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Invited Review

Conscientious objection in medicine: accommodation versus professionalism and the public good

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Abstract

Introduction: In recent years questions have arisen about the moral justification for the accommodation of health care professionals who refuse, on conscience grounds as opposed to professional grounds, to provide particular professional services to eligible patients who request that kind of service.

Source of data: Literature review.

Areas of disagreement: Central to concerns about the accommodation claims of conscientious objectors is that health care professionals volunteer to join their professions that typically they are the monopoly providers of such services and that a health care professional's refusal to provide professional services on grounds that are not professional judgements amounts to unprofessional conduct.

Defenders of conscientious objection maintain that in a liberal society respect for a professional's conscience is of sufficient importance that conscientious objectors ought to be accommodated. To deny conscientious objectors accommodation would reduce diversity in the health care professions, it would deny objectors unfairly equality of opportunity, and it would constitute a serious threat to the moral integrity of conscientious objectors.

Growing points: The legal literature on the subject is growing due to the impossibility of satisfactory compromises.

Key words: conscientious objection, professionalism, equal citizenship, diversity, culture wars

Introduction

Acts of conscientious objection can occur in at least three quite different contexts, only one of which is relevant to this article. Acts of conscientious objection historically were most prevalent in the context of pacifists' objections to conscription to military service. Objectors would go to great length, including prison, to avoid becoming part of an organization they objected to on religious or ethical grounds. They were prepared to make personal sacrifices to live true to their conscience. Other types of objectors refuse to do certain things because they aim to maintain the professional standards of their profession. This could entail doctors refusing to undertake cost-cutting measures in their for-profit hospital if in their considered judgement these measures are detrimental to patients' best interests. This article is not concerned with either of these cases of conscientious objection.

I will be focusing on the more fundamental question of whether or not health care professionals have morally justifiable claims to see their conscience-based refusals to provide professional services accommodated by regulatory bodies or the state, if eligible patients are demanding those services of them and if those patients are entitled to receive those services.

Patients suffer significant harmful health consequences when access to health services is denied on grounds of provider conscience and alternative access avenues to the required service are unavailable.[1] Chavkin *et al.*,[1] for example, note that 'in South Africa, widespread conscientious objection limits the number of willing providers and, thus, access to safe care, and the number of unsafe abortions has not decreased since the legalization of abortion'. Minerva describes a similar phenomenon for Italy.[2] There can be little doubt that many, but arguably not all conscience related claims are reflections and consequences of ongoing societal culture wars. NeJaime and Siegel[3] point out that they are a 'transnational phenomenon, and the organizations and activists encouraging these claims work across borders'.

Historically the need to accommodate conscientious objectors in medicine was taken for granted in medical ethics, and certainly among medical doctors' associations. The view was held that particular practices in medicine could impact on professionals' individual consciences and potentially constitute a threat to their integrity as moral agents.[4,5]

Unsurprisingly perhaps, the courts in many jurisdictions have addressed various aspects of the conscientious objection issue, among them the question of whether there is a legally relevant difference between conscientiously objecting to the provision of particular health services and transferring an eligible patient to a colleague who would provide such services if one refused to provide them on grounds of conscience, as well as the question of whether health care institutions could reasonably defend their refusal to provide particular health services on grounds of conscience.[6,7]

Much of the legal dispute on conscientious objection in national jurisdictions is foreshadowed in a landmark international human rights document issued by the United Nations. Its International Covenant on Civil and Political Rights states in Article 18(1)1: 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt 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)1 aims to limit the exercise of these freedoms. '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.'[8] While health care professionals, like everyone else, have a moral claim to freedom of conscience and religion, these rights are not absolute, they are limited to the extent that they infringe on others' fundamental rights.

Most liberal democracies' constitutional arrangements mirror if not the wording, but certainly the sentiments expressed in the Covenant. How the limitations on 18(1)1 that are introduced in 18(3)1 are realized varies widely among jurisdictions. In a number of US states conscientious objectors among health care professionals are well within their legal

rights to even refuse the provision of emergency services.

