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CONSCIENTIOUS OBJECTION IN HEALTH CARE PROVISION: A NEW DIMENSION

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1. Introduction

Reproductive health care services, such as abortion and contraception, are the subject of a long-running and heated debate in biomedical ethics and health policy worldwide. On one side of the debate, those opposed to contraception and abortion liken their use to murder, and argue that the state should neither support such immoral actions, nor require objectors to participate in their provision. In response, advocates of rights to contraception and abortion argue that they are essential health services, access to which is necessary for the enjoyment of fundamental freedoms, health, and reproductive autonomy.

In this paper we examine the ongoing debate surrounding the rights of health care professionals to object to professional duties which conflict with their personal beliefs – with

particular reference to services which promote reproductive autonomy, such as abortion and contraception¹. In doing so, we draw attention to a worrying trend in health care policy. To examine this trend we consider examples of a tendency in Europe and the United States to undermine women's rights to reproductive autonomy by prioritising the rights of ideologically motivated service providers to freedom of conscience. Increasingly, this occurs not only at the level of decision-making of individual health professionals, but also at higher levels of professional and state policy. We argue that some of the rights to freedom of conscience asserted by health care providers² are excessive in liberal societies, incompatible with liberal norms

¹ While other areas of medical practice raise similarly complex issues relating to conscientious objection, particularly physician assisted suicide, we focus on services which promote reproductive autonomy in this paper. This is because, while there are similarities between the two cases, they are sufficiently different that an adequate discussion of each case would not be possible in a paper of this length. However, some of the issues discussed in this paper may be relevant to discussions of physician assisted suicide for example.

² In this paper, instead of 'doctor', 'patient' etc., we use the terms 'provider' and 'client' to refer to the persons participating in the provision of contested health care services and those who use them, respectively. This is to capture health professionals and recipients of services outside the doctor-patient-relationship.

of pluralism and personal freedom, and impose unjustifiable costs on both individual persons, and society as a whole.

To make this argument we first consider the general claims in favour of the conflicting rights to freedom of conscience and reproductive autonomy.³ Second, we examine two examples in the debate surrounding the conflict between these two competing rights claims. Our goal is to draw out the specific claims and counter-claims surrounding the two categories of right as they are applied in the policy context. In doing so, we examine the claims made by advocates for strong rights to conscientious objection and freedom of conscience in specific health care policy contexts. We argue that demands of the type made by conscientious objectors in the given examples are unreasonably broad, and would allow objecting health care providers to prevent other persons from enjoying their rights to reproductive autonomy, and to basic health care services. Consequently, the demands made by these objectors cannot be justified by appeal to liberal presumptions in favor of personal freedom. In closing, we argue that the trend towards ever-greater concessions to freedom of conscience in healthcare policy settings must be resisted in order to preserve other important rights.

³ These rights conflict in this case; not in general.

2. Arguments in favour of rights to conscientious objection

The following account is intended to provide a descriptive (rather than logical or normative) overview of contexts in which the right to conscientious objection is generally exercised:

1. A duty to X is owed by all persons in group Y
2. Either the duty itself, or its likely consequences are deemed immoral by some members of Y
3. Some members of Y will assert a conscientious objection to X, and will request an exemption from the duty to X
4. An exemption will be granted (or not) to some or all of those who objected, with or without conditions attached.

The right to exempt oneself from the fulfilment of a generally held duty is typically justified on the grounds that such a right is vital for the preservation of freedom of conscience. The latter is itself argued to be a core value of pluralist, liberal-democratic states,⁴ and ‘a moral right’.⁵ Further, the rights to freedom of

⁴ R.S. Dresser. ‘Freedom of Conscience, Professional Responsibility, and Access to Abortion’. *J Law Med Ethics* 1994; 22: 280-285: 280.

⁵ E.D. Pellegrino. ‘The Physician’s Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective’. *Fordham Urban Law J* 2002; 30: 221-244: 226, 239.

conscience and conscientious objection are argued to be constitutive of liberty and autonomy,⁶ and to be necessary for the preservation of individual moral integrity.⁷ In promoting these goods, the rights are argued to be vital for the adequate toleration of different moral and philosophical perspectives in a pluralistic society.⁸

Correlatively, failure to adequately protect freedom of conscience is argued to impose a particular view of the good on those who hold minority moral principles. This is argued to unjustifiably infringe upon the personal liberties of those with uncommon ethical perspectives and restrict their ability to live free lives. On this argument, denying rights to conscientious objection restricts personal liberty and autonomy. Each of these

⁶ E. Ceva & S. Moratti. 'Whose Self-Determination? Barriers to Access to Emergency Hormonal Contraception in Italy'. *Kennedy Inst Ethics J* 2013; 23: 139-167: 139.

