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POLICY FORUM

Access and Conscience: Principles of Practical Reconciliation

Lynn D. Wardle, JD

There are many situations in which conflicts arise between health care professionals who have religious objections to certain medical services and their employers or patients who want them to provide those services. The services that are generally controversial include delivery or support of abortion, sterilization, contraception, assisted reproduction techniques (ART), withdrawal of life support, withdrawal of nutrition and hydration, autopsies, or assisted suicide.

The American health care system can protect the basic rights of both institutional providers and individuals who have religious objections to certain services while still ensuring that patients have effective access to them. It is important to recognize that not all religious objections are categorical but often pertain to providing the service in only *some* situations, such as providing elective abortions but not therapeutic or life-saving abortions, or providing ART for polygamous, same-sex, or unmarried couples. Full respect for the core principles of both religious freedom and health care professionalism can be achieved under two conditions: first, if there is full commitment to protecting both interests, and, second, if there is a willingness to accept practical and reasonably complementary solutions, even if they are less than ideal from either perspective.

Right of Conscience as a Basic Human Right

The U.S. legal system has a deep tradition of protecting and respecting rights of conscience, particularly religious conscience, while endorsing excellence in and access to medical care. Respect for and protection of religious freedom predates the adoption of our Constitution and undergirds the First Amendment.

When our nation was founded, two different views of protection of religious conscience were competing [1]. One view was that protection of conscience was a matter of utilitarian tolerance and prudent political accommodation [2]. Here, respect for conscience and religion was a matter of *toleration*—sound public policy, neighborliness, good will, and expedient politics. If that view had prevailed, only a weak and unreliable civil-rights tradition would have developed. It makes a big difference whether respect for another's moral convictions is simply a matter of expediency and tolerance (to be suspended when outweighed by other political considerations), or whether it is a positive, basic civil right that everyone can exercise.

The founders adopted a positive right of conscience that has prevailed since and was most eloquently articulated by the father of the Bill of Rights, James Madison. Early colonial charters and state constitutions spoke of it as a right [3]. The Virginia Declaration of Rights was initially drafted to guarantee “fullest toleration” of religion but Madison amended it to say that “all men are *entitled* to the full and free exercise of [religion] according to the dictates of conscience.” When an effort to revive the religion tax in Virginia was made after the War of Independence, Madison drafted his famous “Memorial and Remonstrance” using the language of positive rights, not mere toleration: “The equal *right* of every citizen to the free exercise of his Religion according to the dictates of conscience is *held by the same tenure with all our other rights*” [4]. He described it as “an *unalienable right*,” and explained:

The Religion then of every man must be left to the conviction and conscience of every man; and *it is the right of every man to exercise it as these may dictate*. . . . It is the *duty* of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him [5].

Madison explained further why conscience had to be protected in terms that underscored the foundational nature of rights of conscience:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of a Civil Society, who enters into any subordinate Association, must always do it with reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign [5].

Madison saw the individual’s right of conscience as tied to and derived from his preexisting and superior duty to God. It was Madison’s view that was adopted by the founders of the American republic.

Today, as in Madison’s day, it is futile to expect citizens in a free democracy to be loyal to public officials and to obey their laws, if the laws do not allow them to be faithful to their God and obedient to His laws. Denying rights of conscience to health care professionals undermines the moral foundation for the claims of others on access to controversial services. If one’s own moral rights of conscience are not protected by law, it seems incongruous to be asked to respect another’s moral claim for access.

Practical Protections of Rights and Access

As Professor Kent Greenawalt writes:

In principle, people should not have to render services that they believe are forbidden directly by God or are deeply immoral. However, any privilege to refuse needs to be compatible with individuals being informed about and being able to acquire standard medical services and drugs, and with health care institutions and pharmacies not having to turn handsprings to have personnel on hand to provide what is needed [6].

