

## Virtual Mentor

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### ETHICS CASE

#### Positive Claims of Conscience and Objections to Immigration Law

Commentary by Mark R. Wicclair, PhD

Dr. Prado flipped the hallway flags outward and pushed his shoulder into the door. Inside the room a man and woman sat, the woman manifestly pregnant. They bowed their heads shyly as he entered and then looked up at him expectantly.

Dr. Prado sat. “Senora, buenas tardes. Senor.”

The woman smiled at his articulation, clumsy but sincere.

“Todo parece bien. Su bebe esta...creciendo bueno. Er, bien.”

All three laughed. The couple pleased, as they should be; they awaited good news with all the anxiety of first-time parents.

They proceeded through the visit without incident, and Dr. Prado assured them that he would be there when she finally went into labor. When they rose to leave, the man hesitated for a moment and looked at the doctor. He was on the verge of a question.

“Yes?” Dr. Prado asked. The man explained something quickly, in Spanish. Dr. Prado frowned for a moment, struggling to translate. “Papeles,” the man said, shaking his head and gesturing to his wallet.

“Ah. No.” Dr. Prado shook his head. “I don’t report. No reporto.” He wasn’t concerned that patients like these seemed to find him more or less regularly, and he considered it part of his duty to treat them regardless of their immigration status. Often they would find a way to pay, sometimes not. He had never asked for documentation, and preferred not to cast his relationship with his patients in an atmosphere of suspicion. It was somewhat unclear whether his actions were legal; state law prohibited him only from providing sanctuary for the immigrants, without requiring him to report them.

As Dr. Prado was returning to his desk, another physician in the practice, Dr. Hartz, intercepted him. “Listen,” he said, “I don’t want you endangering this practice.”

Dr. Prado sat back from his computer, but remained silent. Dr. Hartz glared. This wasn’t the first time he had confronted Dr. Prado about some of the patients he took, but the intensity of his criticism had grown in recent months.

“Be a doctor, not a zealot,” he said evenly.

Dr. Hartz turned and walked away. Dr. Prado watched him go, then turned back to the open chart on his desk.

### **Commentary**

The worry that physicians who provide services to undocumented patients may be subject to legal sanctions cannot be dismissed as a paranoid’s nightmare. Section 202 of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (HB 4437) [1], which passed in the U.S. House but not in the Senate, included provisions that, according to some commentators, would have prohibited health care professionals from providing services to “illegal aliens.” In 2011, two states, Alabama and Georgia, enacted laws (HB 56 and HB 87, respectively) that prohibit “concealing, harboring, or shielding” undocumented immigrants (referred to as “aliens” in the Georgia law and “illegal aliens” in the Alabama law) [2, 3]. Unlike the Alabama law, the Georgia statute provides an exemption for “a person providing emergency medical service,” but neither includes a general exemption for health care professionals.

The scope of these laws is somewhat vague, which leaves considerable room for prosecutorial discretion. If Dr. Prado’s practice is in Alabama or Georgia, an aggressive prosecutor might charge him with violating state immigration law. The U.S. Court of Appeals for the 11th Circuit enjoined enforcement of the sections of the Alabama and Georgia statutes that prohibit concealing, harboring, or shielding “(illegal) aliens,” and one of the court’s stated grounds was a concern about excessive prosecutorial discretion because it was “the intent of Congress to confer discretion on the Executive Branch [not on the states] in matters concerning immigration” [4].

One might argue that health care is so important that any obstacles that are likely to interfere with a patient’s access to it are unjustified. Accordingly one might well question whether, as a matter of public policy, immigration laws should exempt health care professionals so that physicians like Dr. Prado do not have to fear prosecution when they provide medical services to undocumented patients.

However, I want to address another, equally important question: If immigration laws do not provide general exemptions for health care services, should they at least provide exemptions for health care professionals who cannot in good conscience comply with the law because they believe they have an ethical obligation to treat patients without regard to their immigration status?

To answer this question, it first is necessary to consider reasons for protecting the exercise of conscience. The primary reason is to protect a person’s moral integrity [5]. Most of us have core moral beliefs—i.e., beliefs that are part of our understanding of who we are and are integral to our self-conceptions or identity. Maintaining one’s moral integrity requires acting in accordance with these core

moral beliefs. Acting against one's conscience and failing to maintain one's moral integrity can result in substantial moral harm, such as loss of self-respect and feelings of guilt, shame, and remorse. There are several additional reasons for protecting the exercise of conscience and enabling people to maintain their moral integrity: (1) maintaining moral integrity—being able to act in accord with one's core moral values—can be an essential feature of a person's conception of a good or meaningful life; (2) acting against one's conscience can destroy or seriously weaken one's long-term commitment to moral principles; (3) respect for persons, an important ethical principle, requires us to allow others to act on the basis of their personal values and beliefs and thereby maintain their moral integrity; and (4) although there are exceptions, for example when a person's core values require a commitment to invidious discrimination or senseless cruelty, moral integrity generally is considered valuable and a virtue.