⁷ M.R. Wicclair. 'Conscientious Objection in Medicine'. *Bioethics* 2000; 14: 205-227.

⁸ D.P. Sulmasy. 'What is Conscience and why is Respect for it so Important?'. *Theor Med Bioeth* 2008; 29: 135-149: 146; A. Giubilini. 'The Paradox of Conscientious Objection and the Anemic Concept of 'Conscience': Downplaying the Role of Moral Integrity in Health Care'. *Kennedy Inst Ethics J* 2014; 24: 159-185: 163.

consequences are claimed to be considerable harms, which weigh in favor of guaranteeing rights to conscientious objection.

Guaranteeing rights to conscientious objection is therefore seen as a means to protect important personal freedoms, ensure state neutrality amongst alternative, incommensurable moral values, and to avoid the imposition of major harms on people with uncommon moral or philosophical perspectives. On this view, being able to conscientiously object to duties one finds objectionable enables right holders to hold minority moral beliefs, pursue their personal life goals in accordance with such beliefs, and enjoy status as equal and autonomous members of society.

3. Arguments in Favour of Guaranteed Rights to Contraception

There are two key factors which feature prominently in arguments in favour of rights to contraception; first, there are significant health benefits associated with access to contraception. For example, oral contraceptives can reduce the risk of some forms of cancer and can also treat ‘menstrual disorders, acne or hirsutism, and pelvic pain’.⁹ Further, women

⁹ Committee on Preventative Services for Women (CPSW), Institute of Medicine (IOM). 2011. *Clinical Preventive Services for Women: Closing*

with certain medical conditions can face additional health risks which may contraindicate pregnancy, while pregnancy and birth can carry long-term health risks to women.¹⁰

Second, access to contraception, and the control over fertility that it provides, is a key factor in the promotion of women's autonomy.¹¹ This is particularly important given that '[p]regnancy and birth are not minor inconveniences...They constitute a major life event, which even when welcome causes immense discomfort and disruption to many women'.¹² Being able to decide whether to become pregnant enables women to control if and when the health, social and economic costs of pregnancy and parenthood are incurred and to avoid them when appropriate.¹³ Therefore, access to contraception allows women

the Gaps. Washington DC: The Institute of Medicine of The National Academies.

¹⁰ Ibid: 103-4; A. Sonfield, et al. 2013. *The Social and Economic Benefits of Women's Ability to Determine Whether and When To Have Children*. New York, USA: The Guttmacher Institute.

¹¹ J.J. Thomson. 'A Defense of Abortion'. *Philos Public Aff* 1971; 1: 47-66.

¹² B. Hewson. 'Reproductive Autonomy and the Ethics of Abortion'. *J Med Ethics* 2001; 27: ii10-ii14: ii10.

¹³ L.P. Freedman & S.L. Isaacs. 'Human Rights and Reproductive Choice'. *Stud Fam Plann* 1993; 24: 18-30: 19; D. Tjetjens Meyers. 'The Rush to

to live a full life in accordance with their personal life plans.¹⁴ The right to reproductive autonomy is also argued to be justified because of its role in enabling people to be ‘self determining...a central condition of personhood’.¹⁵

4. Freedom of Conscience Vs. Reproductive Autonomy

Each of these two rights are claimed by their advocates to be vital to the interests of all persons. A guaranteed right to freedom of conscience protects the ability to think and believe what one likes, and to live according to moral principles which one endorses in accordance with a self-selected life plan. Similarly, the right to reproductive autonomy also enables right holders to live according to their own view of the good, pursue

Motherhood: Pronatalist Discourse and Women's Autonomy’. *Signs* 2001; 26: 735-773: 736.

¹⁴ C. Goldin & L.F. Katz. ‘The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions’. *J Polit Econ* 2002; 110: 730-770: 731; O. O’Neill. 2002. *Autonomy and Trust in Bioethics*. Cambridge: Cambridge University Press: 52; E.O. Ananat & D.M. Hungerman. ‘The Power of the Pill for the Next Generation: Oral Contraception's Effects on Fertility, Abortion, and Maternal & Child Characteristics’. *Rev Econ Stat* 2012; 94: 37-51.

