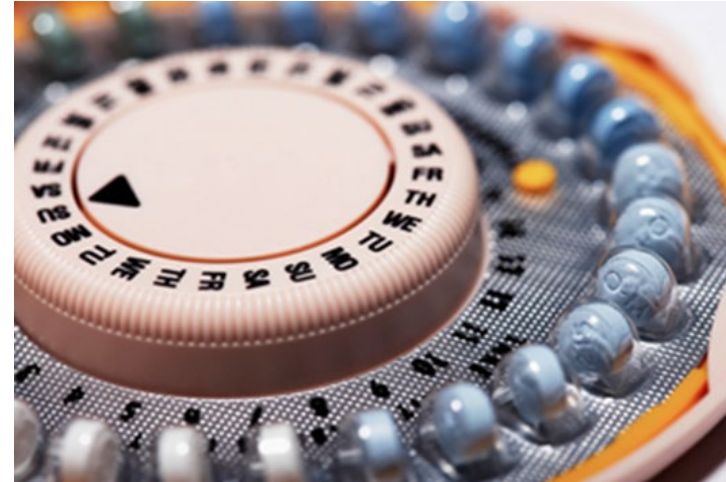


The Law and Ethics of Conscience in Medicine

Elizabeth Sepper
Professor of Law
University of Texas School of Law

Overview

- Defining “conscience,” “conscientious refusal” & “conscientious commitment
- Ethical compromise
- Legal framework
- Concerns
 - Access to healthcare
 - Over- and under-protection of conscience and religion
- Emerging Issues and Predictions



Lifestyle

In Texas, the nation's largest children's hospital is halting gender-affirming care for trans youths

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By [Anne Branigin](#)

March 8, 2022 at 9:00 a.m. EST



(Stock/Washington Post illustration)

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📹 'Wealthy Texans will find the means to obtain safe abortion care, as they always have. But patients I care for, who are mostly low-income and people of color, can't afford enormous travel expenses to get medical care.' Photograph: Jordan Vonderhaar/Getty Images



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Supreme Judicial Court sign at the John Adams Courthouse in Boston. (Robin Lubbock/WBUR)

"All the News
That's Fit to Print"

The New York Times

LATE CITY EDITION

Weather: Partly sunny, mild today;
fair tonight. Sunny, mild tomorrow.
Temp. range: today 45-55; Monday
35-54. Full U.S. report on Page 16.

VOL. CXXII, No. 42,003

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NEW YORK, TUESDAY, JANUARY 23, 1973

15 CENTS

LYNDON JOHNSON, 50TH PRESIDENT WAS ARCHITECT OF 'GREAT SOCIETY' PROGRAMS *High Court Rules Abortions Legal the First 3 Months*

**State Bans Ruled Out
Until Later**

**National Guidelines
Set by 7-to-2 Vote**

By WARREN WEAVER Jr.
Special to The New York Times
WASHINGTON, Jan. 22 —
The Supreme Court overruled
today all state laws that pro-
hibit, or restrict a woman's
right to obtain an abortion
during her first three months
of pregnancy. The vote was
7 to 2.

In a historic resolution of a
decades-long controversy, the
court today ruled that a woman
has the right to decide whether
to have an abortion during the
first three months of her preg-
nancy.

**Cardinals Shocked
—Reaction Mixed**

By LAWRENCE VAN GELDER
Reaction to the Supreme
Court decision on abortion
fractured yesterday along
predictable lines, as leaders of
the Roman Catholic Church an-
nounced the ruling while birth
control and women's rights ac-
tivist praised it.

In the forefront of Catholic
reaction were Cardinal Cooke
of New York and Cardinal
Cushing of Boston.

**3.7 MILLION CARS
RECALLED BY GM**

DETROIT, Jan. 22 — The
General Motors Corporation re-
called today 3.7 million 1971
and 1972 cars, its full-size
Chevrolet, Pontiac, Buick and
Oldsmobile models.