Typically, federal and state health care “conscience clauses” and institutional conscientious objection policies protect health care professionals from sanctions for conscience-based refusals to provide goods and services, such as abortion, sterilization, (emergency) contraception, and sedation to unconsciousness. Such policies on conscience-based *refusals* protect *negative* conscience claims. If physicians are legally required to question patients about their immigration status and report (suspected) undocumented immigrants to the authorities, and Dr. Prado believes that it is ethically wrong to satisfy that requirement, he might exercise a negative conscience claim and refuse to do so. If the law were to include a conscience clause that protects such negative conscience claims, Dr. Prado could maintain his moral integrity without being subject to legal penalties.

But suppose physicians are legally prohibited from treating undocumented immigrants: for example, a law that prohibits concealing, harboring, or shielding “(illegal) aliens” is interpreted to authorize the prosecution of physicians who treat undocumented patients. If Dr. Prado believes that he has an ethical obligation to provide services to all patients regardless of their immigration status, no conscience clause limited to protecting negative conscience claims would enable him to maintain his moral integrity without facing legal penalties. Protecting his moral integrity would require a different type of conscience clause—one that protects *positive* conscience claims by permitting individuals to perform actions that are otherwise prohibited by legal or institutional rules.

Insofar as enabling people to maintain their moral integrity is the primary reason for protecting the exercise of conscience, not protecting positive conscience claims does not appear to be justified [5, 6]. One's moral integrity can be compromised either by performing an action that is contrary to one's core ethical beliefs or by failing to perform an action that is required by those beliefs. Consider the following two cases: (1) Physicians are legally required to report suspected undocumented patients, and Dr. X believes that it is seriously wrong to do so. (2) Physicians are legally prohibited from treating suspected undocumented patients, and Dr. Y believes that it is seriously wrong to fail to do so. Just as a failure to respect a negative conscience

claim by physician X can be injurious to her moral integrity, so, too, a failure to respect a positive conscience claim by physician Y can be injurious to his moral integrity. Accordingly, positive conscience claims can have moral weight and can merit protection for the same reasons as negative conscience claims.

Although there is insufficient evidence to conclude that the selective recognition of negative conscience claims is politically motivated, it is at least worth noting that in the current U.S. social and political context, the exclusive protection of negative conscience claims has tended to privilege “socially conservative” positions—such as the opposition to legally permitted practices like participating in abortions and dispensing emergency contraception. The result has been to disregard positive conscience claims that might be more consistent with positions of “social liberals,” such as honoring the living wills of pregnant women, providing unrestricted access to (emergency) contraceptives, performing abortions [7], providing counseling concerning reproductive options, and providing health care services to people without regard to their immigration status.

There are two possible objections to protecting positive conscience claims. First, it can be objected that recognizing positive conscience claims may require condoning and enabling law breaking. For example, if it is illegal for physicians to treat undocumented patients, protecting the moral integrity of a physician who believes there is an ethical obligation to treat them would require condoning law breaking. This objection begs the question because the issue is precisely whether the law should recognize and protect such conscience claims. If a law prohibiting the treatment of undocumented patients were to grant an exemption for physicians with conscience-based objections to it, physicians who treat such patients would not be breaking the law.

A second objection alleges that protecting positive conscience claims will result in the infringement of important patient rights. This objection applies in some, but not all, cases. For example, it applies to physicians who are conscientiously opposed to forgoing medically provided nutrition and hydration in compliance with advance directives because they believe that they have an ethical obligation to provide it. However, this objection does not apply to a positive conscience claim in relation to treating undocumented patients. Arguably, protecting a physician’s positive conscience claim in this context would enable the physician to respect the rights of such patients.

Even if it is acknowledged that there are good reasons to protect both negative and positive conscience claims, to determine whether they should be accommodated, it is necessary to consider competing interests and values. If accommodating Dr. Prado and other health care professionals with similar conscience-based objections would have a significant impact on the effective enforcement of legitimate immigration law, it would be necessary to weigh two conflicting values: (1) the value of protecting the moral integrity of health care professionals such as Dr. Prado and (2) the value of maximally effective enforcement of legitimate immigration policy.

Unfortunately, there is no established algorithm for making such challenging ethical judgments.

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