¹⁵ A. Buchanan, et al. 2002. *From Chance to Choice: Genetics and Justice*. Cambridge: Cambridge University Press: 216

their personal goals, and perhaps most importantly, control what happens to their bodies. Each of these rights is therefore argued to be vital for the attainment of the same goal – the preservation of personal liberty. Each right is certainly important, and it is therefore necessary to ensure that in making public policy we remain aware of the ways in which the promotion of each right is said to infringe upon the promotion of the other.

In the sections that follow, we discuss examples where the rights to freedom of conscience and to bodily integrity and reproductive autonomy conflict, and examine claims made by advocates of wide reaching rights to conscientious objection in the context of contraceptive and reproductive services. The kind of broadly applicable right asserted by health care providers has been defined by LaFollete and LaFollete as ‘unqualified’, meaning that right holders are claimed to be entitled to conscientiously object ‘without having to give any account of her views and without having to do anything in lieu of discharging her professional duties’.¹⁶ LaFollete and LaFollete criticise the extent of these claimed rights, and note that in other contexts objectors are obliged to fulfil compensatory duties in

¹⁶ E. LaFollette & H. LaFollette. ‘Private Conscience, Public Acts’. *J Med Ethics* 2007; 33: 249-254: 251.

order to be granted exemptions to duties to which they object.¹⁷ Like LaFollete and LaFollete, we reject the ‘unqualified’ status of rights of conscientious objection in the context of health care provision for the reasons we set out below.

5. Example One: Health Care Professionals and Conscientious Objection

Health care workers, including physicians, midwives, nurses, and pharmacists have frequently asserted rights to exempt themselves from duties which would oblige them to participate in the provision of contraceptive and abortion services. These claims are often supported with reference to the supposedly serious harms associated with denials of freedom of conscience such as losing a job. In 2014, for example, a physician and hospital director in Poland was fired when he refused to admit a woman to the hospital he managed for an abortion, and failed to refer her to another hospital.¹⁸ Pellegrino further argues that denying physicians a right to exempt themselves from participating in abortion or contraception services risks excluding members of certain groups from access to the medical professions – a major violation of their rights to personal

¹⁷ Ibid: 250.

¹⁸ Reuters. 2014. ‘Polish Doctor fired for Refusing to Allow Woman to Have Abortion’. *The Irish Times*. 10 July.

freedom.¹⁹ In many cases, such harms are held to justify refusal to fulfill otherwise mandatory duties, even where those duties are fundamental to the professional role of objectors.

To illustrate, many pharmacists have asserted rights to conscientiously object to the provision of medicines they deem objectionable,²⁰ including the contraceptive pill²¹ and ‘emergency hormonal contraception’ (EHC).²² While such asserted rights are not always respected, in many jurisdictions, such rights are enshrined in law.²³ Physicians and nurses have

¹⁹ Pellegrino, *op. cit.* note 5, p.226, 239.

²⁰ L.A. Davidson, et al. ‘Religion and Conscientious Objection: A Survey of Pharmacists’ Willingness to Dispense Medications’. *Soc Sci Med* 2010; 71: 161-165: 161-162.

²¹ M.K. Collins. ‘Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction’. *Annals Health L* 2006; 15: 37-60: 37-38; Giubilini, *op. cit.* note 8, p.173; M. Rohde. 2008. ‘Rebuke Upheld in Refusal to Fill Birth Control’. *Milwaukee Wisconsin Journal Sentinel* 26 March.

²² C.T. Gallagher, et al. ‘The Fox and the Grapes: An Anglo-Irish Perspective on Conscientious Objection to the Supply of Emergency Hormonal Contraception without Prescription’. *J Med Ethics* 2013; 39: 638-642: 638.

²³ The Guttmacher Institute. 2015. *State Policies in Brief: Refusing to Provide Health Services*. New York, NY: The Guttmacher Institute. Available at: http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf

also been granted similar legal rights, which are even more widely protected, with regard to participation in abortion or physician assisted suicide.²⁴ Recently in Sweden, the new leader of the Christian Democrats political party stated that she would campaign for the introduction of a law guaranteeing a right to conscientious objection for health care workers.²⁵

The right to conscientious objection has also been asserted when only indirect participation in a contested service is required. For example, two midwives in the United Kingdom recently sued (unsuccessfully) for a right to conscientiously object to the performance of services which were indirectly involved in the

[Accessed 1st September 2015]. National Women's Law Center. 2015. *Pharmacy Refusals 101*. Washington D.C.: National Women's Law Center. Available at: <http://www.nwlc.org/resource/pharmacy-refusals-101> [Accessed 1st September 2015].

