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# Illinois controversy about legislative overreach

## Catholic bishops withdraw opposition, others remain opposed

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## Introduction

Among American states, Illinois has the most comprehensive protection of conscience legislation, the *Health Care Right of Conscience Act* (HCRCA). In 2009 an attempt was made to nullify the Act with respect to abortion, contraception and related procedures by introducing HB 2354 (*Reproductive Health and Access Act*), but the bill died in committee two years later.[1] Now it appears that the HRCA may be changed by Senate Bill 1564. Critics say the bill tramples upon physician freedom of conscience,[2] while the bill's supporters, like the American Civil Liberties Union (ACLU), claim that the bill is "about making sure no one is withholding information from the patient."[3]

SB 1564 was actually drafted by the ACLU,[3] but it was introduced by Illinois Senator Daniel Biss. He said that the amendments were partly in response to the case of a woman who was miscarrying over several weeks, but who was refused "diagnosis or options" in the hospital where she had sought treatment.[4] Senator Bliss was apparently referring to the story of Mindy Swank, who testified before a Senate legislative panel about her experience. The *Illinois Times* reported that she suffered "a dangerous, weeks-long miscarriage" because of the refusal of Catholic hospitals to provide abortions.[5]

Unfortunately, the Illinois Senate Judiciary Committee does not record or transcribe its hearings, and conflicting news reports make it difficult to determine exactly what happened at some critical points in her story. Moreover, it appears that the Committee did not hear from the hospitals and physicians who were involved with Ms. Swank, so we are left with a one-sided account of what took place.[6]

Nonetheless, as a first step in considering the particulars of the bill and the controversy it has engendered, it is appropriate to review the evidence offered to support it. We will begin with Mindy Swank's testimony, even if some details are lacking, and then examine the experience of Angela Valavanis, a second case put forward by the ACLU to justify SB 1564.[7]

## Mindy Swank

Ms. Swank and her husband were expecting a second child, but, at what seems to have been about twenty weeks gestation, she was informed that the infant had "several abnormalities" that made it unlikely it would live, that having the child might compromise her ability to bear more children "and possibly endanger her life."[5]

That fetal abnormality might have such effects seems most unusual. The American Congress of Obstetricians and Gynecologists described numerous fetal anomalies in an amicus brief filed in 2012 to oppose a twenty week abortion ban in Arizona, but did not report that any fetal malformations were known to present a threat to the fertility or life of the mother.[8] Perhaps this is one of the points obscured by the news reports. In any case, the Swanks were sent to a Catholic hospital for further tests.[5,9]

Physicians at the Catholic hospital seem to have confirmed the diagnosis of fetal abnormalities and infant prognosis. Ms. Swank decided that it would be best to have an abortion, since she understood that the baby was not going to survive,[9] but the Swanks were advised that the hospital would not provide an abortion due to Catholic teaching against the procedure.[5]

> "I was told to monitor my bleeding and temperature, and come back if I bled more, or if I had my fever," Swank said. "No one offered to help us find somewhere else to go that was not constrained by these restrictions. No one talked to us about other options, other than waiting to get sick enough for them to help us."[10]

It is not clear that Ms. Swank was bleeding when she presented at the hospital. However, the instructions given suggest that there were signs or symptoms of vaginal bleeding, which, in the circumstances, indicated a risk of infection: hence, the advice to be alert for indications of infection, like a fever. She and her husband went to a non-denominational hospital to obtain an abortion. However, their health insurance would not cover it because the Catholic hospital would not confirm that the abortion was "medically necessary."[5]

This is of particular interest for two reasons.

First: it demonstrates that Ms. Swank did not need the assistance of physicians at the Catholic hospital to determine that an abortion could be obtained elsewhere, and where they could be obtained.

Second: the physicians at the non-denominational hospital were unconstrained by Catholic teaching. The Swank's insurance would presumably have paid for an abortion had the physicians at the non-denominational hospital observed signs or symptoms indicating that it was "medically necessary," whether or not information was forthcoming from the Catholic hospital. For example, had they believed that her life or health were immediately at risk, it seems likely that they could have proceeded with an abortion and would have been paid by the insurance company. The fact that the insurance company wanted certification of "medical necessity" from the Catholic hospital indicates that doctors at the non-denominational hospital were not satisfied that the procedure could be medically justified.

ACLU claims and news reports notwithstanding, it thus seems doubtful that Ms. Swank was miscarrying or that her life or health were at risk. It seems more likely that she was requesting an abortion because of fetal malformation, evidence of which was in the records at the Catholic hospital.

Consistent with this inference, the next incident did not occur until a few weeks later, when Ms. Swank woke up bleeding. Her husband took her to the local hospital, another Catholic institution, where physicians again - initially- declined to intervene. It appears that, when she presented, she was

either not bleeding, or the bleeding observed was not first thought significant.

