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A Duty to Serve?: Assessing the Application of Religious Exemptions for Marriage Officiants in Same-Sex Marriage Laws with Lessons Learned from the Reproductive Rights World

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Introduction

Religious exemptions in public accommodation statutes have raised quite a bit of debate. Most notably in the area of health care, providers are often offered a blanket exemption to get out of performing services that are contrary to their religious, moral or ethical beliefs. However, health care providers are said to have special duties to their patients. This paper argues that judges and other public officers authorized to solemnize marriage also have a special obligation. Duties prescribed by law and professional codes of conduct expect both health care providers and public officials who solemnize marriages to act out of respect for their "patient's" well-being. While the religious convictions held by health professionals and public officials should be guarded, patients seeking care and same-sex couples seeking marriage should not suffer harm or potential harm because of a belief they do not share. In that spirit, while it is right to offer statutory accommodations to individuals who wish to exercise their religious beliefs, religious exemption clauses in health care provider and same-sex marriage statutes that promote blanket immunity for refusals to provide a service, do little to truly resolve the tension between the needs of the person seeking the service and the service provider's autonomy. So little tension is resolved because while accommodations are made to protect religious freedom, not as much protection is afforded to the service provider or to those who are seeking out the service.

In the Part I of this paper, the value of religious freedom will be discussed. Part II will discuss the rise of the religious exemption in the health care system, particularly in the area of

reproductive rights. Part III will discuss the balancing of same-sex marriage rights with that of religion, highlighting the same-sex marriage statutes in Connecticut, Maine, New Hampshire and Vermont. Part IV will summarize the two models of religious exemption in same-sex marriage statutes: one emerging from Connecticut and Vermont and the other emerging from New Hampshire and Vermont. This section will describe why the Connecticut-Vermont model is a better one based on: (1) a New Jersey Attorney general official opinion and (2) lessons learned from the reproductive rights context. A short conclusion will follow.

Part I - The Value of Religious Freedom

Decided in 1990, the case of *Employment Division v. Smith*[1] held that the First Amendment affords protection to religion from state action specifically directed at religion. Any discriminatory action against religion from a "neutral, generally applicable law" is not protected.[2] When this court interpreted the free exercise protections of the First Amendment, they upheld the withholding of unemployment benefits to two Native Americans who had been fired from their jobs for using the drug peyote as part of a religious exercise.[3] They argued that the law that outlawed their drug use infringed upon their First Amendment right to the Free Exercise of their religion and that in order for the law excluding them from benefits to be applied, the state would have to show a "narrowly tailored…compelling state interest" citing the holding in *Wisconsin v. Yoder*.[4] This test requires a sort of balancing between the First Amendment Free Exercise rights and the interests of the state. For an individual right to be trumped, the state's interest cannot be broad and/or vague, but instead must be one that is

[1] Employment Division v. Smith, 494 U.S. 872, 876-90 (1990).
[2] *Id.* at 880.
[3] *Id.* at 890.
[4] *Id.* at 892.

specifically targeting a specific issue that is both substantial and compelling. The public good is then more important than the good of the individual.

Yoder was a case in which Amish parents sought to be exempted from a law requiring that their children go to formal schooling because it went against their religious doctrine, which allowed them to homeschool their children.[5] The parents felt that the Free Exercise Clause shielded this.[6] Here, the Court found that this schooling requirement law did infringe on the Amish religious practices and while they did acknowledge that the state does have an interest in "universal education."[7] If found that even this "paramount responsibility" needed to be balanced with the protections afforded by the Free Exercise Clause.[8] When balancing these competing interests, the Court held that the homeschooling "satisfied both the religious imperatives," as well as the state's interest in education.[9]

The Court in *Smith* rejected the respondents' reliance on *Yoder*, particularly in this case in which a generally applicable law impinges on religious freedom, ruling that the law prohibiting withholding of benefits was permissible and that the compelling state interest test need not be applied to justify this generally applicable law.[10] The Court went on to highlight the fact that *Yoder* dealt with not only an allegation of a burden on religious freedom, but another right as well – the right to direct the education of one's child.[11] Therefore, the *Smith* case

[5] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
[6] *Id.* at 209.
[7] *Id.* at 214.
[8] *Id.* at 213.
[9] *Id.* at 234.
[10] Smith, 494 U.S. at 876.
[11] *Id.* at 910.

resulted in limiting protection of free exercise of religion to only cases wherein not only religious freedom is being challenged, but also where another right is at stake.[12]

Some commentators, including Michael W. McConnell in his article entitled *Free Exercise Revisionism and the Smith Decision*, have been critical of the *Smith* decision particularly in the fact that the "additional" right – the right to direct one's own child's education -- in *Yoder* as a fundamental one, when the Court in *Yoder* explicitly states that parents do not possess this right constitutionally.[13] Congress responded to the backlash to the *Smith* decision in 1993 when the passed the Religious Freedom Restoration Act of 1993 ("RFRA").[14] Congress' intent in enacting this legislation was to "restore the compelling interest test as set forth in…*Yoder*…and to guarantee its application in all cases where free exercise of religion is substantially burdened."[15] The response to the RFRA was not entirely positive and in the case of *City of Boerne v. Flores*,[16] the Supreme Court struck down the RFRA and reaffirmed its holding in *Smith*.[17] In this case, the Archbishop of San Antonio requested a building permit to enlarge his sanctuary.[18] When this was denied, he filed a suit in federal court seeking relief, relying on the RFRA to support his claim that the City incorrectly denied him his building permit.[19] The District Court found the RFRA to be an unconstitutional extension of Congress' Fourteenth Amendment enforcement power, while the Court of Appeals for the Fifth Circuit found RFRA, in fact, to be constitutional.[20] Finally, the Supreme Court reversed the Fifth Circuit, citing

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[12] *Id.* at 881.
[13] Mitchell W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1123-24 (1990).
[14] 42 U.S.C. 1988, 2000bb-4 (Supp. 1997).
[15] 42 U.S.C. 2000bb(b)(1) (1994).
[16] City of Boerne v. Flores, 117 S. Ct. 2157 (1997).
[17] *Id.* at 2162.
[18] *Id.* at 2157.
[19] *Id.* at 2162.
[20] *Id.* at 2165.

