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Conscientious Objection: Resisting Ethical Aggression in Medicine

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Responding to: *Cantor, Julie D., Conscientious Objection Gone Awry - Restoring Selfless Professionalism in Medicine." N Eng J Med 360;15, 9 April, 2009*

Note: The NEJM declined this paper: "We do not publish full-length manuscripts in response to previously published NEJM articles." The Journal was willing to consider a 175 word letter to the editor.

Judging from the title of her article, Professor Julie D. Cantor believes that "selfless professionalism" in medicine is being destroyed by health care workers who will not do what they believe to be wrong. (Cantor, Julie D., "Conscientious Objection Gone Awry - Restoring Selfless Professionalism in Medicine." N Eng J Med 360;15, 9 April, 2009)

She also implies that Americans have access to health care only because health care workers are compelled to provide services that they find morally repugnant. At least, that is the inference to be drawn from her warning that health care "could grind to a halt" if a federal protection of conscience regulation were "[t]aken to its logical extreme."

Such anxiety is inconsistent with the fact that religious believers and organizations have been providing health care in the United States for generations. If anything, this demonstrates that health care is provided to many Americans - and many of the poorest Americans - *because* of the commitment of health care workers to their moral convictions, not *in spite* of them.

Professor Cantor's article suggests that she is worried that protection of conscience regulations will limit patient access to health care. If so, she offers a peculiar solution.

"Qualms about abortion, sterilization, and birth control?" she asks. "Do not practice women's health." (As if someone taking her advice could possibly enter general practice.)

"Do not become a transplant surgeon."

"Do not train to be an intensivist."

In other words, people unwilling to do what they believe to be wrong should not become physicians or health care workers because they lack "selfless professionalism." What Professor Cantor proposes as a "solution" to the problem of patient access to health care could drive as many as 90% of

religious believers out of the field.[1] Her "solution" could shut down over 900 Catholic hospitals and health care centres that served over 90 millions patients last year,[2] to say nothing of other denominational facilities. How all of this will improve access to health care she does not explain.

Professor Cantor frankly acknowledges that the current controversy is rooted in fundamental disagreement about abortion. What she does not acknowledge is that disagreement about abortion is, in itself, insufficient to cause the kind of conflict now developing about freedom of conscience. Were she and like-minded activists content to agree to disagree, to live and let others live according to different moral standards, there would be no controversy and no need for protection of conscience legislation.

The current conflict (which is not limited to the United States) has arisen primarily because abortion laws were changed with an overly optimistic expectation that health care workers would be willing to participate in the procedure. Having discovered that this is not the case, abortion advocates have been moving from persuasion to a policy of coercion.

To this end, they claim to have discovered a "right" to abortion and "reproductive health care" in international law. They seek enforcement of the purported "right" through national and international institutions and tribunals, as well as regulatory authorities and professional associations. Such "rights" claims, initially aimed at governments to force changes in abortion laws, are also directed at "third parties" - objecting health care workers.[3] This strategy is exemplified in a proposed federal *Freedom of Choice Act* (FOCA).[4]

Canada provides a case study of the trajectory from persuasion to coercion. Protection of conscience measures were deliberately rejected when abortion became a regulated procedure in Canada in 1969, since hospitals were not obliged to offer abortion services and doctors did not have to perform abortions, or even to initiate applications for them.[5] However, it gradually became apparent that many hospitals were not willing to provide abortions. Only five years after decriminalization of the procedure, Toronto's *Globe and Mail* demanded that all publicly funded hospitals (which included Catholic hospitals) be forced to establish abortion committees.[6]

The "public funding" argument is particularly effective where (as in Canada) the state has assumed responsibility for providing health care. "In our society, we all pay taxes for this medical system to receive services," said Dr. Preston Zuliani, the President of the College of Physicians and Surgeons of Ontario. "And if a citizen or taxpayer goes to access those services and they are blocked from receiving legitimate services by a physician, we don't feel that's acceptable."[7]

Dr. Zuliani was defending a policy drafted last year in obedience to the Ontario Human Rights Commission (OHRC). Like Professor Cantor, it demands that physicians "'check their personal views at the door' in providing medical care."[8] The draft policy was opposed by the Ontario Medical Association, representing 25,000 physicians.[9] The most inflammatory language was removed from the final policy, but the OHRC continues to pursue a radical "rights" agenda. Objecting physicians face financially ruinous harassment by the province's inquisitorial human rights apparatus.[10] Moreover, their practice environment is increasingly poisoned by innuendo like that found in an essay in a standard Canadian health law textbook. A passage in the essay implies that objecting health care workers who decline to tell patients where or how they can obtain the morning after pill or abortion commit the offence of "forced pregnancy" under

international law. The author portrays this as a crime against humanity "analogous to torture," or, at least, a gross violation of human rights.[11],[12]

