

DISOBEDIENCE, MEDICINE, AND THE RULE OF LAW

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Professor Dov Fox's *Medical Disobedience*¹ could not have appeared at a more consequential time for the medical profession. Just look at what is happening in the abortion context. Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,² conscientious providers and educators have faced what *New York Times* reporter Jan Hoffman called a "treacherous choice."³ In September 2022, the Accreditation Council for Graduate Medical Education (ACGME) reaffirmed requirements that all accredited medical programs offer abortion training, even in states that have criminalized abortion.⁴ Other no-win situations face doctors treating pregnant patients with emergent conditions. The Centers for Medicare and Medicaid Services (CMS) issued guidance in July 2022 suggesting that the federal Emergency Medical Treatment and Active Labor Act⁵ (EMTALA) preempted contrary state abortion laws, requiring providers to offer "stabilizing treatment," including "abortion."⁶ Noncompliance with EMTALA could cost a provider over \$119,000 per violation and result in the termination of a hospital's Medicare provider agreement;⁷ violating a state abortion law might cost a physician their license and liberty (prison sentences under state laws run up to life in prison).⁸

As Fox observes, a lack of protection for conscientious providers is nothing new.⁹ Professor Elizabeth Sepper's pioneering work established

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¹ Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. 1030 (2023).

² 142 S. Ct. 2228 (2022).

³ Jan Hoffman, *OB-GYN Residency Programs Face Tough Choice on Abortion Training*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/health/abortion-training-residency-programs.html> [<https://perma.cc/669V-LNDE>].

⁴ See ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., ACGME PROGRAM REQUIREMENTS FOR GRADUATE MEDICAL EDUCATION IN OBSTETRICS AND GYNECOLOGY 29 (Sept. 17, 2022), https://www.acgme.org/globalassets/pfassets/programrequirements/22o_obstetricsandgynecology_9-17-2022.pdf [<https://perma.cc/29ZL-FETQ>].

⁵ 42 U.S.C. § 1395dd.

⁶ Memorandum from Karen L. Tritz & David R. Wright, Dirs., Ctr. for Clinical Standards and Quality, Ctrs. for Medicare & Medicaid Servs., Dep't of Health and Hum. Servs. to State Survey Agency Dirs. (July 11, 2022) [hereinafter CMS Memo], <https://www.cms.gov/files/document/qso-22-22-hospitals.pdf> [<https://perma.cc/6FXV-DNRU>]. The Department of Health and Human Services is currently enjoined from enforcing the Guidance. See *Texas v. Becerra*, No. 22-CV-185, 2022 WL 3639525, at *1 (N.D. Tex. Aug. 23, 2022). But see *United States v. Idaho*, No. 22-cv-00329, 2022 WL 3692618, at *2 (D. Idaho Aug. 24, 2022) (enjoining Idaho statute that conflicted with EMTALA).

⁷ See CMS Memo, *supra* note 6, at 5.

⁸ See Peter Butler & Dan Avery, *Abortion Laws by State: Where Has Abortion Been Banned?*, CNET (Nov. 14, 2022, 9:00 AM), <https://www.cnet.com/health/abortion-laws-in-every-state-where-is-abortion-legal> [<https://perma.cc/H3WE-SUD2>].

⁹ See Fox, *supra* note 1, at 1036.

that “[o]nly in the exceptional case does legislation acknowledge the *willing* individual provider.”¹⁰ Fox expands the frame, proposing a strategy for conscientious providers in a variety of medical fields to resist state sanctions.¹¹ Fox is cautiously optimistic about conscientious provision. “[C]onscience offers a glimmer of hope; that ideal resonates across the ideological spectrum and religious/secular divide, even if it isn’t enough on its own to claim common ground once again.”¹² He proposes protections for some forms of medical disobedience. Within institutions, he writes, providers should have to make their objections clear to both their patients and employers and pay a modest fee to offset any costs created by their departure from institutional rules.¹³ When states forbid medically reasonable services, Fox’s proposed defense would mitigate the penalties facing providers so long as they obtain competent consent from their patients, provide clinically reasonable care, and do not abuse scarce medical resources.¹⁴

This Response mines the history of conscience and abortion to identify underappreciated obstacles to Fox’s proposal. In the 1970s, following the passage of the Church Amendment,¹⁵ antiabortion activists drew on what I call an argument for equal liberty — if *Roe v. Wade*¹⁶ had honored a constitutional liberty to choose abortion, antiabortion objectors, employers, and taxpayers claimed an equal liberty not to be involved with it.¹⁷ This conscience frame, as Professor Jeremy Kessler observes, was defensive, “deploying the language of discrimination against and coercion of conscience to describe American law’s relationship to the Catholic citizen.”¹⁸ But this liberty frame had more than defensive potential, entrenching the idea that the needs of objectors trumped those of patients seeking services or doctors delivering them.

By the late 1990s, antiabortion conscience claims multiplied, and their focus shifted.¹⁹ Objecting pharmacists not only refused to fill prescriptions for emergency contraceptives but also suggested that they reasonably believed such drugs to be abortifacients.²⁰ These new claims

¹⁰ Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1512 (2012).

¹¹ See generally Fox, *supra* note 1.

¹² *Id.* at 1104–05.

¹³ *Id.* at 1076.

¹⁴ *Id.* at 1085–96.

¹⁵ Health Program Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (codified at 42 U.S.C. § 300a-7); see also Jeremy Kessler, *The Legal Origins of Catholic Conscientious Objection*, 31 WM. & MARY BILL RTS. J. (forthcoming 2023) (manuscript at 60), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323328 [<https://perma.cc/QRM8-SM3X>] (discussing the Church Amendment).

¹⁶ 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

¹⁷ See Kessler, *supra* note 15 (manuscript at 57).

¹⁸ *Id.* (manuscript at 66).

¹⁹ See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2538 (2015).

²⁰ See *id.* at 2558 n.173.

carved out space for refusal of care while legitimizing the basis for an objecting provider's belief. While antiabortion groups promoted a wide variety of new state conscience laws,²¹ their defense of conscientious objectors increasingly implied that criminal laws might be more appropriate for resolving disputes than medical norms.²²

In other words, expanding ideas of complicity²³ create obstacles for the framework Fox proposes, changing what courts and legislatures alike recognize as "accepted" within the medical profession — or even whether criminal law, rather than medical practice, should shape practice. Between the 1990s and the present, complicity arguments served as a bridge: between conceding that abortion was a medical service and reestablishing it as a crime, between leveraging the respect given to medical experts and erasing it.²⁴ Justice Alito's opinion for the Court in *Dobbs* underscored this transition. "Not only was there no support for such a constitutional right until shortly before *Roe*," Justice Alito wrote, "but abortion had long been a *crime* in every single State."²⁵

Courts have long been reluctant to exempt disobeyers from criminal punishment. Consider the legal reception of claims made by antiabortion protesters in the organization Operation Rescue, who faced criminal charges for trespassing and other offenses in the 1980s and 1990s.²⁶ They invoked the defense of necessity and failed spectacularly.²⁷ Regardless of the depth of the moral conviction underlying civil disobedience, courts reasoned, disobeyers did not get to choose when to obey the criminal laws of a state.²⁸ These decisions suggest reasons for the reluctance to honor disobedience claims — and especially so when criminal law is at issue. At least under some circumstances, disobedience defenses can undermine rule-of-law norms, raise concern about the separation of powers, or invite discriminatory application of the law.