The European Court of Human Rights, on the other hand, concluded that a pharmacist may not refuse to sell contraceptives on conscience grounds, because 'as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs outside the professional sphere'.[9] The view held by this court is essentially that while Article 9 of the European Convention on Human Rights guarantees freedom of conscience, among others, it does not protect 'each and every act or form of behaviour motivated or inspired by a religion or a belief'.[9] That limitation is particularly important 'with regard to the right to behave in public in a manner governed by that belief'.[9] The European Commission of Human Rights noted that the protection for conscience guaranteed by the European Convention on Human Rights extends only to individuals and not to institutions.[6] That matters a great deal, given the large number of religiously affiliated hospitals. Courts in the USA reached the opposite conclusion with regard to that country's Constitution.[7]

Chavkin *et al.*,[1] in a review article analysing conscientious objection globally in the context of health care professionals' refusal to provide certain contested reproductive health services, conclude that 'objection occurs least when the law, public discourse, provider custom and clinical experience all normalize the provision of the full range of health services'. Of note, in at least one jurisdiction, Sweden, health care professionals' conscientious objection accommodation claims have no legal standing. Munthe explains Sweden's rationale, 'first, deeply entrenched and widely shared views on the importance of public service provision, and of related civic duties to take part in the promotion and not to prevent the production of public goods. Second, strong ideals about the rule of law, equality before the law and non-discrimination.'[10]

This article is primarily focused on the ethical issues involved in the debates on conscientious objection accommodation, however, reference to some relevant court cases will be made in so far as they are instructive. As mentioned, historically conscientious objection has been discussed in the context of 'conscription' to military service. Of course, people 'voluntarily' choose to study medicine and become doctors, hence, care has to be taken not to conflate two very different scenarios. It is noteworthy that today most conscientious objection claims that reach the courts are not the result of conflicts over conscription but the result of the latter scenario. They are lodged by people who volunteer to join particular professions or who choose to become monopoly providers of particular services to the public, and who subsequently object, despite their career choices.

Conscience—what is it, and does it matter?

Perhaps surprisingly, there is no consensus in either the ethics or the legal literature on an uncontroversial definition of 'conscience', or, indeed, on why (and whether at all) it is morally important.[11] At its most basic conscience is often described as a religious or ethical belief or conviction that motivates us to act or omit to act in a particular manner. Conscience itself is unlikely a faculty with an epistemological property, rather, as Childress suggests, it 'emerges after a moral judgement or after the application of moral standards'.[12] Sulmasy[13] probably gets it right when he conceptualizes conscience as the conviction that we should act in accordance with our individual understanding of what morality demands of us, but also as then autonomously acting in accordance with what we consider to be morally good and right.

Typically conflicts or frictions arise in the health care context when a health care professional's conscience and their professional obligations collide. Many a country's constitutions protect individual conscience indirectly, by guaranteeing freedom of religion or, as is sometimes the case in more recent documents, also explicitly freedom of conscience, as for instance, the Canadian Charter or Rights and Freedoms does, when it states 'Everyone has the

following fundamental freedoms: (a) freedom of conscience and religion….'[14] Of course, that does not mean that Canadians would have an absolute right to follow the tenets of their conscience convictions or religion, no matter what the consequences, especially for others, might be.[15] However, what is uncontroversial is that in liberal democracies citizen's rights to live their lives by their own values are given a great deal of importance.

