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ORIGINAL RESEARCH

Freedom of Conscience in Health Care: Distinctions and Limits

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Abstract The widespread emergence of innumerable technologies within health care has complicated the choices facing caregivers and their patients. The escalation of knowledge and technical innovation has been accompanied by an erosion of moral and ethical consensus among health providers that is reflected in the abandonment of the Hippocratic Oath as the immutable bedrock of medical ethics. Ethical conflicts arise when the values of health professionals collide with the expressed wishes of patients or the dictates of regulatory bodies and administrators. Increasing attempts by groups outside of the medical profession to limit freedom of conscience for health providers has raised concern and consternation among some health professionals. The personal and professional impact of health professionals surrendering freedom of conscience and participating in actions they deem malevolent or unethical has not been adequately studied and may not be inconsequential when considering the recognized impact of other circumstances of coerced complicity. We argue that the distinction between the two ways that freedom of conscience is exercised (avoiding a perceived evil and seeking a perceived good) provides a rational basis for a principled limitation of this fundamental freedom.

Keywords Coerced complicity · Freedom of conscience · Health professionals · Medical ethics · Perfective freedom · Preservative freedom · Professionalism

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Introduction

The Ontario Human Rights Commission warning that it expects health professionals to "'check their personal views at the door' in providing medical care" (Ontario Human Rights Commission 2008, ¶7 under "Moral or Religious Beliefs") reflects a perspective that seems increasingly popular in ethical and administrative circles. That perspective is shaped by a variety of assertions, including claims about human rights (Ontario Human Rights Commission 2008) or medical professionalism (Gordon 2004; Charo 2005; Cantor 2009) that are sharply contested (Genuis 2006, 2008; Murphy 2005, 2009a). The personal impact on front-line professionals of unduly restricting or suppressing their freedom of conscience has been insufficiently considered by ethicists and administrators because the complex relationship between this fundamental freedom and the human person has been inadequately assessed.

Exercising Freedom of Conscience

While the nature of conscience itself may be disputed (Lawrence and Curlin 2007), it is generally agreed that freedom of conscience can be exercised in two different but complementary ways. One may avoid doing what is apparently evil or engage in doing what is apparently good; some decisions involve both elements. This is notably reflected in health care settings by refusals to facilitate morally contested services, since conscientious objection may generate discomfort or conflict, especially in the context of ongoing technological developments alongside the increasing ethical diversity among health care professionals (Fernandez-Lynch 2008, 38). However, conscientious convictions can also serve as the motivation for health care workers to provide services, including abortion (Harris 2012) or medical treatment for illegal immigrants (Triviño 2012). Finally, though it is seldom recognized, one can be said to be acting in accordance with conscience whenever a treatment decision reflects a conscious effort to minimize harm or maximize benefits for a patient. This may be mischaracterized as an exercise of "professional" conscience (Daar 1993; Faunce, Bolsin, and Chan 2004).

It has been suggested that existing law is unbalanced because it appears to favor the protection of conscientious objectors and not conscientious providers (Harris 2012). Given the importance of freedom of conscience, this concern is not *prima facie* unreasonable. Why should law not equally protect both conscientious objectors and conscientious providers? Unfortunately, in view of vehement denunciations of conscientious objection in health care (Canning 2002) and repeated efforts by some activists to suppress it (Murphy 2009b), an expansion of current legal protection to cover conscientious provision of services is unlikely to be welcome. In any case, given continuing attempts to limit or suppress freedom of conscience, we confine our reflections here to what kind of limits are most consistent with human freedom and dignity and the best traditions of liberal democracy. We begin with a closer examination of the two ways of expressing judgments of conscience.

Perfective and Preservative Freedom of Conscience

A traditional view holds that one who freely chooses a moral good—say, helping someone in need—perfects himself/herself to the extent that what is chosen is truly good and not just apparently so. A moral pluralist might say that the free choice of a desired good actualizes personal autonomy and thus contributes to an ultimate end described as self-fulfillment. The decision to pursue an apparent good in either case can be called an exercise of *perfective* freedom of conscience because it is potentially perfective of the human person.

