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POLICY FORUM

Protecting Positive Claims of Conscience for Employees of Religious Institutions Threatens Religious Liberty

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An important good for doctors, nurses, and other health care professionals could be described as that of “professional freedom.” This is the good of being able to bring one’s professional medical knowledge and one’s commitments to the norms and values of the medical profession to bear on one’s professional judgments and actions. This is, after all, one of the important aspects of being *in* a profession: professionals are not merely technicians performing the same routine tasks over and over, nor are they functionaries, blindly carrying out orders from above with little or no discretion on their part.

It is partly for this reason that stories of doctors or nurses who are prevented from, or punished for, carrying out their professional judgment in a clinical setting can seem so problematic. There are other reasons, of course: when a patient suffers because a physician has been prevented from doing what he or she thought was the right thing, then there is clearly a problem. But even apart from that, there seems to be a violation of professional freedom when doctors are prevented from acting in accordance with their best judgment.

This sense of violation is increased when we consider that a doctor’s best judgment, in the circumstances, and guided by her commitment to her own and the profession’s values and norms, is in fact a judgment of *conscience*. For judgments of conscience are just the work of practical reason being brought to bear on a concrete situation and issuing in a determination of what one *ought* to do: to perform this procedure, to make this recommendation or referral, to provide this medication [1]. And so a doctor’s inability to carry out a procedure she has determined to be required, or to make a recommendation she thinks warranted, or to provide the appropriate medication, can seem not just an infringement of professional freedom, but of conscience.

Clearly such infringements are on occasion justified, and proposals to allow medical professionals to carry out *all* judgments of conscience are unreasonable: a sincere but not clinically justified judgment to sterilize a poor woman against her will, or to provide a Jehovah’s Witness with a blood transfusion against his will, are both judgments of conscience that are prohibited at law, even when a doctor believes that the action in question is not simply permissible but obligatory. In such cases, the patient’s rights to bodily integrity and religious liberty, respectively, are thought to override the right to professional liberty on the part of the doctor.

The considered judgment of the profession itself also is allowed to trump individual judgments; when a procedure has been judged contrary to the goals of medicine by the vast majority of the profession, then the judgment of the profession is taken to have normative authority for all professionals; moreover, that authority might itself eventually be translated into a legal judgment. Thus, subsequent to widespread medical denunciation of female genital circumcision, now more commonly called female genital mutilation, the U.S. Congress passed a law forbidding such a practice on girls younger than 18 [2].

What, though, of the professional freedom of doctors and nurses in religious institutions? Their freedom has typically been thought to be rightly limited: such institutions can specify a range of procedures that are forbidden to its employees and enforce their bans with some degree of sanction and coercion. Perhaps the most prominent case in recent years is the Phoenix abortion case, in which an abortion was performed in a Catholic hospital on a young mother with pulmonary arterial hypertension, with subsequent punishments exacted by the bishop of the diocese [3]. Doctors in that case may plausibly be thought to have asserted what Mark Wicclair has called a “positive” right of conscience to perform an abortion the patient has consented to, an assertion clearly in line with the right of “professional freedom” I have outlined above [4].

The Phoenix case raises a larger issue, however, one brought to prominence in Wicclair’s essay: should positive rights of conscience—rights to exercise one’s professional and moral judgment in a committing a prohibited act—be protected for employees of religious institutions whose views conflict with that institution’s norms or ethics? Ought a doctor who believes she should recommend or perform an abortion, or prescribe or provide emergency contraception, for example, be allowed to do so, even if it would be contrary to the stated norms and policies of the religious institution for which she works?

Abstracting from the specifics of the Phoenix case, I believe the answer here is no: to broaden conscience protections of individuals within religious institutions that enforce the norms and proscriptions of a given religion would be a fatal blow to the good of religious liberty and, in fact, to the good of professional freedom as exercised by religious groups and institutions.

Consider first the good of religious liberty: the good of being able to determine what one’s religious vocation is, and how, and with whom, that vocation is to be pursued. For some not insignificant number of Christians, for example, that vocation is to minister to others as Christ did, whether in the field of health care or in some other domain of apostolic work. Moreover, their vocation is to do that *in community with others*, joining together in a cooperative venture to provide health care to the needy in accordance with the tenets of their religious faith.

