thought religion to be "quite important" had a mean score of 12.0, those who believed religion to be "somewhat important" shared an average of 15.3, and those for whom religion was "not important" had a mean score of 21.7. The range between the highest and lowest scores among members of denominations who perceived religion to be extremely important was 16.8, whereas among those for whom religion was not important the range was 10.8.

In short, as the importance of religion decreases, the impact of religious preference also declines, and differences between members of various religious denominations are almost totally blurred. A two-way analysis of variance indicated that the main effects of religious preference and perceived importance of religion were highly significant, with religious preference exerting the greater influence. However, the interaction effects between these two independent variables were negligible.

D. Reservations About Participation in Abortions

Although a large plurality of nurses were accepting of a potential abortion patient's request, especially if the abortion would be performed during the first trimester, nearly half (45.2%) of the respondents had reservations about assisting in therapeutic abortions and over half (59.8%) expressed strong reservations about participating in nontherapeutic abortions. Nearly half (48.5%) indicated that they would prefer not to work in an area of the hospital in which abortions are performed.

About two-thirds of the respondents (63.4%) worked in hospitals in which abortions are actually performed, but one-fourth (24.8%) of the nurses said they strongly preferred to work in hospitals prohibiting therapeutic abortions, and 39% preferred hospitals prohibiting *non*therapeutic abortions. On the other hand, half of the nurses (51.8%) preferred to work in hospitals which *allow* therapeutic abortions and one-third (34.7%) prefer hospitals which allow nontherapeutic abortions.

E. Diffusion of Responsibility

There is a substantial body of research in experimental social psychology dealing with the problems of bystander apathy and the diffusion of responsibility when one is faced with a request for help which may entail some personal costs that could be borne by others.[78] Thus, it was of interest to determine if those nurses who were likely to be more heavily involved with abortion patients were more likely to refuse to accept responsibility for the patient's actions than those working in other areas of the hospital. The nurses were asked to indicate the degree to which they agreed or disagreed with the following statement: "Any moral responsibility for abortion rests solely with the patient." (Scored 1=strongly disagree and 7=strongly agree). As shown in Table 8, slightly over half the respondents (52.7%) agreed (responses=5, 6 or 7), 14.5% were "uncertain" (responses=4), and 30.2% "strongly disagreed" (responses=1, 2 or 3). We then controlled for the hospital department in which they worked.

Although differences between the nurses in various departments are not dramatic, 63% of the administrators, 56% of those in OB/GYN and general nursing, and 55.9% of those in medical-surgical departments strongly agreed that abortion patients are solely responsible for their abortions. These are also the nurses most likely to be working in areas in which abortions are performed. Of the nurses working in pediatrics, 49% agreed that the patient must accept sole moral responsibility; 50.6% of those working in neonatal nurseries and 45.7% of those in intensive care units and emergency rooms shared the same degree of agreement.

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78. E. ARONSON, THE SOCIAL ANIMAL (1976); Darley & Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY & SOCIAL PSYCHOLOGY 100 (1973); Darley & Latone, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOCIAL PSYCHOLOGY 377 (1968).

TABLE 8
Nurses' Attitudes and Preferences Regarding the Performance of Abortions

% in Strong Agreement with the following . . .	Hospital Department						
	OB/GYN	PED.	NEONAT.	ICU/ER	MED/SURG.	GEN. NURS.	ADMIN.
N=	(206)	(105)	(81)	(35)	(59)	(25)	(37)
1. Any moral responsibility for abortion rests solely with the patient	56.0	49.0	50.6	45.7	55.9	56.0	63.0
2. I would prefer to work in a hospital which prohibits nontherapeutic abortions	44.1	36.5	37.0	42.9	37.9	52.0	40.5
3. I have reservations about assisting in nontherapeutic abortions	59.6	64.1	61.3	67.6	67.2	60.0	62.2
4. I would prefer not to work in OB/GYN if I have to assist in some types of abortions	47.8	56.2	48.1	48.5	65.0	44.0	56.8
5. I sense no conflicts between my moral and religious beliefs about abortion and hospital policies	42.2	38.2	53.1	42.9	39.7	28.0	37.8

F. Hospital Preferences

As mentioned previously, 63.4% of the respondents in our sample work in hospitals in which abortions are performed on a regular basis. It was, therefore, of interest to determine the congruence between personal preferences and hospital policies regarding abortion. The responses to Item 2 in Table 8 indicate that a substantial minority of nurses would prefer to work in hospitals whose policies prohibit nontherapeutic abortions. A slight majority (52%) of those involved in general nursing shared this view, and roughly 40% of the nurses assigned to other departments expressed a strong preference for nonabortion hospitals.

G. Relationship of Nurses' Abortion Attitudes and Policies of Hospitals in Which They Work

Kenneth Boulding has observed that within organizations "[w]hen a square peg is fitted into a round role it is true that the peg becomes rounder, but it is also true that the role becomes squarer."[79] This phenomenon seems to occur with regard to nurses' attitudes toward abortion, as is indicated by Table 9.

TABLE 9

One-Way Analysis of Variance of Nurses' Attitudes Toward Abortions, Controlling for Hospital Policies Regarding the Performance of Abortions

Mean Attitude Scores	Hospital Policies						
	Emergency Only (n=34)	First Trimester (n=51)	Before* 24th Wk. (n=53)	No Restriction (n=9)	F	p	eta
1st Trimester	9.0	10.2	10.8	10.7	2.40	.07	.22
2nd Trimester	4.6	7.3	7.5	6.9	3.63	.01	.27
3rd Trimester	2.2	2.6	2.8	4.2	.94	.43	.14
Total Score Means	15.7	19.8	21.1	22.0	2.75	.05	.23

* Included in these 53 hospitals are five whose policy requires consultation with a second physician when gestation is in the second trimester.

79. K. BOULDING, THE IMAGE, KNOWLEDGE IN LIFE AND SOCIETY 60 (1956).

Of the 144 nurses who responded to the request to describe the policies of their respective hospitals, those working under the most restrictive policies had significantly more conservative views toward abortion than those working under fewer or no restrictions. In fact, when one considers the total attitudinal scores there is a strong monotonic trend, with those working under an "emergency or life threat" policy having an average score of 15.7, those with a "first trimester" policy having a mean of 19.8, those with a "second trimester" policy having a mean of 21.1, and those working under "no restrictions" having a grand mean of 22.0.

Given the fact that the *Roe* and *Doe* decisions were handed down nine years ago, it is impossible to determine if nurses tend to adopt attitudes congruent with hospital policies or tend to gravitate to hospitals and areas within a given hospital whose policies are congruent with their personal views. Regardless of the genesis of such relationships between attitudes and organizational policy, the eta correlations as high as .27 indicate a moderate relationship between policies and attitudes. At least one can safely conclude that such relationships are not totally random.

H. Personal Reservations

When asked if they had reservations about assisting in abortions, two-thirds of the intensive care or emergency room nurses expressed strong reservations as did a similar proportion of nurses in the medical-surgical units. In large hospitals it is in the medical-surgical units rather than in OB/GYN that abortions are generally performed.

I. Moral Conflicts

A majority of neonatal nurses (53.1%) sensed no incongruity between their personal beliefs about abortion and the hospital policies under which they worked. Over forty percent (42.2%) of those in OB/GYN and 39.7% of the nurses working in the medical-surgical area sensed no conflicts.

J. Hospital Accommodation of Moral Beliefs

In order to determine how well hospital policies generally accommodate nurses' religious and moral beliefs, we asked our respondents to identify the number of colleagues who had been

limited in their hospital assignments and opportunities due to their beliefs. The nurses in our sample identified a total of 103 definite cases in which nurses had either been dismissed or had had their opportunities limited because of moral beliefs. Many of the limiting circumstances identified did not involve abortion.[80] However, fifty-seven cases were identified in which nurses' beliefs about abortion had cost them opportunities for promotion or sustained employment.

TABLE 10

Frequency of Individual's Perceiving Assignments and Opportunities Being Affected by Religious and Moral Beliefs

Number of nurses who have been strongly influenced by their beliefs about abortion:	Catholic Import. of Relig.		Prot. & Other Import of Relig.		
	Impt. N	Not Impt. N	Impt. N	Not Impt. N	% of Total
1. Choice of a given department	23	6	28	5	8.8%
2. Assignment to a given dept	14	4	19	2	5.5
3. Employment opportunities offered by hospital	9	3	12	3	3.8
4. Choice of employment opportunities	20	3	29	8	8.5
5. Hospital imposition of work schedules	6	0	19	4	4.1
6. Choice of work schedules	7	0	20	5	4.5
7. Advancement opportunities offered by hospital	5	1	14	7	3.8
8. Choice of advancement opportunities	8	1	20	7	5.1

The nurses in our study were asked to indicate the degree to which various facets of their employment conditions had been affected by their personal beliefs regarding abortion. The data in Table 10 indicate that 8.8% felt their choice of a given department had been strongly influenced by their religious and moral

80. Three nurses refused to participate in tubal ligations; six Jehovah Witnesses refused to participate in medical procedures involving transfusions; two Orthodox Jews refused to violate sabbath or holiday observances by working; one nurse objected to baptizing infants prior to serious surgical procedures; four were dismissed when the head nurse insisted her staff share her own religious preference; and eight other nurses had strong reservations about participating in euthanasia. The remaining cases involved a variety of miscellaneous belief-related incidents.

beliefs. This is not to say that hospitals were unaccommodating, because the choice of a department could have been self-initiated in light of an awareness of unpleasant duties performed in certain departments but not in others.

About one in twenty nurses (5.5%) indicated that assignment to a given department, an externally imposed action, had been strongly affected by moral beliefs. A very small proportion of the nurses (3.8%) revealed that the employment opportunities offered by the hospital had been greatly limited due to their beliefs, and 8.5% felt their *choice* among those employment opportunities offered had been limited for the same reasons.

About four percent (4.1%) perceived that the imposition of their work schedules had been strongly influenced by their moral and religious beliefs, and 4.5% also felt their choice of work schedules was influenced for the same reason. The choice of work schedules may be a double-barrelled issue, however, because it is conceivable that some hospitals might require nurses with supportive abortion attitudes to work on "abortion shifts" in order to accommodate the religious beliefs of nurses who strenuously object to participating in abortions. Unfortunately our data do not address both sides of this issue.

Nearly four percent (3.8%) felt that their advancement opportunities had been abridged because of their moral beliefs, and 5.1% indicated that their choice of advancement opportunities had been strongly influenced for the same reasons.

In light of the foregoing findings, one might well conclude that hospitals are generally quite adept at accommodating the religious and moral beliefs of their respective nursing staffs. As previously mentioned,[81] however, the 62 nurses indicating areas of rather severe infringement of their occupational opportunities due to their personal beliefs may represent as many as 50,000 nurses throughout the United States who share similar perceptions of inadequate accommodation.

IV. The Scope of Protection Available Under Title VII

With the foregoing empirical data in mind, we now turn to an analysis of the various legal protections available to medical

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81. *See supra* text accompanying note 9. The percentages reported in the preceding paragraphs vary slightly from the statistics reported in Table 1 because of differential response rates to two control variables—religious preference and perceived importance of religion.

personnel who have conscientious objections to participation in abortion procedures. One of the more salient findings of our study in this regard was that very few nurses have any clear idea of the nature of the protections available to them. In response to a question which asked, "Does your state have a law to protect hospital employees from discrimination based on their beliefs about abortion?," 12.5% of the respondents circled "yes," 3.7% circled "no," 82.4% circled "don't know," and 1.4% did not respond. Since forty-four states have enacted "conscience clause" legislation,[82] it seems clear that a large percentage of the respondents were not aware of the legal protections available to them. If the protections analyzed in the remainder of this article are to become meaningful, steps must be taken to insure that a much larger percentage of nurses are made aware of the protections available to them.

For present purposes, we assume that this practical obstacle to effectuating legal protections will be overcome in time through appropriate educational efforts.[83] In what follows, we analyze the potential protections available to those objecting to abortion under general federal[84] and state[85] civil rights legislation, and under federal[86] and state[87] "conscience clauses," which have been specifically drafted to protect both individuals and certain institutions from being required to participate in or provide abortions. We also analyze the constitutionality of these protections[88] and the extent to which the first amendment's free exercise clause may afford protections independently of those available on a statutory basis.[89] In general, the protections available to nurses are quite strong—certainly much stronger than most nurses realize.

A. The Legislative Background

At the federal level, the primary statutory vehicle for protecting employees against most types of discriminatory conduct

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82. *See infra* text accompanying note 179.

83. States could require, for example, that statements informing medical personnel of their rights be posted in relevant areas of hospitals, or that such statements be included among materials given to nurses at the time they are hired.

84. *See infra* text accompanying notes 90-153.

85. *See infra* text accompanying notes 154-62.

86. *See infra* text accompanying notes 167-78.

87. *See infra* text accompanying notes 179-303.

88. *See infra* text accompanying notes 306-415.

89. *See infra* text accompanying notes 414-40.

is Title VII of the Civil Rights Act of 1964.[90] Of particular concern in this Article is Title VII's prohibition of discrimination against an employee or prospective employee on the basis of his or her religion.[91] Title VII applies to an extremely broad range of situations in which problems stemming from conscientious objections to abortion might arise. However, as will appear in what follows,[92] its practical significance for parties who have experienced employment difficulties as a result of their abortion-related beliefs has been seriously eroded by the Supreme Court's holding that employers have only a de minimis obligation under Title VII to accommodate the religious beliefs of their employees.[93]

Interpretations of Title VII's ban on religious discrimination have been expansive. While the statute as originally enacted contained no definition of the term "religion," it did authorize the Equal Employment Opportunity Commission (EEOC) to promulgate regulations to govern the area of religious discrimination.[94] The focus of the first set of regulations[95] was on sabbath observance and intentional discrimination. Under the initial regulations, employers were free to establish a normal workweek applicable to all employees, and to require them to work that week. At the same time, however, the regulations defined the "duty not to discriminate on religious grounds" to include "an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and in some cases prospective employees where such an accommodation can be made without serious inconvenience to the conduct of the business."[96] After a little over a year, the EEOC amended the

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90. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

91. Specifically, Title VII provides:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1976).

92. *See infra* text accompanying notes 119-29.

93. Trans World Airlines, Inc. v. Hardison, 532 U.S. 63, 84 (1977).

94. 42 U.S.C. § 2000e-12(a) (1976).

95. 29 C.F.R. § 1605.1 (1966).

96. *Id.*

initial regulations by deleting the provisions permitting an employer to establish a regular workweek and by substituting "undue hardship" for "serious inconvenience" as the standard for determining when an employer was not required to accommodate the religious needs of employees.[97]

The rather broad requirement that employers accommodate the "reasonable religious needs of employees" was further expanded by a 1972 amendment to Title VII[98] proposed by Senator Jennings Randolph, a sabbatarian from West Virginia. The Randolph amendment embraced the EEOC view of an employer's duty of reasonable accommodation and augmented it with a partial definition of religion: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[99] While Senator Randolph was primarily concerned with deterring discrimination against employees who observed their sabbath on Saturday, the amendment included protection for "all aspects of religious observance and practice as well as belief." The precise ambit of this phrase was left undefined, but its addition to the statutory framework, together with the codification of the "undue hardship" standard, provided the launching pad for further Title VII developments: the definition of religious observance, practice, and belief, and the determination of what constitutes reasonable accommodation.

B. The Breadth of Title VII's Conceptions of Religious Observance, Practice, and Belief

In grappling with the problem of defining "religious observance and practice, as well as belief," the EEOC has concluded that it would be inappropriate to apply a narrower definition of "religion" under Title VII than the Supreme Court has developed in analyzing conscientious objection cases under the Universal Military Training and Service Act.[100] Thus, the EEOC's

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97. 29 C.F.R. § 1605.1 (1968).

98. 42 U.S.C. § 2000e(j) (1976).

99. *Id.*

100. EEOC Dec. No. 71-799, 1973 EEOC Dec. (CCH) ¶ 6180, at 4305 (Dec. 21, 1970) (citing United States v. Seeger, 380 U.S. 163, 176 (1965)).

test for whether a belief is "religious" is whether it is "sincere and meaningful" and "occupies in the life of its possessor a place parallel to that filled by God" in traditional theistic religions. In formulating its test, the EEOC also referred to Supreme Court language indicating that " 'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect' come within the meaning of 'religious belief.' "[101] Presumably, a "religious observance or practice" is one based on a religious belief. This test avoids the issue of defining a bona fide religious belief by focusing on the sincerity of the belief.[102] Moreover, according to the regulations, the fact that "no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."[103]

The EEOC approach to what constitutes a religious observance, practice, or belief for purposes of Title VII has thus been very broad. For the most part, judicial construction of the relevant provisions has been similarly expansive. In *Cooper v. General Dynamics*,[104] the employee was a Seventh Day Adventist who believed paying union dues was contrary to his religion. The employer argued that this did not qualify as a religious observance. The court, focusing on the broad language of the Randolph amendment to Title VII, stated that "*all* forms and aspects of religion, however eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a businesslike operation."[105] Other federal courts of appeals that have reviewed this question have reached similar results.[106]

In some situations, however, courts have rejected claims that discrimination was religiously based. In *Brown v. Pena*,[107]

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101. EEOC Dec. No. 71-799, 1973 EEOC Dec. (CCH) ¶ 6180, at 4305 (Dec. 21, 1970) (citing Welsh v. United States, 398 U.S. 333, 339-40 (1970) (citing United States v. Seeger, 380 U.S. 163, 186-87 (1965))).

102. 29 C.F.R. § 1605.1 (1981).

103. *Id.*

104. 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

105. *Id.* at 168-69.

106. Nottelson v. Smith Steelworkers D.A.L.U. 19806, 643 F.2d 445 (7th Cir. 1981); Yott v. North American Rockwell Corp., 602 F.2d 904 (9th Cir. 1979); Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978), *cert. denied sub nom.* International Ass'n of Machinists and Aerospace Workers v. Anderson, 442 U.S. 921 (1979); McDaniel v. Essex International, 571 F.2d 338 (6th Cir. 1978).

107. 441 F. Supp. 1382 (S.D. Fla. 1977).

for example, the court refused to find that an employee's personal belief that eating "Kozy Kitten People/Cat Food . . . contribut[ed] significantly to his state of well being"[108] constituted a religious belief meriting protection. The court reasoned that the belief reflected a merely personal moral preference, lacking the distinctive features that set religious beliefs apart.[109]

More recently, in *EEOC v. Sambo's of Georgia, Inc.*,[110] a federal district court held that a restaurant chain which refused to make an exception to its grooming standards in order to hire a Sikh, who was forbidden by his religion from shaving his facial hair, had not violated the religious discrimination provisions of Title VII. In large part, the decision turned on "undue hardship" considerations that will be considered in more detail below.[111] But two facets of the court's opinion imply a narrowing of the notion of religious discrimination under Title VII. First, although the court acknowledged that the reason Sambo's refused to process the Sikh's employment application beyond the interview stage was his religiously based refusal to shave, it did not view the facts as posing a problem of religious discrimination.[112] From the court's perspective, the decision not to hire the complainant was based on a variety of business-related concerns and was not made on religious grounds. Second, the court concluded that the "disparate impact" doctrine that has emerged in race and sex discrimination cases is inapplicable in the context of religious discrimination.[113] The court reasoned that the fact that the religious accommodation provision (section 701(j)) was adopted after the "disparate impact" doctrine was well-established indicated that Congress did not think disparate impact notions applied in the context of religious discrimination.

The *Sambo's* decision is troubling in that it seems to narrow unduly the range of what is likely to count as religious discrimination. Part of the difficulty with respect to the first point derives from an unfortunate structural feature of Title VII itself. The operative provisions of the statute simply proscribe discrimination on the basis of "religion," without making any separate provision for situations in which the demands of accommodating

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108. *Id.* at 1384.
109. *See id.* at 1385.
110. No. C80-1164A, 27 Fed. Empl. Prac. Cas. 1210 (N.D. Ga. Dec. 31, 1981).
111. *See infra* text accompanying notes 256-65.
112. 27 Fed. Empl. Prac. Cas. at 1214.
113. *Id.* at 1215-16.

a particular religious practice, observance, or belief exceed what can be reasonably expected in the overall scheme of Title VII. The approach has been to attempt to pack the solution of such problems into the definition of "religion." Thus, under section 701(j), " 'religion' includes all aspects of religious observance [etc.] . . . *unless* an employer demonstrates that he is unable to reasonably accommodate [the employee's religious practice] . . . without undue hardship . . . ."[114] Literally interpreted, this provision defines religion for purposes of Title VII not by reference to the employee's belief system, but by reference to whether the employer, under the facts of the particular case, can establish that the practice, observance, or belief in question cannot be accommodated without undue hardship. The statutory term "religious" may continue to have an expansive meaning, but "religion" is made logically dependent on the happenstances of the employer's workplace. The consequence is the counter-intuitive result encountered in the *Sambo's* decision: an employment determination made because a prospective employee refused to abandon a religious practice is held not to constitute discrimination on the basis of religion. This is reminiscent of the now-discredited[115] argument that facially neutral employment policies that link disadvantageous treatment to pregnancy do not constitute discrimination on the basis of sex. At the very least, it would seem preferable to characterize the situation in *Sambo's* as one in which religious discrimination had occurred, but was permissible on some independent ground, rather than to pretend no such discrimination had occurred.

Even more troubling is the court's refusal to apply the disparate impact doctrine in the context of religious discrimination suits. There is a broad range of contexts in which employment policies can have disparate impacts on members of different groups. Problems arising from dress and grooming standards, for example, are certainly not limited to Sikhs. And as our study shows, in view of the strong correlation between religious preference and abortion attitudes,[116] abortion policies would be likely to have disparate impact, depending on the religious affiliation of particular nurses.

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114. 42 U.S.C. § 2000e(j) (1976) (emphasis added).

115. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (deprivation of employees returning from maternity leave of accumulated seniority violated § 703(a)(2) of Title VII).

116. *See supra* text accompanying note 69.

The district court's contention that the legislative history of section 701(j) evidences a congressional view that the disparate impact doctrine does not apply to religious discrimination is unpersuasive. The fact that Congress in 1972 added a provision to Title VII clarifying the obligations of employers with respect to religious discrimination cases does not imply that it wished to preclude employees from invoking a well-established method (disparate impact analysis) of proving that the employer had breached the newly defined obligation. Section 701(j) was enacted not, as the district court suggests,[117] because the disparate impact doctrine was unavailable in religious discrimination cases, but because the overall obligations of employers in this area needed clarification. In adopting section 701(j), Congress aimed not to deprive victims of religious discrimination of the protections inherent in disparate impact analysis, but to clarify the terms on which these and other protections would be available.

In summary, the definition of religion and the conceptions of religious practice, observance, and belief are unlikely to constitute an obstacle to the invoking of Title VII protections by an individual with religious objections to participation in abortion procedures. For the most part, nurses with strong objections to abortion tend to be adherents of religious faiths that would clearly qualify as "religions" under Title VII.[118] Moreover, they tend to be members of the numerous religious faiths that have taken a stand against the performance of abortion.[119] Even those

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117. 27 Fed. Empl. Prac. Cas. at 1216.

118. Fewer than 6.3% of respondents in our survey indicated religious affiliations other than traditional mainline religions. Many of those, classified as having no preference, were associated with non-denominational religions. Thus, only an extremely small percentage of respondents would not be in a position to base objections on beliefs linked to a well-established religion.

119. The Roman Catholic Church's opposition to abortion is well known. *See, e.g.*, O'Donnell, *A Traditional Catholic's View*, in ABORTION IN A CHANGING WORLD 34, 35 (R. Hall ed. 1970). One study indicates that members of major protestant denominations which have restrictive views or at least strong reservations about abortion outnumber members of denominations with liberal abortion attitudes by more than two to one. Nelson, *The Divided Mind of Protestant Christians*, in NEW PERSPECTIVES ON HUMAN ABORTION 387, 396 (1981). Traditional Judaism also opposes abortion. Bleich, *Abortion and Jewish Law*, in NEW PERSPECTIVES ON HUMAN ABORTION, 405, 418 (1981). For a summary of the attitudes of a number of major denominations toward abortion, see McRae v. Califano, 491 F. Supp. 630, 690-702 (E.D.N.Y. 1980).