Returning to the United States, in 2006 Professor Cantor herself argued that American plastic surgeons should provide "female genital alteration" (female circumcision) for adults, not only to "spare [patients] the tribal elder's knife," but to respect a choice made by an adult. She implied that surgeons who refused were abandoning the patient, and even cited one opinion that refusing to perform the surgery was discriminatory.[13]

What is remarkable in the current context is that, despite her own views, Professor Cantor was willing to admit that a reasonable surgeon might see things differently and refuse to perform adult female circumcision, since "there is no obligation to treat any patient in a nonemergent situation."[14] Now, however, she believes that it is time to "reconsider the scope of conscience in health care," and that the current freedom to refuse to participate in abortion and sterilization ("perhaps too broad") must not be extended further. She calls for a law to force physicians to provide or facilitate all legal services demanded by patients.

But if health care workers can be compelled to participate in abortion and sterilization, there is no principled reason why they should not be forced to participate in adult female circumcision or other controversial procedures: artificial reproduction, assisted suicide, euthanasia, sex reassignment surgery, and eugenic screening, to name a few. Objecting health care workers are acutely aware of this. They see current efforts to suppress their freedom of conscience as the first steps on a slippery slope that will prove inimical to their careers and their fundamental freedoms. Support for protection of conscience legislation is simply a response to increasingly coercive ethical aggression.

Professor Cantor, too, is worried about a slippery slope - what she calls "conscience creep" - arguing that allowing freedom of conscience is the first step to anarchy in health care. "Conscience is a poor touchstone" she writes, because "it can result in a rule that knows no bounds."

She has good reason to be worried, but not because of what conscientious objectors might refuse to do. The shadow of anarchy she sees lying on the future of health care is cast by her own beliefs and her own understanding of conscience, not by those of objecting health care workers. There are at least three different views of what conscience is and how it works, and Professor Cantor has made the mistake of assuming that people who disagree with her about abortion and sterilization nonetheless share her views about morality and conscience.

It is often thought that conscience is a faculty that independently constructs personal moral norms: that it actually *creates* right and wrong. Conscience becomes the great liberator, to which one appeals against any restrictive moral precept on the ground that my conscience has determined what is "right for me," or at least "right for me in these circumstances."

A second idea about conscience is that it is simply a barometer of moral distress, a faculty that senses one's 'comfort level' based on the tension between one's moral views and the demands of a particular situation. There is no question here of the objective morality of a procedure; it is all a question of dissonance between personal views and what are purported to be professional

obligations. In these circumstances, sacrificing one's personal 'comfort' to help the patient can be portrayed as the noble thing to do: in Professor Cantor's words, "selfless professionalism."

These ideas are not mutually exclusive. Someone whose moral views have been inculcated by culture and upbringing may retain some, discard others, and modify the rest through a 'creative' exercise of conscience. Common to both ideas about conscience, however, is an underlying belief that there are no objective standards of good and evil, or that it is impossible to arrive at any certain conclusions about such things. This is moral relativism: what Professor Cantor calls "the randomness of individual morality." No wonder she is frightened. It is impossible to conceive of a society that could survive if conscience, understood in these terms, were to be let off its leash.

Unlike Professor Cantor, most conscientious objectors are not moral relativists. Most subscribe to some form of the belief that conscience judges whether an act is good or evil according to a true moral standard that it does not make. It judges correctly only when its judgement accords with objective reality and true moral principles. Thus, one is first obliged to ascertain relevant facts - say, what correct science tells us about stem cells - and then determine which moral principles apply. Typically, these are drawn from religious or philosophical traditions. It follows that conscience can err in two ways; it can be mistaken as to the facts, and it can be mistaken in its choice of principles.[15] Moreover, one is morally responsible for evil done if the mistakes could have been avoided by more careful enquiries or moral reflection.

One cannot discount the possibility that some people may attempt to justify illicit conduct by appeals to freedom of conscience. However, as the U.S. *Declaration of Independence* and *Bill of Rights* indicate, the fact that fundamental freedoms can be abused is not a reason to suppress them. Normally, the need to ascertain all relevant facts and apply correct moral principles prevents the legitimate exercise of freedom of conscience from degenerating into the kind of anarchy that Professor Cantor fears. This explains why Americans have, for generations, been able to obtain dependable medical care from religious believers and denominational health care facilities.

Professor Cantor stands outside this tradition. That is why she implies that health care workers who refuse to do what they believe to be wrong are pursuing selfish interests under "the cloak of conscience." That is why she invokes the concept of self-sacrifice by calling for "a brand of professionalism that demands less self-interest, not more." Like her fear of anarchy, her perception of selfishness arises from her own views about the nature of conscience, not the real history of health care in the United States.