Marbury v. Madison in its ruling that Congress exceeded its authority with RFRA by "attempting to enact an interpretation of, rather than enforce constitutional guarantees."[21] Currently, there remains tension in free exercise jurisprudence with conflict between the *Smith* holding and the analysis offered in *Yoder*.[22] It is safe to assume that religious exemptions from generally applicable laws remain a matter of legislative discretion rather than constitutional mandate. To this end, in a wide variety of federal and state statutes, covering a wide range of subjects, religious exemptions (also known as religious refusals or religious accommodations) have been created up in order to alleviate some of this tension.

Part II – The Rise of the Religious Exemption in the Health Care System and Reproductive Rights Arena

One area in which these religious exemptions have begun to be implemented into statutes, is the health care arena. With this implementation of these clauses into statutes, has come great debate. In the past few years, this debate has centered around whether health care providers should be allowed to be exempt from providing services that conflict with their personal beliefs.[23] Tension exists between protecting religious integrity and the access of patients to a full array of adequate care, particularly within the sphere of reproductive services and much has been written in this area. However, this debate is not localized to this controversial reproductive rights area, but it extends to other areas of the health care system, as well. Commentators note that the controversy continues to grow as the ever-expanding array of

[21] *Id.* at 2172 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
[22] *See, e.g.*, Alan Brownstein, Taking Free Exercise Rights Seriously, 57 Case W. Res. 55 (2006); Mitchell W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1123-24 (1990).
[23] Dennis Rambaud, Note, Prescription Contraceptives and the Pharmacist's Right to Refuse: Examining the Efficacy of Conscience Laws, 4 Cardozo Pub. L. Pol'y & Ethics J. 195 (2006).

medical technologies continues to expand at a rapid pace. Also fueling the continued controversy is the continually increasing presence of expression of religious faith in public life.[24]

Religious exemption provisions have been enacted both on the state and federal level to address these tensions, with a high prevalence of legislation allowing the free exercise of religion by health care providers to trump their duty to provide services.[25] Under this type of legislation, health care professionals relying on their religious beliefs to refuse to give treatment, can be shielded from being disciplined by their professional boards, being sued by their patients or being subjected to employment actions by their employers.[26] The newer conscience clauses are not restricted to religious objections. In fact, some proposed legislation grants health care providers the right to refuse to provide services for any ethical or moral reason, not just those related to religion.[27] Harrington and I both argue that with laws granting these seemingly unlimited exemptions, not enough effort has been made to achieve a consistent, reasonable balance between providers' personal (which perhaps could be religious in nature) interests and patients' interests in receiving and having access to the appropriate medical care. In most cases, the enacted exemption recognizes an absolute right of providers to refuse to provide health care and there is very little recognition of the burden that a religious refusal may have on the provider's employer hospital or medical group or the health care worker's colleagues and staff (such as nurses, technicians, and assistants).[28]

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[24] Maxime M. Harrington. The Ever-Expanding Health Care Conscience Clause: Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs. 34 Fla. St. U.L. Rev. 779 (2007).
[25] Nat'l Conference of State Legislatures, Pharmacist Conscience Clauses: Laws and Legislation at http://www.ncsl.org/programs/health/conscienceclauses.htm (listing states that have passed or considered health care conscience clauses).
[26] Harrington, 34 Fla. St. U.L. Rev. 779 (2007).
[27] *Id.* at 782.
[28] *Id.*

Religious exemption clauses (also known as "conscience clauses" or "refusal clauses") first arose in the early 1970's, on the heels of the landmark, controversial *Roe v. Wade* case.[29] A District Court case enjoined a Catholic hospital from refusing to allow a sterilization procedure on its premises.[30] In response, Congress quickly enacted legislation known as the "Conscience Clauses" in order to protect recipients of federal funding (and their providers) from being required to participate in abortion or sterilization procedures that conflicted with the religious or moral beliefs of said providers.[31] In 1974, Congress then expanded this law by allowing for a health care provider who has personal religious or moral beliefs contrary to any service to refuse to perform said service.[32] This 1974 amendment also extended the scope of the Conscience Clauses to recipients of funds under any program administered by the Secretary of Health and Human Services.[33]

Today, nearly every state in the nation now has carved out space in their body of laws for medical providers to withdraw from participating in any acts they find immoral.[34] These religious exemption clauses authorize individual providers or entities to refuse to participate in certain specified procedures, usually abortion, sterilization, physician-assisted suicide, and, increasingly, the dispensing of emergency contraceptives.[35] In the realm of reproductive rights,

[29] Roe v. Wade, 410 U.S. 959 (1973).
[30] Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), aff'd, 523 F.2d 75 (9th Cir. 1975), cert. denied, 424 U.S. 948 (1976).
[31] 42 U.S.C. section 300a-7(b).
[32] 42 U.S.C. 300a-7(d).
[33] *Id.*
[34] Robin Fretwell Wilson, Matters of Conscience: Lessons for Same-Sex Marriage from the Health-Care Context, in Same-sex Marriage and Religious Liberty: Emerging Conflicts 233 n. 7 (Douglas Laycock, Anthony Picarello, & Robin Fretwell Wilson, eds., 2008).
[35] *Id.*

this chips away at the strong, fundamental right of a woman to make her own choices concerning abortion and contraception as established in *Roe v. Wade*[36] and *Griswold v. Connecticut*.[37]

Following this federal action and the action of many states following suit and passing their own religious exemption clause statutes to protect their health care providers from being forced to perform certain health care services in conflict with their personal religious and moral beliefs, litigation ensued.[38] In *Poelker v. Doe*,[39] a woman challenged a city-owned hospital's refusal to grant her a "non-therapeutic" abortion. The hospital's policies regarding abortion were entrenched in the anti-abortion stance taken by the Jesuit medical school that supplied the hospital with physicians and students.[40] The Eight Circuit Court of Appeals held that the public hospital's policy to staff the hospital with providers with strong religious convictions about abortion infringed too much on the woman's reproductive rights.[41] However, the Supreme Court found that the city did not violate the woman's constitutional right, holding that when a state refuses to "provide a health service to a woman that [sic] has a constitutional right [to that service it] does not constitutionally interfere with her exercise of that right."[42] Id. at 521.

