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Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?

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I. Introduction

On Friday, August 28, 2002, Verona Victim, a college student, is jogging alone at night on a wooded running trail near Useful University.[1] A man wearing a black ski mask jumps out of the woods, grabs Verona around the neck, pins her down, and brutally rapes her at knifepoint. Terrified and upset, Verona calls her roommate, Rachel Roomie, who rushes Verona to the St. Peter's hospital emergency room. St. Peter's, a Catholic hospital, is the only hospital in the area. Because Useful University's student health center is not open at night or on weekends, students with emergencies have no choice but to go to St. Peter's.

At St. Peter's, the emergency room doctor examines Verona and treats her for injuries. A nurse takes blood and DNA samples in case Verona later decides to press charges. Verona also meets with a hospital psychologist. During this meeting, Verona expresses feelings of shame and fear. Verona also expresses a concern that she will become pregnant as a result of the rape. The psychologist tells Verona to spend time with friends and family over the weekend and to make an appointment to see a Useful University psychologist when the student health center opens on Monday.

On Monday, Verona schedules an appointment with Carrie Counselor, the staff university psychologist. Carrie advises Verona of her option to receive emergency contraception—an increased dose of oral contraceptives that, if

1. The author created all facts for purposes of this hypothetical.

administered within seventy-two hours of intercourse, can reduce Verona's chance of pregnancy by 89%.[2] Verona has never heard of the "morning-after" pill. The St. Peter's emergency room doctor did not notify her of this option. Carrie informs Verona that St. Peter's does not administer or counsel its patients about the treatment because it is a Catholic hospital, and the Catholic Church believes that emergency contraception can cause abortions.

Verona expresses a strong desire to receive the morning-after pill, so Carrie refers her to Dr. Pill, a local gynecologist. As soon as she returns to her dorm room, Verona calls Dr. Pill, but his office closes for the day at 4:30 p.m. Verona tries several other doctors, but a receptionist tells her that Dr. Pill is the only doctor in town that will write prescriptions for emergency contraception. Verona calls Dr. Pill's office the next morning, and he agrees to see Verona at 3:30 p.m. Verona obtains a prescription and fills it at 5 p.m. on Tuesday.

Verona takes the medication immediately, but by this time she is well outside of the seventy-two-hour window in which the pill is most effective. After a month of worrying, she purchases and takes a home pregnancy test; the result is positive. Verona visits Dr. Pill, who confirms that she is, in fact, pregnant. Verona is extremely distraught—she does not want to carry this baby to term because it reminds her of the rape. On the other hand, Verona is Catholic and morally opposed to abortion. After much mental anguish, she ultimately decides to get an abortion.

On October 1, 2002, with a view to cases like Verona's, the state legislature passes a bill requiring all hospitals to provide emergency contraception to rape victims. All of St. Peter's board members believe that post-coital contraception can cause abortions and that to administer it would fundamentally violate the precepts of the Catholic faith, undermine the hospital's policies, and contradict the Catholic Health Care Directives.[3] If St.

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2. *See, e.g.*, Suz Redfearn, *Preparing for a Mistake: For Emergency Birth Control, Plan Ahead*, WASH. POST, May 21, 2002, at F1 (discussing the need for wider availability of the morning-after pill).

3. *See* U.S. CONFERENCE OF CATHOLIC BISHOPS, INC., ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 10, Directive 36 (4th ed. 2001) [hereinafter DIRECTIVES] (quoting Directive 36), *available at* http://www.nccbuscc.org/bishops/directives.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review). Directive 36 states:

> A female who has been raped should be able to defend herself against a potential conception from the sexual assault. If, after appropriate testing, there is no evidence that conception has occurred already, she may be treated with medications that would prevent ovulation, sperm capacitation, or fertilization. It is not permissible, however, to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.

Peter's does not comply with the law, it faces fines and the possible revocation of its operating license. The board believes that the hospital cannot fulfill its religious mission while administering this treatment to patients. The board decides to shut down St. Peter's rather than comply with the statute's requirements. This closure costs the community hundreds of jobs. After St. Peter's shuts down, the closest medical center is Horrible Hospital, which is a 45-minute drive from Useful University and has the reputation of being one of the worst hospitals in the state.

The hypothetical situation above illustrates the ethical, medical, and legal dilemma that occurs every time a rape victim arrives at a Catholic emergency room for treatment. This dilemma arises from the clash of two important interests—patient autonomy and religious freedom. Rape victims should have access to the best available treatment.[4] Arguably, this treatment includes administration of the morning-after pill.[5] In contrast, a Catholic hospital has an interest in operating in accordance with its religious views, as protected by the First Amendment's Free Exercise and Establishment clauses.[6] Requiring religious hospitals to provide emergency contraception to rape victims compromises this religious freedom.[7] The values of patient autonomy and religious freedom directly conflict in this case, creating a quandary as to how to strike the correct balance between protecting the rights of rape victims and respecting the autonomy of religious institutions.

Id.

4. *See infra* Part II (discussing the medical community's support of the morning-after pill).

5. *See* LIZ BUCAR, CATHOLICS FOR A FREE CHOICE, CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS TO YOUR HEALTH 7 (1999) ("Offering emergency contraception is a medically accepted standard of care for rape victims."); Katherine A. White, Note, *The Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1715 (1999) ("Currently it is the medically accepted standard of care to offer emergency contraception to rape victims."); AM. MED. ASS'N HOUSE OF DELEGATES § 75.985, ACCESS TO EMERGENCY CONTRACEPTION (2002) [hereinafter ACCESS] ("It is the policy of our AMA . . . to recognize that information about emergency contraception is part of the comprehensive information to be provided as part of the emergency treatment of sexual assault victims . . . ."), *at* http://www.ama-assn.org/apps/pfonline/pf_online?fn=browse&doc=policyfiles/HOD/H-75.985.HTM (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

6. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); *see also infra* Part V.B (discussing the importance of religious freedom).

7. *See infra* Part V.B (discussing the argument that emergency contraception statutes interfere with hospitals' religious freedom).

This conflict is especially significant because Catholic hospitals constitute the largest group of health care providers in the United States.[8] Most Catholic hospitals do not administer emergency contraception to rape victims, even though the American Medical Association (AMA) recognizes it as the medically accepted standard of care for sexual assault victims.[9] This denial is significant in that each year in the United States, more than 330,000 women are sexually assaulted, resulting in 25,000 pregnancies.[10] In the past several years, a handful of state legislatures have responded to the needs of rape victims by passing or proposing statutes that require all hospitals to provide rape victims with the morning-after pill on request.[11] On the federal level, Congress considered two bills that attempted to make it easier for women to obtain the medication, but the bills died in committee last term.[12] In addition, one state court has held that a rape victim whose health care provider denied the treatment can bring a cause of action against the treating hospital.[13] Attempts by Congress and state legislatures to make emergency contraception more available to rape victims have sparked considerable resistance from Catholic hospitals and pro-life activists, who believe that the administration of emergency contraception can cause an abortion.[14] Catholic hospitals argue that mandating the treatment for sexual assault victims violates their religious freedom and prevents them from practicing medicine in accordance with their

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8. *See* Alison Manolovici Cody, *Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women's Reproductive Services When Hospitals Become Catholic*, 57 N.Y.U. ANN. SURV. AM. L. 323, 324–25 (discussing the dominance of Catholic hospitals in the health care market).

9. *See supra* note 5 and accompanying text (stating that providing the morning-after pill is the standard of care for rape victims).

10. *See, e.g.*, H.R. 4113, 107th Cong § 2(1) (2002) (quoting the statistics on the number of women who will become pregnant each year as a result of rape); 410 ILL. COMP. STAT. 70/2.2(a)(1) (2002) (same); WASH. REV. CODE 70.41.1(d)(2) (2002) (same). The United States Congress cited a recent study in the American Journal of Preventative Medicine, which found that emergency contraception could have prevented 22,000 rape-related pregnancies. H.R. 4113.

11. *See infra* Part III.B (summarizing the current state legislation concerning emergency contraception).

12. *See infra* Part III.C (discussing the federal proposals concerning rape victims and emergency contraception).

13. *See* Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 245 (Ct. App. 1989) (concluding that a rape victim whose health care provider has denied her information about emergency contraception has a cause of action against the hospital); *see also infra* Part III.A (discussing the possibility of a state tort remedy for rape victims when health care providers deny them emergency contraception).

14. *See infra* Part II (explaining the Catholic view that the morning-after pill can cause an abortion).

beliefs.[15] Some Catholic hospitals have threatened to close their doors rather than administer the medication.[16]

This Note attempts to answer the question of how lawmakers should balance the concerns of Catholic health care providers with those of rape victims. Following this introduction, Part II briefly surveys the medical and Catholic viewpoints on the morning-after pill. Part III summarizes existing federal and state law regarding religious hospitals and emergency contraception. Part IV examines the constitutional implications raised by this legislation with respect to the First Amendment's Free Exercise and Establishment Clauses, as well as the Due Process Clause of the Fourteenth Amendment. Part V explores the policy concerns created by balancing the interests of rape victims and religious hospitals. This section will present the policy arguments made by advocates of emergency contraception statutes, and conversely, by religious hospitals opposing these statutes. Finally, Part VI will determine which of these competing interests should prevail, using a framework for analysis suggested by Tom Beauchamp and James Childress in *Principles of Biomedical Ethics*.[17] Ultimately, this Note will conclude that state legislatures and Congress should require hospitals to provide emergency contraception to rape victims.

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15. *See infra* Part II (discussing Catholic opposition to these statutes).

16. *See* S. 92-24, Reg. Sess., at 156–57 (Ill. 2001) (Statement of Sen. O'Malley) (stating that "effectively, the American Medical Association is being asked to help abolish Catholic health care in this country," and that such resolutions could "drive the churches out of health care by making it impossible for them to operate in accord with their ethical and religious mission."); Editorial, *Caring for Victims of Rape*, CHI. TRIB., Apr. 12, 2001, LEXIS, Nexis Library, Chicago Tribune File [hereinafter Editorial] (statement of Doug Delaney, executive director of the Catholic Conference of Illinois) (stating that emergency contraception legislation "would . . . forc[e] Catholic hospitals into civil disobedience"); Mark Hare, *Regarding Religious Freedom, Fine Lines Are Important*, DEMOCRAT & CHRONICLE (Rochester, N.Y.), Feb. 24, 2002, at 1B (stating that Catholic hospitals might shut down rather than comply with these restrictions); *id.* (statement of Dennis Poust, assistant executive director of the New York State Catholic Conference) ("But to offer the pill to terminate a pregnancy is another matter. The Catholic Conference defines that as an abortion, and its hospitals will not comply.").

17. *See infra* Part VI (suggesting a framework for analysis using four principles of biomedical ethics: (1) respect for autonomy; (2) nonmaleficence, or avoiding the causation of harm; (3) beneficence, or doing good; and (4) justice, or equitable distribution of benefits, risks, and costs). *See generally* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (5th ed. 2001) [hereinafter ETHICS] (presenting the basic theories of biomedical ethics).

II. Medical Perspectives and Catholic Views on Emergency Contraception

Emergency contraception, popularly known as the morning-after pill, consists of increased dosages of oral contraceptives.[18] The patient takes two doses of contraceptives, twelve hours apart.[19] The treatment can reduce the risk of pregnancy when taken up to 120 hours after sexual intercourse, but the patient must take the first dose within seventy-two hours, and its effectiveness is inversely proportional to the time elapsed.[20] Taking the medicine within twenty-four hours reduces the risk of pregnancy by 95%, and taking it within seventy-two hours reduces the risk of pregnancy by 89%.[21] Although the medication primarily works by preventing ovulation, some studies have found that it also can work by preventing fertilization or implantation of the fertilized egg in the uterus.[22] Once implantation has occurred and the pregnancy is established, emergency contraception will not prevent a pregnancy or cause an abortion.[23]

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18. *See, e.g.*, PLANNED PARENTHOOD, FACT SHEET: OBSTRUCTING ACCESS TO EMERGENCY CONTRACEPTION IN HOSPITAL EMERGENCY ROOMS [hereinafter OBSTRUCTING ACCESS] (providing general information about the morning-after pill), *available at* http://www.plannedparenthood.org/library/facts/obstructing_032102.html (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

19. *See id.* (explaining the administration of emergency contraception).

20. *See id.* (discussing the effectiveness of the morning-after pill); Press Release, American College of Obstetricians and Gynecologists, New ACOG Leader Promotes Widespread Advance Prescriptions for Emergency Contraception (Apr. 30, 2001) [hereinafter New ACOG Leader] (stating that the first dose must be taken within seventy-two hours), *available at* http://www.acog.org/fromhome/publications/pressreleases/nr04-30-01-1.cfm (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

21. *See* PLANNED PARENTHOOD, FACT SHEET: EMERGENCY CONTRACEPTION (discussing when to take emergency contraception), *available at* http://www.plannedparenthood.org/library/BIRTHCONTROL/EC.html (last visited July 28, 2003) (on file with the Washington and Lee Law Review); New ACOG Leader, *supra* note 20 (discussing the effectiveness of emergency contraception).

