Conscience in Health Care: Past, Present, and Future

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Hippocrates

- Born about 460 BC on the island of Cos
- Medicine was a **healing profession** for the first time, apart from religion, philosophy, sorcery
- To kill was different than to cure
Hippocrates

- **The Oath:**
  - Establishes a covenant between patient and physician
  - Principles are self-evident
  - Abortion, euthanasia proscribed
  - Medical education, confidentiality, beneficence, sexual boundaries affirmed and established

- **The Attack on the Oath:**
  - Medicine as a “contract”; physician as “gatekeeper”
  - Moral relativism
  - The Pro-choice and Death with Dignity Movements
  - The Sacrificial Lambs
Conscience is Deeply Embedded

2 + 7 = ___

I cannot answer this question, as it is against my religious principles.

It's worth a shot.
Objectives

- To discuss the secular philosophical and Christian theological definitions of “conscience,” and the implications of both definitions for medical care
- To give a legal and regulatory overview of the state of the right of conscience for health care providers
- To outline the philosophical arguments against such a right, and provide some answers to those arguments
- To discuss whether or not it is ethical to refer patients for acts proscribed by conscience
Now Pay Attention!
The Nature of Conscience

Conscience as a Right
Religious and Secular Conscience
### Conscience is Universal

<table>
<thead>
<tr>
<th>Patient</th>
<th>Physician/Health care worker</th>
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<tbody>
<tr>
<td>• A person who acts in his/her best interests (integrity of values)</td>
<td>• A person who acts in his/her best interests (integrity of values)</td>
</tr>
<tr>
<td>• A person who deserves respect for autonomy (i.e., not the enemy)</td>
<td>• A person who deserves respect for autonomy (did not cede autonomy for the white coat!)</td>
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<tr>
<td>• A person who makes decisions in good faith, but in context (e.g., fear, anxiety, cultural beliefs etc.)</td>
<td>• A person who acts in good faith for another</td>
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Conscience is Universal
Conscience as a Right

- Conscience is:
  - A Human/Natural Right (based in our nature as autonomous beings; from a Judeo-Christian-Islamic point of view—we are made in the image and likeness of God)
  - A political/legal right (at least for now)
  - A professional right (again, at least for now)

- Conscience is:
  - A negative right—there is a duty on another not to interfere with my exercise of conscience
Poll: U.S. Catholics likely to follow 'conscience'

Wednesday, April 20, 2005 Posted: 5:27 AM EDT (0927 GMT)

ATLANTA (CNN) -- Nearly three-quarters of American Catholics say they are more likely to follow their own conscience on "difficult moral questions," rather than the teachings of Pope Benedict XVI, according to a new CNN/USA Today/Gallup Poll.
What is a Judeo-Christian conscience?

- In Scripture:
  - Christ never uses the word “conscience,” but...
  - Adam and Eve hide nakedness from the Creator (shame) [Gn. 3:1-14]
  - David’s “heart struck him” with remorse (1 Sm. 24:6)
  - Christ’s morality is both teleological (has a purpose) and deontological (requires adherence to true moral precepts)

- Christian conscience is seen as an distinctly human property that allows a person to determine what is good (leads to God) and what is bad (leads away from God)
- Conscience has a cognitive element: recognizes good/bad
- Conscience has a normative element: obliges us to act in accordance with the truth
- Conscience is not “the little voice inside one’s head”
### What is Conscience?

<table>
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<tr>
<th>Religious-Philosophical View</th>
<th>Secular Views</th>
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<tr>
<td>“The aim of conscience formation is to bring the subjective conscience into accordance with the objective one, i.e., with moral reality... Faith enlightens us to grasp the principles of conscience [by enabling is to accept the teaching of Jesus through his Church].”</td>
<td>Conscience is “the private, constant, ethically attuned part of the human character.” (ACOG)</td>
</tr>
<tr>
<td>Ashley, B., in Catholic Conscience: Foundation and Formation (1991)</td>
<td>Freud: Conscience rests in the superego, and is a societal construction</td>
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<td></td>
<td>Evolutionary biologists: conscience is an evolutionary mechanism designed to aid the group in the promotion of altruistic behavior</td>
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</table>
What is Conscience?

