Special Section: Open Forum

Negative and Positive Claims of Conscience

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Discussions of appeals to conscience by healthcare professionals typically focus on situations in which they object to providing a legal and professionally permitted service, such as abortion, sterilization, prescribing or dispensing emergency contraception, and organ retrieval pursuant to donation after cardiac death. ''Negative claims of conscience'' will designate such appeals to conscience. When healthcare professionals advance a negative claim of conscience, they do so to secure an exemption from ethical, professional, institutional, and/or legal obligations or requirements to provide a healthcare service.

Consistent with this focus on negative claims of conscience, when conscientious objection is legally recognized in so-called conscience clauses, the latter typically function to exempt healthcare professionals from penalties for refusing to provide or participate in providing goods or services when doing so would be contrary to their moral and/or religious beliefs. The first U.S. federal conscience clause legislation, referred to as the ''Church Amendment'' after its author, Senator Frank Church, protects negative claims of conscience.[1] It was enacted in 1973, a few months after the U.S. Supreme Court in *Roe v Wade* recognized a constitutional right to abortion, and less than a year after a U.S. District Court in Billings, Montana, issued an injunction prohibiting a Catholic hospital from denying a physician use of its facilities to perform a sterilization procedure.[2] The Church Amendment provided that receipt of specified federal funds did not authorize courts or public officials to require (1) individuals with religious or moral objections to perform or participate in providing abortions or sterilizations or (2) facilities to permit the provision of these services if performing them is contrary to a facility's policies.

Consistent with this focus on negative claims of conscience, the Weldon Amendment, enacted by the U.S. Congress more than 30 years after the Church Amendment, denied federal funding to ''a Federal agency or program, or to a State or local government'' that ''subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.''[3] Several U.S. states have adopted conscience clause legislation that protects negative claims of conscience. Some, similar to the Church and Weldon amendments, are limited to specific procedures, such as abortion, or medications, such as emergency contraception. Others provide blanket protection for healthcare professionals with a conscience-based objection to any procedure or service. Whether narrow or broad in scope, conscience clause laws generally protect negative claims of conscience by preventing healthcare professionals from being required by courts, institutions, employers, licensing boards, and so forth to provide a service and prohibiting penalties (e.g., dismissal, loss of privileges, or revocation of a license to practice) for refusing to provide a service.

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Positive Claims of Conscience

Significantly, conscience clauses typically offer no exemption for healthcare professionals who claim to have a conscience-based obligation to *provide* professionally permitted medical goods or services (e.g., medications and procedures) when doing so is prohibited by law, institutional rules, employer policies, and so forth. That is, healthcare provider conscience clauses typically do not protect what will be referred to as "*positive* claims of conscience."

A recently enacted Pennsylvania law, referred to as "Act 169," illustrates the failure to recognize positive claims of conscience.[4] With a few exceptions, Act 169 does not permit physicians to honor the living wills of pregnant women who lack decision-making capacity if doing so would require forgoing life-sustaining treatment. Significantly there is no exemption for a physician who believes, as a matter of conscience, that she has an obligation to respect a patient's documented wishes to forgo life-sustaining treatment. To be sure, Act 169 does permit a physician with a conscience-based objection to "opt out" by facilitating a transfer to another physician. In this respect, Act 169 protects a negative appeal to conscience by not requiring a physician to continue providing life-sustaining treatment if she has a religious and/or ethical objection to doing so. However, the opt-out provision does not protect a positive appeal to conscience by a physician who claims to have an ethical duty to order and supervise the process of forgoing life-sustaining treatment in accordance with a patient's advance directive. Act 169 provides no exemption to enable such a physician to fulfill her perceived ethical obligation to her patient.

The following are a few additional illustrations of contexts in which healthcare professionals might advance unprotected positive claims of conscience:

- The South Dakota Women's Health and Human Life Protection Act (HB 1215), signed into law in March 2006 and later repealed by voters, included the following provision:

  > No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.[5]

  The Act included an exception for abortions performed to prevent the death of the pregnant woman but no exemption for healthcare professionals who believe that they have an ethical obligation to provide abortions or a prohibited medication.
- Section 202 of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (HB 4437), which passed in the U.S. House but not in the Senate, included provisions that, according to some commentators, would have prohibited health professionals from providing services to illegal aliens.[6] The Act included no exemption for healthcare professionals who believe that they have an obligation to provide services to anyone who needs them, regardless of immigration status.
- So-called gag rules prohibit healthcare professionals from informing patients about specified family planning options, such as abortion. For example, the

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so-called global gag rule, reinstated by President George W. Bush on January 22, 2001, prohibits foreign nongovernmental organizations (NGOs) who receive family planning funds from the U.S. Agency for International Development (USAID) from providing information to pregnant women about the option of legal abortion or where they can obtain abortion services.[7] As is typical of gag rules, the global gag rule provides no exemption for healthcare professionals who believe that they have an ethical obligation to inform patients about all legal and professionally permitted family planning options.

