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Conscientious Refusal of Abortion in Life-Threatening Emergency Circumstances and Contested Judgments of Conscience

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Lawrence Nelson (2018) criticizes conscientious objection (CO) to abortion statutes as far as they permit health care providers to escape criminal liability for what would otherwise be the legally wrongful taking of a pregnant woman's life by refusing treatment (i.e. abortion). His key argument refers to the U.S. Supreme Court judgment (*Roe v. Wade* 1973) that does not treat the unborn as constitutional persons under the Fourteenth Amendment. Therefore, Nelson claims that within the U.S. legal system any vital interests of pregnant women must always take precedence over fetuses' interests. While agreeing with the main thesis of the article, we believe that the author's argument neither vindicates his claim, nor explains why those who believe that fetuses are equally protectable human beings do not have the right to refuse to perform an abortion in life-threatening emergency circumstances (AE). Therefore, the main aim of our commentary is to outline, by referring to our earlier works on conscientious objection in health care (Żuradzki 2016) and cultural exemptions (Ciszewski 2016), a better and universalizable argumentative path that would lead to the same conclusion.

Some legal frameworks fetishize individual judgments of conscience, which may have its roots in the Thomistic understanding of conscience, according to which it is always objectively morally wrong for a person (not only wrong from an agent's subjective perspective) to breach his own conscience, even if the particular judgment of conscience is false or mistaken (Głowała 2016). In contrast with this approach, we claim that not every judgment of conscience to which someone is deeply committed deserves legal protection in the cases where the interests of others are at stake. In particular, there are no reasons to accommodate judgments that are obviously mistaken about either empirical facts or the content of legal or ethical norms (including professional codes). Moreover, we believe that the reasons for CO should be revealed and (at least sometimes) externally evaluated (as in the case of conscripts) to avoid accommodating inauthentic judgments of conscience

that aim at protecting some objectors' interests that are not related to the integrity of their consciences or their religious freedom. To these requirements, which have been extensively discussed in the literature (e.g., see the reasonability view defended by Robert Card [2014]), we would like to add the moral threshold requirement: CO in health care is justified if and only if the reasons behind a refusal are of a moral nature and meet a certain threshold of moral importance within a normative doctrine (Żuradzki 2016). This last requirement demands that a particular normative judgment serving as the basis for the CO exemption (i) is formulated in terms of objective reasons about what ought or ought not to be done in a given situation that are intelligible to, even if not shared by, all stakeholders (intersubjectivity), and (ii) involves the reasonable expectation of the CO applicant that the judgment will be adhered to by others who find themselves in given circumstances, regardless of their religious affiliation or moral views (generality).

Let us see this requirement on an example: If someone actually recognizes the personal status of a human embryo or fetus (no matter whether that someone's views are inspired by a religious or secular morality), one is able to present her views in terms of intersubjectively intelligible and generalizable reasons for action, one may claim that other normative views—which do not assume such a status—are somehow wrong or mistaken, and one hopes that everyone treats embryos or fetuses as if they had full moral status. This means that a CO applicant may indeed object to abortion in the “standard” cases, but not in the case of AE. Why? Because even for those who believe that fetuses have full personal status AE does not have to be conceptualized as the intentional and direct killing of one person to rescue another (i.e., as a direct abortion), which is prohibited by some normative doctrines, even if the only alternative would be to let two persons (a pregnant woman and a fetus) die. Instead, AE may be understood differently (and, in fact, very often it is), even within the Catholic tradition or

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other moral doctrines that ascribe full personal status to fetuses. Many theologians or religious leaders have defended the moral permissibility of AE on the ground of either (i) the principle of double effect, as an indirect (and permissible within these doctrines) abortion where the intended aim is to remove not the fetus, but some biological material (e.g., a cancerous but gravid uterus or a placenta) that is treated as a real threat to the pregnant woman's life and also the cause of the fatal threat to the fetus (Lysaught 2011; Magill 2011); or (ii) the principle of choosing the lesser evil, which states that in a situation of choice between two or more evils (in this case, the death of one person or the death of two), one is obliged to perform the least wrong action (Prusak 2011). The Catholic tradition, surprisingly, has not reached a satisfactory consensus on this issue, and CO refusals in life-threatening emergency circumstances are contested even within this normative doctrine (for a review of possible Catholic views on this issue, see Coleman 2013).

