LAW, RELIGION, AND HEALTH IN THE UNITED STATES

Should religious physicians be required to disclose their beliefs to patients? How should we think about institutional conscience in the health care setting? How should health care providers deal with families with religious objections to the withdrawal of treatment? These are but a few of the pressing questions at the intersection of law, religion, and health in the United States. The law can generate conflict between religion and health, but it can also act as a tool for the religious accommodation and protection of conscience. This book explores both angles, bringing together expert authors from a variety of perspectives and disciplines to offer insights on what the public discourse gets right and wrong, how policymakers might respond, and what future unanticipated conflicts may emerge. It not only tackles issues of academic interest, but also real-world conflicts with the capacity to touch the lives of any one of us – patient or physician, secular or devout.

Holly Fernandez Lynch is Executive Director of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School, Massachusetts and a faculty member at the Harvard Medical School Center for Bioethics. She is the author of *Conflicts of Conscience in Health Care: An Institutional Compromise* (2008) and co-editor of *Nudging Health: Health Law and Behavioral Economics* (2016), *FDA in the Twenty-First Century: The Challenges of Regulating Drugs and New Technologies* (2015), and *Human Subjects Research Regulation: Perspectives on the Future* (2014).

I. Glenn Cohen is a Professor at Harvard Law School, Massachusetts and Faculty Director of the Petrie-Flom Center. He is one of the world's leading experts on the intersection of bioethics and the law, as well as health law. He has authored or co-edited eight books and has published more than eighty articles in venues like *The New England Journal of Medicine*, *JAMA: The Journal of the American Medical Association*, *Nature*, and the *Harvard Law Review*.

Elizabeth Sepper is an Associate Professor at Washington University School of Law. She is an expert in health law and religious liberty law. She has written extensively on conscientious refusals to provide reproductive and end-of-life care, and conflicts between religion and antidiscrimination laws with articles in top law journals, including the *Columbia Law Review*, *Virginia Law Review*, and *Indiana Law Journal*.

Law, Religion, and Health in the United States

Edited by

HOLLY FERNANDEZ LYNCH
Harvard Law School

I. GLENN COHEN
Harvard Law School

ELIZABETH SEPPER
Washington University School of Law

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781316616543
DOI: 10.1017/9781316691274

First published 2017

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Lynch, Holly Fernandez, editor. | Cohen, I. Glenn, editor. | Sepper, Elizabeth, editor.
Title: Law, religion, and health in the United States / edited by Holly Fernandez Lynch, I. Glenn Cohen, Elizabeth Sepper.
Description: New York: Cambridge University Press, 2017. |
Includes bibliographical references and index.
Identifiers: LCCN 2017008238 | ISBN 9781107164888 (hardback) | ISBN 9781316616543 (paperback)
Subjects: LCSH: Freedom of religion – United States. | Health Care Reform – United States. | Christian ethics – United States. | Religious health facilities – United States. | Catholic Church – United States – Doctrines. | Medicine – Religious aspects.
Classification: LCC KF4783.L387 2017 | DDC 342.7308/52–dc23
LC record available at https://lccn.loc.gov/2017008238

ISBN 978-1-107-16488-8 Hardback
ISBN 978-1-316-61654-3 Paperback

To Bill, for your unending patience and support.

– H. F. L.

To Eddie Soloway, the good soldier.

– I. G. C.

To Navid, through thick and thin, rant and rave.

– E. S.

Contents

Contributors

Noa Ben-Asher, LL.B., LL.M., J.S.D. Professor of Law, Elisabeth Haub School of Law at Pace University.

Teneille R. Brown, J.D. Professor, S.J. Quinney College of Law, University of Utah; Adjunct Professor, Division of Medical Ethics, University of Utah.

Mary Anne Case, J.D. Arnold I. Shure Professor of Law, University of Chicago Law School.

I. Glenn Cohen, J.D. Professor of Law and Faculty Director of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, Harvard Law School.