In our study 594 of the 705 respondents indicated a preference for some recognized religious denomination. Those who expressed no preference tended to be the most accepting of abortion. *See* Table 5, *supra* at p. 278.

who do not belong to such denominations, or whose beliefs are not based on the views of a traditional religion, are likely to fit under the broad umbrella of Title VII. Under the EEOC test, virtually any deeply held and "intensely personal" convictions within the domain traditionally covered by religious beliefs are sufficient to trigger Title VII protections. Even if the relatively narrow approach of the *Pena* court is followed, objections to abortion—unlike eccentric affinity for cat food—are unlikely to be disqualified as matters of mere "personal preference."

C. Reasonable Accommodation

The leading case interpreting the "undue hardship" test established by section 701(j) is *Trans World Airlines, Inc. v. Hardison.*[120] Hardison was employed by TWA in a department that was operated 24 hours a day, 365 days per year. The collective bargaining agreement negotiated between TWA and the International Association of Machinists and Aerospace Workers, which covered Hardison, contained a seniority system allowing senior employees first choice on job and shift assignments. Hardison was converted to the Worldwide Church of God, a Christian denomination that observes the Sabbath on Saturday, and informed his employer that he would no longer be available for work on Saturday. Attempts were made to accommodate him and these were initially successful because Hardison had sufficient seniority to regularly avoid work on Saturday. Hardison then voluntarily transferred to another building, where he moved to the bottom of the seniority list. After the transfer, Hardison was scheduled to work on Saturdays. TWA agreed to permit the union to seek a change of work assignment, but the union was not willing to violate the seniority system. After TWA rejected a proposal that Hardison work only four days a week, Hardison refused to report for Saturday work and was fired for insubordination. He filed a Title VII action.[121]

The district court ruled in favor of TWA and the union, holding that the union's duty to accommodate Hardison's religious beliefs did not require it to ignore the seniority system, and that TWA had satisfied its reasonable accommodation obligations.[122] The court of appeals affirmed the judgment for the

120. 432 U.S. 63 (1977).
121. *Id.* at 66-69.
122. Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 883 (W.D. Mo. 1974).

union, but reversed the judgment for TWA, holding that TWA had not satisfied its duty to accommodate Hardison.[123] The court took the view that TWA had rejected three reasonable alternatives that would have satisfied its duty to accommodate Hardison's religious views without undue hardship. First, TWA could have permitted Hardison to work a four-day week while still complying with the seniority system by using a supervisor or other worker in Hardison's place, even though this would have caused dislocation elsewhere. Second, TWA could have filled Hardison's Saturday shift with other available personnel, although this could have involved paying premium overtime wages. Finally, TWA could have arranged a swap between Hardison and another employee, either for another shift or for Saturday, even though this would have involved a breach of the seniority system.[124]

The Supreme Court held for TWA, reasoning that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."[125] The Court examined each of the court of appeals' suggested alternatives and said that each would have created an undue hardship within the meaning of the statute.[126] The Supreme Court held that an employer's duty of reasonable accommodation did not require an employer to violate the terms of a bona fide collective bargaining agreement.[127] The religious preferences of some employees do not need to take precedence over the general preferences of other employees[128] who have attained greater seniority. The Court pointed out that had TWA circumvented the seniority system by excusing Hardison from Saturday work and ordering a more senior employee to replace him, it would have deprived the other employee of a contractual right.[129] Moreover, Title VII itself, in section 703(h), allows different treatment of employees based on bona fide seniority systems.[130]

The Court's de minimis approach to assessing what constitutes undue hardship greatly diminishes the force of Title VII's requirement that employers accommodate religiously based be-

123. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 39-42 (8th Cir. 1975).
124. *Id.*
125. 432 U.S. at 84.
126. *Id.* at 77.
127. *Id.* at 79.
128. *Id.* at 81.
129. *Id.* at 80.
130. *Id.* at 81-82.

liefs and practices. If a hospital does not need to incur more than de minimis expense or exert more than de minimis effort to accommodate the abortion-related beliefs of its nurses, those beliefs are likely to receive de minimis protection under Title VII. Despite these limitations, however, there are still a number of areas in which Title VII may provide some assistance.

First, an employer cannot refuse to hire or promote an employee simply because of his or her religiously based objections to abortion. In most instances this would constitute intentional religious discrimination.

The primary exception to this rule involves those situations in which an individual's religion constitutes a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of an enterprise.[131] Abortion-related beliefs could conceivably give rise to a BFOQ when the position involved is defined to include abortion-related tasks. Thus, the lack of conscientious objection to abortion might constitute a BFOQ for a position at an abortion clinic. Classification of abortion-related beliefs as a BFOQ would allow an employer to inquire about accommodation issues in advance of hiring. Hospitals would need to be very careful, however, to avoid making inquiries into abortion-related beliefs as a "necessary" part of jobs that do not really require a certain viewpoint. In other words, the pre-employment inquiry into abortion-related beliefs is acceptable only in cases of genuine "business necessity."[132] A hospital cannot circumvent its obligation to accommodate by simply adjusting job descriptions so that accommodation problems are ruled out by definitional fiat.

Second, an employer may be required to make adjustments in work schedules in order to accommodate the beliefs of a conscientiously objecting employee, so long as this does not involve breach of collective bargaining agreements or more than de minimis expense. Alternatively, the employer may have a duty to restructure job assignments to make them consistent with employee beliefs, so long as this also does not involve undue hardship.

In this connection, the EEOC's 1980 guidelines with regard to religious discrimination suggest three restructuring possibili-

131. 42 U.S.C. § 2000e-2(e) (1976).
132. 29 C.F.R. § 1605.3(b)(2)(ii) (1981).

ties.[133] The first involves voluntary substitutes and swapping. The Commission notes that in a number of cases, the securing of a substitute has been left entirely to the individual seeking an accommodation, and states that the Commission believes that the obligation to accommodate requires that employers facilitate the securing of voluntary substitutes. The guidelines suggest that the publication of policies regarding voluntary accommodation, the maintenance of a central file for matching voluntary substitutes, and the promotion of an atmosphere in which substitutes are favorably regarded are ways that employers can fulfill their obligations.[134] Second, employers should consider flexible scheduling. The Commission suggests that employers of organizations consider the creation of flexible work schedules for individuals requesting accommodations. Such schedules might include flexible departure and arrival times, optional holidays, flexible work breaks, use of lunch time in exchange for early departure, and permitting the employee to make up time lost due to the observance of religious practices.[135] Finally, when an employee cannot be accommodated as to his or her job or assignment within the job, employers and labor organizations should consider whether it is possible to change the job assignment or give the employee a lateral transfer.[136]

Although these suggestions seem primarily aimed at accommodating employee sabbaths or other religious holidays, some of the suggestions are also useful for the employer seeking to accommodate the needs of an employee who conscientiously objects to abortion. Employees should remember, however, that the duty to accommodate does not arise until the employee makes known his need for accommodation.[137] Facilitating the voluntary swapping of assignments is certainly one mechanism for relieving employees from participating in abortion-related services. However, there may be difficulties with this as a practical matter. The literature indicates that participation in abortion is considered a less desirable assignment from the perspective of many employees.[138] Moreover, our study indicates that

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133. *Id.* § 1605.2(d)(1) (1981).
134. *Id.* § 1605.2(d)(1)(i).
135. *Id.* § 1605.2(d)(1)(ii).
136. *Id.* § 1605.2(d)(1)(iii).
137. *Id.* § 1605.2(c)(1).
138. *See* Allen, Shea, Reichelt, McHugh, & Werley, *Factors to Consider in Staffing an Abortion Service Facility*, J. NURSING AD. 22-27 (July/Aug. 1974); Branson, *Nurses Talk About Abortion*, 72 AM. J. NURSING 106 (1972); Hendershot & Grimm, *supra* note 42.

nurses feel significant amounts of pressure from other nurses to participate in abortion.[139] Such pressure may indicate that many employees do not particularly like to participate in abortion services; for this reason many may feel that each should do his or her own share of the undesirable assignments. Such pressures may prevent voluntary swaps—even if facilitated by the hospital—from being an effective mechanism for accommodating the needs of the objecting employee. If employee attitudes prevent a willing change of assignments, an employer should, at a minimum, see that fellow workers do not create an atmosphere of persecution or mockery aimed at the conscientiously objecting employee. Although an employer cannot be expected to predict and control all aspects of employees' behavior, the EEOC has stated that an employer must maintain an environment free of religious intimidation.[140]

Changing the job assignment and transferring the employee who objects to participation in abortion services is another possible mechanism for accommodating the needs of the objecting employee. Our survey indicates that some employees who object to the performance of abortions do in fact seek transfers.[141] Difficult questions are raised, however, when there are no possible assignments that do not involve abortion-related service, or when the objecting employee prefers his or her current assignment but wants to be exempted from the abortion-related aspects of his job.[142] Such difficulties may make it easier for the

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139. Participants in our survey were asked to indicate how much pressure to participate in abortions they felt from various sources. 8.4% of the respondents perceived considerable pressure from hospital administrators, 13.1% perceived pressure from physicians, and 8.2% perceived extreme pressure from their nursing colleagues.

140. EEOC Dec. No. 72-1114, 1973 EEOC Dec. (CCH) ¶ 6347 (Feb. 18, 1972). *See also* EEOC Dec. No. 71-2344, EEOC Dec. (CCH) ¶ 6257 (June 3, 1971) (race discrimination).

141. Eighteen of the respondents (nearly 3%) indicated that they had transferred to other departments as a specific response to pressures to perform abortion. Of these, 13 preferred to work in a hospital which prohibits nontherapeutic abortions; 12 indicated they had strong reservations concerning participation in abortion; 9 disagreed with the statement in the survey that the responsibility for the abortion choice rests solely with the patient; 15 expressed strong conflicts regarding participation in abortion; 3 indicated that their hospitals' policies allowed little latitude for those with conscientious objections to abortion; 7 indicated their employment opportunities had been strongly influenced by their religious beliefs; 4 indicated their advancement opportunities had been strongly influenced by their religious beliefs.

142. In EEOC v. Sambo's of Georgia, Inc., 27 Fed. Empl. Prac. Cas. 1210, 1213, 1215 (N.D. Ga. Dec. 31, 1981), the court rejected a Sikh's request that a restaurant chain accommodate his religious beliefs by exempting him from the chain's grooming standards, apparently reasoning that accommodation does not require an outright exemp-

employer to argue that the employee's needs cannot be accommodated without undue hardship.

The only Title VII case involving conscientious objection to abortion involved precisely this issue, but in a rather unusual factual setting. In *Haring v. Blumenthal*,[143] Haring was a tax lawyer for the Internal Revenue Service (IRS) who alleged that he was denied a promotion because of his Catholic beliefs and practices. Haring was unwilling to review tax exemption applications submitted by abortion clinics, a job that would be his were he promoted.[144] The government argued that undue hardship would result from accommodation of Haring's beliefs—first, because office efficiency would be impaired; second, because allowing Haring to choose the applications he would review would encourage others to do likewise and would precipitate an unmanageable situation; and third, because a victory for Haring would undermine the nation's confidence in the IRS.[145] The court, applying Title VII, concluded that the volume of applications objectionable to Haring was so small that it would cause the IRS no undue hardship to assign them to another reviewer.[146] The court addressed the government's second argument by deciding that undue hardship relates to present conditions and not to anticipated hardship from future acts of employees.[147] The government's third argument was answered by the observation that "public confidence in our institutions is strengthened when a decisionmaker disqualifies himself on account of financial interest, insuperable bias, or the appearance of partiality."[148] The court denied the Government's motion for summary judgment on the Title VII issue, with the caveat that "[i]t is only where, as here, the area of conscientious or other

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tion. What this reasoning fails to recognize is that accommodation virtually always entails exempting an employee from some aspect of his or her normal work assignments. In many cases, the burden on the employer resulting from such exemptions is eased by the fact that the employee can render some "substitute performance." *See id.* at 1215. But contrary to the court's assumption in *Sambo's*, there is no reason to assume that the availability of such alternative performance options is a necessary precondition of the employer's obligation to accommodate. The establishment clause concerns to which the *Sambo's* court alludes are unfounded. *See infra* text accompanying notes 319-80.

143. 471 F. Supp. 1172 (D.D.C. 1979), *cert. denied sub nom.* Itaring v. Regan, 101 S. Ct. 3082 (1981).

144. *Id.* at 1178.

145. *Id.* at 1180-83.

146. *Id.* at 1180.

147. *Id.* at 1182.

148. *Id.* at 1183.

problems leading to potential disqualifications is relatively slight that such problems do not stand as a bar to employment or advancement."[149]

The *Haring* case reinforces one's sense that the duty to accommodate religious beliefs under Title VII is broad but shallow. That is, the range of potential situations in which cognizable Title VII claims might arise is extremely broad, but the depth of protection is very thin. If someone as remote from the actual participation in an abortion as Haring is covered, it is difficult to imagine anyone with the slightest involvement who is not. But it was also significant to Haring's case that the abortion-related services required by the job in question amounted to an extremely small percentage of the total work assigned and could easily be shifted to someone else. If the IRS had been able to show that accommodation would create problems of any genuine magnitude, it seems clear that Haring would have lost on undue hardship grounds.

One final point from the *Haring* decision deserves mention. The *Haring* court argues that undue hardship must mean present undue hardship as distinguished from anticipated or multiple hardship.[150] Likewise, the EEOC guidelines state that "[a] mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship." [151] However, others have argued that the employer should not be limited to looking at the particular employee seeking accommodation, but must also look at the future accommodations that he may have to make in determining his expense.[152] Because the likelihood is great that many hospitals will encounter accommodation requests from multiple employees,[153] the resolution of this particular issue is critical. Realistically, a hospital needs to be able to consider the cumulative cost of accommodating employees' objections to abortion in deciding what accommodations it can make without undue hardship. Thus, an approach should be adopted which allows a hospital to give some weight to the

149. *Id.* at 1185.

150. *Id.* at 1182; *accord*, Brown v. General Motors Corp., 601 F.2d 956, 961-62 (8th Cir. 1979).

151. 29 C.F.R. § 1605.2(c)(1) (1981).

152. *See* Frantz, *Religious Discrimination in Employment: An Examination of the Employer's Duty to Accommodate*, 1979 DET. C.L. REV. at 219; Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579, 583 n.22 (3d Cir. 1977).

153. *See* Kemp, Carp & Brady, *supra* note 27.

potential "domino effect" of an accommodation extended to a particular employee, but which does not allow speculative bureaucratic fears to totally undermine the institutional obligation to accommodate.

D. State Legislation Concerning Employment Discrimination

Many states have adopted general civil rights statutes which parallel federal legislation and in particular follow Title VII's pattern of prohibiting religious discrimination in employment. In most states, the statutes prohibit discrimination based on religion; some also refer to discrimination based on creed.[154] In most states, the legislation is applicable to both public and private employment. The Georgia, Texas, and Virginia statutes, however, apply only to employment in the public sector.[155] Eleven states have explicitly adopted the "reasonable accommodation" and "undue hardship" language from Title VII in their regulatory schemes,[156] and four additional states have done the

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154. ALASKA STAT. § 18.80.220 (1981); ARIZ. REV. STAT. ANN. § 41-1463 (1974); CAL. GOV'T CODE § 12940 (West 1980); COLO. REV. STAT. § 24-34-402 (Supp. 1981); CONN. GEN. STAT. ANN. § 46a-60 (West Supp. 1981); DEL. CODE ANN. tit. 19, § 711 (1979); D.C. CODE ANN. § 1-2519 (1981); FLA. STAT. ANN. § 23.167 (West Supp. 1982); HAWAII REV. STAT. § 378-2 (Supp. 1981); IDAHO CODE § 67-5909 (1980); ILL. ANN. STAT. ch. 68, § 2-102 (Smith-Hurd Supp. 1981-82); IND. CODE ANN. § 22-9-1-2 (Burns 1974); IOWA CODE ANN. § 601A.6 (West 1975); KAN. STAT. ANN. § 44-1009 (1973); KY. REV. STAT. § 344.040 (Supp. 1980); ME. REV. STAT. ANN. tit. 5, § 4572 (1979); MD. CODE ANN. art. 49B, § 17 (1979); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1971); MICH. COMP. LAWS ANN. § 37.2202 (West Supp. 1981); MINN. STAT. ANN. § 363.03 (West Supp. 1982); MO. ANN. STAT. § 296.020 (Vernon Supp. 1982); MONT. CODE ANN. § 49-2-303 (1981); NEB. REV. STAT. § 48-1104 (1978); NEV. REV. STAT. § 613-330 (1981); N.H. REV. STAT. ANN. § 354-A 8 (Supp. 1981); N.J. STAT. ANN. § 10:5-12 (West Supp. 1981); N.M. STAT. ANN. § 28-1-7 (1978); N.Y. EXEC. LAW § 296 (McKinney Supp. 1981); N.C. GEN. STAT. § 143-422.2 (1977); N.D. CENT. CODE § 34-01-19 (1979); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1981); OKLA. STAT. ANN. tit. 25, § 1302 (West Supp. 1981); OR. REV. STAT. § 659.030 (1979); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1981); R.I. GEN. LAWS § 28-5-7 (Supp. 1981); S.C. CODE ANN. § 1-13-80 (Law. Co-op. Supp. 1981); S.D. CODIFIED LAWS ANN. § 20-13-10 (1979); TENN. CODE ANN. § 4-21-105 (Supp. 1979); UTAH CODE ANN. § 34-35-6 (Supp. 1981); VT. STAT. ANN. tit. 21, § 495 (Supp. 1981); WASH. REV. CODE ANN. § 49.60.180 (Supp. 1981); W. VA. CODE § 5-11-9 (Supp. 1981); WIS. STAT. ANN. § 111.31-111.325 (West 1974); WYO. STAT. § 27-9-105 (1977).

155. GA. CODE ANN. § 89-1703 (1980); TEX. REV. CIV. STAT. ANN. art. 6252-16 (Vernon Supp. 1982); VA. CODE § 2.1-116.10 (1979).

156. CAL. ADMIN. CODE, tit. 4, R. 7293.3 (1980); COLO. ADMIN. CODE 3-708-1 § 50.3(b) (1980); Guidelines on Discrimination in Employment issued by Illinois Fair Employment Practices Commission, effective Oct. 13, 1976, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 22,497.05 (1981); Rules and Regulations Governing Practice and Procedure Before the Kansas Commission on Civil Rights, effective May 1, 1978, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 23,079.01 (1981); Employment Regulations issued by Maine Human Rights

same thing indirectly by adopting the 1967 EEOC Guidelines on Religious Discrimination by reference.[157]

Because of the close relationship of many of the state civil rights statutes to the federal model, state courts have been inclined to follow Title VII precedents.[158] Thus, in *American Motors Corp. v. Department of Industry, Labor and Human Relations*,[159] the Wisconsin Supreme Court construed a general employment discrimination statute to require an employer to take reasonable steps to accommodate religious holidays of an employee, even though the statute did not expressly provide that the prohibition of religious discrimination included a duty to make reasonable accommodation.[160] In large measure, then, the foregoing analysis of the implications of Title VII for those with conscientious beliefs concerning abortion is likely to apply to general state antidiscrimination statutes. For that reason, we have chosen not to engage in extensive analysis of the state statutes.

This is not, of course, to say that state approaches have been uniform. A Michigan court, for example, recently held that a duty to afford reasonable accommodation to the religious beliefs to employees could not be inferred from that state's general

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Commission, effective Oct. 1, 1980, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 23,830 (1981); Religious Discrimination Guidelines Approved by the Maryland Commission on Human Relations, July 11, 1972, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 23,830 (1981); MASS. GEN. LAWS ANN. ch. 151B, § 4(1A) (West Supp. 1981); 4 MO. ADMIN. CODE § 180-3.050 (1980); Questions and Answers on Re-employment Inquiries issued by New Jersey Division on Civil Rights, June, 1975, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 25,649I (1981); Guidelines on Discrimination adopted by the Oklahoma Human Rights Commission, effective Mar. 2, 1977, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 26,978.06 (1981); Commission's Policies, Guidelines and Interpretations of Discrimination in Employment adopted by South Dakota Commission on Human Rights, effective Dec. 16, 1979, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 27,835.10 (1981).

157. 104 KY. ADMIN. REGS. 1:050 (1976); Interpretive Guidelines on Civil Rights Law issued by Michigan Civil Rights Commission, Sept. 26, 1972, [3] EMPLOY. PRAC. GUIDE ¶ 24,238.07 (1981); 9 MONT. ADMIN. REG. § 24.9.1408 (1980); TENN. ADMIN. COMP. § 1500-1.11 (1979). For a discussion of the EEOC Guidelines, see *supra* text accompanying notes 94-99.

158. *See, e.g.*, Wondzell v. Alaska Wood Prod., Inc., 583 P.2d 860 (Alaska 1978), *rev'd on other grounds on reh'g.*, 601 P.2d 584 (Alaska 1979); Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, *appeal dismissed*, 444 U.S. 986 (1979); Olin Corp. v. Fair Employment Practice Comm'n., 34 Ill. App. 3d 868, 341 N.E.2d 459 (1976), *aff'd*, 67 Ill. 2d 477, 367 N.E.2d 1267 (1977); Maine Human Rights Comm'n. v. Local 1361, United Paperworks Int'l. Union, 383 A.2d 369 (Me. 1978). *See generally* 91 A.L.R.3d 155 (1979).

159. 93 Wis. 2d 14, 286 N.W.2d 847 (1979).

160. *Id.* at 26-27, 286 N.W.2d at 853.

antidiscrimination statute, even though the Michigan Civil Rights Commission—an administrative body charged with handling discrimination claims—had promulgated interpretive guidelines that construed the statute as requiring reasonable accommodation when undue hardship to the employer would not result.[161] The effect of this Michigan decision is to extend even less protection to employees with conscientious beliefs affecting their work than the de minimis approach to Title VII adopted by the Supreme Court in *Hardison*. On the other hand, some states have taken approaches that are even more protective of the rights of employees than the federal standard. Guidelines adopted by the Ohio Civil Rights Commission in 1973, for example, provide that

> [a]n employer must accommodate an employee's or prospective employee's religion in a manner least burdensome to that employee or prospective employee unless such accommodation is excused due to a business necessity.
>
> 'Business necessity' entails a practice or policy essential to job performance such that no acceptable alternative practice or policy with lesser discriminatory impact exists.
>
> Since business necessity is an affirmative defense, and the nature of employment discrimination due to religion is particularly sensitive, the employer has the burden of proving that an accommodation is excused due to business necessity.[162]

Under these guidelines, an employer would appear to have an extremely strict duty to accommodate. Perhaps the phrase "no acceptable alternative" could be interpreted by reference to the "undue hardship" formula, but at least on its face it appears to call for much more. Certainly, de minimis accommodation would not appear to meet this test.

Despite the existence of state-by-state variation, the point remains that general state antidiscrimination statutes (as opposed to the conscience clause provisions discussed in the next section) are unlikely in the main to provide appreciably greater protections to those with abortion-related beliefs than does Title VII.

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161. Michigan Dep't of Civil Rights *ex rel.* Parks v. General Motors Corp., 93 Mich. App. 366, 287 N.W.2d 240 (1979).

162. Religious Discrimination Guidelines Adopted by Ohio Civil Rights Commission, Nov. 13, 1973, [3] EMPLOY. PRAC. GUIDE (CCH) ¶ 26,620 (1981).