Another important case is *Hummel v. Reiss*.[43] In this case, a woman brought suit against a Catholic hospital and treating physician for "wrongful birth" on behalf of her daughter who was born severely retarded and disabled.[44] Hummel claimed that the hospital and physician "departed from acceptable medical standards by failing to allow her the option of an abortion or

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[36] Roe v. Wade, 410 U.S. 959 (1973).
[37] Griswold v. Connecticut, 381 U.S. 479, 486 (1965); See also, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[38] Lynn D. Wardle, Protecting the Rights of Conscience of Health Care Providers, J. Legal Med., 177, 177 (1993).
[39] Poelker v. Doe, 432 U.S. 519 (1977).
[40] *Id.* at 520.
[41] *Id.* at 525.
[42] *Id.* at 521.
[43] Hummel v. Reiss, 589 A.2d 1041 (N.J. Super. Ct. App. Div. 1991), aff'd, 608 A.2d 1341 (N.J. 1992).
[44] *Id.*

a transfer to another facility that would be willing to perform the abortion."[45] This decision took place before *Roe v. Wade*, but the law at the time in New Jersey did afford women the right to a "therapeutic, but not a eugenic abortion."[46] Therefore, both the trial and appellate courts concluded that Hummel's claim on behalf of her child was not actionable, but speculated that if her case had arisen after *Roe*, that there would be a cause of action if the mother "could have proved that she had been wrongly deprived of advice on and the choice of terminating the pregnancy."[47] The court did note that there was a present religious exemption, but it did not explain the possible implications of the state's conscience clause on the case.[48] However, the dicta in this case suggests that a religious exemption may not always excuse a religiously-affiliated hospital from having to at least counsel their patients about treatments that are inconsistent with their religious tenets.[49]

In both *Doe* and *Hummel*, there is a clear conflict between state law and religious "law" and there is also a clear indication that religious exemptions do not do much to relieve the tension.[50] In fact, Boozang goes on to state that these cases show the "impossibility of choosing between patient access to care and hospitals' religious freedom."[51] This article also raises several practical issues that arise due to this conflict, in particular a financial one.[52] When religious hospitals fail to provide a full array of abortion-related medical services, they suffer a

[45] *Id.* at 1043.
[46] *Id.* at 1045.
[47] *Id.*
[48] *Id.*
[49] Kathleen M. Boozang. Deciding the Fate of Religious Hospitals in the Emerging Health Care Market. 31 Hous. L. Rev. 1429 (1995).
[50] *Id.*
[51] *Id.* at 1491.
[52] *Id.* at 1438.

market disadvantage and lose "business" to institutions that offer a wider array of complete reproductive services.[53]

Religious exemptions, such as the ones seen in these cases, chip away at a woman's right to reproductive services. Not only do cases exist in which women are seeking abortions from religiously opposed hospitals or health care providers, but there is also a line of cases and writings that involve religiously motivated refusals by pharmacists to dispense with either routine or emergency birth control medication. In this situation, it is commonly held that a religious exemption clause which would allow an individual to "refuse to provide or cover certain health services based on religious or moral objections."[54] This would not be applicable to most instances of a pharmacist refusing to fill prescription. The majority of states have religious exemption clauses to protect the religious beliefs of health care providers who refuse to provide abortions, not necessarily that of distributing contraception.[55] Some states even have general religious exemption provisions that protect some health care providers from liability for refusing to dispense prescription contraceptives, but do not specifically articulate an inclusion of pharmacists in that group.[56] Only a handful of states actually have specific religious exemptions that allow for pharmacists to refuse to dispense contraception.[57]

Different states have different statutes, all with varying language.[58] Using the application statutory interpretation, an argument exists that a religious exemption provision does not provide

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[53] *Id.* at 1490.

[54] CATHERINE WEISS, CAITLIN BORGMANN, LORRAINE KENNY, JULIE STERNBERG, MARGARET CROSBY, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 3 (2002).

[55] Guttmacher Inst., State Policies in Brief: Refusing to Provide Health Services (2006).

[56] Charu Chandrasekhar. Rx for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraception Under State Public Accommodation Law, 70 Alb. L. Rev. 55, (2006).

[57] Guttmacher Inst., Refusing to Provide Health Services (2006).

[58] Charu Chandrasekhar. 70 Alb. L. Rev. 55, 108 2006.

protection to pharmacists who refuse to dispense prescription contraception.[59] Courts have also displayed a willingness to construe refusal clause statutes narrowly.[60] According to NARAL Pro-Choice America, "law in this area is rapidly evolving" and that more and more measures are cropping up in various states to protect a woman's ability to receive a contraceptive prescription, while other states are implementing more laws to shield the religious objections of the pharmacist.[61]

In order to compare the application of religious exemptions clauses in the abortion context to the application of religious exemptions in the same sex marriage statute we need to review and summarize the particular rights that are being balanced in the abortion context. In this case, an individual patient seeks out a doctor for a medical service. This service can be an abortion or it can be general reproductive healthcare that includes a discussion of abortion. When an individual seeks out this kind of care, she expects sound and accurate care from her health care provider. And health care providers have an obligation to their patients. Set out by professional guidelines, professional healthcare providers have an ethical duty to serve their patients. However, these health care professionals are also individuals, with their own personal set of values, religious tenets and belief systems. When religious exemption clause are enacted, a health care provider is allowed to opt out of treatment or provide incomplete information based on moral or religious objections. When this happens, the importance of the healthcare provider's "higher duty" is diminished, as is the precious doctor-patient relationship. Instead, the healthcare

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[59] *Id.* at 109.

[60] *See, e.g.*, Spellacy v. Tri-County Hosp., No. 77-1788, 1978 WL 3437, at 3-4 (Pa. C.P. Mar. 23, 1978) (In this case, a Pennsylvania Superior Court found that the state conscience statute protected those who "perform, participate or cooperate in" abortion or sterilization procedures from liability for refusing to perform their duties. The plaintiff was an admissions clerk who would not process the paperwork of patients receiving terminations of pregnancies. The court found that the plaintiff's responsibilities did not place her in the class of persons protected under the conscience law).

[61] NARAL Pro-Choice Am. Found., Guarantee Women's Access to Prescriptions 5 (2006). http://www.prochoiceamerica.org/assets/files/Birth-Control-Pharmacy-Access.pdf. (last visited Apr. 23, 2010).

provider's individual right to make personal choices based on personally held religious, moral or ethical values trumps the patient-individual's right to receive the kind of healthcare they deserve, expect, want and need. This is the same type of competition of rights seen in the next section in the sphere of same-sex marriage. In this context, religious exemption clauses in same-sex marriage statutes in New England states allow marriage officiants to back-out of performing same-sex marriage solemnization ceremonies, whittling away at a same-sex couple's right to marry.