David M. Craig, M.T.S., M.A., Ph.D. Professor of Religious Studies and Adjunct Faculty in Philanthropic Studies, Indiana University – Purdue University Indianapolis.

Gregory Curfman, M.D. Editor in Chief, Harvard Health Publications; Assistant Professor of Medicine and Lecturer in Health Care Policy, Harvard Medical School; Assistant in Medicine, Massachusetts General Hospital; Affiliated Faculty, Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, Harvard Law School; Senior Advisor and Physician-Scholar in Residence, Solomon Center for Health Law and Policy, Yale Law School.

Jemel Amin Derbali, J.D. Co-founder, Wise Systems.

Melanie Di Pietro, S.C., J.D., J.C.D. Founder and Co-Director, Seton Center for Religiously Affiliated Non-Profit Corporations, Seton Hall Law School (Formerly: Distinguished Practitioner in Residence and Professor, Seton Hall Law School).

Richard H. Fallon Jr., J.D. Story Professor of Law, Harvard Law School.

Dov Fox, D.Phil., J.D., LL.M. Associate Professor of Law and Director of the Center for Health Law Policy and Bioethics, University of San Diego School of Law.

Michele Goodwin, J.D., LL.M. Chancellor's Professor of Law and Director of the Center for Biotechnology and Global Health Policy, University of California, Irvine School of Law.

Claudia E. Haupt, M.A., Ph.D., LL.M. J.S.D. Candidate, Columbia Law School; Resident Fellow, Information Society Project, Yale Law School.

B. Jessie Hill, J.D. Associate Dean for Academic Affairs and Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law.

Adèle Keim, J.D. Counsel, Becket — Religious Liberty for All.

Craig J. Konnoth, M.Phil., J.D. Sharswood Fellow and Lecturer in Law, University of Pennsylvania Law School; Senior Fellow, Leonard Davis Institute of Health Economics, University of Pennsylvania; Rudin Fellow, Division of Medical Ethics, NYU Langone Medical Center.

Douglas Laycock, J.D. Robert E. Scott Distinguished Professor of Law, Class of 1963 Research Professor in Honor of Graham C. Lilly and Peter W. Low, and Professor of Religious Studies, University of Virginia School of Law.

Samuel J. Levine, J.D., Rabbinical Ordination, LL.M. Professor of Law and Director of the Jewish Law Institute, Touro College Jacob D. Fuchsberg Law Center.

Gregory M. Lipper, J.D. Partner, Clinton Brook & Peed (Formerly: Senior Litigation Counsel, Americans United for Separation of Church and State).

Holly Fernandez Lynch, J.D., M.Bioethics Executive Director, Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, Harvard Law School; Faculty, Center for Bioethics, Harvard Medical School.

Aileen Maria Marty, M.D. Professor and Clinical Lab Director, Florida International University, Herbert Wertheim College of Medicine.

Elena Maria Marty-Nelson, J.D., LL.M. Associate Dean for Diversity, Inclusion, and Public Impact and Professor of Law, Nova Southeastern University, Shepard Broad College of Law.

Ryan Meade, J.D. Director of Regulatory Compliance Studies and Visiting Professor of Law, Beazley Institute for Health Law and Policy, Loyola University Chicago School of Law.

Martha Minow, Ed.M., J.D. Morgan and Helen Chu Dean and Professor of Law, Harvard Law School; Member, Faculty of Education, Harvard Graduate School of Education.

Christine Mitchell, M.T.S., M.S. Executive Director, Center for Bioethics, Harvard Medical School.

Diane L. Moore, M.Div., D.Min., Ph.D. Director of Religious Literacy Project, Senior Lecturer on Religious Studies and Education, and Senior Fellow at the Center for the Study of World Religions, Harvard Divinity School.

Thaddeus Mason Pope, M.A., J.D., Ph.D. Professor of Law and Director of the Health Law Institute, Mitchell Hamline School of Law; Adjunct Professor, Australian Centre for Health Law Research, Queensland University of Technology; Adjunct Associate Professor, Alden March Bioethics Institute, Albany Medical College; Affiliate Faculty, University of Minnesota Center for Bioethics; Visiting Professor of Medical Jurisprudence, School of Medicine, St. George's University.