22. *See* New ACOG Leader, *supra* note 20 (stating that emergency contraception works by preventing ovulation, fertilization, or implantation); AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, STATEMENT ON CONTRACEPTIVE METHODS (2003) [hereinafter CONTRACEPTIVE METHODS] (explaining how the different methods of contraceptives work and stating that preventing ovulation is the primary method of preventing pregnancy in contraceptives), *at* http://www.acog.org/fromhome/departments/deptnotice.cfm?recno=11&bulletin=600 (last visited July 28, 2003) (on file with the Washington and Lee Law Review). Study results are mixed on whether emergency contraception works by preventing implantation. *See* THE HENRY J. KAISER FAMILY FOUND., FACT SHEET: EMERGENCY CONTRACEPTION 1 (Nov. 2000) (discussing how emergency contraception works).

23. *See* CONTRACEPTIVE METHODS, *supra* note 22 (explaining how emergency contraceptives work).

The Food and Drug Administration (FDA) has declared that emergency contraceptive pills are a safe and effective means of preventing pregnancy.[24] In 1998, the FDA approved Preven™, the first drug developed and marketed explicitly for emergency contraceptive use, for sale on the market.[25] A year later, the FDA approved Plan B®, another drug developed explicitly for use as an emergency contraceptive.[26] Currently, the medically accepted standard of care calls for providing rape victims with emergency contraception.[27] The American College of Obstetricians and Gynecologists (ACOG) has voiced its support of the medication, declaring it "safe and effective," and endorsing its sale "over-the-counter."[28] The AMA and the American Medical Women's Association (AMWA) also have endorsed the treatment as a means of preventing pregnancy.[29] These groups maintain that the morning-after pill does not cause abortions, because the medical definition of pregnancy defines conception as beginning at implantation.[30]

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24. *See, e.g.*, Press Release, American College of Obstetricians and Gynecologists, Statement of the American College of Obstetricians and Gynecologists Supporting the Availability of Over-the-Counter Emergency Contraception (Feb. 14, 2001) [hereinafter Statement] (endorsing the morning-after pill and also noting the FDA's support of the medication), *available at* http://www.acog.org/fromhome/publications/pressreleases/nr02-14-01.cfm (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

25. *See* New ACOG Leader, *supra* note 20 (discussing the FDA's approval of Preven™).

26. *See id.* (discussing emergency contraception kits).

27. *See supra* note 5 and accompanying text (stating that providing emergency contraception to rape victims is the standard of care).

28. *See, e.g.*, News Release, American College of Obstetricians and Gynecologists, ACOG Supports Safety and Availability of Over-the-Counter Emergency Contraception (Feb. 28, 2002) (supporting the increased availability of the morning-after pill), *available at* http://www.acog.org/fromhome/publications/pressreleases/nr02-28-01-2.cfm (last visited July 28, 2003) (on file with the Washington and Lee Law Review); New ACOG Leader, *supra* note 20 (same); Statement, *supra* note 24 (same).

29. *See* ACCESS, *supra* note 5 (arguing for measures to increase the availability of emergency contraception); AM. MED. WOMEN'S ASS'N POSITION STATEMENT ON EMERGENCY CONTRACEPTION (Nov. 1996) [hereinafter POSITION STATEMENT] (announcing AMWA's support for the widespread use of emergency contraception), *at* http://www.amwa-doc.org/publications/Position_Papers/contraception.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

30. *See, e.g.*, S. 92-24, Reg. Sess., at 152 (Ill. 2001) (statement of Sen. Radogno) (stating that all the major medical groups, including the AMA, agree that pregnancy begins at implantation and emergency contraception does not cause an abortion); New ACOG Leader, *supra* note 20 (statement of Thomas Purdon, ACOG President) ("Unlike abortion, if a woman is already pregnant, EC will not terminate her pregnancy."); POSITION STATEMENT, *supra* note 29 (endorsing emergency contraception). The AMWA states:

> AMWA agrees with respected organizations such as the National Institutes of Health and the American College of Obstetricians and Gynecologists (ACOG) in defining pregnancy as beginning with implantation. Emergency contraceptive pills

The Catholic Church, on the other hand, defines a pregnancy as beginning at fertilization.[31] Therefore, many Catholics believe that emergency contraception can cause a "chemical abortion" when it acts to prevent implantation of a fertilized egg.[32] Consequently, the Ethical and Religious Directives for Catholic Health Care Services only allow a rape victim to receive post-coital contraception in certain circumstances.[33] According to the Directives, a rape victim can receive the medication only after testing shows that conception has not already occurred and if the treatment will not interfere with the implantation of a fertilized ovum.[34]

III. Current State of the Law

A. Availability of a State Tort Remedy for Rape Victims

In 1989, the California Court of Appeals for the Second District decided *Brownfield v. Daniel Freeman Marina Hospital*,[35] holding that a rape victim can bring a cause of action for damages against a hospital that does not provide

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work prior to implantation and therefore are considered by these respected organizations and AMWA as a contraceptive, not as an abortifacient.

Id.

31. *See, e.g.*, Press Release, Pro-Life Wisconsin, The Morning After Pill . . . What You Don't Know! (Sept. 1998) ("The morning after pill is an abortion causing agent."), *available at* http://www.prolifewisconsin.org/infolibraryshow.asp?IID=23 (last visited July 28, 2003) (on file with the Washington and Lee Law Review); ILLINOIS RIGHT TO LIFE COMM., BIOLOGY 101: LIFE BEGINS AT FERTILIZATION, NOT IMPLANTATION (arguing that life beings at fertilization), *at* http://www.illinoisrighttolife.org/biology.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review); AMERICAN LIFE LEAGUE, BIRTH CONTROL: WHAT PART OF 'EMERGENCY CONTRACEPTION' IS NOT ABORTION? ("It is very clear that pregnancy begins at fertilization . . . . Any 'treatment' that destroys the living human being at any point after fertilization is an abortion . . . ."), *at* http://www.all.org/issues/ecabort.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review); PASTORS FOR LIFE, CHEMICAL ABORTION: AN ALARMING BUT SILENT BATTLEFRONT IN THE STRUGGLE FOR THE LIFE OF THE UNBORN (1996) ("Pastors for Life believes that using any form of so-called birth control that kills or has the potential to kill the unborn child after fertilization is sinful."), *at* http://www.prolifewisconsin.org/infolibraryshow.asp?IID=22 (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

32. *See supra* note 31 and accompanying text (stating the pro-life view that the morning-after pill causes abortion).

33. *See* DIRECTIVES, *supra* note 3, at 10 (quoting Directive 36, which permits the administration of emergency contraception to rape victims only if tests show that the victim is not pregnant).

34. *See id.* (explaining when rape victims can receive emergency contraception).

35. Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240 (Ct. App. 1989).

her with emergency contraception as part of her emergency care.[36] After Kathleen Brownfield was raped, she arrived at Daniel Freeman Marina Hospital, a Catholic hospital, for emergency treatment.[37] Brownfield's mother asked hospital personnel for information about the morning-after pill, but the hospital denied her request.[38] Emergency room personnel also failed to inform Brownfield that the morning-after pill is most effective in the first seventy-two hours after sexual contact.[39] Brownfield did not see her doctor until more than seventy-two hours after the rape.[40] Although Brownfield did not become pregnant as a result of the rape, she filed an action on behalf of herself and the public seeking a declaration that the hospital failed "to provide optimal emergency treatment of rape victims in accordance with the standard of good medical practice."[41] She also sought an injunction ordering the hospital to provide rape victims with information and access to emergency contraception, or in the alternative, to transport rape victims to a facility willing to provide the treatment.[42] Brownfield did not seek monetary damages.[43]

The court concluded that Brownfield did not state a cause of action because she did not establish any damages.[44] The court, however, held that a rape survivor could state a cause of action by showing that: (1) a skilled practitioner of good standing would have provided her with information about emergency contraception under similar circumstances; (2) she would have elected such treatment if it had been available; and (3) she suffered damages as a result of the hospital's failure to provide her with information about this treatment option.[45]

After *Brownfield*, a rape victim who is denied emergency contraception and becomes pregnant as a result of the rape has a possible cause of action in California against the denying hospital.[46] No other court has ruled on this

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36. *See id.* at 245 (concluding that a rape victim whose health care provider has denied her information about emergency contraception has a cause of action against the hospital).

37. *See id.* at 242 (reciting the facts of the case).

38. *See id.* (referring to the appellant's amended complaint).

39. *See id.* (citing the appellant's complaint).

40. *See id.* (reiterating the appellant's allegations).

41. *See id.* (describing the provision for declarative relief sought by Brownfield).

42. *See id.* (explaining the appellant's causes of action).

43. *See id.* (summarizing the appellant's claims for relief).

44. *See id.* at 245 (stating that the appellant did not prove damages, and therefore did not state a cause of action).

45. *See id.* (determining that a cause of action can be brought against a hospital that does not provide information about emergency contraception).

46. *See id.* (holding that a rape victim can state a cause of action for damages for medical malpractice when a hospital denies her emergency contraception and she can prove that

particular issue. But, both ACOG and the AMA have declared that providing the morning-after pill is the proper standard of care for treating rape victims.[47] These declarations provide powerful support for a victim trying to prove that a hospital breached its duty to her and failed to comply with the pertinent standard of care by not providing the treatment.[48]

B. State Legislation

1. Requiring Hospitals to Provide or Discuss Emergency Contraception

In addition to the possibility of a state tort remedy, six states have passed laws to make emergency contraception more available to rape victims.[49] In the past three years, nine additional states have considered or are currently considering bills that would increase victims' access to the medication.[50] These

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damages have proximately resulted from this denial).

47. *See* White, *supra* note 5, at 1715 ("Currently it is the medically accepted standard of care to offer emergency contraception to rape victims."); Statement, *supra* note 24 (endorsing emergency contraception); ACCESS, *supra* note 5 ("It is the policy of our AMA . . . to recognize that information about emergency contraception is part of the comprehensive information to be provided as part of the emergency treatment of sexual assault victims . . . .").

48. *See* White, *supra* note 5, at 1717 (stating that based on *Brownfield*, "patients denied treatment may be able to successfully sue providers for malpractice"). The medically-accepted standard of care for rape victims could vary by jurisdiction if a local rather than a national standard applies. This issue, and other issues raised by the possibility of a tort action against hospitals that deny emergency contraception to rape victims, are beyond the scope of this Note. In particular, such a cause of action raises issues with respect to proving duty, breach, causation, and proof of damages.

49. *See* CAL. PENAL CODE § 13823.11(e)(1) (West 2002) (requiring hospitals to provide a victim with postcoital contraception if she requests it); 410 ILL. COMP. STAT. 70/2.2 (2002) (requiring emergency rooms to develop a protocol in order to provide information about the morning-after pill to rape victims); S.C. CODE ANN. § 16-3-1350(B) (2002) (requiring emergency rooms to provide emergency contraception to rape victims); WASH. REV. CODE § 70.41.350(1)(a) (2002) (same). In addition, in May 2002, the New York State Department of Health issued protocols for the treatment of sexual assault victims, which include a provision obligating hospitals to inform victims about emergency contraception and provide a referral if a hospital does not provide it. *See* CATHOLICS FOR A FREE CHOICE, SECOND CHANCE DENIED: EMERGENCY CONTRACEPTION IN CATHOLIC HOSPITAL EMERGENCY ROOMS 6 (2002) [hereinafter SECOND CHANCE] (describing state efforts to increase the availability of emergency contraception). In Ohio, all hospitals must follow a standard protocol in order to be reimbursed from the state fund for the cost of sexual assault exams. *See* OHIO REV. CODE ANN. § 2907.28 (West 2002) (requiring the administration of emergency contraception in order to qualify for state reimbursement). The protocol requires hospitals to provide sexual assault victims with emergency contraception or a referral within seventy-two hours of the assault. *See* § 2907.28 (discussing the protocol).

50. *See* S.B. 1334, 45th Leg., 2d Reg. Sess. (Ariz. 2002) (requiring hospitals to provide

statutes and proposals come in three varieties: (1) statutes requiring hospitals to provide information about emergency contraception to victims;[51] (2) legislation requiring hospitals to provide victims with a referral for the morning-after pill;[52] and (3) laws requiring hospitals to provide information about the pill and to furnish the treatment on-site if the victim requests it.[53]

The Sexual Assault Survivors Emergency Treatment Act, enacted by the Ninety-Second Illinois General Assembly on May 3, 2001, represents one example of a creative approach by a state legislature to deal with the conflicting needs of rape victims and religious hospitals.[54] This law requires hospital emergency rooms to provide information about emergency contraception to

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emergency contraception to rape victims; died in committee); H.B. 564, 141st Gen. Assem., Reg. Sess. (Del. 2002) (same; died in committee); S.B. 2246, 2002 Leg., Reg. Sess. (Fla.) (same); H.B. 125, 2002 Leg., Reg. Sess. (Fla.) (same; died in committee); H.B. 1802, 2002 Leg., Reg. Sess. (Haw.) (same; died in committee); S.B. 114, 2002 Leg., Reg. Sess. (Haw.) (same; died in committee); H.B. 2311, 2001 Leg., Reg. Sess. (Kan.) (same; died in committee); H.B. 930, 2002 Gen. Assem., 417th Sess. (Md.) (requiring hospitals to develop a protocol to provide information about emergency contraception to victims; died in committee); S. 956, 2002 Leg., Reg. Sess. (N.J.) (same; referred to committee); A. 297, 2002 Leg., Reg. Sess. (N.J.) (same; referred to committee); A.O. 15, 2003 Assem., Reg. Sess. (N.Y.) (same; died in committee); S. 202, 2003 Assem., Reg. Session (N.Y.) (same; referred to Health Committee); A.O. 2214, 2002 Assem., Reg. Sess. (N.Y.) (same; died in committee); S.O. 2347, 2002 Assem., Reg. Session (N.Y.) (same; died in committee); S.B. 391, 2002 Leg., Reg. Sess. (Wis.) (same; referred to Health Committee); *see also* H.B. 1224, 2001 Gen. Assem., Reg. Sess. (Md.) (requiring hospitals to provide information and a referral for emergency contraception; died in committee); S.F. 1461, 2001 Leg., Reg. Sess. (Minn.) (same; died in committee); A. 3385, 2001 Leg., Reg. Sess. (N.J.) (same; died in committee).

