

Background

No. 2543
April 13, 2011



Published by The Heritage Foundation

From Culture Wars to Conscience Wars: Emerging Threats to Conscience

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Abstract: *Today, religious liberty issues are more complicated than simply freedom from government interference in religious worship or teaching. Threats to religious liberty and respect for conscience are emerging in the health care field, in the area of institutional religious freedom, and in the context of issues involving same-sex marriage and nondiscrimination policies. Religious liberty and respect for conscience should be encouraged and protected, both in civil society and in law and policy, as an effective and principled way to promote social peace and civic fraternity in an increasingly pluralistic society.*

By now, many people are familiar with debates concerning legalized abortion, the display of religious symbols or expression of religious ideas in the public square, whether the state should license homosexual unions as marriages, and similar issues. Fewer people might realize that these debates have entered a new phase in which respect for conscience is under attack. For example:

- Now the issue is not only whether the state can place any restrictions on terminating the lives of children before birth, but also whether health care providers who conscientiously object to abortion should be forced to participate in or help to facilitate abortion.
- Now the issue is not only what place religion should have in public life, but also whether religious groups can prefer coreligionists without

Talking Points

- Threats to conscience are growing in three areas: health care, institutional religious freedom, and issues involving same-sex marriage and nondiscrimination policies.
- In many cases, government overreach raises the stakes of moral discourse and encourages intolerance on the part of private citizens.
- In pluralistic societies where consensus is elusive, protecting religious liberty and rights of conscience is one of the most effective and principled ways to promote social peace and civic fraternity.
- Where governments choose to act, whether through regulation or through condition-based funding, they should promote respect for religious and moral conscience, not discourage it.
- Where a government itself imposes a burden on religious and moral conscience, the case for protecting conscience is even more compelling.
- Private citizens and institutions should encourage each other to recognize the value of moral conscience and to respect it as an essential ingredient of a free and civil society.

This paper, in its entirety, can be found at:
<http://report.heritage.org/bg2543>

Produced by the Richard and Helen DeVos
Center for Religion and Civil Society

Published by The Heritage Foundation
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Washington, DC 20002-4999
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being hauled into court or excluded from publicly sponsored social service programs.

- Now the issue is not only whether the state should license homosexual unions as marriages, but also whether individuals and institutions that believe marriage is one man and one woman will face civil liability and loss of equal access to government programs and benefits if they do not go along.

Today, religious liberty issues are more complicated than simply freedom from government interference in religious worship or teaching. In many cases this is because, at the same time our society is becoming more pluralistic on questions of basic morality, the government continues to intrude more than ever in both public and private areas of social life. Another factor is an increasing number of incidents in which private citizens and society at large demonstrate intolerance of and hostility to orthodox religious and moral viewpoints.

This paper provides a brief overview of some of these issues and recommends respecting and protecting conscience as an effective, principled, and essential way to promote social peace and civic fraternity in an increasingly pluralistic society.

Threats to Conscience in Health Care

The health care field is fraught with difficult moral issues including abortion, contraception, artificial reproductive technologies, euthanasia, and assisted suicide. Health care providers with moral or religious objections to participating in these and other procedures face threats to conscience in at least two ways.

1. Under nondiscrimination laws and other mandates imposed by the state, health care providers in some jurisdictions might be required to provide goods or services that violate their religious beliefs or moral convictions. For example:
 - Pharmacists who believe that life starts at fertilization might face demands to provide “Plan B,” a drug that can act as both a contraceptive and an abortifacient.¹ Doctors could face similar mandates.
 - Two doctors in California were sued under a state nondiscrimination law when they objected on religious grounds to helping a lesbian woman conceive a child through artificial means.²
2. Universities, bodies that establish standards of professional care, accrediting institutions, and health industry employers might try to require health care students and workers to participate in abortion or other morally controversial procedures. For example:
 - According to certain allegations,³ Vanderbilt University had been requiring applicants for the Women’s Health Track of its nurse residency program to sign a letter acknowledging that they could be required to assist with abortions.⁴ According to a complaint letter filed in this case,⁵ conditions attached to federal funding that it receives require Vanderbilt not to discriminate against applicants who object to abortion, and after a lawyer with the Alliance Defense Fund became involved, the university clarified that its policy was that no health care provider would be required to assist with abor-

1. See *Stormans v. Selecky*, Washington, (2010 – current), BECKET FUND FOR RELIGIOUS LIBERTY (Feb. 7, 2011), <http://www.becketfund.org/stormans-v-selecky-washington-2010-%E2%80%93-current/>.