On the other hand, one who refuses to participate in wrongdoing—refusing an invitation or pressure to steal, for example—preserves his/her own integrity, even though he/she does not achieve the kind of personal growth that might be possible by doing some positive good. A moral pluralist might hold that such a refusal preserves rather than develops personal autonomy. Thus, a decision to avoid an apparent evil can be described as an exercise of *preservative* freedom of conscience.

Certainly, the exercise of preservative freedom of conscience may have a perfective effect. According to a traditional account, the exercise of moral judgment and will required by resistance to wrongdoing tends to strengthen as well as preserve these faculties, which are understood to be characteristic of the human person. Once more, a moral pluralist might agree, referencing positive effects on capacities for autonomous judgment and action. However, an adequate account of the human person must include reference to human interdependence and the centrality of social relationships. Thus, one encounters forceful arguments that doing good for others is more fully perfective of the human person than simply refusing to do what is wrong.

Limiting Perfective Freedom of Conscience

It is generally agreed that the state may limit the exercise of freedom of conscience if it is objectively harmful, or if the limitation serves the common good. While there is disagreement about how to apply these principles, they are seen at work when the law refuses to countenance human sacrifice in religious worship or when it limits the practice of medicine to qualified professionals rather than faith healers.

Notice, however, that the limitation imposed is typically on *perfective* freedom of conscience; someone is prevented from doing some good that he/she believes ought to be done. Supposing that an injustice results from this limitation, the person impeded does not participate in the resulting injustice. It occurs

against his will, without any positive action on his/her part, as a result of the decisions and actions of others.

Nor is a restriction on perfective freedom of conscience inconsistent with the position that doing good for others is *more* perfective of the human person than refusing to do what is wrong. This does not mean that both species of freedom of conscience warrant equal protection. Precisely because others are involved, the judgment about what constitutes their good may be legitimately contested and limitations may be imposed on perfective freedom of conscience to prevent harm to others.

Such limitations may interfere with some of the aspirations of citizens or their pursuit of moral perfection but are not necessarily inconsistent with democratic freedom or human dignity. Certainly, restrictions may go too far; they might fail to demonstrate sufficient understanding and respect for human freedom and dignity, even if they do not subvert them entirely. But no polity could long exist without restrictions of some sort on human acts, so some limitation of perfective freedom of conscience is not unexpected.

Limiting Preservative Freedom of Conscience

If the state can legitimately limit perfective freedom of conscience by preventing people from doing what they believe to be good, it does not follow that it is equally free to suppress preservative freedom of conscience by forcing them to do what they believe to be wrong. There is a significant difference between preventing someone from doing the good that he/she wishes to do and forcing him/her to do the evil that he/she abhors.

In the first place, preservative freedom of conscience is more fundamental than perfective freedom of conscience, because the latter depends upon the preservation of moral character ensured by the former. This is reflected in the ethical maxim, "First, do no harm." But the difference goes much deeper than this.

Coercion, Culpability, and Responsibility

It is generally thought that someone who is forced to do evil against his/her will cannot be blamed for the act. However, while some kinds of coercion have that effect, not all of them do, and the gravity of the evil enters into the calculation. Broadly speaking, culpability for more serious wrongdoing can be diminished or extinguished only by more oppressive forms of coercion. Further, it may be held that some things are so gravely wrong that even the worst forms of coercion cannot extinguish personal culpability, though it may be significantly diminished (*Criminal Code of Canada* 1985, s 17).

In addition, no act is possible unless a person chooses to act, and that involves, even if coerced, an act of the will. Strictly speaking, it remains possible for him/her *not* to act if he/she is willing to suffer the consequences. In that limited sense the act is voluntary and thus engages the person to some degree. If the coercion is sufficient to extinguish personal culpability, it cannot completely eradicate personal responsibility, nor can it eliminate personal moral awareness (Todorov 2000, 61, 232).