A feasible medical disobedience defense thus requires an additional step: a demonstration that medical disobedience is at least sometimes less worrisome than other forms of civil disobedience. Physicians' divided loyalties differ in kind; conscientious providers do not claim to follow a higher law but rather the norms of their profession and their obligations to their patients.²⁹ Conscientious providers do not always challenge rule-of-law values because they do not pledge allegiance to an

²¹ See *id.* at 2538.

²² See *id.* at 2556.

²³ "Complicity" refers to "*complicity-based conscience claims*" — "religious objections to being made complicit in the assertedly sinful conduct of others." *Id.* at 2519.

²⁴ See *generally id.* (discussing the development and evolution of the conscientious refusal movement).

²⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022).

²⁶ See MARY ZIEGLER, *BEYOND ABORTION: ROE V. WADE AND THE FIGHT FOR PRIVACY* 214, 219 (2018).

²⁷ See *id.* at 220.

²⁸ See *id.*

²⁹ See Fox, *supra* note 1, at 1109.

alternative code or an unwritten (and potentially unknowable) set of norms. Providers instead have obligations to their patients that are well understood, defined by relevant professional organizations, and recognized by courts, both in medical malpractice cases and otherwise.³⁰ Fox's proposal demands legal and cultural work to establish that deference to medical experts sometimes still makes sense — and an account of when that expertise should be given special weight.

The Essay proceeds in three parts. After setting out what I see to be the bases for Fox's optimism about a medical disobedience defense, Part I offers a historical overview of the rise and transformation of antiabortion conscience claims from the 1960s to the present. The transition from a liberty-centered to a complicity-centered frame was no accident: it accompanied a deepening divide about the reality of abortion in America and a growing distrust of the legacy media and the medical establishment among Americans opposed to abortion.³¹

Building on this history, Part II returns to the critical distinction Fox at least implicitly draws between medical disobedience and other conscience-based refusals to follow the law: medical disobedience involves *doing* a criminal act.³² Here, I draw on the example of anti-abortion civil disobedience and lawbreaking in the 1980s and 1990s to understand courts' basic discomfort with disobedience that takes the form of criminal lawbreaking.

Part III uses this history to make sense of the strategic move made in *Dobbs* to frame the criminalization of abortion as a national tradition. Once lawmakers understand a medical service to be a crime, the obstacles facing medical disobeyers become much more serious. Part III identifies some of the distinctions between medical disobedience and other civil disobedience that are implicit in Fox's compelling work and suggests a way to overcome concerns about disobeyers who violate criminal laws.

I. FROM EQUAL LIBERTY TO COMPLICITY

Fox's proposal is thoughtfully designed, and he defends it as politically realistic. Conscience-based protections, he writes, have served as a rare "unifying force," even in areas of practice that spark serious disagreement, such as sterilization, abortion, and contraception.³³ Fox is right about the diverse ideological coalition that backed the 1973 Church Amendment, which created protections for doctors and other providers with conscientious objections to performing or refusing

³⁰ See Nadia N. Sawicki, *The Conscience Defense to Malpractice*, 108 CALIF. L. REV. 1255, 1258 (2020).

³¹ See NeJaime & Siegel, *supra* note 19, at 2520.

³² See Fox, *supra* note 1, at 1063–75.

³³ *Id.* at 1104.

abortion or sterilization for moral or religious reasons.³⁴ Among the amendment's supporters at the time was Senator James Buckley, a New York conservative who was sponsoring a constitutional amendment banning abortion.³⁵ Representative Bella Abzug, a feminist from New York who voted for the Church Amendment despite her misgivings, had urged Congress to codify *Roe* the very same year it was decided.³⁶ But within a few years of the passage of the Church Amendment, a genuine consensus about conscience began to fracture.

Antiabortion leaders mobilized more expansive ideas of conscience during a series of tax protests in the 1970s.³⁷ The idea of tax protest was not new: when President Lyndon B. Johnson proposed an excise tax on phone calls to fund the mobilization of additional troops in Vietnam, antiwar activist Karl Meyer called on protesters to refuse to pay.³⁸ Taxpayers who identified with the antiabortion movement soon adopted a similar technique.³⁹ Some withheld a token amount to object to the use of Medicaid funding to pay for abortions; others refused to pay any taxes at all.⁴⁰ These protesters defended their refusal to pay as an act of conscience.⁴¹

But while the members of Congress who voted for the Church Amendment had wanted to avoid making the vote a referendum on *Roe v. Wade*, antiabortion tax protesters insisted that robust conscience protections flowed naturally from the *Roe* decision. Dexter Duggan, an antiabortion columnist, framed his tax protest as a call for equal liberty.⁴² "We hear frequently about freedom of choice for abortion," he wrote in a letter to the *National Right to Life News*.⁴³ "So I must conclude that there should be freedom of choice not to be forced to pay for this repugnant practice of permissive abortion."⁴⁴ Duggan argued that if those whose conscience compelled them to terminate a pregnancy had

³⁴ 42 U.S.C. § 300a-7(c)(1)(A).

³⁵ See Sara Dubow, "A Constitutional Right Rendered Utterly Meaningless": *Religious Exemptions and Reproductive Politics, 1973–2014*, 27 J. POL'Y HIST. 1, 4–5 (2015). On Buckley's proposed constitutional amendment, see MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 42 (2015).

³⁶ See Dubow, *supra* note 35, at 11–14 (detailing the reasoning behind Abzug's vote). On Abzug's proposal to codify *Roe*, see Barbara Campbell, *Mrs. Abzug Spurs Bill to End All Abortion Laws*, N.Y. TIMES, Jan. 27, 1973, at 8.

³⁷ MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* 37–40 (2020).

³⁸ *Id.* at 37; Karl Meyer, *New Resistance to War Taxes*, CATH. WORKER, Jan. 1971, at 1.

³⁹ See ZIEGLER, *supra* note 37, at 38.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *Pro-lifers Deny Government's Right to Tax for Abortions*, NAT'L RIGHT TO LIFE NEWS, June 1975, at 5.