V. Conscience Clauses

The political storms that have raged over the abortion issue during the past decade have sensitized legislators at both the federal and state levels to the plight of those who may face employment discrimination or related problems because of religious or moral objections to participation in abortion. As a result, Congress[163] and forty-four of the states[164] have passed "conscience clause" legislation, aimed at protecting both individuals and institutions from being compelled to participate in abortion procedures when such participation conflicts with conscientious beliefs.[165] From the perspective of a nurse conscientiously opposed to abortion, Title VII protections are likely to be substantially less significant than those afforded under applicable conscience clause legislation. In part, this reflects the fact that the Supreme Court's de minimis test for undue hardship has eliminated much of the bite of Title VII's religious accommodation provision. More significantly, conscience clause legislation has been drafted to deal specifically with problems arising in connection with accommodation of beliefs concerning abortion.

At present, relatively few cases have been decided under the conscience clause legislation. One of the questions that is beginning to emerge, however, is whether courts construing conscience clauses should use the de minimis analysis that has been applied under Title VII. In what follows, we will first describe existing federal and state conscience clause provisions,[166] and then argue that a de minimis approach would be out of place in this area.[167]

A. The Church Amendment to the Health Programs Extension Act of 1973

The federal conscience clause,[168] best known as the "Church amendment," provides broad protections for institutions and individuals with conscientious objections to abortion. First, it assures that the receipt of government grants, contracts, loans, or loan guarantees does not authorize courts or other public au-

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163. *See infra* text accompanying notes 168-78.

164. *See infra* text accompanying notes 179-99.

165. For a useful early analysis of conscience clauses, see Comment, *Abortion Conscience Clauses*, 11 Colum. J.L. & Soc. Prob. 571 (1975).

166. *See infra* text accompanying notes 168-253.

167. *See infra* text accompanying notes 254-303.

168. 42 U.S.C. § 300a-7 (1976 & Supp. III 1979).

thorities to require an individual recipient to participate in abortions or sterilizations, or to require any institutional recipient to make facilities available to perform abortions or sterilizations, contrary to moral beliefs.[169] Second, it provides that no entity receiving specified types of federal health care aid may engage in employment discrimination due to an individual's participation or conscientious refusal to participate in abortions or sterilizations.[170] Third, it specifies that no individual may be required to participate in any part of a government-funded health research or service program over moral objections.[171]

The leading case under the Church amendment is *Watkins v. Mercy Medical Center*.[172] Dr. Watkins, who had staff privileges at Mercy Medical Center beginning in 1967, sought damages and injunctive relief after the hospital denied his application for reappointment to the staff in 1972. He was denied staff privileges because he would not agree to abide by the Ethical and Religious Directives for Catholic Health Facilities, which prohibited certain sterilization and abortion procedures from being performed in the hospital.[173]

While the district court held that most of Watkins' claims lacked merit, it concluded that Watkins did have a claim under the Church amendment. The court explained that a

> hospital cannot discharge a staff member who religiously or morally believes that . . . [sterilization or abortion procedures] should be performed. . . . The hospital can prohibit its staff from performing sterilization procedures or abortions in the hospital, but it cannot require its staff to adhere to the religious or moral beliefs which support the hospital's policy as a condition of employment or extension of privileges.
>
> . . . .
>
> . . . Dr. Watkins is free to believe that sterilization services should be provided for the public and to perform them anywhere he is able. However, he cannot force Mercy Medical Center to allow him to perform them in its hospital.[174]

In its affirming opinion, the Ninth Circuit characterized[175] the

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169. *Id.* § 300a-7(a).
170. *Id.* § 300a-7(b).
171. *Id.* § 300a-7(c).
172. 364 F. Supp. 799 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).
173. 364 F. Supp. at 800.
174. *Id.* at 803.
175. This characterization does not coincide precisely with the published version of the lower court's opinion. There, all the relief requested by Dr. Watkins was denied. *See*

lower court's ruling as a finding that the hospital violated the Church amendment "by removing [Watkins] from the staff because of his belief that sterilizations and abortions should be performed. The judgment provided for the restoration of Dr. Watkins to staff privileges on condition that he not perform abortions or sterilizations contrary to the hospital's rules."[176]

The *Watkins* case is significant in two respects. First, it appears to recognize a private right of action under the Church amendment, at least for injunctive relief. Second, it establishes precedent for a sound analysis of the federal conscience clause. A hospital may prohibit abortions on its premises but may not discriminate against staff members merely because their beliefs (as opposed to their conduct) run counter to this policy. At the same time, medical personnel willing to participate in abortions may not force a hospital to allow its facilities to be used for abortions if that is inconsistent with morally based policies of the institution.

While the Church amendment leaves unanswered many of the more difficult questions[177] about the scope of protection and the extent of reasonable accommodation, *Watkins* suggests that the amendment provides at least a moderately workable remedy. When the threshold federal funding requirements are met—and particularly in jurisdictions in which conscience clause legislation has not yet been adopted[178]—the Church amendment provides important protections for both individuals and institutions.

B. State Conscience Clauses

As already noted, forty-four states have enacted conscience clauses that attempt to protect hospital employees who might otherwise be subject to discriminatory treatment because of their beliefs about abortion.[179] All such statutes forbid discrimi-

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id. at 803-04. Presumably, the Ninth Circuit opinion reflects aspects of the record not available in the published district court opinion.

176. 520 F.2d at 895-96.

177. Such issues are explored more fully in connection with state conscience clause legislation, *infra*, part V(B).

178. Alabama, Connecticut, Mississippi, New Hampshire, and Vermont. West Virginia has legislation exempting public employees from participating in family planning services when contrary to the employee's religious beliefs, but abortion is excluded from these services, and the typical nurse and doctor working in a hospital would fall outside the scope of the statute. W. VA. CODE §§ 16-2B-2, 16-2B-4 (1979).

179. ALASKA STAT. § 18.16.010(a) (1981); ARIZ. REV. STAT. ANN. § 36-2151 (1974);

nation against a person who refuses to participate in abortion procedures, and six of them enlarge the scope of protection to include those discriminated against because of their pro-abortion attitudes.[180] Many of the conscience clauses have been adopted as part of post-*Roe v. Wade* abortion legislation and focus exclusively on conscientious objection to abortion. A number of states, however, have extended protections to those who may object to participation in a broader range of ethically sensitive medical procedures.[181]

Most of the statutes are phrased broadly in terms of the right of a hospital employee or other person to refuse to assist in

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ARK. STAT. ANN. § 41-2560 (1977); CAL. HEALTH & SAFETY CODE § 25955 (West Supp. 1982); COLO. REV. STAT. § 18-6-104 (Supp. 1981); DEL. CODE ANN. tit. 24, § 1791 (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1982); GA. CODE ANN. § 26-1202(e) (1977); HAWAII REV. STAT. § 453-16(d) (1976); IDAHO CODE § 18-612 (1979); ILL. ANN. STAT. ch. 111½, §§ 5201-5314 (Smith-Hurd Supp. 1981-82); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1981-82); IND. CODE ANN. § 16-10-3-2 (Burns 1973); IOWA CODE ANN. § 146.1 (West Supp. 1981); KAN. STAT. ANN. § 65-443 (1981); KY. REV. STAT. § 311.800 (Supp. 1980); LA. REV. STAT. ANN. § 40:1299.31 (West 1977); ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592 (1980); MD. ANN. CODE art. 43, § 556E (1980); MASS. GEN. LAWS ANN. ch. 112, § 12*I* (West Supp. 1981); MICH. COMP. LAWS ANN. §§ 333.20181 to 333.20199 (1980); MINN. STAT. ANN. §§ 145.414, 145.42 (West Supp. 1982); MO. ANN. STAT. § 197.032 (Vernon Supp. 1982); MONT. CODE ANN. § 50-20-111 (1981); NEB. REV. STAT. § 28-338 (1979); NEV. REV. STAT. § 632.475 (1979); N.J. STAT. ANN. §§ 2A:65A-1, 2A:65A-3 (West Supp. 1981); N.M. STAT. ANN. § 30-5-2 (1978); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1976); N.C. GEN. STAT. § 14-45.1(e) (1981); N.D. CENT. CODE § 23-16-14 (1978); OHIO REV. CODE ANN. § 4731.91 (Page 1977); OKLA. STAT. ANN. tit. 63, § 1-741 (West Supp. 1981); OR. REV. STAT. § 435.485 (1981); PA. STAT. ANN. tit. 43, § 955.2 (Purdon Supp. 1981); R.I. GEN. LAWS § 23-17-11 (1979); S.C. CODE ANN. § 44-41-50 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 34-23A-12, 34-23A-13 (1977); TENN. CODE ANN. § 39-304 (1975); TEX. REV. CIV. STAT. ANN. art. 4512.7 (Vernon Supp. 1982); UTAH CODE ANN. § 76-7-306 (1978); VA. CODE § 18.2-75 (1975); WASH. REV. CODE ANN. § 9.02.080 (1977); WIS. STAT. ANN. §§ 140.42 (1974 & Supp. 1981), 441.06(6), 448.06(8) (1974); WYO. STAT. § 35-6-106 (1977).

180. CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982); IOWA CODE ANN. § 146.1 (West Supp. 1981); KY. REV. STAT. § 311.800 (Supp. 1980); MICH. COMP. LAWS ANN. § 333.20184 (1980); PA. STAT. ANN. tit. 43, § 955.2 (Purdon Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 4512.7(3) (Vernon Supp. 1982).

181. ILL. ANN. STAT. ch. 111½, § 5302 (Smith-Hurd Supp. 1981) ("protect the right of conscience of all persons who refuse to obtain, receive, or accept, or who are engaged in, the delivery of medical services and medical care"); MD. ANN. CODE art. 43, § 556E(a) (1980) ("termination of pregnancy, sterilization or artificial insemination"); MASS. GEN. LAWS ANN. ch. 112, § 12*I* (West Supp. 1981) ("abortion or any sterilization procedure"); N.J. STAT. ANN. § 2A:65A-1 (West Supp. 1981) ("abortion or sterilization"); PA. STAT. ANN. tit. 43, § 955.2(a) (Purdon Supp. 1981) ("abortion or sterilization"); R.I. GEN. LAWS § 23-17-11 (1979) ("abortion or any sterilization procedure"); WIS. STAT. ANN. § 140.42(3) (Supp. 1981) ("procedures for sterilization or the removal of human embryo or fetus"); WYO STAT. § 35-6-106 (1977) ("a human miscarriage, euthanasia or any other death of a human fetus or human embryo").

abortions and provide protection aganst discrimination during any phase of a person's employment.[182] Eleven focus specifically on discrimination at the point of hiring.[183] The statutes are typically drafted to prevent discrimination against individuals who refuse to participate in abortions, but three also provide protection for those who favor abortion.[184] In addition, eleven of the statutes prohibit discrimination against applicants to and participants in medical and other health-care schools and training programs.[185] Many of the state conscience clauses protect not

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182. The conscience clauses adopted by Kansas and Texas are representative. The Kansas conscience clause provides:

> No person shall be required to perform or participate in medical procedures which result in the termination of a pregnancy, and the refusal of any person to perform or participate in those medical procedures shall not be a basis for civil liability to any person. No hospital, hospital administrator or governing board of any hospital shall terminate the employment of, prevent or impair the practice or occupation of or impose any other sanction on any person because of such person's refusal to perform or participate in the termination of any human pregnancy.

KAN. STAT. ANN. § 65-443 (1980).

The Texas provision is similar, except that it substitutes the more narrow terms "physician, nurse, staff member or employee of a hospital" for "person." TEX. REV. CIV. STAT. ANN. art. 4512.7(1) (Vernon Supp. 1982). Other important variants in the phraseology of conscience clauses are found in CAL. HEALTH AND SAFETY CODE § 25955(a) (West Supp. 1982), KY. REV. STAT. § 311.800(c) (Supp. 1980), and MICH. COMP. LAWS ANN. § 333.20182 (1980). California includes a "prospective employee" among the protected class. Kentucky includes "any applicant for admission" to "a medical, nursing or other school," and Michigan includes a "medical student" and "student nurse." Discrimination may reach not only those who are a part of the medical profession but also those who wish to enter.

183. CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982); ILL. ANN. STAT. ch. 111½, § 5201(c) (Smith-Hurd Supp. 1981-82); IND. CODE ANN. § 16-10-3-2 (Burns 1973); IOWA CODE ANN. § 146.1 (West Supp. 1981); KY. REV. STAT. § 311.800(5)(c) (Supp. 1980); ME. REV. STAT. ANN. tit. 22, § 1592 (1980); PA. STAT. ANN. tit. 43, § 955.2 (Purdon Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 4512.7 (Vernon Supp. 1982); UTAH CODE ANN. § 76-7-306 (1978); VA. CODE § 18.2-75 (1975); WIS. STAT. ANN. § 140.42(3) (1974 & Supp. 1981).

184. IOWA CODE ANN. § 146.1 (West Supp. 1981); KY. REV. STAT. § 311.800(5)(b)-(c) (Supp. 1980); PA. STAT. ANN. tit. 43, § 955.2(b)(2) (Purdon Supp. 1981). The Texas statute, though ambiguous, arguably belongs to this group. TEX. REV. CIV. STAT. ANN. art. 4512.7(3) (Vernon Supp. 1982).

185. CAL. HEALTH & SAFETY CODE § 25955(b) (West Supp. 1982); ILL. ANN. STAT. ch. 111½, § 5307 (Smith-Hurd Supp. 1981-82); IND. CODE ANN. § 16-10-3-2 (Burns 1973); IOWA CODE ANN. § 146.1 (West Supp. 1981); KY. REV. STAT. § 311.800(5)(c) (Supp. 1980); ME. REV. STAT. ANN. tit. 22, § 1592 (1980); MASS. GEN. LAWS ANN. ch. 112, § 12*I*(West Supp. 1981); PA. STAT. ANN. tit. 43, § 955.2(b)(3) (Purdon Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 4512.7(3) (Vernon Supp. 1982); WIS. STAT. ANN. § 140.42(3) (1974 & Supp. 1981).

Descriptions of the relevant educational programs range from "educational institution" (Texas) to a "medical school or other facility for the education or training of physi-

only the rights of individuals to abstain from participating in abortions, but also the right of hospitals or other medical institutions to refuse to make their facilities available for the performance of such procedures.[186]

Fifteen states condition protection on the claimant's putting his or her objection into writing.[187] Presumably, the mere expression of objection in any form will suffice to invoke conscience clause protections in other jurisdictions. Twenty-three states require that the objection be predicated on moral, ethical, or religious grounds.[188] In the other twenty-one jurisdictions, the

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cians, nurses, or other medical personnel" (California). The California statute is typical of the language depicting the proscribed discrimination:

> No medical school or other facility for the education or training of physicians, nurses, or other medical personnel shall refuse admission to a person or penalize such person in any way because of such person's unwillingness to participate in the performance of an abortion for moral, ethical, or religious reasons.

CAL. HEALTH & SAFETY CODE § 25955.3(b) (West Supp. 1982). The only state to explicitly anticipate various forms of this kind of discrimination is Illinois. It provides that it shall be unlawful for the educational institutions in question to "deny admission because of, to place any reference in its application form concerning, to orally question about, to impose any burdens in terms or conditions of employment on, or to otherwise discriminate against" any such applicant. ILL. ANN. STAT. ch. 111 ½, § 5307 (Smith-Hurd Supp. 1981-82).

186. States providing such protection are those cited in note 179, *supra*, with the exception of Kansas, Massachusetts, Nevada, New York, Oregon, and Rhode Island. A number of states protect only private or denominational hospitals: CAL. HEALTH & SAFETY CODE § 25955 (West Supp. 1982) ("nonprofit hospital or other facility or clinic which is organized or operated by a religious corporation or other religious organization"); IND. CODE ANN. § 16-10-3-1 (Burns 1973) ("private or denominational hospital"); IOWA CODE ANN. § 146.2 (West Supp. 1981) ("hospital, which is not controlled, maintained and supported by a public authority"); Wolf v. Schroering, 541 F.2d 523 (6th Cir. 1976) (interpreting KY. REV. STAT. § 311.800 (Supp. 1980)) ("private hospital or private health care facility"); MONT. CODE ANN. § 50-20-111 (1981) ("private hospital or health care facility"); OKLA. STAT. ANN. tit. 63, § 1-741 (West Supp. 1981) ("private hospital"); S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1976) ("private or nongovernmental hospital or clinic"); TEX. REV. STAT. ANN. art. 4512.7, § 2 (Vernon Supp. 1982) ("private hospital or private health care facility"); UTAH CODE ANN. § 76-7-306 (1978) ("private and/or denominational hospital"); WYO. STAT. 35-6-106 (1977) ("private hospital, clinic, institution or other private facility").

187. ARIZ. REV. STAT. ANN. § 36-2151 (1974); CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982); COLO. REV. STAT. § 18-6-104 (Supp. 1981); GA. CODE ANN. § 26-1202(e) (1977); IDAHO CODE § 18-612 (1979); ILL. ANN. STAT. ch. 38, § 81-33 (Smith-Hurd Supp. 1981); KY. REV. STAT. § 311.800(4) (Supp. 1980); MASS. GEN. LAWS ANN. ch. 112, § 12*I* (West Supp. 1981); NEV. REV. STAT. § 632.475(1) (1979); N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 1976); PA. STAT. ANN. tit. 43, § 955.2(a) (Purdon Supp. 1981); R.I. GEN. LAWS § 23-16-11 (1979); S.C. CODE ANN. § 44-41-50 (Law. Co-op. 1976); VA. CODE § 18.2-75 (1975); WIS. STAT. ANN. § 140.42(1) (1974).

188. ARIZ. REV. STAT. ANN. § 36-2151 (1974); CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982); COLO. REV. STAT. § 18-6-104 (Supp. 1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1982); GA. CODE ANN. § 26-1202(e) (1977); IDAHO CODE § 18-612

statutory language appears to proscribe discrimination against any individual refusing to participate in abortion regardless of the grounds of his or her personal objections. Statutes may be phrased in this way to prevent conscientious objectors from being required to disclose the specific grounds of their objection or to provide the broadest possible support to those who may be disinclined to participate in abortion, whether the grounds are conscientious or not. Alternatively, statutes may have been phrased in this manner to avoid any potential establishment clause concerns associated with affording favored treatment to those who object to abortions on religious grounds.[189]

Once a legally adequate objection is lodged, most states appear to grant to the objector an unconditional legal right not to assist in abortions.[190] Six states specify that the right does not extend to certain kinds of situations, typically those involving emergency medical treatment.[191]

(1979) ("personal" grounds also suffice); ILL. ANN. STAT. ch. 38, § 81-33; ch. 111½, § 5303(e) (Smith-Hurd Supp. 1981-82); IND. CODE ANN. § 16-10-3-2 (Burns 1973); IOWA CODE ANN. § 146.1 (West Supp. 1981); KY. REV. STAT. § 311.800(4) (Supp. 1980) ("professional" grounds also suffice); MASS. GEN. LAWS ANN. ch. 112, § 12*I* (West Supp. 1981); MICH. COMP. LAWS ANN. § 333.20182 (1980) ("professional" grounds also suffice); MO. ANN. STAT. § 197.032(1) (Vernon Supp. 1982); MONT. CODE ANN. § 50-20-111(1) (1981); NEV. REV. STAT. § 632.475(1) (1979); N.M. STAT. ANN. § 30-5-2 (1978); N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 1976); N.C. GEN. STAT. § 14-45.1(e) (1981); PA. STAT. ANN. tit. 43, § 955.2(a)-(b) (Purdon Supp. 1981) ("professional" reasons also suffice); R.I. GEN. LAWS § 23-17-11 (1979); UTAH CODE ANN. § 76-7-306(1) (1978); VA. CODE § 18.2-75 (1975); WIS. STAT. ANN. § 140.42 (1974 & Supp. 1981).

189. *See infra* text accompanying note 374.

190. Presumably, an individual objecting to an abortion need only register the objection once. This question is specifically addressed by the Virginia statute, which provides that "[t]he written objection shall remain in effect until such person shall revoke it in writing or terminate his association with the facility with which it is filed." VA. CODE § 18.2-75 (1975). However, some of the state statutes could be construed to require the objection to be renewed with regard to each abortion authorized in the facility where the objector works. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2151 (1974); MASS. GEN. LAWS ANN. ch. 112, § 12*I* (West Supp. 1981); R.I. GEN. LAWS § 23-17-11 (1979). As a practical matter such a requirement makes little sense. Requiring a conscientious objector to repeatedly lodge the same objection would further no purpose other than harassment. If the concern is that some individuals may object to participation in some abortions and not others, the logical approach at the statutory level would be to require the individual to articulate the scope of his or her willingness to participate in the initial oral or written objection. Liberal amendment of initial statements ought to be allowed to accommodate changing beliefs or unforeseen circumstances.

191. CAL. HEALTH & SAFETY CODE § 25955(d) (West Supp. 1982) ("emergency situations and spontaneous abortions"); FLA. STAT. ANN. § 390.001(9) (West Supp. 1982) ("performance of a procedure which terminates a pregnancy in order to deliver a live child"); ILL. ANN. STAT. ch. 111½, § 5306 (Smith-Hurd Supp. 1981-82) ("emergency medical care"); IOWA CODE ANN. § 146.1 (West Supp. 1981) ("medical care which has as

While most states thus provide fairly broad protection for both individuals and institutions opposed to participation in abortion, only fourteen states provide explicit sanctions or remedies for violation of the rights protected by the conscience clauses.[192] Some states subject those who infringe conscience clause rights to criminal liability.[193] A number of states expressly provide for recovering damages[194] and obtaining equitable relief.[195] Illinois allows trebling of proven damages and sets a minimum $2000 award.[196] Other states allow for reinstatement of employment in addition to damages, backpay,[197] and attorney's

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its primary purpose the treatment of a serious physical condition requiring emergency medical treatment necessary to save the life of a mother"); NEV. REV. STAT. § 632.475(3) (1979) ("medical emergency situations"); OKLA. STAT. ANN. tit. 63, § 1-741(B) (West Supp. 1981-82) ("when the aftercare involves emergency medical procedures which are necessary to protect the life of the patient"); OKLA. STAT. ANN. tit. 63, § 1-741(C) (West Supp. 1981-82) ("medical procedures in which a woman is in the process of the spontaneous, inevitable abortion of an unborn child, the death of the child is imminent, and the procedures are necessary to prevent the death of the mother").

192. ALASKA STAT. § 18.16.010(b) (1981) (fine of not more than $1,000 and/or imprisonment for not more than five years); CAL. HEALTH & SAFETY CODE § 25955(d) (West Supp. 1982) (misdemeanor); ILL. ANN. STAT. ch. 111½, §§ 5201(c), 5312 (Smith-Hurd Supp. 1981-82) (treble damages not less than $2,000); IND. CODE ANN. § 16-10-3-2 (Burns 1973) (damages); MICH. COMP. LAWS ANN. § 333.20199(2) (1980) (misdemeanor); MO. ANN. STAT. § 197.032(3) (Vernon Supp. 1982) (civil action); MONT. CODE ANN. § 50-20-111 (1981) (injunction, damages); NEB. REV. STAT. §§ 28-339 to 28-341 (1979) (misdemeanor, damages, injunction); NEV. REV. STAT. § 632.475 (1979) (misdemeanor); N.Y. CIV. RIGHTS LAW 79-i(1) (McKinney 1976) (misdemeanor); OHIO REV. CODE ANN. § 4731.91(E) (Page 1977) (damages); S.C. CODE ANN. § 44-41-50(c) (Law. Co-op. 1976) (damages); TEX. REV. CIV. STAT. ANN. art. 4512.7(4) (Vernon Supp. 1982) (injunction, reinstatement, "any other relief necessary"); WYO. STAT. § 35-6-113, -114 (1977) (fine, injunction, damages).

193. ALASKA STAT. § 18-16-010(b) (1981); CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982); MICH. COMP. LAWS ANN. § 333.20199(2) (1980); NEB. REV. STAT. § 28-339 (1979); NEV. REV. STAT. § 632.475(4) (1979); N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 1976).