Part III - Religious Exemption and Same-Sex Marriage

Overview

This section will explain what happens when religious exemptions for officiants clash with a same-sex couple's desire to marry. First, in Part A, will be a discussion of the origins of the right to marriage in the United States, followed by how that right extended to same-sex couples (Part B). Following that discussion, the same-sex marriage statutes (and their respective religious exemption clauses) in four New England states will be examined in Part C. The statutes of New Hampshire and Maine have religious exemptions that protect all officiants (both clergy members and public officials performing marriage solemnizations) and will be discussed first in Part C-1. The statutes of Connecticut and Vermont, which have religious exemption statutes that protect only clergy members, will be discussed next in Part C-2. Following that, an official New Jersey Attorney General opinion on the matter will be discussed. While this state does not have a same sex-marriage statute, the Attorney General opines on the issue of religious exemptions for marriage solemnization officiants and offers some compelling reasons why the Connecticut-Vermont model should be followed (allowing exemptions for clergy, not for public servants, as well).

Part A - The Right to Marriage

In the United States, there is a constitutional right to marry. As early as 1888 in the case of Maynard v. Hill, the court stated that marriage is "the most important relation in life" and that "the foundation of the family and of society, without which there would be neither civilization nor progress…"[62] In the seminal case of *Griswold v. Connecticut*, the Court further opined that "the right to marry is of fundamental importance to all individuals."[63] The limitations on the right to marry were further carved out in *Loving v. Virginia*.[64] In this case, an interracial couple got married in Washington, DC, went back to Virginia (where they resided), but because Virginia had anti-miscegenation laws which treated interracial marriage as a felony, they were arrested.[65] Here, the Court applied strict scrutiny to this "fundamental freedom" and found it "so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[66] *Loving* outlaws restricting the freedom of choice to marry based on racial discrimination. Another case dealing with limitations on marriage was *Zablocki v. Redhail*.[67] At issue here was a Wisconsin statute that denied the right to marry to anyone who was delinquent on child support obligations.[68] The Court here found that this statute violated the Equal Protection Clause of the 14th Amendment of the United States Constitution in that it directly and substantially interfered with the fundamental

[62] Maynard v. Hill, 25 U.S. 190 (1888).
[63] Griswold v. Connecticut, 381 U.S. 479 (1965).
[64] Loving v. Virginia, 388 U.S. 1 (1967).
[65] *Id.* at 1.
[66] *Id.* at 12.
[67] Zablocki v. Redhail, 434 U.S. 374 (1978).
[68] *Id.* at 375.

right to marry without being closely tailored to effectuate the state's interests.[69] This case further clarified restrictions on marriage, by making it clear that a state's interest had to be discrete, well-defined while being purposeful. The last seminal case on marriage restrictions was *Turner v. Safley*.[70] Here, a Missouri regulation was at issue, which permitted prison inmates to marry only with permission of the prison superintendent who was required to give approval only when the reasons for marrying were compelling.[71] Here, the Court struck down the regulation because it did not adhere to the far-reaching breadth of the restriction.[72] Taken together, *Loving, Zablocki* and *Turner* cement the fundamental importance of the right to marry, with that right triumphing over state restrictions. Another restriction placed on marriage is the expansion of this right to same-sex couples. State-by-state this restriction is slowly being lifted, but not without heated controversy.

Part B - Right to Marry as Applied to Same-Sex Marriage

The first state allow same-sex marriage was seen in the case of *Goodridge v. Dept's of Public Health*, 14 individuals from five Massachusetts counties each of whom wished to marry his/her same-sex partner filed suit. The issue in this case was whether, consistent with Massachusetts's constitution, the Commonwealth could deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.[73] The court held that the Commonwealth failed to identify constitutionally adequate reason for denying civil marriage to same-sex couples. The Department of Public Health argued that no fundamental right or "suspect" class was at issue so the appropriate standard of review was

[69] *Id.* at 388.
[70] Tuner v. Safley, 482 U.S. 78 (1987).
[71] *Id.* at 82.
[72] *Id.* at 85.
[73] Goodridge v. Dept's of Public Health, 798 N.E.2d 941 (Mass. 2003).

rational basis.[74] The court concluded that marriage ban did not meet rational basis test for either due process or equal protection.[75] The Department argued three different rationales for prohibiting same-sex couples from marrying: (1) providing a favorable setting for procreation;[76] (2) ensuring for the optimal setting for child rearing, which the Department defined as "a 2-parent family with one parent of each sex";[77] and (3) preserving scarce state and private financial resources.[78] The court said that laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family and that fertility is not a condition for marriage or grounds for divorce.[79] It went on to state that restricting marriage to heterosexual couples does not protect the welfare of children reasoning that the oft-used "best interests of child" standard does not turn on a parent's sexual orientation or marital status.[80] Lastly, the court stated that an absolute ban on same-sex marriage bears no rational relationship to the goal of economy.[81]

The same-sex marriage controversy also found its way across the country to California. In this state, the issue in the *In re Marriage*[82] cases was whether the California constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal right and obligations traditionally associated under state law with the institution of marriage, but the opposite-sex couple's recognized relationship is designated a

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[74] *Id.* at 330.
[75] *Id.* at 331.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 334.
[81] *Id.* at 336.
[82] In re Marriage, 43 Cal. 4th 757 (2008).

"marriage" and same-sex couple's recognized relationship is designated a "domestic partnership."[83] The question posed was whether, under these circumstances, does the failure to designate the official relationship of same-sex couples as marriage violate the California Constitution.[84] The Court applied strict scrutiny because the classifications and differential treatment embodied in the relevant statutes significantly impinges upon the fundamental interests of same-sex couple and it then reversed and remanded.[85] So, Massachusetts and California in which the same-sex marriage issue was addressed in the courts. How this issue gets addressed in a state, also varies by state. Four, progressive New England states addressed this issue not in the courts, but in their legislature.

Part C - Religious Exemption and Same-Sex Marriage

The floors of their respective state legislatures were the grounds on which the same-sex marriage battle was fought in the four New England states of New Hampshire, Maine, Connecticut and Vermont. Supporters and opponents both aired their respective arguments for and against same-sex marriage and their respective arguments for and against adoption of the bill. The floor testimony of many opponents of same-sex marriage was riddled with claims that recognition of same-sex marriage was antithetical to religious beliefs.[86] Following these debates,

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[83] *Id.* at 780.

[84] *Id.*

[85] *Id.* at 857.