**TO CORRECT FLAW
CHOOSEN FOR TALKS**

Shields Will Be Installed to
Prevent Entry of Gravel
Into Steering System

By JERRY M. FLINT
Special to The New York Times
DETROIT, Jan. 22 — The
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**CHOOSEN FOR TALKS
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and Paying Tribute**

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Kissinger arrived in Paris
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**NATION IS SHOCKED
Apparent Heart Attack
Comes as Country
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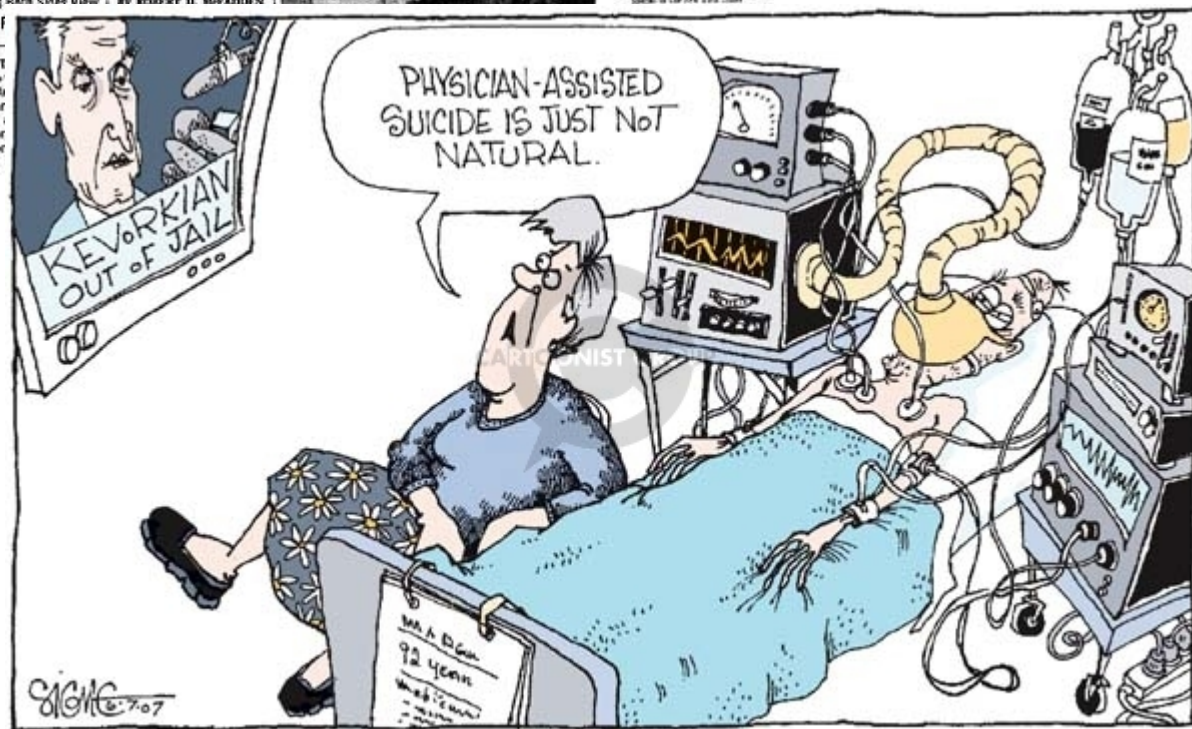
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Special to The New York Times



Professional Organizations & Conscience

American Medical Association Code of Medical Ethics Opinion 1.1.7:

[P]hysicians should have considerable latitude to practice in accord with well-considered, deeply held beliefs that are central to their self-identities.

Physicians' freedom to act according to conscience is not unlimited, however. Physicians are expected to provide care in emergencies, honor patients' informed decisions to refuse life-sustaining treatment, and respect basic civil liberties and not discriminate against individuals

The Opinion calls for transparency about services that will not be provided; careful consideration of the decision; respect for duties of informed consent; and, in general, a duty to refer patients to a willing provider.

American Nurses Association Code of Ethics:

a nurse is justified in refusing to participate in a particular decision or action that is morally objectionable, so long as it is a conscience-based objection and not one based on personal preference, prejudice, bias, convenience, or arbitrariness.

