Protection of Conscience Project
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Referral: A False Compromise

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Many people, grappling with concerns about freedom of conscience, agree that health care workers should not be forced to participate in procedures or services to which they object for religious, moral, or ethical reasons. However, their agreement is frequently qualified by the condition that a conscientious objector must refer the patient to someone who will provide what is wanted or otherwise assist the patient to that end. This condition is unacceptable to many conscientious objectors, and continuing controversy about 'referral' suggests the need for a more detailed consideration of the subject.

'Distance'

Refusal to refer is sometimes explained or interpreted as an attempt by the objector to "distance" himself from something he finds morally objectionable, but this has to do with complicity, not geography.

Consider *Newsweek* columnist Jonathan Alter's suggestion for the interrogation of terrorist suspects. Acknowledging that physical torture is "contrary to American values," but arguing that torture is appropriate in some circumstances, he proposed a novel 'compromise:' that the United States turn terrorist suspects who won't talk over to "less squeamish allies,"[1] a practice known as "extraordinary rendition."

Alter may have some supporters, but most people reject the idea that the United States could relieve itself of moral complicity in torture by referring prisoners for 'special treatment' in another country. On the contrary: protests against "extraordinary rendition" for this purpose resulted in the removal from the *9/11 Commission Recommendations Implementation Act* of sections that would have made it possible,[2] and one congressman introduced a bill to reinforce American policies and laws that prohibit what he called "outsourcing torture" and "Abu Ghraib by proxy." [3]

Vicarious moral responsibility

The reaction against "outsourcing torture" reflects long-standing legal, religious and moral principles that we can be held responsible for the actions of someone else. As a matter of law, for example, one can be charged for bank robbery if one assists the robber by providing the weapon used, even if one is absent when the robbery occurs; employers may be civilly liable for misconduct by their employees that they could have prevented.

The increasing popularity of 'ethical investment' reflects a belief that one is responsible for the good or the harm that flows indirectly from one's financial participation in a company. Many people adopt ethical investment as a

strategy to preserve their personal integrity, whether or not their investment choices actually influence corporate policies. Similarly, a 44% increase in the sale of "fair trade" products in the United States is attributed to the exercise of 'social conscience' by more and more people who do not want to indirectly support unfair labour practices through their purchases. "I want to look good," explained one fair trade supporter, "but I don't want to feel guilty."[4]

The examples illustrate that the principle of vicarious moral responsibility is widely accepted, deeply entrenched, and, if anything, becoming more important as people more fully appreciate the interconnectedness of the world. Health care workers who refuse to refer patients for something they judge to be wrong are not demonstrating excessive scrupulosity, but an adherence to the same principle that guides their fellow citizens in other situations.

Legality

Torture, of course, is contrary to international law, illegal in most countries and abhorrent to many people, so it is not difficult to explain why someone would object to participating in it even indirectly. Those who would force conscientious objectors to refer for morally controversial services often try to justify their position with the claim that, unlike torture, such services are legal.

Yet most people are normally willing to respect freedom of conscience even with respect to *legal* acts that they recognize are of grave moral importance to others. Capital punishment is legal in many jurisdictions, but there is a range of opinion about its morality. Even supporters of capital punishment do not usually demand that people who object to it be forced to facilitate executions because they are "legal," for they understand that objectors are seized with sincere and significant moral convictions that warrant respect.[5] In fact, professional medical authorities often expressly prohibit their members from participating even indirectly in executions, despite the fact that they are legal.[6]

Neither torture nor capital punishment are forms of health care, so it may be more illuminating to consider legal but ethically controversial medical procedures.

In 1999, Dr. Robert Smith of Scotland performed single leg amputations on two patients who desired the amputation of healthy limbs. The surgery was performed with the permission of the Medical Director and Chief Executive of the hospital, in a National Health Service operating theatre with NHS personnel, after consultation with the General Medical Council and professional bodies.[7] The procedures were legal and even deemed ethical by regulatory authorities, but, to date, no one has argued that this is sufficient reason to oblige physicians to refer for the amputation of healthy limbs.

There is no law against sex-selective abortion in Canada, nor against determining the sex of an infant before birth. Nonetheless, an official with the College of Physicians and Surgeons of British Columbia was horrified in August, 2005, when he learned that a pre-natal gender testing kit was being marketed on the internet. Dr. T. Peter Seland, Deputy Registrar (Ethics) for the College, described gender selection as "immoral." He explained that College policy was not to disclose the sex of a baby until after 24 weeks gestation in order to reduce the risk of gender selection abortion, and that physicians violating the policy were liable to be disciplined by the College.[8]

One might observe, in passing, that the Deputy Registrar's comments were not condemned as attempts to "impose his morality." More relevant here, however, is that College policy clearly

indicates that the legality of a procedure is not reason enough to compel a health care worker to facilitate it. And while Dr. Seland was not asked if physicians could refer patients for gender selection in order to circumvent College policy, it seems most unlikely that the College would look favourably upon referral for a procedure that the Deputy Registrar has so vigorously denounced as "immoral."