Wicclair[16] gives four reasons why the exercise of conscience ought to be protected:

- by protecting conscientious objectors society shows respect for autonomous agents' moral choices and integrity. In this analysis a health care professional's refusal to provide professional services on grounds of conscience is not merely an expression of their moral values (as opposed to their professional judgement), it is also giving notice that their integrity as moral agents is at stake. Pellegrino[17] discusses similar rationales. It is not difficult to appreciate that threats to one's moral integrity or even the perceived loss of one's moral integrity have the potential to cause significant psychological harms to those at the receiving end of those threats. The above mentioned international human rights documents and court decisions suggest that even if one agreed with Wicclair, such accommodation rights are not absolute;
- by protecting conscientious objectors we underline the importance of diversity and toleration in a multi-cultural society;
- by protecting conscientious objectors we acknowledge that our current take on the subject matter of the objection could be mistaken; and
- by protecting conscientious objectors we ensure that members of society that would likely become conscientious objectors are not prevented from joining particular professions.[18]

Similar reasons have been discussed by West-Oram and Buyx[19] and Cowley.[20] I will address the most significant of these arguments in the second half of this article. Support in favour of the accommodation of conscientious objectors cuts across the dividing line of religious[17] and secularist.[21]

Conscience claims—should they be reasonable and genuine?

Assuming one was swayed by the arguments presented thus far, invariably the question would arise whether conscience claims should be reasonable in terms of the substance of the convictions a claimant reports to hold.

Should there be a minimum reasonability standard with regard to the rationality or coherence of the basis of conscience claims? Indeed, some authors have proposed just that.[22] Card, for instance, proposes that objectors must provide reasons for their objection as opposed to merely claiming their objection. He suggests that the accommodation seeking objector 'must state and explain their putative conscientious objection and the beliefs supporting it, thereby allowing [a regulatory body] to understand the objector's reasoning and assess how its weight compares with the provider's professional duties'.[23] Others have proposed different standards, but the principle that objectors ought to explain themselves, as it were, is supported by numerous authors.[24]

In the USA the courts have put to rest any notion that objectors must provide rationales for their professed conscience convictions. The US Supreme Court writes on this issue, 'what principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'… it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds … courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim'.[25] The US Supreme Court is not unique in its take on this subject, as Canadian jurisprudence demonstrates.[26] The views expressed by these courts seem reasonable, given the need for the secular state to remain neutral with regard to the validity or otherwise of these ideologies and individual convictions.

If the reasonableness of a conscientious objector's views cannot be evaluated for the reason mentioned, should a society at least want to ensure that the conscience claims made are genuine? In Canada, for instance, doctors reportedly turn away patients asking for medical aid in dying because they consider the schedule of fees set by government for the delivery of their services to be too low.[27] Is it possible to determine whether objectors hold the conscience views they claim to hold, as opposed to other concerns to do with financial issues, inconvenience, etc.? Some authors have proposed that the evaluative focus should not be on the reasonableness of a conscience claim but on its genuineness. Myers and Woods,[28] for instance, expect conscientious objectors to show that they are sufficiently serious about their objection that the failure to accommodate them would cause significant mental hardship. This does seem similar to Wicclair's concerns about threats to health care professionals' integrity as moral agents. Kantymir and McLeod[24] have rightly pointed out that this standard would require the accommodation of conscientious objectors who are genuine, but who are genuinely racist, sexist or homophobic. MacLure and Dumont[29] note that courts in Canada do 'probe the 'sincerity' of the claimant'. In reality such tests can only investigate how efficient conscience claimants are in terms of persuading a regulatory body or a court that they are genuine. None of that proves sincerity. Genuineness cannot be tested, and as Kantymir and colleague show, even if it could be tested, it is not a plausible standard for determining whether a conscientious objector should be accommodated.

Conscience and professionalism

A number of authors, including me, have defended the so-called 'incompatibility thesis'.[18] A hallmark of a professional judgement is that it is informed exclusively by specialist technical competencies and professional values. A conscientious objector insists on overriding what they know a professional judgement would demand of them. They place their personal convictions above their professional obligations.[30] Rhodes, for instance, argues that medical practice ought to be understood as a contract between society that grants both a high degree of self-governance as well as a monopoly on the provision of particular specialist services to doctors, and the professions. The profession promises that its members will—in return—provide reliably professional specialist services that are governed by its professional values. In Rhodes' words, this view implies 'First, […] clinician decisions must be informed by professional judgement, not personal judgement. Patients and society rely on physicians to provide treatment according to that standard and, for the most part, they cannot know enough about their doctors' personal values to choose them on any other basis. The second implication is that becoming a doctor is a moral commitment to give priority to 'the ethical standard of care' over personal values. Becoming a doctor is, therefore, also ceding authority to professional judgement over personal preference'.[30] Essentially, as the name suggests, the incompatibility thesis maintains that professionalism and conscientious objection are incompatible.