2. See Tom Messner, *A Path to Accommodating Sexual Orientation and Protecting Religious Freedom?*, THE FOUNDRY (Aug. 22, 2008, 11:06 AM), <http://blog.heritage.org/2008/08/22/a-path-to-accommodating-sexual-orientation-and-protecting-religious-freedom/>.

3. See Letter from Matthew Bowman, Legal Counsel, Alliance Defense Fund, Washington, D.C., to Roosevelt Freeman, Regional Manager, Office for Civil Rights, U.S. Dept. of Health and Human Services (Jan. 11, 2011), available at http://adfwebadmin.com/resources/Files/HHS_Complaint_Letter.pdf.

4. See Casey Mattox, *Vanderbilt Rescinds Supposedly Non-Existent Policy, Protects Conscience!*, SPEAK UP MOVEMENT (Jan. 12, 2011), <http://blog.speakupmovement.org/university/uncategorized/vanderbilt-rescinds-supposedly-non-existent-policy-protects-conscience>.

5. See Letter from Matthew Bowman, *supra* note 3, at 1, 3–5.

tion if doing so would violate the individual's religious beliefs or moral convictions.⁶ However, the case illustrates the need to protect conscience in law and to educate institutional decision-makers about the value of respecting convictions on controversial moral issues.

- In another case, Mount Sinai Hospital in New York allegedly told a Roman Catholic nurse that she could face disciplinary action if she did not participate in terminating the life of a 22-week unborn child.⁷ The nurse has argued that the hospital's actions violate certain state laws and certain conditions of federal funds that it receives.⁸ Like the Vanderbilt case, this example illustrates the concerns underlying state and federal protections for conscience and the need to preserve and strengthen those protections.

Some state governments have enacted conscience protection laws. In addition, federal law conditions receipt of certain federal funds on respect for conscience in particular situations. These protections reflect the high value a civil society places on religious and moral conscience.

However, these protections require vigilance against attack from activists and public officials who fail to accord conscience its proper value. The

Obama Administration, for example, recently weakened federal regulations designed to make existing statutory protections more effective.⁹

Threats to the Religious Integrity of Religious Groups

Religious groups face at least two types of threats to their religious liberty, both of which are focused on religious hiring rights.

1. Independent, nontraditional religious groups, or "parachurches," that maintain their religious identity and character by hiring coreligionists face the threat of civil liability under religious nondiscrimination laws. For example:
 - A Christian parachurch organization called World Vision was sued by two employees who were fired for not agreeing with certain religious beliefs of World Vision. A federal appellate court sided with World Vision, but at least one judge in that case would have ruled that federal nondiscrimination law requires Christian parachurch organizations like World Vision to compromise their religious integrity by not preferring coreligionists for employment.¹⁰

Social welfare organizations like World Vision make up a significant part of the contemporary