Accounting for Victim Guilt or Shame

This is not an argument for rigid moralism, inhuman perfectionism, or tyrannous legalism. It does, however, explain why a sense of guilt or shame often haunts people who have been forced to participate in wrongdoing. Jean Améry writes of the "shame of destruction" experienced by those who succumb to torture (Todorov 2000, 264) and compares the shame of concentration camp inmates forced to do what they abhor to the guilt experienced by rape victims.[1] Tzvetan Todorov accepts Améry's hypothesis that such shame is a product of the *dissociation* of the person from the will (Todorov 2000, 263). It is at least as plausible to account for such shame or self-reproach as a consequence of the *inseparability* of the person and the will—and, thus, an inability to completely separate oneself from acts and omissions even if they have been coerced.

Reaction of the Person to Complicity

There appears to be something about complicity in wrongdoing that triggers an instinctive and profound sense of abhorrence. A sense of uncleanness, taint, or shame arising from complicity in wrongdoing—even if it is coerced—is the natural response of the human

[1] See also Jean Améry's (1966) *At the Mind's Limits*: *Contemplations by a Survivor on Auschwitz and Its Realities*, translated by Sidney Rosenfeld and Stella P. Rosenfeld and published in Bloomington by Indiana University Press.

person to something fundamentally opposed to his/her nature and dignity. It is illustrated by expressions such as the "poisoned" fruit doctrine, "tainted" evidence, money that has to be "laundered," and "dirty" hands (Lee and Schwarz 2010).

This is not surprising, since even an objectively evil choice is motivated by a desire for some apparent good. Should one choose something harmful to oneself—even death—it is chosen because it is perceived to provide some good that is proportionately greater than the alternative. It would be perverse to choose an evil absent such motivation, but coerced participation in wrongdoing imposes precisely this kind of perversion upon the objector: By nature disposed to choose an apparent good, he/she is made to choose an apparent evil.

It may be argued that, when health providers acquiesce in actions they perceive as harmful or wrong, another entity (patient, proxy, ethics committee, the state) makes the choice and thus bears the moral responsibility for the act. But this ignores the essential unity of the human person who experiences moral culpability, responsibility, and awareness. Equally important, when some other entity substitutes its will for that of the objector, it effectively deprives him/her of his/her will, just as concentration camp guards and survivors were, according to Todorov, deprived of theirs, albeit in different ways (Todorov 2000, 165–169, 263).

Jekyll and Hyde Revisited

In explaining how normal men could commit the atrocities characteristic of the Nazi and Soviet camps, Robert Jay Lifton and Tzvetan Todorov both identify the same phenomenon. Lifton calls it "doubling" (1986, 418–429). Todorov describes it as "compartmentalization" (2000, 149–157). Both authors emphasize that "doubling" or "compartmentalization" are often found in ordinary life and may serve useful purposes. Lifton, however, identifies a destructive form of it that he calls "victimizer's doubling" that makes it possible for a "human self" to be joined by a "professional self" willing "to ally itself with a destructive project" (Lifton 1986, 464–465).

Lifton (1986) and Todorov (2000) make clear that doubling/compartmentalization made it possible for guards and others operating the camps to persist in atrocities because it effectively protected them from feelings of guilt. Todorov remarks that, "as a rule, the legally guilty feel they are innocent while those who are truly innocent live in guilt" (2000, 263).

Lessons Learned

The juxtaposition of the consequences of doubling/compartmentalization on victimizers and victims suggests a lesson that can be drawn from the work of Lifton and Todorov. When preservative freedom of conscience is surrendered voluntarily, the consequence is victimizer's doubling that enables evildoing and transforms people into submissive conformists and docile clerks who easily become the tools of repressive regimes. When it is suppressed by coercion, the result is the kind of spiritual rape suffered by those victims of the camps who were forced to do what they believed to be wrong.