The opposite view argues that health care professionals have an absolute moral right to object on grounds of conscience, and that they should have an absolute legal right, to abstain from the delivery of professional services that they object to on grounds of conscience. The argument is that compromises that are oftentimes implemented by policy makers and regulators, are not compromises, they are asking too much of the conscientious objector. Proponents of this stance might, for instance, think of the examples of abortion and voluntary euthanasia. Conscientious objectors could consider one or both of these as acts of murder, with terrible punitive consequences for them in the afterlife that they believe in. If someone believes that these professional services are acts of murder, or morally equivalent to acts of murder, they are absolutists who—on their worldview—are rightly objecting to a compromise position that would not require of them to provide an abortion or euthanasia in response to an eligible patient's request, but that would oblige them to transfer the patient without delay to a colleague who they know will provide these contested services to eligible patients. While it is true, there are degrees of complicity, as for instance,

Sulmasy[13] notes, it is also not too difficult to understand that to such a conscientious objector the moral distinction between actively killing and transferring a patient on to a colleague whom they consider a killer, amounts to mere academic hair-splitting. Accordingly, this view holds that health care professionals must have an absolute right to conscientious objection accommodation. This stance is oftentimes taken by doctors' voluntary associations such as the Canadian Medical Association.[31] Typically, but not always, the line drawn in the sand is emergency situations where even doctors' lobby organization concede that their members have a conscience-overriding professional obligation to provide services.[32] Of note, in a fair number of states in the USA, as NeJaime mentions '… health care refusal laws allow doctors or nurses to refuse to treat a patient even in an emergency situation and do so without requiring that health care professionals provide advance notice of their objection to the employer so that the patient receives needed care. In addition, some of these laws allow health care workers and institutions to refuse to provide referrals, counselling, or information that would notify the patient of the availability of alternative care'.[7] This undoubtedly represents the extreme policy end of the spectrum, but it is one that is consistent with the view that conscientious objectors have an absolute right to refuse not only the provision of professional services to eligible patients, but also an absolute right to refuse the participation in the timely transfer of these patients to colleagues who will provide those services.

Voluntariness and monopoly

Opponents of conscientious objection accommodation point to two features that they argue make a crucial difference to the moral evaluation of accommodation demands, when compared to the military conscription scenario. The first is that health care professionals volunteered to join the profession. Nobody forced them to join a profession the scope of which they object to. They knew that during their lifetime the scope of the profession could and likely would change, as is true for most, if not all career choices. They also knew that they would not be able to control what kind of changes would occur. In most, if not all other professions, professionals unwilling to adapt have the choice to change their careers.[33] Indeed, this is also true for the medical profession. It is unclear why health care professionals and their associations take as a given that they are entitled to practice as they began practicing when they joined the profession.[34]

Professionals also enjoy a societal monopoly on the provision of the kinds of services that lie within the scope of the profession. Societies typically subsidize their training and grant professions a high degree of self-regulation. In return, as Munthe[10] noted, they promise to place the patient interest and the public good above their own sectarian interests. For professionals to accept that kind of special status and the privileges that come with it, and then refuse to provide the services they contracted and promised to provide when they join a particular profession is difficult to justify.

Equality of opportunity

Some authors have argued that the refusal to accommodate conscientious objectors would unacceptably impact on their equality of opportunity with regard to their job choices and opportunities.[29] That argument suffers from various weaknesses. If a person knows that they would conscientiously object to the provision of the professional scope of practice in a particular specialty, say, gynaecology or palliative care, they would still be free to choose a different area of specialization within medicine.