⁴³ *Id.*

⁴⁴ *Id.*

the freedom to do so, then the government could not force those with moral objections to the procedure to bankroll it.⁴⁵

This claim of equal liberty became a key early argument for proposed bans on Medicaid reimbursement for abortion. In 1974, Joe Biden, then a Senator from Delaware, endorsed a Medicaid ban by suggesting that Congress should “be consistent[,] and . . . keep the federal government out of this issue.”⁴⁶ Citing the “very strong feeling[s]” of those opposed to abortion, John Pastore, a Democratic Senator from Rhode Island, argued that equal choice required that objecting taxpayers’ money not be “used and . . . abused” in paying for Medicaid abortions.⁴⁷ On occasion, tax protesters even took these arguments to court. In 1977, Michael McKee, one such protester, argued that to “force conscientiously objecting taxpayers to contribute to the fund from which abortions are paid violates the right to privacy.”⁴⁸

In the late 1970s, Catholic employers used similarly expansive ideas of conscience to challenge the coverage of abortion-related conditions in employee disability plans.⁴⁹ In one suit, the National Conference of Catholic Bishops and the United States Catholic Conference argued that the federal Pregnancy Discrimination Act unconstitutionally burdened the religious liberty of antiabortion employers by forcing them to cover abortion-related disabilities.⁵⁰ While the D.C. Circuit held that the plaintiffs could not identify a real enough risk of harm to satisfy the case-or-controversy requirement,⁵¹ the Hyde Amendment,⁵² a ban on Medicaid reimbursement for abortion, passed in 1976.⁵³ The idea of equal liberty caught on with some outside of the formal antiabortion movement — people who believed, as conservative columnist George Will suggested, that if “freedom of choice” was a fundamental value, it was time to challenge “the idea that the revolution is just ‘pro-choice.’”⁵⁴

⁴⁵ *Id.*

⁴⁶ *HEW Funding Bill Delayed*, NAT’L RIGHT TO LIFE NEWS, Nov. 1974, at 11.

⁴⁷ *Id.*

⁴⁸ ZIEGLER, *supra* note 37, at 38.

⁴⁹ See *U.S. Sued by Catholic Bishops*, HARTFORD COURANT, Jun. 22, 1979, at 8; see also *Discrimination on the Basis of Pregnancy, 1977: Hearings Before the Subcomm. on Lab. of the S. Comm. on Hum. Res.*, 95th Cong. 495–96 (1977) (letter from Monsignor James T. McHugh, Director of the Bishops’ Comm. for Pro-life Activities, to Sen. Harrison Williams (1977)) (“Another weakness of the proposed amendment is that it implicitly provides the same disability benefits for elective abortion as for pregnancy care and birth.”).

⁵⁰ See *Nat’l Conf. of Cath. Bishops v. Smith*, 653 F.2d 535 (D.C. Cir. 1981). In 2022, similar concerns about obligations to cover abortion blocked passage of a bill that would have required reasonable accommodations for pregnant workers. See Alanna Vagianos, *Anti-abortion Republicans Block Bill to Give Pregnant Workers Basic Accommodations*, HUFFINGTON POST (Dec. 13, 2022, 1:35 PM), https://www.huffpost.com/entry/anti-choice-republicans-block-bill-that-gives-pregnant-workers-basic-accommodations_n_6398a7e3e4bo19c696261doo [https://perma.cc/A7WC-Z2LT].

⁵¹ See *Smith*, 653 F.2d at 539–43.

⁵² Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

⁵³ See *id.*

⁵⁴ George Will, *The Abortion Compulsion*, ATLANTA J.-CONST., Aug. 19, 1979, at 3D.

These equal liberty arguments claimed to expand on the framework set out in *Roe*, but dueling ideas of conscience emerged. While the Church Amendment, as Fox rightly notes, protected both conscientious providers and objectors,⁵⁵ the Hyde Amendment seemed to give primacy to conscience-based omissions. Feminist litigators questioned this primacy in litigating the constitutionality of the Hyde Amendment. In *Harris v. McRae*,⁵⁶ for example, feminist lawyers argued that the denial of abortion funding violated the Free Exercise Clause of the First Amendment and contradicted “the universal guarantee of liberty of conscience.”⁵⁷ Conscience claims, on this understanding, required the government to do more than leave an objector alone; objectors at times were entitled to affirmative governmental support.⁵⁸ That meant that pregnant people seeking abortion funding — or perhaps even physicians seeking to perform the procedure — could invoke conscience protections too.⁵⁹

Arguments about the meaning of conscience further diverged in the decades to come, with antiabortion advocates more often foregrounding complicity. Of course, even in the 1970s, antiabortion objectors already claimed that any participation in abortion made them morally culpable.⁶⁰ For example, mid-decade, Dexter Duggan tackled the question of whether taxpayers truly were complicit, given how much less directly they were involved in abortion than the health care providers protected by the Church Amendment.⁶¹ “Though citizen participation is sanitized through government taxing powers (the payment is indirect),” Duggan wrote, “the bottom line is still that taxpayers pay the bill.”⁶²

But tax protesters struggled to explain why they drew the line for complicity where they did — or why other taxpayers could not simply follow suit and refuse to pay because they did not like the government’s policy on fossil fuels, or sex discrimination, or a wide range of other issues.⁶³ Henry Hyde, the author of the eponymous amendment, offered the beginnings of a distinction: antiabortion protesters could avoid any kind of complicity because abortion was categorically objectionable in

⁵⁵ See Fox, *supra* note 1, at 1104; 42 U.S.C. § 300a-7(c)(1)(A).

⁵⁶ 448 U.S. 297 (1980).

⁵⁷ Brief of Appellees at 151, *Harris* (No. 79-1268). In *Harris v. McRae*, the Supreme Court held that those raising conscience-based concerns about the Hyde Amendment lacked standing because they did not allege that they were or expected to be pregnant or were eligible for Medicaid. 448 U.S. at 320.

⁵⁸ See Brief of Appellees, *supra* note 57, at 151–53.

⁵⁹ See *id.*

⁶⁰ See *infra* notes 61–62 and accompanying text. For more on the role played by complicity in conscience claims, see generally Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS* 187, 218 (Susanna Mancini & Michael Rosenfeld eds., 2018); NeJaime & Siegel, *supra* note 19; and Sawicki, *supra* note 30, at 1265.

⁶¹ *Pro-lifers Deny Government’s Right to Tax for Abortions*, *supra* note 42, at 5.

⁶² ZIEGLER, *supra* note 37, at 38.

⁶³ See *id.* at 42–43.

a way that other procedures or actions were not: an act of violence that long had been treated as a crime.⁶⁴ “[Y]ou cannot in logic and conscience fund the destruction of this innocent human life,” he told his colleagues.⁶⁵

Before the late 1990s, antiabortion lobbyists campaigned for laws barring wrongful birth and wrongful life suits on the ground that they were “‘conscience laws’ to protect doctors morally opposed to abortion.”⁶⁶ Congress expanded conscience protections too, responding to an intensifying struggle over accreditation requirements. As early as 1985, most OB-GYNs were either unwilling or unable to perform abortions: although eighty-four percent of them supported legal abortion, only a third of those performed abortions and only four percent of OB-GYNs who favored abortions performed twenty-six or more procedures a month.⁶⁷ By 1992, a study found that eighty-four percent of American counties had no abortion provider.⁶⁸ The reasons for the decline were not hard to find: abortion providers were not well paid and faced stigma, protests, and potential danger. Between 1977 and 1988 alone, there were well over 100 violent attacks on clinics,⁶⁹ and by the mid-1990s, extremists began murdering abortion providers.⁷⁰ In 1992, only twelve percent of OB-GYN residency programs offered instruction in routine first-trimester abortions.⁷¹ A dedicated campaign began, led by Medical Students for Choice, founded in 1993, and the National Abortion Federation, a group representing abortion providers, culminating in the 1995 decision of ACGME to require abortion training for any accredited OB-GYN program.⁷² The move prompted Republicans in Congress to pass the Coats-Snowe Amendment to the 1996 Omnibus Consolidated Rescissions and Appropriations Act,⁷³ which prohibited “[a]bortion-related discrimination in governmental activities regarding training and

⁶⁴ See *id.* at 43.

