C/L 205: Jessica Mason Pieklo

Jenn Stanley: For Rewire Radio, I'm Jenn Stanley, and this is CHOICE/LESS. The past two weeks, we've heard from people who were denied care at Catholic hospitals because the hospitals claimed their treatment plans violated the church's ethical and religious directives.

Evan Minton is a transgender man who was denied a hysterectomy at a Catholic hospital in California. Mindy Swank was already a mother and in need of a therapeutic abortion for an unviable pregnancy, but the Catholic-affiliated hospital she went to in Illinois sent her home bleeding and in pain several times before they would intervene.

We've covered Catholic hospitals quite a bit here at Rewire, and I've gotten a lot of questions about these stories, like, "How does this happen?" "Is this legal?" "Should religious institutions be able to deny care that they disagree with?" These are all great questions, but as it turns out, they don't have such simple answers.

No matter where you're leaning in this debate, a few facts are very important to keep in mind, like, one in six hospital beds in the United States is controlled by the Catholic church, and that number is growing. For many Americans, Catholic hospitals are the only option, especially in an emergency when they'll be taken into the nearest hospital.

Finally, not all hospitals that follow the Catholic ethical and religious directives have religious sounding names. In many cases, in Mindy's case even, patients don't realize that the hospitals treating them are Catholic.

In this episode, we're taking a step back from personal stories. To dig a little deeper and gain some more insight into what exactly was going on in Mindy and Evan's stories, I brought in Rewire's own vice president of law and the courts, Jessica Mason Pieklo.

Jess knows this stuff inside and out. As an attorney she worked in medical malpractice and health-care law, and here at Rewire she provides daily reporting, analysis, and commentary on reproductive rights and social justice issues that are happening within the courts.

Just a few months ago, Rewire launched a new legislative tracker that specifically tracks religious imposition laws across the country, state by state.

Jess, can you tell us a little bit about this kind of legislation and how this tracker came to be?

Jessica Mason Pieklo: Sure. Once we, at Rewire, had the opportunity and the experience tracking anti-abortion and anti-contraception legislation at the states and following the Supreme Court's decision in Obergefell that affirmed marriage equality across the board, we noticed an uptick in certain bills designed to restrict the impact of that Supreme Court decision immediately.

Knowing what we knew from the anti-abortion realm, we figured that there was probably a pattern to this and that it would be a good idea to start tracking it, and so that's exactly what the impetus was for the religious imposition tracker. Our hunch has proved accurate. We've seen a significant uptick in legislation designed to target the rights of LGBTQ people and the rights of women in terms of anti-contraception measures, and so-called religious freedom was that are designed to shield individuals and businesses from complying with otherwise upheld civil rights protections.

One of the things that we are really proud of with the tracker that I think is really useful and will be a really critical tool as we get further into the legislative session and as we see cooperation between the Trump administration and conservative state houses is the ability to track legislative activities.

When you are looking at the tracker, you'll see a map of the United States and it's shaded in various colors of red, and that red signals the amount of legislative activity with regard to religious imposition laws that are happening in a particular state.

For example, if you were to hover over the state of Oklahoma, that state is very red, and that's not necessarily because it has the most religious imposition laws enacted and on its books and in effect, but in part, because lawmakers there consistently, time and time again, session after session after session, introduce measure after measure after measure, designed to limit the civil rights of other folks under the guise of religious freedom bills.

The tracker allows you to not just see what bills are in effect, but what lawmakers are passing and trying to pass in introducing laws across the board. Which is important, because one of the things that we've learned from the anti-abortion movement is that conservative lawmakers will use trial balloons in states all the time and they will push laws and model legislation that they hope to get passed just somewhere and they will keep working on and keep working on it and fiddling with it and fiddling with it.

We found that, very specifically in the tracker, we have the laws organized in categories. For example, right after the marriage equality decision, we saw a lot of bills that we cover for bills that are religious freedom restoration act bills and modeled after the federal legislation.

There was a cultural shift away from that. People broadly speaking supported the marriage equality decision, and so as popular public opinion turned, we saw conservative lawmakers go away from those RFRAs and move towards what we've categorized as anti-transgender bills, or bathroom bills, for example. Targeting a very specific population there when previous legislative efforts proved to be politically less popular.

Jenn Stanley: I know that's a lot of information, but the tracker lays this all out in a very simple, easy to understand way. I'll provide a link to that on our website and in the podcast description. Definitely, check it out.

No matter how much of a grasp you have on the issues of religious imposition laws and Catholic ethical and religious directives, the details can be complicated and confusing. In part, because the language and practice of these exemptions kind of lives in a legal gray area.

Let's take Mindy's case for example. Religious imposition laws play a part in her story, and she worked with the ACLU to get an amendment to Illinois conscience refusal law that says, "Sure, Catholic hospitals can refuse to provide services they disagree with, but they have to inform patients of all their options and refer for care if they don't provide those services.