194. ILL. ANN. STAT. ch. 111½, § 5201(c) (Smith-Hurd Supp. 1981-82); IND. CODE ANN. § 16-10-3-2 (Burns 1973); MO. ANN. STAT. § 197.032(3) (Vernon Supp. 1982); (MONT. CODE ANN. § 50-20-111(3) (1981); NEB. REV. STAT. § 28-340 (1979); OHIO REV. CODE ANN. § 4731.91(E) (Page 1977); S.C. CODE ANN. § 44-41-50(c) (Law. Co-op. 1976); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 4 (Vernon Supp. 1982); WYO. STAT. § 35-6-114 (1977).

195. MO. ANN. STAT. § 197.032(3) (Vernon Supp. 1982) (suit in equity or other redress); MONT. CODE ANN. § 50-20-111(3) (1981) (injunctive relief); NEB. REV. STAT. § 28-341 (1979) (injunction); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 4 (Vernon Supp. 1982) ("such affirmative relief as may be appropriate"); WYO. STAT. § 35-6-114 (1977) (injunction).

196. ILL. ANN. STAT. ch. 111½, §§ 5201(c), 5312 (Smith-Hurd Supp. 1981-82).

197. IND. CODE ANN. § 16-10-3-2 (Burns 1973); S.C. CODE ANN. § 44-41-59(c) (1976); TEX. REV. CIV. STAT. ANN. art. 4512.7, § 4 (Vernon Supp. 1982).

fees.[198] Presumably, damages and appropriate equitable relief for discrimination against conscientious objectors would be available despite the lack of express provisions affording such relief. Where legislatures have adopted conscience clauses, courts are unlikely to view them as being merely precatory.[199]

The statutory framework erected through conscience clauses in the various states is obviously designed to provide protections at various critical points along professional career paths: admission into a health care training program; training; the point of hiring; assignment to a particular job; daily work assignments; scheduling of hours and work days; transfers; promotion and advancement; discipline; termination; and references for further jobs. The precise problems that are likely to arise at any one of these points vary subtly at different stages along a career path. Yet certain basic problems recur. In what follows, we explore a number of the more salient of these recurring issues.

C. *Scope of Permissible Inquiry Concerning Conscientious Beliefs*

The threshold conundrum in many accommodation situations, particularly at the earlier stations along a career path, concerns the extent to which an employer can probe the beliefs of an employee or prospective employee. Conscience clauses in eleven of the states specifically address this question at the point of a person's application for employment.[200] One state, Illinois, prohibits questions about beliefs concerning abortions in connection with application to medical school or other health care training program.[201] Interestingly, none of the states expressly addresses questions about the appropriateness of soliciting or disclosing such information in reference letters or letters of recommendation from those who have worked with an individual at a prior job or school. This appears to be a particularly

198. ILL. ANN. STAT. ch. 111½, § 5312 (Smith-Hurd Supp. 1981-82); NEB. REV. STAT. § 28-340 (1979).

199. The development of remedies under the early civil rights acts may provide some guidance in this regard. *See generally* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1972); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974).

200. *See supra* note 183.

201. ILL. ANN. STAT. ch. 111½, § 5307 (Smith-Hurd Supp. 1981-82); *see supra* note 185.

obvious oversight in a statutory structure such as Illinois', where the scope of permissible questioning of an applicant is otherwise extremely restrictive.

The problem with respect to the scope of permissible inquiry is threefold. Forbidding such questions altogether can be highly impractical. The extreme case is presented by the situation in which the employing entity is an abortion clinic,[202] but the problem is a more general one. Even an employer who is anxious to accommodate sensitivities concerning participation in abortion can scarcely do so if he does not know what the sensitivities are. Unfortunately, however, permitting such questions may allow an employer to discriminate against a job applicant even when the employer could accommodate the applicant's religious beliefs but chooses to hire someone else in order to avoid any possible inconvenience.[203] Finally, in addition to the employer's practical need for information and the risk that such information may be abused, there are difficult questions about the nature of the applicant's right to privacy. To what extent does an individual have a right to refrain from disclosing his inmost beliefs, and to what extent is an employer obligated to respect not only the beliefs themselves, but the individual's right to withhold disclosure of those beliefs?

The approaches to these problems vary considerably from state to state. The most rigorous constraints on the scope of permissible inquiry have been adopted in Illinois. The pertinent statute there declares it unlawful

> for any public or private employer, entity, agency, institution, official or person, . . . *to place any reference in its application form concerning, to orally question about,* to impose any burdens in terms of conditions of employment on, or to otherwise discriminate against, any applicant . . . on account of the applicant's refusal to receive, obtain, accept, perform, counsel, suggest, recommend, refer, assist or participate in any way in any forms of medical care contrary to his or her conscience.[204]

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202. In Pennsylvania, the statutory provisions that proscribe discrimination against those with conscientious scruples against participation in abortion contain an exception for "any health care facility operated exclusively for the performance of abortion or sterilization or directly related procedures" and for separate clinics operated for such purposes. By necessary implication, such facilities must be allowed to ask questions about job applicants' conscientious beliefs. PA. STAT. ANN. tit. 43, § 955.2(3) (Purdon Supp. 1981).

203. For further discussion of this issue, *see supra* text accompanying notes 131-32.

204. ILL. ANN. STAT. ch. 111½, § 5307 (Smith-Hurd Supp. 1981-82) (emphasis

This statute is unrealistically strict. By its terms, it would prevent even those employers anxious to make good faith efforts to accommodate the conscientious objections of their employees from obtaining the factual data about employees necessary to determine who should be accommodated, and in what manner.

California's statute is more flexible. After proscribing discrimination on the basis of "refusal for moral, ethical, or religious reasons to participate in an abortion," it provides:

> No provision of this chapter prohibits any hospital, facility, or clinic which permits the performance of abortions from inquiring whether an employee or prospective employee would advance a moral, ethical, or religious basis for refusal to participate in an abortion before hiring or assigning such a person to that part of a hospital, facility, or clinic where abortion patients are cared for.[205]

While California statutory language is a brave attempt to protect employees and employers in a sensitive area, it is possible that employers could avoid the "spirit of the law" by defining "that part of a hospital, facility, or clinic where abortion patients are cared for" so broadly that it obliterates all possibility of inconvenience or necessity to accommodate employee beliefs. Such a broad definition could encompass the entire obstetrics and gynecology department, the entire surgery department, the laboratory, and even the admissions, clerical, housekeeping, or food preparation departments of a hospital. In addition, at least one study has shown that some nurses who object to participation in the actual abortion procedure are still comfortable caring for abortion patients before or after the procedure.[206] Thus, the California delineation between parts of a hospital or facility ignores the possibility that some employees could work in a part of the facility where abortion patients are cared for and yet not participate in abortions. In addition, the California statute ignores the possibility that an employee may feel comfortable about participating in some abortions but not in others. As the results of our study demonstrated, the circumstances under which nurses object to participation in abortions may be highly differentiated.[207] For example, a certain nurse could participate

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added).

205. CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982).

206. Allen, Reichelt & Shea, *Two Measures of Nurses' Attitude Toward Abortion as Modified by Experience*, 15 MED. CARE 849, 852, 855-56 (1977).

207. *See supra* text accompanying notes 57-60.

in an abortion necessary to save the pregnant woman's life, even though her religious beliefs would not allow her to participate in an abortion sought for socioeconomic reasons.

In Iowa, the issue of the permissible scope of questions to job applicants is not expressly covered by statute. However, that state's conscience clause has been construed in an attorney general's opinion to allow certain questions: "A medical employer may ask potential employees if the employee is willing to assist in abortions prior to employment when that is a duty of the job for which the individual is being considered."[208] Iowa's duty-specific approach avoids some of the problems inherent in the California statute. Nevertheless, it leaves open the possibility that an employer could avoid any need to accommodate by defining jobs to include abortion-related duties, when in fact an employee could effectively perform such a job without participating in abortions if the employer took reasonable steps to accommodate the employee's beliefs.

Most states have not yet directly addressed the issue of the extent to which employers' questioning about conscientious beliefs regarding abortion is appropriate. What is needed in this area is a realistic recognition that accommodation is impossible if employers are required to act blindly, coupled with constraints designed to prevent employers from making hiring or assignment decisions with the aim of avoiding rather than resolving the problem of accommodation.

D. The Applicability of Conscience Clauses to Indirect Participation in Abortion Procedures

For the most part, conscience clause legislation has been drafted with the primary aim of protecting those who might otherwise be directly involved in the termination of a pregnancy from the need to violate conscientiously held beliefs by participating in such procedures. In fact, however, there is a broad spectrum of types of involvement in abortion procedures. In addition to those directly involved, such as the doctor or nurse who injects the saline or scrapes the uterus and removes the fetus, there may be additional personnel who help prepare the woman for the procedure, monitor her progress during the abortion process, or assist her during her recuperation. In some cases, an anesthesiologist may participate. Less directly involved are those

208. IOWA CODE ANN. § 146.1 note (West Supp. 1981).

who perform a broad range of support functions at the typical hospital: admitting and accounting personnel, the food services staff, and janitorial workers. The outer limits of attenuated connection are suggested by *Haring v. Blumenthal*,[209] discussed above,[210] in which an IRS tax lawyer successfully complained of employment discrimination growing out of his refusal to review tax exemption applications for abortion clinics.

A lower Pennsylvania court was recently confronted with a question involving the scope of participation covered by conscience clause legislation. In *Spellacy v. Tri-County Hospital*,[211] the plaintiff alleged that she was discharged from her job as a part-time admissions clerk as a result of her refusal to participate or cooperate in abortions. Mrs. Spellacy sought to change her job so that she would be required neither to have any personal contact with abortion patients, nor to participate in any clerical or admission procedures for abortion patients. The hospital attempted to accommodate Mrs. Spellacy's objections and offered her four different jobs within the hospital, all of which she refused.[212]

The *Spellacy* court referred to regulations promulgated under the state's conscience clause, which stated that ancillary, clerical, or recordkeeping tasks did not constitute cooperation in abortion and thus were not protected under the statute.[213] Because Mrs. Spellacy's duties fit within the "ancillary" and "clerical" categories, the court held that the hospital had no duty, under the conscience clause, to accommodate her beliefs.[214] In the alternative, the court held that even if the hospital had a duty to accommodate, it had met that obligation by offering the plaintiff a variety of alternative positions.[215]

The *Spellacy* decision points out two difficulties that can arise under conscience clause legislation. First, an employee must be reasonably willing to accept suitable alternative work tendered by the employer in a good faith effort to solve the employee's conflict.[216] There came a time in the *Spellacy* situation

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209. 471 F. Supp. 1172 (D.D.C. 1979).

210. *See supra* text accompanying notes 143-53.

211. 18 Empl. Prac. Dec. (CCH) ¶ 8871 (Pa., C.P. Del. County 1978), *aff'd*, 261 Pa. Super. 459, 395 A.2d 998 (1978).

212. *Id.* at 5604.

213. *Id.* at 5605.

214. *Id.*

215. *Id.*

216. For further discussion of this type of difficulty, *see infra* text accompanying

when the plaintiff had simply rejected one too many reasonable accommodation offers, and her employer could not be expected to continue generating new ones. More important at this point is the question of who is to decide whether a particular activity is too remote from direct participation in abortion procedures to warrant conscience clause protections. In Pennsylvania, the administrative agency charged with promulgating regulations interpreting the state's conscience clause took this role upon itself. By restricting the definition of "performing, participating in, or cooperating in abortion" under the statute to direct involvement, the agency in effect concluded that the moral conflict felt by Mrs. Spellacy was not significant enough to deserve protection, because of its remoteness from the abortion itself. Obviously, the agency's reading of the statute is not implausible. But if the aim of the conscience clause is to protect individuals who experience work-related conflicts as a result of conscientious objections to abortion, the protection ought to be defined by reference to what the employee sees as a conflict, not by reference to what an administrativee agency thinks is the legitimate scope of acceptable conflict situations. Admittedly, this may enlarge the number of individuals with legally cognizable conflicts, but it seems more reasonable to bring the full range of potential problems within the purview of the law and then to deal with problems of reasonable accommodation than simply to define a significant range of problems out of legal existence.

To a considerable extent, resolution of "scope of participation" problems will depend on the phrasing of the applicable conscience clause. The most commonly used phrase extends protections to all who "assist or participate in" abortions.[217] Both the terms "assist" and "participate" are vague with respect to those performing auxiliary support services. They would clearly apply to medical personnel actually performing the abortion or physically involved in the procedure (e.g., an anesthesiologist), and at least the term "assist" would apply to someone helping during the preparation or recuperation stages. Whether the terms would extend as far as admitting clerks and other remote support personnel is more questionable, as the gloss given similar terms in *Spellacy* suggests.

Formulations diverge from the frequently used "assist or

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note 302.

217. *See, e.g,* IDAHO CODE § 18-612 (1979).

participate in" phrase either by broadening or narrowing the range of participants entitled to conscience clause protection. Thus, the phrase "perform or participate in," found in Arkansas[218] and Delaware[219] statutes, is slightly narrower, in that it stresses the performance dimension of involvement and deemphasizes assistance.[220] Much the same can be said of the Maryland approach, which limits protection to those who "perform or participate in or refer to a source for such medical procedure."[221] This formulation simply broadens the "perform or participate" coverage to protect those who object to referring patients. Providing a referral is obviously a form of "assistance," but is equally obviously not the only form of potential assistance. Thus the Maryland approach is narrower than the more pervasive "assist or participate." California's "directly participate in"[222] is even narrower; it appears to rule out indirect support services.

For the most part, divergence from the "assist or participate" formula broadens the range of coverage. Texas, for example, uses the phrase "perform or participate, directly or indirectly."[223] The use of the term "indirectly" negates any implication that the conscience clause can be invoked only by those physically involved in the abortion process. The Missouri statute, which protects specified medical personnel who "treat or admit for treatment ,"[224] might protect an admitting clerk such as Mrs. Spellacy, but would fail to protect a variety of other support personel whose claims to protection are arguably just as strong. Probably the broadest protections are provided by the Louisiana and Illinois statutes, which protect those who might be called upon to "recommend, counsel, perform, assist with or accommodate" abortion (Louisiana)[225] or to "receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of medical care con-

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218. ARK. STAT. ANN. § 41-2560(a) (1977).

219. DEL. CODE ANN. tit. 24, § 1791(a) (1981).

220. Similarly, the phrase "participate in" used by Alaska, Arizona, and Colorado, may be somewhat narrower than "assist or participate in"—depending on how flexible the term "participate" is deemed to be. ALASKA STAT. § 18.16.010(a) (1981); ARIZ. REV. STAT. ANN. § 36-2151 (1974); COLO. REV. STAT. § 18-6-104 (Supp. 1981).

221. MD. ANN. CODE art. 43, § 556E(a) (1980).

222. CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982).

223. TEX. REV. CIV. STAT. ANN. art. 4512.7(1) (Vernon Supp. 1982).

224. MO. ANN. STAT. § 197.032(1) (Vernon Supp. 1982).

225. LA. REV. STAT. ANN. § 40:1299.31(A) (West 1977).

trary to his or her conscience" (Illinois).[226]

In construing the scope of participation features of particular conscience clauses, courts should bear two things in mind. First, conscience clause legislation has generally been adopted as remedial legislation and, as such, should be liberally construed.[227] Second, from the perspective of the employee with the conflict, even remote forms of participation may conflict with moral beliefs. Such an employee might reasonably believe that remote participation would link him or her to objectionable abortion procedures, just as remote participation in a crime may generate liability of an accomplice or co-conspirator. The fact that a legislature or an administrative body does not believe conflicts are likely to arise in such cases does not resolve the difficulty for the objecting employee. If some reasonable way to accommodate even hypersensitive beliefs exists, the overall objectives of most conscience clauses would be best achieved by encouraging such accommodation.

E. Emergency and Other "Unobjectionable" Abortions

A small number of states (currently six) limit the applicability of their conscience clauses in a narrow range of circumstances in which normal conscientious objections to abortion are thought not to apply. Five states have statutes providing that normal conscience clause protections are not available in medical emergency situations.[228] In three of the five jurisdictions,

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226. ILL. ANN. STAT. ch. 111½, § 5305 (Smith-Hurd Supp. 1981-82). In addition to its broad approach to the issue of remoteness of participation, the Illinois statute raises a question at the opposite end of the participation continuum: What of the most intimately involved participant of all—the expectant woman? A scenario in which this type of question might arise is suggested by *In re* Smith, 16 Md. App. 209, 295 A.2d 238 (1972). In that case, a pregnant minor appealed from the decision of a juvenile court placing her in the custody of her mother and specifically requiring her to submit to abortion procedures her mother wished her to obtain. The appellate court reversed the decision of the juvenile court and allowed the minor to veto her mother's demands. While there can be little doubt that a minor has at least as great a right to veto an abortion as she may have to obtain one under appropriate circumstances despite parental objections, *cf.* Bellotti v. Baird, 443 U.S. 622 (1979), it probably makes more sense to handle this type of problem in the context of informed consent rather than conscience clause provisions.

227. *See* 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 60.01, at 29-30 (4th rev. ed. 1974).

228. CAL. HEALTH & SAFETY CODE § 25955(d) (West Supp. 1982); ILL. ANN. STAT. ch. 111½, § 5306 (Smith-Hurd Supp. 1981-82); IOWA CODE ANN. § 146.1 (West Supp. 1981); NEV. REV. STAT. § 632.475(3) (1979); OKLA. STAT. ANN. tit. 63, § 1-741(B)-(C) (West Supp. 1981).

"medical emergency" is left undefined.[229] In Iowa and Oklahoma, however, the statutes make it clear that the emergencies contemplated are limited to those situations in which the life of the mother is threatened.[230] The sixth state, Florida, has a provision in its conscience clause statute that makes the statute inapplicable "to the performance of a procedure which terminates a pregnancy in order to deliver a live child."[231] California's conscience clause is inapplicable in situations involving spontaneous abortions.[232] In a similar, if somewhat narrower vein, Oklahoma's statute does not apply to spontaneous and inevitable abortions in which the death of the child is imminent and an abortion is necessary to prevent the death of the mother.[233]

The reasoning behind such statutes is apparent: medical personnel ought not to be excused from participation in abortions in emergency situations when the abortion would be more properly characterized as a miscarriage, or when, as in a cesarean section, the aim is to deliver a live child. But although the reasoning is clear, a question remains: Is there any genuine need for such provisions?

Of the nurses sampled in our study, at most 10.8% thought abortion would not be justified during the first trimester if the life of the mother was in jeopardy. Parallel figures for the second and third trimesters were 22.7% and 44.7% respectively.[234] With respect to situations threatening the physical health of the mother, at most 19.3% thought abortion would be unjustifiable during the first trimester, 36.0% during the second trimester, and 62.6% during the third.[235] Objection levels to assistance with spontaneous abortions or cesarean sections would presumably be much lower. While the objection levels with respect to third trimester abortions are fairly high, they are considerably lower than objection levels with respect to non-emergency abor-

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229. CAL. HEALTH & SAFETY CODE § 25955(d) (West Supp. 1982); ILL. ANN. STAT. ch. 111½, § 5306 (Smith-Hurd Supp. 1981-82); NEV. REV. STAT. § 632.475(3) (1979).

230. IOWA CODE ANN. § 146.1 (West Supp. 1981) ("emergency care necessary to save the life of a mother"); OKLA. STAT. ANN. tit. 63, § 1-741(B)-(C) (West Supp. 1981-82) ("when the aftercare involves emergency medical procedures which are necessary to protect the life of the patient," and when "a woman is in the process of the spontaneous, inevitable abortion of an unborn child, the death of the child is imminent, and the [medical] procedures are necessary to prevent the death of the mother").

231. FLA. STAT. ANN. § 390.001(9) (West Supp. 1982).

232. CAL. HEALTH & SAFETY CODE § 25955(d) (West Supp. 1982).

233. OKLA. STAT. ANN. tit. 63, § 1-741(c) (West Supp. 1981-82).

234. *See supra* Table 3 at p. __.

235. *Id.*

tions.[236] And since nursing personnel tend to be less accepting of abortion than other medical personnel,[237] the other groups are likely to encounter even fewer conflict situations. None of this implies that conflict situations cannot still arise, but it does show a high likelihood of being able to accommodate a conflict by having nonobjecting personnel handle emergency situations. This suggests that, at the very least, "emergency statutes" should be redrafted to relieve employers of accommodation responsibilities only if the emergency goes not only to the status of the mother's health but also to a shortage of alternative personnel. In the unlikely event of someone objecting to participation in a spontaneous abortion (e.g., a nurse who is skeptical that the process is really spontaneous), or in a late abortion (ostensibly aimed, say, at saving the life of the fetus, but when the prospects of survival are remote), ease of accommodation through swapping would be even greater.

In the conflict situations that remain, it is not clear that it makes sense to withhold conscience clause protections. Consider the plight of a devout Catholic nurse who is the lone person available to assist with a delivery in which it suddenly becomes apparent that a choice must be made between saving the life of the mother and saving the fetus. For purposes of analysis, it is not necessary to specify the precise medical details of the situation in which such a dilemma might arise. It is sufficient to assume that the situation poses the kind of dilemma in which Catholic theology would condemn abortion, even though it seems certain that if the nurse does nothing, the child may live, but the mother will definitely die.[238] For the devout nurse, any sanctions the employer might wield in this context (termination, a cross claim in a wrongful death action, etc.) would tend to pale in comparison with the prospects of excommunication[239] and possibly even more severe sanctions in the hereafter. Even penal sanctions are likely to be rather ineffective in this context. And even if such sanctions were effective, would they be legitimate? Perhaps so. Sacrifice of human life has generally been regarded as the clearest case in which state interests could override

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236. *Id.*

237. *See supra* text accompanying note 42.

238. For a discussion of the Catholic theology in question, see G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 192-207 (1957).

239. *See* O'Donnell, *A Traditional Catholic's View*, in 1 ABORTION IN A CHANGING WORLD 34, 37 (R. Hall ed. 1970).

deeply held religious beliefs.[240] But assuming the pertinent conscience clause deprives the devout nurse of protection in this emergency, the *Antigone*-like quandary into which the nurse is thrust pleads that her conduct be treated, if not as justified, at least as excused.

F. Accommodation of Changing Views

The analysis of conscience clause issues to this point has assumed that a particular individual's beliefs are stable over time. But that is often not the case. Comments from the respondents to our survey suggested a variety of circumstances in which beliefs might change. Perhaps the most obvious possibility is religious conversion. One respondent indicated that she had assisted with abortions and had been heavily involved with Planned Parenthood, but had subsequently experienced a religious conversion and had come to view abortion as morally wrong. Alternatively, the experience of working with abortions may lead to changed views, as suggested by the following comment from another survey respondent:

> Before I worked . . . on a gyne ward, I had no feelings on abortion—I didn't believe in them for myself, but I thought everyone else should be able to decide for themselves. After I worked with abortions and saw the fetus in the bottles and realized that the mother's only counseling was that she would have her uterus scraped of its "contents" I changed my mind. We were not to mention fetus or let mother see aborted fetus (it might upset the mother). I had no trouble getting off the ward—*I only worked there about 3-4 months but I changed from not caring who gets abortions to being completely against them.*[241]

A closely related situation involves the problem of psychological burn-out. A respondent currently involved in curriculum consulting and teaching at a school of nursing indicated that some

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240. *See, e.g.*, Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964) (sustaining order authorizing a hospital to administer blood transfusions to save life of a mother opposed to transfusions on religious grounds), *cert. denied*, 337 U.S. 978 (1965). *But see In re* Osborne, 294 A.2d 372 (D.C. Ct. App. 1972) (refusing to order life-saving transfusion). *See generally* Pepper, *The Case of the Human Sacrifice*, 23 ARIZ. L. REV. 897, 922 (1981).

