



## Protection of Conscience Project

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Liberty,  
Sydney, Australia

**Administrator**  
Sean Murphy

# The problem of unregulated conscientious objection

Sean Murphy, Administrator  
Protection of Conscience Project

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In late 2010, the Parliamentary Assembly of the Council of Europe (PACE) was presented with a report from its Social, Health and Family Affairs Committee expressing deep concern about the problem of “unregulated conscientious objection” in Europe. The Committee proposed to solve this problem by having states adopt “comprehensive and clear regulations” to address it.<sup>1</sup>

The Council ultimately adopted a resolution that almost completely contradicted the premises of the report,<sup>2</sup> but in 2011 the theme was resurrected by Dr. Leslie Cannold, an Australian ethicist. Dr. Cannold warned that, “[a]t best, unregulated conscientious objection is an accident waiting to happen,” and, at worst, “a sword wielded by the pious against the vulnerable with catastrophic results.” It was, she wrote, “a pressing problem from which we can no longer, in good conscience, look away.”<sup>3</sup>

The UN High Commissioner for Human Rights complained about “unregulated conscientious objection” the following year, demanding that “laws and policies allowing conscientious objection” be changed.<sup>4</sup> Meanwhile, faculty members of Monash and Oxford Universities Anne O'Rourke, Lachlan De Crespigny, and Amanda Pyman, published a paper attacking “the unregulated use of conscientious objection.”<sup>5</sup>

A paper appearing in April, 2013 in the *American Journal of Public Health* advocated the need to challenge “the unregulated practice of conscientious objection.”<sup>6</sup> Two months later, the Center for Reproductive Rights (CRR) and groups forming the Sexual Rights Initiative did just that, complaining to the U.N. Human Rights Council about “unregulated conscientious objection” in the United States.<sup>7</sup>

## Obstructing access to lawful drugs and procedures

From the beginning, a principal and constant theme in these complaints is that “unregulated conscientious objection” is illegitimate and/or unethical because it hinders access to lawful drugs, procedures or services.<sup>8</sup>

*Time* magazine has now provided a current example of this problem:

By September, Texas will run out of the sole drug it uses in lethal injections thanks in part to an overseas effort that has persuaded a European pharmaceutical company to halt its supply to U.S. states for use in executions.

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### **The *Pharmaceutical Hippocratic Oath***

The company's decision was the result of a continuing campaign by Amnesty International and Reprieve, organizations that oppose capital punishment. Reprieve has been especially successful in convincing pharmaceutical companies to prevent the use of their products in executions.<sup>9</sup> A number of them have signed Reprieve's *Pharmaceutical Hippocratic Oath*:

We dedicate our work to developing and distributing pharmaceuticals to the service of humanity; we will practice our profession with conscience and dignity; the right to health of the patient will be our first consideration; we condemn the use of any of our pharmaceuticals in the execution of human beings.<sup>10</sup>

Reprieve describes the traditional Hippocratic Oath as “the bedrock of western medicine” that should apply to drug manufacturers as well as physicians.<sup>11</sup> Maya Foa, a Reprieve specialist in lethal injection, told *Time* that Reprieve is not attempting to stop capital punishment in the United States, but to convince pharmaceutical companies to abide by the Hippocratic Oath to “do no harm.”

### **Moral/ethical motivation**

Some companies that have responded positively to Reprieve's lobbying may have been motivated by legal worries,<sup>12</sup> and others may have been influenced by fear that bad publicity would reduce profits.<sup>13</sup> However, at least some - including Texas' supplier- have offered moral or ethical reasons for their refusal to supply drugs for lethal injections:

Lundbeck: “. . .Use of our products to end lives contradicts everything we’re in business to do - provide therapies that help improve people’s lives . . .”

Kayem: “. . .we voluntarily declare that we as Indian Pharma Dealer who cherish the Ethos of Hinduism (A believer even in non-livings as the creation of God) refrain ourselves in selling this drug where the purpose is purely for Lethal Injection and its misuse.”

