



Protection of Conscience Project

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Gagging conscience, violating humanity

Sean Murphy, Administrator
Protection of Conscience Project

Introduction

In 2008, when the Council of the College of Physicians and Surgeons of Ontario was considering the final draft of an earlier policy, Physicians and the Human Rights Code, a member of the Council seems to have been troubled by the policy direction being given to the College by the Ontario Human Rights Commission (OHRC).

Speaking during the Council meeting, he drew his colleagues' attention to a chilling New England Journal of Medicine article by Holocaust survivor, Elie Wiesel: "Without conscience."¹ It was about the crucial role played by German physicians in supporting Nazi horrors. "How can we explain their betrayal?" Wiesel asked. "What gagged their conscience? What happened to their humanity?"²

Now, however, to the applause of the OHRC,³ the College of Physicians and Surgeons of Ontario has approved a policy to gag the consciences of physicians in the province,⁴ and Saskatchewan is next in line.⁵ We may soon begin to discover the answers to Wiesel's questions.

There is no duty to do what is believed to be wrong.

Policies like those adopted in Ontario and proposed in Saskatchewan are incoherent because they purport to include a duty to do what one believes to be wrong in a code of ethics or ethical guidelines, the very purpose of which is to encourage physicians to act ethically and avoid wrongdoing.

Beyond this, when discussion about difficulties associated with the exercise of freedom of conscience in health care is repeatedly characterized as "the problem of conscientious objection,"⁶ it becomes clear that the underlying premise is that people and institutions ought to do what they believe to be wrong, and that refusal to do what one believes to be wrong requires special justification. This is exactly the opposite of what one would expect. Most people believe that we should not do what we believe to be wrong, and that refusing to do what we believe to be wrong is the norm. It is wrongdoing that needs special justification or excuse, not refusing to do wrong.

The inversion is troubling, since "a duty to do what is wrong" is being advanced by those who support the "war on terror." They argue that there is, indeed, a duty to do what is wrong, and that this includes a duty to kill non-combatants and to torture terrorist suspects.⁷ The claim is sharply contested,⁸ but it does indicate how far a duty to do what is wrong might be pushed. In Quebec, in Ontario and in Saskatchewan it is now being pushed as

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far as requiring physicians to participate in killing patients, even if they believe it is wrong: even if they believe that it is homicide.⁹

This reminder is a warning that the community must be protected against the temptation to give credence to the dangerous idea that is now being advanced by medical regulators in Canada: that a learned or privileged class, a profession or state institutions can legitimately compel people to do what they believe to be wrong - even gravely wrong - and punish them if they refuse.

Forcing someone to do wrong is a violation of humanity, not a limitation of freedom.

Attempts to suppress freedom of conscience and religion in the medical profession are often defended using a statement of the Supreme Court of Canada: "the freedom to hold beliefs is broader than the freedom to act on them."¹⁰

The statement is not wrong, but it is inadequate. It is simply not responsive to many of the questions about the exercise of freedom of conscience that arise in a society characterized by a plurality of moral and political viewpoints and conflicting demands. More refined distinctions are required. One of them is the distinction between perfective and preservative freedom of conscience, which reflects the two ways in which freedom of conscience is exercised: by pursuing apparent goods and avoiding apparent evils.¹¹

It is generally agreed that the state may limit the exercise of perfective freedom of conscience if it is objectively harmful, or if the limitation serves the common good. Although there may be disagreement about how to apply these principles, and restrictions may go too far, no polity could long exist without restrictions of some sort on human acts, so some limitation of perfective freedom of conscience is not unexpected.

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 wishes to do and forcing him to do the evil that he abhors.

We have noted the danger inherent in the notion of a "duty to do what is wrong." Here we add that, as a general rule, it is fundamentally unjust and offensive to suppress preservative freedom of conscience by forcing people to support, facilitate or participate in what they perceive to be wrongful acts; the more serious the wrongdoing, the graver the injustice and offence. It is a policy fundamentally opposed to civic friendship, which grounds and sustains political community and provides the strongest motive for justice. 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. 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.

None of these conditions have been met in Ontario or in Saskatchewan.

Notes

1. Email to the Administrator, Protection of Conscience Project, from P__ H__ (present at College Council meeting 18 September, 2008) (2014-02-11, 10:10 am)
2. Wiesel E. "Without Conscience." *N Engl J Med* 352;15 april14, 2005 (<http://www.nejm.org/doi/full/10.1056/NEJMp058069>) Accessed 2014-02-24.
3. Letter from the Office of the Chief Commissioner, Ontario Human Rights Commission, to the College of Physicians and Surgeons of Ontario, dated 19 February, 2015, Re CPSO Draft Policy: Professional Obligations and Human Rights
4. College of Physicians and Surgeons of Ontario, Policy #2-15: *Professional Obligations and Human Rights* (Updated March, 2015) (<http://www.cpso.on.ca/Policies-Publications/Policy/Professional-Obligations-and-Human-Rights>) Accessed 2015-03-16.
5. College of Physicians and Surgeons of Saskatchewan, Policy: *Conscientious Refusal* (<http://consciencelaws.org/archive/documents/cpss/2015-01-20-cpss-policy.pdf>)
6. For example, Cannold L. "The questionable ethics of unregulated conscientious refusal." *ABC Religion and Ethics*, 25 March, 2011. (<http://www.abc.net.au/religion/articles/2011/03/25/3174200.htm>) Accessed 2013-08-11.
7. Gardner J. "Complicity and Causality," 1 *Crim. Law & Phil.* 127, 129 (2007). Cited in Haque, A.A. "Torture, Terror, and the Inversion of Moral Principle." *New Criminal Law Review*, Vol. 10, No. 4, pp. 613-657, 2007; Workshop: Criminal Law, Terrorism, and the State of Emergency, May 2007. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=958059) Accessed 2014-02-19.
8. Haque, A.A. "Torture, Terror, and the Inversion of Moral Principle." *New Criminal Law Review*, Vol. 10, No. 4, pp. 613-657, 2007; Workshop: Criminal Law, Terrorism, and the State of Emergency, May 2007. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=958059) Accessed 2014-02-19.
9. Quebec has already passed a law purporting to legalize euthanasia: Murphy S. "Redefining the Practice of Medicine- Euthanasia in Quebec, Part 9: Codes of Ethics and Killing." *Protection of Conscience Project*, July, 2014 (<http://consciencelaws.org/law/commentary/legal068-009.aspx>). The Supreme Court of Canada has ordered legalization of physician assisted suicide and physician administered euthanasia. When the ruling takes effect in early 2016, the Ontario and Saskatchewan policies, as written, will have the effect of forcing physicians unwilling to kill patients or help them kill themselves to find a colleague willing to do so.

10. *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 (<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1867/index.do>) Accessed 2014-07-29.

11. This section of the paper draws from an extended discussion of the subject in Murphy S, Geunis S.J. "Freedom of Conscience in Health Care: Distinctions and Limits." *J Bioeth Inq.* 2013 Oct; 10(3): 347-54 (<https://rd.springer.com/article/10.1007/s11673-013-9451-x#>)