It is implausible to insist that one's equality of opportunity in the job market and specifically with regard to job choice was violated because one chose to refuse to accept the obligations that are part and parcel of a particular job. Animal rights activists choosing to apply for and accepting a job offer in a butchery also could not reasonably demand conscientious objection accommodation. The killing of animals is part and parcel of what it means to be a butcher. It does appear strange indeed that anyone would choose to join a profession the scope of practice one objects to in the first place.

Card discusses a somewhat related problem, namely the issue of conscientiously objecting medical

students.[35] He notes that the kinds of professionalism based arguments that are usually deployed against conscientious objection accommodation do not apply to medical students, because, while students, they are not professionals. Card is troubled by reports about some Muslim medical students in the UK asking for accommodation during teaching exercises involving the touching (for diagnostic purposes) of persons of the opposite sex. He rightly notes that students refusing to participate in such learning activities will fail to acquire important skill sets that enable them to distinguish between sensual and clinical touching, for instance. While there are a few exceptions, in most countries conscientious objection accommodation is not granted for scenarios involving emergency circumstances. If students such as those described by Card were accommodated, they would be unable to respond appropriately if faced with such emergency situations. It is arguable that medical schools' admissions committees would be well advised to discriminate against prospective students who will object on grounds of conscience to the provision of professional services that are within the scope of professional practice.

The courts, keeping in mind the limitations set out in the earlier cited International Covenant on Civil and Political Rights Article 18(3)1 will have to determine whether this view would be minimally impairing on conscientious objectors. Different jurisdictions will take different views on this question.

Diversity

Another argument cautions against a reduction of diversity in the profession, triggered by expectations of greater uniformity of service delivery by professionals. This view is expressed in different ways. Some warn against automatons taking over, where humanity and subjectivity disappear. Others suggest we ought to show some degree of epistemic humility by permitting diversity of opinion at least on controversial issues such as abortion and euthanasia. After all, as Mill would have it in 'On Liberty', we might be mistaken, and we would never find out if we eliminated all divergence of opinion from the profession.

Of course, what is justifiably considered controversial is in itself a matter of opinion rather than fact. However, Mill was correct, diversity of opinion is important in more than one way, but the question arises what is the proper locus for discussions about controversial practices in medicine. Should it really be at the bedsit, or should it be on the societal level where, once a decision has been made by democratic means, it is the profession's role to implement it. As Savulescu notes, 'the place of reasons and values in medicine is properly located in dialogue with patients, and in attempting to shape policy and law…. However, [health care professionals, U. Sch.] are not entitled to impose those values on patients in the delivery of health care and deny treatment when these patients are legally entitled to access that particular service.'[33]

Given that the primary reason for having specialist monopoly provider professions in society is to maximize the public good,[36] it is worth asking whether a possible reduction in the number of professionals refusing to contribute toward achieving that objective is an outcome that is indefensible, in light of the arguable impact on diversity. Depending on one's answer to this question one would arrive at different policy recommendations for members of medical school admissions committees who are reviewing applications by prospective students.

Equal citizenship

Proponents of conscientious objector accommodation reject the idea set forth in the International Covenant on Civil and Political Rights Article 18(3)1. They do not think the state or any other regulatory agency (in a self-regulated profession this could well be a statutory body such as the UK's General Medical Council) has any role to play with regard to mediating when a conflict arises between doctors and patients. Lyus, for instance, writes in response to critics of conscientious objection accommodation, that their stance 'demands individuals to devolve moral decision-making to a forum separate from that in which the moral act takes place. This forum might be at the level of managers, regulatory bodies or philosophical discourse….I find this proposal concerning.'[37]