Moral perceptions

Dr. Seland's reaction to the news about gender selection neatly illustrates the key role played by the perception of immorality in controversies about conscientious objection.

Critics who do not share the convictions of conscientious objectors often find their unwillingness even to refer a patient completely incomprehensible, or misconstrue objection as an attempt to control the patient. This is usually a result of the critic's perception that the controverted procedure is morally acceptable and that the objector is mistaken in holding otherwise. Thus, someone who might be willing to tolerate refusal to participate *directly* in "X" cannot see what good reason could be given for refusing even to *refer* for "X." That this conclusion is based upon an unexamined assumption that begs the very point in issue is best illustrated by analogy.

In a school where cheating is customary, one student is approached by another for the answers to an upcoming test. If he declines to supply the answers, should he feel morally obliged, in deference to prevailing practice, to direct the other student to someone willing to provide them?

A second case: a child asks her father to lie about her medical condition in order to move her case forward on a wait list. If the father objects to lying, does his fiduciary relationship with the child oblige him to refer her to someone willing to lie in his stead?

A third: in a place where bribery is almost universal practice, an honest official refuses a bribe from a businessman seeking preferential treatment. The businessman, annoyed, says, "If you won't do it, direct me to someone who will." Is the official obliged to help the businessman find someone who will accept the bribe?

Most people would *not* say that a student must help a classmate cheat by directing him to someone else. Some might *excuse* a father who lied for his daughter, but most would not assert that he had a duty to do so. It is unlikely that anyone would require an honest official to help a businessman find others who would take a bribe. Instead, most would maintain that no one should be made to facilitate cheating, lying or bribery *because such things are wrong*. That is: *to the extent that they sense or appreciate the wrongness of an act*, they would support and defend those who refuse to assist with it. Equally important, they would recognize conscientious objection as an act necessary to preserve one's personal integrity rather than an effort to impose limitations upon someone else.

The problem of precedent

A principle that conscientious objectors ought to be forced to refer a patient would, logically, apply to *all* controversial procedures. Health care workers who are inclined to support mandatory referral should think carefully about the broader ramifications of such a policy, especially if their own views would make them unwilling to facilitate gender testing or infant male circumcision, or assisted suicide and euthanasia.

Assisted suicide and euthanasia are are illegal in most jurisdictions. But laws can be changed, as

they have been in the Netherlands, Belgium and Oregon, and such changes in law bring with them changes in expectations. Since late 2003, general practitioners in Belgium unwilling to perform euthanasia have faced demands that they help patients find physicians willing to provide the service. It is argued that mandatory referral for euthanasia is required by respect for patient autonomy, the paradigm of "shared decision making" and the fact that euthanasia is a legal "treatment option."[9]

These are among the arguments used by those who demand that objecting health care workers should be forced to refer for abortion, contraception and the morning after pill, so the resolution of current controversies about referral for these procedures will have significant consequences in jurisdictions that decriminalize assisted suicide and euthanasia.

This was reflected in evidence taken in 2004 and 2005 by the British House of Lords Select Committee on Assisted Dying for the Terminally Ill and in the conclusions of the Committee. The bill, in its original form, included a requirement that objecting physicians refer patients for euthanasia. Numerous submissions protested this provision because it made objecting physicians a moral party to the procedure,[10] and the Joint Committee on Human Rights concluded that the demand was probably a violation of the European Convention on Human Rights.[11] The bill's sponsor, Lord Joffe, promised to delete the provision in his next draft of the bill.[12]

'Striking a balance'

Referral is often erroneously explained as "striking a balance" between the interests of the worker and those of the patient. However, in cases of conscientious objection their interests cannot be balanced because they are not commensurable; they concern fundamentally different goods. A patient has an interest in obtaining a particular product or service, but the health care worker has an interest in his ability to live and work according to his conscientious convictions. With sufficient imagination and political will one may find a way to accommodate the interests of both, but no 'balance' is achieved by subordinating one to the other.

Professionalism

Nonetheless, some people insist that, as professionals, health care workers should be willing to subordinate their personal interest and comforts to those of their patients. They argue that self-sacrifice is an important aspect of professionalism.[13] Self-sacrifice, however, has never been understood to include the sacrifice of one's integrity. To abandon one's moral or ethical convictions in order to serve others is prostitution, not professionalism.[14]

A false compromise

Activists and persons in positions of power or influence often argue that to require a conscientious objector to refer for a controversial procedure is a compromise that demonstrates respect for both the conscientious convictions of the objector and the autonomy of the patient. This simply raises, in a different form, the intractable problem of "striking a balance" between incommensurable goods.