Nurses are obliged to provide for patient safety, to avoid patient abandonment, and to withdraw only when assured that nursing care is available to the patient. Nurses who decide not to participate on the grounds of conscientious objection must communicate this decision in a timely and appropriate manner, in advance and in time for alternate arrangements to be made for patient care.

Legal Framework re Religion



Constitutional provisions

Statutes entitling religious believers to seek exemptions in court



Statutory exemptions

First Amendment to the U.S. Constitution

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
- The Free Exercise Clause does not bar the application of a “neutral, generally applicable law” to religiously motivated acts.
 - Supreme Court, *Employment Div. v. Smith* (1990)

State constitutional provisions may apply differently.

Religious Freedom Restoration Act

“The federal government may only substantially burden a person’s exercise of religion when the burden:
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.”

21 States have state versions of this Act.

Statutory exemptions



Conscience Clauses

Federal Church Amendment: federal funding will not require an entity to provide any personnel or “make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions.”

State law (New Jersey, e.g.): “The refusal to perform, assist in the performance of, or provide abortion services or sterilization procedures shall not constitute grounds for civil or criminal liability, disciplinary action or discriminatory treatment.”

Mississippi

Protects “[a]ny individual who may be asked to participate in any way in a health-care service” from discrimination for declining to participate in a health care service, defined as “any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health-care providers or health-care institutions.”