⁶⁵ *Id.*

⁶⁶ Georgia Dullea, *Courts Weigh Value of Unwanted Lives*, N.Y. TIMES, Apr. 12, 1982, at B6.

⁶⁷ See Gina Kolata, *Under Pressures and Stigma, More Doctors Shun Abortion*, N.Y. TIMES (Jan. 8, 1990), <https://www.nytimes.com/1990/01/08/us/under-pressures-and-stigma-more-doctors-shun-abortion.html> [<https://perma.cc/D5LT-3R92>].

⁶⁸ Jennifer Templeton Schirmer, *Physician Assistant as Abortion Provider: Lessons from Vermont, New York, and Montana*, 49 HASTINGS L.J. 253, 270 (1997).

⁶⁹ David A. Grimes et al., *An Epidemic of Antiabortion Violence in the United States*, 165 AM. J. OBSTETRICS & GYNECOLOGY 1263, 1263–68 (1991).

⁷⁰ On antiabortion violence and murders, see DAVID S. COHEN & KRISTEN CONNOR, *LIVING IN THE CROSSHAIRS: THE UNTOLD STORY OF ANTI-ABORTION TERRORISM* 4 (2015).

⁷¹ See Linda Villarosa, *Newest Skill for Future Ob-Gyns: Abortion Training*, N.Y. TIMES (June 11, 2002), <https://www.nytimes.com/2002/06/11/health/newest-skill-for-future-ob-gyns-abortion-training.html> [<https://perma.cc/FGB7-B4CL>].

⁷² See Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES MAG. (July 14, 2010), <https://www.nytimes.com/2010/07/18/magazine/18abortion-t.html> [<https://perma.cc/T38R-GBPW>].

⁷³ Pub. L. No. 104-134, 110 Stat. 1321, 1321-245 (1996) (codified at 42 U.S.C. § 238n(a)(1)).

licensing of physicians.”⁷⁴ The fight over accreditation reinforced the uniqueness of battles over conscientious provision: abortion could be both restricted by law and a required step in basic medical training.

A broader shift in conscience arguments came after the Food and Drug Administration approved two emergency contraceptives in 1998 and 1999.⁷⁵ Individual pharmacists began refusing to fill prescriptions for the drugs, and large chains, including Walmart, initially refused to stock them.⁷⁶ Objecting pharmacists, many of whom joined Pharmacists for Life, a group founded in 1984⁷⁷ and led at the time by Lloyd DuPlantis Jr., insisted not only that they had “a right to refuse to fill a prescription” but also that their beliefs about emergency contraception were reasonable.⁷⁸ “[B]ased on the way we feel that life begins at fertilization,” DuPlantis explained, “it’s an abortifacient mechanism.”⁷⁹ While framing his belief about the beginning of life as subjective, DuPlantis suggested that his thoughts on the functioning of the emergency contraceptive, Preven, were factual. This strategy soon gained momentum: by 2004, the prominent antiabortion organization Americans United for Life was pushing legislation in six states that would allow pharmacists to conscientiously object to filling prescriptions for emergency contraception.⁸⁰

By 2006, nearly twenty states were considering expansive conscience bills; while some focused on pharmacists, others swept much further, covering insurance companies, hospitals, clinics, and a variety of workers employed in the health care industry.⁸¹ Those championing these laws suggested that emergency contraceptives really did qualify as abortion-inducing drugs. In 2006, antiabortion activist Margie Montgomery, the proponent of a Kentucky conscience measure, explained: “Doctors tell us that Plan B can cause a very early abortion,

⁷⁴ *Id.*

⁷⁵ Michele Slachetka, Note, *Getting to Plan B: A History of Contraceptive Rights in the United States and an Argument for a Private Right of Action Against the FDA*, 16 WM. & MARY BILL RTS. J. 345, 351 (2007). On the approval of emergency contraceptives in the period and its significance, see HEATHER MUNRO PRESCOTT, *THE MORNING AFTER: A HISTORY OF EMERGENCY CONTRACEPTION IN THE UNITED STATES* 91–106 (2011).

⁷⁶ See Charu A. Chandrasekhar, *RX for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55, 56 & n.8 (2006); see also Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight*, N.Y. TIMES, Apr. 19, 2005, at A1 (describing the legislative push for state legislation granting pharmacists the right to refuse to dispense contraceptives).

⁷⁷ *About Us*, PHARMACISTS FOR LIFE INT’L, <https://www.pfli.org/main.php?pfli=aboutus> [<https://perma.cc/BH7V-WGBW>].

⁷⁸ See Dana Canedy, *Wal-Mart Decides Against Selling a Contraceptive*, N.Y. TIMES, May 14, 1999, at C1.

⁷⁹ *Id.*

⁸⁰ See Stephanie Simon, *Pharmacists New Players in Abortion Debate*, L.A. TIMES, Mar. 20, 2004, at A18.

⁸¹ Rob Stein, *Health Workers’ Choice Debated*, WASH. POST, Jan. 30, 2006, at A1, A9.

and we oppose that.”⁸² In 2008, when the Bush Administration unveiled a regulation allowing conscientious objectors, including receptionists and volunteers in medical research, the right to refuse participation in any conduct “contrary to their religious beliefs or moral convictions,”⁸³ antiabortion activists again insisted that concerns about complicity were warranted.⁸⁴ “Individuals and institutions committed to healing,” a spokesperson for the U.S. Conference of Catholic Bishops told the media, “should not be required to take the very human life that they are dedicated to protecting.”⁸⁵

These complicity-centered claims later took center stage in the response to the contraceptive mandate of the Affordable Care Act.⁸⁶ The mandate required insurance coverage for all FDA-approved contraceptive methods including several believed by abortion foes to terminate a pregnancy.⁸⁷ While exempting some religious employers, the mandate did not make an exception for religious for-profit businesses, and some brought challenges under the Religious Freedom Restoration Act⁸⁸ (RFRA), which prohibits the federal government from placing any substantial burden on a person’s religious exercise unless the government uses the least restrictive means of achieving a compelling governmental purpose.⁸⁹ Some antiabortion groups suggested that it was not for courts to determine what made an employer complicit: what mattered was the employer’s subjective experience of moral culpability.⁹⁰ At the same time, antiabortion amici suggested that these feelings of culpability were sensible because drugs covered by the mandate took a human life.⁹¹ “The approved contraceptive methods and procedures include abortion-inducing drugs and devices,” the Thomas More Society argued

⁸² Marc Kaufman, *Plan B Battles Embroil States*, WASH. POST, Feb. 27, 2006, at A1, A7.

⁸³ David G. Savage, *Conscience Rule Unveiled*, CHI. TRIB., Dec. 19, 2008, at 16.

⁸⁴ See *id.*

⁸⁵ *Id.*

⁸⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

⁸⁷ See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); J. Lester Feder, *Contraceptive Rule a Pill for Obama*, POLITICO (Dec. 7, 2011, 11:55 PM), <https://www.politico.com/story/2011/12/contraceptive-rule-a-pill-for-obama-070036> [<https://perma.cc/8N8J-TRPM>].

