

Final Reflections

Thus far our study has revealed that opposing parties value both autonomy and rights of the person. We have seen professional organizations, like the APhA, craft recommendations that attempt to accommodate a pharmacist's desire to practice according to conscience while providing timely access to the dispensing of legally written prescriptions. Real life applications of these recommendations by state boards of pharmacy or state mandate have largely met with dissatisfaction by one or both parties, as demonstrated by the account of the Washington State Board of Pharmacy and Governor Gregoire. Mixed outcomes from resulting litigation, as seen in cases like Koch and Noesen, have left the question of conscientious objection unresolved because of conflicting opinions. These observations raise the question: Why have reconciliation and accommodation of differences remained unattainable?

The legal impasse and the wave of proposed legislation suggest something more fundamental lies at the core of the disagreement. The power struggle between the opposing camps revealed in the very language used to frame the argument, either "conscience clause" or "refusal clause," points to the same notion; that is, there reside deeper currents under the splash of contention. The legal impasse and language battle also suggests that the common valuation of rights and autonomy might be only mid-level principles that veil a socio-cultural shift in the political hegemony with apparently competing but incompatible systems.

Principle of Autonomy

The use of the often vaunted principle of autonomy to serve as the guiding principle has contributed little to resolve the conflict, as clearly articulated in the *Newsletter of the National Association of Boards of Pharmacy*.¹ A woman's reproductive self-determination through access to emergency contraceptives contradicted a pharmacist's self-determination to exercise religious conscience. The subjugation of the autonomy of one to the dominant power of the other looks much like conflicts years ago when a patient's self-determination to request or to forgo life-sustaining end-of-life treatment came into conflict with a physician's determination to practice medicine according to professional and moral conscience.² Some ethicists at that time declared autonomy illusory since values of the dominant voice overrode the self-determination of the less powerful. Lack of continuity in conflict resolution today and the assertion of the dominant power make an appeal to honoring autonomy as a basis of personal preference just as illusory today as it was then. It seems that the principle of power-in-hand inferred from articles of that era are applicable today in that those garnering and successfully applying their power-in-hand assert their autonomy over weaker powers.³

Rights

An appeal to 'rights' to serve as the arbitrator of self-determination has proven to be just as ineffective as an appeal to autonomy. The right to privacy and the right to reproductive access have positioned advocates of "Must-Fill Laws" in a favorable position to win court cases. Asserting the current socio-cultural norm of women's rights and gender equality against conflicting rights of religious freedom renders the assertion insuperable even though both parties recognize 'rights' as a human construct.⁴ The

¹Larissa Doucette (ed): "Controversy over Conscience Clauses, Must-Fill Laws Fueled by Plan B Decision," *Newsletter of the National Association of Boards of Pharmacy*. (August 2007) v. 36/7, pp. 113-115, 123. Autonomy is often drawn from the seminal work of Beauchamp and Childress and construed as an eminent principle amidst nonmaleficence, beneficence, and justice (cf. Tom L. Beauchamp and James F. Childress: *Principles of Biomedical Ethics*. (New York: Oxford Press, 3rd edition, 1989) pp. 67-119.

²David Orentlicher: "The Illusion of Patient Choice in End-of-Life Decisions." *JAMA* (April 15, 1992) v. 267, 16, p. 2101.

³ Kathryn A. Koch, Bruce W. Meyers, and Stephen Sandroni: "Analysis of Power in Medical Decision-Making: An Argument for Physician Autonomy." *Law, Medicine, and Health*. Winter, 1992, v. 20/4, pp. 320-326.

⁴ Dershowitz, Alan: *Rights from Wrongs: a Secular Theory of the Origins of Rights*. (New York, Basic Books) 2004.

questions are raised, then, as to “where do rights come from” and “do the sources of these constructs provide persuasive appeals to override one of the competing claims.”⁵

Antecedent meta-ethical commitments

The adequacy of applying mid-level principles like autonomy or rights has been debated in the past.⁶ One insight that remains important to our study is that different antecedent epistemological commitments lead to different conceptions of mid-level principles and “virtually guarantee their respective conclusions.”⁷ Our observations have clarified that (1) legislation was initially made to protect Roman Catholic or conservative Protestant expressions of religion, (2) changes in rule making have been sought by women’s rights organizations, and (3) litigation has involved only Roman Catholic or conservative Protestant claimants in conflict with woman’s rights organizations. Our analysis has revealed that the pundits in this debate are primarily devout Roman Catholics, conservative Protestants, and proponents of a progressive secular feminist rights agenda. Our observations strongly suggest that we consider differing epistemological commitments of these groups in order to determine if the sources of their commitments provide persuasive appeals to override the competing rights and autonomy claims of either group.