51. *See* 410 ILL. COMP. STAT. 70/2.2 (2002) (requiring emergency rooms to develop a protocol to provide information about emergency contraception to victims but not to provide it on-site); H.B. 930, 2002 Gen. Assem., 417th Sess. (Md.) (same); *see also supra* note 49 and accompanying text (discussing the mandated protocols in New York and Ohio that require hospitals to provide a referral about emergency contraception to rape victims).

52. *See* H.B. 125, 2002 Leg., Reg. Sess. (Fla.) (requiring hospitals to provide information and a referral for emergency contraception); S.B. 2246, 2002 Leg., Reg. Sess. (Fla.) (same); H.B. 1224, 2001 Gen. Assem., Reg. Sess. (Md.) (same).

53. *See* CAL. PENAL CODE § 13823.11(e)(1) (West 2002) (requiring hospitals to provide a victim with postcoital contraception if she requests it); S.C. CODE ANN. § 16-3-1350(B) (2002) (same); WASH. REV. CODE § 70.41.350(1)(a) (2002) (same); S.B. 1334, 45th Leg., 2d Reg. Sess. (Ariz. 2002) (same); H.B. 564, 141st Gen. Assem., Reg. Sess. (Del. 2002) (same); H.B. 1802, 2002 Leg., Reg. Sess. (Haw.) (same); S.B. 114, 2002 Leg., Reg. Sess. (Haw.) (same); A. 297, 2002 Leg., Reg. Sess. (N.J.) (same); S. 956, 2002 Leg., Reg. Sess. (N.J.) (same); A.O. 15, 2003 Assem., Reg. Session (N.Y.) (same); S. 202, 2003 Assem., Reg. Session (N.Y.) (same); A.O. 2214, 2002 Assem., Reg. Sess. (N.Y.) (same); S.O. 2347, 2002 Assem., Reg. Session (N.Y.) (same); H.B. 2311, 2001 Leg., Reg. Sess. (Kan.) (same); S.F. 1461, 2001 Leg., Reg. Sess. (Minn.) (same); A. 3385, 2001 Leg., Reg. Sess. (N.J.) (same); S.B. 391, 2002 Leg., Reg. Sess. (Wis.) (same).

54. *See* 410 ILL. COMP. STAT. 70/2.2 (2002) (requiring emergency rooms to provide information about emergency contraception).

rape survivors, but does not require them to furnish it on-site.[55] Under the statute, every hospital must develop a protocol to provide victims with information about the medication, including information about the risks associated with use of the medication and how women may obtain it from a physician.[56] This act represents a compromise between faith-based institutions and women's rights activists because it allows hospitals the freedom to develop their own plans for compliance.[57] The Illinois Catholic Hospital Association (ICHA) did not oppose this bill and surveyed its member institutions to develop a protocol that complied with the statute but also was consistent with Catholic doctrine.[58]

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55. *See* 70/2.2 (2002) (stating that each hospital must develop a protocol to provide victims with this information).

56. *See* 70/2.2(b) (2002):

> [E]very hospital providing services to alleged sexual assault survivors . . . must develop a protocol that ensures that each survivor of sexual assault will receive medically and factually accurate and written and oral information about emergency contraception; the indications and counter-indications and risks associated with the use of emergency contraception; and a description of how and when victims may be provided emergency contraception upon the written order of a physician licensed to practice medicine in all its branches.

Id.

57. *See* Paul Swiech, *BroMenn, OSF Set to Give Contraceptive Information*, PANTAGRAPH (Bloomington, Ill.) Jan. 1, 2002, at A3 ("In a compromise with Catholic hospitals, the law doesn't require hospitals to provide contraceptives."); *see also* S. 92-24, Reg. Sess., at 149–50 (Ill. 2001) (statement of Sen. Radogno) (explaining that Catholic hospitals support the emergency contraception bill because it permits hospitals to develop their own protocols). A bill that required all hospitals in Illinois to provide the morning-after pill to rape patients (H.B. 3201) died in committee in the 1999 session due to Catholic opposition. Ill. S. 92-24. State Delegate Cheryl Kagan proposed an almost identical bill to Illinois' current statute in Maryland's 2002 legislative session, but the bill died in committee. *See* H.B 930, 2002 Gen. Assem., 417th Sess. (Md.); *see also* Susan Reimer, *People Should Know About Emergency Contraception*, BALT. SUN, Feb. 26, 2002, at E1 (stating that Kagan crafted the Maryland bill's language to match the Illinois law because it had the blessing of the Catholic conference in that state). But the Maryland Catholic Conference immediately voiced its opposition to the bill. *Id.* The strong opposition in Maryland to this bill may be a result of the state's high proportion of Catholic citizens—about 40% of the members of the Maryland General Assembly identified themselves as Catholic. *See* Margie Hyslop, *Catholic Groups Oppose Pill Bill*, WASH. TIMES, Mar. 2, 2001, at C1 (stating that Maryland has more Catholics than Virginia).

58. *See* S. 92-24, Reg. Sess., at 154 (Ill. 2001) (statement of Sen. Radogno) (stating that the ICHA model protocol would meet the requirements of the proposed bill and should be approved by the Department of Public Health). The protocol conditions the provision of the morning-after pill on the results of several pregnancy tests to determine whether it can be administered consistent with church teachings. *See* Emergency Contraception Protocols, 26 Ill. Reg. § 545, app. C (Apr. 1, 2002) (stating that emergency contraception will be administered to a victim who shows a negative result for pregnancy on the blood test and the urine dip-stick test but not to a victim who shows a positive effect on these tests or to whom administration of emergency contraception would not be effective to prevent ovulation).

2. Making Emergency Contraception Available "Over-the-Counter"

Three states have taken a different approach to ensure that rape victims receive emergency contraception—making it available over-the-counter.[59] These states have made the morning-after pill more widely available to women by allowing pharmacists to enter into an agreement with doctors to prescribe the pill.[60] Pharmacists must be trained and certified to distribute the morning-after pill and must explain to women how to take the pills.[61] Ten more states have considered or are considering similar proposals to make the medication available over-the-counter.[62] On the federal level, in February 2001, seventy-six medical groups, including the AMA and the American Public Health Association, petitioned the FDA to make emergency contraceptives available over-the-counter.[63] The FDA currently is reviewing the petition.[64] Advocates

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59. *See* CAL. BUS. & PROF. CODE § 4052(a)(8) (West 2002) (allowing pharmacists to dispense the morning-after pill after completing a training program and in accordance with a standardized protocol, which includes providing the woman with a fact sheet on the drug). In 2001, the Alaska State Board of Pharmacy approved new regulations providing for collaborative practice protocols (CPPs), which allow pharmacists to enter into agreements with hospital-based prescribers in order to distribute emergency contraception. *See* Fred Gebhart, *Alaska R. Ph.s Can Now Prescribe Emergency Contraception*, 146 DRUG TOPICS 24, 24 (June 17, 2002) (describing Alaska's regulation). This approach is similar to legislation passed by Washington in 1998 allowing pharmacists to dispense emergency contraception through CPPs with prescribers. *See id.* (stating that Alaska is the third state to allow CPPs, following California and Washington).

60. *See supra* note 59 and accompanying text (discussing legislation by California, Alaska, and Washington making emergency contraception available over-the-counter).

61. *See* Sandra G. Boodman, *The 'Morning After' Kit; New Emergency Contraceptive Gives Women a Second Chance to Prevent Pregnancy*, WASH. POST, Sept. 22, 1998, at Z13 (discussing a Washington law allowing over-the-counter distribution of the morning-after pill); Lisa Rapaport, *'Morning-After' Pill Access May Be Costly*, SACRAMENTO BEE, Mar. 27, 2002, at A1 (discussing a California law allowing over-the-counter distribution of the morning-after pill); *see also* CAL. BUS. & PROF. CODE § 4052(a)(8) (West 2002) (requiring pharmacists to complete a training program and to provide women with specified information on the treatment).

62. *See* A.O. 888, 2003 Assem., Reg. Sess. (N.Y.) (allowing pharmacists and registered nurses to dispense the morning-after pill from a non-patient order, written either by a licensed physician, a certified nurse practitioner or a licensed midwife; status pending); H.B. 2782, 2001 Gen. Assem., Reg. Sess. (Va.) (establishing procedures by which a physician, in accordance with a standard protocol, may authorize a licensed pharmacist to dispense emergency contraception to women; died in committee). In addition, Kentucky, Maine, Maryland, Michigan, Oklahoma, Florida, Hawaii, and North Carolina are considering allowing pharmacists to dispense emergency contraception using CPPs similar to those adopted by Alaska, California and Washington. *See* Gebhart, *supra* note 59, at 26 (discussing collaborative practice protocols).

63. *See* Trish Wilson, *Preventing Unwanted Pregnancy Abortions*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 21, 2002, at A1 (describing the need for over-the-counter distribution of

of over-the-counter distribution, however, say that this petition is unlikely to succeed during the current Republican administration.[65]

In states that have recently passed legislation allowing over-the-counter distribution of emergency contraception, pharmacies have been slow to stock the pill. [66] Pharmacies have established policies against prescribing the pill because of moral objections.[67] Some pharmacists who are morally opposed to emergency contraception have refused to dispense the medication.[68] In addition, other pharmacists who object to the pill say they will not become certified to dispense it over-the-counter.[69] Pharmacists for Life International opposes over-the-counter distribution because this organization views the pill as an abortifacient.[70] In May 1999, Wal-Mart announced that it would not sell Preven™ in any of its pharmacies.[71] A few months later, Wal-Mart instructed its pharmacists to fill emergency contraception prescriptions with birth control pills or to refer customers to other pharmacies.[72] Walgreens' company policy permits its pharmacists to refuse to fill emergency contraception prescriptions for religious reasons.[73] In such situations, the policy requires pharmacists to refer women to a colleague or to a nearby Walgreens for the medication.[74]

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emergency contraception).

64. *See Group Still Pushing for OTC Emergency Contraception*, 47 CONTEMPORARY OB/GYN 23 (May 2002) (tracking the status of the petition).

65. *See* Karen Brandon, *Clash Over Emergency Contraception: Foes Consider it Akin to Abortion*, CHI. TRIB., May 10, 2002, at N10 (discussing the national debate over emergency contraception).

66. *See id.* (quoting Jack Watts, president of the North Carolina Board of Pharmacy, who said that he suspects North Carolina pharmacies owned by abortion opponents will not want to stock the pill). Only 337 pharmacies out of 2,002 in North Carolina carry either Preven™ or Plan B®. *Id.*; *see also* Rapaport, *supra* note 61 (stating that California pharmacies have been slow to stock the pill after passage of a law allowing emergency contraception to be dispensed over-the-counter). Another obstacle to over-the-counter distribution of the pill is high prices—many California pharmacies are charging between $30 to $70 for the medication, a steep price considering women could get it for free from a clinic. *Id.*

67. *See* Redfearn, *supra* note 2, at F1 (discussing why some pharmacies refuse to stock the medication).

68. *See id.* (stating that some pharmacists have refused to dispense emergency contraception).

69. *See* Rapaport, *supra* note 61 (discussing why California pharmacies have been slow to offer the morning-after pill).

70. *See* Redfearn, *supra* note 2 (discussing the position of Pharmacists for Life on emergency contraception); *see also supra* Part II (explaining the Catholic view that the morning-after pill causes abortion).

71. *See id.* (stating that Wal-Mart has refused to offer Preven™).

72. *See id.* (discussing Wal-Mart's policy on emergency contraception).

73. *See* Diane West, *Emergency Contraception Sparks Renewed Debate*, 24 DRUG STORE NEWS 23, 23 (May 20, 2002) (discussing the controversy created by over-the-counter

3. *"Conscience Clause" Legislation*

"Conscience clauses"—legislation allowing individuals or institutions an exemption from providing controversial medical services—could render state emergency contraception laws meaningless.[75] Most states and the federal government have laws that create a right to refuse to perform or provide abortions for moral or religious reasons.[76] The majority of these conscience clause provisions were adopted between 1973 and 1982, when federal courts were defining the new and controversial constitutional right to abortion.[77] More recently, a handful of states have extended their conscience provisions to other procedures, such as artificial insemination, sterilization procedures,

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distribution of emergency contraception).

74. *See id.* (discussing Washington's program to dispense emergency contraception over-the-counter).

75. *See* AM. CIVIL LIBERTIES UNION REPROD. FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 10 (2002) [hereinafter RELIGIOUS REFUSALS] ("Such laws offer important protections for health care professionals but may endanger patients . . . ."); Lynne D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 226 (1993) (stating that comprehensive conscience clause legislation could "alleviate most abuses of rights of conscience of health care providers").

76. *See* Wardle, *supra* note 75, at 178 (examining existing conscience clauses in the United States). Forty-four jurisdictions have some type of conscience clause legislation. *Id.* Seven jurisdictions do not have a conscience clause provision of any type, including Alabama, Connecticut, Mississippi, New Hampshire, Vermont, Washington, and the District of Columbia. *Id.* at 178 n.2.

77. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973) (declaring that the right to privacy is fundamental and encompasses the decision to have an abortion); *see also* Wardle, *supra* note 75, at 180 (discussing the historical reasons for enacting conscience clause legislation). Twenty-seven state conscience clauses apply only to abortion. *See* ALASKA STAT. § 18.16.010(b) (Michie 1991) (providing a "conscience" exemption from providing abortions); ARIZ. REV. STAT. ANN. § 36-2151 (West 1986) (same); DEL. CODE ANN. tit. 24, § 1791 (1987) (same); HAW. REV. STAT. § 453-16 (1985) (same); IDAHO CODE § 18-612 (Michie 1987) (same); IND. CODE § 16-10-3-2 (1990) (same); IOWA CODE ANN. § 146.1 (West 1989) (same); KAN. STAT. ANN. § 65-443-4 (1985) (same); KY. REV. STAT. ANN. § 311.800 (Michie 1990) (same); LA. REV. STAT. ANN. §§ 40:1299.31, 40:1299.32, & 40:1299.33 (West 1977) (same); MICH. COMP. LAWS ANN. §§ 333.20181–333.20184 & 33.20199 (West 1980) (same); MINN. STAT. ANN. §§ 145.414, 145.42 (West 1989) (same); MO. ANN. STAT. § 197.032 (West 1983) (same); MONT. CODE ANN. § 50-20-111 (1991) (same); NEB. REV. STAT. § 28-337 (1989) (same); NEV. REV. STAT. § 632-475 (1991) (same); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1976) (same); N.C. GEN. STAT. § 14-45.1 (1986) (same); N.D. CENT. CODE § 23-16-14 (1991) (same); OHIO REV. CODE ANN. § 4731.91 (Anderson 1987 & Supp. 1991) (same); OKLA. STAT. ANN. tit. 63, § 1-741 (West 1984) (same); PA. STAT. ANN. tit. 18, § 3213 (West 1983 & Supp. 1992) (same); S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1985) (same); S.D. CODIFIED LAWS § 34-23A-12-14 (Michie 1986) (same); TEX. REV. CIV. STAT. art. 4512.7 (West Supp. 1992) (same); UTAH CODE ANN. § 76-7-306 (1990) (same); VA. CODE ANN. § 18.2-75 (Michie 1988) (same).

providing contraceptives, and euthanasia.[78] The Illinois Right of Conscience Act, the broadest existing conscience clause, exempts health care providers from performing any medical treatment that is "contrary to the conscience."[79]

All of the states that have considered emergency contraception laws, with the exception of Washington and California, have conscience clause statutes.[80] But the majority of these states' conscience exemptions probably would not allow hospitals or physicians to refrain from providing emergency contraception to rape victims.[81] With the exception of Florida and Illinois, these states' conscience clause provisions extend only to procedures such as abortion, sterilization and artificial insemination.[82] Catholic groups, however, have attempted to make the argument that exemptions for abortion extend to the morning-after pill.[83] Nevertheless, a court addressing this question held that

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78. *See* 42 U.S.C. § 300(a)(7) (1988) (sterilization); ARK. CODE ANN. § 20-16-301 (Michie 1991) (contraception); COLO. REV. STAT. § 25-6-102(9), 207 (1989) (contraception); FLA. STAT. ANN. § 381.0051(6) (Supp. 1991) (contraception); GA. CODE ANN. § 49-7-6 (Michie 1990) (contraception); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1983) (sterilization); MD. HEALTH-GEN. II CODE ANN. § 20-214 (1990 & Supp. 1991) (sterilization and artificial insemination) ME. REV. STAT. ANN. tit. 22, § 1903(4) (contraception); N.J. STAT. ANN. §§ 2A:65A-1,2,3 (West 1987) (sterilization); N.J. STAT. ANN. § 30:11-9 (West 1981) (sterilization, euthanasia, contraception and similar practices); N.M. STAT. ANN. § 24-8-6 (Michie 1991) (sterilization); OR. REV. STAT. § 435.225 (contraception); R.I. GEN. LAWS § 23-17-11 (1989) (sterilization); TENN. CODE ANN. § 68-34-104 (1987) (contraception); W.VA. CODE § 16-2B-4 (1991) (contraception); WIS. STAT. ANN. § 140.42 (West 1989); WYO. STAT. § 42-5-101 (1988) (contraception).

79. 745 ILL. COMP. STAT. 70/4 (2002). The Illinois conscience clause states:

> No physician or health care personnel shall be civilly or criminally liable . . . by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel.

Id.

80. *See supra* Part III.B (explaining that states that have passed or proposed statutes to make it easier for rape victims to get the morning-after pill are Alaska, Arizona, California, Delaware, Florida, Hawaii, Illinois, Kansas, Maryland, Minnesota, New Mexico, New Jersey, New York, South Carolina, Virginia, Washington and Wisconsin); *see also supra* notes 76–79 and accompanying text (discussing existing conscience clause legislation). California's conscience clause provision, CAL. HEALTH & SAFETY CODE § 25955 (West 1984), which applied only to abortion, was repealed in 1995 by Senate Bill 1360. S. B. 1360, 1995 Leg., Reg. Sess. (Cal.).

81. *See* RELIGIOUS REFUSALS, *supra* note 75, at 6 ("[T]he United States Constitution neither requires nor forbids most refusal clauses."); White, *supra* note 5, at 1729 (stating that conscience clauses are "neither required nor forbidden" by the Establishment Clause).

82. *See supra* notes 76–79 (summarizing existing conscience clause legislation).

83. *See* Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 244–45 (Ct. App. 1989) (summarizing the hospital's argument that it was free from liability under the California Therapeutic Abortion Act, which provides that no religious hospital or employee of a non-religious hospital shall be liable for failure or refusal to perform an abortion); *see also*

furnishing emergency contraception is not an abortion for purposes of conscience clause legislation.[84] Other courts have interpreted such legislation narrowly, declining to extend conscience clauses to procedures such as withdrawing a gastro-intestinal tube and withdrawing life-sustaining measures for a patient in a persistent vegetative state.[85]

Florida's conscience clause provision establishes the right to refuse to furnish contraceptives or information about contraceptives for medical or religious reasons.[86] The Florida statute, however, refers to "physicians" and "other persons."[87] Thus, a Catholic hospital could not claim an exemption under the Florida law because it only protects individuals.[88] Only the Illinois Right of Conscience Act, which extends to any "health care service which is contrary to the conscience,"[89] would exempt religious hospitals from providing or advising about the morning-after pill. Catholic hospitals in Illinois have not

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supra Part II (discussing Catholic views that emergency contraception causes abortion).

84. *See Brownfield*, 256 Cal. Rptr. at 245 (concluding that emergency contraception was not an abortion within the definition of the California Therapeutic Abortion Act, which provides that no religious hospital or employee of a non-religious hospital shall be liable for failure or refusal to perform an abortion). Senate Bill 1360 repealed the Therapeutic Abortion Act in 1995. S. B. 1360, 1995 Leg., Reg. Sess. (Cal.). For more discussion of *Brownfield*, see *supra* Part III.A (discussing *Brownfield* as a precedent for a malpractice action against hospitals denying emergency contraception).

85. *See* Gray v. Romeo, 697 F. Supp. 580, 590–91 (D.R.I. 1988) (concluding that a state's conscience clause is limited to abortion and sterilization procedures and does not give a health care facility the right to refuse to participate in the withdrawal of life-sustaining measures for a patient in a persistent vegetative state); Elbaum v. Grace Plaza, Inc., 544 N.Y.S.2d 840, 847 (App. Div. 1989) (declaring that a state conscience clause which protects the right to decline sterilization and abortion procedures does not extend to a nursing home's right not to participate in withdrawing a gastrointestinal tube).

86. FLA. STAT. ch. 381.0051(6) (1999). The Florida conscience clause states:

> The provisions of this section shall not be interpreted so as to prevent a physician or other person from refusing to furnish any contraceptive or family planning service, supplies, or information for medical or religious reasons; and the physician or other person shall not be held liable for such refusal.

Id.

87. *Id.*

88. *See* Wardle, *supra* note 75, at 182–83 (discussing the state conscience clauses that extend protection only to individuals); *see also* FLA. STAT. ch. 381.0051(6) (1999) ("The provisions of this section shall not be interpreted so as to prevent a physician or other person from refusing to furnish any contraceptive or family planning service . . . .").

89. 745 ILL. COMP. STAT. 70/4 (2002). The Illinois conscience clause states:

> No physician or health care personnel shall be civilly or criminally liable . . . by reason of his or her refusal to perform, assist, counsel suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel.

Id.

attempted to challenge the emergency contraception statute under the state's conscience exemption.[90] But, the statute's legislative history clearly states that the conscience clause provision would control.[91]

Thus, the majority of existing state conscience clauses would not exempt religious hospitals from providing the morning-after pill if state law mandated that they do so. The passage of state emergency contraception statutes, however, could prompt legislatures to pass corresponding conscience provisions specifically directed at this treatment.[92] In light of recent efforts to pass laws giving women access to basic reproductive services, Catholic health care providers and organizations already have begun lobbying for broader conscience clauses.[93] With the passage of emergency contraception laws, Catholic lobbyists most likely will seek exemptions from these laws as well.

C. Proposed Federal Legislation

Attempts to pass emergency contraception statutes on the federal level have been less successful than on the state level. In the 107th Congress, Representative Connie Morella (R-Md.) and Senator Patty Murray (D-Wash.) proposed two pieces of legislation that would have made it easier for sexual assault victims to receive the morning-after pill.[94] Both bills died in committee,

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90. Because the Illinois "Sexual Assault Survivors Emergency Treatment Act" allows hospitals to develop a protocol for providing information about emergency contraception that is consistent with their religious beliefs, hospitals in Illinois have not attempted to claim an exemption under the Illinois Right of Conscience Act. *See supra* notes 54–58 and accompanying text (noting that the Illinois law was a compromise provision between Catholic hospitals and women's rights activists).

91. In the debate over the Illinois emergency contraception law, Senator Radogno explicitly stated that the Illinois Right of Conscience Act would trump all laws, including the Illinois Sexual Assault Survivors Emergency Treatment Act. *See* S. 92-24, Reg. Sess., at 151 (Ill. 2001) (statement of Sen. Radogno) (responding to question, "No, it does not change the Health Care Right of Conscience. In fact, that Act supersedes all others.").

92. *See* RELIGIOUS REFUSALS, *supra* note 75, at 1 (stating that in the mid-1990s, state legislatures began to enact a "second wave" of conscience clauses).

93. *See id.* at 3 (stating that religious groups are "urgently seeking" more expansive conscience clause legislation); CATHOLICS FOR A FREE CHOICE, CATHOLIC HEALTH CARE: INTRODUCTION TO THE ISSUES ("[M]ore and more Catholic organizations are seeking 'exemption clauses' that would allow them to opt out of providing reproductive health services . . . ."), *at* http://www.cath4choice.org/healthissues.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

94. *See* H.R. 4113, 107th Cong. (2002) (requiring Catholic hospitals to provide emergency contraception to rape victims in order to receive federal funding); H.R. 3887, 107th Cong. (2002) (providing for an educational campaign about emergency contraception); S. 1990, 107th Cong. (2002) (same).

due to intense opposition from pro-life groups.[95] When the legislators proposed these bills, many people did not expect them to pass because of the pro-life leanings of the Bush administration and the 107th Congress.[96] Even the less-controversial Emergency Contraception Education Act, which was supported by 72% of Americans, was defeated due to strong opposition from pro-life forces.[97]

1. Compassionate Care for Female Sexual Assault Survivors Act

On April 9, 2002, Representative Connie Morella introduced the Compassionate Care for Female Sexual Assault Survivors Act in the United States House of Representatives.[98] This bill mandated that any hospital receiving federal funds provide sexual assault survivors with "medically and factually" accurate and unbiased information about the morning-after pill.[99] The bill stated that this information included explaining to the patient that the pill does not cause an abortion[100] and that in most cases, it is effective in preventing pregnancy after unprotected sex.[101] The proposed legislation

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95. *See Bill Summary and Status, 107th Cong., at* http://thomas.loc.gov/bss/d107query.html (providing legislative information, including the status of bills) (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

96. *See Post-Election, Pro-Choice Advocates Brace for a Tough Fight*, U.S. NEWSWIRE, Nov. 6, 2002 (discussing the political views of the Bush administration and Congress on reproductive rights); Press Release, American Life League, Planned Parenthood Supports Misleading Senate Bill; Murphy's Proposal Would Promote Chemical Killing, Mar. 19, 2002, (opposing the Emergency Contraception Education Act), *available at* http://www.all.org/stopp/st020314.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review); Catholic Health Association of the United States, *Bill Seeks to Mandate Multimillion-Dollar Emergency Contraception Education Program*, CATHOLIC HEALTH WORLD, Mar. 15, 2002, at 1, *available at* http://www.chausa.org/PUBS/PUBSART.ASP?ISSUE=W020315&ARTICLE=A (describing alignment of legislators) (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

97. *See* Sally Peters, *Voter Support for EC*, 37 OB. GYN. NEWS 30 (Nov. 1, 2002) (stating the results of a study that found that 72% of Americans supported the Emergency Contraception Education Act); *see also supra* note 96 and accompanying text (discussing opposition to the Emergency Contraception Education Act).