⁸⁸ Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated as applied to state and local laws* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁸⁹ *Id.* § 2000bb-1. For an overview of some of this litigation, see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701–05 (2014).

⁹⁰ See Brief of the United States Conference of Catholic Bishops as Amicus Curiae in Support of Hobby Lobby and Conestoga Wood Specialties Corp., et al. at 25, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354 & 13-356) (“If Hobby Lobby and Conestoga interpret the ‘creeds’ of their faith to prohibit provision of the mandated coverage, ‘[i]t is not within the judicial ken to question’ ‘the validity of [their] interpretation[.]’” (alterations in original) (quoting *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989))).

⁹¹ See *infra* notes 92–93 and accompanying text.

in one such amicus brief.⁹² A group of antiabortion OB-GYNs echoed this argument in their own amicus brief: “Drugs and devices with post-fertilization (*i.e.*, life-ending) mechanisms of action are included in the FDA definition of ‘contraception.’”⁹³ In 2014, the Supreme Court concluded that the contraceptive mandate violated RFRA.⁹⁴ In reaching this conclusion, the Court stressed that believers were burdened so long as they had an “honest conviction” about their complicity.⁹⁵ When it came to the actual function of emergency contraception, the *Hobby Lobby* majority implied in a footnote that these drugs caused termination after fertilization but before implantation — and that the only disagreement was about whether the prevention of implantation constituted an abortion.⁹⁶

These complicity-centered arguments tested the boundaries of existing frameworks for objecting health care workers. Leading medical authorities, including the American College of Obstetricians and Gynecologists (ACOG), maintained that emergency contraceptives did not act as abortifacients and were effective only before pregnancy was established.⁹⁷ By disputing the effects of these drugs, antiabortion groups suggested that these medical authorities were not to be trusted.

In part, this argument appealed to grassroots antiabortion activists already suspicious of ACOG and the broader medical establishment, which had largely rejected the movement’s arguments about contraception-related infertility and an abortion-elevated risk of breast cancer.⁹⁸ But at least implicitly, complicity-centered arguments questioned the relevance of medical expertise. If health care providers could cite moral reasons for opting out of otherwise applicable obligations to provide care, antiabortion activists reasoned, then why were questions about that care not better resolved in areas of the law that dealt with morality — particularly criminal law?

In the aftermath of *Dobbs*, this transition — from a health care frame to a criminal one — has been clear. Eighteen states have passed criminal bans on abortion, many of them from the moment an egg is

⁹² See Brief of Thomas More Law Center as Amicus Curiae in Support of Hobby Lobby and Conestoga, et al. at 7, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354 & 13-356).

⁹³ Amicus Curiae Brief of Drury Development Corporation, Drury Southwest, Inc., and Drury Hotels Company, LLC et al. at 11, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354 & 13-356).

⁹⁴ *Hobby Lobby*, 573 U.S. at 736.

⁹⁵ *Id.* at 725 (citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981)).

⁹⁶ *Id.* at 698 n.7 (“The owners of the companies involved in these cases and others who believe that life begins at conception regard these four methods as causing abortions, but federal regulations, which define pregnancy as beginning at implantation, do not so classify them.” (citation omitted)).

⁹⁷ See *Emergency Contraception*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (2022), <https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2015/09/emergency-contraception> [<https://perma.cc/K3N8-PTV8>].

⁹⁸ See ZIEGLER, *supra* note 37, at 157–59.

fertilized.⁹⁹ Some have retooled lifesaving exceptions as affirmative defenses to criminal charges.¹⁰⁰ And this might be just the beginning: lawmakers are considering the application of criminal laws on aiding or abetting to websites and internet service providers that provide information about abortion,¹⁰¹ the extraterritorial application of existing criminal laws,¹⁰² and even the use of criminal abortion laws against pregnant patients.¹⁰³ For years, antiabortion groups insisted that “abortion is not health care,”¹⁰⁴ but after the Supreme Court’s composition changed, they more clearly suggested that abortion was a crime — and that criminal rules, not medical norms, should guide its provision.

This idea figured centrally in the Court’s decision in *Dobbs*. Justice Alito’s opinion for the majority intervened in a broader historical debate about the standing of pre-quickening abortion, both before and after the ratification of the Fourteenth Amendment.¹⁰⁵ Ignoring the majority

⁹⁹ *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023, 5:00 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/3KL7-PV55].

¹⁰⁰ See TENN. CODE ANN. § 39-15-213(c) (2022); IDAHO CODE § 18-622(3) (2022).

¹⁰¹ See Cat Zakrzewski, *South Carolina Bill Outlaws Websites that Tell How to Get an Abortion*, WASH. POST (July 22, 2022, 5:27 PM), <https://www.washingtonpost.com/technology/2022/07/22/south-carolina-bill-abortion-websites> [https://perma.cc/DGL3-73CQ] (detailing the consideration of a proposed South Carolina law modeled off a blueprint proposed by the National Right to Life Committee that defines aiding or abetting broadly); Daniel Wiessner, *Legal Clashes Await U.S. Companies Covering Workers’ Abortion Costs*, REUTERS (June 27, 2022, 4:08 PM), <https://www.reuters.com/world/us/legal-clashes-await-us-companies-covering-workers-abortion-costs-2022-06-26> [https://perma.cc/XCQ5-RWU7] (considering the potential application of existing criminal laws on aiding or abetting).

¹⁰² See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–52 (2023).

¹⁰³ This idea, championed by so-called abortion “abolitionists,” appears in model bills and received serious consideration from lawmakers in Louisiana. See Rick Rojas & Tariro Mzezewa, *After Tense Debate, Louisiana Scraps Plan to Classify Abortion as Homicide*, N.Y. TIMES (May 12, 2022), <https://www.nytimes.com/2022/05/12/us/louisiana-abortion-bill.html> [https://perma.cc/86NL-JNGX]. For more on the abortion abolitionists, see Elizabeth Dias, *Inside the Extreme Effort to Punish Women for Abortion*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/us/abortion-abolitionists.html> [https://perma.cc/5N6V-WU69].

¹⁰⁴ See *Call Legislator*, AM. ASS’N PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, <https://aaplog.org/call-legislator> [https://perma.cc/KT55-ZY9X]; *Five Things that Planned Parenthood Doesn’t Want You to Know*, STUDENTS FOR LIFE AM. (Aug. 13, 2020), <https://studentsforlife.org/2020/08/13/five-things-that-planned-parenthood-doesnt-want-you-to-know> [https://perma.cc/M746-YSA6].