> "Desperate to prove I was sick enough for them to treat me, I brought to the hospital all of the pads and clothing I had bled through," Mindy said. "The doctors decided that I was sick enough to induce delivery. I gave birth to a baby boy who never gained consciousness and died within a few hours."[5]

The fact that premature labour was induced at a Catholic hospital is not unusual. Setting aside other situations, Catholic physicians may prematurely induce labour during or after the threshold of viability (between 22 and 25 weeks gestation[11]) if there is sufficient risk to the life or physical health of the mother that can only be addressed by such measures. The goal is to save and successfully treat both mother and child, taking into account the risks faced by both and the possibility of infant survival with appropriate neonatal intensive care.[12] The fact that the baby lived for a few hours after delivery suggests that this is what happened.

However, physicians will not necessarily induce labour after 20 weeks gestation in the absence of a threat to the life or health of the mother.[13] Physicians at neither the Catholic nor non-denominational facilties appear to have perceived such a threat until Ms. Swank's final hospital visit, when labour was induced.

## Angela Valavanis

39 year old Angela Valavanis had three children when she learned that she was expecting a fourth. She and her husband decided that the fourth child would be their last. Although she wanted a natural delivery, she planned to have a tubal ligation if it became necessary to have a Caesarean section, since both procedures could be done at the same time. This direction was included in a written birth plan that she gave to her obstetrician-gynecologist, who had cared for her for 15 years.[7]

During her 36-week check-up it was found that Ms. Valavanis had lost a significant amount of amniotic fluid, and she was sent to Presence St. Francis Hospital for an immediate induction. However, having failed to deliver the baby after three days labour, she was advised that she would have to have a C-section.[7] At the same time, she learned that the hospital would not allow tubal ligation. According to the *Chicago Tribune*, this exchange occurred only minutes before the delivery of a healthy baby boy.[14]

Ms. Valavanis and her husband were shocked. She had previously given birth at Presence St. Francis Hospital, but were completely unaware of the policy, which was based on Catholic teaching against contraceptive sterilization. Had her obstetrician made her aware of it, she would have chosen to give birth in a different hospital.[14]

A further surprise awaited her during a post-partum consultation with her obstetrician, who had sold her practice to a Catholic health care company. The obstetrician told her that, as a result of restrictions imposed by the company, she would no longer be able to prescribe contraceptives[14] - unless Ms. Valavanis was willing to lie and say that she wanted the pill to control acne.[7] Nonetheless, neither the ACLU nor the Chicago Tribune suggest that Ms. Valavanis was unable to obtain contraceptives or experienced any difficulty in getting them.

## Swank, Valavanis and the *Health Care Right of Conscience Act (HCRCA)*[15]

Section 4 of the HCRCA protects all Illinois health care providers from civil and criminal liability arising from a refusal to "perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service" to which they object for reasons of conscience. Thus, it was not illegal for the physician at Presence St. Francis Hospital to refuse to provide a tubal ligation for Angela Valavanis.

Further, the HCRCA does not require health care providers to disclose objections in advance to patients or employers, although advance notification is generally thought to be at least good practice whenever it is reasonably possible. While not illegal, the failure to notify Angela Valavanis can be criticized as an oversight, bad practice, or, perhaps, a breach of a standard of care. It exposed her to the inconvenience, cost and risks of a second invasive surgical procedure if she wished to have her tubes tied. It is not clear that the attending physician be blamed, unless he became aware of her plans in the days preceding the delivery. That responsibility lay with her obstetrician and, perhaps, the hospital admissions office.

Section 6 states that the HCRCA does not relieve health care providers of the duty to provide "emergency medical care," nor does it relieve physicians of duties imposed by law and medical practice that require them to inform patients of their "condition, prognosis and risks." It does not appear that physicians failed to advise Mindy Swank of her condition, prognosis and attendant risks, nor does it seem that she required "emergency medical care."

Section 6 also provides that objecting physicians are "under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience," so the fact that no one at the Catholic hospital offered to help Mindy Swank find someone to provide an abortion was neither surprising nor illegal. However, as noted above, Ms. Swank knew that she could seek an abortion elsewhere and knew where to go for that purpose.

The appropriate question to ask in light of these cases is whether or not the HCRCA can be amended in a way that does not defeat the purpose of the statute, but is also responsive to the concerns of the two women.

## Possible amendments responsive to the cases

With respect to the concerns of Angela Valavanis, the HCRCA could be amended to require advance notification of a patient whenever that is reasonably possible. Conflicts should be avoided, especially in circumstances of elevated tension - as in the moments before her C-section - and they often can be avoided by timely notification of patients, erring on the side of sooner rather than later.