[86] In his testimony in support of his state's same-sex marriage bill, same-sex marriage proponent Maine State Senator Larry Bliss offered an explanation of why some people oppose homosexuality based on religion. He quoted Leviticus 20:13 of the Bible which states that "for a man to lie with another man as he would a woman is toevah," which is translated as abomination or sin. Senator Bliss went on to share that the Bible was written at a time when people needed to reproduce to "strengthen their community." He then listed other rules offered by the Bible which are extremely outdated: touching of a pig's skin making ones hands unclean, not working on the Sabbath, an allowance for selling one's daughter into slavery. He cited these passages to explain to his legislative colleagues that "humanity can progress" and that if religion can abandon such ludicrous outdated notions, it seems wacky to continue to adhere to such outmoded Biblical offerings.

same-sex marriage statutes were enacted in each of these four states.[87] The controversy surrounding religion was not forgotten, however: all four of the state's same-sex marriage statutes contain provisions that allow for religious exemptions for marriage officiants. In each of these statutes, certain persons authorized to solemnize marriages are allowed to refuse to do so based on religious (or other) grounds. The first set of statutes to be discussed is that of New Hampshire and Maine. Both of these states have enacted statutes that generally allow for religious exemptions for all officiants of marriages, both clergy and public servants. The next set of statutes to be discussed is that of Connecticut and Vermont. These two states have enacted statutes that allows for religious exemptions for clergy-officiants, only.

Part C-1 – Religious Exemption Clauses in the Same-Sex Marriage Statues of New Hampshire and Maine

New Hampshire

The governor signed this state's same-sex marriage statute into law on June 3, 2009 and it became effective on the first day of this year.[88] The aim of the law was to eliminate the exclusion of same-sex couples from the institution of marriage.[89] It also provides safeguards for marriage officiants, affording them religious protection regarding the solemnization of marriage.[90] Section 457.31 of the statute concerns the solemnization of marriage.[91] In New Hampshire, there are two ways by which a marriage can be solemnized: in a civil ceremony conducted by justice of the peace, a judge, a bankruptcy judge and a United States magistrate judge; or in a religious ceremony "by any minister of the gospel in the state who has been

[87] Despite the fact that Maine enacted a same-sex marriage law, opponents successfully petitioned for and then won the referendum on November 3, 2009.
[88] N.H. REV. STAT. ANN. § 457:1 (2009).
[89] N.H. REV. STAT. ANN. § 457:1-a (2009).
[90] N.H. REV. STAT. ANN. § 457:31 (2009).
[91] *Id.*

ordained according to the usage of his or her denomination, resides in the state and is in regular standing with the denomination; by any member of the clergy who is not ordained" but is engaged in the service to the religious body to which he or she belongs, resides in the state and is licensed; or a minister residing outside the state, but has "pastoral charge wholly or partly in this state."[92]

Section 457.37 is titled "Affirmation of Freedom of Religion in Marriage"[93] and it allows for certain officiants to be exempted from performing marriages due to their religious beliefs. The text of the section is as follows: "Members of the clergy as described in [section] 457.31 or other persons otherwise authorized under law to solemnize a marriage shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion protected by the First Amendment to the United States Constitution or by part I, Article 5 of the New Hampshire Constitution."[94] At first glance, the statute seems to allow for clergy members to withdraw from performing religious ceremonies outlined in § 457.31 (II), but the language of this section seems to allow for more than that. Despite articulating that the clergy can use this exemption, the inclusion of the phrase "or other persons otherwise authorized under law to solemnize a marriage" seems opens the door to the list of people authorized to solemnize a marriage not only in §457.31(II), but (II) as well – judges, magistrates, justices of the peace. To further clarify that this exemption not only applies to clergy, the text of § 457.37 states that this exemption applies to any civil marriage or religious rite of marriage. This exemption that aims to protect freedom of religion, no longer merely applies to clergy members, but to all the officiants who can perform a civil ceremony. Not only

[92] *Id.*
[93] N.H. REV. STAT. ANN. § 457:37 (2009).
[94] *Id.*

does this exemption allow for clergy members to excuse themselves due to same-sex marriage being antithetical to the religious that they practice and preach, but now civil servants and people working in the public interest who may be morally, politically or for any other reason, use religion to avoid performing same-sex marriages.

Looking to the legislative history of this law, this religious exemption was a floor Amendment 0742h that was adopted.[95] The report from the New Hampshire State house from March 20, 2009,[96] containing quotes Representative Nancy Weber, who states that the "bill affirms that no officiant is obliged to preside at any civil or religious ceremony in violation of his or her free exercise of religion."[97] She goes on to call this a "matter of fundamental fairness" that serves to "strengthen our familial and societal ties."[98] This entire law did not come without protest from New Hampshire state legislators, however.[99] In House Journal No. 16, a protest statement was presented by a group of legislators who stated that "whereas no society in history has ever considered two people of the same gender as a marriage, and, whereas we used to be expected to tolerate difference we are now being asked to tolerate differences that go against our religious beliefs." This outcry was signed by sixty-seven religious legislators who are opposed to same-sex marriage. The protest goes on to say that this same-sex marriage bill "uses the power of government to redefine what is fundamentally a religious rite."[100] In summation, New Hampshire's statute allows for any officiants (a member of clergy or a public servant) to refuse to perform a religious or civil marriage ceremony due to religious objections.

Maine

[95] N.H. HOUSE RECORD, NO. 22 (2009).
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] N.H. HOUSE RECORD, NO. 16 (2009).
[100] *Id.*

Maine's same-sex marriage statute is similar to that of New Hampshire, in that it allows for any officiants to back-out of solemnizing marriages based on their religious beliefs. The law, known as Act to End Discrimination in Civil Marriage and Affirm Religious Freedom affirms religious freedom.[101] This section states that

> "this part does not authorize any court or other state or local government body, entity or agency or commission to compel, prevent or interfere in any way with any religious institution's religious doctrine, policy or teaching, or solemnization of marriage within that particular faith's tradition as guaranteed by the Maine Constitution, Article 1, Section 3 or the First Amendment of the United States Constitution. A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal."[102]

This section protects religious institutions from having their teachings and views attacked in any way, particularly protecting the views of the institution on the solemnization of the rite of marriage. It also insulates any person authorized to perform marriage[103] solemnization who refuses from any sort of penalty. However, it does not explicitly state, that the refusal of the solemnization has to be because of religious reasons. The Maine legislature clearly does not want to interfere with religious teachings and wants to allow religions to continue to practice their own views on marriage.[104]

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[101] ME. REV. STAT. ANN. 19-A § 655, SUB-§3 (2009).