Ahmed Ragab, M.D., Ph.D. Richard T. Watson Associate Professor of Science and Religion and Director of Science, Religion, and Culture Program, Harvard Divinity School; Affiliate Associate Professor, Department of the History of Science, Harvard University.

Abbas Rattani, M.Be., M.D. Candidate, Meharry Medical College School of Medicine.

Eloisa C. Rodriguez-Dod, M.B.A., J.D. Professor of Law, Florida International University College of Law.

Marc A. Rodwin, M.A., J.D., Ph.D. Professor of Law, Suffolk University Law School.

Mindy Jane Roseman, J.D., Ph.D. Director, Gruber Program for Global Justice and Women's Rights, Yale Law School.

Nadia N. Sawicki, J.D., M.Bioethics Professor of Law and Academic Director of the Beazley Institute for Health Law and Policy, Loyola University Chicago School of Law.

Rachel E. Sachs, J.D., M.P.H. Associate Professor of Law, Washington University School of Law.

Richard Schragger, M.A., J.D. Perre Bowen Professor of Law and Joseph C. Carter, Jr. Research Professor of Law, University of Virginia School of Law.

Micah Schwartzman, D.Phil., J.D. Professor of Law, University of Virginia School of Law.

Amy J. Sepinwall, M.A., J.D., Ph.D. James G. Campbell, Jr. Memorial Term Assistant Professor, Department of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania.

Elizabeth Sepper, J.D., LL.M. Associate Professor of Law, Washington University School of Law.

Susan J. Stabile, J.D. Distinguished Senior Fellow, University of St. Thomas School of Law; Adjunct Instructor in Theology, St. Catherine University.

Eric M. Stephen, M.A., M.T.S., Ph.D. Candidate, Harvard University.

Nelson Tebbe, J.D., Ph.D. Professor of Law, Brooklyn Law School; Visiting Professor of Law, Cornell Law School.

Robert D. Truog, M.D., M.A. Frances Glessner Lee Professor of Medical Ethics, Anaesthesia, & Pediatrics and Director of the Center for Bioethics, Harvard Medical School; Senior Associate in Critical Care Medicine, Boston Children's Hospital; Executive Director, Institute for Professionalism & Ethical Practice; Chair, Harvard University Embryo Stem Cell Research Oversight Committee.

Jay Wexler, M.A., J.D. Professor of Law, Boston University School of Law.

Jonathan F. Will, J.D., M.A. Associate Dean for Academic Affairs and Faculty Development, Professor of Law, and Founding Director of the Bioethics and Health Law Center, Mississippi College School of Law; Affiliate Faculty, Center for Bioethics and Medical Humanities, University of Mississippi Medical Center.

Robin Fretwell Wilson, J.D. Roger and Stephanie Joslin Professor of Law, Director of the Family Law and Policy Program, and Director of the Epstein Health Law and Policy Program, University of Illinois College of Law.

Foreword

Martha Minow

This volume of essays demonstrates both the range of contemporary health issues generating conflicts reflecting religious concerns, and the power and limitations of reasoned arguments in resolving those conflicts. Flash points between religion and medicine involve whether physicians and other health care professionals can assist individuals who choose to die; whether parents can refuse public health vaccinations for their children; and access to contraception, reproductive technologies, and abortion. The issues engage individuals, as well as institutions and groups. May a religiously affiliated hospital avoid engaging in practices deemed out-of-bounds by the relevant religion and even decline to make referrals to other providers? May religiously identified employers decline to provide employees with access to contraceptives through their health plans?