6. See Posting of Casey Mattox, *supra* note 4 (follow links for "application packet" and "email by Vanderbilt"); see also eNews for Faith-Based Organizations (Stanley Carlson-Thies, ed.), "A Victory for Professionals with a Pro-Life Conscience," Jan. 25, 2011, <http://archive.constantcontact.com/fs020/110243353>.
7. See *Cenzon-DeCarlo v. The Mt. Sinai Hospital* resource page, ALLIANCE DEFENSE FUND (Nov. 23, 2010), <http://www.alliancedefensefund.org/News/PRDetail/2895>; *NY nurse threatened, forced to assist in late-term abortion*, ALLIANCE DEFENSE FUND (JULY 22, 2009), <http://www.alliancedefensefund.org/News/PRDetail/2694>; *Fact Sheet: Cenzon-DeCarlo v. The Mt. Sinai Hospital*, ALLIANCE DEFENSE FUND, <http://oldsite.alliancedefensefund.org/userdocs/Cenzon-DeCarloFactSheet.pdf> (last visited Mar. 28, 2011).
8. In *Cenzon-DeCarlo v. Mount Sinai Hospital*, 626 F.3d 695 (2d Cir. 2010) (per curiam), the U.S. Court of Appeals for the Second Circuit affirmed a district court ruling that the federal law in question does not provide a private right of action. The nurse has filed a state court action asserting certain claims under state and local law. See *NY nurse forced to participate in abortion files additional suit against Mt. Sinai Hospital*, ALLIANCE DEFENSE FUND (Apr. 29, 2010), <http://adfmmedia.org/News/PRDetail/2895>.
9. See Michael W. McConnell and Nathan Chapman, *A Step Backward for Freedom of Conscience*, ADVANCING A FREE SOCIETY (Mar. 1, 2011, 06:28 AM), <http://www.advancingafreesociety.org/2011/03/01/a-step-backward-for-freedom-of-conscience/> (discussing conscience protections in federal statutes and steps taken by Obama Administration to weaken regulations that had been designed to strengthen federal conscience protections); eNews for Faith-Based Organizations (Stanley Carlson-Thies, ed.), "Reduced Conscience Protections for Health Care Institutions and Professionals," Feb. 22, 2011, <http://archive.constantcontact.com/fs020/110243353>; Chuck Donovan, *Conscience Regulations: HHS Stops (Just) Short of Rescission*, THE FOUNDRY (Feb. 18, 2011, 03:30 PM), <http://blog.heritage.org/2011/02/18/conscience-regulations-hhs-stops-just-short-of-rescission>.

religious landscape in this country.¹¹ Whether they qualify for exemptions from religious non-discrimination laws is a major legal and policy issue with significant ramifications.

2. Religious groups that prefer coreligionists face discrimination in equal access to government programs, funding, recognition, and other benefits. For example:

- In the last Congress, a bill was introduced that, according to one source, would have created “a universal ban on religious hiring in federally funded drug treatment and mental health programs.”¹²
- A Christian student organization was denied official recognition by a state university because the organization required its officers and voting members to adhere to a Christian statement of faith.¹³

Whether imposed directly through mandates or indirectly through conditions on equal access, religious nondiscrimination mandates would force religious groups to “hide their candle under a bushel” before entering into the public square. This would

undermine the vital and distinct contribution that religiously inspired civil society groups make to the greater good of all society.¹⁴

Threats to Conscience from Same-Sex Marriage and Nondiscrimination Policies

People and groups with traditional understandings of sexual morality, including the understanding that marriage is the union of one man and one woman, face at least two types of burdens on conscience. The potential for conflicts already exists under nondiscrimination laws that treat marital status, sexual orientation, and gender as protected statuses. Redefining marriage would increase the number of conflicts.¹⁵

1. People who support marriage as one man and one woman might face potential civil liability under nondiscrimination laws that prohibit private discrimination based on sexual orientation, marital status, or gender. For example:

- In New Mexico, a family-owned photography business declined to photograph a same-sex “commitment ceremony” because the owners’

10. See *Big Victory for Religious Hiring in World Vision Case*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Aug. 29, 2010), <http://www.irfalliance.org/component/content/article/43-big-victory-for-religious-hiring-in-world-vision-case.html>.

11. See Thomas M. Messner, *Can Parachurches Hire and Fire Based on Religion Without Violating Title VII?*, 17 U. FLA. J. L. & PUB. POL’Y 63, 67–74, 105 (2006).