[102] *Id.*

[103] Persons authorized to perform marriage are as follows: a justice or judge; a lawyer admitted to the Maine bar, a notary public (all having to be Maine residents); and an ordained minister of the gospel; a cleric engaged in the service of the religious body to which the cleric belongs; and a person licensed to preach by an association of ministers, religious seminary or ecclesiastical body. See, ME. REV. STAT. ANN. 19-A § 655, SUB-§3 (2009).

[104] The Legislative Record (recorded on May 5, 2009), presents the Committee reports on the bill and expresses specific legislative intent on Section 5 of the bill. State Senator Priest states that this section is "an affirmation of religious freedom" and that it "strongly protects the First Amendment right of religious institutions to marry or refuse to marry certain persons." Senator Cleary shared religious arguments of people in his Church community and informed his legislative colleagues that they are divided. And while the religious institutions take their own stances, it is not up to the legislature to discern who is correct or not. Instead, he says that "it is for each denomination to decide for itself how it will worship and whom it will marry" and it is therefore the role of the Legislature to protect their right to "agree or disagree on religious grounds."

Part C-2 - *Religious Exemption Clauses in the Same-Sex Marriage Statues of Connecticut and Vermont*

Connecticut

The governor signed the law allowing for same-sex marriage into law on April 23, 2009.[105] It was enacted to implement the decision of the Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health*,[106] in order to provide for the equal protection under the Connecticut Constitution for same-sex couples. Section 7 states that

> "(a) no member of the clergy authorized to join persons in marriage…shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the first amendment of the United States Constitution or Section 3 of Article First of the Constitution of [Connecticut] (b) no church or qualified church-controlled organization, as defined in 26 U.S.C. 3121, shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of that church or qualified church-controlled organization."[107]

Like the same-sex marriage statues of Maine and New Hampshire, Connecticut allows for the exemption of clergy and other church-affiliated groups from participating in the consecration of same-sex marriages. Unlike the other two states, however, Connecticut does not allow for anyone performing a marriage solemnization to use the religious exemption, just clergy. Connecticut, while not limiting the exemption to religious ceremonies, does not extend the exemption to judges, magistrates, or anyone else besides clergy who is authorized to perform this rite. However, unlike its sister New England states, Connecticut goes further and states that

> "a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such services, accommodations, advantages, facilities,

[105] CONN. GEN. STAT. § 46B-38QQ (2009).
[106] Kerrigan v. Commissioner of Public Health, 289 Conn. 135 (2008).
[107] CONN. GEN. STAT. §1-1M (2009).

> goods or privileges is related to the solemnization of a marriage or the celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith…Any refusal to do so shall not create a civil claim or cause of action or result in state action, any penalty or withholding of benefits."[108]

In this passage, Connecticut recognizes that the officiant is not the only participant in a marriage solemnization celebration that may have religious objections to the union of a same-sex couple. This passage allows for those with mere affiliations to a religious organization that objects, to also refuse to provide services without penalty. While it seems as though the Connecticut statute is more limiting than that of Maine or New Hampshire because it only allows for clergy and not public officials to refuse to officiate, it is actually far more sweeping in that it allows for any entity involved in any way with a religious organization to refuse to provide goods or services related to a same-sex marriage solemnization based on religious beliefs. This provision allows for anyone related to the religious organization who usually provides goods, services or facilities to back out due to an objection against same-sex marriage. This could mean a banquet hall, caterer or photographer who usually contracts with a church (for example) could, under this provision in this statute, refuse to perform services as part of a same-sex marriage solemnization celebration. The statute makes no suggestion that the affiliated banquet hall, caterer or photographer actually be a sanctioned member of the religious organization, or religious in nature in any way. These affiliated entities need only be "in conjunction with" said religious organization.

Connecticut State Senator McDonald stated in a Session of the State Assembly, on the day before the signing of the bill into law, that while the law codifies the right for any two individuals to get married, the law makes it "abundantly clear" that no member of the clergy or

[108] *Id.*

the church would be compelled to participate in any marriage ceremony which would conflict with any religious belief or tenet.[109] He goes on to state that Connecticut is intent on balancing two competing bodies of rights: that of same-sex couples to marry and the protections afforded by the U.S. Constitution in the 1st Amendment and the Connecticut Constitution to the free exercise of religion.[110] State Senator McDonald stated that the law "strikes a balance between the deeply held religious beliefs of religious organizations in the solemnization of a marriage, with the state's rights, or mandate…to provide for civil marriage to any two individuals who seek to get married. And since there are many other ways under which a couple could have a marriage solemnized or celebrated, it seems to me at least, that there viable alternatives that would allow for accommodation of both interest in this amendment."[111] Representative Lawlor also stated that "members of the clergy are not obligated to marry any person who they – who, as a matter of religious belief they don't feel is entitled to a marriage. That's always been the case in Connecticut. No member of the clergy has ever been required to marry a couple if they felt it wasn't in conformity with the provisions of their religious beliefs. That's being restated here."[112]

In conclusion, Connecticut departs from her sister states of Maine and New Hampshire, by only allowing a religious exemption in performing marriage solemnization for clergy members. Connecticut does not go as far as Maine or New Hampshire by including all officiants in this religious refusal clause. While Connecticut is not as broad as Maine or New Hampshire in who is allowed to refuse to solemnize a marriage, Connecticut goes broader in a different way: by allowing any organization or entity affiliated with the religious organization that is refusing to perform the solemnization, also refuse to participate in a same-sex marriage solemnization.

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[109] C.T. ASSEMBLY RECORD, (APRIL 22, 2009).
[110] *Id.*
[111] *Id.*
[112] *Id.*

Vermont

Vermont's same-sex marriage law was put into effect over the governor's veto by a legislative override on April 10, 2009.[113] The short title of this law is "An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage"[114] and its purpose is to protect religious freedom of clergy and religious societies authorized to solemnize civil marriages.[115] In Section 5144, titled "Persons Authorized to Solemnize Marriage" subsection (b) does not "require a member of the clergy authorized to solemnize a marriage as set forth in subsection (a) of this section, nor societies of Friends or Quakers, the Christadelphians Ecclesia or the Baha'i Faith to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action."[116] It goes on in § 4501 to outline the exemptions, including that

> "civil marriage laws shall not be construed to affect the ability of a society to determine the admission of its members as provided in section 4464 of this title, or to determine the scope of beneficiaries in accordance with section 4477 of this title, and shall not require a society that has been established and is operating for charitable and educational purposes and which is operated, supervised or controlled by or in connection with a religious organization to provide insurance benefits to any person if to do so would violate the society's free exercise of religion, as guaranteed by the First Amendment to the Constitution of United States or by Chapter I, Article 3 of the Constitution of the State of Vermont."[117]

Like Connecticut, Vermont goes further to state that

> "a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, goods, or privileges in accordance with subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or

[113] VT. STAT. ANN. 8 § 4501 (2009).
[114] *Id.*
[115] *Id.*
[116] VT. STAT. ANN. 8 § 5144 (2009).
[117] VT. STAT. ANN. 8 § 4501 (2009).