Bottom Line:

- Conscience is a universal right of persons
- Conscience is intimately tied to truth
- Conscience is an active force which effects the (metaphysical) character of a person
- A person can have a “bad” (ill-formed/un-informed), or a “good” conscience
- A person, through his or her actions, can become good or bad
- Thus the use and respect of conscience is crucial to personal integrity
I just drank Daddy’s coffee!
Conscience and Medicine

EXAMPLES OF CONFLICTS OF CONSCIENCE
THE LEGAL STATUS OF RIGHTS OF CONSCIENCE
Conscience and Medicine

- **Institutions**
  - A Catholic hospital is asked to perform sterilizations

- **Physicians**
  - A patient in Oregon asks to be referred for assisted suicide “services”

- **Residents**
  - The program director demands that all residents counsel teens for contraceptives, but argues that abstinence-only counseling is not acceptable/does not work

- **Medical Students**
  - Asked on an OBGYN rotation to help with an abortion procedure
Legal Status of Conscience Protection

- **United States:**
  - 3 federal statutes:
    - Church Amend. (‘73)
    - Pub. Health Serv. Act (‘96)
    - Weldon Amend. (‘05)
  - 45 states have some conscience protection statutes
  - Almost none explicitly mention students
  - No criminal/civil liability
  - 1st amendment (free exercise); Title 7 of Civil Rights Act (1965)

- **Rights Under Siege?**
  - Freedom of Choice Act
  - ACOG statement (2007)
  - AAP statement (2010)
  - Bioethics literature (Curlin et. al., NEJM 2007)
  - 2007- CT court ruled that a Catholic hospital must provide “Plan B” in cases of rape without pregnancy test
  - Pt Aff. Care Act (2010)
  - Obama HHS rescinds ‘Bush rule’ (2011)
• In General– Nothing in this Act shall be construed to have any effect on Federal laws regarding—
  ○ (i) conscience protection;
  ○ (ii) willingness or refusal to provide abortion;
  ○ (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.
  ▪ Title X, page 2077.
Obama voids Bush conscience rule in favor of decades-old protections

The administration says the rule extended protections too far beyond the scope of abortion services. Meanwhile, House Republicans are pushing several anti-abortion bills.

TANYA ALBERT HENRY
AMNEWS CORRESPONDENT

The bulk of a Bush administration health care conscience protection regulation—one that many in organized medicine feared would undermine patient access to care—was rescinded by a final rule the Dept. of Health and Human Services released Feb. 18.

After considering more than 300,000 comments, HHS stripped the Bush White House’s more expansive definitions of the protections available under federal conscience laws that have been on the books for decades, including the Church and Weldon amendments. The move does not affect those established protections for physicians or other health professionals who object to providing abortion services on moral grounds.

The final Obama administration rule does, however, retain the Bush enforcement process for health professionals who believe they have been compelled to perform or assist in an abortion.

CONSCIENCE LAWS STILL IN PLACE

Although a new HHS final rule rescinds most of a Bush-era regulation on conscience protections for health care professionals, the latest move does nothing to alter several conscience protections in statute:

Church Amendment (1973): Prevented federal, state or local entities getting federal funds from discriminating against health care workers or institutions that refuse to perform or participate in any lawful health service, including abortion or sterilization, based on moral objections.

Public Health Service Act (1966): Extended conscience protections to individual and institutional health care entities, including medical training programs, that refuse to perform, train in or refer for abortion services.

Weldon Amendment (2006): Extended conscience protections to individual and institutional health care entities, including hospitals and health plans, that refuse to provide, pay for or refer for abortion services.

SOURCE: DEPT. OF HEALTH AND HUMAN SERVICES

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New Ethical Standards from our “Leaders”
## New Ethical Standards from our “Leaders”

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<th>ACOG (No. 385, 2007)</th>
<th>AAP (Committee on Bioethics, 2010)</th>
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<td>Physicians have a “duty to refer” if conscience does not permit them to provide “standard of care”</td>
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<td>Providers who conscientiously object should live in close proximity to those who do not.</td>
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<td>In emergencies, providers have an obligation to perform the procedure they oppose.</td>
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<td>Physicians have a “duty to refer”</td>
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<td>Physicians have a “duty to disclose” what they object to</td>
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<tr>
<td>Physician’s duty to perform objectionable procedures rises as availability of alternatives decreases.</td>
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International Legal Status

- Australia (2008): State of Victoria attempting to nullify conscience protection for individuals and institutions
- Canada (2008): State of Ontario with similar measures—“doctors should be prepared to set aside personal beliefs”
- Belgium (2006): Catholic hospitals must perform euthanasia
The Arguments

ARGUMENTS AGAINST A RIGHT OF CONSCIENCE
ARGUMENTS FOR A RIGHT OF CONSCIENCE
“If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors.”