The real history of health care in the United States has been made by hundreds of thousands of professionals with only *one* identity, served by a single conscience that governs conduct in private and professional life. This moral unity of the human person is identified as integrity, a virtue highly prized by Martin Luther King, who described it at as essential for "a complete life."[16] Selflessness or self-sacrifice, in the tradition of King, might mean going to jail or losing one's life, but has never been understood to include the sacrifice of one's integrity.

From this perspective, to abandon one's moral or ethical convictions in order to serve others is not "selfless professionalism," but prostitution.

Notes

1. Memorandum from the Christian Medical Association to the Office of Public Health and Science, Department of Health and Human Services (9 April, 2009) Data and analysis of two national surveys on conscience rights regulation and laws, as related to HHS requested information on rescission proposal, online: <https://www.consciencelaws.org/law/commentary/legal040-010.aspx>.

2. United States Conference of Catholic Bishops, "The Catholic Church in the United States at a Glance" (2007) *Internet Archive Wayback Machine* (website), online: <https://web.archive.org/web/20090313120344/http://www.usccb.org/comm/statisti.shtml>.

3. US, *Cong Rec*, vol 149(176), Extensions of Remarks at E2534–E2547 (8 Dec 2003) (Christopher H. Smith) Center for Reproductive Rights, International Legal Program Summary of Strategic Planning: Through October 31, 2003: Memo #1: "International Reproductive Rights Norms: Current Assessment;" Memo #2- "Establishing International Reproductive Rights Norms: Theory of Change." Center for Reproductive Rights, Domestic Legal Progam Summary of Strategic Planning Through October 31, 2003: Memo #3- "Report to Strategic Planning Participants From 'Other Litigation' Subgroup." online: <https://www.govinfo.gov/content/pkg/CREC-2003-12-09/pdf/CREC-2003-12-09.pdf#page=185>.

4. US, Bill S 1173, *Freedom of Choice Act*, 110th Cong, 2007, online: <https://www.govtrack.us/congress/bills/110/s1173>.

5. Parliament of Canada, *Hansard- Commons Debates*, 28th Parl, 1st Sess, No 8 (28 April, 1969) at 8058 (Hon John Turner), online: <https://parl.canadiana.ca/view/oop.debates_HOC2801_08/28>.

6. "Law that Denies Equality", Editorial, *The Globe and Mail* (18 January 1974). Quoted in Alphonse de Valk, *Morality and Law in Canadian Politics: The Abortion Controversy* (Dorval, Quebec: Palm Publishers, 1974), at 138.

7. Stuart Laidlaw, "Does faith have a place in medicine?" *Toronto Star* (18 September, 2008), online:<http://www.thestar.com/living/article/500852>.

8. Ontario Human Rights Commission, "Submission of the Ontario Human Rights Commission to the College of Physicians and Surgeons of Ontario Regarding the draft policy, 'Physicians and the Ontario Human Rights Code'" (15 August, 2008) Ontario Human Rights Commission (website), online: <http://www.ohrc.on.ca/en/resources/submissions/physur>.

9. Ontario Medical Association, "OMA Response to CPSO Draft Policy 'Physicians and the Ontario Human Rights Code'" (11 September, 2008), *Internet Archive Wayback Machine* (website), online:<https://web.archive.org/web/20081223130308/http://www.oma.org/health/rights.asp>.

10. Sean Murphy, "The New Inquisitors", (31 August, 2008), Protection of Conscience Project (website), online: <https://www.consciencelaws.org/law/commentary/legal036.aspx>.

11. Bernard M Dickens,"Informed Consent" in Jocelyn Downie, Timothy Caulfield, Timothy Colleen Flood, eds, *Canadian Health Law and Policy* 2nd ed (Toronto: Butterworths, 2002) [*Dickens*] at 149.

12. Sean Murphy, "Conscientious Objection as Crime Against Humanity", (10 April, 2009), Protection of Conscience Project (website), online: <https://www.consciencelaws.org/law/commentary/legal038.aspx> (Critiquing *Dickens*, supra note 11).

13. Julie D Cantor, "When an Adult Female Seeks Ritual Genital Alteration: Ethics, Law and the Parameters of Participation", (2006) 117(4) Plastic and Reconstructive Surgery 1158 at 1161, n 18, online:<https://journals.lww.com/plasreconsurg/Abstract/2006/04010/When_an_Adult_Female_Seeks_Ritual_Genital.13.aspx>.

14. *Ibid* at 1161.

15. J Budziszewski,"Handling Issues of Conscience", *The Newman Rambler*, 3:2 (Spring/Summer 1999) 3, online: <https://www.consciencelaws.org/ethics/ethics007.aspx>.

16. Martin Luther King Jr, "The Three Dimensions of a Complete Life" (Sermon delivered at New Covenant Baptist Church, Chicago, Illinois, 9 April 1967), *The Seattle Times, Martin Luther King Jr: An Extraordinary Life* (website) online: <https://projects.seattletimes.com/mlk/words-life.html>.