Protagonists

Devout Roman Catholics, like Niel Noesen, reject the use of artificial contraceptives based upon their abrogation of “openness to procreation” in the sexual act of “conjugal love.”^{8,9} The asserted meaning and truth of these ethical standards are based upon epistemological commitments attached to the magisterial teaching of the Roman Catholic Church.¹⁰ The Church’s epistemological and ontological commitments are grounded in the revelation of God as taught in the Bible. Hence, supernatural facts from these sources are used to construct the language that gives knowledge and meaning in order to discern the morality of contraception. Their theory of knowledge accounts for why the language “conscience clause” is used and “refusal clause” is rejected. “Conscience” intimates the bringing together of the law of God written on man’s heart and the words of the faith community that give that law clarity. These narratives are brought to bear upon the moral practice of dispensing of medication.

A misunderstanding of the metaphysical implications of conscientious objection has been seen when pharmacy boards and professional standards mandate referrals. The same confusion attends when attempting to frame the discussion in refusal language. The use of “refusal” in this context changes the moral discourse to the mere external act and denies the epistemic reasoning and heart behind the religious objection. In the same way, we have noted attempts to accommodate a pharmacist’s objection by permitting her not to physically dispense Plan B prescriptions. The caveat demanded, however, was an honoring of the patient’s autonomy and right to timely access to medication by requiring transfer or referral to a pharmacy or pharmacist that would dispense the medication. In doing so, the intention of the

⁵ *Id.* p. 1.

⁶ Davis, Richard B. “The Principlism Debate: A Critical Overview,” in *The Journal of Medicine and Philosophy*. (February, 1995) v. 20/1, pp. 85-105.

⁷ *Id.* p. 85.

⁸See Pope Pius XI: *Casti Connubii*. No. ¶18-27, December 1930. Pope Pius XI draws these principles from Cannon Law as well as Scripture. Cf. http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html .

⁹*Op. cit.* *Casti Connubii*. No. ¶18-27. http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html . See also Pope John Paul II: *Evangelicum Vitae*. No. ¶13. March 25, 1995. <http://www.vatican.va/edocs/ENG0141/P7.HTM> Last visited November 10, 2006.

¹⁰Walter, James J. and Thomas A. Shannon: *Contemporary Issues in Bioethics: a Catholic Perspective*. (New York: Rowman and Littlefield Publishers Inc., 2005) p. 158.

act is conflated with the material act itself. Any participation in the dispensing of the contraceptive may be conceived as proximate “material cooperation.”¹¹ Material cooperation concerns a cooperator’s act that involves them in a wrongdoer’s evil actions without sharing in the wrongdoer’s intention. The perceived evil that one is contributing to is a foreseen but unintended side effect. Material cooperation can be either morally acceptable or unacceptable, but always involves an undesirable situation. At a minimum, then, situations of ongoing material cooperation with an action deemed evil, even when justified, are near occasions of sin and should be avoided unless there is a countervailing grave reason to engage in them.¹² Moral turpitude would depend upon the proximity of the pharmacist to the moral act. Although debated, some like Noesen, interpreted transfer of the prescription to a pharmacist who would dispense sufficiently close in proximity as to violate conscience.¹³

Since inhibition of implantation is touted as one of the plausible mechanisms of Plan B contraception, it could be interpreted as abortion. If that were the case then a follower of the moral teaching of the Roman Catholic Church would need to opt out of the act or facilitation of the act in order not to commit a grave sin. It would not matter if a government sanctioned Plan B as lawful; abortion is a crime against humanity which no human law can claim to legitimize. There is no obligation in good conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection.¹⁴

Human life is sacred because from its beginning it involves the creative action of God and it remains forever in a special relationship with the Creator, Who is its sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right directly to destroy an innocent human being" (*Donum Vitae*, 5).¹⁵

The conservative Protestant position finds common ground at this point. For instance, in our analysis of the Koch document, we found an appeal to conscientious objection based upon the same sanctity of life principle as found in *Donum Vitae*. Her objection was predicated upon the perception that dispensing Plan B presented the “potential to destroy a life.” The notion that the *conceptus* is life finds a basis in her “Christian faith,” informed by passages like Psalm 139, Genesis 1:27, and Exodus 20:3 which dignifies the human being as made in God’s image even from the moment of conception and forbids the taking of innocent life and classifying the action as murder.¹⁶ As a director of Pharmacists for Life, she “upholds and protects the sanctity of all human life from conception to natural death.”¹⁷

¹¹Germain Grisez: *Difficult Moral Questions* (Quincy, IL: Franciscan Press, 1997), pp. 871 – 897. Respected Roman Catholic ethicist, Edmund Pellegrino, “finding a provider is an illicit active cooperation, but transferring information is acceptable.” Pellegrino, Edmund D.: “The Physician’s Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective. *Fordham Urban Law Journal*. (November 2002) v. 30/1, p. 240.