No better result is obtained if, seeking a common denominator, the problem is framed as an attempt to strike a balance between conflicting moral viewpoints. The objector refuses to refer because he believes X to be wrong, and he believes that referral makes him unacceptably complicit in X. His opponents dispute either his moral evaluation of X, or of referral, or both. They can insist on compulsory referral only if they deny the objector freedom of conscience altogether, or if they reject the objector's moral evaluation of X and/or referral in preference to their own, enforcing their

(correct) views against his (erroneous) views with threats of discipline or dismissal.

This is a blatant assertion of superior moral judgement and of a right to compel others to conform to it. Paternalistic it may be, but it is not a compromise.

Notes

1. Alter, Jonathon, "Time to Think About Torture." *Newsweek*, 5 November, 2001, p. 45.

2. Section 3032 of the bill (since deleted) would have authorized the revision of regulations implementing the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment so as to exclude "certain aliens" from protection against removal to countries known to practise torture.

3. HR 4674, *A BILL To prohibit the return of persons by the United States, for purposes of detention, interrogation, or trial, to countries engaging in torture or other inhuman treatment of persons.* http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.4674.IH: (Accessed 6 October, 2005) Statement by Representative Edward J. Markey House Floor Debate on H.R. 10, 7 October, 2004

4. Kim, Gina, "Fashion conscience:clothing and accessories are becoming both free-trade and chic." *Sacramento Bee*, 30 July, 2005. http://www.sacbee.com/content/business/story/13316724p-14158839c.html Accessed 2005-07-31

5. That capital punishment is legal in many parts of the United States is well known. What is less well known is that a federal statute ensures that employees in the United States Department of Justice, the Federal Bureau of Prisons, or the United States Marshals Service who object to capital punishment for reasons of conscience cannot be forced to participate an execution or even in a *prosecution* for a capital offence. (18 U.S.C. §3597 (b)

6. American Medical Association Policy E-2.06: Capital Punishment (http://www0.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/E-2.06.HTM&s_t=execution&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=6&) Accessed 2008-09-08

7. Ramsay, Sarah, "Controversy over UK surgeon who amputated healthy limbs". *The Lancet*, Volume 355, Number 9202, 05 February 2000. Dr. Smith waived his fee and the patients paid for the surgery. http://www.thelancet.com. (Accessed 2001-10-04)

8. Lee, Jenny, "Official slams 'sex selection' blood test: Gender of fetus can be seen five weeks into pregnancy." *Vancouver Sun*, 13 August, 2005. http://www.canada.com/vancouver/vancouversun/news/story.html?id=1735ec8d-56cc-4510-89e8-c62c480e97b6 (Accessed 2005-10-10)

9. *Standpunt over medische beslissingen rond het levenseinde en euthanasie / Policy Statement on End of Life Decisions and Euthanasia*. The Association of General Practitioners of Fleming

(Belgium);The Academy at the Catholic University of Leuven; The Academy for Knowledge at the University of Ghent. Press Conference, Brussels, 4 December, 2003. Original statement in Flemish (http://www.wvvh.be/files/PB_euthanasie.htm) In Flemish and English (http://www.consciencelaws.org/Examining-Conscience-Background\BackEuthanasia09.html)

10. United Kingdom Parliament, House of Lords Select Committee on Assisted Dying for the Terminally Ill Bill: Selections from the First Report (http://www.consciencelaws.org/Examining-Conscience-Legal/Legal29.html)

11. Joint Committee On Human Rights Twelfth Report: Assisted Dying for the Terminally Ill Bill, Para. 3.11 to 3.16.
http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/93/9302.htm (Accessed 2005-11-01)

12. Examination of Witnesses (Questions 70 - 79) , Thursday, 16 September, 2004, Q70.
http://www.publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/4091602.htm (Accessed 2005-11-01)

13. "Professionalism," Professor R. Alta Charo suggests rhetorically, ought to include "the rather old-fashioned notion of putting others before oneself." Charo, R. Alta, *The Celestial Fire of Conscience- Refusing to Deliver Medical Care.* N Eng J Med 352:24, June 16, 2005. (http://content.nejm.org/cgi/content/full/352/24/2471) Accessed 2008-09-13.

14. Payne, Stewart, "Hospice helped dying man lose his virginity." *The Telegraph*, 31 January, 2007.
(http://www.telegraph.co.uk/news/uknews/1540753/Hospice-helped-dying-man-lose-his-virginity.html) Accessed 2008-11-28. See also Choy, Heather Low, "Sex visits organised for disabled men." *news.com.au, Tasmania News*, 28 September, 2005.
(http://www.news.com.au/story/0,10117,16747586-1244,00.html) Accessed 2008-11-30.