On this point, a word of caution: What is proposed here is a reflection upon a single aspect of the experience of some death camp victims; it is not advanced as a global explanation for "survivor guilt." Further, the present reflection is confined to forced *participation* in wrongdoing, not to coerced *passivity* in the face of it, also a dehumanizing experience productive of guilt (Wiesel 1985, 39, 54; Levi 2000, 180–181).

The foregoing discussion suggests that the reactions of shame, guilt, and a sense of contamination that occur in those forced to be complicit in what they believe is evil cannot be dismissed as the product of irrational hypersensitivity or minimized as an ephemeral emotional response. They are symptoms of real harm caused by a violation of personal integrity that deprives people of their essential humanity. This explanation is consistent with the phenomenon of *moral injury* that some researchers believe they have identified among soldiers who appear to be suffering forms of impairment related to personal violations of moral codes they accept (Litz et al. 2009; Drescher et al. 2011; Maguen and Litz 2011). Most important in the present context, it indicates that any proposals to limit freedom of conscience must first take into account the distinction between its perfective and preservative forms.

Distinctions and Limits

By its nature, perfective freedom of conscience demands much more of society than preservative freedom of conscience. Limiting perfective freedom of

conscience may prevent people from perfecting themselves, fulfilling their personal aspirations, or achieving some social goals. This may do them some wrong; that is why democratic regimes have been increasingly inclined to err on the side of freedom, demanding that restrictions on freedom of conscience must be demonstrably necessary, narrowly framed, and strictly construed. But if it does them some wrong, it does not necessarily do them an injury.

In contrast, to force people to do something they believe to be wrong is always an assault on their personal dignity and essential humanity, even if they are objectively in error; it is always harmful to the individual, and it always has negative implications for society. It is a policy fundamentally opposed to civic friendship, which grounds and sustains political community and provides the strongest motive for justice (Aristotle 1905; Bradshaw 2009). It is inconsistent with the best traditions and aspirations of liberal democracy, since it instills attitudes more suited to totalitarian regimes than to the demands of responsible freedom.

This does not mean that no limit can ever be placed on preservative freedom of conscience. It does mean, however, that even the strict approach taken to limiting other fundamental rights and freedoms is not sufficiently refined to be safely applied to limit freedom of conscience in its preservative form. The stakes are far too high. Like the use of potentially deadly force, if the restriction of preservative freedom of conscience can be justified at all, it will only be as a last resort and only in the most exceptional circumstances. All of this, of course, is without prejudice to the question of whether or not legal protection for perfective freedom of conscience should be further expanded, which is beyond the scope of this paper.

Practical Applications

This discussion differs from the kind of deliberation associated with ethical decision-making about treatment because it occurs at a level that is usually well "beneath the radar" in professional environments. In some respects, it may even be preliminary to metaethics (Beauchamp and Childress 2013).

The key point is that bioethical discourse about freedom of conscience in health care is controlled by foundational premises, assumptions, and blind spots, so that what is proposed here first intersects with practice at the level of education, policy-making, regulation, and law. Hence, the examples offered to illustrate the implications of what we propose are not ethical controversies at the bedside but at the regulatory level.

Example 1: Tasmania: Access to Terminations Bill 2013

A draft bill in the State of Tasmania requires that a medical practitioner who objects to abortion for reasons of conscience must refer a woman seeking an abortion to a colleague willing to provide the procedure (Tasmania Department of Health and Human Services 2013). Those who fail or refuse to do so will be subject to a fine of up to AU$65,000 (Gora 2013).

> **The conflict**: Some physicians who object to abortion are also unwilling to refer for the procedure on the grounds that referral constitutes morally illicit participation in the act. However, those supporting the mandatory referral requirement deny that referral involves moral complicity and/or claim that medical practitioners are ethically obliged to facilitate access to all legal procedures that are not medically contraindicated.

Example 2: British Columbia: Access to Drugs

A pharmacy regulatory authority issues a directive that pharmacists who have moral objections to dispensing drugs must promptly direct clients to a colleague willing to do so and, in the absence of a willing colleague, dispense the drugs themselves. The regulator's ethics committee suggests that this expectation would hold even in the case of drugs used for "voluntary or involuntary suicide" and executions by lethal injection (College of Pharmacists of British Columbia 2000).