The good of religious liberty is among the most valued goods that reasonable political states exist to protect. And while it is true that infringements of this liberty

can be justified, justification for a significant infringement of religious liberty must itself be significant: the common good must make a very strong demand that cannot be met in any other way [5].

But a law that created general conscience protections for “positive” rights of conscience would be, in effect, a law that destroyed the ability of religious groups to govern themselves in accordance with their religious convictions in the field of health care. Catholic health care professionals share a normative judgment that views unborn life as sacred and that involves a refusal to kill anyone, including an unborn child. Catholic institutions formed around shared commitment to this norm thus prohibit direct abortion, and try, though perhaps not as hard as they should, to insure that all who undertake the mission of the institution are on board with that institution’s commitments regarding human life. To protect judgments and actions within the institution that are radically contrary to those commitments, however, is to deny the institution the liberty necessary to act socially for the sake of those shared commitments; hence it is to violate the religious liberty of the group.

Moreover, those judgments, though specifically Catholic, are *also* health care judgments. That is to say, medical professionals who are Catholic, and who join together to provide Catholic health care, understand what they are providing as genuine health care. They understand abortion not simply as wrong from a Catholic standpoint, but as a violation of their health care vocation: it is anti-health. Similarly, many also see the provision of contraceptives as contrary not just to their Catholic morality, but as contrary to the ethos of medicine: contraceptives do not address any medical condition, and in fact act contrary to what is, strictly speaking, the healthy and normal functioning of the body. So positive conscience protections afforded to dissenters from this view who nevertheless work within institutions whose guiding presuppositions track this line of thought would also undermine the freedom of Catholic health care professionals to be professional in the way that they see fit. It would become impossible to sustain an institutional existence predicated on the Catholic conception of health and health care.

Of course, in extreme cases a religious institution’s ethical and medical judgments might be positively damaging to the common good: if that institution refused to serve women, or worked on the basis of a demonstrably false conception of medical science. Such institutions would and should be subject to a range of legal and professional sanctions. But Catholic judgments about abortion and contraception fit neither description: they are contested morally, to be sure, but they are not in the domain of irrational prejudice; nor are they scientifically obscurantist. What health is, and what its requirements are, are, at their boundaries, contested ideas, even among health care professionals. In the absence of a much more robust consensus than currently exists in the medical profession, it is consistent with professional comity to allow reasonable disagreement to shape difference of practice within the profession. That is an aspect of legitimate professional freedom.

Accordingly, I believe the idea of protections for positive rights of conscience for health care workers in Catholic (and many other religious) institutions, where the judgments of conscience in question run contrary to the foundational commitments of the institution, to be a non-starter: its facial deference to the rights of conscience actually conceals a deeper antipathy to the rights of conscience and religious liberty that are exercised not just by individuals acting in isolation from others, but by individuals acting cooperatively together with others to serve essential goods in accordance with their deepest religious and professional convictions.

References

1. For a further articulation and defense of this understanding of conscience, see Tollefsen C. Conscience, religion, and state. *Am J Jurisprudence*. 2009;54:93-116.
2. Criminalization of Female Mutilation Act of 1996, 18 USC sec 116.
3. For the former, see Arizona hospital loses its Catholic status over abortion case. *USA Today*. December 22, 2010. http://usatoday30.usatoday.com/news/religion/2010-12-21-phoenix-catholic-hospital_N.htm. Accessed February 2013.
4. Wicclair MR. Negative and positive claims of conscience. *Cambr Q Healthc Ethics*. 2009;18(1):19-22.
5. This is, I believe, a core tenet of the document *Dignitatis Humanae* of the Second Vatican Council. While that document asserts a right of society to “defend against possible abuses” of religious freedom {#7}, it goes on to detail the great care that must be taken in that defense to ensure that such measures are neither arbitrary nor unlawful, and are in keeping with the objective demands of the common good. Pope Paul VI. *Dignitatis humanae*: on the right of the person and of communities to social and civil freedom in matters religious. http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html. Accessed February 20, 2013.

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