Ganpati Exem: “. . . We are deeply opposed to the use of medicines in killing prisoners and wish to have no part in facilitating capital punishment in the USA or elsewhere. . .”<sup>14</sup>

These statements are clearly analogous to the ethical positions taken by physicians and other health care workers - especially pharmacists - who, for reasons of conscience, refuse to participate in procedures like abortion, assisted suicide and euthanasia. In fact, the Euthanasia Prevention Coalition fully supports the *Pharmaceutical Hippocratic Oath* and has asked Maya Foya to extend the Stop the Lethal Injection Project (SLIP) to prevent the use of pentobarbital in euthanasia and assisted suicide.<sup>15</sup>

### **Corporate freedom of conscience**

Here we encounter an obstacle erected by those complaining about unregulated conscientious objection. They claim that institutions or corporations are not entitled to exercise freedom of conscience, since (they say) only individuals have consciences, so only individuals can assert a right to freedom of conscience.<sup>16</sup> The Irish government has recently adopted this view with respect to

Catholic hospitals,<sup>17</sup> while the *New York Times* editorial board has relied on the same reasoning to denounce civil liberties lawsuits brought by businesses: “Profit-making corporations are not human beings capable of engaging in religious exercise.”<sup>18</sup>

Certainly, the *New York Times* could argue that corporations or institutions that sign the *Pharmaceutical Hippocratic Oath* are not “really” exercising conscientious objection or not “really” taking a moral or ethical stand, even though that is how it appears. It could describe Lundbeck's decision purely in terms of amoral corporate autonomy, or as a naked exercise of corporate self-interest. It could, if it wished, even argue that it is legitimate to refuse to supply legal products for lawful purposes if the decision is based on worries about profitability, but not if based on moral conviction.<sup>19</sup> Of course, all of this would require that the *New York Times* continue to do what it did in its editorial: adopt and act upon corporate moral or ethical convictions, which, according to its editorial, a corporation cannot possibly have.

### **Corporate moral/ethical responsibility**

In any case, there is a point beyond which deconstruction becomes fabrication. It is not reasonable to assert that corporations that sign the *Pharmaceutical Hippocratic Oath* intend to express only a commitment to corporate profits and success, and do not mean to express moral or ethical convictions about executions by lethal injection. Moreover, the tone and content of the *Time* magazine article suggests that the corporate signatories to Oath did nothing unusual or inappropriate in formulating and acting upon conscientious convictions about execution by lethal injection.

On the contrary: the reader is left with the impression that corporate recognition of moral obligations is entirely natural and expected. Those cited or quoted by *Time* believe that pharmaceutical companies are ethically obliged to prevent their products from being used for executions, and would be culpably negligent if they did not. For example, *Time* quotes an open letter to the chief executive officer of Lundbeck from Dr. David Nicholl and 60 physicians and academics stating that they were “appalled at the inaction of Lundbeck to *prevent* the supply of their drug, Nembutal [pentobarbital], for use in executions in the USA.” (Emphasis added.)

### **Facilitation and referral**

Contrast this with Dr. Cannold's approach: that objectors may “*step away from* participating in an activity to which they object, but cannot *step in the way*” to prevent people from accessing lawful services.” (Original emphasis) On this view, even if corporations were entitled to exercise freedom of conscience (and the *New York Times*, Dr. Cannold and others say they are not), they would not be entitled to actively *prevent* access to pentobarbital. On the contrary: Dr. Cannold and her confreres demand that objectors facilitate access to morally contested procedures by referral or some other means, so that no one is deprived of access to a lawful service. This is touted as a “balance” of competing rights, or as a compromise.<sup>20</sup> Under this kind of regulatory scheme, Lundbeck would be required to help the state of Texas find alternative supplies of pentobarbital or other drugs that could be used for lethal injection.