²⁴ Dresser, *op. cit.* note 4, p. 282–283; Pellegrino, *op. cit.* note 5, p.222; D.P. Flynn. 'Pharmacist Conscience Clauses and Access to Oral Contraceptives'. *J Med Ethics* 2008; 34: 517-520: 517. We discuss this point in more detail below.

²⁵ S. Rogberg. 2015. 'Ebba Busch Thor: Vårdpersonal ska få neka utföra aborter'. *Aftonbladet* 4 May; C. Munthe. *Philosophical Comment* [Internet] Gothenburg: Christian Munthe. 1 May 2015 – [cited 2015 May 9]. 'Five Observations About Conscientious Objection in Health Care'. Available from ; <http://philosophicalcomment.blogspot.de/2015/05/five-observations-about-conscientious.html>.

provision of abortions. They were asked to ‘answer telephone calls to book women in for care, and delegate to or supervise staff providing that care to women’.²⁶ Despite the indirectness of this involvement, the two midwives argued that they should have a right to conscientiously object to these duties. They did not object to answering phone calls or doing administrative paperwork as such, yet by their definition of complicity they were as morally involved in an action they believed was objectionable as if they were personally required to perform abortions.²⁷

In many instances, the right to conscientiously object to professional duties is argued to be contingent upon two main factors; first, that the objecting professional refers their client to an alternative provider.²⁸ Second, that accessing such alternative provision does not impose significant additional

²⁶ Royal College of Midwives. 2014. ‘Landmark Supreme Court Judgement’.

²⁷ Ibid; R. Alta Charo. ‘The Celestial Fire of Conscience — Refusing to Deliver Medical Care’. *N Engl J Med* 2005; 352: 2471-2473:2471;

J.D. Cantor. ‘Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine’. *N Engl J Med* 2009; 360: 1484-1485:1484.

²⁸ C. Del Bò. ‘Conscientious Objection and the Morning-After Pill’. *J Appl Philos* 2012; 29: 133-145; Gallagher et al., *op. cit.* note 22.

costs on clients.²⁹ Where these conditions are met, it is argued that both objecting providers and their clients achieve their desired outcomes. Clients are able to access the contested services, while providers are able to avoid participating (at least as closely) in actions which they believe to be immoral. Notably however, this solution is disputed, with some advocates for the rights of conscientious objectors claiming that such a duty would still violate their right to freedom of conscience.³⁰

These examples all focus on the rights asserted by individual persons to refuse to fulfil professional duties which they feel are prohibited by their religious beliefs. In the following section we examine a recent example which has significantly extended the boundaries of the category of agents to whom rights to conscientious objection must be granted.

²⁹ H. Brody & S.S. Night. 'The Pharmacist's Personal and Professional Integrity'. *Am J Bioeth* 2007; 7: 16-17.

³⁰ R. Stein. 2005. 'Pharmacists' Rights at Front Of New Debate'. *The Washington Post* 28 March; R. Dresser. 'Professionals, Conformity, and Conscience'. *Hastings Cent Rep* 2005; 35: 9-10: 9.

5. Example Two: Corporate Conscientious Objection³¹

Recently, the owners of three privately owned, for-profit corporations³² claimed in a case tried before the Supreme Court of the United States (SCOTUS) that obliging them to cover the cost of certain contraceptives through their insurance schemes violated their right to freedom of conscience.³³ This objection by Hobby Lobby et al. was based on the claim that the contested services were immoral since, according to their beliefs, they

³¹ It should be noted that neither of the authors are Lawyers. Our analysis of this case serves to illustrate the normative arguments brought forward to support or refute an important trend in health policy we want to criticise. It is derived from a philosophical, normative perspective which may not account for some of the finer legal intricacies surrounding it. For analysis of the legal arguments and history of the Hobby Lobby case, see E. Sepper. ‘Contraception and the Birth of Corporate Conscience’. *Am U J Gender, Soc Pol’y & Law* 2014; 22: 303-342.

³² *Burwell v. Hobby Lobby Stores, Inc*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356). For the purposes of brevity, we shall refer to the three corporations and their owners collectively as ‘Hobby Lobby et al.’. The objections raised by Conestoga Wood Specialties Limited refer to fewer contraceptive services than those of Hobby Lobby or Mardel, but each corporation makes similar enough claims that they can be aggregated for the purposes of this paper.