- Julian Savulescu, Professor of Practical Ethics, Oxford University, 2006
The Physician-Patient Relationship

Patient: an acting person

Covenant: mutual obligations and trust

Physician: an acting person
Arguments Against a Right of Conscience

1. AN UNFAIR BURDEN ON THE PATIENT
2. AN AFFRON TO AUTONOMY
3. DE-LEGITIMIZES CERTAIN MEDICAL PRACTICES
4. LEADS TO THE ‘SLIPPERY SLOPE’
5. ALL PHYSICIANS SHOULD HAVE TO REFER
Arguments Against a Right of Conscience: An Unfair Burden?

1. To refuse to perform or refer for X “unnecessarily burdens the patient.”
   * There is an “information gap” between doctor and patient
   * There is a “power gap” between doctor and patient
   * The physician has what the patient lacks and must level the playing field (the physician “owes it” to the patient)
The Rebuttal

Unfair Burden?

- The Physician-Patient relationship is one built on trust *precisely because* of the information/power differential.
- Physician promises to act in the “best interests” of the vulnerable patient (beneficence).
- The physician can neither be silent in the face of this vulnerability, nor can she take advantage of it.
- It is sickness/illness that creates vulnerability, not the physician.
2. The use of a “right of conscience” undercuts the principle of autonomy, the dominant principle of medical ethics

- The physician is always obligated to do what the patient wishes, even if that means putting personal or religious values aside
- Religion should be kept separate from the practice of medicine
- To refuse a particular treatment, procedure, counsel etc. is to “impose one’s values” on another, and is paternalistic
The Rebuttal

Affront to Autonomy?

- Autonomy and Beneficence are complimentary (not contradictory), and arise out of the Physician-Patient relationship.
- True autonomy in practice does not mean the total independence from the physician.
- Like rights, one can view autonomy as a “negative” (we should not interfere) or “positive” (we must provide)—medicine should view autonomy in the first sense.
• THE PHYSICIAN IS AN AUTONOMOUS, MORAL PERSON
  ○ The patient cannot impose her values on the physician
  ○ The physician has autonomy as a person, as a physician, and as a member of her profession
  ○ Autonomy has it’s limits:
    ▪ Patient: should not hurt self or another
    ▪ Physician: should not be incompetent, act in self-interest, act paternalistically
Arguments Against a Right of Conscience: Undercuts an Act’s Moral/Ethical Legitimacy

3. To allow physicians to “opt out” of abortion, contraception, euthanasia etc. would send a message (to patients, physicians, society) that such actions might somehow be “illegitimate practices.”

- Abortion as a “reproductive health service” or part of “women’s health”
- Sterilization/contraception as required “medical treatment,” rather than elective procedures
- Euthanasia and assisted suicide as “medical options” or “end-of-life choices”
- The medicalization of the death penalty
Irony: “Pro-choice” advocates who oppose conscientious objection do not wish to allow physicians/hospitals/students to have a “choice” in whether to participate or not in these procedures!

Because a practice/procedure is accepted by society, laws, or medical professional bodies does not make this practice legitimate (they might be wrong...)
“If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors.”

- Julian Savulescu, Professor of Practical Ethics, Oxford University, 2006

These points of contention are crucial to understanding why a physician’s right of conscience must be protected.
Hippocrates and his followers rejected the "standard of care" of medicine at the time

- Confidentiality
- Euthanasia
- Abortion

Semmelweis was ridiculed and ostracized for his insistence on the use of antiseptic in OB wards

- Lister made use of his work in surgical procedures

Hippocrates (460-370 BC) and Ignaz Semmelweis (1818-1865): Men of Conscience
Arguments Against a Right of Conscience: “The Slippery Slope”

- If we do not impose limits on what physicians and other health care workers can object to, then where does it end?
  - People will be able to “opt out” of anything (a “cafeteria-style” profession with no standards)
  - People will be able to “opt out” for morally repugnant reasons (“I don’t want to treat gay people, Black people, poor people etc.)
  - Patients will lose confidence in healthcare
Historically, the “slippery slope” argument for conscientious objection has not occurred.

Ideally, we want a society which is tolerant of others’ beliefs—but where tolerance is a “golden mean”

- Not overly restrictive
- Not overly licentious
Daniel Sulmasy’s “Questions” as limits to conscientious objection:

- Does the practice undermine or contradict the principle of tolerance itself?
- Does the practice entail a substantial risk of serious illness, injury, or death for those who do not share the belief that is said to justify the practice?
- Is the practice an action, or a refraining from action? (less justification needed to “override” conscience if it is an action)

Sulmasy, DP (2008). What is conscience and why is respect for it so important? *Theor Med and Bioethics*
The Rebuttal

Some Other Arguments Supporting Conscience

- A tolerant society should embrace religious pluralism and accommodate different beliefs
- Personal and professional virtues cannot (should not) be separated
- We have a duty of beneficence to the patient to not take actions which harm him/her
Why Not Refer?

