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OP-ED

Unethical Protection of Conscience: Defending the Powerful against the Weak

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In "The Personal is Political, the Professional is Not: Conscientious Objection to Obtaining/Providing/Acting on Genetic Information," Joel Frader and Charles L. Bosk [1] make a compelling argument that the invocation of personal conscience violates medical professional ethics. They believe that provisions like those in new federal legislation and regulations that prohibit discrimination against health care professionals who refuse to provide services or referrals on religious or moral grounds violate medical ethics.

The rules on protection of conscience issued by the federal Department of Health and Human Services (DHHS) were given legal effect January 20, 2009, as a final gesture of the Bush administration, and are now under review by the Obama administration. They were proposed under three laws: the Weldon Amendment, named after former Representative Dave Weldon (R-FL), which amends the HHS Appropriations Act; section 245 of the Public Health Service Act, signed by President Clinton in 1996; and the Church Amendments, named after former Senator Frank Church (D-ID), and enacted following the Supreme Court's 1973 decision in *Roe v. Wade* [2] to ensure that physicians and hospitals were not required to perform abortions or sterilizations as a condition of receipt of federal funds. At least seven states and two abortion-rights groups are in federal court claiming that the Bush administration provisions are unconstitutional on the grounds that they interfere with state laws guaranteeing access to abortion-related and comparable health care services.

The protection that the federal provisions offer is glaringly at odds with the self-sacrifice that has characterized the four historically reputable professions, namely medicine, religious ministry, the profession of arms, and the law. Physicians tend to the sick and risk succumbing to their infections. For instance, Dr. Carlo Urbani, who first diagnosed and named the severe acute respiratory syndrome (SARS) in 2003, died from the disease. Ministers of religion have similarly attended the sick and infected, counseled, and consoled the worst of sinners. Lawyers defend the legal rights and interests of heinous offenders, at times without fee, and serve clients whose lawful purposes they personally deplore. Those in military service, whether as volunteers or conscripts, risk and, too often in conflicts pay with, their lives. By contrast with this tradition of self-sacrifice, the federal provisions protect health care professionals who object to participation in legal health care services and allow them instead to abandon patients or sacrifice patients' interests to their own.

The federal provisions' wide if not comprehensive scope governs performing, participating in, referring for, learning about, teaching, or administering procedures for abortion, sterilization, contraception, and some forms of end-of-life care. Although introduced under a claim to protect health care professionals against discrimination, the rules risk making such procedures unavailable to dependent patients who are lawfully entitled to have access to them. Patients whose care is not religiously or morally contentious and who require such procedures as safe removal of a dead fetus or of cancerous reproductive organs or sedation following trauma for routine therapeutic purposes face possible harm from the dearth of health care professionals who are trained to perform or participate in those procedures.

Health care professionals who place their own religious or moral interests above their patients' health care interests experience an especially unethical conflict of interest because physicians enjoy the power of a legal monopoly over the provision of medical services. If they choose not to avoid this conflict, e.g., by selecting a health care or research specialty that is unrelated to reproductive or end-of-life medicine, they should disclose their conflict of interest to patients, those considering becoming their patients, and hospital and other agencies that assign them to care for patients.

This ethical requirement is reinforced by laws on negligence and fiduciary duty. Fiduciary duties of disclosure are particularly relevant. They are based on rules of equity derived from the historical English Court of Chancery—the "court of conscience." Those seeking protection of their rights of conscience are reciprocally required to observe their duties of conscience. Leading U.S. courts [3] have ruled that physicians' legal duty of care requires disclosure to patients of all treatments that are suitable according to the professional standard of care. This applies whether or not the physicians recommend such care or are able or willing to provide it, and includes disclosure of information about where such care is available, if it is not through the physicians themselves.

The federal provisions on protection of conscience prohibit discriminatory practices by federal, state, and local agencies that receive funds from the federal DHHS and perhaps other federal funds. It is not clear, however, and appears doubtful that the federal provisions bind courts that determine patients' rights to nonnegligent care and to physicians' discharge of their fiduciary responsibilities. Whether federal legislation supersedes states' law or is subject to it is a matter for judicial interpretation. Regulatory provisions developed within administrative units of government and not by legislatures are usually interpreted to be subject to legislation rather than displacing or changing it. Although courts will usually not compel health care professionals to participate directly in procedures that violate their personal faith or conscience, they construe objections of associated "complicity" narrowly (as "performing") and thus may require health care professionals to provide their patients with reasonable information about access to appropriate treatments [4].

Physicians and other health care professionals are usually free to decline to accept applicants for their care on a wide variety of nondiscriminatory grounds without assuming any responsibility to refer them to other health care professionals. Once a patient-physician or comparable relationship exists, however, the AMA recognizes an ethical duty of referral [5]. Legal duties arise under negligence, fiduciary, and contract law that binds physicians to protect patients' interests in gaining access to requested services, notwithstanding physicians' own legal protections against unlawful discrimination. Since not every exercise of a legal power is ethical, health professional licensing authorities and medical associations are free to declare what legal protections they consider unethical, even if individual sanctions for professional misconduct cannot be applied. Such declarations serve the legislated or moral mandate to protect patients against unethical professional conduct.

Courts may find it negligent or a breach of fiduciary duty for health care professionals to care for patients to whom they have not previously disclosed the procedures within their expected scope of practice that they will refuse to provide. As Frader and Bosk observe, patients for genetic counseling and prenatal diagnosis may reasonably presume that they will be informed of tests that meet their requirements and choices that are available in response to the test results that follow. Health care professionals who refuse or fail to disclose accessible tests or consequent choices, on grounds of conscience or otherwise, face legal liability, for instance for wrongful pregnancy, wrongful birth, and breach of contract or of fiduciary duty, when refusing to participate in or inform patients about their lawful options of contraception, sterilization, or abortion. Federal provisions on conscience may protect health care professionals against discrimination, for instance, in appointment to and promotion within institutions that receive federal funds, but they do not empower those physicians to enforce their religious or moral convictions and deprive patients of their lawful rights to reproductive or comparable decision making.

The key ethical failing of the federal provisions is their blindness to the special category of professional obligations that physicians agree to assume when they join the profession. Protection of conscience in itself is worthy and necessary. The United States has ratified the United Nations' International Covenant on Civil and Political Rights, a central pillar of human rights that gives legal force to the 1948 UN Universal Declaration of Human Rights. Article 18(1) of the Covenant states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 18(3), however, provides the balance that:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others [6].

The federal provisions protect health care professionals' conscience to refuse participation in, for instance, certain reproductive and terminal-care procedures, but fail to recognize their professional commitment to undertake them [7]. The provisions allow health care professionals to exploit the power of their superior knowledge over that of patients, promote their own interests, and protect their careers, by subordinating of the interests of patients they have a legal monopoly to treat.

In protecting and privileging health care professionals who withhold information that their patients depend upon, the provisions reduce health care professionals to the status of self-serving traders in an unequal market who may take advantage of those obliged or unwise enough to trust them and rely on their integrity. The provisions underscore the challenge that conscientious objection poses to health care professionalism [8]. To allow physicians to deny or frustrate a patient's rights of conscience by enforcing their own through nonreferral, as the new regulations do, is unethical. It is ethically justifiable to be intolerant of religious or other fundamentalist intolerance.

References

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