The ACLU also sued on behalf of Tamesha Means, a pregnant woman who is denied emergency medical treatment for a miscarriage, because the hospital is prohibited from providing appropriate care by the religious directives.

As Jess explained to me, Catholic hospitals don't always need to rely on religious imposition laws. The directives are enough.

Jessica Mason Pieklo: What's really interesting about religious imposition laws and the case of health-care refusals is that, generally speaking, the religious imposition laws that are on the books are not cited as the basis for the religious refusal. Instead, what's cited as the basis for the religious refusal are Catholic directives. Directives from the bishops themselves.

On the one hand, that shows that there's this multilayer and web of legal restrictions or protections, depending on how you want to look at it, for when issues of faith conflict with civil rights protections. When we're talking about religious refusals in the health-care context, sometimes they may be covered by laws that permit certain conscious refusals. Pharmacists, for example, can, in some cases, refuse to fill a prescription for birth control, but they often then need to refer the patient to somebody or to a pharmacy that will.

In the case of Catholic hospitals, for example, turning patients away, they're not relying really on state religious imposition laws to protect them. They're relying on dogma and doctrine from the bishops that say, "This is how care in these institutions will be delivered."

Jenn Stanley: Don't they need religious imposition laws to be able to do that? Don't they rely on that kind of law, or no? What is their legal support in these cases? Can they just say, "We don't want to do it, so we're turning you away."

Jessica Mason Pieklo: That's what we're trying to figure out right now, which is what is their legal support for it? Many of these instances, the hospitals have not relied on state religious imposition laws. They've relied simply on the church directives. In the Tamesha Means case, this issue came up, specifically, because the ACLU sued on the directives and said, "If you're going to do that, then that creates negligence and also an avenue for opening up liability for the bishops directly themselves," which would be a big deal. We're talking about hundreds of thousands of dollars in medical damages, institutions that they say they don't have the ability to pay those things. Having more packets in that sense is better.

In the Means case, Federal Court of Appeals said, "It's not really the Federal Court's job to go in and start deciding what they categorized as matters of faith." The Federal Appeals Court, they're punted on whether or not the directives could be the basis of defending against a medical negligence claim like the ones that come up in these refusals.

Now, there's a slightly different battle going on under the ACA, in section 1557, which is the Affordable Care Act's broad nondiscrimination on the basis of gender provision. There has been some litigation around there. In particular, there's the Franciscan Alliance case, which is in Texas, which is situated like the first, the Notre Dame and the Little Sisters challenges to the birth control benefit.

In that case, they're arguing that the Religious Freedom Restoration Act is actually a shield from them having to comply with section 1557. Complying with section 1557 would mean things like being nondiscriminatory in the case that they provide trans patients, or by making full comprehensive reproductive healthcare available at all healthcare facilities.

Jenn Stanley: Section 1557 of the Affordable Care Act plays a big role in Evan's story. Evan is a transgender man who was denied of hysterectomy by the Catholic hospital he was being treated at. The hospital said that they wouldn't perform a sterilization procedure unless there was a clear and present pathology.

Gender dysphoria is a clear and present pathology, and transgender patients are protected as anyone else would be under section 1557 of the Affordable Care Act, which prohibits gender discrimination in health care.

When I was reporting Evan's story, his lawyers wanted me to make it very clear that by ignoring the pathology of gender dysphoria, the hospital was discriminating against Evan on the basis of his gender.

Jessica Mason Pieklo: Evan's story is, I agree with you, I think a pretty textbook clear-cut case of gender discrimination. The objection that religious institutions make to treating transgender patients is a religious objection based on their existence as transgender, and there's a little bit to breakdown there.

You had mentioned that the hospital said that they wouldn't provide a sterilization service without a clear pathological, or a clear diagnosis of pathology. Sterilization, broadly, is prohibited under the directives. That's the first hurdle.

Evan is able to clear that hurdle, right? There's gender dysphoria. There's the pathology that's required. Except that these institutions won't acknowledge or recognize gender dysphoria as a pathology, because their religious beliefs dictate that biological sex is immutable and derived from God. Therefore, any variation or treatment of that is, in fact, a violation of their religious beliefs. Under that thinking, trans patients can't ever get care.

The standard model that had been in play for a while of refuse and refer is a pretty decent balance, right? If somebody sincerely has a religious objection to providing contraception, they sincerely believe that hormonal contraception is religiously against their moral code, or whatever, then fine. I have questions about why you're working in certain professions to begin with, but put those aside, there can be a balance.

You, pharmacists, may not have to fill this prescription, but you do need to refer somebody to a pharmacy that will. I think that it has to be reasonable too. It doesn't do anybody any good to refer somebody to a pharmacy that is 80 or 90 miles away with limited hours. That referral has to be meaningful.

We've seen a slide away from that even, and the argument is that the referral itself is a violation, because it's furthering of perpetuating, or making them complicit in sin, was how the Little Sisters of the Poor phrased it in their challenge to the birth control benefit. We've seen a slide away from reasonableness.

