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Morning Panel: Recent Trends and Policy Developments at State

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I'm glad we ended on a question of patients' rights, because I will talk about an area in which patients don't have any rights (but I will try to end with something positive). I want to talk about a largely invisible struggle that we are engaged in here in the United States, which involves oppressive and restrictive religious doctrines limiting our access to health care. The question on the table right now is which is going to prevail in women's health: medical standards or religious doctrine?

There are many religious systems that operate health care facilities. Very few of these restrict any of the services that are available at those facilities. And even fewer are major players in the health care arena. So I will focus on Catholic health care systems. Adventist systems also restrict some women's health services. They don't provide abortion although they don't restrict other services. Modern Healthcare magazine does an annual survey of the largest systems in the country. The largest religious system that's not Catholic doesn't show up on the list until number twenty-five. Catholic systems, on the other hand, constitute three of the six largest health care systems in the country. These three systems alone have net patient revenues of over eighteen billion dollars. Catholic systems control eleven percent of the beds in the United States.

In 1999, they had a 22.8% increase in staffed beds compared to a 5.5%
increase in staffed beds overall. Between 1990 and 2000 there were a 159
mergers between Catholic hospitals and non-sectarian hospitals in thirty-
four states. In California our largest health care system is a Catholic
health system, Catholic Healthcare West. They own forty-six hospitals
in the State. In many communities around the State they operate the
only hospital, so they say everything there is to be said about what kind
of health care the men and women in those communities can get.

And they do what they do with public money. I was glad to hear
Assemblywoman Dion Aroner talk about public funding. I was one of the
drafters, with Lourdes Rivera of the National Health Law Program, of
Assembly Bill 525, which I’ll talk about in a little more detail later. We
tried, unsuccessfully, to put a restriction on public bond funding to protect
access to reproductive health services. One of the legislators in Southern
California told me that the Daughters of Charity came to his office and
said “Don’t touch our money.” Now I, of course, thought it was our
money. But California has an agency called the California Health Facili-
ties Financing Authority, similar to agencies that exist in many states.
It’s basically a way to access bond funding for non-profit health systems.
When private systems go public they get money through the stock mar-
et. They raise money by selling shares. The Health Facilities Financing
Authority is a parallel track for non-profits. In California, Catholic
Healthcare West is the largest borrower. It has borrowed $1.9 billion
guaranteed by the State of California with no restrictions other than they
must “serve the public good.”

Sister Irene Kraus, former president of the Daughters of Charity Na-
tional Health System was quoted in the Wall Street Journal as saying “No
margin, no mission.” I think it’s a big mistake to fail to look at the
Catholic hospital systems as the gigantic corporate structures that they
are. They market themselves as serving the poor and the sick, and as
acting based on their Catholic mission. These missions certainly are the
roots of Catholic hospitals. Across the country and the world, there are
many communities where the only health care access was once a small
hospital started by nuns, acting on their mission to serve the poor and to
tend to the sick. But today they are major corporate players.

Catholic health care systems are major lobbyists, and I will talk
about some legislation that has been enacted because of the strength of
their lobby. They lobby in church, which we don’t do. They have tre-
mendous impact on patients’ access to care. Catholic hospitals are gov-
erned by a document called “The Ethical and Religious Directives for
Catholic Health Care.” These directives talk about how one should treat
patients with dignity; they talk about workers and how workers should be
treated; and they list the services that may not be provided in Catholic
hospitals. The services that are prohibited include: family planning, any
kind of contraception including condoms (even when they’re intended to
prevent the spread of AIDS), any kind of sterilization for men or for women, and fertility treatments (with a single exception). There is a controversy within the Catholic health systems and the church about emergency contraception for rape victims. There's no controversy about emergency contraception for anybody else; it is rejected. But for rape victims, there is some disagreement among Catholic hospitals about whether it is allowed.

Interestingly, the Ethical Directives were recently revised. Within the litany of things they prohibit there are two different categories. One category is "not permitted": family planning and condoms fall into this category. It used to be that sterilization was not permitted. The other category is "intrinsically evil." The "intrinsically evil" category is where abortion always was. And that is why you have always seen around the country a range of services provided at some Catholic hospitals. Richard Katz, one of our former State legislators who now sits on the California Medical Assistance Commission, said that women in California really have to go bishop-shopping, because depending on the policies of the local bishop, there may or may not be reproductive health services in any Catholic hospital. This summer, the Conference of Bishops changed that possibility when they moved sterilization over from the "not permitted" category to the "intrinsically evil" category. Sterilization is the most common form of birth control in this country. Surprisingly, we have a large number of Catholic hospitals that are providing sterilization. I just got an e-mail yesterday from a doctor in a hospital in California where they're just starting to talk about eliminating this service. We're just beginning to see what will happen under the new Directives. If all the Catholic hospitals in this country decide they aren't going to provide sterilization, what will that mean for women?