> society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others."[118]

Like Connecticut, Vermont's religious exemption provision applies only to clergy members. Also similar to Connecticut, Vermont adds provisions that allow for those with mere affiliations to a religious organization that objects, to also refuse to provide services without penalty. Like Connecticut, Vermont's statute allows for any entity involved in any way with a religious organization to refuse to provide goods or services related to a same-sex marriage solemnization based on religious beliefs.

Part IV – Analysis

From the four New England state same-sex marriage statues, two different models of religious exemptions for marriage officiants have emerged: one that grants religious exemptions just for clergy-officiants (like in Connecticut and Vermont) and one that grants religious exemptions to all marriage officiants, including clergy members, other religious officials and also all public officials that are authorized to do so. In their statutes, all four states have tried to balance the fundamental right of marriage of same-sex couples with the religious freedom of officiants. Maine and New Hampshire have gone further than Connecticut and Vermont by accounting for the religious beliefs held by public servants. The Connecticut-Vermont model should be the model that is favored for adoption. There are two compelling reasons for its adoption: one is found in a state attorney general opinion and the other is found in the abortion religious exemption context. Former New Jersey Attorney General Stuart Rabner, in an official

[118] *Id.*

statement,[119] threw his support behind the Connecticut-Vermont model and offered a unique argument for its adoption and implementation: stating that public officials who are authorized to solemnize marriage are state actors and therefore by not offering up their services equally to everyone, are being discriminatory under Equal Protection. Clergy, he opines, is not state actors and therefore can be exempt from solemnizing marriages based on their faith. The second compelling reason for the adoption of the Connecticut-Vermont model is something that we have learned from the scenario of religious exemptions in the reproductive rights area. Public officials authorized to solemnize marriages are like healthcare providers offering care to patients: they are held to a higher duty and the well-being of those seeking care or services come first.

New Jersey Attorney General Official Opinion

Attorney General Stuart Rabner opined that while religious figures may decline to exercise their authority to solemnize civil unions[120] public officials may not.[121] He states that "generally available services of government entities and public officials" are "places of public accommodation," and that the regular availability of a public official to solemnize a marriage or a civil union is an "accommodation, advantage or privilege" or a place of public accommodation.[122] When public officials do not make this solemnization ability available to all, it leads to an "incongruous result" contrary to the state Law Against Discrimination, as noted by a myriad of judicial statements in New Jersey.[123] He goes on to state that based on these judicial opinions leave "no doubt that State and municipal governments and the services offered by public officials are places of public accommodation under the Law Against Discrimination" and

[119] 3 Op. Atty. Gen. N.J. (2007).
[120] New Jersey does not recognize marriage between same-sex couples, only civil unions.
[121] *Id. at 1*.
[122] *Id.* at 2.
[123] I*d.* at 3.

when a public official elects to be available to solemnize a marriage, that official must also be available on the same terms to solemnize same-sex unions, as well.[124] To do otherwise would be discriminatory and could lead the state Attorney General to seek a judicial remedy.

Just as the Attorney General's distinction between clergy and public officials is applicable in New Jersey, the Attorney General's reasoning can be applied to assess the religious exemptions statues presented in this paper. While Connecticut and Vermont fall in line with the Attorney General's thoughts on the matter, Maine and New Hampshire which allow all public officials and religious figures to be exempt would, according to the Attorney General, possibly result in judicial action.

According to the Attorney General, insulating clergy members only is the way these religious exemption statutes should be implemented. In his letter, he states that it is the long held position of his office and the courts of his state that "religious institutions are not places of public accommodation under the Law Against Discrimination with respect to religious worship, sincerely held religious beliefs, practices and liturgical norms, even where the acts of religious institutions are ostensibly or colorably at odds with any of the categories prohibited by the Law Against Discrimination." This position was recognized by the Third Circuit in The Presbytery of the Orthodox Presbyterian Church v. Florio.[125] The statutory provision in New Jersey that would allow clergy (or religious societies, institutions or organizations) to solemnize only marriage that are in accordance with their tenets of their faith, is deemed by the Attorney General as recognizing the fact that it is "constitutionally complicated" for a state to attempt to dictate what services should be performed by religious figures. The Attorney General also notes that a refusal by a clergy member to solemnize a marriage (or in the case of New Jersey a civil union) between

[124] *Id. at 5.*
[125] The Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454 (1994).

a same-sex couple would not raise any equal protection concerns under the federal or state constitution, but these concerns would arise if differential treatment arose by the behavior of a public official, a state actor.

Attorney General Rabner makes a case for differential treatment between clergy and public officials who are authorized to solemnize marriages. He urges for clergy to be allowed an exemption from performing same-sex marriage solemnizations due to their religious tenets. On the contrary, he does not support the same exemption for public servants who are authorized to solemnize marriages and who may have a personally-held, religious objection to same-sex marriage. He sees public officials authorized to solemnize marriages as state actors and for them to offer their solemnization ability to all seeking it, then they are violating Equal Protection laws. This is one compelling reason why public officials should not be given the same refusal power that clergy members are given when it comes to solemnizing marriages: public officials are state actors. The second compelling reason why public officials should be given this religious exemption, we can glean from the abortion arena.