This would be clearly unacceptable to Reprieve and the signatories to the *Pharmaceutical Hippocratic Oath*. After all, none of the companies were directly involved in providing lethal objections to begin with. Pressure brought to bear on them was effective because of a general

conviction that even blind distribution of pentobarbital through middlemen was sufficient to make them morally complicit in executions by lethal injection, since it was possible to arrange distribution to prevent executioners from obtaining the drug. It is ludicrous to suggest that Reprieve or the signatories would agree that deliberately facilitating executions by referring executioners to other sources of pentobarbital involves no significant degree of moral complicity.

The ethical norms approved by the American Medical Association and the World Medical Association are relevant here. Both associations consider it unethical for physicians to participate in capital punishment, and both define participation to include indirect facilitation in any way.<sup>21</sup> In 2012 the WMA reaffirmed this position and expressly stated that physicians must not “facilitate the importation or prescription of drugs for execution.”<sup>22</sup>

### **Corporate moral/ethical evangelism**

Lundbeck sold the rights to pentobarbital to an American firm in 2011, but the sale was conditional upon an agreement that the new company would adhere to the same restrictions on the distribution of the drug as Lundbeck. The agreement effectively imposed Lundbeck's corporate moral view of execution by lethal injection on the American company, apparently in perpetuity, but it does not appear that the condition has been challenged or questioned. *Time* reported the agreement without comment and without seeking comment from third parties, which suggests that both the reporter and *Time*'s editors considered the restriction on distribution to be within the parameters of ordinary and acceptable business arrangements.

Compare this with the controversy that often erupts when Catholic hospitals attempt to make conformity to Catholic teaching a requirement in hospital mergers. Such restrictions are loudly protested and contested by groups like MergerWatch and the American Civil Liberties Union (ACLU).<sup>23</sup> Three weeks before the *Time* story appeared, the *Seattle Times* praised the Governor of Washington State for directing a review of rules governing hospital mergers and partnerships. The Governor was responding to lobbying by the ACLU, among others, who complained that Catholic institutions are likely to insist upon Lundbeck-type restrictions against elective abortion and assisted suicide.<sup>24</sup>

Much of this was left out of the *Time* feature because the magazine did not make the connection between Lundbeck's refusal to supply pentobarbital to executioners and ongoing controversy about freedom of conscience in health care. The story of Lundbeck and the *Pharmaceutical Hippocratic Oath* is not just a story about opposition to capital punishment, but about “the problem of unregulated conscientious objection,” presented in a new and potentially enlightening context.

### **Notes**

1. PACE Social, Health and Family Affairs Committee, Report: Women's access to lawful medical care: the problem of unregulated use of conscientious objection.”Doc. 12347, 20 July 2010. (<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12506&Language=EN>) Accessed 2013-08-18 (Hereinafter "*The Report*")

2. PACE Resolution 1763 (2010) *The right to conscientious objection in lawful medical care*. 7 October, 2010 (<http://www.consciencelaws.org/law/proposed/europe-001.aspx>)