Greenawalt counsels further that “people who can get treatment or drugs elsewhere and have adequate information about alternative possibilities have a much less powerful claim that refusal impinges on them to an impermissible degree” [7].

This is a good recipe for balanced accommodation: protection for rights of conscience, protection for the access interests of patients, and practical disclosure of information about conflicts and accessible alternatives to satisfy both values.

This formula has been tried and has worked in practice, showing that it is possible to protect both rights of conscience and rights of patients to controversial medical procedures. For example, the American Pharmaceutical Association adopted a policy in 1998 that protects the rights of conscience of pharmacists while supporting the establishment of “a system to ensure patient access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal.” The system supplies free telephone information about pharmacies and pharmacists who will fill controversial prescriptions that may violate the rights of conscience of some pharmacists [8]. The toll-free referral system operates successfully in Washington state [9].

The landmark model for protecting rights of conscience without denying patient access arose from the controversy over requiring physicians to provide abortions and contraception products over their religious objections [10, 11]. Shortly after the Supreme Court of the United States struck down laws restricting abortion in 1973, federal courts forced church-run hospitals to allow sterilization or abortion despite faith-based hospital policy [12, 13]. Congress responded with the Church Amendment which prohibits courts from ordering an institutional health care provider or individual to participate in performing abortions or sterilizations contrary to their religious beliefs or moral convictions [14]. Later, Congress expanded protection for rights of conscience by enacting the Danforth Amendment to bar discrimination against those who declined to participate in abortion training, abortions, or referrals, and the Weldon amendment, barring federal, state, and local agencies or programs from eligibility for certain federal funds if they discriminated against individuals or institutions for failing to provide, pay for, provide coverage of, or referral for abortions [15, 16].

Nearly all states have enacted similar conscience-protection provisions into state laws—only Alabama, New Hampshire, and Vermont currently lack explicit conscience protection covering at least abortion services [17]. While many of the state and federal laws offer protection for rights of conscience that is limited to specific services, procedures, personnel, or institutions and does not extend to or cover many others, these laws have had a powerful symbolic effect in preserving the principle of protection of religious conscience of health care professionals generally, with very little documented evidence of hardship for persons seeking controversial medical procedures [18, 19].

Protection for rights of conscience is not always favored. For example, the 2007 Ethics Opinion Number 385 of the Committee on Ethics of the American College of Obstetricians and Gynecologists entitled “The Limits of Conscientious Refusal in Reproductive Medicine,” would significantly curtail the rights of providers of reproductive medicine to exercise conscientious abstention [20]. While the opinion acknowledges tensions between a physician’s conscience and patient access to controversial services, it fails to recognize that protection of conscience is a fundamental human right, not merely a convenient accessory. Its analysis presents many reasons for facilitating full patient access but fails to present with equal care the reasons for protecting rights of conscience, so the conclusion that physicians’ rights of conscience must nearly always be subordinated to facilitating patients’ access to care reflects flawed analysis. For persons interested in serious analysis of the legal and moral debate, Opinion Number 385 is a disappointingly one-sided.

We Can Do Both

Tensions between religious values and professional obligations can be reconciled by respecting both interests. Preserving protection for rights of conscience while accommodating access takes frustratingly more time, effort, and creativity for those whose goal is maximum ease and efficiency of delivery of particular health care services. The inconvenience factor may be one reason why profit-driven or cost-conscious health care institutions and organizations are impatient with efforts to protect their rights. While protecting rights of conscience and of access to services may sometimes require additional cost or sacrifice on both sides, in the long run it takes less time and expense than the litigation, deep resentment, and backlash that denial of the first American right—the right of religious conscience—inevitably produce.

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Lynn D. Wardle, JD, is the Bruce C. Hafen Professor of Law at the J. Reuben Clark Law School at Brigham Young University in Provo, Utah. He teaches and writes about biomedical ethics and law, as well as family law, origins of the Constitution, and other subjects. He is a member of the American Law Institute.

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