98. H.R. 4113, 107th Cong. (2002).

99. *See* H.R. 4113, § 3(b)(1) (stating that receiving federal funds is conditioned on providing information about emergency contraception to sexual assault victims).

100. *See* H.R. 4113, § 3(b)(1)(A) (requiring hospitals receiving federal funds to instruct victims that taking emergency contraception does not cause an abortion).

101. *See* H.R. 4113, § 3(b)(1)(B) (requiring hospitals receiving federal funds to instruct victims that "emergency contraception is effective in most cases in preventing pregnancy after unprotected sex").

required any medical institution receiving federal funds to "promptly" offer emergency contraception to a rape survivor and provide it to her upon her request.[102]

2. Emergency Contraception Education Act

On March 6, 2002, Representative Louise Slaughter (D-N.Y.) introduced the Emergency Contraception Education Act[103] to the House of Representatives, and Senator Patty Murray (D-Wash.) introduced a companion bill in the Senate.[104] These bills would have allocated $10 million annually between 2003 and 2007 to implement an educational campaign about the morning-after pill.[105] The bills called for the Secretary of Health and Human Services to distribute information on the treatment either directly or through nonprofit organizations, consumer groups, institutes of higher education, clinics, the media, and federal, state, and local agencies.[106] Finally, the bills also directed the Secretary to disseminate information on the pill to health care providers.[107]

IV. Constitutional Analysis

When evaluating whether or not governments should require hospitals to provide emergency contraception to rape victims, one first must ask whether they have power to do so under the United States Constitution. This Note primarily focuses on the constitutional issues surrounding state legislation because the states appear to be a more likely avenue for reform.[108] First, one must ask whether state emergency contraception laws violate the Free Exercise Clause by interfering with the religious beliefs of health care providers.[109]

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102. *See* H.R. 4113, § 3(b)(2) ("The hospital promptly offers emergency contraception to the woman, and promptly provides it to her upon her request.").

103. H.R. 3887, 107th Cong. (2002).

104. S. 1990, 107th Cong. (2002).

105. *See* H.R. 3887, § 3(d) (authorizing $10 million dollars to fund the program); S. 1990, § 3(d) (same).

106. *See* H.R. 3887, § 3(b)(2) (describing how the Secretary can disseminate information on emergency contraception); S. 1990, § 3(b)(2) (same).

107. *See* H.R. 3887, § 3(c)(1) (instructing the Secretary to distribute information to health care providers); S. 1990, § 3(c)(1) (same).

108. *See supra* Parts III.B–C (discussing the successful passage of several state statutes and the failure to pass similar laws on the federal level).

109. *See infra* Part IV.A (discussing Free Exercise analysis).

Next, one must consider whether conscience clause provisions exempting Catholic health care providers from providing the treatment would violate the Establishment Clause of the First Amendment.[110] Finally, one must determine whether the Due Process Clause of the Fourteenth Amendment compels the administration of the morning-after pill to rape victims.[111]

A. Free Exercise

State laws requiring hospitals to provide emergency contraception to rape victims potentially could violate the Free Exercise Clause of the First Amendment.[112] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[113] The Free Exercise Clause prevents the government from burdening religious beliefs or targeting religious practices for special restrictions.[114] Catholic hospitals could argue that these laws violate the Free Exercise Clause by forcing them to provide services that interfere with their religious beliefs, thus preventing the uninhibited practice of their religion.[115]

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110. *See infra* Part IV.B (discussing Establishment Clause analysis).

111. *See infra* Part IV.C (discussing Due Process analysis).

112. *See* RELIGIOUS REFUSALS, *supra* note 75, at 6–7 (same); White, *supra* note 5, at 1724–29 (discussing whether the Free Exercise Clause requires the government to exempt religious believers from certain laws).

113. U.S. CONST. amend. I.

114. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 (discussing the Free Exercise Clause); White, *supra* note 5, at 1725 (stating that the Free Exercise Clause sets limits for how far the government can intrude into the religious practices of citizens); *see also, e.g.*, Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829, 834 (1989) (upholding unemployment compensation for a worker who refused to work on Sundays for religious reasons); Thomas v. Review Bd., 450 U.S. 707, 709, 716–19 (1981) (reversing Indiana's denial of unemployment benefits to a Jehovah's Witness who refused to work in a munitions factory because of religious objections to war); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina could not deny unemployment benefits to a Seventh Day Adventist who lost her job because she refused to work on a Saturday).

115. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 (discussing whether a religious institution has a federal constitutional right to refuse to abide by a general law requiring the provision of heath services or coverage); White, *supra* note 5, at 1724–25 (discussing whether religious providers could claim that states must exempt them from laws regarding controversial health care services, such as the morning-after pill).

Employment Division v. Smith[116] represents the Supreme Court's most recent discourse on the Free Exercise Clause.[117] In *Smith,* the Court stated that the Free Exercise Clause would not relieve an individual or an institution from complying with a "valid and neutral law of general applicability."[118] The Court upheld Oregon's criminal drug prohibitions, stating that they did not interfere with the Free Exercise Clause by attempting to regulate religious beliefs.[119] The prohibitions criminalized peyote, resulting in the denial of unemployment benefits to plaintiffs, members of the Native American Church who used the drug for sacramental purposes.[120] Justice Scalia's opinion declared that the Free Exercise Clause does not apply to invalidate a neutral, generally applicable law that happens to affect religious practices unless another constitutional right,

116. Employment Div. v. Smith, 494 U.S. 872 (1990). In *Smith*, the Court considered whether the Free Exercise Clause prohibited Oregon from denying plaintiffs' unemployment benefits for the use of peyote, a controlled substance under Oregon law. *Id.* at 874. The plaintiffs in *Smith* were fired from their jobs because they ingested peyote for sacramental purposes at a ceremony of the Native American Church. *Id.* They were then denied unemployment compensation because they were fired for "misconduct." *Id.* The Court first stated that the plaintiffs' religious beliefs do not relieve them from compliance with an otherwise neutral, generally applicable law. *Id.* at 878–79. The Court then stated that the only cases in which the First Amendment bars application of a neutral, generally applicable law have involved other constitutional protections, such as freedom of speech and of the press. *Id.* at 881. The Court concluded that Oregon's denial of unemployment benefits did not violate the Free Exercise Clause. *Id.* at 890; *see also* City of Boerne v. Flores, 521 U.S. 507, 533–36 (1997) (declaring the Religious Freedom Restoration Act, which attempted to restore the strict scrutiny test for laws substantially burdening religious practices, unconstitutional, and reaffirming the *Smith* standard of neutrality and general applicability); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 526–32 (1993) (restating and applying the *Smith* standard to find Florida ordinances against ritualistic animal slaughter unconstitutional).

117. *See Smith*, 494 U.S. at 879 (reciting case law holding that the right of free exercise does not relieve an individual from the obligation to comply with a valid and neutral law).

118. *See id.* at 878–79 (stating that the Free Exercise Clause does not relieve one from compliance with a neutral and generally applicable law).

119. *See id.* at 882 (upholding the Oregon drug law despite its incidental effect on respondent's religious practices).

120. *See id.* at 874 (reciting the facts of the case).

such as freedom of speech or of the press, is at stake.[121] The Free Exercise Clause does not make "each conscience . . . a law unto itself."[122]

The state statutes concerning emergency contraception require *all* hospitals to provide emergency contraception to rape victims.[123] The statutes do not target religious hospitals and are not the product of animus against any particular religion.[124] Therefore, the laws are both neutral and generally applicable.[125] No other constitutional right is at stake to bar the application of a neutral and generally applicable law to religious hospitals.[126] The emergency contraception statutes do not implicate freedom of speech because they regulate the conduct of the religious institutions, not their beliefs.[127] The Free Exercise Clause does not prohibit state legislatures and Congress from passing such laws.[128]

B. Establishment Clause

Some commentators argue that conscience clause provisions giving health care providers the right to refuse services that they oppose on moral grounds violate the Establishment Clause of the First Amendment.[129] The

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121. *See id.* at 881 (stating that the First Amendment only bars application of neutral, generally applicable laws when the freedom of speech or the freedom of press is at issue); *see also* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (invalidating the compelled display of a license plate slogan that offended individual religious beliefs); Wisconsin v. Yoder, 406 U.S. 205, 231–34 (1972) (invaliding compulsory school-attendance laws as applied to Amish parents who, for religious reasons, did not want to send their children to school); Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating a compulsory flag salute statute when challenged by religious objectors); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (upholding the right of parents to send their children to Catholic schools).

122. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

123. *See supra* Part III.B (discussing state statutes).

124. *See supra* Part III.B (analyzing state statutes).

125. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 ("A religious observer or institution therefore has no federal constitutional right to refuse to abide by a general law requiring the provision of health services or coverage."); White, *supra* note 5, at 1728 (stating that "it seems clear" that the Free Exercise Clause does not prohibit conscience clauses).

126. *See Smith*, 494 U.S. at 878–79 (stating that the only cases in which the First Amendment bars application of a neutral, generally applicable law have involved other constitutional protections, such as freedom of speech and of the press).

127. *See id.* (stating that a statute must implicate another right, such as the freedom of speech, to bar application of a neutral, generally applicable law).

128. *See id.* (stating that state emergency contraception laws do not violate the Free Exercise Clause).

129. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 (evaluating whether conscience clause provisions violate the Establishment Clause); White, *supra* note 5, at 1729–33 (same).

Establishment Clause declares, "Congress shall make no law respecting an establishment of religion"[130] and prevents the government from favoring one religion over another and from favoring religion over nonreligion.[131] Conscience clauses give religious institutions a special right to refuse to comply with the law, thus leading to a possible violation of the Establishment Clause.[132] The Supreme Court has indicated, however, that the Establishment Clause tolerates broad religious exemptions from otherwise generally applicable laws.[133] Under the Constitution, legislatures may be permitted to pass conscience clauses that exempt institutions or individuals from providing emergency contraception for moral reasons.[134]

C. Due Process

Finally, rape victims could argue that they have a constitutionally protected right under the Due Process Clause of the Fourteenth Amendment to receive emergency contraception.[135] The Court has found a right to privacy under the Fourteenth Amendment that protects reproductive rights.[136] The Constitution, however, does not ensure access to comprehensive reproductive

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130. U.S. CONST. amend. I.

131. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 (discussing whether conscience exemptions violate the Establishment Clause); White, *supra* note 5, at 1729 (stating that the Establishment Clause sets the maximum amount of assistance that the government might offer).

132. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 (laying out the argument that religious exemptions give religious institutions a special right to refuse to fulfill a legal obligation); White, *supra* note 5, at 1729 (discussing whether conscience exemptions for health care providers violate the Establishment Clause).

133. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (noting that states are free to pass laws allowing religious-practice exemptions); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 329–30 (1987) (upholding an exemption from Title VII of the Civil Rights Act that permits religious organizations to discriminate on the basis of religion in employment decisions, including plaintiff who was fired because he was not in good standing as a Mormon).

134. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 (stating that conscience clauses likely do not violate the Establishment Clause); White, *supra* note 5, at 1729 (same).

135. *See* RELIGIOUS REFUSALS, *supra* note 75, at 6–7 (discussing whether statutes can require hospitals to provide certain controversial reproductive services under the Due Process Clause of the Fourteenth Amendment); White, *supra* note 5, at 1733–35 (same).

136. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion) (acknowledging that the right to privacy prevents the government from imposing an "undue burden" on the decision whether to have an abortion); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (declaring that the right to privacy is fundamental and encompasses the decision to have an abortion); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding a fundamental right of marital privacy to make decisions regarding contraception).

health services or coverage.[137] For example, the Court has held that the Constitution does not require public hospitals to provide abortions or any other reproductive health services.[138] Even if the Constitution required a public hospital to provide such services, no corresponding right would exist against a private or religiously affiliated hospital.[139] Therefore, a rape victim likely has no right under the Due Process Clause of the Fourteenth Amendment to demand emergency contraception from a Catholic hospital.[140]

V. Policy Arguments for Patient Autonomy and Religious Freedom

A constitutional analysis does not answer the question of how to balance patients' rights and the religious autonomy of Catholic hospitals.[141] One then must turn to the public policy arguments addressing the issue.[142] The hypothetical presented in the introduction of this Note illuminates the competing policy interests created by this dilemma.[143] On one hand, Verona Victim deserves to receive the best health care available, including the administration of emergency contraception. Because Verona did not receive this treatment at the hospital, she faced a greater chance of becoming pregnant. Verona could not find a doctor who would dispense the medication, so she did not receive it within the seventy-two hour time frame. This delay further increased her chances of becoming pregnant. Verona became pregnant as a result of the rape, resulting in additional trauma and anguish. She had to make the very difficult decision of whether to carry the pregnancy to term or have an abortion.

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137. *See* RELIGIOUS REFUSALS, *supra* note 75, at 6 ("Although the U.S. Constitution protects reproductive rights, it does not ensure access to comprehensive reproductive health services or coverage.").

138. *See* Harris v. McRae, 448 U.S. 297, 326–27 (1980) (upholding the Hyde Amendment, which eliminated federal funding for most abortions provided through Medicaid).

139. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 (stating that the Constitution imposes no requirements on private or religiously affiliated hospitals).

140. *See id.* (stating that a woman has no constitutional right to receive reproductive services from a private or religiously affiliated hospital).

141. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 ("A survey of the constitutional landscape thus reveals few boundaries."); White, *supra* note 5, at 1725 ("However, attempting to define the constitutional parameters between citizens, religious health care entities, and the government does not yield any clear rules.").