The Catholic systems have also been very successful in obtaining gag rules. As the Patients' Bill of Rights catches fire, one of the big issues has been to say that managed care organizations cannot prohibit doctors from talking about recommended treatments with their patients. Nobody wants a situation where the managed care plan says to doctors: "This patient may need this kind of heart surgery but it's too expensive; we're not going to cover it, so you can't tell them about it." The Catholic Health Association has basically said: "We need an exemption from the gag rules because we can't be compelled to tell patients about any service to which we object on a religious grounds." The new Medicaid rules now state that any managed care organization under Medicaid can't be compelled to tell women that they have access to reproductive health services. In New York City there is a huge Medicaid Managed Care Plan called Fidelis Care, which is a Catholic plan. They don't even have to make referrals, even though family planning is a guaranteed service for women on Medicaid.
The Catholic systems have also been able to get carve-outs. Many laws include what the Catholic systems like to call "conscience clauses," and we like to call religious exemptions for non-compliance laws. These began right after *Roe v. Wade*. They emerged from a bill called the Church Amendment. It has nothing to do with churches but is named after Senator Frank Church, who aptly named his amendment. It says that nobody can be compelled to perform sterilization or an abortion. Now I don’t think any of us would disagree with the idea that if someone has a personal religious belief that they shouldn’t have to violate that religious belief, but the system ought to be held accountable for ensuring those services stay available. What the Balanced Budget Act of 1997 did, and what we’re seeing with these new kinds of religious exemptions, is that entire managed care organizations are being exempted. Since they don’t have to provide this information, neither do the Catholic hospitals with which they contract.

We’re trying to change that. We really need to pose this issue in terms of standards of care. The American College of Obstetricians and Gynecologists defines emergency contraception as the standard of care for women who have been raped. So why should someone else’s religious belief be allowed to trump the standard of care?

One of the very few cases on this issue was here in California. It only went to the Court of Appeals. In *Brownfield v. Daniel Freeman Marina Hospital*, a woman was raped and she was taken to Daniel Freeman, which is a Catholic hospital. I never would have known until I actually saw the sign that said Sisters of Carondolet. They did not offer her emergency contraception and she sued. She really wanted injunctive relief to compel them to provide emergency contraception. She didn’t get that, but the court did say if emergency contraception is the standard of care, and they failed to meet the standard of care, and she suffered damages as a result, she would have had grounds to bring a malpractice action against the hospital. The good news for Kathleen Brownfield is that she didn’t get pregnant, so she did not have a malpractice case. The court found she had not suffered damages.

The other manifestation of corporate power is in the area of workers’ rights. Even though the Ethical and Religious Directives say that workers are supposed to be respected we do see religious hospitals claiming exemptions from anti-discrimination laws. Many states have laws that do exempt them. The genesis of these laws was the notion that a Catholic church wouldn’t have to hire a woman to be a priest and they couldn’t be sued for employment discrimination. Issues of homosexuality were also raised. So, in many cases, the Church has blanket exemptions.

Now states are starting to wake up. In California we had a case called *McKeon v. Mercy of Sacramento*. June McKeon is an African-American woman who is an administrator. She was fired and she sued the
hospital for race and gender discrimination. The case went to the California Supreme Court. The Catholic hospital said “I'm sorry, we're exempt from discrimination laws,” and the California court agreed. As a result, in California the legislature has now amended the law, and Catholic hospitals are specifically subject to anti-discrimination laws based on race and gender.

The Adventist system went to the National Labor Relations Board when the California Nurses Association had a successful vote for the nurses to join the union. The Adventist system argued that negotiating with a union violated their religious beliefs. I'm going to tell you this very respectfully, but it blows my mind. Their argument was that they communicate directly with God for their decision making, and that they could not be compelled to communicate through a union because that would interrupt their ability to commune with God.

The Catholic health care systems also act like corporations in their marketing. They market their mission. They market their mission even when they're trying to defeat a union. There were advertisements up here in the Bay Area when the Service Employees International Union was trying to organize the Catholic Healthcare West hospitals. The ads said, “We answer to a higher power,” as if to say, “You don’t need a union because we have to satisfy God.” If that were true, maybe they wouldn’t need a union, but that’s not the way it works.

They also market their restrictions on reproductive health services as if this were only an issue of abortion. When the California Women’s Law Center did organizing in Gilroy, California, abortion was not an issue. There are five obstetrician-gynecologists at the Gilroy hospital. They all do sterilizations; some of them don’t do abortions. So the community agreed this is not about abortion, but about preserving sterilization. Catholic Healthcare West responded with press releases about what “Abortion Advocates” want, and they did a public opinion poll asking: “Do you think we should have to provide abortion?” There is a new media campaign. I don’t know if it’s hit the West Coast yet. “Priests for Life” are doing a media campaign that our issues are all about abortion. So the other reproductive health services that men and women need and use are being camouflaged, as Catholic hospitals try to market on the fact that there is not as much support for abortion as there is for other reproductive health services.