Notice should be given when it would be apparent to a reasonable and prudent person that a conflict is likely to arise. In some cases - but not all - this may be when a patient is accepted or admitted to hospital. The same holds true for notification of patients when a physician's views change significantly. A failure to fulfil this obligation should not mean that an individual or health care facility should be made to provide the morally contested service, but the HCRCA could be changed to allow civil action against them in such circumstances.

News reports of Mindy Swank's story are compelling because, abbreviated, one-sided and unreflective, they portray the Catholic institutions and physicians as uncaring, saying, in effect, "Too bad about your bleeding and pain and the baby with the deformities. Can't do anything for you. Come back and see us when you are really sick. Have a nice day."

However, as we have seen, the circumstances do not support the view that Ms. Swank's situation was a medical emergency. Further, she knew about the option of abortion (the only option that seems to have been of interest) and where she could go for that purpose. The advice given in the first instance to monitor her temperature and bleeding may or may not have been prudent, and it seems consistent with the response of physicians at the non-denominational hospital she later attended, but, without hearing from the physicians involved, we cannot be sure. Ultimately, labour was induced at a Catholic hospital, so the HCRCA did not prevent her from receiving treatment, once it was clear what the appropriate treatment was.

On the other hand, if she was seeking an abortion because of fetal malformation, the effect of the HCRCA was to prevent her from forcing the Catholic hospital to provide it or from forcing it to direct her to someone who would do so, which is clearly one of the central purposes of the law.

The only element in Ms. Swank's case that might be addressed by an amendment to the HCRCA is the transmission of patient records from one institution to another. Ms. Swank was legally entitled to obtain copies of her medical records held by the Catholic hospital or to have them delivered to another institution. However, the law requires that the request for records be made in writing and gives an institution thirty days to respond, so it is not a suitable process in situations in which prompt access is desired.[16] More important, Section 14 of the HCRCA overrides the records access law in cases of conscientious objection, and it is likely that the Catholic hospital relied on this when it refused to provide information to physicians at the other institution.

The HCRCA effectively allows an institution or health care provider to unilaterally assume the exclusive control of patient medical information, to the point of denying the patient access to or control of it. This is the kind of power that police have over information they hold about criminals; it is markedly inconsistent with the kind of relationship that one expects to exist between patients and physicians, other health care providers and holders of their medical records.

Without going further into the matter, this suggests that, with respect to patient access to medical records, the HCRCA seems to go beyond what the law might prudently allow in protecting individual and institutional freedom of conscience. Relevant here is the fact that, in jurisdictions where euthanasia and/or assisted suicide are legal, objecting physicians are not legally obliged to help patients find someone willing to kill them, but they are obliged to transfer records to the patient or another physician identified by the patient under customary records transfer protocols.[17]

In sum, then, the cases of Ms. Swank and Ms. Valavanis might be cited to justify two amendments to the HCRCA: one, to require advance notification of patients when reasonably possible, and the other, to require the expeditious transfer of medical records when requested by a patient. Such amendments would address their concerns, and would have little or no impact on the central purpose of the law.

## SB 1564 as introduced

Senator Biss explained that he introduced SB 1564 to ensure freedom of conscience and religion for health care workers, while also ensuring "the patient's right to have information as well as access to care."[14] Consistent with this, the bill reiterated the current law's recognition of freedom of conscience for health care workers and institutions, adding that it was also the public policy of Illinois "to ensure that patients receive timely access to material information and medically appropriate care."[18]

To achieve this goal, the original version of the bill disallowed refusal to provide or facilitate procedures for reasons of conscience except when it occurred in conformity with "written access to care and information protocols." The original bill specified that the protocols must be designed to ensure that patients receive "material information in a timely fashion" and that the refusal would "not impair" their health "by causing delay of or inability to access the refused health care service."[19]

"Material information" was defined to include "all information, pertinent to patient health care decision making and consistent with accepted standards of medical practice," including "prognosis, relevant treatment options, and the risks and benefits of such treatment options,"[20] but also:

> (2) a written document that contains the names of and contact information for health care facilities, physicians, or health care personnel that can provide the patient the particular form of health care service refused because of a conscience-based objection to the health care service, unless the patient has been referred or transferred to a health care facility, physician, or other health care personnel that can provide him or her with the refused health care service.[21]

Incidentally, the bill struck out a provision in the HCRCA that prevents discriminatory screening of applicants.[22]

Finally, the bill effectively made those in charge of hospitals, clinics, physician offices, etc. responsible for enforcing the provisions of the *Act* by authorizing them to compel physicians and health care personnel to "comply with access to care and information protocols," regardless of their conscientious convictions.[23]

**Did the original text of SB 1564 propose amendments responsive to the concerns raised by Mindy Swank and Angela Valavanis, while maintaining the purpose of the statute?**

In the first place, some elements of SB 1564 seem reasonable. Insisting upon written protocols at least helps to ensure that individuals and institutions have thoughtfully consider how to address difficulties that might arise in contentious situations. Similarly, requiring that patients be provided with relevant information "in a timely fashion" should prevent the kind of problem faced by Angela Valavanis.