Should the fact that a judgment of conscience is contested within a religious or a moral doctrine affect claims for conscientious exemption? We would answer in the affirmative, arguing that such claims might be justified only by judgments that are commonly recognized by the representatives of a relevant tradition. There are two main reasons for this position. First, political institutions (e.g., legislatures and courts) are not allowed to interfere in the internal disputes within moral or religious traditions, and therefore they should not grant exemptions on the basis of judgments which are contested within these traditions. The legal recognition of a judgment in such circumstances might be reasonably perceived as taking a side in an internal dispute, and, consequently, as a violation of the state's obligation to be neutral with respect to moral and religious worldviews. An analogy with the role of scientific reasons in political decision making may be invoked to clarify this point. It is fully legitimate for a court to base its judgment on noncontroversial scientific conclusions; however, in the absence of such conclusions and the ongoing disagreement among scientists on a given issue, appealing to contested arguments becomes highly problematic (Rawls 1993). Second, the moral threshold requirement implies that only doctrines that are coherent and reasonable can provide legitimate demands for legal exemptions (cf. Billingham 2017). The claimant should have a relevant and intelligible reason to oppose the law, and his judgments of conscience must be minimally credible within a normative doctrine in order to qualify for special legal protection. Following Charles Larmore, one might contend that this last requirement expresses respect for persons as rational agents (Larmore 1996). Based on this assumption, we argue that a reason for an exemption cannot be recognized as coherent and reasonable if the relevant doctrine justifies mutually exclusive positions on the same normative issue.

How does the fact that a judgment is contested affect the claim for an exemption? Does the agreement within a doctrine mean it should be treated as (i) a threshold

condition or as (ii) a weighing condition? According to the former approach, the doctrinal consensus on some issue constitutes a minimal requirement of adequacy of an exemption demand, whereas on the latter account, the more contested the judgment is, the weaker the demand becomes. We argue that the threshold approach is the appropriate one, and we believe that the existence of a sufficiently robust agreement within a doctrine satisfies the requirement of common recognition and avoids risks specified in the previous paragraph. Our claim is that such doctrinal agreement should be easily discernible for the experts on this tradition. For that reason, the mere existence of a minoritarian view within a doctrine does not necessarily undermine consensus in this sense. The conclusion of whether there is a commonly recognized agreement on a particular issue should be decided on a case-by-case basis, and the answer to this question may depend on different factors, including the history of the disagreement, the number of dissidents, the quality of their argumentation, and even one's position within the religious group.

To sum up, the legitimacy of CO to perform an abortion in life-threatening emergency circumstances might be assessed in two aspects: the first is an internal aspect that concerns the justification of the claim to CO within the claimant's normative doctrine (that is the moral threshold requirement, and the common recognition requirement); the second is an external aspect that concerns legal and political feasibility of the claim within some legal system. Nelson focuses only on the second aspect; however, the demand for CO in life-threatening emergency circumstances might be successfully dismissed at the more universal level: the doctrinal disagreement on the normative status of the claim.

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Accommodating Conscience Without Curtailing Women’s Rights, Health, and Lives

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Nelson (2018) makes a plausible legal argument that homicide charges are warranted when individual and institutional medical providers, due to conscientious objection, refuse to disclose or to provide emergent pregnancy termination for a woman who dies as a result. In response, I want to expand the analysis to ascertain whether in similar cases civil claims are plausible, not only in cases in which women die, but also in cases when women don’t die but suffer harms. Nelson recognizes that district attorneys elected by voters may be reluctant to file homicide charges against physicians and hospitals that refused emergent terminations based on conscience. Private plaintiff’s attorneys, however, who might bring a wrongful death civil law claim, would not have that political risk. Moreover, the lower standard of proof in a civil claim, “mere preponderance” rather than “beyond reasonable doubt,” would make a claim substantially easier to prove than homicide.

Recently, the ACLU sued on behalf of Tamesha Means. Ms. Means entered Mercy Health Partners, a Catholic hospital in Michigan, for emergent care from labor contractions at 18 weeks. Diagnosed with premature rupture of membrane and told her fetus was not viable, she was not told the risks of infection and sepsis if she continued the pregnancy, nor of the option to terminate it, much less that hospital policy prohibited termination. Sent home, she returned the next day with pain, bleeding, and fever. Her physician suspected chorioamnionitis (intra-amniotic bacterial infection). When her fever subsided, she was sent home and told to return

if fever returned or contractions became unbearable, again without warnings about the risks of continued pregnancy or the option of termination. She returned hours later in pain and delivered an infant that lived 3 h. The pathology report confirmed acute chorioamnionitis and acute funistitis (inflammation of the connective tissue of the umbilical cord) (*Means v. United States Conference of Catholic Bishops* 2015).

By the time a public health researcher disclosed that this had happened to five women at the same hospital (Redden 2016), Michigan’s statute of limitations on medical malpractice had passed. So the ACLU suit claimed ordinary negligence against the U.S. Conference of Catholic Bishops (USCCB) and officers of Catholic Health Ministries (CHM), a national Catholic sponsor of hospitals like Mercy Health Partners. The federal trial court dismissed the USCCB for lack of jurisdiction, which the Sixth Circuit Court of Appeal upheld (*Means v. United States Conference of Catholic Bishops* 2016). The trial court also dismissed CHM, reasoning that analysis of the negligence claim would require the court to interpret the Ethical and Religious Directives (ERDs), which would entail excessive entanglement in religion in violation of the Free Exercise Clause of the First Amendment.

Recognizing its ruling would leave women in similar cases no recourse, the trial court noted such claims could be pursued under medical negligence law. The defendant, CHM, had raised Michigan’s liability protection for refusal of abortion as a defense, and the court declined to rule on whether the conscientious objection

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