> **The conflict**: For reasons of conscience, some pharmacists are unwilling to dispense some drugs that are to be used for what they consider to be immoral purposes, even if no willing pharmacists are available to do so. For the same reasons, others are unwilling even to refer patients, since they believe that this makes them morally complicit in a wrongful act. On the other hand, the ethics committee maintains that pharmacists must "respect patient autonomy" by dispensing the drugs or by referral and that this is required by "the ethics of the profession."

Example 3: Texas: Provision or Withdrawal of Life-Supporting Interventions

The provision or withdrawal of life-supporting interventions, especially near the end of life, can be a contentious issue. In some cases, patients and families wish interventions to continue, while physicians believe they should be withdrawn. In others, patients and families seek withdrawal of life-supporting interventions, while physicians believe they should continue.

> **The conflict**: Some physicians want to ensure that they are not compelled to provide or continue interventions they believe are wrongful; others want to ensure that they are not forced to wrongfully withdraw interventions. Both groups insist that they should not be compelled to act against their conscientious convictions, either by providing interventions or by withholding/withdrawing. On the other hand, some patient and family advocates demand that physicians should be required to comply with their wishes and should not "impose their morality" by refusing to do so.

Discussion

In the first two examples, regulators jeopardize or suppress the exercise of preservative freedom of conscience; in the third, preservative freedom of conscience is threatened.

Applying the arguments advanced in this paper, if a restriction or suppression of preservative freedom of conscience can be justified, it can only be justified in the most exceptional circumstances and as a last resort. Such justification is lacking in all of the cited cases.

Approaching each case from this perspective forecloses coercive measures, if not entirely then at least until a much later stage in deliberation. Instead, one begins by asking (a) how the morally contested services might be provided without the participation of objecting health care workers, and (b) to what extent objecting health care workers might be amenable to modifying their positions. Thus, the energies and resources of the regulator and those seeking access to morally contested services will be directed to the immediate provision of services sought by patients and to respectful engagement with objecting health care workers.

Resolving and Preventing Conflicts

It is reasonable to believe that problems associated with access to morally contested services can be resolved with sufficient imagination and political will, without prejudice to freedom of conscience. For example:

- Access to abortion is maintained by regulators in some jurisdictions in a variety of ways without compromising freedom of conscience: by permitting self-referral, by ready access to a health-link information line providing details on available services, and by widely disseminating contact information for those willing to provide or assist with facilitating the procedure.
- A non-objecting pharmacy employee can screen incoming prescriptions, directing prescriptions for morally contested products to those willing to provide them. The accommodation of objecting pharmacists can be accomplished in this way without the need for interaction between an objecting pharmacist and a patient (Chipeur 2001).
- A regulatory authority can maintain and disseminate a register of facilities or providers willing to consider accepting patients seeking to continue or discontinue life-supporting interventions so that both freedom of conscience and responsiveness to patient/family requests can be accommodated. Such as system is already in place in Texas (Fernandez-Lynch 2008, 146).

The examples and suggestions are intended to highlight the application of the distinction between perfective and preservative freedom of conscience. They should not be understood to preclude other reasonable measures that can help to prevent and resolve conflicts, such as advance notification for patients, colleagues, and employers of a provider's conscientious objection(s) with regard to particular issues, when feasible.

Conclusion

The distinction we make between preservative and perfective freedom of conscience provides a rational basis for the principled limitation of this fundamental freedom, establishing the former as *prima facie* exempt from limitation and proposing the "use of deadly force" paradigm as a potentially suitable standard to be applied in resolving conflicts involving it. While we have not

explored the more complex issues involved with the principled limitation of perfective freedom of conscience, what we have proposed is sufficient to support the conclusion that willingness to do what one believes to be wrong must never be made a condition for participation in public life or for membership in professional organizations.

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