So how are we going to find the answer to who’s going to decide what kind of health care we can get? Most of the activism has been community organizing with mixed results. There are communities in which mergers were stopped. There are communities where there have been compromises, good compromises. The California Women’s Law Center was involved in 1994 with a whole coalition of folks in the Sierra Nevada region where we got a compromise with Catholic Healthcare
West. They now provide sterilization in eighteen of their hospitals. We’re waiting to see how that’s going to change under the new Directives.

Many of the laws protecting religious exemptions presume that we live in a fee-for-service, patient choice world, which we don’t. We used to think this was more of a problem in rural areas where there was no patient choice because we all arrogantly thought we would always have patient choice in urban centers. But of course now we know that’s not true. There may be ten hospitals lined up in front of you and you may not be able to go to any of them to get the services you need.

We’re looking to new legislation. In New York, there is legislation to require all emergency rooms to provide emergency contraception to rape victims. We’re hoping to have similar legislation proposed here in California in the next session. Dion Aroner talked about A.B. 525. There’s a notice-and-disclosure requirement, so health plans have to tell their members that some providers in hospitals don’t offer reproductive services, and they have to list these services so members don’t think it’s just about abortion. They also must offer a toll-free number so you can find a provider who offers the services that you need. This is the first legislation of its kind to ensure that consumers can get the information they need about restrictions on access to reproductive health services.

In many states we have attorney general review of hospital mergers. We have a new law here in California that requires that when a non-profit hospital is transferred to either a for-profit or another non-profit hospital, they must seek Attorney General approval of the transaction through a very public process that includes public hearings and access to documents pertaining to the transaction. It also requires that the Attorney General assess the impact of the transaction on health access in the community including the impact of reproductive health access. This process ensures that health services are not bargained away in back rooms.

Remember the Summit-Alta Bates merger had to be approved by the Attorney General, and there was a public process. What’s interesting about that merger is that the one service at risk was abortion. Alta Bates provided abortion, but Summit did not because they affiliated with Providence seven years ago. We got a promise that abortions would remain available at Alta Bates. Now the question is, since they’re now going to consolidate services, if they transfer OB-GYN services to the hospital that doesn’t provide abortions, what will happen to those services?

In the courts there’s an interesting case right now in California that merges the issues of contraceptive equity and Catholic doctrine. It’s Catholic Charities v. Superior Court. In California, all employers are required to have contraceptive coverage if they offer drug benefits. Catholic Charities has sued the State of California, wanting to be exempt. The religious exemption in the California law is very narrow. It is similar to
Title VII and a piece of the IRS code. It basically says that if you primarily serve people of a particular religion, and you primarily employ people of a particular religion, and it offends that religion, then you don't have to provide contraceptive coverage to your employees. Of course, Catholic Charities serves the general population and hires the general population, and they do not qualify for an exemption from the statute. They have sued the State arguing the statute violates their First Amendment rights, among other things, and that the statute targets Catholics. The case has gone through the Court of Appeals. The court decisions have been beautiful and exquisite, clearly stating that there is no First Amendment problem here and that the statute is neutral. We'll see what our California Supreme Court does. This is a case that's being watched by all of us. We have to ask, what is the proper reach of the First Amendment? Should health care be a right? And if so, would it trump the First Amendment? What kind of limits can we put on public funds and still protect our religious liberties, which we all want to protect? Are we going to let religion trump medical standards of care and let one religious group take over our entire medical decision making? Thank you.

**Relevant Sources**


**CAL. GOV. CODE §§ 15430-15462.5** (West’s Ann. 1992) (setting forth Health Facilities Financing Authority’s governing regulations and authorizing $1.9 billion loan to Catholic Healthcare West).


Balanced Budget Act of 1997, Public Law 105-33, § 1932(b)(3) ("Protection of Enrollee-Provider Communications," permitting health maintenance organizations serving Medicaid recipients to refuse to provide counseling or referral for services, such as abortion, to which the organization objects on moral or religious grounds).

Roe v. Wade, 410 U.S. 113 (1973) (holding that the state may not interfere in a woman’s right to terminate her pregnancy during the first trimester).


Brownfield v. Daniel Freeman Marina Hospital, 256 Cal. Rptr. 240 (2d Dist. 1989).


Ukiah Adventist Hosp., 332 N.L.R.B. 59 (2000) (confirming that the N.L.R.B. has jurisdiction over religious health care institutions including the Seventh Day Adventist Church).

New York Women’s Health and Wellness Act, A. 2214, S. 2347 (requiring all hospitals in the State of New York to provide female rape victims with information regarding pregnancy prevention and, upon their request, to provide immediate emergency contraception).

CAL. HEALTH & SAFETY CODE §§ 1363.02, 1339.80 et. seq; CAL. INS. CODE § 10604.1; CAL. WELFARE & INST. CODE § 14016.8.