¹²http://www.ascensionhealth.org/ethics/public/key_principles/cooperation.asp Last visited November 12,, 2007.

¹³Noesen objected to transferring on the basis of the doctrine of material cooperation or, as recorded in the court record, objecting transferring the prescription for contraception to another pharmacist on the basis that it would induce another to do a morally wrong or sinful act pursuant to the doctrines of the Roman Catholic Church. See *Id.* 2 at 5 *In re Disciplinary Proceedings against Neil T. Noesen*, State of Wisconsin Pharmacy Board No. LS0310091PHM (ALJ Colleen Baird)(February 28, 2005).

¹⁴Pope John Paul II: *Evangelicum Vitae*. Paragraph 73. http://www.vatican.va/edocs/ENG0141/_PS.HTM Last visited October 24, 2007.

¹⁵Pope John Paul II: *Donum Vita* 5 <http://www.nccbuscc.org/prolife/tdocs/introduction.htm> Last visited October 24, 2007.

¹⁶Koch, Paula. See n. 89.

¹⁷<http://www.pfli.org/main.php?pfli=aboutus> Last visited November 19, 2006.

In all of the cases studied, one common position is clearly held by both Roman Catholic and Protestant Christians. Philosophical commitments and the moral beliefs derived from them are not subservient to the professional, legal, or legislative beliefs about what is right or wrong.¹⁸ Moral authority derives not from well-meaning human constructs, be they legal or professional. Neither is a human legal construct morally sufficient to justify overriding the health care provider's moral conscience. Sufficiency for moral justification of an act by Christian conscience is founded upon a supernatural worldview. Moral justification of an act is given meaning by the narratives of Scripture as interpreted in one's faith community. Herein lies much misunderstanding and sometimes the great divide from those seeking to grant accommodation while maintaining full freedom to reproductive access.

Antagonists

Finding the predominant worldview which best represents those opposed to a full and free exercise of the refusal clause is difficult. Part of the difficulty is that a paucity of clear philosophical discussion that addresses their underpinning after looking for websites using search engines. Certainly, the religious arguments based upon supernatural belief commitments described by protagonists have long been considered strange at best to many of the well-known pro-choice ethicists and attorneys. For instance, one celebrated bio-ethicist mused decades ago that an ethic built on the image of God is philosophically untenable and called for the abandonment of views based on such "religious mumbo jumbo."¹⁹ What then is the prominent alternative epistemological and meta-ethical commitment that values emergency contraception as ethical and moral for society? A search for worldview commitments by prominent proponents in NARAL, Planned Parenthood, and the ACLU was used in an attempt to answer this question.

The NARAL website framed their position in terms of a positive right, that is, an entitlement to reproductive health services in accordance with the time and place of a woman's choosing. The site stated:

When women choose birth control as their contraceptive method, they are acting responsibly and taking control of their reproductive health.²⁰

No evidence for epistemological or ontological commitment could be found on the site.

Planned Parenthood constructs their position for emergency contraception in terms of a positive right, describing that right as well; however, they add that the notion is based upon a 'worldwide principle of individual liberty.'²¹

The ACLU's Reproductive Freedom Project considered "refusal clauses" in the contours of the constitution. They concluded "constitutional principles neither require nor forbid most refusal clauses" but that their presence suggested "some duty to provide health services or coverage."²² With this in mind

¹⁸Pellegrino, op cit. p. 242.

¹⁹Schaeffer, Francis A. and Everett C. Koop: *What Ever Happened to the Human Race*, in the series *The Complete Works of Francis A. Schaeffer: A Christian View of the Church*. (Westchester, Illinois: Crossway Books, 1982), v. 4, pp. 375-376.

²⁰<http://www.prochoiceamerica.org/assets/files/Birth-Control-Pharmacy-Access.pdf> Last visited November 12, 2007.

²¹<http://www.plannedparenthood.org/about-us/who-we-are/mission-and-policy-statements.htm> Last visited November 12, 2007.