142. *See* RELIGIOUS REFUSALS, *supra* note 75, at 7 ("Because constitutional challenges are of limited utility . . . legislative advocacy is of paramount importance in this area.").

143. *See supra* Part I (introducing a hypothetical that illustrates the dilemma between the conflicting interests of rape victims and of religious hospitals).

On the other hand, requiring St. Peter's hospital to provide a service to which it was morally opposed impinged on the hospital's religious freedom. Individual doctors, nurses, or pharmacists at St. Peter's could have personal objections to providing emergency contraception that would make performing their job morally repugnant. The St. Peter's Board of Directors either had to agree to provide a service to which it was morally opposed, defy the law, or close the hospital. St. Peter's decided to close its doors, resulting in a loss of jobs and valuable health care services. The closest hospital was many miles away, forcing rape victims and other patients to travel long distances in order to receive treatment.

A. Respecting the Personal Autonomy of Rape Victims

Rape victims have both a privacy interest in intimate decisions concerning their reproductive health and an autonomy interest in important decisions concerning their medical treatment. The Supreme Court has interpreted the Bill of Rights to create a constitutionally protected personal right to privacy, which extends to the right to make decisions intimately affecting one's welfare.[144] The Court has held that the government cannot intrude on an individual's decision regarding abortion or use of contraceptives.[145] The Court also has recognized that individuals possess a constitutionally protected right to make medical decisions, including the right to refuse unwanted treatment.[146] In addition, society's respect for patient autonomy has manifested itself in state and federal patients' rights legislation.[147] A majority of Americans feel that the autonomy of individuals seeking medical treatment supersedes the need to protect the religious freedom of medical institutions.[148]

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144. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion) (acknowledging that the right to privacy prevents the government from imposing an "undue burden" on the decision whether to have an abortion); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (declaring that the right to privacy is fundamental and encompasses the decision to have an abortion); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding a fundamental right to marital privacy to make decisions regarding contraception).

145. *See supra* note 144 and accompanying text (discussing the right to privacy).

146. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . .").

147. *See* H.R.J. Res. 10, 108th Cong. (2003) (proposing an amendment to the federal constitution that states, "The rights of victims of violent crime . . . are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this statute;" status pending); S.J. Res. 1, 108th Cong. (2003) (same; status pending).

148. *See* RELIGIOUS REFUSALS, *supra* note 75, at 22 (finding that 81% of Americans feel

Rape victims and sexual assault victims present an especially sympathetic situation because they have endured such a traumatic event.[149] These women usually do not have a choice as to which hospital will treat them in such an emergency.[150] The preservation of the religious principles of Catholic hospitals comes at a high price for a woman seeking emergency care.[151] The denial of emergency contraception can result in an unwanted pregnancy, causing the victim further trauma.[152] The victim then must make the very difficult choice between having an abortion and carrying the baby to term.[153]

The public's sympathy for rape victims is evidenced by the recent efforts to pass laws that would increase access to the morning-after pill.[154] According

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that it is more important to protect the rights of individuals who are seeking medical care than to protect the religious freedom of hospitals).

149. *See, e.g.*, 410 ILL. COMP. STAT. 70/2.2(a)(1) (2002) (finding that crimes of sexual violence cause "significant physical, emotional and psychological trauma" which can compound through a victim's fear of being pregnant); S. 92-24, Reg. Sess., at 149 (Ill. 2001) (statement of Sen. Radogno) ("[M]any women who are raped have to suffer the added trauma of either bearing a child or having an abortion that has resulted from that rape.").

150. *See* S. 92-24, Reg. Sess., at 149 (Ill. 2001) (statement of Sen. Radogno) ("[I]t's really just luck of the draw as to what hospital a woman would end up at as to whether or not they had emergency contraception."); Reimer, *supra* note 57 (statement of Maryland Del. Cheryl C. Kagan) ("The type of health care that a crime victim receives should not depend on what hospital she stumbles into after she's raped.").

151. *See, e.g.*, H.R. 4113, 107th Cong § 2(1) (2002) (quoting the statistics on the number of women who will become pregnant each year as a result of rape); 410 ILL. COMP. STAT. 70/2.2(a)(1) (2002) (same); WASH. REV. CODE 70.41.1(d)(2) (2002) (same). Each year in the United States, more than 330,000 women are sexually assaulted, resulting in 25,000 pregnancies. *See* H.R. 4113, § 2(1) (reciting statistics that support passage of the bill). Congress cited a recent study in the American Journal of Preventative Medicine which found that emergency contraception could have prevented 22,000 of these pregnancies. H.R. 4113.

152. *See* Editorial, *supra* note 16 (statement of Pam Sutherland, head of Illinois' Planned Parenthood Council) ("Besides being afraid they're going to get killed, the next thing rape victims worry about is getting pregnant or contracting HIV."); Steven T. Dennis, *Catholic Church Wants State Out of 'Morning After' Issue*, GAZETTE (Montgomery Co., Md.), Mar. 2, 2001 (relaying the experience of Colleen, who was gang-raped in college, and was not given emergency contraception and had an abortion three weeks later), http://www.gazette.net /200109/montgomerycty/state/46181-1.html (last visited July 28, 2003) (on file with the Washington and Lee Law Review). "The entire experience could have ended much sooner, and my physical and emotional pain could have been cut dramatically, had such birth control been available at the time." *Id.; see also supra* note 149 and accompanying text (discussing how an unwanted pregnancy can further traumatize a rape victim).

153. *See* Dennis, *supra* note 152 (relaying the statement of a woman who was raped in college and received emergency contraception at the hospital). "I have never been so relieved in my entire life. I am a fairly devout Catholic and the thought of having to decide whether to bring a baby to term or have an abortion would have debilitated me." *Id.*; *see also supra* note 152 and accompanying text (discussing the difficult decision resulting from an unwanted pregnancy).

154. *See supra* Part III (discussing the recent legislative efforts to make the morning-after

to a recent study conducted by Catholics for a Free Choice, 78% of American women believe that Catholic hospitals should offer emergency contraception to rape victims, even when this treatment conflicts with the hospital's religious beliefs.[155] Another study conducted by the American Civil Liberties Union (ACLU) found that 81% of Americans believe that Catholic hospitals should not be able to claim a religious exemption to avoid providing emergency contraception to rape victims.[156] Respected medical organizations such as ACOG, AMA and AMWA have endorsed the treatment, declaring it the standard of care for rape victims.[157] Even the Catholic Church recognizes the special need for rape victims to protect themselves against pregnancy.[158] The Ethical and Religious Directives for Catholic Health Care Services allow a rape victim to receive emergency contraception in certain situations,[159] but the same directives forbid the administration of contraceptives for any other purpose.[160]

The FDA's determination that the medication is a safe and effective means of preventing pregnancy strengthens the case for providing the morning-after pill to rape victims.[161] Supporters of emergency contraception, including the drafters of state and federal legislation, repeatedly stress the effectiveness and safety of the medication.[162] Widespread use of the medication drastically could

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pill more available to rape victims).

155. *See* BELDEN RUSSONELLO & STEWART, RELIGION, REPRODUCTIVE HEALTH AND ACCESS TO SERVICES: A NATIONAL SURVEY OF WOMEN CONDUCTED FOR CATHOLICS FOR A FREE CHOICE 2 (2000) (finding that American women expect to receive reproductive services from Catholic hospitals and that 78% of American women believe that Catholic hospitals should provide emergency contraception to rape victims), *available at* http://www.cath4choice.org/new/Pollreport.htm (last accessed July 28, 2003) (on file with the Washington and Lee Law Review).

156. *See* RELIGIOUS REFUSALS, *supra* note 75, at 20–23 (polling Americans about whether Catholic hospitals should refuse certain treatments or procedures that conflict with religious beliefs).

157. *See supra* Part II (discussing various medical organizations' endorsement of emergency contraception and stating that the medication currently is the accepted standard of care for rape victims).

158. *See* DIRECTIVES, *supra* note 3, at 10 (quoting Directive 36, which states, "A female who has been raped should be able to defend herself against a potential conception from the sexual assault.").

159. *See id.* (explaining that Directive 36 allows the administration of emergency contraception to rape victims in certain circumstances).

160. *See id.* (quoting Directive 52, which states, "Catholic health institutions may not promote or condone contraceptive practices but should provide, for married couples and the medical staff who counsel them, instruction both about the Church's teaching on responsible parenthood and in methods of natural family planning.").

161. *See, e.g.*, Statement, *supra* note 24 (stating that the FDA has endorsed the morning-after pill as "safe and effective").

162. *See supra* Part II (discussing the effectiveness of the medication).

reduce the number of rape-related pregnancies.[163] In addition, the treatment significantly could reduce the number of abortions resulting from such pregnancies.[164]

Requiring Catholic hospitals to provide emergency contraception to rape survivors is especially significant given that Catholic hospitals constitute the largest group of nonprofit health care providers of health care in the United States, controlling 15% of the market.[165] Catholic hospitals rapidly are expanding and merging with other institutions to control an even larger share of the market.[166] Often, a merger with a Catholic hospital means the adoption of Catholic policies and the loss of reproductive services, such as the morning-after pill, for patients.[167] Although the Catholic Directives allow administration of emergency contraception if tests have clearly determined that a woman is not pregnant,[168] this guideline often is difficult to apply and often results in a blanket denial of the treatment.[169] In practice only 23% of Catholic emergency rooms dispense the treatment to rape victims.[170]

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163. *See* H.R. 4113, 107th Cong. § 2(1) (2002) (stating that emergency contraception could prevent 22,000 of the 25,000 pregnancies resulting each year from rape).

164. Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000–2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 294, 300 (2002) (finding that emergency contraception could have accounted for a 43% decline in abortions from 1994 to 2000).

165. *See* Cody, *supra* note 8, at 327 (stating that Catholic hospitals make up the largest group of health care providers in United States). Catholic health care organizations control more than twice the market controlled by Columbia/HCA, the largest commercial health care entity in the United States. *See* White, *supra* note 5, at 1703–04 (discussing the dominance of Catholic institutions in the health care market).

166. *See* Cody, *supra* note 8, at 323–24 (discussing the impact of Catholic health care on reproductive services). Catholic health systems reported a 12% growth rate in 1996, compared to a 3% growth rate experienced by Columbia/HCA. *Id.* at 326–27.

167. *See, e.g.*, Cody, *supra* note 8, at 323 (stating that when Catholic hospitals merge with other hospitals, the result is the elimination of women's reproductive services); *see also* CATHOLICS FOR A FREE CHOICE, HOSPITAL MERGERS IN THE USA (estimating that about half of all mergers between Catholic and non-Catholic hospitals eliminate or greatly reduce some or all reproductive services), *at* http://www.cath4choice.org/healthmergers.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review); MERGERWATCH, THE THREAT TO PATIENT CHOICES (stating that when a Catholic hospital merges with a non-Catholic hospital, the Catholic Directives usually are implemented at the new hospital), *at* http://www.mergerwatch.org/hospitals (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

168. *See* DIRECTIVES, *supra* note 3, at 10 (quoting Directive 36, which allows the administration of emergency contraception to rape victims in certain circumstances).

169. *See* SECOND CHANCE, *supra* note 49, at 5 (stating that Directive 36's guideline that a victim can receive emergency contraception if "after appropriate testing, there is no indication that she is pregnant" is complex and requires significant judgment calls by Catholic hospital personnel).

170. *See* SECOND CHANCE, *supra* note 49, at 5 (finding that 23% of Catholic hospitals provide the morning-after pill to rape victims).

Because emergency contraception is effective only within a narrow time frame, victims need immediate access to the treatment in the emergency room.[171] If a woman does not receive the morning-after pill, or at the very least, information about the medication at the treating hospital, she likely will never receive it.[172] Researchers have found that few American women know about the morning-after pill, labeling it medicine's "best kept secret."[173] Only approximately 2% of American women have used the pill, and only 11% of American women have heard of it.[174] This lack of knowledge may be the result of opposition from pro-life forces and from a reluctance of doctors to discuss the availability of the treatment with their patients.[175] According to a study conducted by the Kaiser Foundation, 56% of obstetricians-gynecologists discuss this option only "sometimes" with their patients, and 16% never discuss it.[176] Even if a woman knows about emergency contraception, she still may have difficulty obtaining it within the seventy-two hour window for effectiveness, especially if the assault occurs on a weekend, because not all doctors or pharmacists will prescribe or dispense it.[177]

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171. *See, e.g.*, OBSTRUCTING ACCESS, *supra* note 18 (stating that emergency contraception is most effective if taken within twenty-four hours).

172. *See, e.g.*, H.R. 4113, 107th Cong. (2002) (concluding that "[i]t is essential that all hospitals . . . provide emergency contraception as a treatment option to any woman who has been sexually assaulted" because of the limited time period for effectiveness and because of a lack of knowledge about emergency contraception); WASH. REV. CODE ANN. § 70.41.350(1)(C) (2003 Supp.) (deeming it "essential that all hospital emergency rooms provide emergency contraception as a treatment option to any woman who seeks treatment as a result of sexual assault").

173. *See* Anne Barnard, *Emergency Birth Control Maintains Low Profile*, BOSTON GLOBE, Apr. 2, 2002, at C7 (discussing why most American women do not know about emergency contraception).

174. *See* Redfearn, *supra* note 2 (reporting on a Kaiser Family Foundation study that found that very few women have heard of the morning-after pill).

175. *See id.* (discussing why most American women do not know about emergency contraception).