However, the bill did not include the only change that would have been relevant to the case of Mindy Swank - ensuring the transfer of patient medical records. Moreover, it is obvious that the the original version of SB 1564 proposed changes that went far beyond what could be justified by the evidence of Ms. Swank and Ms. Valavanis. Indeed, SB 1564 went so far as to effectively nullify the statute. The demand that objectors must direct patients to someone who will provide a service that they find

morally objectionable - even abhorrent - is unacceptable to many health care workers because they believe that doing so makes them morally complicit in the act.

Canadian physicians are becoming acutely aware of this issue because physician assisted suicide and euthanasia will be legal in Canada early next year, and euthanasia activists have been demanding for some time that physicians unwilling to kill patients should be forced to help patients find a colleague who will."[24] Their reasoning is precisely the same as that of Senator Biss and his supporters: that, notwithstanding one's moral or religious beliefs, one must provide or at least facilitate "timely access to medically appropriate care" - even if that means killing someone.

On this point, Illinois health care workers and legislators would do well to consider the position of the American Medical Association (AMA), which will be publicly incorporated into its policies next month.[25] In a submission to the state regulator of medical practice in the province of Ontario, the AMA described its approach to the exercise of freedom of conscience by physicians, beginning with the obligation to provide information relevant to "health care decision making":

> In the Council's view, an account of the nature and scope of a physician's duty to inform or to refer when a patient seeks treatment that is in tension with the physician's deeply held personal beliefs must address in a nuanced way the question of moral complicity. The Council concurs that physicians must provide information a patient needs to make a well-considered decision about care, including informing the patient about options the physician sincerely believes are morally objectionable. However, the Council sought to clarify that requirement, holding that before initiating a patient-physician relationship the physician should "make clear any specific interventions or services the physician cannot in good conscience provide because they are contrary to the physician's deeply held personal beliefs, focusing on interventions or services that a patient might otherwise reasonably expect the practice to offer."

The AMA submission also responded to the regulator's proposal to force physicians "unwilling to provide certain elements of care on moral or religious grounds," to make "an effective referral"- that is, to direct patients to "a nonobjecting, available, and accessible physician or other health care provider." This is exactly what was proposed in the original text of SB 1564.

The AMA stated:

> This seems to us to overstate a duty to refer, risk making the physician morally complicit in violation of deeply held personal beliefs, and falls short of according appropriate respect to the physician as a moral agent. On our view, a somewhat less stringent formulation of a duty to refer better serves the goals of non-abandonment, continuity of care, and respect for physicians' moral agency. The council concluded that:
>
> > In general, physicians should refer a patient to another physician or institution to provide treatment the physician declines to offer. When a deeply held, well-considered personal belief leads a physician also to decline to refer, the physician should offer impartial guidance to

> patients about how to inform themselves regarding access to desired services.
>
> On the Council's analysis, the degree or depth of moral complicity is defined in part by ones "'moral distance' from the wrongdoer or the act, including the degree to which one shares the wrongful intent."
>
> Other factors also influence complicity, including "the severity of the immoral act, whether one was under duress in participating in the immoral act, the likelihood that one's conduct will induce others to act immorally, and the extent to which one's participation is needed to facilitate the wrongdoing."[26]

## Opposition by Catholic authorities

Despite the overreaching nature of the bill, the Senate Judiciary Committee approved SB 1564 by a 7-3 margin (2 abstentions), largely along party lines.[27] When the bill moved to the Senate floor, the Catholic [Bishops'] Conference of Illinois and the Illinois Catholic Health Association redoubled their opposition, because, they said, it "essentially obliterates" the *Health Care Right of Conscience Act.*

> The complex legislation states that when conscience rights are invoked, patients must receive written information that includes a referral to "health care facilities, physicians, or health care personnel that can provide the patient the particular form of health care service."
>
> This referral could constitute a direct cooperation with the morally objectionable services, resulting in a violation of conscience.[28]

Although expressed within the context of Catholic teaching, their opposition to the bill was based on the same concern about complicity that informs the approach of the American Medical Association.