Complicating each of these difficult subjects is the fact that they inevitably involve not just one person, but also the relationship between the affected individual and others, ranging from intimate family members to the larger society. Whose interests or values should govern? Each issue potentially puts health care providers in the middle of conflicts between family members and between groups in society. Physician involvement in hastening death, exemptions from mandated vaccinations, and reproductive choice can also generate conflicts between duties to individual patients and adherence to the providers' own conscience and professional norms. And increasing recognition of the potential role of religious and spiritual dimensions in patient healing and well-being makes attentiveness to religion matter, even from a purely health care vantage point.[1]

[1] This foreword draws upon Martha Minow, "Religion, Medicine, and Law: How to Heal When Values Conflict", George W. Gay Lecture (November 3, 2016), which, in turn, reflected Hannah Solomon-Strauss's excellent research assistance and comments, and invaluable comments from Stephen Carter, Glenn Cohen, Charles Fried, Atul Gawande, Newton Minow, Robert Mnookin, Joe Singer, Mira Singer, Vicky Spelman, and Mark Tushnet. Helpful resources include *Religion as a Social Determinant of Public Health* (Ellen L. Idler ed., 2014); Christina M. Puchalsky, Ethical

None of these issues is especially new, and yet they appear to be generating heightened attention and debate, at least within the United States. Why may this be the case? I offer these possible explanations:

1) Political and social movements have focused on religiously inflected issues for the past several decades to mobilize voters and to alter public policies. Particular issues for the past several decades have involved the status and autonomy of women, the nature of families, and the rights of LGBTQ individuals. All of this makes health care simply one of many sectors caught up in the particular cultural and religious disputes that now sweep in employers, florists, photographers, hotels, and other service providers.
2) Constitutional law has changed after the Supreme Court, in 1990, cut back on the accommodations for free exercise of religion; Congress and many states responded with legislation reinstating it. In *Employment Division v. Smith*, the Supreme Court overturned several decades of accommodation for individuals' religious beliefs and ruled that a general rule that does not target religious beliefs or practices can stand without exemptions.[2] Perhaps the Court was unsympathetic to the particular claims in the case, which involved two Native Americans seeking unemployment benefits after losing their jobs due to ingesting peyote in a religious ritual; intentional possession of peyote was a crime under state law. The Court suggested that a legislative response could provide accommodations, but probably did not expect the groundswell of popular sentiment, producing federal and state statutes rejecting the Court's whole approach in the *Smith* case. Faced now with statutory language calling for accommodations, public actors including judges, educators, and hospital administrators encounter disputes over particular situations and the scope of required accommodations. Because the United States Constitution both protects free exercise of religion and bans government establishment of religion, navigating the space for individual conscience without erecting a government endorsement of religion is tricky business. And religious questions raise potential clashes between minority rights and majority views.
3) Changes in medical technologies and in the practices for delivering health care involve teams of nurses, doctors, technicians, insurers, and others giving more visibility, greater access, and more regulated record keeping around decisions that in the past took place in the more private consultations of patient and doctor; other changes bring new technologies into play for prolonging life, affecting reproductive practices, and permitting discussion and

Concerns and Boundaries in Spirituality and Health, 11 Virtual Mentor 804 (2009); Stephen G. Post, The Perennial Collaboration of Medicine and Religion, 11 Virtual Mentor 807 (2009).

[2] *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

debate on the internet and elsewhere by individuals concerned, for example, about vaccinations.

4) Expansions of the government's role in medical care and insurance – with the Affordable Care Act a prime example – have produced more regulations and institutional oversight, creating more visibility of and opportunities for potential conflicts with religious practices.
5) Some religious groups have become more engaged in political conflicts and litigation over aspects of secular culture and government practices.[3]
6) Junk science and even antipathy to science certainly have fueled opposition to vaccinations (especially based on apparently unfounded fears that the measles, mumps, and rubella vaccine causes autism), even as new technologies imaging fetal life have affected the politics of reproduction and abortion.[4]
7) Disputes over religion and medical issues, like many other societal conflicts, have landed in the hands of lawyers and judges, framed by litigation, adversarial politics, and allergy to compromise. Because lawsuits require casting issues in terms of competing arguments, seeking a definitive answer – yes or no – to a complaint by a plaintiff, middle or compromise positions are not possible inside the courts, and the adversarial framing affects discussions and resolutions outside the courts.
8) Individual choice is not only a deep American value, but also the solvent of intergroup conflict. On questions over how best to raise children, whether children should learn a language other than English, whether women should change their name upon marriage, and even what religion to adopt are treated largely as questions of individual choice in the United States, whereas comparable decisions in other countries are subject to more collective or governmental policies. Americans, compared with people in other nations, fall on the far end of scales valuing individualism and ascribing events to individual effort.[5]
9) Medical ethics have, over time, shifted from reliance on medical expertise to individual choice, rather than to expert medical judgment.[6] This shift