Impact on Patients

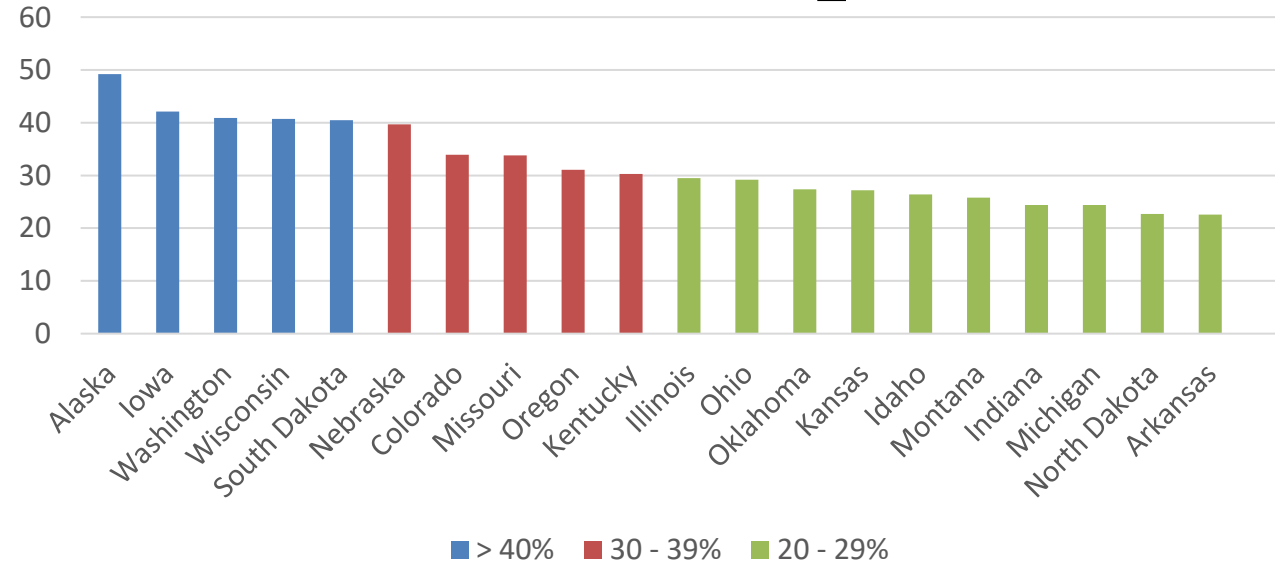


Top 10 Health Systems by Net Patient Revenue

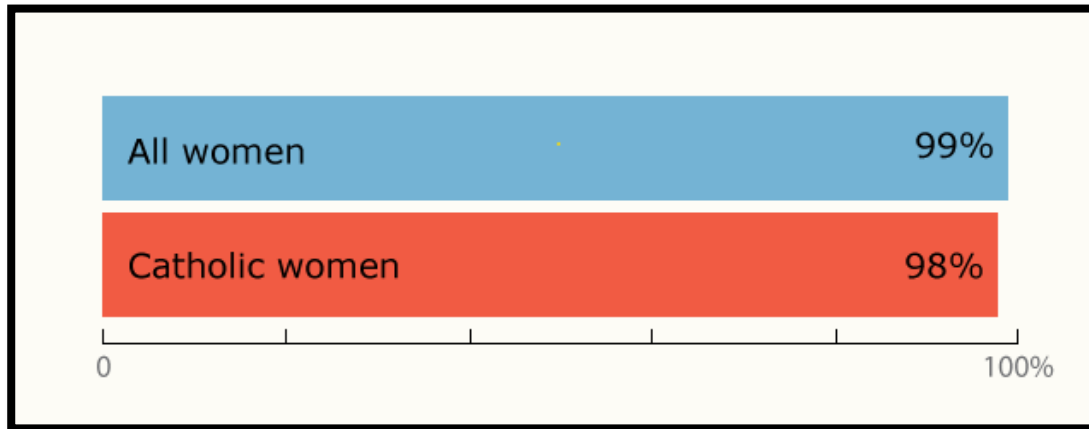
#	Health System Name	Total Net Patient Revenue
1	HCA Healthcare (FKA Hospital Corporation of America)	\$44,921,737,146
	2 CommonSpirit Health	\$30,248,548,684
	3 Dignity Health	\$25,041,738,942
	4 Ascension Health	\$19,176,289,454
5	Northwell Health (AKA North Shore Long Island Jewish Health System)	\$18,641,544,520
6	Cleveland Clinic Health System	\$18,323,722,784
7	NewYork-Presbyterian Healthcare System	\$17,717,194,762
8	Trinity Health (FKA CHE Trinity Health)	\$17,699,228,464
	9 Tenet Healthcare	\$17,699,185,110
	10 Providence St Joseph Health (AKA Providence)	\$17,248,594,986

Fig 1 – Data from Definitive Healthcare’s Hospitals & IDNs database. Net patient revenue is an aggregate of member hospital financial information from the April 2021 Medicare Cost Report release. The next scheduled Medicare Cost Report release is July 2021. Accessed June 2021.