## Opposition dropped

Worried that the bill would pass in the Senate, the Conference and Association employed Catholic health care ethicists and Catholic hospital lawyers to negotiate with Senator Biss to correct the problems they had identified. The Senator agreed to amendments that were acceptable to the Conference and Association, which then dropped their opposition to the bill and adopted a neutral position concerning it.[29]

According to the Catholic Conference of Illinois and the state's Catholic Health Association, the amended bill reflects "current medical practices in Catholic hospitals."[29] Those practices were discussed with the *Chicago Tribune* by Patrick Cacchone, executive director of the Illinois Catholic Hospital Association, and Erica Laethem, regional director of ethics for one of the state's largest health care organizations, OSF Health Care, a Catholic entity.

Mr. Cacchione said that patients are supposed to be advised of all options, even those not available in Catholic hospitals:

> We put them in the right direction to get the care they need. If we didn't operate this

> way, it would be malpractice and we wouldn't be in business. That's our protocol - fully informed patients.[14]

Erica Laethem agreed.

> We really do believe that there's no topic about which a provider would be advised to say to a patient, "I can't even discuss this with you." The patient-provider relationship is a relationship based on trust, and that requires dialogue.[14]

Ms. Laethem explained that Catholic health care providers can do everything but formally refer for a procedure, suggesting that they can provide "information about providers who have a certain specialty who could perform an independent consultation and continue the conversation with the patient."[14]

If Ms. Laethem meant that such information could include contact information for those who provide abortion or other procedures prohibited by Catholic teaching, her explanation goes beyond what is acceptable to the Catholic Conference of Illinois. The following note appears in capitalized bold type in its statement about SB 1564:

> PLEASE NOTE THAT THE AMENDED SB 1564 REQUIRES NO ONE TO TELL PEOPLE WHERE ABORTIONS CAN BE OBTAINED.[29]

## SB 1564 as amended

SB 1564 passed the Senate on 30 April, 2015 and is now before the state House of Representatives. The text of the bill has been posted on the Project website in parallel with the corresponding provisions of the existing HCRCA at Illinois: Senate Bill 1564 (2015) so that the changes can be easily identified.[30]

Section 4 of the HCRCA (discussed above) is unchanged. Also unchanged is the critical provision in Section 6 that states that an obligation to provide information cannot be construed to impose a "duty to perform, assist, counsel, suggest, recommend, refer or participate in any way" in procedures to which one objects for reasons of conscience. However, as will be seen presently, the protection against coerced referral or participation is qualified by Section 6.1.

SB 1564 adds to Section 6 a duty to inform patients of "legal treatment options." It also adds a requirement that physicians disclose not only the risks of treatment options (as required by the current law), but their benefits, a provision retained from the original bill.

Section 6.1, an entirely new section, appears to be the principal product of the negotiations that led to the amendments accepted by Senator Biss. SB 1564 no longer demands that objectors provide patients with timely written notice of the names and contact information of facilities or personnel who would provide morally contested procedures. Further, the requirement that conscientious objection not cause "inability to access the refused health care service" has been dropped.

However, the exercise of freedom of conscience will not be allowed unless an individual or institution has written policies to ensure that conscientious objection does not "cause impairment of

patient's health," and that explain how conscientious objections will be managed "in a timely manner to facilitate patient health care services."

At a minimum, when a service is refused for reason of conscience, four requirements must be met.

1) All information relevant to informed decision-making (diagnosis, prognosis, treatment options, risks, benefits) must be given to the patient;

2) Someone else in the facility must provide the morally contested procedure, or the patient must be told that it will not be provided.

3) If a procedure will not be provided, upon request of the patient or his legal representative, an objecting health care worker or facility must do one of three things:

   i) refer the patient to other health care providers who they reasonably believe may provide the morally contested service; or

   ii) transfer the patient to other health care providers who they reasonably believe may provide the morally contested service; or

   iii) provide the patient with written information about other health care providers who the objecting facility or individual reasonably believes may offer the morally contested service.

4) Upon the request of the patient or his legal representative, provide copies of medical records to the patient or to another health care professional or health care facility designated by the patient, without undue delay."Undue delay" is defined to mean "unreasonable delay that causes impairment of the patient's health."

The fourth requirement addresses the failure of the original bill to provide for the transfer of records.

The amended bill retains the provision in the original that permits facilities to force health care workers to comply with these requirements, regardless of their conscientious convictions.[31]

## New opposition

Even as amended, SB 1564 goes well beyond what might be justified by the cases of Mindy Swank and Angela Valavanis, but it was acceptable to the Catholic Conference of Illinois and others responsible for delivering health care in Catholic institutions. Nonetheless, its passage was denounced by the Board of Directors of Catholic Citizens of Illinois (CCI) as "an act of insufferable arrogance."