Lessons Learned from Religious Exemptions in the Reproductive Rights Context

When allowing both public officials and religious figures to refuse to solemnize marriage the problem is that some public officers, like health care providers, have a professional, ethical duty to the people they serve that clashes with their right to conscience. This is seen in the reproductive rights context all too often. Out of respect for his or her religion, can a physician refuse to provide or even talk about the availability of common vaccines, such as chicken pox (varicella) because the cell lines were originally developed from aborted fetal tissue?[126] It seems to be antithetical to a health care professional's "higher duty" to his or her patients to refuse to

[126] Pontifical Academy for Life, Moral Reflections On Vaccines Prepared from Cells Derived from Aborted Human Fetuses (June 5, 2005), http://www.academiavita.org/template.jsp?sez=Documenti&pag=testo/vacc/vacc&lang=English (last visited Apr. 24, 2010).

provide or share the option of these services on moral grounds. Different treatments and procedures should not be completely omitted from a healthcare provider's care simply because he or she personally objects to it. Why should patients be given little or no information on the range of options available to them? Why should the healthcare provider simply get to pick and chose what gets shared with patients based on the provider's personal feelings instead of his or her professional, medical opinion? If the chicken pox vaccine that was developed from cell lines from fetal tissues is the best way to prevent someone from getting the chicken pox, in the most expert of medical opinions, why should a healthcare provider, take that expert hat off and use his or her personal judgment of the situation to make recommendations to patients. If patients seeking care were looking for moral, ethical, religious or personal suggestions, then they would not go to a doctor: they would visit their mom, sister, best friend or priest! Patients go to doctors to seek out the most expert, specialize, medical care. This broad blanket exemption from providing service all too easily renders a provider immune from accountability to their patients or their professional boards. By enacting religious exemption clauses the state is granting more weight and value to an individual's right to make personal, moral choices than it does to the provider's ethical and professional duty to his or her patient.

A professional's responsibility to patients are set out not only in law, but in ethical and professional guidelines.[127] Dr. Edmund Pellegrino, former chairman of the President's Council on Bioethics, observes that while "[t]he moral values of religious persons transcend the 'values' of the profession," a provider's conscience claim is not superior to the patient's own value system. Both the physician and the patient as human beings are entitled to respect for their personal autonomy. Neither one is empowered to override the other. The protection of freedom

[127] Maxime M. Harrington. The Ever-Expanding Health Care Conscience Clause: Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs. 34 Fla. St. U.L. Rev. 779 (2007).

of conscience is owed to both."[128] Legal standards recognize that abandonment of the patient; breaches of fiduciary duty, including failure to provide information necessary for the patient to make an informed choice; and failure to disclose conflicts pertinent to the treatment relationship may serve as grounds for a malpractice claim.[129]

Like healthcare providers, do public officers authorized to solemnize marriages have a similar professional "higher duty" to the people they serve? As pointed out by New Jersey's Attorney General: they do (in a way). Because they are public officials, acting on behalf of the state, they have to uphold the tenets of the State and United States Constitution. They are held to uphold these documents and the rights contained therein, including the right to equal protection under the laws. One group of public officials authorized to solemnize marriages – judges – are also held to their code of ethics, which binds them to "perform the duties of the office fairly, impartially and diligently."[130]

Religious exemptions in statutes address difficult issues. Health care providers are said to have special obligations to their patients. This paper asserts that judges and other public officers authorized to solemnize marriage also have a special obligation. Duties prescribed by law and professional codes of conduct expect that both health care providers and public officials who solemnize marriages to act out of respect for their same-sex couple's well-being. Yes, the religious convictions held by health professionals and public officials should be protected, but patients seeking care and same-sex couples seeking marriage should not suffer harm or potential harm because of a belief they do not share. A provider-patient relationship is similar to that of a public-servant-officiant and a couple seeking marriage. In both cases, a party seeking a service

[128] Edmund D. Pellegrino, The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective, 30 Fordham Urb. L.J. 221, 222 (2002).
[129] Maxime M. Harrington. The Ever-Expanding Health Care Conscience Clause: Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs. 34 Fla. St. U.L. Rev. 779 (2007).
[130] 2009 Code of Conduct for United States Judges.

has come to someone endowed with a specialized, expert power (the power to marry, which has to be granted by the state in one case and the power to "heal" which is granted by medical boards, state licensing agencies and years of schooling). In both cases, the party seeking the service cannot perform the service themselves and relies upon the expert officiant or healthcare provider to give them what they are seeking. When party is at a detriment and does not have the power it needs to accomplish what it wants, and instead relies upon someone else who has the expert power, the expert party has a duty to oblige, not in all situations, but particularly in this case of the public-servant-marriage-officiant and the healthcare provider, because these are two roles that are bound by ethical and professional standards and are roles that have a profound impact on the protected, valuable, fundamental rights of others. In that spirit, while it is right to offer statutory accommodations to individuals who wish to exercise their religious beliefs, religious exemption clauses in health care provider and same-sex marriage statutes that promote immunity for refusals to provide a service, do little to truly resolve the tension between the needs of the person seeking the service and the service provider's autonomy. It only serves to accommodate the needs of the service provider.

V. Conclusion

Four New England states have made an attempt to accommodate religious beliefs of marriage officiants, offering two different models of religious exemptions for marriage officiants have emerged: one that grants religious exemptions just for clergy-officiants (the Connecticut-Vermont model) and one that grants religious exemptions to all marriage officiants, including clergy members, other religious officials and also all public officials that are authorized to do so (the New Hampshire-Maine model). Should this issue arise in another state or even on the national stage, the Connecticut-Vermont model should be the model that implemented. This

paper discussed the two main reasons why this model's "clergy-only" religious exemption is favorable and that public servants should not be granted the same exemption. Both reasons have to do with the nature of a public servant. One reason, offered by the former New Jersey Attorney General in an official opinion, is that public officials authorized to solemnize marriage are state actors and therefore by not offering up their services equally to everyone, are being discriminatory under Equal Protection. The second reason for the adoption of the Connecticut-Vermont model is that public officials authorized to solemnize marriages are like healthcare providers offering care to patients: they are held to a higher duty and the well-being of those seeking care or services come first, something that is very apparent in the context of religious exemptions and reproductive rights.

The expansion of religious refusal provisions to create immunity for *anyone* who refuses to perform same-sex marriage service for almost any reason (not just those related to religion) is cause for alarm. These religious exemption provisions clauses fail to achieve a reasonable balance. Instead, they bestow a special benefit on those whose religious, moral, ethical or otherwise personal beliefs compel them to deny a service while completely absolving them of all the consequences of their choices. In the health care context, when a health care provider refuses to participate in health care services, a that provider "may have eased her own conscience, but …neither benefited the society-at-large, the patient nor the patient's family."[131] Similarly, when accommodating the religious beliefs public officials authorized to solemnize marriages, what is lost is recourse for couples when marriage, a rite to which they are legally entitled, is not provided.

[131] Warthen v. Toms River Cmty. Mem'l Hosp., 488 A.2d 229, 234 (N.J. Super. Ct. App. Div. 1985).