¹⁰⁵ Compare JOHN KEOWN, *ABORTION, DOCTORS, AND THE LAW: SOME ASPECTS OF LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982*, at 3–5 (1988) (explaining that from 1200–1600 English common law courts appeared to avoid convicting for abortion “not denying abortion to be a secular offence,” *id.* at 5, but because they “were content to allow the exceptional difficulties of proof that it posed to be resolved in an ecclesiastical forum [(church courts)],” *id.*), and JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY*, at xii (2006) (arguing that “Anglo-American law has always treated abortion as a serious crime, generally even including early in pregnancy”), with JANET FARRELL BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA* 253–58 (1994) (stating that prior to the 1830s abortion was treated in America according to “common law tradition,”

scholarly view, Justice Alito stressed that the common law had always treated abortion as immoral, if not fully criminal.¹⁰⁶ *Dobbs* reiterated that the proper understanding of abortion was not as a right deeply rooted in history and tradition or as a form of health care.¹⁰⁷ Instead, the Court reasoned that “an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”¹⁰⁸ This reading of the history — problematic as it is — expands on the complicity-centered ideas that had been circulating in the antiabortion movement for decades.

Fox recognizes the complications facing his proposal in a post-*Dobbs* world. He does an admirable job of heading off potential abuses of a medical disobedience defense, requiring that conscientious providers obtain meaningful consent from their patients, conform with reasonable medical practice, and refrain from wasting scarce medical resources.¹⁰⁹ This defense is attractive, not least because the distinction between acts and omissions does not always make much sense. But after *Dobbs*, many states suggest that the context is not a medical one at all. They frame abortion as a crime and suggest that a different set of considerations should shape the conversation. And once criminal law is on the table, history counsels that disobedience of any kind is far more complicated, doctrinally and otherwise.

Fox proposes that criminal sentences should be mitigated when “a competent patient or appropriate surrogate give[s] informed consent to the prohibited procedure.”¹¹⁰ Significantly, however, in the pre-*Roe* era, courts did not allow doctors to raise their patients’ consent as a mitigating factor in the crime of abortion.¹¹¹ Indeed, at common law, courts disallowed consent as a defense or mitigating factor any time that the law made an act “criminal because it primarily injures the public.”¹¹²

id. at 254, in which pre-quickening abortions were not punishable), JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 3–22 (1978) (similar), LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 8–18 (1998) (same), SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 10–17 (2011) (same), and DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 11 (2016) (same).

¹⁰⁶ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2251 (2022) (“[A]lthough common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice.”).

¹⁰⁷ See *id.* at 2253–54.

¹⁰⁸ *Id.*

¹⁰⁹ See Fox, *supra* note 1, at 1081–96.

¹¹⁰ *Id.* at 1085.

¹¹¹ *State v. Brown*, 85 A. 797, 803 (Del. 1912); *State v. Decker*, 104 S.W.2d 307, 311 (Mo. 1937); *State v. Edwards*, 152 A. 452, 452 (N.J. 1930); *McCandless v. State*, 162 N.Y.S.2d 570, 573–74 (App. Div. 1957).

¹¹² James J. Lorimer, Note, *Consent as a Defense to Crimes Against the Person*, 54 DICK. L. REV. 186, 193 (1949); see also *Taylor v. State*, 133 A.2d 414, 415 (Md. Ct. App. 1957) (“A criminal assault which tends to bring about a breach of the public peace is treated as a crime against the public generally, and therefore the consent of the victim is no defense.”).

Most morals offenses, such as punishments for fornication or sodomy, fell into this category.¹¹³ So did crimes that involved the taking of a life, such as euthanasia.¹¹⁴

Fox is certainly right that medical practitioners routinely ignore euthanasia laws by administering potentially fatal doses of painkillers or other drugs.¹¹⁵ But making consent formally relevant might be a different matter, especially when the law frames a crime as one that is either a victimless or violent offense — categories that states could easily apply to abortion, gender-affirming care, and other criminalized services.

Fox's next requirement for mitigation is that medical disobedience be "clinically reasonable on the balance of medical risks and benefits to patients."¹¹⁶ But the question of medical reasonableness — or even medical necessity — will seem out of step with criminal laws that do not treat abortion, gender-affirming care, or other treatments as medical procedures in the first place. Indeed, in the abortion context, states have already legislated a definition of medical reasonableness, allowing for access to abortion only when a patient's life would be at risk,¹¹⁷ for example, or only when a patient is likely to suffer permanent "impairment of a major bodily function."¹¹⁸ It seems unlikely that lawmakers would allow for mitigation based on a medical judgment at odds with the one written into a criminal law. Some antiabortion leaders have even pushed to establish that any procedure needed to protect the life or even health of the pregnant person is not an abortion but another medical procedure — and that abortion has an inherent moral meaning, one associated with the intentional taking of fetal life.¹¹⁹ This strategy again frames abortion as a moral and criminal matter and suggests that doctors, including conscientious providers, should have no say in the matter.

But Fox is right that medical disobeyers have made a difference in the past, not least when it comes to abortion.¹²⁰ Might conscientious providers receive a similar reception today? I think the answer is yes, but only if Fox adjusts his proposal. Courts in particular have been very leery of conscientious objection in the context of criminal law. The

¹¹³ See Lorimer, *supra* note 112, at 193.

¹¹⁴ See *id.*

¹¹⁵ Fox, *supra* note 1, at 1055.

¹¹⁶ *Id.* at 1087.

¹¹⁷ E.g., UTAH CODE ANN. § 76-7a-201(1)(a)(i) (West 2022).

¹¹⁸ *Id.* § 76-7a-201(1)(a)(ii) (providing an exception if "the abortion is necessary to avert . . . a serious risk of substantial and irreversible impairment of a major bodily function of the woman").

¹¹⁹ *Premature Delivery Is Not Induced Abortion*, AM. ASS'N PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, <https://aaplog.org/premature-delivery-is-not-induced-abortion> [<https://perma.cc/EE4J-JP9G>] ("Induced abortion, that is the deliberate killing of an unborn child prior to separating that child from the mother, is never necessary to save the life or preserve the health of any woman.").

¹²⁰ Fox, *supra* note 1, at 1053–55.

issue becomes how to distinguish medical disobedience from any other kind.

II. MEDICAL VERSUS CIVIL DISOBEDIENCE

Fox argues persuasively that there should be no bright line between conscientious objection and provision.¹²¹ But for many courts, there is a firm distinction between conscientious objection and a refusal to obey otherwise-applicable criminal laws. Recognizing this hurdle is easier when we understand courts' deep discomfort with necessity defenses, especially in contexts of social movement mobilization.

Fox is not proposing a necessity defense, of course, and juxtaposes his framework with it.¹²² But disobedience of any kind may face obstacles that are easier to see when we consider courts' treatment of the necessity defense. Consider, for example, the widespread use of necessity defenses by antiabortion protesters in the late 1980s and 1990s. Operation Rescue, founded by Randall Terry, radically expanded on the model of clinic protest developed by antiabortion activists in earlier decades, hosting blockades of abortion clinics and counseling protesters to get arrested, clog the courts, and force a reckoning about abortion.¹²³ Blockaders also hoped to use their trials to publicize their claims that abortion was murder.¹²⁴ Often, they yoked their beliefs to the necessity defense, which applies when a criminal act is "necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense."¹²⁵

Some of the problems with blockaders' civil disobedience claims flowed from the fact that, at the time, courts treated abortion as a fundamental right. A necessity defense applies only to cases where the wrong prevented was "a legal harm or evil as opposed to a moral or ethical belief of the individual defendant."¹²⁶ As a Missouri court explained in 1989, necessity defenses did not work "when the harm sought to be avoided [(abortion)] remains a constitutionally protected activity and the harm incurred [(trespass)] is in violation of the law."¹²⁷

But courts' discomfort with civil disobedience ran deeper. In one case, antiabortion protesters Joseph Wall and Joan Andrews faced trespassing charges in the late 1980s after invading an abortion clinic.¹²⁸ The Superior Court of Pennsylvania rejected their necessity defense.¹²⁹

¹²¹ *Id.* at 1063–75.