241. Emphasis added. One of the more notorious changes of heart of this sort involved Dr. Bernard Nathanson, who at one time served as director of the largest abortion clinic in the world, but later became convinced on nonreligious grounds that abortion was wrong. *See* B. NATHANSON & R. OSTLING, ABORTING AMERICA at xi (1979).

nurses

> may be equipped to deal with their practice in abortion care for a period of time and then be unable to tolerate it. . . . The individuals who work in such situations, so morally heavy and emotionally-laden, may also need periodic work assignments to less taxing areas so that burn-out does not occur. I believe that in nursing, when we find individuals who are willing to do the 'hard' work, we lean on them too hard; we overuse them, we abuse them until they no longer have the skills to cope with the job demands and then they leave—they either leave the hospital's employ or they leave nursing, disillusioned.

Examples could be multiplied, but those cited are sufficient to suggest the existence of a continuum with the causes of changed beliefs ranging from religious conversion, through changed perceptions of the moral significance of the procedure and burn-out, to the development of a distaste for abortion work as a matter of personal preference. The question, then, is the extent to which conscience clauses should afford protection to nurses at various points along this continuum.

Swanson v. St. John's Lutheran Hospital[242] is one of the few cases that has dealt squarely with this issue. *Swanson* involved a nurse-anesthetist who claimed she had been wrongfully discharged due to her refusal to continue assisting in sterilization procedures. The hospital-employer argued that her willingness to participate in such procedures in the past "demonstrated she had 'flexible' religious principles and scruples"[243] and accordingly should not be allowed to avail herself of conscience clause protection.[244] The facts indicated that the week before her final refusal to participate in additional sterilizations, she assisted in a dilatation and curettage procedure, which she learned at the last minute had been given abortion clearance. Observation of the removal of the fetal tissue caused her to be "horrified and very upset,"[245] and may have solidified her opposition to sterilization procedures. Reasoning that "it seems natural that a person's concept of the propriety or morality of a procedure or situation might change from time to time,"[246] the court held that

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242. 597 P.2d 702 (Mont. 1979).

243. *Id.* at 709.

244. *See id.* Montana's conscience clause has parallel provisions covering conscientious objection to participation in sterilization and abortion procedures. *Id.* at 704.

245. *Id.*

246. *Id.* at 709.

"[t]he right given by the statute is unqualified, irrespective of past participation."[247]

Although not expressly addressed by the court, the consideration that appears to make *Swanson* a hard case is determining whether Ms. Swanson's ultimate views on sterilization reflected a genuine change in religious or moral outlook or whether she was simply a victim of upset or "burn-out." The distinction is important because Montana's statute, like most conscience clauses, keys protections to refusal to participate "because of religious beliefs or moral convictions."[248] An employee's decision not to participate in any more abortions because she had become repulsed by them or had tired of participation would not be protected by the typical statute. The court in *Swanson* apparently concluded that there was sufficient moral and religious basis for Ms. Swanson's refusal to participate in further sterilizations to warrant invocation of conscience clause protections. Given the factual assumption, the court's conclusion is sound because Montana's statute (like most others) assumes that the moral or religious beliefs that trigger conscience clause protections are those held at the time of refusal to participate—not at some earlier time.

One of the more awkward problems in the area of changing beliefs involves the situation in which an employee develops conscientious beliefs opposing abortion after accepting employment in which it is clear at the time of acceptance that participation in abortion procedures will be expected. A nurse, for example, might accept work in a major public hospital, knowing that a large number of abortions are performed there and that she might be expected to participate. She might even assure her employer, in perfectly good faith, that she has no qualms about participation in abortions, and be hired on the basis of that representation. (Assume, for the moment, that the employer obtains this information without violating any state or federal requirements.)[249] If the nurse experiences a subsequent change in her conscientious beliefs, whether as a result of religious or other experiences, may she at that time invoke conscience clause protections? Not surprisingly, the answer depends on the facts of the particular case. If the position involved is one in which willing-

247. *Id.*

248. MONT. CODE ANN. § 50-20-111(2) (1981), *quoted in* 597 P.2d at 704.

249. *See supra* text accompanying notes 131-32 and 200-08.

ness to participate in abortion is a bona fide occupational qualification (BFOQ)[250]—i.e., if willingness to participate in abortions is reasonably necessary to the normal operation of that particular business or enterprise[251]—the risk of changed beliefs ought to be borne by the employee. On the other hand, if willingness to participate in abortions were merely a desirable but not a necessary characteristic for a prospective employee, there is really no reason why the employer should not exert reasonable efforts to accommodate the changed circumstances in the life of the employee.[252] To allow employers to treat good faith representations[253] about the lack of conscientious beliefs as irrevocable waivers of conscience clause protections would be inconsistent with the basic purpose of most such statutes—to protect medical personnel from being coerced to violate sincerely held conscientious beliefs, whenever or however those beliefs arose.

G. Reasonable Accommodation

While the range of interpretive questions raised by conscience clause litigation is broad, no question is more central than what constitutes reasonable accommodation. Analysis in several of the preceding sections has suggested that reasonable accommodation is the real question that lies behind a number of other problems. Thus, we argued that "scope of participation" issues should be construed broadly so that the maximal range of individuals with potential conflicts might be able to invoke "reasonable accommodations" protections.[254] We also suggested that "reasonable accommodations" may even be possible in emer-

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250. *See supra* text accompanying notes 131-32.

251. *See* Title VII, § 703(e), 42 U.S.C. 2000(e) (1976 & Supp. III 1979).

252. When the shoe is on the other foot, and the changed circumstances are those of the institution, hospital administrators apparently do not feel it is inappropriate to expect employees to adjust to those circumstances. For example, one of our respondents indicated she had worked for some time in a state hospital. Because of conscientious objections to abortion, she specifically requested at the beginning of her employment that she be given no abortion patients. However, as time passed, it developed that she was the only Registered Nurse in the gynecology department of her hospital (at least on her shift), and thus she fell into the role of the primary care giver for a number of abortion patients. She indicated that she was able to give good care, but that afterwards she would become very upset. If medical personnel are in fact expected by hospitals to respond to needs with some flexibility in this type of situation, surely it is not unreasonable to expect hospital administrators to show some flexibility in return.

253. Of course, if the representations were fraudulent or misleading, there would probably be independent grounds for termination.

254. *See supra* text accompanying notes 216-17, 227.

gency situations.[255] The meaning of this convenient cipher for the most difficult conscience clause problems must now be worked out. Our analysis proceeds in two stages. We first argue that conscience clauses impose much stricter accommodation demands than Title VII and then suggest a number of factors that bear on whether specific accommodation efforts are reasonable.

1. Degree of accommodation required

To date, relatively few courts have specifically explored the meaning of reasonable accommodation in the context of conscience clause statutes. In view of the large number of states that have adopted such provisions,[256] and the relatively large number of nurses who may be experiencing conflicts,[257] the paucity of precedent is not likely to endure. As long as it persists, however, courts may be tempted to borrow the "undue hardship" test for reasonable accommodation established by Title VII and, what is worse, to borrow the de minimis gloss on that test articulated by the Supreme Court in the *Hardison* case.[258]

The allure of this approach is evident in *Kenny v. Ambulatory Centre of Miami, Florida, Inc.*,[259] the most recent case dealing with this issue. In *Kenny*, an operating room nurse claimed she had been demoted in violation of her right against religious discrimination for refusing to assist with abortions. Initially, when Kenny objected to participating in abortions, she was able to find another nurse who would swap duties with her during such procedures. After some time, however, she was no longer able to find a substitute.[260] Continued refusal to participate in abortions led to Kenny's demotion.[261] The court ultimately concluded that the employer had failed to establish that "additional accommodation efforts would have caused undue hardship."[262] Only sixteen percent of the procedures performed at the center were of a gynecological nature, and there was no showing that

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255. *See supra* text accompanying note 237.

256. *See supra* note 179.

257. *See supra* text accompanying note 9.

258. *See generally supra* Section IV.

259. 400 So. 2d 1262 (Fla. Dist. Ct. App. 1981).

260. *Id.* at 1263.

261. *Id.*

262. *Id.* at 1266. The dissenting judge argued that there was substantial evidence in the record supporting the lower court's determination that the demotion was based on financial necessity, "although having a spin-off color of discrimination." *Id.* at 1264, 1267.

schedules could not have been adjusted to accommodate Kenny's beliefs.[263]

In reaching its result, the court analyzed not only Title VII precedents, including *Hardison*, but also a variety of state court decisions involving general state civil rights statutes proscribing religious discrimination in employment. Summarizing the results of this analysis, the court stated:

> Our evaluation of the alternatives, that is, whether to apply the federal standard requiring reasonable accommodation unless undue hardship exists, or to apply the more stringent standard of disallowing discrimination regardless of the cost, impels us to accept the former.[264]

There are two problems with this analysis. First, it is not at all clear why the court assumes that there is no middle ground between Title VII's de minimis approach and an absolute duty to accommodate.[265] Second, despite the court's sensitivity to the fact that state and federal standards of accommodation might vary, the court failed to recognize the even stronger likelihood that standards of accommodation under conscience clause legislation could be expected to be substantially more rigorous than those under general (state or federal) civil rights legislation.

There are, no doubt, similarities between general civil rights statutes banning religious discrimination and conscience clause provisions: the latter relate to the former in a sense as species to genus. But it does not follow that the standards of accommodation for the generic problem are adequate or appropriate for handling the special case posed by the conscientious beliefs of medical personnel concerning abortion and other sensitive medical procedures. As will become apparent in what follows, conscience clause statutes tend to impose much stiffer requirements on employers with respect to the accommodation of conscientious beliefs than Title VII and general state civil rights statutes. In part, this difference may be justified by reference to the fact that the general legislation applies to a much broader range of employees and employment situations than conscience clauses. Legislatures and courts may have deeper concerns about excessive or unforeseen impacts in connection with the general

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263. *Id.* at 1266-67.

264. *Id.* at 1266.

265. The source of this unnecessarily extreme position is not apparent from the decision.

legislation, and accordingly be more reluctant to impose rigorous accommodation requirements in that context. Moreover, the nature of the problem with which conscience clauses deal and the typical objectives of legislators in adopting them call for stricter interpretation of their accommodation requirements. General antidiscrimination legislation tends to start with the assumption that employers may structure the work environment to achieve their legitimate business objectives, so long as they do not differentiate among employees or prospective employees except in ways mandated by the predetermined objectives. In contrast, conscience clause legislation by its very nature assumes that employers ought to adjust their priorities to accommodate certain types of employee beliefs. A conscience clause statute that proscribes discrimination on the basis of refusal to participate in particular medical procedures obviously fails to give unfettered respect to an employer's autonomy in structuring work it has chosen to perform. The idea of accommodation is logically required by the nondiscriminatory norm expressed by the conscience clause.

Of course, as broader conceptions of an employer's obligation not to discriminate under general statutes gain currency, there is an increasing tendency to read a duty to accommodate into general nondiscrimination statutes. Congressional adoption of the reasonable accommodation provisions of Title VII can be viewed as part of this development, as can the trend among state courts toward reading reasonable accommodation requirements into general civil rights statutes, even though the statutes lack such provisions.[266] But the general point remains: the basic expectation of accommodation is much stronger in the conscience clause area than under general antidiscrimination statutes. Because the difficulties posed by conscientious objection to abortion are much narrower in scope than the general problem of employment discrimination, and because the intensity of the disapproval particular individuals may feel for abortion and the

266. *See, e.g.*, Wondsell v. Alaska Wood Prod. Inc., 583 P.2d 860 (Alaska 1978), *rev'd on other grounds on reh'g*, 601 P.2d 584 (Alaska 1979); Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, *appeal dismissed*, 444 U.S. 986 (1979); Olin Corp. v. Fair Employment Practice Comm'n, 34 Ill. App. 3d 868, 341 N.E.2d 459 (1976), *aff'd*, 67 Ill. 2d 466, 367 N.E.2d 1267 (1977); Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369 (Me. 1978); Michigan Dep't of Civil Rights *ex rel.* Parks v. General Motors Corp., 412 Mich. 610, ___ N.W.2d ___ (1982). *But see* American Motors Corp. v. Department of Indus., Labor & Human Relations, 101 Wis. 2d 337, 305 N.W.2d 62 (1981).

political divisiveness associated with the issue are, at this point, much greater, legislatures have tended to view the plight of those with moral and religious qualms about abortion with particular sympathy. As a result, they have tended to impose more exacting requirements in the conscience clause area.

Another significant difference between general civil rights legislation and conscience clauses—one that graphically reflects basic differences in legislative intent—has to do with union seniority systems. Title VII contains a provision that expressly excepts differential treatment based upon a "bona fide seniority or merit system" from the act's employment discrimination bans.[267] The existence of this provision has played an important role in insulating both employers and unions from charges of inadequate accommodation of religious beliefs when alternative accommodation measures would have involved violations of seniority provisions of collective bargaining agreements. In *Trans World Airlines, Inc. v. Hardison*,[268] for example, one way Hardison's desires to celebrate a Saturday sabbath might have been accommodated would have been to assign other workers with greater seniority to work in his place. The Court cited the existence of the seniority system exception as proof that "reasonable accommodation" under Title VII need not go that far.[269] In contrast to Title VII, *none* of the conscience clause statutes makes any exception with regard to seniority systems. Thus, the fact that accommodating a junior employee's moral beliefs concerning abortion might conflict with seniority rules would not defuse an employer's obligation to accommodate under a conscience clause. If one accepts *Hardison*'s conclusion that the effect of the seniority system exception is to limit accommodation under Title VII to accommodation within the confines of a seniority system, it is a short step to saying that Congress only intended to demand de minimis accommodation. The fact that there is no statutory basis for a parallel argument in the conscience clause context reinforces the conclusion that the legislatures expected employers to make more substantial accommodations.

Still another distinguishing feature of conscience clauses has

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267. 42 U.S.C. § 2000e-2(h) (1976). The Supreme Court has recently reemphasized the significance of the seniority exception under Title VII by holding that the exception is not limited in applicability to bona fide seniority systems adopted prior to Title VII. American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364, 4367-68 (U.S. Apr. 15, 1982).

268. 432 U.S. 63 (1977), discussed *supra* in text accompanying notes 120-30.

269. *Id.* at 81-83.

to do with the nature of the entire complex of interacting rights typically covered by such provisions. The aim of general civil rights statutes forbidding religious discrimination is to ensure equal treatment, which is increasingly thought to include a right to the reasonable accommodation of divergent beliefs, whatever they are. That is certainly part of the objective of conscience clause legislation, but when participation in a morally sensitive procedure such as abortion is the issue, another set of considerations comes into play. The typical conscience clause situation involves a patient who wishes to receive an abortion, a health care facility willing to perform the procedure, and an employee of the facility who conscientiously objects to participating. Since the patient's seeking of an abortion is shielded by her right of privacy, and as such is an expression of her fundamental right to liberty, the question arises whether her rights and interests, when added together with those of the employer, outweigh the rights of the employee to abstain from participation. One of the principal objectives of conscience clause legislation, whether promulgated before or after *Roe v. Wade*,[270] has been to stress that the woman's right to choose to terminate her pregnancy does not carry with it a right to coerce objecting parties to participate in the process. Conscience clause statutes thus assert not only that those with conscientious objections to abortion are entitled to equal treatment and to reasonable accommodation of their abortion-related beliefs, but also that those inconvenienced by those beliefs (i.e., the patient and the health care facility) do not have claims strong enough to justify failure to accommodate the conscientiously objecting party. Thus, inherent in the structure of conscience clauses is an implicit reference to the fundamental rights of third parties that is not present in general civil rights legislation. If claims as strong as those available to the patient are not sufficient to undermine an obligation to accom-

270. 410 U.S. 113 (1970). The fact that a number of conscience clauses were promulgated before 1973, the year of *Roe v. Wade*, *see, e.g.*, ARK. STAT. ANN. § 41-2560 (1977) (adopted 1969); HAWAII REV. STAT. § 453-16(d) (1976) (adopted 1970); KAN. STAT. ANN. § 65-443 (1980) (adopted 1969); MINN. STAT. ANN. § 145.42 (West Supp. 1982) (adopted 1971); N.M. STAT. ANN. § 30-5-2 (1978) (adopted 1969); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1976) (adopted 1971); OR. REV. STAT. § 435.485 (1981) (adopted 1969); WASH. REV. CODE ANN. § 9.02.080 (1977) (adopted 1970), helps to emphasize that conscience clauses are not merely a part of the pro-life reaction to *Roe v. Wade*. They are clearly more than obstructionist tools in the pro-life arsenal. None of the partisans in the abortion controversy has a monopoly on the respect for deeply held inner beliefs which grounds the conscience clauses.

modate, the level of hardship an employer would have to encounter before the obligation to accommodate would be defused would appear to be quite substantial. The fact that conscience clauses, unlike general antidiscrimination statutes, inevitably embody a legislative balancing of the accommodation rights of conscientious objectors against the fundamental rights of third parties further buttresses the argument that the former impose a more stringent obligation to accommodate than the latter.

The strongest basis for arguing that the conscience clauses impose much more than a de minimis demand for accommodation rests on the language of the conscience clauses themselves. Whereas section 701(j) of Title VII expressly requires an employer to accommodate "all aspects of religious observance and practice, as well as belief, unless . . . [he] demonstrates that he is unable to reasonably accommodate . . . without undue hardship,"[271] *none* of the conscience clauses enacted to date contains any express mention of an undue hardship exception. Virtually every conscience clause employs mandatory language to the effect that medical personnel "*shall not* be required to participate in medical or surgical procedures which will result in . . . abortion,"[272] or that "[n]o employer or other person *shall require* a physician, a registered nurse, a licensed vocational nurse, or any other person . . . to directly participate in the induction or performance of an abortion" if the person involved objects on conscientious grounds.[273] The statutes lacking the "shall" or "shall not" formulations are generally phrased in the indicative: "[no one] *is* required to participate,"[274] or "refusal by the individual to participate *does not* create a liability for damages on account of the refusal or for any disciplinary or discriminatory action

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271. 42 U.S.C. § 2000e(j) (1976).

272. ARIZ. REV. STAT. ANN. § 36-2151 (1974) (emphasis added). *See also* ARK. STAT. ANN. § 41-2560(a) (1977) ("[n]o person shall be required to perform or participate in"); IND. CODE ANN. § 16-10-3-2 (Burns 1973) ("[n]o physician, and no employee . . . shall be required to perform any abortion or to assist or participate in"); MO. ANN. STAT. § 197.032(1) (Vernon Supp. 1982) ("[n]o physician or surgeon, registered nurse, practical nurse, midwife or hospital . . . shall be required to treat or admit for treatment"); N.J. STAT. ANN. § 2A:65A-1 (West Supp. 1981-82) ("[n]o person shall be required to perform or assist").

273. CAL. HEALTH & SAFETY CODE § 25955(a) (West Supp. 1982) (emphasis added). *See also* N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 1976) (no person or entity "shall discriminate against the person so refusing to act"); TENN. CODE ANN. § 39-304 (1975).

274. OR. REV. STAT. § 435.485(2) (1981) (emphasis added). *See also* ALASKA STAT. § 18.16.010(a) (1981).

. . . against the individual."[275] According to the most common formulation, "the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person, nor a basis for any disciplinary or other recriminatory action against him."[276]

Many of the statutes go to great lengths to make it clear that accommodation is required under virtually any circumstances. The Indiana statute provides in relevant part, "nor shall any person *as a condition of training, employment, pay, promotion, or privileges,* be required to agree to perform or participate in the performing of abortions, nor shall any hospital, person, firm [etc.] . . . discriminate against or discipline any person on account of his or her moral beliefs concerning abortion."[277] The Louisiana statute is similarly explicit: "no person or entity 'shall be held civilly or criminally liable, *discriminated against, dismissed, demoted, or in any way prejudiced or damaged* because of his refusal for any reason to recommend, counsel, perform, assist with or accommodate an abortion.' "[278] North Dakota and Washington have statutes providing that no persons or entities that object to abortion shall be required "in any circumstances" to participate in the performance of an abortion, and that "[n]o such person or institution shall be discriminated against because he or they so object."[279] Along similar lines, the Texas statute provides that hospitals or health care facilities "may not discriminate *in any manner*" against persons who refuse to perform or participate in abortions.[280]

The theme running through the conscience clause statutes is

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275. MICH. COMP. LAWS ANN. § 333.20182 (1980). *See also* COLO. REV. STAT. § 18-6-104 (Supp. 1981).

276. DEL. CODE ANN. tit. 24, 1791(a) (1981). Other states with this formulation include FLA. STAT. ANN. § 390.001(8) (West Supp. 1982); IDAHO CODE § 18-612 (1979); N.M. STAT. ANN. § 30-5-2 (1978); OHIO REV. CODE ANN. § 4731.91(D) (Page 1977). Some states using this formulation have added a phrase to make it clear that refusal does not give rise to a damage action, GA. CODE ANN. § 26-1202(e) (1977); MASS. GEN. LAWS ANN. ch. 112, § 12*I* (West Supp. 1981); MONT. CODE ANN. § 50-20-111 (1981); N.C. GEN. STAT. § 14-45.1(e) (1981); R.I. GEN. LAWS § 23-17-11 (1979); WIS. STAT. ANN. § 140.42(1) (1974 & Supp. 1981), or civil liability, MD. ANN. CODE art. 43, § 556E(a) (1980); OKLA. STAT. ANN. tit. 63, § 1-741(B) (West Supp. 1981-82).

277. IND. CODE ANN. § 16-10-3-2 (Burns 1973) (emphasis added).

278. LA. REV. STAT. ANN. § 40:1299.31(A) (West 1977) (emphasis added). South Carolina and South Dakota have similar statutes. *See* S.C. CODE ANN. § 44-41-50(c) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23A-13 (1977).

279. N.D. CENT. CODE § 23-16-14 (1978); WASH. REV. CODE ANN. § 9.02.080 (1977).

280. TEX. REV. CIV. STAT. ANN. art. 4512.7(3) (Vernon Supp. 1982) (emphasis added). *See also* WYO. STAT. § 35-6-106 (1977).

that employees have a virtually absolute right not to be coerced or pressured into participation in abortion if this conflicts with their conscientious beliefs, and that employers have at the minimum a substantial obligation to accommodate this right. The statutes are remedial in character, and should accordingly be liberally construed to effectuate their purpose of protecting this right.[281] In this area, liberal construction demands more than imposing a de minimis burden on employers. The mandatory language of virtually all conscience clauses and the clarity of legislative intent that employees should not suffer prejudicial treatment despite refusal to participate in abortion procedures suggests that, at a minimum, an employer cannot be excused from its responsibilities under a conscience clause unless accommodation would involve substantial hardship. In many states, depending on the precise statutory language, employers might be expected to meet even more rigorous standards.

In *Swanson v. St. John's Lutheran Hospital,*[282] a nurse's refusal to participate in sterilization procedures required the small hospital where she worked to obtain a substitute from the nearest towns, which were fifty-five and ninety miles away. The court held that the resulting hardship to her employer did not outweigh her right to protection under Montana's conscience clause. "The statutory right," stated the court,

> is *unqualified,* and it may not be qualified or limited by the District Court on other considerations. . . .
>
> . . . [T]he hospital must accept the statute in the way it is written, which in this case means it applies to "all persons" *irrespective of their geographic location* and *the discomfitures that might result from the exercise of the statutory right.*[283]

Rejecting the lower court's conclusion that Swanson's right under the conscience clause was "far outweighed" by her inability to perform effectively as a result of her conscientious refusal to participate in sterilizations, the court added that the conscience clause "admits *of no such limitation or qualification,* nor may the statutory rights of Marjorie Swanson be so weighed because *to do so would emasculate her statutory rights.*"[284] The

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281. 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 60.01, at 29-30 (4th rev. ed. 1974).

282. 597 P.2d 702 (Mont. 1979).

283. *Id.* at 710 (emphasis added).

284. *Id.* (emphasis added).

Montana Supreme Court thus concluded that the duty to accommodate under Montana's conscience clause was virtually absolute.