12. *Sign of the Times: Rising Washington Tide Against Religious Hiring*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (July 27, 2010), <http://www.irfalliance.org/component/content/article/40-signs-of-the-times-rising-washington-tide-against-religious-hiring.html>. See also *Lame Duck Congress Leaves Religious Hiring Alone*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Dec. 29, 2010), <http://www.irfalliance.org/component/content/article/46-lame-duck-congress-leaves-religious-hiring-alone.html>.

13. See *Christian Legal Society v. Martinez (UC Hastings)*, CHRISTIAN LEGAL SOCIETY (providing resources about case), <http://www.clsnet.org/center/litigation/christian-legal-society-v-martinez-uc-hastings> (last visited Mar. 28, 2011).

14. See Ryan Messmore, *Private Faith, Big Government: Understanding the Impact of Marginalizing Religion*, HERITAGE FOUND. BACKGROUNDER NO. 2123, Apr. 15, 2008, available at <http://www.heritage.org/Research/Reports/2008/04/Private-Faith&Big-Government&Understanding-the-Impact-of-Marginalizing-Religion>. For more information on institutional religious freedom issues, the Web site of the Institutional Religious Freedom Alliance is an excellent resource. See www.irfalliance.org.

15. See, e.g., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock *et al.* eds., 2008) (including contributions from Anthony R. Picarello, Jr., Marc D. Stern, Jonathan Turley, Robin Fretwell Wilson, Douglas W. Kmiec, Chai R. Feldblum, Charles J. Reid, Jr., and Douglas Laycock); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939 (2007); Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story*, NPR, June 16, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=91486340>; Peter Steinfelds, *Beliefs: Advocates on Both Sides of the Same-Sex Marriage Issue See a Potential Clash with Religious Liberty*, N.Y. TIMES, June 10, 2006, at A11, available at <http://query.nytimes.com/gst/fullpage.html?res=9C05E4DC1231F933A25755C0A9609C8B63&sec=&spn=&pagewanted=1>; Mary Ann Glendon, Op-Ed, *For Better or For Worse?*, WALL. ST. J., Feb. 25, 2004, at A14, available at <http://www.opinionjournal.com/editorial/feature.html?id=110004735>.

religious beliefs conflict with the message communicated by the ceremony. The New Mexico Human Rights Commission prosecuted the small business under the state's sexual orientation nondiscrimination law and demanded that it pay thousands of dollars in costs.¹⁶

- In Illinois, “[j]ust one month after Governor Patrick Quinn signed the civil union bill into law, a homosexual couple [] filed complaints with both the Illinois Attorney General and the Illinois Department of Human Rights for the refusal of two innkeepers to rent out their privately owned bed and breakfasts for a civil union ceremony and reception.”¹⁷ The complaints reportedly alleged that the innkeepers violated the Illinois Human Rights Act, “which prohibits discrimination on the basis of sexual orientation by businesses open to the public.”¹⁸ According to one report, one of the bed and breakfasts is owned by “a Christian father of five children who has been deluged with vicious, hateful emails and phone calls.”¹⁹

Conflicts like the ones in Illinois and New Mexico will only become more common if states redefine marriage or enact other legal recognitions for homosexual unions. The Becket Fund for Religious Liberty studied more than 1,000 state laws prohibiting discrimination on the basis of sexual orientation, gender, or marital status and found that more than “350 separate state anti-discrim-

ination provisions would likely be triggered by recognition of same-sex marriage.”²⁰

Regrettably, there is strong opposition to respecting conscience rights of people trying to earn a living through small business. For example, before she was appointed to serve as a member of the U.S. Equal Employment Opportunity Commission, Georgetown law professor Chai Feldblum stated:

[F]or all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried, straight couples and all gay couples, this is a point where I believe the “zero-sum” nature of the game inevitably comes into play. And, in making the decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people.²¹

2. People who support traditional understandings of sexual morality also face discrimination in equal access to government benefits and programs. For example:
 - Boy Scouts of America has lost equal access to public facilities and programs because of its position on open homosexuality.²²
 - A Christian student organization at a state university was denied official recognition because it required officers and voting members to

16. See Thomas M. Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, HERITAGE FOUND. BACKGROUND NO. 2201, Oct. 30, 2008, at 16 & nn.82–84, available at <http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty>; see also Alliance Defense Fund, “Fact Sheet: Willock v. Elane Photography,” available at <http://oldsite.alliancedefensefund.org/userdocs/ElanePhotoFactSheet.pdf> (current through Jan. 25, 2008). The case has been appealed to the New Mexico Court of Appeals.