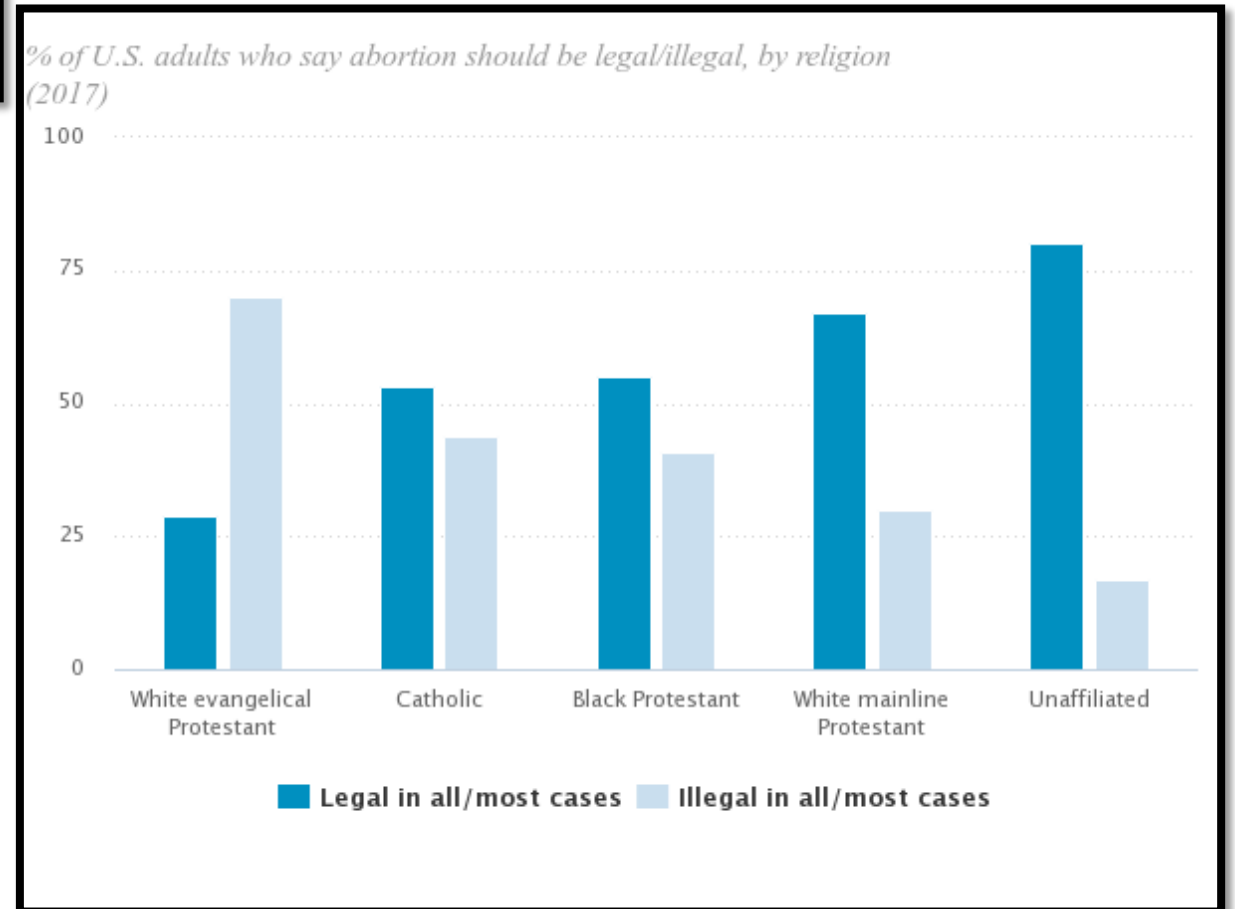
Percentage of Acute Care Beds in Catholic Owned or Affiliated Hospitals



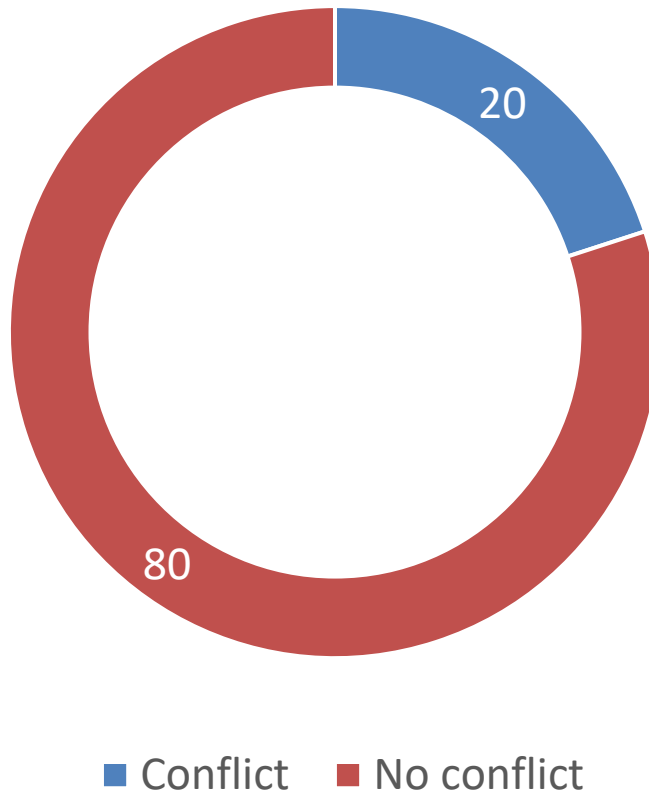
Based on data from MERGERWATCH & MADISON HEALTHCARE ADVISORS, GROWTH OF CATHOLIC HOSPITALS AND HEALTH SYSTEMS: 2016 UPDATE OF THE MISCARRIAGE OF MEDICINE REPORT 8 (2016)