³³ *Hobby Lobby Stores, et al.* 2012. Complaint: Case 5:12-cv-01000-HE. Oklahoma: United States District Court For the Western District of Oklahoma; Supreme Court of the United States, *op. cit.* note 32, p.4.

caused abortions, which the plaintiffs believe to be a sin.³⁴ Consequently, contributing to the cost of providing such services would make Hobby Lobby et al. complicit in immoral behavior. Being forced to continue providing funding for these services would thus represent an unjustifiable infringement on the plaintiff's right to freedom of conscience. Therefore, they argued to be allowed an exemption to the requirement in order to avoid incurring significant harm.³⁵

³⁴ Supreme Court of the United States, *op. cit.* note 32, p.2. In this way, the claims made by Hobby Lobby et al. echo earlier claims made by several religious, non-profit employers who demanded, and received, a right to be exempt from the requirement to contribute to the cost of services which conflict with their values, P. West-Oram. 'Freedom of Conscience and Health Care in the United States of America: the Conflict Between Public Health and Religious Liberty in the Patient Protection and Affordable Care Act'. *Health Care Anal* 2013; 21: 237-247.

³⁵ The assertion that the contested services cause abortions is disputed by medical evidence. Medical consensus on the four contested services is that they are non-abortive, and perform their contraceptive function primarily by preventing ovulation or inhibiting fertilization, I. Sivin. 'IUDs are Contraceptives, Not Abortifacients: A Comment on Research and Belief'. *Stud Fam Plann* 1989; 20: 355-359; 'Long-Acting Reversible Contraception (LARC): IUD and Implant'. *The American College of Obstetricians and Gynecologists* 2014. However, we proceed in our argument as though this empirical claim was correct.

The Supreme Court ruled in a close majority on 30 June 2014 that the requirements of the ACA did violate the rights of the owners of Hobby Lobby et al. to freedom of conscience.³⁶ Consequently, Hobby Lobby et al. were granted an exemption to the requirement to cover the cost of insuring the disputed services. However, in order to preserve the rights of women to access the services, the Supreme Court stated that insurance companies, instead of employers, should be required to take on the cost of providing the contested contraceptive services.³⁷

6. Against Unqualified Rights to Conscientious Objection

In the rest of this paper we argue that both in the individual and the corporate cases discussed, unqualified rights to conscientious objection of the kind described are incompatible

³⁶ Supreme Court of the United States, *op. cit.* note 32, p.4.

³⁷ *Ibid*: pp.9-10. The Court found that the government had a compelling interest in ensuring that women enjoy access to the contested contraceptive services. However, rather than requiring compliance with the ACA, it held that a less restrictive means to ensuring access would be to extend an existing concession, previously granted to religious non-profit employers, so that it also applied to closely held, for-profit corporations. For a discussion of the issues with this approach see West-Oram, *op. cit.* note 34.

with the liberal, pluralist paradigm.³⁸ We also reject the claim that rights to conscientious objection prevent state intrusion into the private sphere of personal moral beliefs. Instead, we argue that in granting rights to be exempt from otherwise applicable duties, States allow ideological objectors to impose additional duties on other persons, and expand their own view of the good into the public arena, thereby restricting the freedoms of other persons to live according to their own view of the good.

Complicity

First, the arguments for a right to conscientious objection in the above examples rely upon an unreasonably broad definition of complicity. The breadth of this definition results in the ascription of responsibility for wrongful actions to an implausibly large number of persons, only tangentially involved in actions they find objectionable.³⁹ As Del Bò argues in the context of pharmacist refusals to dispense the ‘emergency contraception pill’ (ECP),⁴⁰ ‘the mere act of selling ECP to a woman who asks for it certainly does not *ipso facto* prevent

³⁸ For the purposes of argument we presuppose the validity and legitimacy of such a paradigm.

³⁹ Cantor, *op. cit.* note 27, p.1484.

⁴⁰ Del Bò, *op. cit.* note 28, p.133.

anything, and therefore certainly does not cause an abortion'.⁴¹ Correlatively, midwives who are obliged to provide administrative support to an hospital department which provides abortions, and the corporations discussed in section five, are even further removed from the contested behaviour, in that their responsibilities extend only so far as enabling other parties to *potentially* provide contested services to clients who have legal entitlements to them.⁴²

It is also worth noting that employer provided health insurance is generally seen as merely one part of the remuneration package provided to employees, in addition to a salary.⁴³ Consequently, in order to be consistent to their opposition to the use of 'their' funds for contested contraceptive services, objecting employers such as Hobby Lobby et al. would have to also object to providing their employees with a salary. This is because, in each case the financial transfer from employer to employee could

⁴¹ Ibid: 139.

⁴² Of course, in the case of participation in the actual performance of abortions, the involvement is much more direct, though we address this below.