²²Op. cit. *ACLU Reproductive Freedom Project*. 2002. P. 6. cf <http://www.aclu.org/FilesPDFs/ACF911.pdf> Last visited: November 12, 2007.

the matter is then deferred to policymakers who are called to be mindful of two criteria to consider when determining the validity of refusal clauses:

- if the refusal would place burdens on people who do not share the beliefs that motivate the refusal. The more the burdens fall on such people, the less acceptable any claimed right to refuse.
- a refusal would protect the religious practices of a sectarian institution or would instead protect an entity operating in a public, secular setting. The more public and secular the setting, the less acceptable an institution's claimed right to refuse.²³

The intriguing part of this analysis lies in how a right is deemed valid. Their site does not lend a clear and distinct statement disclosing epistemological or ontological commitments. The lack of a clear statement leads to a search for key members whose method of validation may both parallel the organizations' method and reveal the philosophical penchants behind that method. Alan Dershowitz provides us with one such example. In his book *Rights from Wrongs: A Secular Theory of the Origin of Rights*, the author concurs with the aforementioned validation.²⁴ Dershowitz argues for a "nurture right" that derives from the 'majorities' current experience of "grievous injustice whose recurrence we seek to prevent."²⁵ His epistemological and ontological commitment dismisses any external derivation of positive rights from God or a God-given natural law.²⁶ Rather, he reveals his commitment to a pragmatic empirical relativistic utilitarianism.²⁷ Rights are empirical and relativistic in that they can be tested by experience over time, though as scientific knowledge they are not absolutely certain; nor are they universal.²⁸ Rights also derive from human constructs that use abstractions, but through time and experience are capable of addressing practical moral issues; hence, his commitment to pragmatism and utility.²⁹ The type of utility is determined by the majority "unless there is a compelling source of rights that trumps the majoritarian preferences."³⁰

The notions of rights in the approach of Dershowitz parallel those of NARAL and Planned Parenthood in significant areas. First, they are neither external nor derived from any supernaturalism. Second, the oppressive male domination of women exemplified by reproductive inequality meets "the grievous injustice" criterion of Dershowitz. Finally, the minority of pharmacists denying reproductive access places an undue burden upon women, a burden that unjustly contravenes the preferences of the democratic majority.

Going deeper, the source of the right to the freedom of exercise of Judeo-Christian conscience does not trump a "majoritarian preference." The conflict of the proper source for the ethic seems to be the quintessential feature of the disagreement. Some well-known pro-choice advocates, like Singer and Kuhse, are clear about their commitment to naturalistic materialism and rejection of supernaturalism as the

²³*Id.*

²⁴Dershowitz, Alan: *Rights from Wrongs: a Secular Theory of the Origins of Rights*. (New York, Basic Books) 2004. Dershowitz has "been an active member of the American Civil Liberties Union." Cf. <http://www.alandershowitz.com/detailed.php> . Last visited: November 12, 2007.

²⁵*Id.* pp. 82, 90.

²⁶*Id.*, pp. 4-5, 87-90

²⁷*Id.*, pp. 4-5.

²⁸*Id.* pp. 90-91.

²⁹*Id.*, p. 136.

³⁰*Id.* p.3.

source for ethics and morals.³¹ We were unable to find excurses clarifying this worldview as a foundation to the primary antagonists. However, former founders or promoters of their organizations, such as Margaret Sanger and Alan Guttmacher, apparently opposed a Christian worldview, embraced Darwinism, and attached to materialist notions of population control and eugenics.

If our analysis has warrant, it seems that the source of the disagreement lies in a conflict of worldviews. These views give meaning to the perceived rights and actualization of the individuals involved. Where reality, meaning, and practice are founded upon a Judeo-Christian worldview, conscience gains clarity through narratives derived from a supernatural source, their Bible. Where reality, meaning, and practice are constructed by an evolutionary natural materialism; rights and self-determination gain meaning from narratives derived from human reason and experience. Can there be a place of consensus in practice with such divergent constructions of reality, meaning, and practice? This question and those raised throughout our article bring us to the following conclusion. Tolerance extended to health care providers practicing with Christian-conscience is eroding as those sympathetic to Judeo-Christian belief lose traction in the power structures of our government. Consensus may work for some who find an ability to negotiate an acceptable compromise as in Oregon's context. For many, however, litigation seems to be the only recourse for resolving conflicting worldviews. For these, the hammer stroke of the Supreme Court's gavel and the philosophical commitment that powers the reasoning of those comprising the Court will likely determine where the accent falls on the phrase "dispense with conscience."

³¹Peter Singer and Helga Kuhse (Eds): *Unsanctifying Human Life: Essays on Ethics* (Malden Mass: Blackwell Publishing) 2002.