¹²² *Id.* at 1081–85.

¹²³ See ZIEGLER, *supra* note 37, at 86.

¹²⁴ See ZIEGLER, *supra* note 26, at 218.

¹²⁵ *United States v. Bailey*, 444 U.S. 394, 410 (1980) (quoting *United States v. Bailey*, 585 F.2d 1087, 1097–98 (D.C. Cir. 1978)).

¹²⁶ *City of Wichita v. Tilson*, 855 P.2d 911, 914 (Kan. 1993).

¹²⁷ *State v. O'Brien*, 784 S.W.2d 187, 192 (Mo. App. 1989).

¹²⁸ *Commonwealth v. Wall*, 539 A.2d 1325, 1326–27 (Pa. Super. Ct. 1988).

¹²⁹ *Id.* at 1328.

“To accept appellant’s argument would be tantamount to judicially sanctioning vigilantism,” the court explained.¹³⁰ “If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos.”¹³¹

In part, courts’ suspicions stem from rule of law concerns. In theory, any disobeyer has an alternative to breaking the law, such as public education efforts, grassroots protest, litigation, or lobbying.¹³² Disobeyers can appear to be sore losers — people who demand that the law immediately honor their beliefs even when they have failed to convince the elected branches of government to change the law.

And mitigating the penalties facing disobeyers could send the message that complying with the law is optional as long as one pledges loyalty to a higher moral code. Even if some civil disobeyers have sympathetic causes, courts fear that treating criminal disobeyers differently will lead to less respect for and willingness to follow the law. “While legally sanctioned forms of activism might not have achieved an *immediate* halt to [the harm they seek to stop], ‘appellants cannot claim they have no legal alternatives merely because their law-abiding efforts are unlikely to effect a change in policy as soon as they would like,’” the First Circuit explained in 2002.¹³³ “A contrary holding ‘would be tantamount to giving an individual *carte blanche* . . . whenever he becomes disaffected by the workings of the political process.’”¹³⁴

Disobeyers also raise separation of powers concerns. A judge or jury recognizing a disobedience defense will in effect decide that the moral (or policy) upshot of a disobeyer’s objections should mitigate the criminal consequences of their actions. But this may oblige a court to second-guess legislatures’ moral judgments. “[N]egative political or policy judgment about that course of action,” the Eighth Circuit reasoned, “are not the province of *judge (or jury)* under the separation of powers established by our Constitution.”¹³⁵

Further, civil disobedience defenses can invite discriminatory application. For example, historian Alicia Gutierrez-Romine has documented how, in California before *Roe*, prominent Black physicians whose patients died during abortions faced murder convictions for procedures performed at a time when white counterparts whose patients died faced less harsh sentences or were simply acquitted.¹³⁶ Midwives and other

¹³⁰ *Id.* at 1329.

¹³¹ *Id.*

¹³² See *State ex rel. Haskell v. Spokane Cnty. Dist. Ct.*, 465 P.3d 343, 350 (Wash. Ct. App. 2020).

¹³³ *United States v. Ayala*, 289 F.3d 16, 27 (1st Cir. 2002) (quoting *United States v. Sued-Jiménez*, 275 F.3d 1, 7 (1st Cir. 2001)).

¹³⁴ *Id.* (quoting *United States v. Maxwell*, 254 F.3d 21, 29 (1st Cir. 2001)).

¹³⁵ *United States v. Kabat*, 797 F.2d 580, 591–92 (8th Cir. 1986) (emphasis added).

¹³⁶ See ALICIA GUTIERREZ-ROMINE, *FROM BACK ALLEY TO THE BORDER: CRIMINAL ABORTION IN CALIFORNIA, 1920–1969*, at 75–91 (2020).

women who participated in abortion outside the hospital setting, including steerers, also faced comparably harsh penalties.¹³⁷

The possibility of discriminatory enforcement makes courts leery of picking winners and losers among those with objections to the law. Some defendants will be more sympathetic to a given jury or judge because of their race, class, sex, sexual orientation, religion, gender identity, or education. Instead of unfairly favoring some conscientious disobeyers over others, courts have given up the enterprise of protecting them altogether.

III. THE MEDICAL DISOBEDIENCE DISTINCTION

Implicit in Fox's argument is a claim that medical disobedience is different in ways that matter. Civil disobedience creates unease for courts because protesters pledge their loyalty to a higher law. Medical disobeyers, too, have divided loyalties, but they differ in kind. These conscientious providers object that the laws require them to take steps that are not medically reasonable.

Questions of medical reasonableness differ in salient ways from the objections raised by most disobeyers. First, different standards define medical reasonableness. Expert bodies, such as the American Medical Association (AMA), issue official pronouncements on specific medical procedures; other entities set norms for the accreditation of medical programs or set licensing standards for medical providers or those seeking board certification. Recently, for example, the AMA introduced standards for providing care in public health emergencies.¹³⁸ As Fox observes, this creates a professional and at times legal conundrum for physicians, who may have to refuse patients treatment that is concurrently criminally prohibited and medically mandated.¹³⁹

Second, because medical standards of care are relatively concrete (if not uncontested), courts will not have to engage in a free-ranging policy analysis to adjudicate cases of medical disobedience. In medical malpractice cases, courts routinely apply a national standard to determine what a reasonable practitioner would do, given that provider's specialty and surrounding circumstances.¹⁴⁰ Courts are familiar with this inquiry, as well as with the gatekeeping required to determine which expert witnesses are competent to establish a standard of care. Courts applying a medical disobedience test will be applying rules rooted in medical practice, tort law, and the rules of evidence rather than taking moral questions away from other branches of government. Because courts will be

¹³⁷ See *id.* at 100–09.

¹³⁸ See *Crisis Standards of Care: Guidance from the AMA Code of Medical Ethics*, AM. MED. ASS'N (Apr. 5, 2020), <https://www.ama-assn.org/delivering-care/ethics/crisis-standards-care-guidance-ama-code-medical-ethics> [https://perma.cc/PL5D-CU85].

¹³⁹ See Fox, *supra* note 1, at 1096.

¹⁴⁰ See, e.g., *Norris v. Fritz*, 270 P.3d 79, 87 (Mont. 2012).

looking at conventional evidence-based findings to identify a standard of care, the danger of discriminatory enforcement is less acute.

And medical disobeyers may have fewer valid alternatives to law-breaking. Courts may fault civil disobeyers for failing to seek out legal strategies to register their objections to the status quo, such as public education or grassroots protest. In theory, physicians can engage in any of these steps to bring legislation into conformity with medical norms. But this process may well be more complicated because physicians are not asking legislators to reevaluate their moral judgments but instead to account for a different set of decision criteria, those involving patient outcomes and medical norms. Changing the frame in which lawmakers operate may well be harder than asking people to reconsider their views on a moral matter.