> [A]mendments can't cure the problem. The bill is intended to require Catholic "medical personnel" to act against their religious convictions, and thus an inexcusable and unacceptable attempt to coerce consciences.[32]

Catholic Citizens of Illinois describes itself as an organization that works "for a restoration of traditional Catholic values to the public life of Illinois. . . from a perspective formed in strict fidelity to the Magisterium and in loyalty to the bishops and the Holy Father."[33]

Notwithstanding its affirmation of "loyalty to the bishops," CCI seems to have been referring to the declaration of neutrality by the Catholic Conference when, in relation to SB 1564, it stated, "for Catholics, 'neutrality' in the face of an intrinsic evil is never an option."[32]

A few days later, CCI was joined in its opposition to SB 1564 by the Illinois Women's Health and Life Alliance, a coalition of 30 organizations and individuals, including the president of the Chicago guild of the Catholic Medical Association. Among its criticisms, the Alliance claimed that SB 1564 "would require doctors to facilitate abortions for any reason, and at any stage of pregnancy, despite their conscientious and professional objections," and "would require pregnancy center workers to violate their core mission by referring women for abortions or distributing information on where to obtain abortions."[34]

Responding to a *Chicago Tribune* Op-Ed supporting the bill, Anna Paprocki, staff counsel for Americans United for Life (a member of the Alliance) wrote that SB 1564 "creates new obligations for healthcare providers . . . to promote and participate in conscience-violating activities" and "promotes the coercive anti-conscience agenda of his abortion-industry backers, Planned Parenthood and the ACLU."[35]

Professor Robert P. George of Princeton University added his voice to the opposition in the form of an open letter to Illinois legislators, urging them to "vote down a bill that would trample on citizen conscience rights."[36]

## Complicity: when is referral not referral?

While not the only point of contention, the issue of complicity is central to the controversy about the SB 1564 and the differences that have arisen between the Catholic bishops' conference and Catholic health care entities on the one hand and pro-life and Catholic individuals and organizations on the other.

In a legal analysis of SB 1564, Anna Paprocki noted that the current law "respects a healthcare provider's conscientious determination of what constitutes his or her complicity" in wrongdoing.[37] The provider - not the state - determines whether or not giving a patient contact information for someone willing to provide a contested service is a violation of the his conscientious convictions, and the provider - not the state - determines what constitutes an acceptable compromise.

The text of SB 1564, like any law, is subject to interpretation. The Catholic Conference, acting on the advice of ethicists and lawyers, appears to have withdrawn its opposition because it seemed to the bishops that a "friendly" interpretation of the text was possible, one consistent with current practice in Catholic health care. Of the three options provided in the bill, it would seem that neither institutionally initiated referral nor institutionally initiated transfer would be possible for a Catholic institution. However, they understood the third option - referral - to include an acceptable alternative:

> Counsel against the objectionable service, tell the patient what the problems are with it, but if the patient continues to insist on it, to say, 'Look, we don't do that here; here is a list of medical providers: Maybe one of them can help you.'"

Zachary Wichmann, the Conference's director of governmental relations, said, "That, in our minds,

is not a morally objectionable referral."[38]

For example: an objecting individual or institution might provide a generic list of all physicians or health care facilities within a five mile radius, information that is already publicly available. That would be similar to directing a patient to the Yellow Pages, albeit in a more convenient form. It would not direct a patient to a specific institution or individual known to provide the morally contested procedure. Certainly, this interpretation is consistent with the Conference's statement that SB 1564 "requires no one to tell people where abortions can be obtained."

However, one wonders if that is what was understood by Senator Biss when he agreed to the amendment, or if a court considering the actual text of the law would agree. The revised wording of SB 1564 does not readily yield that interpretation. An objector is required to provide information, not about all reasonably accessible health care providers whom a patient might approach, but about other health care providers who the objecting facility or individual *reasonably believes may offer* the morally contested service. This hardly sounds like a generic list that might be copied from a telephone book or health care directory.

Professor George made this point in his open letter to Illinois legislators. Referring to abortion, the kind of list required by SB 1564, he said, is a list "composed solely of those of whom it is 'reasonable' to believe would perform the abortion."

> (If one has no reason to believe a facility performs abortions, it would not be "reasonable" to put it on the list. Similarly, if one knows a facility does not perform abortions, it would not be reasonable to put it on the list.)[39]

On the other hand, the Catholic Conference perhaps saw that, strictly speaking, other interpretations are possible, and agreed to settle to avoid the less certain outcome of a pitched political battle.

Nonetheless, it seems that a pitched political battle is on the horizon, with those supporting freedom of conscience in health care apparently more divided than those who wish to suppress it.

## Notes

1. Murphy, S. "Illinois HB2354 to nullify Health Care Right of Conscience Act: Illinois, USA (2009-2010)." Protection of Conscience Project (http://www.consciencelaws.org/repression/repression054.aspx)

2. "Illinois Women's Health and Life Alliance Urges House Defeat of SB 1564: Bill Violates Rights of Doctors, Women and Creates Legal Liabilities." Illinois Women's Health and Life Alliance news release, 4 May, 2015 (http://www.christiannewswire.com/news/4991875995.html) Accessed 2015-05-07.