176. *See generally* THE HENRY J. KAISER FAMILY FOUND., WOMEN'S HEALTH CARE PROVIDERS' EXPERIENCES WITH EMERGENCY CONTRACEPTION (Nov. 2000) (conducting a study of how often ob/gyns and family practice physicians prescribe and discuss emergency contraception).

177. *See* Regan Good, *U.S. Health: Pharmacies New Reproductive Rights Battleground*, INTER PRESS SERVICE, Aug. 16, 2002 (describing Jessica Scerry's attempts to obtain emergency contraception). First, a local pharmacist at Walgreen's told Scerry that he would not dispense the pill for moral reasons. *Id.* Next, Scerry called her gynecologist and her family doctor, but both had no available appointments. *Id.* Finally, Scerry obtained a prescription from Planned Parenthood. *Id.*; *see also supra* Part I (presenting a hypothetical situation in which a woman is unable to get the medication in time because she is raped on a weekend and because she has trouble finding a doctor willing to dispense it).

B. Protecting the Religious Freedom of Catholic Hospitals

Although protecting rape victims is extremely important, this interest clashes with the right of religious health care providers to practice medicine in accordance with their beliefs.[178] The First Amendment protects the freedom to exercise one's religion without government interference.[179] The Supreme Court's First Amendment jurisprudence illustrates the importance of religious freedom to our society.[180] In the medical context, this right has been protected by state and federal conscience clauses exempting individuals and institutions from providing abortions, sterilizations, and other controversial procedures for religious reasons.[181] This legislation illustrates the widespread belief that the government should not force individuals or institutions to participate in activities to which they are morally opposed.[182] Although the Supreme Court struck down the Religious Freedom Restoration Act[183] (RFRA) in 1997,[184] the proposal and passage of this legislation highlights current political support for protecting the freedom of religion.[185]

Providing emergency contraception to rape victims directly conflicts with Catholic religious beliefs.[186] Requiring Catholic hospitals to provide the morning-after pill is, in their view, forcing them to perform abortions.[187] Even

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178. *See infra* Part V.B (discussing the interests of Catholic hospitals in preserving their religious autonomy).

179. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

180. *See, e.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 834 (1989) (upholding unemployment compensation for a worker who refused to work on Sundays for religious reasons); Thomas v. Review Bd., 450 U.S. 707, 709, 716–19 (1981) (reversing Indiana's denial of unemployment benefits to a Jehovah's Witness who refused to work in a munitions factory because of religious objections to war); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina could not deny unemployment benefits to a Seventh Day Adventist who lost her job because she refused to work on a Saturday).

181. *See supra* Part III.B.3 (discussing existing conscience clause legislation).

182. *See supra* Part III.B.3 (explaining the motivation for passing conscience clause legislation).

183. *See* Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000(b)(b) (prohibiting the government from burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the government can show that the burden (1) is in furtherance of a compelling government interest, and (2) is the least restrictive means of furthering that interest), *overturned by City of Boerne v. Flores*, 521 U.S. 507 (1997).

184. City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (striking down RFRA).

185. *See id.* at 533–36 (overturning RFRA because it exceeded Congress' enforcement power).

186. *See supra* Part II (presenting Catholic views on the morning-after pill).

187. *See id.* (discussing the Catholic view that emergency contraception can cause

requiring hospitals to provide a referral or information about the treatment is repugnant to the Catholic faith because it contributes to an ultimately evil act.[188] Opponents of emergency contraception legislation argue that requiring Catholic hospitals to provide the medication interferes with the doctor-patient relationship and the hospital's ability to practice medicine in accordance with its religious mission.[189] Catholic organizations argue that the Directives already make allowances for the special circumstances of rape victims by permitting the distribution of emergency contraception when it can be shown that the victim is not pregnant.[190] Because Catholic hospitals have made allowances for the needs of rape victims, these hospitals argue that the law should allow them to administer the treatment in accordance with their beliefs.[191] They argue that the decision to counsel and provide the medication should be made by doctors on a case-by-case basis.[192]

Opponents of such legislation argue that hospital boards should have the freedom to determine their hospitals' policy on emergency contraception.[193] If

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abortions).

188. *See* S. 92-24, Reg. Sess., at 158 (Ill. 2001) (statement of Sen. O'Malley) (arguing against the Illinois bill, which requires hospitals to provide information about emergency contraception, but not to provide it on-site). "[I]t is an attack on trusting and encouraging any religious group from fulfilling their mission here in America." *Id.*; Nathan Schlueter, *Drawing Pro-Life Lines*, 116 FIRST THINGS 32, 33 (Oct. 2001) (discussing the moral culpability for those intending to cooperate in an abortion as "cooperation with evil," including the parents of aborted fetus, the abortion doctor, the receptionists and assistants at an abortion clinic, the manufacturer of instruments that make abortion possible, and the owner of the building in which the abortion takes place).

189. *See* Dennis, *supra* note 152 (stating that the Maryland Catholic Conference opposed Maryland's statute because it attempted to make ethical and medical decisions for Catholic doctors and hospitals); Hare, *supra* note 16 (stating that the New York State Catholic Conference feels that state emergency contraception legislation would compromise religious freedom); *see also* S. 92-24, Reg. Sess., at 158 (Ill. 2001) (statement of Sen. O'Malley) (arguing that such legislation is "an attack on trusting and encouraging any religious group from fulfilling their mission here in America").

190. *See* DIRECTIVES, *supra* note 3, at 10 (reciting Directive 36, which states, "a female who has been raped should be able to defend herself against a potential conception from the sexual assault," and allows the administration of the morning-after pill to rape victims in certain circumstances); Hare, *supra* note 16 (statement of Dennis Poust, assistant executive director of the New York State Catholic Conference) (arguing that Catholic hospitals "can and do offer emergency contraception to rape victims when tests show that the victim is not yet pregnant, even though she may conceive hours later").

191. *See supra* notes 188–92 and accompanying text (stating the Catholic arguments for religious freedom).

192. *See supra* notes 188–92 and accompanying text (arguing that Catholic hospitals are private and should be free from government intrusion).

193. *See supra* notes 188–92 and accompanying text (arguing that hospital boards should have the freedom to develop a policy on emergency contraception).

hospitals must provide the treatment in all circumstances, boards will have to choose between (1) providing a service that conflicts with their religious and moral beliefs; (2) acting in defiance of the law; or (3) shutting down the hospital.[194] Several Catholic hospitals and institutions have cautioned that they would close rather than comply with such laws.[195] If a Catholic hospital closes its doors, the surrounding community will lose valuable health services.[196] For many patients, Catholic hospitals offer more individualized and compassionate care than public hospitals.[197] Other hospitals may be many miles away or offer an inferior quality of care.[198]

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194. *See supra* Part I (introducing a hypothetical in which a Catholic hospital faced this difficult decision).

195. *See* S. 92-24, Reg. Sess., at 156–58 (Ill. 2001) (Statement of Sen. O'Malley) (stating that "effectively, the American Medical Association is being asked to help abolish Catholic health care in this country," and that such resolutions could "drive the churches out of health care by making it impossible for them to operate in accord with their ethical and religious mission"); Editorial, *supra* note 16 (statement of Doug Delaney, executive director of the Catholic Conference of Illinois) (stating that emergency contraception legislation "would . . . forc[e] Catholic hospitals into civil disobedience"); Hare, *supra* note 16 (stating that Catholic hospitals might shut down rather than comply with these restrictions); *id.* (statement of Dennis Poust, assistant executive director of the New York State Catholic Conference) ("But to offer the pill to terminate a pregnancy is another matter. The Catholic Conference defines that as an abortion, and its hospitals will not comply.").

196. *See* Hare, *supra* note 16 ("The Catholic hospitals . . . could, of course, shut down rather than comply—but the public needs these institutions."); *supra* Part I (introducing a hypothetical situation in which the closing of a Catholic hospital cost the community hundreds of jobs and the loss of valuable health care services).

197. *See* S. 92-24, Reg. Sess., at 157 (Ill. 2001) (statement of Sen. O'Malley) ("[S]ome of the poorest people in our nation . . . turn to Catholic health facilities to receive help in times of need regardless of their ability to pay."); *see also* DIRECTIVES, *supra* note 3, at 4–5 (stating that the mission of Catholic hospitals includes: (1) respect for human dignity; (2) to provide adequate health care for poor; (3) to contribute to the common good; (4) to promote equity of care; and (5) to remain true to the moral teachings of the Church); Press Release, Catholics for a Free Choice, Catholic Hospitals Limit Women's Access to Emergency Contraception Treatment (Dec. 12, 2002) (statement of Frances Kissling, president of Catholics for a Free Choice) ("Catholic hospitals have a long and proud tradition of compassionate care."), *available at* http://www.cath4choice.org/new/pressrelease/121202ECStudy.htm (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

198. *See* RELIGIOUS REFUSALS, *supra* note 75, at 17 (telling the story of Kathleen Hutchins). Kathleen Hutchins was fourteen weeks pregnant when her water broke, and the chances of carrying her pregnancy to term were remote. *Id.* Hutchins also risked getting an infection that could leave her infertile or threaten her life. *Id.* Hutchins decided to get an abortion, but the hospital she was taken to refused to do it because it had recently merged with a Catholic hospital. *Id.* The nearest hospital was eighty minutes away, and Hutchins did not have the means to get there. *Id.* Hutchin's doctor ended up paying $400 for a taxi to take Hutchins to the hospital. *Id.*; *see also supra* Part I (introducing a hypothetical situation in which the closest non-Catholic hospital is 45 minutes away).

VI. Balancing Patient Autonomy and Religious Freedom: Presenting a Framework for Analysis

The interests of autonomy of rape victims and of religious freedom of Catholic hospitals are both extremely compelling, making it difficult to determine the best solution to this dilemma.[199] In *Principles of Biomedical Ethics*, a leading authority on the subject, Tom Beauchamp and James Childress suggest a framework for ethical decisionmaking that sheds light on the conflicting interests of religious hospitals and rape victims.[200] This framework focuses on four principles that one should consider in ethical and medical decisionmaking: (1) respect for autonomy; (2) nonmaleficence, or avoiding the causation of harm; (3) beneficence, or promoting good; and (4) justice, or the equitable distribution of benefits, risks, and costs.[201] This Note analyzes the dilemma under the first three factors: (1) respect for autonomy; (2) nonmaleficence; and (3) beneficence. The fourth principle—justice—focuses mainly on allocation of resources in conditions of scarcity and competition.[202] These issues are not present in the dilemma between emergency contraception for rape victims and Catholic hospitals.

A. Respect for Autonomy

Although nonmaleficence and beneficence have played a central historical role in medical ethics, respect for autonomy has only recently come into prominence.[203] Autonomy is defined as "personal rule of the self that is free from both controlling interferences by others and from personal limitations that prevent meaningful choice, such as inadequate understanding."[204] Autonomy includes both: (1) liberty, or independence from controlling influences; and (2) agency, or capacity for intentional action.[205] The respect for autonomy flows from the recognition that all persons have unconditional worth.[206]

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199. *See supra* Part V (discussing the policy arguments made in favor of rape victims and Catholic hospitals).

200. *See generally* ETHICS, *supra* note 17 (presenting the basic theories of biomedical ethics).

201. *See id.* at 12 (presenting the four clusters of basic principles).

202. *See id.* at 226 (explaining the principle of justice).

203. *See id.* at 12 (explaining the four basic principles).

204. *See id.* at 58 (introducing the first principle, respect for autonomy).

205. *See id.* (discussing autonomy in biomedical ethics).

206. *See id.* at 63–64 (quoting the theories of Immanuel Kant and John Stuart Mill).

Respect for autonomy often obligates professionals to disclose information and ensures voluntariness in decisionmaking.[207]

In the dilemma created between the interests of rape victims and of religious hospitals, two autonomy interests are at stake. First, rape victims possess a personal autonomy interest in making decisions about their health care, free from the intrusion of Catholic beliefs.[208] The need for rape victims to receive emergency contraception as soon as possible is absolutely crucial to the victim's well being.[209] Rape victims usually do not choose to which hospital they are taken for treatment.[210] They should not be denied a treatment that is the medical standard of care because they are taken to a Catholic hospital. Therefore, the rape victim's autonomy interest is extremely compelling.

On the other hand, religious hospitals have an institutional autonomy interest in operating their hospitals free from government influence.[211] The institutional autonomy interests of Catholic hospitals, however, are less compelling than the autonomy interests of rape victims. Intrusion into the hospitals' religious freedom is minimal because the laws regulate the hospitals' conduct, rather than the hospitals' religious beliefs.[212] Every private hospital must submit to state regulation in order to ensure that the hospital meets minimum standards of treatment. The proposed emergency contraception laws apply to all hospitals that provide emergency care to rape victims, not just Catholic or religious institutions.[213] Thus, the laws do not specifically target Catholic or other religious hospitals, but rather generally apply to all medical institutions.[214] Although Catholic hospitals are private institutions, they take on a more public role by dominating such a large share of the health care market. The established standard of treatment for rape victims is providing the morning-after pill, and a Catholic hospital cannot refuse to provide adequate medical care because of its religious beliefs.[215] Because the autonomy interests

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207. *See id.* (discussing the affirmative demands of the principle of respect for autonomy).

208. *See supra* Part V.A (discussing the interests of rape victims).

209. *See supra* Part V.A (discussing the need for rape victims to receive the morning-after pill).

210. *See supra* Part V.A (stating that rape victims usually do not choose their emergency room).