Jenn Stanley: This also puts doctors in a tricky spot, which we heard a little bit about from Dr. Debra Stulberg at the end of last season. If a doctor knows the best course of treatment but can't provide care because of the directives, so instead, has to refer someone elsewhere for proper and lifesaving care, well that could be seen as negligence if something were to happen to that patient along the way.

Jessica Mason Pieklo: What happens when these directives conflict with the delivery of medical care from the perspective of the doctor, from the perspective of the provider, who is trained under medical malpractice norms and understands what that means, that the delivery and the standard of care means that all patients are able to guarantee that they received a certain floor of care, right? Not everybody is guaranteed that they always get the best care available to them every single time.

Under concepts of medical malpractice and medical negligence, you should have a guarantee that you have a baseline of care. There are no clear protections for doctors in those instances. One thing that is an issue that doctors often are under contract as independent contractors with hospitals. There's a very specific reason why that is, and that's because it decreases the medical malpractice costs for the hospital. Doctors get sued, and then hospitals get sued. Doctors are often these independent contractors on their own.

That also creates a really handy way for hospitals to shirk responsibility when these directives dictate care, because they can say, "Oh, well. This case would have been different," but we don't have the quantitative data to prove the claim of, "Well, this case would have been different," because there aren't enough exceptions. The Catholic hospitals aren't doing enough exceptions to their own directions that we actually have data that would be reliable to say, "Oh! That's a believable claim," versus, "Just trust us, we would have acted differently had the doctor presented us with this information or had we known X, Y, and Z."

One of the outstanding questions that the courts haven't answered to any full conclusory manner is what degree to which medical malpractice claims can trump the claims of hospitals that they are relying on directives, and so therefore, the courts can't peek in and second guess them.

That's a real open question in the courts right now, which is troubling to say the least, because it absolutely does put doctors between a rock and a hard spot. Because if they are not following the directives, or at least, obviously, not following the directives, then, absolutely, that subjects them to risk of termination. Then, you think of all of the ways in which soft discrimination and blowback happens at the workplace too, so that if you're a doctor that are asking ... Then you're someone who's asking for one, or two, or three, or four exceptions to the directives there, you'll probably be viewed with some suspicion. Then, what does that mean?

The point is, I think, broadly, that individual religious belief is something that this country has long cherished, and supported, and really tried to accommodate. When that belief then gets imposed on others in the way that interferes with their bodily autonomy, in which directs and dictates their fundamental humanity, then those scales are out of balance.

Jenn Stanley: My hope is that this information helps you think more clearly about the complexities of religious imposition as it relates to healthcare. More practically, I hope this information can help patients protect themselves moving forward.

One of the major protections against religious refusal that people have on their side right now is the Affordable Care Act, and the future of the healthcare law is unclear at best. Jess, what can people do to protect themselves moving forward and to make sure they're getting the best possible care?

Jessica Mason Pieklo: Yeah, it's an excellent question. It is a really sad thing that, in 2017, we're asking the question of how can patients properly protect their rights and make sure that they're treated with their full dignity and humanity intact when they go to a hospital.

In terms of the legal protections and the immediate, I think it's just important for journalists and advocates to make sure that we are very clear about the fact that with 1557, for example, it's still a good law. You still, as an individual, have those protections. You may not have the full force and effect of the federal government going to bat for you at the moment with those protections, but you still have them.

If you feel like you've been mistreated, absolutely, contact an attorney, and there are attorneys who are working in this area. Gender Justice is an organization that comes to mind immediately, and they're in the Midwest. There are advocacy groups that are helping.

The other thing I think is that really important is, if possible, to have a good tight support network that is very clear and informed of your health-care needs. When I was pregnant with both of my pregnancies, I made it very clear that I did not want to be treated at a Catholic hospital no matter what had happened for fear of exactly what patients like Mindy have talked about and experienced, which is not receiving comprehensive care, and then not having confidence in the follow up care that ensues. All of that is really detrimental when you add it on.

If possible, have folks in your corner who can be advocates and allies with you while you are getting care, because you may be in a moment of trauma. If you may be presenting to a doctor in a place where you are in a lot of stress and duress, and if possible, have somebody there who can advocate with you on your behalf.

Jenn Stanley: Thanks so much to Jessica Mason Pieklo. I'll also add one important way to protect yourself is to know your rights. Check out that religious imposition tracker. I've posted it in the description, also on our website, rewire.news/choiceless.

This episode is produced by me, Jenn Stanley for Rewire Radio. With editorial oversight by Marc Faletti, our director of multimedia. Jodi Jacobson is our editor-in-chief. Brady Swenson is our director of technology. Music for this episode is by Doug Helsel.

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In today's political climate, conversations about these issues can be tough, I know. Please, please, please share these episodes with the people who don't agree with you, or who you don't agree with.

Our hope is that they'll make a great jumping-off point for these debates, and that maybe that elusive common ground isn't just a pipe dream, or maybe it is, I don't know, but it's worth a shot.

Thanks for listening.