⁴³ J. Currie & B.C. Madrian. 'Health, Health Insurance and the Labor Market'. *Handbook of Labor Economics* 1999; 3: 3309-3416: 3368–3376; G.A. Jensen & M.A. Morrisey. 'Employer-Sponsored Health Insurance and Mandated Benefit Laws'. *Milbank Q* 1999; 77: 425-459: 439.

enable the latter to perform an action to which the former objects.⁴⁴

In the above examples, the link between objector and contested service is tenuous, and involves numerous causal steps. With regard to objecting individuals, it has been stated that if complicity is taken to adhere so far down a causal chain, all persons would be entitled to exempt themselves from *any* duty which they felt required them to violate their conscience, without having to explain that belief, or offer any compensatory action in reciprocation for the exemption.⁴⁵ Such a broad interpretation of freedom of conscience, and a commitment to protecting it so extensively would, it is argued, lead to ‘anarchy’ in the provision of medical care.⁴⁶ That is, if physicians could and would conscientiously object to examining and treating members of identifiable groups⁴⁷ on ideological grounds this

⁴⁴ R. Alta Charo. ‘The Supreme Court Decision in the Hobby Lobby Case: Conscience, Complicity, and Contraception’. *JAMA intern med* 2014; 174: 1537-1538; Sepper *op. cit.* note 31, p.321-322.

⁴⁵ LaFollette & LaFollette, *op. cit.* note 16, p.251.

⁴⁶ N. Eyal & A. Gosseries. ‘Obamacare and Conscientious Objection: Some Introductory Thoughts’. *Ethical Perspect* 2013; 20: 109-117: 114.

⁴⁷ For example, Savulescu suggests that a physician might refuse to treat the elderly on the grounds that they have had a ‘fair innings’ J. Savulescu. ‘Conscientious Objection in Medicine’. *Br Med J* 2006; 332: 294-297: 188.

would either endanger patients on a regular basis,⁴⁸ or require major, costly restructuring of medical provision.⁴⁹

Granting health care providers broad rights to conscientious objection would make health care services extremely unreliable, and subject to the ideological commitments of providers, rather than the medical needs of patients. Of course, certain kinds of discrimination of this kind would be prohibited by the UK *Equality Act*.⁵⁰ However, the existence of this legislation supports our claim in this paper, that the ideological commitments of health care providers should not be allowed to dictate what care is available to their patients.⁵¹

Del Bò argues that in order for an exemption to be justified, the otherwise mandatory action must ‘*directly* [bring] about a state

Similarly, Brock discusses cases where pharmacists have refused to dispense emergency contraception ‘because they object to particular kinds of customers using the prescribed item, such as unmarried couples or minors’ D.W. Brock. ‘Conscientious Refusal by Physicians and Pharmacists: Who is Obligated to do What, and Why?’. *Theor Med Bioeth* 2008; 29: 187-200: 191.

⁴⁸ Ibid: p.188.

⁴⁹ Cantor, *op. cit.* note 27, p.1484.

⁵⁰ The *Equality Act*, 2010, c. 15 (UK).

⁵¹ We are grateful to one of the anonymous peer reviewers for highlighting this point to us.

of affairs contrary to the convictions of that agent; it is not enough that the agent merely enables or encourages that state of affairs'.⁵² Endorsing Del Bò's standard for meaningful complicity would therefore limit the number of cases in which a right to conscientious objection could be accepted. Doing so would allow states to consistently protect the right to freedom of conscience, while avoiding the 'anarchy problem' discussed above.⁵³

The anarchy scenario is even more problematic in corporate conscientious objection. If companies – societal actors with an incomparably wider reach than individuals – could exempt themselves on grounds of tenuous complicity from contributing to the provision of contested services, society as a whole could be forced to absorb escalating, and unsustainable, costs in order to ensure the continuity of central infrastructure and vital services. If taken too far, this could result in important services being denied to much, if not all, of society

⁵² Del Bò, *op. cit.* note 28, p.139.

⁵³ Eyal & Gosseries, *op. cit.* note 46, p.114. This definition would also extend rights to conscientiously object to health care professionals who may be required to perform abortions. However, as we discuss below, other reasons motivate rejecting the right to conscientious objection in such cases.