211. *See supra* Part V.B (discussing the interests of religious hospitals).

212. *See supra* Part IV.A (discussing whether such laws violate the Free Exercise Clause).

213. *See supra* Part III.B (discussing the state statutes).

214. *See supra* Part IV.A (concluding that such laws are generally applicable and neutral and therefore do not violate the Free Exercise Clause).

215. *See supra* Part II (stating that providing emergency contraception to rape victims is the medical standard of care).

of religious hospitals are less compelling than those of rape victims, the principle of autonomy weighs in favor of rape victims.

B. Nonmaleficence

The principle of nonmaleficence imposes an obligation not to inflict harm intentionally.[216] This principle relates to the maxim in medical ethics of *prinum non nocere*, "Above all [or first] do no harm."[217] Obligations of nonmaleficence often are more stringent than obligations of beneficence.[218] The principle of nonmaleficence instructs that one must not thwart, defeat, or set back the interests of a party.[219]

Using the principle of nonmaleficence, one can argue that Catholic hospitals should not harm rape victims by refusing to provide them with a treatment that will protect them from the further trauma of an unwanted pregnancy.[220] To the contrary, Catholic hospitals could argue that the principle of nonmaleficence prohibits them from providing a medication that they believe results in the termination of a human life.[221] But the principle of nonmaleficence allows for some harmful actions, if they are justified.[222] The rightness or wrongness of these actions depends on the strength of one's justifications for the action.[223] Therefore, Catholic hospitals could justify harming rape victims by denying them emergency contraception to protect the life of the unborn. Conversely, Catholic hospitals could justify providing the treatment, even though they believe this action would harm the unborn, to protect rape victims from unwanted pregnancies.

One can evaluate both of these actions under the standard of "due care" for nonmaleficence, which requires that a goal must justify the risks that will be imposed to achieve it.[224] The customs, practices, and policies of the medical profession help establish this standard of due care.[225] The current medically

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216. *See* ETHICS, *supra* note 17, at 113 (discussing the principle of nonmaleficence).

217. *Id.*

218. *See id.* at 115 (discussing the differences between nonmaleficence and beneficence).

219. *See id.* at 116–17 (defining harm).

220. *See supra* Part II (discussing the effectiveness of emergency contraception in preventing pregnancy).

221. *See supra* Part II (discussing the Catholic view that emergency contraception causes abortion).

222. *See* ETHICS, *supra* note 17, at 117 (defining nonmaleficence).

223. *See id.* (explaining harm).

224. *See id.* at 117–19 (discussing the standard of due care).

225. *See id.* (discussing the standard of due care).

accepted standard of care, which organizations such as ACOG and AMA recognize, is to provide emergency contraception to rape victims.[226] Thus, this standard of care recognizes that the goal of protecting rape victims outweighs the potential harm of preventing the implantation of a fertilized egg.[227] Thus, because the medically-accepted standard of care requires provision of the morning-after pill to rape victims, the principle of nonmaleficence also weighs in favor of rape victims.

C. Beneficence

The third principle, beneficence, requires doctors to act in a manner that promotes patients' welfare.[228] Beneficence imposes a positive obligation to promote the welfare of patients, not merely a negative obligation to avoid harm.[229] Beneficence includes the obligations to confer benefits, to prevent and remove harms, and to weigh and balance the possible goods of an action against its possible harms.[230] Some obligations to act affirmatively are merely ideals, while others are mandatory.[231] Rules for beneficence include, for example, obligations to protect and defend the rights of others and to rescue persons in danger.[232] Beneficence obligations can be strong enough to override obligations of nonmaleficence, such as when a major benefit for many can only be accomplished by causing harm to a few.[233]

The principle of beneficence imposes an affirmative duty to benefit the patient, not merely a negative duty to refrain from harming the patient.[234] Beneficence also places special emphasis on promoting a patient's welfare.[235] The patient in this case is the rape victim. Beneficence places an affirmative duty on hospitals and doctors to promote the interests of rape victims and protect them from harm. Providing emergency contraception promotes the interests of rape victims by protecting them from the trauma of an unwanted

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226. *See supra* Part II (discussing the medical views on the morning-after pill).
227. *See supra* Part II (discussing the Catholic views on emergency contraception).
228. *See* ETHICS, *supra* note 17, at 166–67 (introducing the principle of beneficence).
229. *See id.* at 173–74 (describing medicine's goal, rationale, and justification).
230. *See id.* (discussing beneficence).
231. *See id.* at 167 (distinguishing between optional and obligatory beneficence).
232. *See id.* (discussing the obligatory rules of beneficence).
233. *See id.* at 168 (discussing the interaction of nonmaleficence and beneficence).
234. *See id.* at 175 (discussing specific beneficence).
235. *See id.* at 169–70 (discussing the beneficence obligations placed on physicians).

pregnancy.[236] Therefore, the principle of beneficence leans toward imposing an affirmative duty on hospitals to provide the treatment to rape victims. In conclusion, the principles of autonomy, nonmaleficence, and beneficence all weigh in favor of protecting the interests of rape victims to the detriment of the interests of religious hospitals.

VII. Conclusion

In the hypothetical situation presented in the introduction to this Note, Verona Victim's interest in receiving emergency contraception to prevent an unwanted pregnancy is in direct conflict with St. Peter's interest in practicing medicine in accordance with its religious beliefs.[237] The recent passage of state laws requiring hospitals to provide the morning-after pill to rape victims creates a direct conflict between the values of patient autonomy and religious freedom.[238] The Constitution neither requires nor prohibits such laws, forcing one to turn to policy considerations in order to evaluate the conflict.[239] The policy interests of both rape victims and religious hospitals are extremely compelling.[240] In order to determine whether states should require hospitals to provide this treatment to rape victims, one must evaluate the dilemma in light of the applicable principles of biomedical ethics.[241] An evaluation of these factors compels the conclusion that the interests of religious hospitals must yield to accommodate the needs of rape victims.[242]

The question then becomes: how much should Catholic interests yield to accommodate the needs of rape victims? Lawmakers have proposed a variety of possible solutions to give sexual assault victims increased access to emergency contraception.[243] These solutions intrude in varying degrees into the religious freedoms of Catholic hospitals. These solutions also vary in their ability to protect rape victims from unwanted pregnancies. This Note concludes that all hospital emergency rooms should be required to provide the

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236. *See supra* Part V.A (explaining the importance of providing emergency contraception to rape victims).

237. *See supra* Part I (introducing the hypothetical).

238. *See supra* Part III.B (discussing state legislation).

239. *See supra* Part IV (discussing the constitutional implications of these laws).

240. *See supra* Part V (discussing the policy considerations created by these laws).

241. *See supra* Part VI (balancing the interests of rape victims and Catholic hospitals).

242. *See supra* Part VI (evaluating the dilemma by using the principles of biomedical ethics).

243. *See supra* Part III.B–C (discussing state and federal legislation).

morning-after pill to rape victims upon request. This option is the most intrusive of Catholic hospitals' religious freedom. It is the only solution, however, that will sufficiently protect rape victims from rape-related pregnancies.

Solutions that require Catholic hospitals to provide information or a referral about emergency contraception undoubtedly will decrease the number of pregnancies resulting from rape by informing victims of the option so that they can obtain the treatment from another source.[244] This solution, however, will not ensure that all rape victims receive the medication in time.[245] Problems with dead-end referrals, weekend hours, and finding a physician or pharmacist willing to dispense the medication often will push a woman beyond the seventy-two-hour window for maximum effectiveness.[246] In addition, requiring rape victims to find another hospital or doctor that dispenses the medication adds extra stress and worry to an already traumatic event.[247] Further, these provisions are nearly as intrusive to hospitals' religious freedom as other solutions and have encountered significant resistance from Catholic groups.[248]

Laws that allow hospitals to develop their own plan for compliance represent an admirable attempt by lawmakers to balance the interests of Catholic hospitals and rape patients.[249] Such laws have earned some support in the Catholic community.[250] Support for such measures, however, has not been

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244. *See* Editorial, *supra* note 16 (stating that the Illinois law "assures that women in crisis will be made aware of all their healthcare options, not just those that hospital workers deem morally acceptable"); Christi Parsons, *Law to Help Victims of Rape Get Advice; Women to be Told of Contraception*, CHI. TRIB., July 26, 2001, LEXIS, Nexis Library, Chicago Tribune File (stating that providing information and referrals to rape victims is a "big step forward"); Reimer, *supra* note 57 (discussing the information requirement, "though a modest requirement, it is an important one, because . . . only 11% of women even know that EC exists"); *see also* Press Release, Relief for Rape Survivors: Bill Guarantees Access to Emergency Contraception (Feb. 9, 2001) ("They should be given information that could help them avoid this additional trauma."), *at* http://www.kaganmd.bizland.com/Press/2001PR/02092001.htm. (last visited July 28, 2003) (on file with the Washington and Lee Law Review).

245. *See supra* notes 51–52 and accompanying text (discussing these laws).

246. *See* SECOND CHANCE, *supra* note 49, at 5–6 (finding that 64% of referrals from Catholic hospitals proved to be dead ends, and that under Directive 36, decisions on whether to provide emergency contraception are often left to Catholic personnel and can be influenced by local bishop's political views).

247. *See supra* note 177 and accompanying text (discussing the difficulties women face in obtaining the morning-after pill); *supra* note 149 and accompanying text (discussing the trauma experienced by rape victims).

248. *See supra* note 188 and accompanying text (discussing the Catholic opposition to information-only laws).

249. *See supra* Part III.B (discussing the Illinois emergency contraception statute).

250. *See supra* notes 54–58 and accompanying text (stating that the Illinois statute was a compromise between the interests of rape victims and of Catholic hospitals).

unanimous.[251] In addition, allowing hospitals to develop their own protocol would leave the decision whether to provide emergency contraception up to Catholic hospital boards. The Catholic Directives state that a victim can receive the treatment *only if* tests show that she is not pregnant.[252] Thus, many victims still would be denied the medication.

Lawmakers should pursue statutes that make emergency contraception available over-the-counter or increase awareness about the treatment through educational campaigns.[253] These laws will increase the availability of, and awareness about, the morning-after pill.[254] These measures are most protective of the religious freedom of Catholic hospitals because they do not require hospitals to provide or counsel about the treatment. Lawmakers should pursue such statutes, however, only in addition to laws requiring hospitals to provide emergency contraception upon request. Very few American women know about the morning-after pill, and no educational campaign could reach every woman in America.[255] The limited time frame in which women can take the pill makes it necessary for victims to get the treatment as soon as possible.[256] A large number of rape victims still would be left unprotected if the treatment is not provided in the emergency room.

Religious hospital administrators undoubtedly will find laws requiring them to provide emergency contraception unreasonable. To lessen the blow, lawmakers could pass conscience clause legislation that exempts individuals, but not institutions, from providing the treatment.[257] Legislators should not pass conscience clauses that exempt institutions from providing the morning-

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251. *See* Diana Mota Morgan, *Kagan Tries Again on Contraceptive Bill*, MONTGOMERY JOURNAL (Md.), Feb. 19, 2002, at A1 (stating that the Maryland Catholic Conference opposed a bill similar to the Illinois bill because the Maryland Department of Health and Mental Hygiene retained veto power over the protocol).

252. *See* Emergency Contraception Protocols, 26. Ill. Reg. § 545, app. C (Apr. 1, 2002) (stating that emergency contraception will be administered to a victim who shows a negative result for pregnancy on the blood test and the urine dip-stick test but not to a victim who shows a positive effect on these tests or to whom administration of emergency contraception would not be effective to prevent ovulation); DIRECTIVES, *supra* note 3, at 10 (quoting Directive 36, which allows a woman to receive emergency contraception only if testing shows that she is not pregnant already).

253. *See supra* Part III.B.2 (discussing over-the-counter statutes); *supra* Part III.C.2 (discussing the Emergency Contraception Education Act).

254. *See supra* Parts III.B.2, C.2 (discussing the benefits of these laws).

255. *See* Redfearn, *supra* note 2 (reporting on a Kaiser Family Foundation study that found that very few women have heard of emergency contraception).

256. *See supra* Part V.A (discussing why it is important for victims to get the morning-after pill as soon as possible).

257. *See supra* Part III.B.3 (discussing conscience clause legislation).

after pill. Such laws would result in a denial of the medication to a large number of rape victims, maintaining the status quo.[258] Exemptions for individuals, however, would allow rape victims protection but also would keep the government from infringing on individual moral beliefs. Lawmakers, however, should be careful to draft provisions so that hospitals could not circumvent the requirements by staffing only nurses and doctors with moral objections to emergency contraception.

Even with such conscience clause provisions, Catholic and pro-life groups will no doubt vehemently oppose state emergency contraception statutes. Catholic hospitals will argue, perhaps rightly so, that the statutes impinge on their religious freedom by forcing hospitals to administer a medication to which they are morally opposed. Although the value of religious freedom is an important one, it must yield in this case to protect rape victims from unwanted pregnancies. Given that Catholic hospitals occupy 15% of the health care market and that their numbers are expanding, too many women are denied an important treatment at precisely the time it is most crucial for them to receive it.[259]

258. *See supra* Part V.A (explaining the dominance of Catholic hospitals in the health care market and their refusal to provide emergency contraception to rape victims).

259. *See* Cody, *supra* note 8, at 323–27 (stating that Catholic hospitals occupy the largest chunk of the health care market and that Catholic health systems reported a 12% growth rate in 1996, compared to a 3% growth rate experienced by Columbia/HCA).