An account of what distinguishes medical disobedience from other forms of civil disobedience will bolster the case for the mitigation that Fox outlines. But the line between political and medical contestation has blurred in a number of areas where medical disobedience would be most likely. In the abortion context, groups like the Charlotte Lozier Institute,¹⁴¹ the American Association of Pro-Life Obstetricians and Gynecologists,¹⁴² and other antiabortion entities employ field experts who publish research and gather data. Policies criminalizing or reducing access to gender-affirming care have come from state health departments and relied on the views of physicians.¹⁴³ Do the views of these entities count when assessing a medical reasonableness standard, even if they are rejected by elite medical organizations? Given the politicization of any number of medical procedures, unsympathetic jurors or judges could easily find a medical intervention to be unnecessary or even unreasonable — or at least find that the evidence is contested enough that a medical disobedience test is unwarranted.

Perhaps the most daunting issue is not a legal one. Fox suggests that medical disobedience is different in part because medical expertise is valuable,¹⁴⁴ but for decades, fewer Americans have agreed with that proposition. Communities of color have long distrusted the medical establishment — and with dire consequences.¹⁴⁵ In 1972, the press broke

¹⁴¹ *About Lozier Institute*, CHARLOTTE LOZIER INST., <https://lozierinstitute.org/about> [<https://perma.cc/J737-N7GY>].

¹⁴² *About Us*, AM. ASS'N PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, <https://aaplog.org/about-us> [<https://perma.cc/K56N-B7CD>].

¹⁴³ See, e.g., Jo Yurcaba, *Florida Medical Board Votes to Ban Gender-Affirming Care for Transgender Minors*, NBC NEWS (Oct. 29, 2022, 10:28 AM), <https://www.nbcnews.com/nbc-out/out-news/florida-medical-board-votes-ban-gender-affirming-care-transgender-minors-rcna54632> [<https://perma.cc/LBG8-R3RW>].

¹⁴⁴ See Fox, *supra* note 1, at 1087.

¹⁴⁵ See Austin Frakt, *Bad Medicine: The Harm that Comes from Racism*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html> [<https://perma.cc/HY9F-EMXL>].

the news of the so-called Tuskegee Study of Untreated Syphilis.¹⁴⁶ Beginning in the early 1930s, the U.S. Public Health Service recruited 600 low-income Black men for the study, many of them suffering from syphilis, did not inform them about what was happening, and refused to provide those suffering from syphilis with readily available treatment — all while the evolution of untreated syphilis was already well understood.¹⁴⁷ The study was not an isolated incident, even in the twentieth century: low-income patients of color were disproportionately victimized by eugenic sterilization laws after World War II¹⁴⁸ and, in the 1960s and 70s, targeted for forced sterilization by rogue doctors performing what were colloquially known as “Mississippi appendectomies”¹⁴⁹ (it is estimated that twenty-five percent of Native American women of childbearing age were involuntarily sterilized in the same period).¹⁵⁰ Today, more subtle harms reinforce this distrust: physicians, for example, are less likely to believe Black patients who report experiencing pain¹⁵¹ and more likely to dismiss these patients as being “noncompliant.”¹⁵² The upshot is that patients of color are less likely to seek treatment — and receive a markedly lower quality of care when they do.¹⁵³

In recent years, distrust of the medical profession has metastasized. The COVID-19 pandemic has given us no shortage of evidence of the value of scientific knowledge. But the pandemic, like conflicts about divisive forms of care, has also made clear that respect for medical expertise has substantially eroded. A 2014 study published in the New

¹⁴⁶ Jean Heller, *Syphilis Victims in U.S. Study Went Untreated for 40 Years*, N.Y. TIMES (July 26, 1972), <https://www.nytimes.com/1972/07/26/archives/syphilis-victims-in-us-study-went-untreated-for-40-years-syphilis.html> [<https://perma.cc/8YP2-KNN7>]. On the Tuskegee Study, see generally SUSAN M. REVERBY, EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY 6–28 (2009); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 157–85 (2008).

¹⁴⁷ See Allan M. Brandt, *Racism & Research: The Case of the Tuskegee Syphilis Study*, 8 HASTINGS CTR. REP. 21, 23, 27 (1978) (“In retrospect the Tuskegee study revealed more about the pathology of racism than it did about the pathology of syphilis.” *Id.* at 27.).

¹⁴⁸ See JOHANNA SCHOEN, CHOICE & COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE 108 (2005).

¹⁴⁹ See DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 90 (1997); see also MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 24–26 (2020).

¹⁵⁰ Brianna Theobald, Opinion, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters.*, TIME (Nov. 28, 2019, 11:47 AM), <https://time.com/5737080/native-american-sterilization-history> [<https://perma.cc/B7BY-87UP>]. For more on the history of the sterilization of Native women in America, see generally BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY (2019).

¹⁵¹ See Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, And False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCIS. U.S. 4296, 4296 (2016).

¹⁵² See Michael Sun et al., *Negative Patient Descriptors: Documenting Racial Bias in the Electronic Health Record*, 41 HEALTH AFFS. 203, 203 (2022).

¹⁵³ See Frakt, *supra* note 145.

England Journal of Medicine had already demonstrated that Americans place less trust in the medical profession than do those surveyed in other countries;¹⁵⁴ in 2021, a poll published by the Harvard T.H. Chan School of Public Health and the Robert Wood Johnson Foundation found that a minority of respondents trusted the National Institutes of Health, the Food and Drug Administration, the Surgeon General, or their state or local departments “a great deal.”¹⁵⁵ The Centers for Disease Control and Prevention did not fare much better, with only about half of Americans placing a great deal of trust in the institution.¹⁵⁶

So, Fox’s project is a political as well as a legal one. If history has offered us examples of what happens when we put too much faith in medical expertise,¹⁵⁷ the present is a powerful reminder of what goes wrong when we discount it too much. An effective medical disobedience defense would require political and cultural work to rebuild trust in the medical profession — and to explain why and how medical expertise is valuable, even when our deepest national fractures are at issue. But saying so is hardly a knock on Fox’s proposal — quite the contrary. If we seek to rebuild trust in medical expertise, we cannot start soon enough.

¹⁵⁴ Robert J. Blendon et al., *Public Trust in Physicians — U.S. Medicine in International Perspective*, 371 NEW ENG. J. MED. 1570, 1570–72 (2014).

¹⁵⁵ ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, THE PUBLIC’S PERSPECTIVE ON THE UNITED STATES PUBLIC HEALTH SYSTEM 5 tbl.1 (2021), https://cdni.sph.harvard.edu/wp-content/uploads/sites/94/2021/05/RWJF-Harvard-Report_FINAL-051321.pdf [<https://perma.cc/SM2W-TY7P>].

¹⁵⁶ *Id.*

¹⁵⁷ See Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 LAW & HIST. REV. 63, 63–103 (1998) (chronicling the role that faith in scientific expertise played in the eugenics movement of the early twentieth century); REVERBY, *supra* note 146, at 6–14.