In *Kenny v. Ambulatory Centre of Miami, Florida, Inc.*,[285] a Florida court concluded that a statute virtually identical to Montana's implicitly embodied an undue hardship test. The *Kenny* court concluded that the employer failed to meet its burden of demonstrating that accommodation would entail undue hardship on the facts of the particular case, but the court made it fairly clear that Title VII standards of undue hardship should be applied.[286] As has already been noted,[287] however, the *Kenny* court failed to recognize that conscience clause provisions differ in a variety of fundamental respects from general antidiscrimination legislation. Accordingly, that case is not sound precedent for the standard of accommodation that should be required in future conscience clause cases.

Significantly, most conscience clauses have been adopted after Title VII and corresponding state civil rights statutes.[288] If legislatures wished to excuse health care employers from accommodating conscientious objection to abortion whenever this created "undue" or de minimis hardship, it seems strange that they have so studiously avoided using the established formulas for accomplishing that objective. As courts begin to be confronted with additional conscience clause cases, they should be cognizant of the important structural differences between conscience clauses and general antidiscriminatory legislation, and should adopt the more stringent accommodation standards that the nature and phraseology of the legislation would appear to require.

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285. 400 So. 2d 1262 (Fla. Dist. Ct. App. 1981).

286. *See id.* at 1266-67.

287. *See supra* text accompanying notes 259-66.

288. Only the following states enacted their conscience clauses prior to the promulgation of the adoption of the title VII "reasonable accommodation" provision in 1972: ARK. STAT. ANN. § 41-2560 (1977) (adopted 1969); HAWAII REV. STAT. § 453-16(d) (1976) (adopted 1970); KAN. STAT. ANN. § 65-443 (1980) (adopted 1969); MINN. STAT. ANN. § 145.42 (West Supp. 1982) (adopted 1971); N.M. STAT. ANN. § 30-5-2 (1978) (adopted 1969); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1976) (adopted 1971); OR. REV. STAT. § 435.485 (1981) (adopted 1969); WASH. REV. CODE ANN. § 9.02.080 (1977) (adopted 1970). Four other state conscience clauses may also belong to this group, but the legislative history in their respective codes is not sufficiently clear to justify including them: ALASKA STAT. § 18.16.010(a) (1981); CAL. HEALTH & SAFETY CODE § 25955 (West Supp. 1982); N.C. GEN. STAT. § 14-45.1(e) (1981); S.C. CODE ANN. § 44-41-50 (Law. Co-op. 1976).

2. Concrete accommodation analysis

The range of situations in which accommodation problems can arise is virtually unending. Moreover, if the foregoing analysis is correct, "substantial hardship" may be the minimal test for adequate accommodation; depending on precise statutory language, accommodation requirements in many states may be even more stringent. The combination of these two considerations makes it impossible to do more than offer a few practical suggestions and identify a set of factors that can be used in assessing the sufficiency of accommodation efforts in any particular setting.

Our study makes it clear that attitudes toward abortion vary considerably depending on the trimester and the circumstances under which it is being performed.[289] In addition, many nurses indicated that while they were morally opposed to abortion, they would be willing to give care (for example, during recuperation) so long as direct involvement in abortion procedures was not required. These considerations suggest that to some extent, accommodation burdens can be eased by determining the scope of a particular employee's objection to participation.[290] This need not include inappropriate probing into the precise theological or moral grounding of the individual's beliefs. Indeed, under some statutes, such probing would be impermissible.[291] But once an individual has informed an employer of his or her objections to abortion, it seems reasonable to allow the employer to ascertain whether the objection goes to all abortions or only some, and whether the employee feels obligated to avoid all contact with abortion patients or only direct involvement in abortion procedures. An employee may, after all, wish to work in a unit in which abortions are being performed but simply not wish to participate in the abortions themselves.[292]

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289. *See supra* Table 3 at p. 271.

290. For example, one nurse indicated that she would never have an abortion for any reason and could never assist with an induced abortion but that she would go so far as to get the consent signed and witness it, assist with spontaneous abortions and with the dilation and curettage of the uterus for a dead fetus, and care for women who had had abortions.

291. IDAHO CODE § 18-612 (1979); ILL. ANN. STAT. ch. 111½, 5307 (Smith-Hurd Supp. 1981-82); MONT. CODE ANN. § 50-20-111(2) (1981); S.C. CODE ANN. § 44-41-50(a) (Law. Co-op. 1976).

292. One of the respondents to our survey indicated that although opposed to abortion herself, she had accepted work in a large high risk OB unit, knowing that the job involved work in the abortion unit, because she wanted "to gain experience and exposure

Hospitals may also wish to take affirmative steps to prevent the emergence of an atmosphere of persecution or disapproval toward those with conscientious objection to abortion. One of the respondents to our survey stated,

> When I've refused to give a preop med to a patient having [an abortion] I was yelled at by the charge nurse to go back to the nursery and stay there. I received positive support from other employees. A supervisor came up and talked to me—trying to convince me that I shouldn't refuse to help with TAB's [therapeutic abortions]. But I stood my ground and no further action was taken.

Another nurse reported that when she refused to participate in an elective abortion, she was told if she didn't agree, to quit, which she did. Still another made the rather contradictory remark, "It has been my experience that strong anti-abortion nurses are not forced to assist with abortion patients but it seems the unit was short staffed and they had to help." In general, conscientious objectors may be exposed to substantial pressures to participate from doctors and other nurses.[292.5] Most conscience clause provisions do not expressly address the question of the employer's responsibility to prevent other employees from creating an atmosphere of persecution and harassment, but as noted above, Title VII protections may be available in this context.[293] The problem of making certain that doctors do not harass objecting nurses is slightly different from the problem of harassment from other nurses, and hospitals may wish to consider particular steps to make certain that both groups are adequately sensitive to the rights of objecting personnel.

Among the factors to be considered in evaluating the adequacy of accommodation efforts are the following: cost to the employer of accommodation, ease of obtaining substitutes, size of the institution providing abortion services, the nature of alternative work offered to the objecting party, and the proximity or remoteness of the objecting party's work to abortion procedures.

At first glance, cost would appear to be the clearest indicator of substantial hardship. Reflecting on the situation in *Swan-*

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to high risk OB." She noted that there was very high turnover on the high risk unit because of the number of second trimester abortions performed there, and that ultimately a separate staff was employed on the abortion unit.

292.5. *See supra* text accompanying note 139.

293. *See supra* text accompanying note 140.

son v. St. John's Lutheran Hospital,[294] for example, one's first intuition might be that it is excessive to require a small hospital in Montana, which has a small number of individuals (perhaps only one) with the objecting party's expertise, to obtain a substitute for abortion or sterilization procedures when the nearest substitutes are located in towns fifty-five or ninety miles away.[295] Before accepting this conclusion, however, it is necessary to think through the nature of the hospital's costs. Presumably, the expense of obtaining a substitute could simply be passed through to the woman seeking the abortion.[296] The result is that the hospital itself is not forced to incur any incremental costs as a result of accommodation. This situation is quite different from the typical religious accommodation situation such as the Saturday-Sabbath problem in *Hardison,*[297] for there imposition of a stringent obligation to accommodate would require either the employer or the union seniority system[298] to absorb the cost of accommodation, since pricing demands of a competitive market may prevent these costs from being passed on to the ultimate consumer. In contrast, in the typical conscience clause situation, the costs of accommodating can be passed on to the precise party who creates the need for accommodation (or to third parties such as insurance companies that have agreed to provide coverage with respect to the types of procedures that generate the accommodation costs). Analyzed in this light, the practical point of conscience clause legislation is that the costs of accommodating conscientious objection to abortion should be incurred not by the conscientious objector (in the form of discrimination, limited job opportunities, demotion or other disciplinary sanctions), but by the party whose request for abortion

294. 597 P.2d 702 (Mont. 1979). For further discussion of this case, *see supra* text accompanying notes 282-84.

295. 597 P.2d at 709.

296. This may not be strictly true, since the costs may be borne by an insurance company or some other cost spreader. Even then, however, the costs are being passed to an entity which has chosen to provide coverage to those who may wish to obtain abortions. The cost of accommodation is thus being borne by an entity supportive of abortions, rather than the individuals with conscientious objection to abortion, which is the result if the conscientious objector's position is not accommodated.

297. *See supra* text accompanying notes 120-30.

298. In *Hardison,* the union seniority system might have been forced to "absorb the cost" of accommodation in the sense that if assignment swapping in violation of that system had been mandated as the method of accommodating Hardison, TWA may have incurred no incremental out-of-pocket costs, but union members would have sacrificed some rights they had obtained under their collective bargaining agreement.

services triggers the need for accommodation. Arguments that the direct costs of accommodation and associated overhead establish substantial hardship are thus unpersuasive. A legislature can reasonably provide that accommodation costs should be borne by the party seeking the abortion rather than by the conscientious objector. Even imposition of an absolute duty to accommodate in this context is not unreasonable, since there is no reason that the party seeking the abortion should not bear all of the costs of obtaining an abortion, including the accommodation costs.

There is another dimension of the cost issue that is slightly more troublesome. This is essentially a problem of opportunity costs that flow from accommodation. At some point, the accommodation costs a hospital is expected to pass on to the patient become so steep that the abortion patient may prefer to go to another hospital. In *Swanson,* for example, it might have been cheaper for the patient to go to the hospital in the adjacent towns from which St. John's borrows its substitute nurses than to pay the time and travel costs to bring a qualified nurse to St. John's. If this occurred, the opportunity cost of accommodating Swanson's beliefs would equal the amount of net gain that would have been received if the procedures involved had been performed at St. John's.[299] While no precise figures are available, one can make rough estimates of what these opportunity costs might be. The average cost a patient pays for an abortion is approximately $200.[300] It seems reasonable to assume that the net gain on a particular abortion, when one has subtracted out all costs of performing the procedure, does not exceed $100, and it is probably substantially less than that. At the average health

299. The opportunity cost problem is complicated somewhat by the fact that not only the hospital but the doctors using the hospital may incur such costs. Thus, hospitals might wish to avoid losing abortion patients to other facilities both because of internal financial pressures and because of pressures from doctors who wish to provide abortion care. Since it is typically the hospital rather than the doctor that employs the objecting personnel, and it is thus the hospital that has the duty to accommodate, the pressures stemming from economic concerns of doctors can simply be analyzed as part of the general financial pressures on the hospital to maximize abortion revenues.

300. Statistics from the Congressional Quarterly indicate that prior to the adoption of the Hyde amendment, approximately 470,000 abortions were being financed by Medicaid each year at a cost of approximately $88 million. 38 CONG. Q. 1863 (1980). This works out to $187 per abortion. While the actual dollar figures per abortion may be going up as a result of inflation, it is unlikely that the net gain per abortion is increasing substantially, since costs are probably going up as fast as or faster than final charges to the patient.

care facility, this is simply not a substantial figure. Aside from situations in which a large portion of a health care facility's revenue is derived from abortion or other ethically sensitive procedures (e.g., an abortion clinic), it is difficult to see how the facility's economic interest in avoiding loss of patients due to accommodation costs could outweigh the employee's interest in the protection of his or her conscientious beliefs. Certainly, this type of balancing of economic interests against values of conscience does not square with the basic tenor of the conscience clause statutes. In the absence of proof of substantial economic hardship to the institution, the employee's rights ought to prevail.

Note that the number of situations in which this kind of substantial hardship is likely to be present would be comparatively rare. If the volume of abortions were sufficiently large that the loss of revenue from this source would have a substantial impact on the hospital, the hospital would probably be justified in hiring some employees into positions in which lack of objection to abortion is an occupational qualification. Moreover, the facility would be likely to have a sufficiently large staff that suitable substitutions could be arranged. In *Kenny,* for example, in which sixteen percent of the employer's revenues were derived from gynecological procedures, the court concluded that the employer had failed to show that accommodation would entail de minimis hardship, let alone substantial hardship.[301]

Another factor that may bear on the analysis of the accommodation issue is the degree of moral, as opposed to economic, commitment the particular institution has to the provision of abortion services. When an institution's affirmative policies of providing abortion services are themselves rooted in conscientious beliefs, there is a much stronger basis for arguing that the institutional interests should be respected. Substantial hardship may have moral as well as economic dimensions. It should be noted, however, that the mere fact that an institution or its employees are willing to permit abortions (even in large volumes or at low cost) is not by itself the type of moral commitment that would bring this type of factor into play. The commitment must be so strong that the institution's conscientious orientation is affronted by nonparticipation in the same way that an objecting employee's conscience is infringed by participation. It is the bal-

301. 400 So. 2d at 1264, 1266-67. *See also supra* text accompanying notes 285-87.

ancing of conscientious belief against conscientious belief that makes the showing of substantial hardship easier in the context of a conscientiously pro-choice institution. The number of institutions in which this type of affirmative, ethically based commitment is present is probably relatively small. Within such institutions, a pro-choice orientation would obviously be entitled to greater weight vis-à-vis beliefs of an objecting employee to the extent that the employee is apprised in advance of the facility's orientation.

The sincerity and seriousness of the employer's efforts to accommodate is another factor to be considered. If an employer acting in good faith offers an employee a series of alternative positions or work assignments that seem to be compatible with the employee's beliefs, only to be met with even more stringent employee demands, there comes a point when the employer is legitimately entitled to abandon a seemingly impossible accommodation effort. As noted earlier, this consideration may lie behind the *Spellacy* court's determination to deny relief to a party claiming breach of a duty to accommodate.[302]

Most of the problems that might relieve an employer of the obligation to accommodate in traditional settings either are insufficiently serious or simply fail to constitute excusing conditions under the conscience clause statutes. Scheduling problems, arranging for substitutes, and juggling work assignments may create some administrative inconvenience and incremental costs for the employer, but as the foregoing analysis of cost issues indicates, this will seldom be sufficient to excuse an employer from making necessary accommodations under conscience clauses. Other problems which frequently give rise to accommodation questions, such as dress and grooming issues and religious objections to paying union dues, for example, are simply not the kinds of issues that are covered under conscience clause statutes. Still other problems stemming from conflicts between accommodation requirements and collective bargaining agreements (e.g., requiring a more senior employee to perform work a junior employee refuses to perform for conscientious reasons) appear to be resolved by conscience clause legislation in favor of the conscientious objector. As noted earlier, conscience clause statutes—unlike Title VII—make no exceptions in their accommodation demands for those situations in which accommodation

302. *See supra* text accompanying note 216.

will conflict with bona fide seniority systems.[303]

In general, then, conscience clauses are designed to provide nurses and other health care personnel with extremely strong protections against employment pressures aimed at eliciting participation in abortion in violation of conscientious beliefs. While the precise test for adequacy of accommodation is likely to vary from state to state, depending to some extent on precise statutory phrasing, the basic objectives and structure of the legislation suggest that the minimum standard should be substantial hardship for the employer, and particular statutes may impose requirements ranging upward from these toward an absolute duty to accommodate. At the very least, it is clear that the de minimis accommodation efforts that would suffice under Title VII would not be sufficient under conscience clause provisions. In view of these more stringent requirements, and in light of the distinctive features of the economic setting in which abortion accommodation problems arise, situations in which health care employers should be excused from their obligations to accommodate conscientious objection to abortion and other ethically sensitive procedures covered by conscience clauses are likely to be very rare.

VI. Constitutional Issues

The statutory mandates of conscience clauses should afford ample protection for most medical personnel likely to encounter discrimination as a result of abortion-related beliefs. However, because there are some gaps in coverage, notably in states which have not yet adopted conscience clauses, and also because arguments have been advanced that at least some features of conscience clauses may be unconstitutional, it is necessary for us to address a number of constitutional issues. In what follows, we first address the threshold question whether conscience clauses violate the establishment clause of the first amendment.[304] Second, we confront the problem of the extent to which statutory provisions that permit public health care facilities to refuse to provide abortion services are permissible under the privacy doctrine articulated in *Roe v. Wade*.[305] Third, we raise the question of the extent to which the free exercise clause itself affords pro-

303. *See supra* text accompanying notes 268-69.
304. *See infra* text accompanying notes 307-12.
305. *See infra* text accompanying notes 381-415.

tection to those with conscientious objections to participation in abortion or other medically sensitive procedures.[306]

A. Establishment Clause Concerns

Two types of establishment clause arguments have been leveled against conscience clause legislation. The first contention is that conscience clauses, like anti-abortion laws in general, constitute an establishment of religion because they are rooted in religious values and inescapably involve either state affirmation of religious values or impermissible entanglement of church and state in the political process. The second contention is that by requiring employers to accommodate the religious beliefs of particular employees, conscience clauses, or more general religious accommodation legislation such as Title VII, advance and thereby "establish" the religions of the employees thus accommodated. Although the weight of authority has rejected both lines of argumentation, they have sufficient continuing vitality to warrant discussion.

The first line of argumentation received its strongest endorsement from Professor Laurence Tribe in 1973.[307] He argued that

> a broader establishment clause issue, going to a whole *area* of governmental regulation, is raised whenever the views of organized religious groups have come to play a pervasive role in an entire subject's legislative consideration for reasons intrinsic to the subject matter as then understood. The evil in such a situation need not lie in the particular statutes or amendments that emerge from so religiously charged a milieu, but in the continual pressures to which the milieu itself subjects lawmakers as long as they retain a decisionmaking role. Whenever this evil can be demonstrated, *all* substantive governmental controls within the "entangled zone" could quite plausibly be deemed tainted, and hence unconstitutional, in the absence of an affirmative demonstration that a particular control is needed to serve a compelling purpose that can be defined, and defended as applicable, in terms generally regarded to be wholly secular.[308]

An initial difficulty with this line of argument is that the bound-

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306. *See infra* text accompanying notes 415-39.

307. Tribe, *The Supreme Court, 1972 Term—Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 22-25 (1973).

308. *Id.* at 23-24.

ary between religious and "wholly secular" statutory purposes is extremely difficult to draw. Values with Judaeo-Christian roots pervade our legal system, and while secular rationales for such statutes can generally be manufactured, it is typically difficult to argue that the purpose or motivation for the statute is *wholly* secular. If the mere presence of religious values or a background of religious motivation in a statutory norm were sufficient to invalidate it on establishment clause grounds, much of our legal system would be in tatters. Not suprisingly, then, courts have consistently rejected establishment clause challenges to a wide array of statutes that arguably embody religious values. For example, courts have sustained the constitutionality of Sunday business proscription statutes,[309] sodomy statutes,[310] fornication statutes,[311] and ordinances prohibiting the sale of alcoholic beverages on Sundays.[312] As the Supreme Court noted in sustaining the Hyde amendment against an establishment clause challenge, a statute does not violate "the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' "[313] The statutes arguably embodying religious values which have been invalidated on establishment clause grounds are all clearly distinguishable from conscience clause provisions.[314]

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309. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961).

310. *See* Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), *cert. denied*, 416 U.S. 905 (1974); Connor v. State, 253 Ark. 854, 490 S.W.2d 114, *appeal dismissed*, 414 U.S. 991 (1973).

311. *See* State v. Saunders, 130 N.J. Super., 234, 326 A.2d 84 (1974).

312. *See* Epstein v. Maddox, 277 F. Supp. 613 (N.D. Ga. 1967). *aff'd*, 401 F.2d 777 (5th Cir. 1968); Asbell v. Caddo Parish Police Jury, 292 So.2d 848 (La. Ct. App. 1974).

313. Harris v. McRae, 448 U.S. 297, 319 (1980) (citing McGowan v. Maryland, 366 U.S. 440, 442 (1961)).

Establishment clause challenges to statutes dealing with abortion have generally been unsuccessful. *See, e.g.*, Margaret S. v. Edwards, 488 F. Supp. 181, 224-25 (E.D. La. 1980); Women's Services, P.C. v. Thone, 483 F. Supp. 1022, 1032-40 (D. Neb. 1979), *vacated*, 101 S. Ct. 3043 (1981); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1188-95 (N.D. Ohio 1979), *aff'd*, 651 F.2d 1198, 1201 (6th Cir. 1981). *But see* State v. Koome, 84 Wash. 2d 901, 908, 530 P.2d 260, 265 (1975).

314. Decisions invalidating blasphemy laws are distinguishable because of the uniquely religious features of such statutes. *See, e.g.*, State v. West, 9 Md. App. 270, 263 A.2d 602 (1970).

The Supreme Court case that comes closest to sustaining the view that laws which are clearly religious in derivation are impermissible on establishment clause grounds is Epperson v. Arkansas, 393 U.S. 97 (1968), in which a law forbidding the teaching of evolution in Arkansas' public schools and universities was struck down. The Court's conclusion rested on a determination that "fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 108. The Court apparently concluded that it was

An even more troubling aspect of the first line of argumentation has to do with its suggestion that there is something constitutionally suspect about laws that emerge from "religiously charged" milieus. In these contexts, the argument runs, pressures from organized religious groups are so continual and pervasive as to create an "entangled zone" in which any legislation would be "tainted." On the surface, such argumentation appears simply to apply traditional principles concerning separation of church and state to the formative stages of the lawmaking process. The rationale appears to be that excluding religious influences from this phase of the political process insulates the system from any risks that establishment clause dangers might be legislated into actuality. In fact, however, such an approach would seriously erode first amendment values. Not only would it deprive religious individuals and groups of freedom of speech —the right to participate actively in the political process—but it would impose this deprivation precisely because of the religiosity of the individuals and groups involved. There is unquestionably something twisted about an interpretation of the establishment clause that would require discrimination *against* religious groups in the allocation of free speech protections and which would operate to muzzle the assertion of religious beliefs in the most important political forum of all.[315] With respect to the inherent tension between the establishment clause and the free exercise clause, some have argued for the priority of free exercise,[316] and some for strict neutrality,[317] but none, so far as we are aware, have seriously argued for the priority of the establishment clause. The reason for this is apparent: the purpose of the establishment clause was to prevent institutional arrangements that would inhibit free exercise. Separation was intended as a means to an end, not an end in itself, and making the end sub-

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clear in that case that the aim was to inculcate a particular religious view of the creation, or at least to inhibit the inculcation of an arguably antithetical scientific theory in the public educational institutions of Arkansas. In contrast to Arkansas' "monkey" law, conscience clauses make no effort to support the inculcation of particular religious doctrines in the minds of unbelievers or those with unformed beliefs; they merely protect the rights of those who wish to act in accordance with the dictates of their own conscientious beliefs.

315. *Cf.* Widmar v. Vincent, 102 S. Ct. 269 (1981) (state university prohibited from excluding student religious group from forum available to student groups on the basis of the religious content of the group's intended speech).

316. P. KAUPER, RELIGION AND THE CONSTITUTION 13-20 (1964).

317. P. KURLAND, RELIGION AND THE LAW (1962).

sidiary to the means obviously gets things backwards.

Significantly, these and similar concerns have led Professor Tribe to repudiate the view that entanglement of church and state within the political process is sufficient to constitute an establishment clause violation. In his treatise on constitutional law, he states:

> On reflection, that view appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question.[318]

For the foregoing reasons, the mere fact that conscience clauses may in part reflect the religious beliefs of some of their proponents is not sufficient to raise a serious establishment clause issue.

The question whether statutes such as Title VII or conscience clauses that require affirmative accommodation of religious beliefs violate the establishment clause has posed more difficult problems for the courts. Indeed, a number of lower courts have invalidated the accommodation provisions of Title VII on establishment clause grounds.[319] The most recent of these, *Isaac v. Butler's Shoe Corp.*,[320] involved a shoe salesman who was discharged as a result of growing a beard in accordance with his religious beliefs and leaving work to attend a religious gathering in another city. The employee brought a Title VII action, and the employer challenged the religious accommodation provision on establishment clause grounds. Relying heavily on the analysis in *Anderson v. General Dynamics Convair Aerospace Division*,[321] which has since been reversed,[322] the court reasoned that Title VII's religious accommodation provision violated all three prongs of the three-part analysis of establishment

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318. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 928 (1978).

319. *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971); Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782 (S.D. Cal. 1980), *rev'd*, 648 F.2d 1247 (9th Cir. 1981); Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979); Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

320. 511 F. Supp. 108 (N.D. Ga. 1980).

321. 489 F. Supp. 782 (S.D. Cal. 1980).