Voluntariness

Second, it has been argued that rights to conscientiously object are already extended to wartime objectors, and that such cases are analogous to objections raised by non-military conscientious objectors because the objecting parties in both cases object to the killing of other persons (or those they define as persons in the case of health care providers). However, comparing the two cases is to assert a false equivalency between them. Notably, participation in a profession which entails some objectionable duties is voluntary, while military conscription is not.⁵⁴ Nobody *has to* become a physician, nurse, midwife, or pharmacist, but having done so they have professional duties which they can reasonably be expected to fulfil, even if they assert a strong moral objection to those duties.⁵⁵

⁵⁴ J.P. Kelleher. 'Emergency Contraception and Conscientious Objection'. *J Appl Philos* 2010; 27: 290-304: 301; LaFollette & LaFollette, *op. cit.* note 16, p.250.

⁵⁵ R. Rhodes. 'The Priority of Professional Ethics Over Personal Morality'. *Br Med J* 2006; 332; U. Schüklenk. *Udo Schuklenk's Ethx Blog* [Internet] Kingston: Udo Schüklenk 26 March 2015 – [cited 2015 April 26]. 'Conscientious Objection in Medicine: Private Ideological Convictions Must Not Supersede Public Service Obligations'. Available from; <http://ethxblog.blogspot.de/2015/03/conscientious-objection-in-medicine.html>.

Similarly, Hobby Lobby et al. have incurred their obligation to provide coverage at least partly voluntarily. Provisions within the ACA would have allowed Hobby Lobby et al. to retain their existing employee health insurance plan as long as no changes were made to it after the date of the ACA's enactment, March 23rd 2010.⁵⁶ This 'grandfather' clause would have allowed Hobby Lobby et al. to 'indefinitely avoid the contraceptive coverage requirement by not making certain changes after the ACA's effective date'.⁵⁷ While this would have imposed costs on Hobby Lobby et al. in terms of reduced flexibility in their future insurance provision, such costs are not unreasonable, given the extent of the concessions that they demand from society as a whole (to be exempted from a generally applicable law, and to have other persons incur additional costs to compensate for their exemption).

Private and public spheres

⁵⁶ Compilation of Patient Protection and Affordable Care Act: Including Patient Protection and Affordable Care Act Health-Related Portions of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-148 (May 1, 2010): sec. 1251.

⁵⁷ P.D. Clement, et al. On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit: Brief for Respondents. 2010.

The concessions granted to objecting providers of important health care goods and services do not represent mere protection of the private sphere from unwarranted public intrusion. Instead, they expand the boundaries of the private sphere of freedom of conscience into the public arena, with two distinct and important consequences. Firstly, conscientiously objecting to the fulfilment of certain professional, legal, or moral duties can impose significant burdens on third parties, and can obstruct the enjoyment of other important rights.⁵⁸

In the case of health care professionals, non-objecting medical professionals may feel obliged to take on extra responsibilities in order to make up for the shortfall in provision caused by their objecting colleagues' intransigence and ensure that the rights of women who want contraception are fulfilled.⁵⁹ Similarly, in the case of objecting corporations, the Supreme Court's decision in *Burwell vs. Hobby Lobby et al.* imposes additional duties on the State and individual duty bearers, such as insurance companies, to restructure social infrastructure to accommodate the concessions granted to Hobby Lobby et al. and to ensure the

⁵⁸ Del Bò, *op. cit.* note 28, p.139; Dresser, *op. cit.* note 4, p.281; R.A. Lindsay. 'When to Grant Conscientious Objector Status'. *Am J Bioeth* 2007; 7: 25-26: 26.

⁵⁹ Del Bò, *op. cit.* note 28, p.139; Dresser, *op. cit.* note 4, p.281

accessibility of contested medical services for when employers raise conscience objections.⁶⁰

More importantly, the right to conscientious objection granted to objecting providers in the cases mentioned does not merely preserve their right to hold particular beliefs and live according to them; it allows them to actively deny that women enjoy the same right. The decision to use contraception is personal and private, and based in part on the beliefs held by any given individual. Both opponents and advocates of contraception hold a right to make the decision to use contraception based on their personal beliefs. Consequently, ideological objectors ‘are not required to use contraceptives and are free to advocate against their use’.⁶¹ However, the breadth of the right to conscientious objection demanded in the above examples allows objectors to deny, via exempting themselves from their professional or legal duties, that women also enjoy a similar right.⁶²

⁶⁰ HRSA.gov [Internet]. Washington D.C.: U.S. Department of Health and Human Services; 2013 [cited 2014 October 22]. Available from: <http://hrsa.gov/womensguidelines/>

⁶¹ Alta Charo, *op. cit.* note 44, p.1537.

⁶² *Burwell v. Hobby Lobby Stores, Inc*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356) *op. cit.* note 32, sec. B-II.