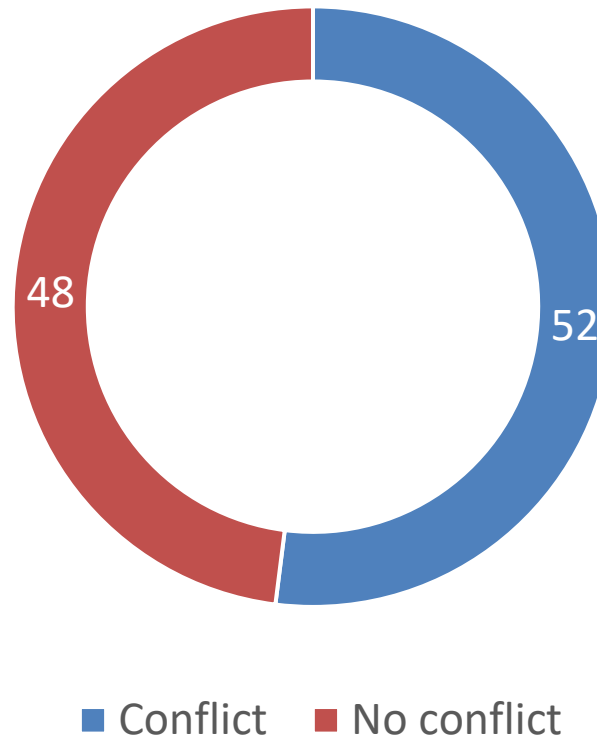
More than 99% of women aged 15–44 who have ever had sexual intercourse have used at least one contraceptive method.



Percentage of physicians practicing at religious hospitals who report conflicts over religion-based policies for patient care



Percent of ob-gyns who work in officially designated Catholic hospitals who report conflicts over religion-based policies for patient care



Based on data from Debra B. Stulberg et al., *Obstetrician-Gynecologists, Religious Institutions, and Conflicts Regarding Patient Care Policies*, 207 AM. J. OF OBSTETRICS & GYNECOLOGY 73.e1, 73.e4 (2012).

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Emerging Issues and Predictions

- **Laws barring practice consistent with the standard of care**
- **Laws barring virtually all abortions**
- *Response:* Pro-reproductive and LGBTQ healthcare claims of conscience and religion in courts
- **Laws building repro and LGBTQ healthcare capacity and regulating healthcare institutions**
- *Response:* Claims of conscience and religion in courts

Family Medicine: Thirty percent of family physicians consider a hospital or health system to be their primary employer.