322. 648 F.2d 1247 (9th Cir. 1981).

clause questions propounded in *Committee for Public Education & Religious Liberty v. Nyquist*.[323] The court reasoned that the provision did not meet *Nyquist*'s "clearly secular purpose" test since the statute's sponsor had indicated that one of the purposes of the statute was to facilitate church attendance on the part of those with Saturday sabbaths.[324] The provision also failed to meet *Nyquist*'s requirement that an enactment "must have a primary effect that neither advances nor inhibits religion,"[325] since the primary effect of the provision was to benefit those religions "that require modification of an employer's work rules."[326] Finally, the provision failed to avoid "excessive government entanglement with religion"[327] because it would require excessive administrative involvement in and litigation concerning difficult questions of the exercise of religious beliefs.[328] The court also attached significance to arguments that failure to demand accommodation would not infringe free exercise rights ("first amendment religious freedoms are not triggered by congressional inaction")[329] and that even without the religious accommodation action, religious employees could bring Title VII actions if they could establish that employer policies had disparate impacts on them which were not warranted by business necessity.[330] The reasoning of the *Isaac* court is representative of that advanced in other decisions and in scholarly literature[331] in support of the proposition that accommodation provisions violate the establishment clause.

Despite decisions such as *Isaac*, the weight of authority has rejected the proposition that accommodation provisions in statutes proscribing religious discrimination violate the establish-

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323. 413 U.S. 756 (1973).
324. 511 F. Supp. at 111.
325. 413 U.S. at 772-73.
326. 511 F. Supp. at 111.
327. 413 U.S. at 772-73.
328. 511 F. Supp. at 111-12.
329. *Id.* at 112.
330. *See id.*
331. *See, e.g.*, Eades, *Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion*, 5 U. DAYTON L. REV. 59 (1980); Comment, *Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution?*, 9 LOY. U. CHI. L.J. 413 (1978); Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 BROOKLYN L. REV. 598 (1978); Note, *Is Title VII's Reasonable Accommodation Requirement a Law "Respecting an Establishment of Religion"?*, 51 NOTRE DAME LAW. 481 (1976); Recent Development, *Cummins v. Parker Seal Co.: Can the Government Require Accommodation of Religion at the Private Job-Site?*, 62 VA. L. REV. 237 (1976).

ment clause. For example, the California Supreme Court in *Rankins v. Commission on Professional Competence*[332] questioned whether failure to accommodate a public school teacher's refusal to work on certain of his religion's holy days by providing a substitute (at the teacher's expense) violated the state constitution's prohibition of religiously based employment discrimination. In interpreting the provision, the California Supreme Court interpreted the language of Title VII's accommodation provision as forbidding "disqualification of employees for religious practices unless reasonable accommodation by the employer [was] impossible without undue hardship."[333] The court then rejected the view that the state constitutional ban on religious discrimination, if construed in this manner, would violate the establishment clause. The court's analysis is worth quoting in some detail:

> We think it clear that the purpose and the primary effect of imposing a similar duty of accommodation under article I, section 8 of the California Constitution are not to favor any religion but to promote equal employment opportunities for members of all religious faiths. The neutrality commanded by the establishment clause does not require the district to extend its accommodation for Byars' religious observances to other employees who seek time off for secular purposes. Without violating the establishment clause, governments may lighten the burden consequent on religious practices through laws that are "secular in purpose, evenhanded in operation, and neutral in primary impact." . . . [T]he effect of the accommodation [here] is simply to lessen the discrepancy between the conditions imposed on Byars' religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations or regular school calendars.[334]

The *Rankins* decision is particularly important because the appeal in that case to the United States Supreme Court was dismissed for want of a substantial question.[335] Despite the summary character of that disposition, it is a decision on the merits and, under the principle established in *Hicks v. Miranda*,[336] con-

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332. 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (1979).
333. *Id.* at 174, 593 P.2d at 856, 154 Cal. Rptr. at 911.
334. *Id.* at 178, 593 P.2d at 858-59, 154 Cal. Rptr. at 914 (citations omitted).
335. 444 U.S. 986 (1979).
336. 422 U.S. 332, 343-44 (1975).

stitutes binding precedent unless overruled by a subsequent Supreme Court decision. Thus, at least where employees of public entities are involved, the validity of religious accommodation provisions appears to be settled.

Accommodation of religious beliefs in employment discrimination contexts seems no more objectionable on establishment clause grounds than a variety of other forms of accommodation of religion that have been sustained. It is difficult to see how statutes excluding religious organizations from tax liability,[337] allowing appropriately structured release-time programs to accommodate religious training,[338] exempting Amish children from compulsory education laws,[339] and modifying normal requirements for qualifications for unemployment compensation[340]—all of which have been upheld—are less offensive to the establishment clause than a statute requiring accommodation in employment.

In analyzing this question, it is useful to remember that there is now little doubt that the federal government and the states have authority to promulgate legislation proscribing employment discrimination either on the grounds of religion in general or on the basis of more specific beliefs such as those relating to abortion, just as they can proscribe discrimination on the basis of race or sex.[341] The difficulty arises when affirmative obligations to accommodate are imposed on employers. Once it becomes clear, however, that discrimination extends to situations involving employment practices that have disparate impacts on different groups,[342] it becomes difficult to see how one could meaningfully proscribe religious discrimination without requiring accommodation. Unlike racial and sexual characteristics, religious beliefs often find expression primarily in terms of differences in outward behavior. Failure to accommodate distinctive behavior expressive of belief becomes functionally indistinguishable from discrimination. As a Wisconsin court has stated:

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337. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

338. Zorach v. Clauson, 343 U.S. 306 (1952).

339. Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972).

340. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981); Sherbert v. Verner, 374 U.S. 398, 409 (1963).

341. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 447-48 (1976) (by implication); *id.* at 458 (Stevens, J., concurring) (by implication); Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981).

342. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

> Without such a corresponding duty [to accommodate religious beliefs], the negative prohibition [against religious discrimination] would be rendered meaningless with respect to a wide variety of facially neutral employment practices which have discriminatory impacts. In practical effect, the practicing adherents of minority religions could be locked out of the job market. In that event, the social policies of encouraging full employment, and of protecting individuals from arbitrary discrimination on religious grounds, would be frustrated.[343]

Thus, unless the establishment clause is construed to invalidate legislation barring religious discrimination in general, it appears that affirmative accommodation requirements are permissible as well. Such accommodation does not appear to violate any of what the Supreme Court has characterized as the "three main concerns against which the Establishment Clause sought to protect"[344]—namely, "sponsorship, financial support, and active involvement of the sovereign in religious activity."[345]

In order to show that employment accommodation provisions simply manifest the "benevolent neutrality"[346] of the state toward religion, which has been held to be consistent with the establishment clause, it will be useful to work through the three parts of the *Nyquist* test and show why neither general religious accommodation provisions nor conscience clauses fail to meet its requirements. In this regard, most courts[347] and commentators[348] have had little difficulty discerning secular purposes behind accommodation statutes. The exact characterization of such pur-

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343. American Motors Corp. v. Department of Indus., 93 Wis. 2d 14, 30-31, 286 N.W.2d 847, 855 (Wis. Ct. App. 1979), *rev'd on other grounds*, 101 Wis. 2d 337, 305 N.W.2d 62 (1981). *See* Michigan Dep't of Civil Rights *ex rel.* Parks v. General Motors Corp., 412 Mich. 610, ___ N.W.2d ___ (1982).

344. Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972).

345. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

346. *Id.* at 669.

347. *See, e.g.*, Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1245 (9th Cir. 1981); Anderson v. General Dynamics Convair Aerospace Div., 648 F.2d 1247, 1248 (9th Cir. 1981); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 543 F.2d 445, 454 (7th Cir. 1981); Cummins v. Parker Seal Co., 516 F.2d 544, 552-53 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976); McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1063-64 (W.D. Mich. 1981); Michigan Dep't of Civil Rights *ex rel.* Parks v. General Motors Corp., 412 Mich. 610, ___ N.W.2d ___ (1982); American Motors Corp. v. Department of Indus., 93 Wis. 2d 14, 286 N.W.2d 847, 856 (Wis. Ct. App. 1979), *rev'd on other grounds*, 101 Wis. 2d 337, 305 N.W.2d 62 (1981).

348. *See, e.g.*, Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 BROOKLYN L. REV. 598, 607-08 (1978); Note, *Is Title VII's Reasonable Accommodation Requirement a Law "Respecting an Establishment of Religion?"*, 51 NOTRE DAME LAW. 481, 485-86 (1976).

poses varies from court to court; the following is a representative list: "[T]o promote Title VII's broader policy of prohibiting discrimination in employment;"[349] "to achieve equality of employment opportunities;"[350] "to relieve individuals of the burden of choosing between their jobs and their religious convictions where such relief will not unduly burden others;"[351] and "to require that employment decisions be based on merit and not on such an impermissible ground as religion."[352] Those who argue that the accommodation provisions of Title VII lack a sustaining secular purpose typically attach great significance, as the *Isaac* court did,[353] to remarks made by the sponsor of the provisions, Senator Jennings Randolph, who noted the dwindling membership of some Sabbatarian religious organizations and the difficulties encountered by adherents of these faiths in the employment market.[354] The contention is that these remarks evidence an intention to benefit specific religious groups. Senator Randolph did in fact make the remarks in question, but his objective in doing so was merely to give specific examples of the hardship and discrimination suffered by some individuals.[355] Moreover, the *Nyquist* requirement is that the law in question must "*reflect* a clearly secular legislative purpose,"[356] and not that its proponent must *articulate* a clearly secular purpose. Accordingly, the mere existence of Senator Randolph's remarks—whatever their meaning—cannot suffice to show that Title VII's accommodation provisions violate the secular purpose test.[357] The various secular purposes courts have identified with respect to general accommodation provisions are equally availa-

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349. Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1245 (9th Cir. 1981).

350. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 454 (7th Cir. 1981) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)).

351. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 454 (7th Cir. 1981).

352. McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1063 (W.D. Mich. 1981). *See also* Michigan Dep't of Civil Rights *ex rel.* Parks v. General Motors Corp., 412 Mich. 610, ___ N.W.2d ___ (1982) ("to prevent employment based on the legally irrelevant factor of religion").

353. *See supra* text accompanying note 324.

354. *See, e.g.*, Eades, *supra* note 331, at 71-72; Comment, *Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution?*, 9 LOY. U. CHI. L.J. 413, 423-24 (1978).

355. *See* McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1063 (W.D. Mich. 1981).

356. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (emphasis added).

357. *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1189-94 (N.D. Ohio 1979), *aff'd*, 651 F.2d 1198, 1201 (6th Cir. 1981).

ble to vindicate conscience clauses.

Courts have also had little difficulty in concluding that accommodation provisions do not lead to excessive entanglement. Obviously, the passage of such legislation may give rise to an increased volume of litigation, and there may be a number of situations in which questions of the sincerity of the employees' beliefs arise.[358] But accommodation provisions are not any more likely to have these effects than legislation simply banning religious discrimination in employment. Questions of sincerity are essentially questions of credibility, which courts may permissibly explore.[359] Moreover, there is no reason to believe that the sincerity problems encountered in connection with accommodation provisions would be more severe than those encountered in the context of the military draft. If anything, the temptation for insincere assertions of conscientious belief would be greater in the draft context, given the magnitude of the risks faced by the potential draftee, yet draft exemption provisions have passed constitutional muster.[360] Accommodation provisions do not require any more doctrinal inquiry than that involved to determine whether a religious entity is entitled to a tax exemption.[361] They certainly "will not subject religious institutions to the sort of 'comprehensive, discriminating, and continuing [governmental] surveillance' that the Supreme Court found impermissible in [the school aid cases]."[362] Finally, accommodation statutes and conscience clause provisions do not require regular reenactment and hence are unlikely to serve as a regular source of renewed political divisiveness, in contrast to school aid appropriations.[363]

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358. Justice Rehnquist pointed to these types of problems in his lone dissent in Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 726 (1981), but he did so in a context in which he was arguing that this would be the result under traditional entanglement analysis, but that the traditional approach unduly narrowed the permissible range of state action. The majority of the *Thomas* Court apparently did not see any serious entanglement problems arising from "sincerity" inquiries and increased legislation. *See id.* at 719-20.

359. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 455 (7th Cir. 1981); *see* United States v. Seeger, 380 U.S. 163, 185 (1965); Theriault v. Carlson, 495 F.2d 390 (5th Cir. 1974).

360. McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1064 (W.D. Mich. 1981) (citing Gillette v. United States, 401 U.S. 437, 456-57 (1971); United States v. Seeger, 380 U.S. 163, 185 (1965)).

361. Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970); McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1064 (W.D. Mich. 1981).

362. Cummins v. Parker Seal Co., 516 F.2d 544, 553 (1975), *aff'd by an equally divided Court,* 429 U.S. 65 (1976) (citing Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

363. 413 U.S. at 794-98; Lemon v. Kurtzman, 403 U.S. 602, 623 (1971).

With respect to that portion of the *Nyquist* test requiring that laws "must have a primary effect that neither advances nor inhibits religion,"[364] the predominant line of analysis has been that religious accommodation provisions confer at most incidental benefits on religion.[365] The Supreme Court's Sunday closing, school aid, and tax exemption decisions have made it clear that accrual of some incidental benefit to a religious body as a result of state action does not, in itself, result in an establishment clause infraction.[366] Accordingly, while accommodation of Sabbatarians may have the result that "churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate,"[367] most courts have recognized that this is at best an "ancillary or incidental" benefit to religious institutions.[368] The Seventh Circuit has gone even further, stating that Title VII's accommodation provision "does not confer a benefit on those accommodated, but rather relieves those individuals of a special burden that others do not suffer."[369] Although the argument that relieving someone of a burden is not a benefit in this way may reflect an overly facile sleight of hand, it does focus attention on the fact that what is really involved is protection of the employee from employment discrimination, and that any "benefit" flows to the employee, not to his or her church; the accommodation provision may ease the *burden* of asserting conscientious beliefs, but it does not result in the *imposition* of beliefs.[370] Note that the incidental ben-

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364. 413 U.S. at 773.

365. *See, e.g.,* Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1246 (9th Cir. 1981); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 454 (7th Cir. 1981); Cummins v. Parker Seal Co., 516 F.2d 544, 552-53 (6th Cir. 1975); McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1064 (W.D. Mich. 1981); Michigan Dep't of Civil Rights *ex rel.* Parks v. General Motors Corp., 412 Mich. 610, ___ N.W.2d ___ (1982).

366. *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 657-59 (1980). *See, e.g.,* 413 U.S. at 771-72; Walz v. Tax Comm'n, 397 U.S. 664, 671-72, 674-75 (1970); McGowan v. Maryland, 366 U.S. 420, 449-50 (1961).

367. Cummins v. Parker Seal Co., 516 F.2d 544, 553 (6th Cir. 1975).

368. *See, e.g., id.;* Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1246 (9th Cir. 1981).

369. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 454 (7th Cir. 1981); *see* Michigan Dep't of Civil Rights *ex rel.* Parks v. General Motors Corp., 412 Mich. 610, ___ N.W.2d ___ (1982).

370. *See generally* Schwartz, *No Imposition of Religion: The Establishment Value,* 77 YALE L.J. 692 (1968). One commentator suggests: "Title VII is overtly coercive, since workers may convert to Sabbatarian beliefs in order to obtain a better working schedule." Comment, *supra* note 353, at 425-26. Leaving aside the fact that sham conversions of this type are relatively rare and would typically not involve the requisite sincerity of belief, what this Comment overlooks is that the employee's "beliefs" are not imposed on

efits to religion in the conscience clause setting are considerably more attenuated than those that arise in conjunction with special days of worship. Release of an employee for the latter purpose arguably advances religion by allowing an additional individual to participate in religious worship. Accommodation of conscientious objection to abortion merely prevents the imposition of burdens on exercise of religious beliefs. Normally, there is no collateral impact in terms of increased participation in religious activities.

It has been argued that accommodation in the employment discrimination area is less justifiable than other forms of accommodation, since legislation mandating such accommodation "creates a class of beneficiaries limited to religious workers,"[371] and since failure to accommodate would not infringe free exercise rights.[372] The first of these contentions is premised on the notion that aid to religion which is an incidental result of uniform public welfare legislation with a broad class of beneficiaries is unobjectionable.[373] Possibly to avoid charges of benefiting an exclusively religious class, many states have drafted their conscience clauses to protect not only religious but also moral objections to abortion, and some afford protections to both pro-choice and pro-life personnel.[374] Our position, however, is that conscience clause provisions are constitutional even without these precautions. After all, "release time" programs, school exemptions for the Amish, and religiously based exemptions from unemployment compensation rules all benefit exclusively religious classes. Thus, that fact alone is not sufficient to invalidate accommodation requirements.

It is at this point that the contention that no free exercise

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the employer or co-workers. *See* Brown v. General Motors Corp., 601 F.2d 956, 961-62 (8th Cir. 1979). In fact, in the normal situation, accommodation will involve assigning someone to do something contrary to the accommodated party's beliefs. As the Ninth Circuit has noted:

> A religious accommodation does not violate the Establisment Clause merely because it can be construed in some abstract way as placing an inappreciable but inevitable burden on those not accommodated. Exemption of conscientious objectors from military conscription has been upheld despite the effect of requiring nonobjectors to serve in their stead.

Tooley v. Martin-Marietta Corp., 648 F.2d 1238, 1246 (9th Cir. 1981).

371. *See, e.g.*, Note, *supra* note 348, at 490.

372. *See, e.g., id.* at 491; Recent Development, *supra* note 331, at 255, 257; *see also* Isaac v. Butler's Shoe Corp., 511 F. Supp. 108, 112 (N.D. Ga. 1980).

373. *See* Note, *supra* note 348, at 487.

374. *See supra* text accompanying note 191.

rights are involved is brought into play. The other cases are all distinguishable, according to this argument, because in each of the other cases, failure to grant an exemption would result in state action directly infringing free exercise rights.[375] There are a number of problems with this position. First, it is not really clear that failure to accommodate in the other settings would necessarily burden free exercise. It is not apparent, for example, that repeal of tax exemption statutes[376] or denial of "release time" opportunities[377] would burden free exercise rights. Second, there is no reason why an attitude of "benevolent neutrality" should permit accommodation only when free exercise values would otherwise be directly jeopardized. Third, this approach overlooks the fact that failure to require accommodation may have the effect of creating a gap in a general antidiscrimination scheme that results in the anomalous situation that only certain species of religiously based discrimination go without protection. Conscience clause statutes, for example, can be viewed as legislative efforts to plug a particularly troubling gap in employment discrimination law. Once a state has begun to afford certain types of protection, it has a legitimate if not compelling interest in making the necessary adjustments to ensure that the system as a whole operates in a manner consistent with "the governmental obligation of neutrality in the face of religious differences."[378] Religious accommodation provisions in general, and conscience clause provisions in particular, are framed to make certain that these religious differences are respected, not to attempt to give them undue weight in our pluralistic society.

One final argument has been advanced in connection with the primary effect test—namely, that accommodation provisions favor religion over irreligion.[379] The short answer to this contention is that advanced by Justice Marshall in his dissent in *Trans World Airlines, Inc. v. Hardison:* "If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be

375. *See, e.g.,* Note, *supra* note 348, at 491.

376. In his concurring opinion in *Walz,* Justice Brennan indicated that "cessation of exemptions *might* conflict with the Free Exercise Clause," Walz v. Tax Comm'n, 397 U.S. 664, 692 n.12 (1970) (emphasis added), but did not need to reach that issue, and noted that he would not go so far as to say that government must provide exemptions.

377. *See* Zorach v. Clauson, 343 U.S. 306 (1952).

378. Sherbert v. Verner, 374 U.S. 398, 409 (1963); *cf.* Widmer v. Vincent, 102 S. Ct. 269 (1981).

379. *See, e.g.,* Comment, *supra* note 354, at 427.

said to establish religion by requiring employers to do the same with respect to obligations owed the employer."[380] In general, then, it seems highly unlikely that conscience clause provisions will be invalidated on establishment clause grounds.

B. Institutional Conscience Clauses

Many of the state conscience clauses protect not only the rights of individuals to abstain from participating in abortions, but also the right of hospitals or other medical institutions to refuse to perform such procedures.[381] There has never been any serious question that purely private hospitals could determine their own policies in these areas.[382] Arguments have been raised that acceptance of state or federal funding should obligate private hospitals to handle abortions,[383] but at least at the federal level, such arguments were laid to rest by the Church amendment, which expressly provides that the receipt of federal funds by an entity such as a private hospital does not require the institution to make facilities or personnel available for the performance of abortions.[384] Forty-two states have adopted similar legislation.[385]

The more controversial question has been whether hospitals holding themselves out as public institutions could refuse to allow their facilities to be used for abortions.[386] In the first few years following the *Roe v. Wade* decision, lower courts held fairly uniformly that public hospitals could not adopt restrictive abortion policies[387] and that institutional conscience clauses

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380. 432 U.S. 63, 90-91 (1977).

381. *See supra* note 186 and accompanying text. Of the forty-four states with conscience clause provisions, only New York and Rhode Island fail to provide some form of protection for hospitals. Of the forty-two states with hospital protection, California, Indiana, Iowa, Kentucky, Massachusetts, Montana, Nevada, Oklahoma, South Carolina, Texas, Utah, and Wyoming provide that protection only for private or denominational hospitals.

382. *See* L. WARDLE, THE ABORTION PRIVACY DOCTRINE 199 (1980).

383. *See, e.g.*, Jones v. Eastern Me. Medical Center, 448 F. Supp. 1156, 1160-63 (D. Me. 1978).

384. 42 U.S.C. § 300a-7(a) (1976).

385. *See supra* notes 179-86.

386. *See, e.g.*, Pilpel & Patton, *Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses*, 6 COLUM. HUM. RTS. L. REV. 279, 290-95 (1974-75); L. WARDLE, THE ABORTION PRIVACY DOCTRINE 199-214 (1980).

387. *See, e.g.*, Nyberg v. City of Virginia, 361 F. Supp. 932, 938-39 (D. Minn. 1973), *aff'd*, 495 F.2d 1342, 1347 (8th Cir.), *appeal dismissed*, 419 U.S. 891 (1974); Doe v. Hale Hosp., 369 F. Supp. 970, 973-75 (D. Mass.), *aff'd*, 500 F.2d 144, 146 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975).

were impermissible except with respect to private institutions.[388] The rationales of a number of subsequent Supreme Court decisions, however, provide a reasonable basis for arguing that more restrictive abortion policies may be permissible in the public hospital setting.

The leading case in this regard is *Poelker v. Doe.*[389] *Poelker* involved a challenge by an indigent woman against the policies of a St. Louis public hospital providing that abortions would not be performed except when there was a risk of grave physiological injury or death to the mother. The likelihood of obtaining abortion services at the hospital was further reduced by a policy of staffing the hospital entirely from a nearby Jesuit-operated medical school. The Court held that there was no constitutional bar to the election by the city of St. Louis "to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions."[390] In *Maher v. Roe,*[391] which was decided the same day, the Court sustained a state regulation prohibiting use of Medicaid funds to subsidize nontherapeutic abortions. In that case, the Court articulated the standard by which the abortion privacy right is to be measured: "the right protects the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy."[392] The Court stressed the "difference between direct state interference with protected activity and state encouragement of an alternative activity consonant with legislative policy,"[393] and found that a decision not to fund nonmedically necessary abortions did not constitute an impermissible state-imposed obstacle to abortion.[394] This principle has been further clarified in *Harris v. McRae,*[395] which sustained the Hyde amendment constraints on federal abortion funding. In that case, the Court stated, "although government may not place ob-

388. Hodgson v. Anderson, 378 F. Supp. 1008, 1017-20 (D. Minn. 1974), *appeal dismissed sub nom.* Spannans v. Hodgson, 420 U.S. 903 (1975), *aff'd sub nom.* Hodgson v. Lawson, 542 F.2d 1350, 1356 (8th Cir. 1976); Wolfe v. Shroering, 388 F. Supp. 631, 638 (W.D. Ky. 1974), *aff'd,* 541 F.2d 523, 527-28 (6th Cir. 1976). *But cf.* Doe v. Mundy, 378 F. Supp. 731, 733 n.3 (E.D. Wis. 1974), *aff'd,* 514 F.2d 1179, 1182-83 (7th Cir. 1975).