17. Laurie Higgins, *Homosexuals Sue Christian Bed & Breakfast Owner for Refusing “Civil Union” Ceremony*, ILLINOIS FAMILY INSTITUTE NEWS & OPINION (Feb. 24, 2011, 07:46:00 AM), <http://www.illinoisfamily.org/news/contentview.asp?c=35169>.

18. Craig Gernhardt, *Gay Couple Denied Civil Union at Bed and Breakfast*, NOW IN GAY CHICAGO (Feb. 18, 2011, 08:00 PM), <http://www.nowingaychicago.com/2011/02/gay-couple-denied-civil-union-at-bed.html>.

19. Higgins, *supra* note 17.

20. BECKET FUND FOR RELIGIOUS LIBERTY, SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2 (Jan. 2009), <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf>.

21. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119 (2006).

adhere to traditional Christian teachings on sexuality.²³

- Catholic Charities in Boston and Washington, D.C., have been forced to abandon their participation in providing adoption services because government mandates would have forced them to place children with homosexual couples in violation of Catholic social teaching.²⁴
- According to a news report, state officials in Illinois are “investigating whether religious agencies that receive public funds to license foster care parents are breaking anti-discrimination laws if they turn away openly gay parents.”²⁵ “If they are found in violation,” states this source, “Lutheran Child and Family Services, Catholic Charities in five regions and the Evangelical Child and Family Agency will have to license openly gay foster parents or lose millions of state dollars, potentially disrupting more than 3,000 foster children in their care.”²⁶
- Christian people wishing to provide foster care might face similar discrimination. In the United Kingdom, for example, “the High Court has suggested that Christians with traditional views on sexual ethics are unsuitable as foster carers.”²⁷ In a statement available on YouTube, one of the Christian carers involved in this case explained that “all we were not willing to do was to tell a small child that the practice of homosexuality was a good thing.”²⁸
- Related conflicts are likely to arise in education and professional situations. For example, a student obtaining professional training in a counseling program at a public university in Michigan was expelled, she alleges, because she was not willing to affirm homosexual behavior as morally acceptable.²⁹ A student enrolled in a counseling program at a public university in Georgia faced a similar hardship when, she alleges, she was told to change her beliefs about homosexuality and undergo a re-education plan or leave the program.³⁰

22. See Messner, *supra* note 16, at 8–9 & nn. 32–33.

23. See Christian Legal Society, *supra* note 13.

24. See, e.g., Maggie Gallagher, *Banned in Boston: The coming conflict between same-sex marriage and religious liberty*, WKLY STANDARD, May 15, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>; Chuck Donovan, *The D.C. Government's Strike Against Foster Kids—and Religious Liberty*, THE FOUNDRY (Feb. 19, 2011, 11:00 AM), <http://blog.heritage.org/2010/02/19/the-d-c-government%E2%80%99s-strike-against-foster-kids-%E2%80%93-and-religious-liberty/>.

25. Many A. Brachear, *State probes religious foster care agencies over discrimination*, CHI. TRIB., Mar. 2, 2011, available at http://articles.chicagotribune.com/2011-03-02/news/ct-met-gay-foster-care-20110301_1_care-and-adoption-catholic-charities-parents.

26. *Id.* See also Laurie Higgins, *Homosexual Activists Go After Illinois Religious Organizations*, ILLINOIS FAMILY INSTITUTE NEWS & OPINION (Mar. 3, 2011, 07:44 AM), <http://www.illinoisfamily.org/news/contentview.asp?c=35177>.