[3] See Darren Dochuk, *From Bible Belt to Sunbelt: Plain-Folk Religion, Grassroots Politics, and the Rise of Evangelical Conservatism* (2010); Matthew Avery Sutton, *American Apocalypse: A History of Modern Evangelicalism* (2014).

[4] See A Case of Junk Science, Conflict and Hype, 9 Nature Immunology 1317 (2008); Lisa Wade, How Fetal Photography Changed the Politics of Abortion, Sociological Images (November 7, 2014), https://thesocietypages.org/socimages/2014/11/07/visualizing-the-fetus/ [https://perma.cc/7WGY-63PB].

[5] Martha Minow, We, the Family: Constitutional Rights and American Families, 74 J. Am. Hist. 959 (1987); Richard Wike, 5 Ways Americans and Europeans are Different, Pew Research Center (April 19, 2016), www.pewresearch.org/fact-tank/2016/04/19/5-ways-americans-and-europeans-are-different/ [https://perma.cc/2TG3-EJXM].

[6] Nancy Neveloff Dubler, A "Principled Resolution": The Fulcrum for Bioethics Mediation, Law & Contemp. Probs., Summer 2011, at 177, 179–80 (2011).

reflects concern over the power imbalances in encounters between physicians and patients and in the responses of hospitals and medical centers to risks of malpractice suits. The shift strengthens philosophic, legal, and pragmatic endorsement of individual patient choice and consent.[7]

The thoughtful and diverse essays gathered in this volume reflect deep learning and sincere efforts to make progress in resolving the disagreements or persuading readers about how to proceed. There are tough and unresolved questions, such as:

1) What is the test for determining when an assertion of religious free exercise deserves constitutional concern – whenever a religious objector says so? When the objector's sincerity is established? When the objector can point to a recognized religious doctrine? When the religious practice is singled out for restriction?
2) What kind of countervailing concerns justify denying claims for religious exemptions – preserving life? Public health? According with standard medical practice? Protecting rights of third-parties?
3) When should courts have the final word, and when should legislatures? What room is and should there be for compromise or settlement of religious claims concerning health care? And;
4) Does repeated reliance on courts to resolve conflicts over religion and health care offer a path toward resolution or instead a kind of repetition compulsion, exacerbating conflict and eroding respect for law?

With deep respect for the efforts of the individual authors and the editors, I hope this work receives serious attention. I also hope readers start with the recognition that discerning "right answers" may not be possible when there are religiously-motivated conflicts over medical care. The conflicts reach to the very notion of what is "right" and who can and should make definitive and legitimate determinations. Ours is a nation that requires separation of religion and government, so any decision by law will be made according to secular lights. Perhaps ironically, this very commitment to separating religion and government has accompanied the flourishing of distinctive religious communities and pluralism in America. The United States has fostered vibrant religious traditions but also many individuals switching religions or developing their own religious beliefs.[8] Even among those who identify with a religion, a vast variety of religious teachings and practices characterizes the United States. Observers who used to predict that secularization follows modernization

[7] Id.
[8] Michael Lipka, 10 Facts About Religion in America, Pew Research Center (August 27, 2015), www.pewresearch.org/fact-tank/2015/08/27/10-facts-about-religion-in-america/ [https://perma.cc/9NYH-2YAR].

have shifted to emphasize that it is pluralism – multiple groups, with contrasting beliefs – that has grown.[9]