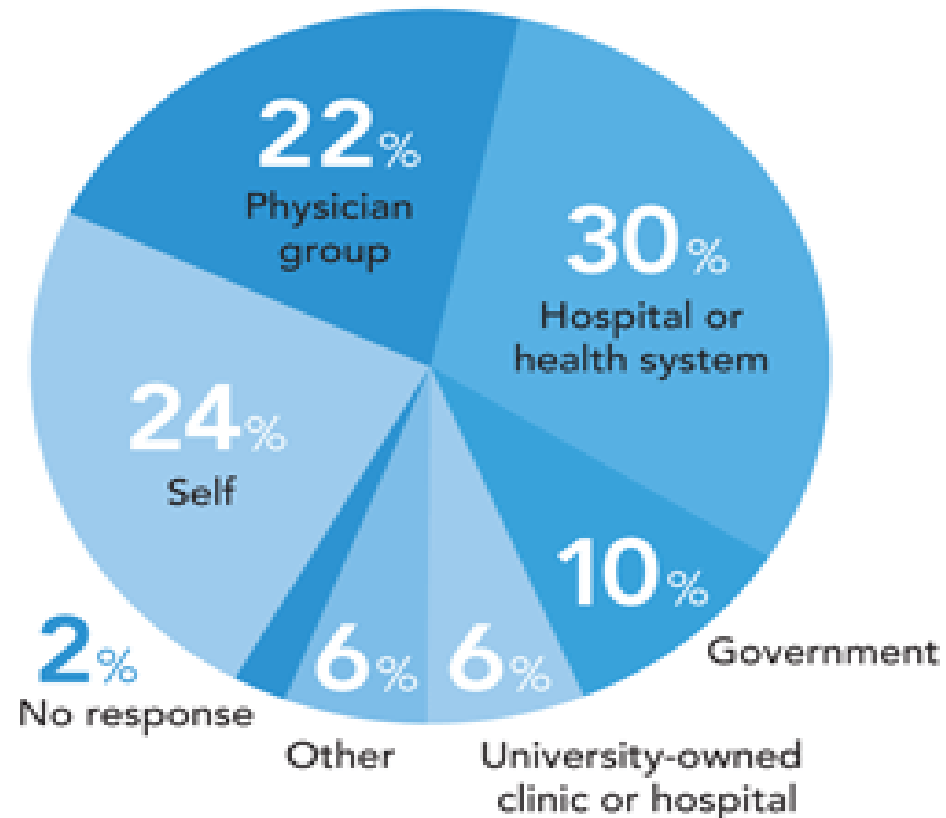
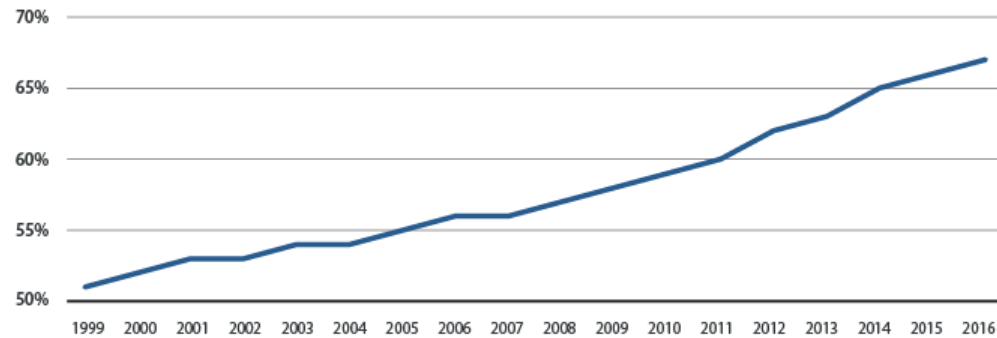


FIGURE 2

Fewer hospitals are independent of health systems

Percent of community hospitals belonging to health systems, 1999–2016

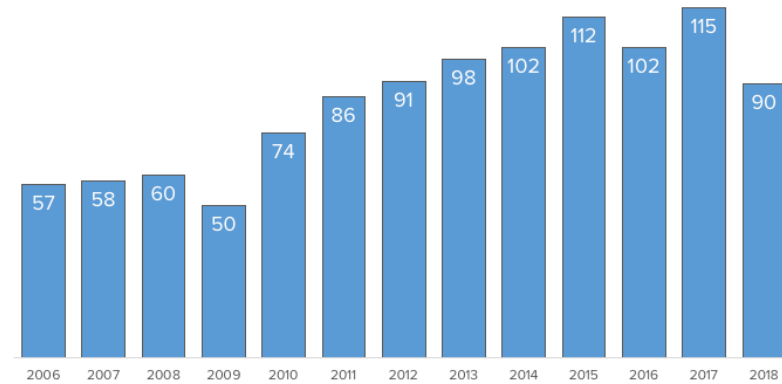


Source: American Hospital Association, "Trendwatch Chartbook 2018" (2018), Table 2.1: Number of Community Hospitals, 1995–2016, available at <https://www.aha.org/system/files/2018-05/2018-chartbook-table-2-1.pdf>.



NIHCM FOUNDATION Significant Consolidation Activity in Hospital Sector in Recent Years

Announced Hospital Consolidations



For full slide deck and all references see <https://www.nihcm.org/categories/hospital-consolidation-trends-impacts-outlook>

TEXASLAW

Thank you!