27. Press Release, Christian Legal Centre, *Amazement as High Court suggests Christian beliefs harmful to children. Fostering by Christians now in doubt* (Feb. 28, 2011), available at <http://christianconcern.com/press-release/amazement-as-high-court-suggests-christian-beliefs-harmful-to-children-fostering-by-ch>. See also *Johns Fostering Case: Effects of the Ruling and Further Analysis*, CHRISTIAN CONCERN (Mar. 4, 2011), <http://www.christianconcern.com/our-concerns/sexual-orientation/johns-fostering-case-effects-of-the-ruling-and-further-analysis>; *High Court Judgment suggests Christian beliefs harmful to children. Fostering by Christians now in doubt*, CHRISTIAN CONCERN (Feb. 28, 2011), <http://www.christianconcern.com/our-concerns/religious-freedom/breaking-news-high-court-judgment-suggests-christian-beliefs-harmful->

28. See NationForMarriage, *British High Court Rules Christian Couple May Not Foster Kids: Eunice and Owens Johns*, YOUTUBE (Feb. 28, 2011), <http://www.youtube.com/watch?v=5miSjrfc47A>.

29. See *Ward v. Wilbanks resource page*, ALLIANCE DEFENSE FUND (July 27, 2010) <http://www.alliancedefensefund.org/News/PRDetail/141>.

30. See *Keeton v. Anderson-Wiley resource page*, ALLIANCE DEFENSE FUND (DEC. 7, 2010), <http://www.adfmedia.org/News/PRDetail/4384>.

These kinds of conflicts will only increase in jurisdictions that officially license homosexual unions.

Conclusion

Today, religious liberty and rights of conscience issues are more complicated than simply freedom from government interference in religious worship or teaching. In many cases, this is because, at the same time our society is becoming more pluralistic on questions of basic morality, the government continues to intrude more than ever in both public and private areas of social life. Another factor is an increasing number of incidents in which private citizens and society at large demonstrate intolerance of and hostility to orthodox religious and moral viewpoints.

Moral deliberation cannot—and should not—be avoided, even in law and policy. In a society that aims to judge people by “the content of their character,”³¹ as Dr. Martin Luther King, Jr., put it, moral deliberation is a constant responsibility for individuals. Further, as President Barack Obama said when campaigning in 2006, “Our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.”³² On some issues, such as how to define marriage or whether taxpayer money should be used to pay for abortions, the government cannot avoid taking a position on the moral questions presented.

In many cases, however, government overreach raises the stakes of moral discourse and encourages intolerance on the part of private citizens. When civil liability or equal access to government benefits depends on private citizens adopting the “official” state position on controversial moral issues, the potential for infringement of religious liberty and rights of conscience is clear. As the diversity of moral viewpoints in society increases, the number of social conflicts will only rise.

In pluralistic societies where consensus is elusive, protecting religious liberty and rights of conscience is one of the most effective and principled ways to promote social peace and civic fraternity. Where governments choose to act, whether through regulation or through condition-based funding, they should promote respect for religious and moral conscience, not discourage it. Where a government itself imposes a burden on religious and moral conscience, the case for protecting conscience is even more compelling.

Finally, private citizens and institutions should encourage each other to recognize the value of moral conscience and to respect it as an essential ingredient of a free and civil society.

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31. Martin Luther King, Jr., “I Have a Dream” speech delivered at the Lincoln Memorial, Washington, D.C., Aug. 28, 1963, available at <http://www.americanrhetoric.com/speeches/PDFFiles/Martin%20Luther%20King%20-%20I%20Have%20A%20Dream.pdf>.

32. Senator Barack Obama, “Call to Renewal Keynote Address,” Call to Renewal Conference on Building a Covenant for a New America, June 28, 2006, available at <http://obamaspeeches.com/081-Call-to-Renewal-Keynote-Address-Obama-Speech.htm>.