3. Cannold, Leslie, “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
4. Human Rights Council, Twentieth session, Agenda items 2 and 3: *Annual Report of the Office of the United Nations High Commissioner for Human Rights- Technical guidance on the application of a human rightsbased approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality* (2 July, 20012) para. 61, 30  
([http://www2.ohchr.org/english/issues/women/docs/A.HRC.21.22\\_en.pdf](http://www2.ohchr.org/english/issues/women/docs/A.HRC.21.22_en.pdf) ) Accessed 2013-08-11
5. O'Rourke, Anne, De Crespigny, Lachlan and Pyman, Amanda, “Abortion and Conscientious Objection: The New Battleground” (July 10, 2012). *Monash Law Review* (2012) Vol 38(3): 87-119. (<http://ssrn.com/abstract=2262139> ) Accessed 2013-08-18)
6. Finer L., Fine JB., “Abortion Law Around the World: Progress and Pushback.” *American Journal of Public Health*, Apr 2013, Vol. 103 Issue 4, p. 585.  
(<http://connection.ebscohost.com/c/articles/85594202/abortion-law-around-world-progress-pushback>) Accessed 2013-08-18
7. Human Rights Council, 23rd Session - June 3, 2013. Agenda Item 3: Presentation of Reports by the Special Rapporteur on Violence against Women. *Oral Statement: Center for Reproductive Rights*. ([http://issuu.com/acpdcanada/docs/statement\\_by\\_crr-sri\\_id\\_with\\_sr\\_on](http://issuu.com/acpdcanada/docs/statement_by_crr-sri_id_with_sr_on))” Accessed 20-13-08-11
8. Evident in the title of *The Report*, which a Center for Reproductive Rights regional manager and senior legal advisor helped to draft. Dr. Cannold refers specifically to “legal abortion” and asserted that health care workers must not block access to “lawful services” to which people are entitled. O'Rourke, De Crespigny, and Pyman argue “that the unregulated use of conscientious objection impedes women’s rights to access safe lawful medical procedures.” (Emphasis added). The Center for Reproductive Rights protests that unregulated conscientious objection allows health care workers to “deny women access to lawful reproductive health services based on moral or religious objections.” (Center for Reproductive Rights, Abortion Opponents Undercut Council of Europe Resolution on Conscientious Objection. 7 October, 2010 (Emphasis added) (<http://reproductiverights.org/en/press-room/abortion-opponents-undercut-council-of-europe-resolution-on-conscientious-objection>) Accessed 2013-08-18.
9. Sandburn, Josh, “The Hidden Hand Squeezing Texas’ Supply of Execution Drugs: After lobbying by human-rights groups, European drug companies are increasingly unwilling to supply U.S. states with lethal medicine.” *Time*, 7 August, 2013.  
(<http://nation.time.com/2013/08/07/the-hidden-hand-squeezing-texas-supply-of-execution-drugs/> ) Accessed 2013-08-10
10. *Sign the Pharmaceutical Hippocratic Oath*. Reprive, 26 March, 2012.  
([http://www.reprive.org.uk/publiceducation/2012\\_03\\_26\\_pharma\\_hippocratic\\_oath/](http://www.reprive.org.uk/publiceducation/2012_03_26_pharma_hippocratic_oath/))”

Accessed 2013-08-19

11. *Sign the Pharmaceutical Hippocratic Oath*. Reprive, 26 March, 2012.  
([http://www.reprive.org.uk/publiceducation/2012\\_03\\_26\\_pharma\\_hippocratic\\_oath/](http://www.reprive.org.uk/publiceducation/2012_03_26_pharma_hippocratic_oath/))”  
Accessed 2013-08-19

12. “We cannot take the risk that we will be held liable by the Italian authorities if the product is diverted for use in capital punishment. Exposing our employees or facilities to liability is not a risk we are prepared to take.” *Hospira Statement Regarding Pentothal (sodium thiopental) Market Exit*, 21 January, 2011.  
(<http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle&ID=1518610&highlight>) Accessed 2013-08-18)

13. Fear of bad publicity is cited explicitly by anti-execution campaigner Dr. David Nicholl, who is quoted in the *Time* article.

14. Reprive, *Ethical Statements from Pharmaceutical Firms*  
([http://www.reprive.org.uk/publiceducation/2012\\_03\\_26\\_ethical\\_statements/](http://www.reprive.org.uk/publiceducation/2012_03_26_ethical_statements/)) Accessed 2013-08-18

15. Schadenberg, Alex, “Drug Company Stops Distributing Euthanasia Drug for Texas Executions.” Euthanasia Prevention Coalition, 8 August, 2013.  
(<http://www.lifenews.com/2013/08/08/drug-company-stops-distributing-euthanasia-drug-for-texas-executions/>) Accessed 2013-08-19