The difficulty with this stance, a stance that is held by many doctors' associations, is that if we

accept it we must give up on the idea of equal citizenship. In the case Lyus is concerned about, namely access to abortion in a society where abortion is legal, publicly funded, and eligible women are entitled to receive this service, his stance would imply that the doctor, whose profession enjoys a monopoly on the provision of this service, would have the final say on whether an equal citizen is able to enjoy her rights as a citizen. At issue is not only that the doctor refuses to provide a service that the patient cannot receive from someone other than a doctor, but also that the doctor's action ultimately is designed to ensure that the patient lives by the doctor's values, as opposed to their own values. The objective of the conscientious objection is not merely to avoid participating in the provision of a professional service the doctor objects to, it also aims to subvert the patient's ability to enjoy their rights as citizens. Delston[38] describes how doctors in the USA who refuse to provide contraceptives resort to ever more sophisticated means to prevent equal citizens from the enjoyments of their rights, because they disapprove of their choices. Artificial hurdles are mounted, for instance, in front of women seeking access to birth control, such as asking women who never had sex to undergo Pap smears before the prescription of birth control.[39]

Some statutory bodies have tried to address this problem. The College of Physicians and Surgeons of British Columbia, for instance, while claiming a doctor's right 'right to decide whether or not to perform or be involved in' medical aid in dying, also stresses that objecting doctors must not delay the transfer of information from such patients to administrators who would then be able to assist such patients in finding a non-objecting doctor.[40] Evidently, this policy does involve the objecting doctor in medical aid in dying. Despite myriad efforts such as this, there does not appear to be a reasonable compromise position that accommodates the conscientious objector and guarantees patients' equal citizenship rights. At the time of writing a court in the Canadian province of Ontario supported the provincial statutory body's policy that conscientiously objecting doctors must provide effective referrals.[41]

Peaceful co-existence

Sulmasy asks us to be tolerant toward conscientious objectors, a claim he has not yet directed toward conscientious objectors whose patients demonstrably suffer hardship due to their doctors' decision to prioritize their ideological commitments over professional patient care.[42,43] Still, it could be argued that there might be no good reasons to accommodate conscientious objectors, but perhaps we should do so regardless, in order to avoid infinite societal strive. Health care systems should try to find a way to work around these objectors who otherwise might be valuable parts of the system. Perhaps, we should put more effort into designing creative ways that ensure that eligible patients asking for particular services receive those in a timely manner, despite the existence of objectors. If we acted accordingly we might be able to avoid the culture wars entering our health care system any more than they already have.

I have doubts that this is as easily possible as some supporters of conscientious objection claim it is. Quite conceivably this could be true for patients seeking access to care in metropolitan areas, alas, the abortion data from Italy that I mentioned earlier strongly suggest that even that might be overly optimistic. Certainly, patients living in rural areas, where doctors are likely to be in limited supply, will find the enjoyment of their citizenship rights subverted by the accommodation of objectors.

Because there is no fact of the matter that can be established, with regard to who objects on grounds of conscience against what kind of service, we are at risk of having to accommodate ever more professionals objecting to ever more services, especially with new medical products entering the market that might assist us in living longer or improving particular dispositional capabilities. It is unclear how a health care system could operate efficiently and reliably that aimed to account for whatever service it is that conscientious objectors might wish to object to at a certain point in time.

It is likely that the continuation of conscientious objection accommodation in our health care systems is lengthening the culture wars rather than contributing toward ending them.

Conclusion

Conscientious objection is undoubtedly always a personal choice, but it is at the same token more than that. Today it is also the peculiar health care profession specific expression of 21st century culture wars. No other profession that professionals voluntarily enter makes similar demands of the society it claims to serve. Arguments ethical, legal and political over conscientious objection accommodation will not disappear any time soon. Health care systems need to consider carefully how reliable service delivery can be guaranteed so that patients, the most vulnerable parts of the system, and the reason for why both the system and the health care professions exist, will be able to receive the services they are entitled to receive in a timely fashion. Patients cannot rely on doctors, doctors' associations or even on statutory bodies, typically made up predominantly of professionals, to take the public good and their rights sufficiently serious to ensure reliable access to care.

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