- If you have a moral opposition to X, you still have an obligation to refer a patient to someone/someplace that will do the task they request
  - A physician cannot “abandon patients”
  - All physicians refer to other physicians/hospitals for practices beyond their expertise or purview.
The Rebuttal

Why Not Refer?

“[The physician] cannot place responsibility on others for morally indefensible decisions or for cooperation in decisions which violate her own conscience. This inescapable fact of the physician-patient relationship places unavoidable obligation on the physician to avoid action she deems harmful to her patient, even if that action is ‘required’ by state regulation, policy, or law.”

-- Edmund Pellegrino, 1994
The Rebuttal

Why Not Refer?

- Principles of Cooperation (“Old School”):
  - **Formal Cooperation:** direct participation in an evil act
    - Implicit (unintended) [student holds instruments during abortion procedure]
    - Explicit (intended) [abortionist]
  - **Immediate Material Cooperation:** a person indirectly contributes to an evil act, which could not occur without their participation [prepping a patient for abortion etc.]
  - **Mediate Material Cooperation:** a person participates indirectly (but distantly) in an evil act, which would occur without their cooperation [cleaning abortionists instruments? contributing to a candidate who supports abortion-rights?]
Why Not Refer?

- There is no law requiring referral.
- “Abandonment” of the patient assumes that everyone agrees that the practice in question is legitimate.
- If one says, “I won’t do X, because X is wrong, but I will refer to someone who will,” either:
  - They do not really think X is wrong (or that wrong), so it should not be prohibited
  - They want to avoid conflict with the patient, society etc.
  - They do not realize that cooperation/facilitation with/of a moral wrong constitutes a share of culpability for that moral wrong
Arguments Against a Right of Conscience (with Answers!)

AN UNFAIR BURDEN ON THE PATIENT?
(NOT IF THE INHERENT BURDEN IS BALANCED WITH TRUST)

AN AFFRONHT TO AUTONOMY?
(DOCTORS ARE PEOPLE TOO!)

DE-LEGITIMIZES CERTAIN MEDICAL PRACTICES
(MAYBE THEY SHOULD BE?)

LEADS TO THE ‘SLIPPERY SLOPE’
(NOT WITH REASONABLE LIMITS)

ALL PHYSICIANS SHOULD HAVE TO REFER
(SAYS YOU!)
YOU

conscience
What Can You Do To Protect Your Right of Conscience?

FUTURE CHALLENGES
ACCEPT THE CONDITIONS AND CONSEQUENCES
LEARN FROM THE PAST
Future (Philosophical) Challenges

- Rationed/Managed care
  - Will you be “forced” to violate conscience?
- What constitutes “good medicine?”
  - At stake is physician integrity and autonomy
  - Just because you don’t agree...

- WHAT IS THE NATURE OF THE HUMAN PERSON?
  - We live in a secular society—but is man a secular being with spirituality “added on”?
  - Or is a person a spiritual being whose purpose is to follow God and His truth?
  - What is the “default?”
Conditions and Consequences of Conscientious Objection

- There must be a grave moral conflict for which there is no other (ethical) alternative
- The objection must be intended to benefit the patient, uphold the oath and dignity of the patient and physician, and/or protect physician integrity
- The physician must be truthful about why they object
- The health care provider must accept the consequences of the refusal
What Can You Do?

- Challenge the “status quo!”
- Fight for your rights—Do not be afraid!
- Pray about where your conscience leads you
- Inform your conscience
- Vote with your conscience
Some Good Starts for 2011?

- **Protect Life Act (Joe Pitts, R, PA)**
  - Bans federal $ from paying for abortion under new health care law

- **No Taxpayer Funding for Abortion Act (Chris Smith, R, NJ)**
  - Stops all direct/indirect funding for abortion

- **Abortion Non-Discrimination Act (John Fleming, R LA)**
  - Makes permanent the Weldon Amendment

- **Cutting funding for abortion providers**
  - Planned Parenthood in the House
“Cheap grace is the mortal enemy of our church. Our struggle today is for costly grace.”

Cardinal Von Galen (1878-1946), Roman Catholic bishop of Munster

“[T]here are also sacred obligations of conscience from which no one can release us, which we must carry out, even if it should cost us our life.”

Dietrich Bonhoeffer (1906-1945), (Confessing) Lutheran Church
References

- Sulmasy, D., “What is conscience and why is it so important?” *Theoretical Medicine and Bioethics*, 29 (3); August 30, 2008: 135-149.
Questions?