Conflicts with public policies mount amid such pluralism. There is no neutral point of view when religious views come into play on public policy questions. It is difficult for policy makers to incorporate all possible religious views in setting general rules and procedures. Even the option of a secular approach, leaving choice to individuals, does not seem neutral to those who feel a particular choice is itself immoral, or who view the resort to individual choice as disrespect for religious viewpoints. Wikipedia, a crowd-sourcing Internet encyclopedia, aims for neutrality but has come to an impasse in the definition of abortion, the entry for which was adjusted some 6,000 times. The "edit war" prompted the site's administrators, at least briefly, to close off discussion.[10] When disputes reflecting religious views come to legislatures, majorities can win, but courts are then entrusted with hearing objections.

Deferring to individual choice can be an attractive solution, yet legally protected choices to secure physician assistance in ending one's life, to avoid otherwise mandated vaccination, or to pursue contraception and abortion are not neutral options. Permitting such choices means allowing people to engage in conduct to which many object and which may harm them or others. A nation that seeks to promote individual liberty inevitably allows, and even supports, many choices to which people may object and which may even bring about harm.

But the choices involving medical care implicate symbolic and practical dimensions of life itself. To permit individuals to seek to accelerate death with medical help is to make death a choice, and doing so, to some, devalues life itself.[11] The deepest sources of meaning, purpose, truth, and morality are at issue, as well as the values and character of society. Yet, disallowing medical assistance to patients who wish to hasten death consigns individuals to suffering. Any framework allowing health care professionals to accelerate an individual's death runs risks of abuse, and great care must accompany such efforts to protect those who are vulnerable due to their physical, mental, emotional, financial, or familial situations. Allowing an employer to

[9] See Eboo Patel, In Promoting Campus Diversity, Don't Dismiss Religion, Chronicle of Higher Education, The Chronicle of Higher Education (March 11, 2015), www.chronicle.com/article/In-Promoting-Campus-Diversity/228427/?cid=at&utm_source=at&utm_medium=en [https://perma.cc/83HF-MFLM]; Gene Veith, Not Secularism but Pluralism, Patheos Blog (March 16, 2015), www.patheos.com/blogs/geneveith/2015/03/not-secularism-but-pluralism/ [https://perma.cc/6WEX-RUK4].

[10] Marshall Poe, A Closer Look at the Neutral Point of View (NPOV), Atlantic (September 2006), www.theatlantic.com/magazine/archive/2006/09/a-closer-look-at-the-neutral-point-of-view-npov/305120/ [https://perma.cc/36XD-BXHA].

[11] See Martha Minow, Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases, 1997 Sup. Ct. Rev. 1 (1997).

opt out of provision of contraceptives burdens choices – constitutionally protected choices – of employees whose own quality of life and meaning are at issue.

Let's be frank. For people with lingering illnesses, massively compromised health care, and grave suffering; for people with unwanted pregnancies; for parents with religious objections to vaccines, whose neighbors have children especially vulnerable to the illness that the vaccine can prevent, there are no great options. Individual accommodations offer individuals some semblance of control or some acknowledgement of competing principles that may not be well-captured by general rules. Without individualized accommodations, lawyers, medical providers, judges and voters will continue to debate when the presumption of individual choice should be overcome because of significant harms to others or limitations of the chooser. Perhaps new forms of mediation would avoid limiting decisions to either-or choices and afford avenues for navigating conflicts between religion and health care. Thoughtful and respectful discussions are crucial. Let's proceed with humility in the face of conflicts we cannot resolve for all times and places.

Acknowledgments

A book like this is the result of the hard work of many. We are very thankful for the help. We thank our student line editors, Eleanor Davis, Noah Heinz, Jessica Goodman, and Ariel Teshuva, who worked tirelessly to bring this manuscript to fruition. We are also grateful to Crissy Hutchison-Jones and Justin Leahey for their administrative support in putting on the conference that gave rise to this book, as well as the conference's sponsors: the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School and the Center for Bioethics at Harvard Medical School, with support from the Oswald DeN. Cammann Fund. Finally, we thank the contributors for their wonderful contributions.