389. 432 U.S. 519 (1977).

390. *Id.* at 521.

391. 432 U.S. 464 (1977).

392. *Id.* at 473-74 (emphasis added).

393. *Id.* at 475.

394. *Id.* at 474.

395. 448 U.S. 297 (1980).

stacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."[396]

The analysis in the funding cases has required courts to rethink the question of the extent to which public hospitals may permissibly refrain from making their facilities available for abortion. *Nyberg v. City of Virginia*,[397] the most recent federal court of appeals decision in this area, reflects the residual uncertainties that the funding cases have created. The question in *Nyberg* was whether an injunction barring implementation of a public hospital's policy of refusing to perform any abortions except those necessary to "save the life of the mother," should be dissolved in the aftermath of the funding cases.[398] The City contended that "the limited purpose of the *Poelker* opinion was to demonstrate that *Maher's* approval of withholding of medicaid subsidies for nontherapeutic abortions also applies to a city's denial of hospital facilities."[399] Thus, in the City's view, a public hospital has no greater obligation to make its facilities available than to make funds available enabling the indigent to use those facilities. Rejecting this claim, the *Nyberg* majority noted that the effect of the hospital's policy would be "to eliminate access to abortion services at the sole hospital in the City of Virginia."[400] The majority reasoned that the case differed significantly from *Maher, Harris*,[401] *Williams*,[402] and *Poelker* in that

> [t]he City of Virginia and the Hospital Commission are not required to provide free abortions, hire doctors who will do abortions, or subsidize the abortion services. The injunction requires the City simply to *allow* staff physicians at the community hospital to perform paid abortions at the hospital. There is no evidence that mere use of the Virginia Municipal Hospital by staff physicians to provide abortion services to their paying patients interferes with the normal hospital routine or causes the government to incur any expenditure of public funds.[403]

The holding in the *Nyberg* case is thus that, at least where a

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396. *Id.* at 316.

397. 667 F.2d 754 (8th Cir. 1982).

398. *Id.* at 755.

399. *Id.* at 757 (citing Reproductive Health Serv. v. Freeman, 614 F.2d 585, 597 n.22 (8th Cir.), *vacated*, 449 U.S. 809 (1980)).

400. *Id.*

401. Harris v. McRae, 448 U.S. 297 (1980).

402. Williams v. Zbaraz, 448 U.S. 358 (1980).

403. 667 F.2d at 758.

public hospital is the sole facility in a community where abortions can be obtained, the hospital cannot adopt an affirmative policy of preventing its staff physicians from performing abortions for patients willing to pay the costs of the procedures. Significantly, the court recognizes that a public hospital does not have an affirmative obligation to "hire doctors who will do abortions," although its reasoning would appear to preclude adoption of a policy of hiring *only* doctors opposed to abortion.[404] The underlying principle adopted by the *Nyberg* majority thus seems to be that a public hospital may not adopt an affirmative policy which has the effect of making it impossible to obtain abortions from any health facilities in the community,[405] but that a woman willing to pay for an abortion may not coerce a public hospital to provide one, if none of its personnel are willing to perform the procedure.

The dissent in *Nyberg* suggests that the funding cases may give public hospitals even greater flexibility in determining the extent to which they wish to make their facilities available for abortions. First, the dissenting judge questioned the majority's claim that the City of Virginia incurs no public expenditures when paid abortions are performed in the municipal hospital.[406] Second, he pointed to an inconsistency in the Eighth Circuit's handling of *Poelker* on remand and its decision in *Nyberg:* "it appears that . . . the City of St. Louis can prohibit all nontherapeutic abortions, either paid or nonpaid, from being performed in its publicly owned hospital while the City of Virginia cannot."[407] And third, he contended that "[i]f reasonable access to abortions is to be the deciding factor"[408]—an apparent reference to *Maher*'s "unduly burdensome interference" test—then the case ought to be remanded for further fact finding. The dissenter's discussion of this point is cryptic, but his reasoning

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404. *Id. Poelker* could be read as vindicating the right of a public hospital to maintain a policy of hiring only anti-abortion personnel, since the staffing policy in effect at the hospital in that case had precisely this effect. But *Poelker* involved an action brought by an indigent against a hospital that was not the sole abortion facility in the community. Thus, the question of the validity of affirmative hospital policies which have the effect of completely barring access to paying abortion patients within a particular community was not reached.

405. The court's reasoning leaves open the possibility suggested by *Poelker* that one or more public facilities might adopt restrictive policies, so long as some public (or possibly merely some private) abortion facilities are available in the community.

406. 667 F.2d at 759.

407. *Id.* at 760.

408. *Id.*

seems to be that one cannot assume that closing the doors of a community's sole public hospital to paying abortion patients necessarily constitutes an unduly burdensome interference with the abortion choices made by those individuals.[409] In the first place, such action might not even involve the kind of burden which the *Maher* test was intended to measure. One of *Maher*'s principal teachings is that a sharp distinction must be drawn between publicly imposed and private burdens. The fact that particular public health care facility adopts restrictive abortion policies does not interfere, in and of itself, with the exercise of a woman's abortion choice. It merely implies she must seek an abortion somewhere else. Inability to bear the incremental costs of going to an alternative facility, like inability to pay for abortion itself, is a reflection of a preexisting distribution of financial resources which the state is not obligated to change or ameliorate. It is clearly permissible, under *Maher,* for the state to use its resources in a manner which would make "childbirth a more attractive alternative" than abortion.[410] So long as the state does not affirmatively prohibit abortions or impose similar direct burdens on the exercise of the abortion choice, the reasoning in *Maher* seems to imply that the withholding of state resources—whether in the form of funds or facilities—does not impinge on the fundamental privacy right recognized in *Roe v. Wade.*[411] Second, even if public facilities did have this type of affirmative obligation, the question would be not merely whether a given facility had adopted restrictive policies, but whether that action constituted an *unduly burdensome* interference under the particular circumstances. Thus, adoption of restrictive abortion policies would be impermissible only if requiring a woman to go elsewhere—i.e., to other public or private facilities—was actually unduly burdensome for the particular woman. In many cases, requiring a woman to go to a nearby community or even an adjacent state would not violate this test. After all, if it is not unduly burdensome to completely deny access to an abortion to a woman who cannot afford to pay for one, it is not immediately clear why the hurdle posed by incremental travel expenses is any more "unduly burdensome."

It is still too early to tell precisely how courts will respond

409. *See id.*
410. *See* Maher v. Roe, 432 U.S. 464, 474 (1977).
411. *See id.*

to questions about the extent to which public hospitals can adopt restrictive abortion policies in light of the funding cases. There do appear to be some significant differences between obstacles to abortion which flow from indigency and obstacles which flow from restrictive policies adopted by public hospitals. The latter embody government action which arguably places "obstacles in the path of a woman's exercise of her freedom of choice,"[412] whereas indigency is a condition which government has not created and is not obligated to remove.[413] Moreover, where a paying patient is precluded from obtaining an abortion, an existing doctor-patient relationship may be disrupted if the woman's doctor cannot perform the procedure at the alternative facility. As the *Nyberg* majority noted, "[t]he woman's own physician would possess familiarity with the woman's background and needs; he would be in the best position to exercise the professional judgment necessary to determine whether abortion in a particular case would be advisable."[414] The Supreme Court has consistently attached significance to protecting the doctor-patient relationship in the abortion privacy context.[415] In view of these considerations, courts may ultimately tend to follow the *Nyberg* majority. But the position of the dissenter indicates that this is not a foregone conclusion. Much will depend on whether courts view the adoption of restrictive policies as a publicly imposed burden or as a refusal to lighten preexisting private barriers. Even if courts adopt the former view, however, *Maher* makes it clear that this does not end the analysis. Future courts ought to be more careful than the *Nyberg* majority in making certain that the factual question whether the burden involved actually constitutes an "unduly burdensome interference" is adequately explored.

Whichever view ultimately prevails, there is good reason to think that at least some public hospitals—for example, those located in areas in which alternative abortion facilities could be reached without undue difficulty, as suggested by the *Poelker* situation—may permissibly implement restrictive policies. If this is correct, state institutional conscience clauses that permit this result would also appear to be constitutional. And in any event, the funding cases make it clear that where a hospital's

412. Harris v. McRae, 448 U.S. 297, 316 (1980).
413. *Id.*
414. 667 F.2d at 758 n.2.
415. *See* Wood & Durham, *supra* note 2, at 783-87.

failure to provide abortion services results not from affirmative hospital policy, but from the unanimous preferences of its staff, no affirmative obligation to coerce participation or to hire personnel with differing views arises merely because the hospital is a public institution.

C. Free Exercise Protections

The final question warranting discussion is the extent to which the free exercise clause itself affords protection to those with conscientious objections to participation in abortion procedures,[416] even in the absence of specific conscience clause legislation. While there appear to be no cases that have dealt squarely with this issue, there is ample precedent to suggest that free exercise protections are indeed available when objection to participation in an abortion is religiously based[417] and when appropriate prerequisites of state action are met.[418]

The key case in this area is *Thomas v. Review Board of Indiana Employment Security Division.*[419] Thomas was a Jehovah's Witness who worked for a foundry and machinery company until he was transferred to a department that produced turrets for military tanks. Claiming that his religious beliefs prevented him from participating in the production of war materials, he checked into the possibility of a transfer to another department, then asked for a layoff. When these avenues proved unavailing, he quit. He then applied for unemployment compensation. Although factual determinations were made to the effect that Thomas quit due to his religious convictions, both the Review Board and the Indiana courts held that this did not constitute "good cause" for termination and thus did not entitle him to obtain unemployment compensation.[420] In part, the Indiana Supreme Court's conclusion rested on the view that Thomas had made a merely "personal philosophical choice rather than a religious choice."[421] Thomas conceded that another Jehovah's Wit-

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416. As a technical matter, actions for deprivation of free exercise rights would probably be brought pursuant to civil rights statutes proscribing deprivation of constitutionally protected rights, such as 42 U.S.C. § 1983. For convenience in analysis, we will omit reference to such statutory mechanisms for asserting free exercise rights.

417. *See infra* text accompanying notes 437-39.

418. *See infra* note 440 and accompanying text.

419. 450 U.S. 707 (1981).

420. *Id.* at 709-13.

421. Thomas v. Review Bd. of the Ind. Employment Sec. Div., _ Ind. _, 391 N.E.2d 1127, 1131 (1979), *rev'd*, 450 U.S. 707 (1981).

ness with whom he had consulted did not regard working on weapons as "unscriptural,"[422] and that working on raw materials which might at some later stage in production be incorporated in war material would not offend his conscience.[423]

The Supreme Court reversed, relying heavily on *Sherbert v. Verner*,[424] in which the Court held that a "good cause" provision similar to Indiana's could not, without violating the free exercise clause, be construed to prevent payment of unemployment compensation to a Sabbatarian who refused to accept Saturday work. The Court concluded that Thomas was put to the same impermissible choice as Sherbert—the "choice between fidelity to religious belief or cessation of work"[425]—and that the coercive impact in the two cases was indistinguishable.[426] The Court then determined that the interests identified by the state in support of its position (avoiding the costs of widespread unemployment if persons are permitted to leave jobs for "personal reasons" and avoiding detailed probing by employers into the religious beliefs of employees) were not sufficiently compelling to justify the burden on Thomas' religious liberty.[427]

The facts in *Thomas* are closer than those in *Sherbert* to the typical situation in which medical personnel object to participation in abortion, inasmuch as they involve a religiously based objection which goes to the nature rather than the timing of the work to be performed. *Thomas* thus makes it clear that state action which forces an employee to choose between acting in accordance with religious beliefs and suffering sanctions for failure to perform work that violates those beliefs imposes a burden on the employee's free exercise rights.

One might argue, however, that all *Thomas* establishes is that medical personnel have a right to obtain unemployment compensation if they resign or are discharged[428] because of refusal to participate in abortion procedures. While this point may be well taken with respect to medical personnel employed at private hospitals, it would not hold in connection with facilities such as public hospitals in which the policies and practices of

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422. 450 U.S. at 711.
423. *Id.* at 714-15.
424. 374 U.S. 398 (1963).
425. 450 U.S. at 717.
426. *Id.*
427. *Id.* at 718-19.
428. The *Thomas* Court treats dismissal and quitting as functional equivalents for purposes of free exercise analysis. *See* 450 U.S. at 718.

the institution are imbued with state action. Disciplinary actions imposed by such public entities impose burdens on the free exercise rights of employees which are more direct and objectionable than the indirect coercion of withholding unemployment benefits.

The fact that the free exercise clause requires accommodation of religiously motivated refusal to work, not only after termination but also within the work environment, is confirmed by reference to the recent cases in which prison officials have been required to accommodate the beliefs of Muslim prisoners.[429] *Chapman v. Pickett*[430] is particularly pertinent. In that case a Black Muslim prisoner objected to participation in certain work details in which he was required to handle pork, which was forbidden by his religion. Noting that "[i]t placed no financial burden on the prison to switch the plaintiff's work assignment, and there was certainly minimal, if any, effect on administrative efficiency,"[431] the court concluded that failure to accommodate plaintiff's refusal to handle pork infringed his free exercise rights.[432] Obviously, the prison context is substantially more coercive than the standard employment setting at a public hospital. But even a relatively slight burden is violative of the free exercise clause in the absence of an overriding compelling state interest. Moreover, it must be remembered that a prisoner's conviction and sentence "have subjected him to some curtailment of his freedom to exercise his beliefs"[433] and that state interests in prison security, discipline, and administration afford stronger justifications for state action infringing free exercise rights than are available in the hospital setting. Thus, a prisoner is in a much less favorable position to assert free exercise rights than a hospital employee. If prison officials are required to accommodate a prisoner's religiously based objections to specific types of work in order to comply with the free exercise clause, surely public hospitals have an even stronger obligation to do so.

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429. *See, e.g.*, St. Claire v. Cuyler, 481 F. Supp. 732, *petition for stay of injunction denied*, 482 F. Supp. 257 (E.D. Pa. 1979), *reh'g denied*, 643 F.2d 103 (3d Cir. 1980) (Adams, J., dissenting), *modified*, 634 F.2d 109 (3d Cir. 1980); Masjid Muhammad—D.C.C. v. Keve, 479 F. Supp. 1311 (D. Del. 1979), *modified*, 634 F.2d 109 (3d Cir.), *reh'g denied*, 643 F.2d 103 (3d Cir. 1980) (Adams, J., dissenting); Cochran v. Rowe, 438 F. Supp. 566 (N.D. Ill. 1977); Monroe v. Bombard, 422 F. Supp. 211 (S.D.N.Y. 1976).

430. 491 F. Supp. 967 (C.D. Ill. 1980).

431. *Id.* at 972.

432. *See id.*

433. Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967).

Of course, the employee's free exercise rights can be overridden, under appropriate circumstances, by higher-order state interests of a sufficiently compelling nature.[434] For example, the interest in preserving the life of a mother would appear to be sufficiently compelling to override the conscientious beliefs of medical personnel. Thus, free exercise rights might give way in emergency situations. As has been noted in connection with emergency provisions in conscience clauses, however, the range of circumstances in which there is likely to be an emergency with respect to both the health of the mother and the absence of nonobjecting fall-back personnel is likely to be extremely rare.[435] At the other end of the continuum, it would seem clear that a public institution's interest in mere administrative convenience is not sufficiently compelling to justify infringement of free exercise rights.[436] An intermediate situation might arise where a public hospital's governing board wished to provide abortion facilities, but either none or an insufficient number of its employees were willing to participate. The question is whether the interests of the public institution in providing abortion services outweigh the free exercise interests of its employees and prospective employees. A persuasive argument can be made that with respect to prospective employees, such a facility may properly prefer new employees willing to participate in abortions over those not willing to do so. The fact that an individual has a conscientious objection to performing an identified type of work obviously does not vest in that person a constitutional right to being given equal or favored consideration for a position involving work the person refuses to perform. On the other hand, with respect to persons already employed, free exercise rights should be given priority. Prospective employees do not have an established employment relationship; but administrative pressures or sanctions brought to bear on individuals who have already been hired disturb settled expectations found in employment relationships and thus impose a burden on free exercise rights. Administrative interests in providing a certain type of procedure—even a procedure such as abortion, which is protected (though obviously not required) by a fundamental right—should not be permitted to outweigh claims rooted in the right to reli-

434. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

435. *See supra* text accompanying notes 228-37.

436. *Cf.* Sherbert v. Verner, 374 U.S. 398, 407 (1963) (state's interest in minimizing potential for fraudulent claims not compelling).

gious liberty.

A more comprehensive analysis of the free exercise claims available to medical personnel objecting to abortion would no doubt delve into the problems of defining religion[437] and delineating the boundary between state and private action.[438] However, since borderline questions concerning the nature of religion are considerably less likely to occur in the conscience clause setting than in other contexts such as conscientious objection to the draft,[439] and since most claims concerning conscientious objection to abortion are likely to be dealt with at the statutory rather than the constitutional level in any event, it makes little sense to further lengthen this Article with detailed analyses of these extremely complex subsidiary issues.[440] Suffice it to

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437. *See generally* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

438. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 261-75, 1147-74 (1978).

439. *See supra* text accompanying notes 118-19.

440. Although this is not the place to explore state action issues in detail, it is useful to note in passing that conscience clause legislation that follows the pattern of the Church amendment, 42 U.S.C. § 300a-7(a) (1976), *see supra* text accompanying notes 118-19, may have created an asymmetry in the availability of state action arguments when one compares those seeking abortions with those who object to participation in abortion. Following the Supreme Court's decision in *Roe v. Wade*, a variety of arguments of varying plausibility were developed to suggest that governmental funding of hospitals was sufficient to imbue the conduct of private hospitals with state action. *See, e.g.*, Jones v. Eastern Me. Medical Center, 448 F. Supp. 1156, 1160-63 (D. Me. 1978); Greco v. Orange Memorial Hosp. Corp., 374 F. Supp. 227, 233 (E.D. Tex. 1974), *aff'd*, 513 F.2d 873, 882-83 (5th Cir.) (Clark, J., concurring), *cert. denied*, 423 U.S. 1000 (1975); Pilpel & Patton, *supra* note 386, at 289-300. Whatever the merits of these arguments may have been, the Church amendment effectively denied them any practical force by precluding courts from finding that the receipt of specified federal funds gives rise to state action and from requiring an individual or an institution to provide abortion or sterilization services in violation of conscientious beliefs. *See* 42 U.S.C. § 300a-7(a) (1976); Watkins v. Mercy Medical Center, 364 F. Supp. 799, 801 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975). The Church amendment and parallel state statutes may reasonably be read as withdrawals of jurisdiction rather than as measures establishing substantive protections. *See* Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 951 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976). *See also* Comment, *Abortion Conscience Clauses*, 11 COLUM J.L. & SOC. PROBS. 571, 597-602 (1975) (suggesting that such a withdrawal of jurisdiction may be impermissible). To the extent this reading is correct, the statutes leave open the possibility that even though state action arguments forged by pro-choice advocates no longer have any practical force, they might still be effective if raised by someone claiming that his or her free exercise rights were being infringed. This is because the withdrawal of jurisdiction is limited to those contexts in which a court might seek to require participation in abortion and does not apply where an individual is seeking to avoid such compulsion. This is not a major point, since for the most part, there is not a sufficient nexus between government funding and hospital abortion policies to constitute state action in any event. *See generally* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-51 (1974); Jones v. Eastern Me. Medical Center, 448 F. Supp. at

say that in the rare case in which statutory protections prove inadequate, there remains a rich borderline of intricate inquiry for further exploration.

VII. Conclusion

At a time when approximately one of every three pregnancies in the United States is terminated in abortion,[441] and when feelings among all sectors of the population concerning the abortion issue are running high, it is not surprising that individuals fulfilling a wide range of roles in the health care field have deep concerns about the provision of this type of medical service. Our study demonstrates, in greater detail than most prior studies, that the attitudes of nurses toward abortion are finely attuned both of the nature of the circumstances and the trimester of particular abortion choices.[442] By analyzing the relationship between abortion attitudes and a larger set of categories of religious preferences than is usually used, we were able to obtain a fairly detailed picture of the way religious preference and religiosity affect abortion attitudes.[443] While our study shows that for the most part the conscientious beliefs of those opposed to participation in abortion are being adequately accommodated, whether by self-selection mechanisms or by affirmative employer efforts,[444] a small but significant percentage of respondents indicated they had encountered strong pressures and varying types of employment discrimination as a result of their beliefs.[445]

Significantly, only a very small percentage of nurses had any clear idea of the types of legal protections available to them in this type of circumstances.[446] This is unfortunate, since a broad array of protections are available at both the state and federal levels. Title VII of the Civil Rights Act of 1964[447] and parallel state statutes[448] provide extremely broad coverage that extends to a number of situations not covered by conscience clause legis-

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1160-63. But it is an important reminder that the effective range of state action for free exercise purposes may be somewhat broader than that for seeking broadened access to abortions.

441. *See* L. Wardle & M. Wood, A Lawyer Looks at Abortion 8 (1982).

442. *See supra* text accompanying notes 56-66.

443. *See supra* text accompanying notes 73-77.

444. *See supra* text accompanying note 79.

445. *See supra* notes 139 & 141 and text accompanying notes 8-11 & 79-80.

446. *See supra* text accompanying note 82.

447. *See supra* text accompanying notes 90-153.

448. *See supra* text accompanying notes 154-62.

lation, which has been more specifically crafted to cover accommodations problems arising out of the abortion context. However, much of the clout of these protections has been eroded by the Supreme Court's determination that de minimis accommodation efforts are sufficient to meet Title VII's undue hardship test.[449]

Conscience clause legislation is likely to provide substantially stronger protections. This would probably not be the case if courts were to extend the Supreme Court's de minimis approach to Title VII into the conscience clause setting, but as we argue at some length, such an approach would be inconsistent with the basic aims, the structure, and the language of the conscience clause provisions.[450] The degree of accommodation required under various conscience clauses will need to be clarified by state courts (unless legislatures begin to do a better job of tackling the task directly), but most statutes would appear to require at a minimum substantial accommodation efforts, and many would appear to require virtually unqualified protection.[451] Our analysis points out that imposing on medical employers stringent accommodation requirements of this nature is not as harsh as it might first appear. Since accommodation costs can be passed on to the individual receiving the abortion, stiff accommodation requirements at bottom reflect a legislative judgment that the woman seeking the abortion, rather than personnel with conscientious objections to participation in the procedure, should bear the burden of accommodation.[452]

At the constitutional level, we have considered three issues. First, we have argued that accommodating conscientious objection to abortion procedures is not inconsistent with the establishment clause.[453] Second, we have contended that the Supreme Court's more recent abortion decisions imply at a minimum that public facilities do not have an affirmative obligation to hire personnel willing to perform abortions, and that a woman seeking an abortion cannot compel a public facility to provide her with one if none of its personnel are willing to participate.[454] We also note a reading of the recent decisions which implies that where

449. *See supra* text accompanying notes 120-53.
450. *See supra* text accompanying notes 253-87.
451. *See supra* text accompanying note 280.
452. *See supra* text accompanying notes 293-303.
453. *See supra* text accompanying notes 307-78.
454. *See supra* text accompanying notes 402-03, 413-14.

other public or private abortion facilities remain accessible, any public institution may decline to make its facilities available for some or all abortions in which the life of the mother is not at stake, just as it may decline to fund such abortions for indigent women.[455] At this juncture, it is too early to tell whether courts will go this far. Finally, we suggest that the free exercise clause itself may provide some measure of protection against state action which would infringe the religiously based beliefs of those opposing participation in abortion.[456]

455. *See supra* text accompanying notes 404-09.
456. *See supra* text accompanying notes 414-36.