16. “According to international human rights law, the right to freedom of thought, conscience and religion is an individual right and, therefore, institutions such as hospitals cannot claim this right.” *The Report*, Section 4.2, paragraph 25. (Despite the claim that this assertion has a basis in law, no authority is cited to support it.) Dr. Cannold insists that “only individuals have consciences, and so conscience rights.” The Center for Reproductive Rights opposes freedom of conscience for institutions and corporations because “[i]nstitutions and corporations don’t have feelings and they don’t have consciences either.” (Center for Reproductive Rights, *Questions and Answers on “Right to Conscience” Laws*.  
(<http://reproductiverights.org/sites/crr.civicactions.net/files/documents/CRR%20Religious%20Exemption%20-%20Q%20%20A.pdf>)” Accessed 2013-08-18.” Acknowledging that freedom of conscience is a human right, O’Rourke, De Crespigny, and Pyman assert that “only human beings, not hospitals or related entities, have human rights.”

17. An unnamed Department of Health official stated that the new Irish abortion law allows for conscientious objection by individuals, but not by hospitals. O’Regan, Eilish, “Hospitals have no right to opt out of abortion law, priest told.” *Irish Independent*, 8 August, 2013  
(<http://www.independent.ie/irish-news/hospitals-have-no-right-to-opt-out-of-abortion-law-priest-told-29482713.html>) Accessed 2013-08-18

18. Editorial: “Contraception and Corporations.” *New York Times*, 2 August, 2013.  
([http://www.nytimes.com/2013/08/03/opinion/contraception-and-corporations.html?\\_r=0](http://www.nytimes.com/2013/08/03/opinion/contraception-and-corporations.html?_r=0) )  
Accessed 2013-08-05
19. Such assertions have occasionally been made, but have not been consistently and continuously articulated. See *Project Letter to the Editor, Pharmacy Practice*, 13 July, 2000 (<http://consciencelaws.org/blog/?p=2921>); Alarcon, Cristina, *Economics Outweighs Ethical Principles in the Pharmacy Profession*, 18 October, 2004.  
(<http://www.consciencelaws.org/archive/news/releases-2004.aspx#Economics Outweighs Ethical Principles>)
20. *The Report*, Part A. ( Draft Resolution) paragraphs 4.1.2.2 - 4.1.2.3. Dr. Cannold describes a mandatory referral provision in an Australian abortion law as an attempt to balance the rights of women and objecting medical practitioners, though she believes it does not go far enough in imposing obligations on objectors. O'Rourke, De Crespigny and Pyman also see the provision as a “balancing act,” but find it satisfactory.
21. *WMA Resolution on Physician Participation in Capital Punishment*. Adopted by the 34th World Medical Assembly, Lisbon, Portugal, September/October 1981 and amended by the 52nd WMA General Assembly, Edinburgh, Scotland, October 2000 and the 59th WMA General Assembly, Seoul, Korea, October 2008. (<http://www.wma.net/en/30publications/10policies/c1/>)  
Accessed 2013-08-19; American Medical Association Policy E-2.06: *Capital Punishment* (<http://www.ama-assn.org/ama1/pub/upload/mm/369/e206capitalpunish.pdf>) Accessed 2013-06-24
22. *WMA Resolution to Reaffirm the WMA’s Prohibition of Physician Participation in Capital Punishment*. Adopted by the 63rd General Assembly of the World Medical Association, Bangkok, Thailand, October 2012. (<http://www.wma.net/en/30publications/10policies/c23/>)  
Accessed 2013-08-19
23. *Hospital Mergers: The Threat to Reproductive Health Services*. American Civil Liberties Union, 31 December, 1995.  
(<http://www.aclu.org/reproductive-freedom/hospital-mergers-threat-reproductive-health-services>)  
Accessed 2013-08-18
24. Editorial: “A sensible response to hospital merger concerns.” *Seattle Times*, 21 July, 2013.”  
([http://seattletimes.com/html/editorials/2021430907\\_editcatholichospitalmergersxml.html](http://seattletimes.com/html/editorials/2021430907_editcatholichospitalmergersxml.html))  
Accessed 2013-08-18