Objecting providers in these cases are therefore not obliged to recognise or respect the rights of their female clients to basic health care, reproductive autonomy and the freedom to live their lives as they choose. When individual providers object to a duty, it is in practice, usually (but not always) possible for clients to gain access to contested services elsewhere. However, corporate entities, having far greater reach and power than individual health care professionals, are able to impose wider, structural costs on society as a whole when they assert rights to conscientious objection. They do so by firstly exempting themselves from duties corresponding to many more rights to reproductive autonomy at once than individual objectors are able (all female employees at all times, rather than one female client at a specific time). In doing so, they impose far greater burdens on society as a whole than individual objectors. The costs imposed by the objections of individual providers are usually (but not always) isolated to clients, and to non-objecting providers who eventually provide services.⁶³ In contrast, the costs imposed by objectors like Hobby Lobby demand State level restructuring of law, and health care infrastructure in order to ensure the continued accessibility of contested services.

⁶³ While there may be many instances of such costs, they are not systemic, and are typically restricted to small groups of persons.

Corporate conscience rights do not therefore guarantee the right to freedom of conscience, but rather entitle corporations to shape public policy according to their particular ideological preferences, and thus restrict the public sphere in which others live.

7. Competing freedoms, competing harms: the dangers for public policy

Our goal in this paper has been to argue that the concessions demanded by, and in many cases granted to, ideologically motivated providers of essential health care services are unreasonable and unjustifiable. This is because they could not be consistently granted to all persons, and because they deny the existence of important rights held by other people. Consequently, we argued that these rights do not grant protections from excessive State interference, but instead allow objectors to dictate the terms of the social contract to their benefit. In doing so, we argued that the claims presented by objectors are based on excessively broad definitions of complicity and of the protections entailed by the right to freedom of conscience. Therefore, these concessions should be recognized as exceeding respect for freedom of conscience *per se*. Instead, they represent a demand for special treatment which privileges an unreasonably broadly defined right to freedom of conscience over the rights of other persons.

This point can be made with reference to the classic injunction that one's freedom to swing one's arms ends 'where the other man's nose begins'.⁶⁴ The claims made by objecting health care providers in the noted examples are not pleas for a right to swing their fists without hitting anyone else's nose. Instead, they are demanding a right to throw punches in a crowded room. That rights to conscientious objection are not always recognized, and are sometimes limited by requirements to ensure alternative sources of provision, means that conscientious objectors have not (yet) landed a knockout blow against the right to reproductive autonomy.

Further, the overall impact of guaranteeing rights to conscientious objection for health care professionals has been largely manageable. While there are instances where people are denied care, these are typically deviations from the norm, often caused by refusals of ideological objectors to comply with requirements designed to ensure continuity in the availability of care. While harmful for the affected persons, generally there are sufficient non-objecting health care providers available to

⁶⁴ Z. Chafee. 'Freedom of Speech in War Time'. *Harv Law Rev* 1919: 932-973: 957. Supreme Court Justice Ruth Bader Ginsburg refers to this point in her dissenting opinion, *Burwell v. Hobby Lobby Stores, Inc*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356) *op. cit.* note 32, sec. B-II.

ensure the continued accessibility of contested services.⁶⁵ However, with corporations now stepping into the ring, the game has changed significantly, moving to higher and therefore broader policy levels.

Previously, exemptions to duties to provide reproductive health services were only extended to religious institutions, such as churches. Under the decision in *Burwell vs. Hobby Lobby et al.*, however, closely-held, non-religious, for-profit organizations, such as hospital operators or private Universities can in principle object to their legal obligations. Conscience objections by societal actors such as these could affect large numbers of people, and impose exponentially greater costs, in terms of new infrastructural, financial, and legislative obligations, than the objections of individual health care providers. Therefore, based on the recent developments described in this paper, it is warranted to fear that the trend to demand rights to freedom of conscience could grow even further, into other areas of health care, and indeed, social and welfare provision as a whole. To

⁶⁵ Brody & Night, *op. cit.* note 29, p.16. However, as Dreweke notes, other legislative actions, such as the imposition of increased (and unnecessary) regulation of abortion clinics, is undermining the ability of women to access needed health care services J. Dreweke. ‘Contraception Is Not Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise’. *Guttmacher Rep Public Policy* 2014; 17: 14-20.

date, the risks of this happening have not been adequately mapped. The Hobby Lobby decision changes what has until now been a debate about the limits of conscience in individuals into one about the very nature of the social provision of important goods, and the extent of what we owe to each other in modern societies. We must, therefore, engage with this debate, and defend important freedoms from gradual erosion by seemingly reasonable concessions to unjustifiable demands.

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