3. Smith PJ, "In Illinois, Bishops and Pro-Life Groups Differ on ACLU Conscience Bill." *National Catholic Register*, 13 May, 2015 (http://www.ncregister.com/daily-news/in-illinois-bishops-and-pro-life-groups-take-different-stands-on-aclu-consc/) Accessed 2015-05-13

4. "Senate Oks measure requiring doctors to provide information even about objectionable treatment." *The Associated Press*, 22 April, 2015 (http://www.greenfieldreporter.com/view/story/1d59549439f24b5e976ef0b08944ed9d/IL--Health-Care-Conscience) Accessed 2015-05-11.

5. Yeagle, P. "Morals in medicine: Senate passes "right of conscience" bill after harrowing testimony." *Illinois Times*, 30 April, 2015. (http://illinoistimes.com/mobile/articles/articleView/id:15434) Accessed 2015-05-11.

6. It is unlikely that they could have testified even if invited by the Committee because of constraints imposed by patient confidentiality. At the very least, Ms. Swank would have had to waive patient privilege to allow them to respond to her allegations.

7. "Why We Need Senate Bill 1564: Angela & Stel's Story." American Civil Liberties Union of Illinois, 21 April, 2015. (http://www.aclu-il.org/why-we-need-senate-bill-1564-angela-stels-story/) Accessed 2015-05-03)

8. No. 12-16670, In the United States Court of Appeals for the Ninth Circuit, Paul A. Isaacson, M.D, *et al*., *Plaintiffs-Appellants*, *v.* Tom Horne, Attorney General of Arizona, in his official capacity, *et al*., *Defendants-Appellees*. On Appeal from the United States District Court for the District of Arizona, Civil Case No. 2:12-cv-01501-JAT (Hon. James A. Teilborg) Brief for *Amici Curiae* American College of Obstetricians and Gynecologists and American Congress of Obstetricians and Gynecologists in Support of Plaintiffs-Appellants and Reversal. (http://cdn.ca9.uscourts.gov/datastore/general/2012/09/26/12_16670_Amicus_Brief.pdf) Accessed 2015-05-20.

9. Gibbs, K. "Proposal seeks to ensure patient care & personal beliefs." WCIA News, 17 March, 2015. (http://www.illinoishomepage.net/story/d/story/proposal-seeks-to-ensure-patient-care-personal-bel/40506/yVQJgHkFM0ygB3TLaUacvw) Accessed 2015-05-11.

10. Gregory, J. "Opposition Mounting Against 'Right of Conscience' Act." *Alton Daily News*, WBGZ Radio, 7 May, 2015 (http://altondailynews.com/news/details.cfm?clientid=17&id=174102#.VUw3JU10zcs) Accessed 2015-05-07.

11. In the developed world. Synnes AR, Buchanan L, Ruth C, Albersheim S. "Management of the newborn delivered at the threshold of viability." *BCMJ*, Vol. 50, No. 9, November 2008, page(s) 498-508 (http://www.bcmj.org/article/management-newborn-delivered-threshold-viability) Accessed 2015-05-13

12. U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (5th Ed.) 17 November, 2009, No. 49. (http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Reli

gious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf) Accessed 2015-05-13

13. World Health Organization, *Recommendations for the Induction of Labour* (2011) (http://whqlibdoc.who.int/publications/2011/9789241501156_eng.pdf?ua=1) Accessed 2015-05-21

14. Pashman, MB. "Bill would make Catholic hospitals tell patients about options elsewhere." *Chicago Tribune*, 17 April, 2015 (Accessed 2015-05-12)

15. 745 ILCS 70/1 *Health Care Right of Conscience Act* (Hereinafter "HCRCA"). (http://consciencelaws.org/law/laws/usa-illinois.aspx#Health Care Right of Conscience Act)

16. Illinois Compiled Statutes, Chapter 735, Code of Civil Procedure, Article VIII, Part 20, Sections 8-2001 through 8-2003. (http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=073500050HArt%2E+VIII+Pt%2E+20&ActID=2017&ChapterID=56&SeqStart=63500000&SeqEnd=64300000) Accessed 2015-05-15.

17. For example: *The Belgian Act on Euthanasia* (2002) Chapter VI: Special Provisions, Section 14 (http://consciencelaws.org/law/laws/belgium.aspx)

18. 99th General Assembly, State of Illinois, 2015 and 2016, SB1564. Introduced 2/20/2015, by Sen. Daniel Biss, Section 2. (Hereinafter, "Original SB 1564") (http://www.ilga.gov/legislation/fulltext.asp?DocName=09900SB1564&GA=99&SessionId=88&DocTypeId=SB&LegID=88256&DocNum=1564&GAID=13&Session=) Accessed 2015-05-15

19. Original SB 1564, Section 6.1

20. Original SB 1564, Section 3(h)1

21. Original SB 1564, Section 3(h)2

22. *HCRCA* Section 7: Discrimination. SB 1564 struck out "to place any reference in its application form concerning, to orally question about."

23. Original SB 1564, Section 6.2

24. Schuklenk U, van Delden J.J.M, Downie J, McLean S, Upshur R, Weinstock D. *Report of the Royal Society of Canada Expert Panel on End-of-Life Decision Making* (November, 2011) p. 62, 69, 101 (http://rsc-src.ca/sites/default/files/pdf/RSCEndofLifeReport2011_EN_Formatted_FINAL.pdf) Accessed 2014-02-23

25. In November, 2014, the AMA House of Delegates adopted a new policy concerning physician exercise of freedom of conscience, which will be formally issued in June. The AMA website states, "Reports not available online (such as those recently adopted by the AMA and pending publication) are made available upon request by contacting CEJA

staff." American Medical Association, *CEJA Reports* (http://www.ama-assn.org/ama/pub/aboutama/our-people/ama-councils/council-ethical-judicial-affairs/ceja-reports.page?) Accessed 2015-02-17

26. Quoted in Murphy, S. "American Medical Association provides details of new freedom of conscience policy: AMA submission to Ontario College of Physicians an improvement on quality of briefing by College working group." *Protection of Conscience Project*, 21 February, 2015 (http://consciencelaws.org/blog/?p=5620)

27. State of Illinois, 99th General Assembly Senate Committee Vote, Judiciary,Senate Bill No. 1564, 17 March, 2015 (http://www.ilga.gov/legislation/votehistory/99/senate/committeevotes/09900SB1564_9275.pdf) Accessed 2015-05-16

28. "Conscience rights under attack." *Catholic Conference of Illinois*, 6 March, 2015. (http://www.ilcatholic.org/conscience-rights-under-attack/) Accessed 2015-05-11.

29. "Agreement reached on conscience rights." *Catholic Conference of Illinois*, 16 April, 2015. (http://www.ilcatholic.org/agreement-reached-on-conscience-rights/) Accessed 2015-05-03

30. Proposed Law-Illinois: Senate Bill 1564 (2015) *Protection of Conscience Project.* (http://consciencelaws.org/law/proposed/usa-illinois-002.aspx)

31. SB 1564, Section 6.2

32. "Statement of Catholic Citizens of Illinois on SB#1564, Health Care Right of Conscience Act." 30 April, 2015. (http://catholiccitizens.org/views/statement-of-catholic-citizens-of-illinois-on-sb1564-health-care-right-of-conscience-act/) Accessed 2015-05-03

33. Catholic Citizens of Illinois: About Us. Who are the Catholic Citizens at CCI? (http://catholiccitizens.org/about/) Accessed 2015-05-12

34. "llinois Women's Health and Life Alliance Urges House Defeat of SB 1564: Bill Violates Rights of Doctors, Women and Creates Legal Liabilities." llinois Women's Health and Life Alliance news release, 4 May, 2015. (http://www.christiannewswire.com/news/4991875995.html) Accessed 2015-05-07

35. Paprocki, A. "Tribune Op/Ed Misleads on Healthcare Right of Conscience." Illinois Family Institute, 20 April, 2015 (http://illinoisfamily.org/life/tribune-oped-misleads-on-healthcare-right-of-conscience-re-write/) Accessed 2015-05-12

36. George RP. "An Open Letter to the Illinois Legislature. *National Review*, 12 May, 2015 (http://www.nationalreview.com/article/418259/open-letter-illinois-legislature-robert-p-george) Accessed 2015-05-13

37. Paprocki A., "Analysis of Illinois SB 1564 - Detrimental to Both Healthcare Providers and Patients." Americans United for Life (http://illinoisfamily.org/wp-content/uploads/2015/04/AUL-statement-on-IL-SB-1564.pdf) Accessed 2015-05-18

38. Smith PJ. "In Illinois, Bishops and Pro-Life Groups Differ on ACLU Conscience Bill." *National Catholic Register*, 13 May, 2015 (http://www.ncregister.com/daily-news/in-illinois-bishops-and-pro-life-groups-take-different-stands-on-aclu-consc/) Accessed 2015-05-13

39. George RP. "An Open Letter to the Illinois Legislature." *National Review*, 12 May, 2015 (http://www.nationalreview.com/article/418259/open-letter-illinois-legislature-robert-p-george) Accessed 2015-05-13