- Some hospitals, especially those affiliated with the Catholic Church, have policies that prohibit performing abortions or providing emergency contraception (EC), and some pharmacies have policies against dispensing EC. Although such hospitals and pharmacies may enjoy legal protection of their refusal to provide those goods and services, individuals who practice within them and who believe that they have an ethical obligation to provide the prohibited goods and services typically are not given an opportunity to follow the dictates of their conscience.

There are a few exceptions to the general failure to recognize and protect positive claims of conscience. For example, Native Americans have been exempted from some drug laws to enable them to practice rituals that require drugs, and employers have been required to allow exemptions from dress codes to permit employees to fulfill their religious obligations. However, exceptions generally are not made for healthcare professionals' positive claims of conscience.

Is the Selective Protection of Negative Claims of Conscience Justified?

If one considers the ethical basis of protecting healthcare professionals' conscience-based objections, selectively protecting *negative* claims of conscience does not appear to be justified. The primary reason for recognizing and safeguarding claims of conscience is to protect moral integrity.[8] This rationale applies equally to negative and positive claims of conscience. One's moral integrity can be damaged by either performing an action that is contrary to one's core ethical beliefs or by failing to perform an action that is required by those beliefs. Consider the following two cases: (1) Physician A believes that it is seriously wrong ethically to discontinue life support in accordance with the documented wishes of a male patient who currently lacks decision-making capacity. (2) Physician B believes that it is seriously wrong ethically to fail to discontinue life support in accordance with the documented wishes of a pregnant woman who currently lacks decision-making capacity. Just as a failure to respect a negative appeal to conscience by physician A can be injurious to her moral integrity, so, too, can a failure to respect a positive appeal to conscience by physician B be injurious to his moral integrity. Accordingly, positive appeals to conscience can have moral weight and can merit protection for the same reasons as negative appeals to conscience.

Although I do not wish to assert that the selective recognition of negative claims of conscience is politically motivated, it is worth noting that in the current U.S. social and political context, the exclusive protection of negative claims of conscience has tended to privilege positions that are generally associated with

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"social conservatives" who oppose legally permitted practices such as participating in abortions and dispensing EC. The result has been to disregard positive claims of conscience that might be more consistent with positions of "social liberals," such as honoring the living wills of pregnant women, providing unrestricted access to EC, performing abortions, providing counseling concerning reproductive options, and providing healthcare services to people irrespective of their immigration status.

Negative and Positive Duties and Moral Asymmetry

Political ideology aside, what might be said to justify selectively protecting negative claims of conscience? A promising strategy may appear to be to argue that the duties that correspond to negative and positive claims of conscience are *morally asymmetrical.* Advocates of moral asymmetry might invoke the familiar distinction between "negative" and "positive" duties.

Unfortunately, there is little agreement about how to define each type of duty. Some definitions focus on a distinction between *omissions* and *acts*. For example, according to Marcus Singer, "A negative duty is a duty not to do something, a duty of omission. A positive duty is a duty to do something and cannot be fulfilled by inaction."[9] Jan Narveson offers a similar account: "A positive duty is a duty to do something, whereas a negative duty is a duty ('merely') to refrain from doing something."[10] Other definitions include a reference to *harm* and *harm prevention*. For example, according to H.M. Malm, negative duties are "duties not to cause harm," and positive duties are "duties to prevent harm."[11] Similarly, Raymond Belliotti defines negative duties as duties to "refrain from harming or injuring others" and positive duties as duties to "render assistance to those in distress."[12] By contrast, Nancy Davis limits negative duties to duties to refrain from harmful acts of commission and understands positive duties as duties to perform beneficial acts of commission. Negative duties are said to be "duties not to *actively* harm," and positive duties are said to be "duties to *actively* benefit."[13]

N-duties and P-Duties and the Moral Asymmetry Thesis

To avoid entering into a distracting terminological debate, I will refer to the duties that correspond to negative claims of conscience as "N-duties" and the duties that correspond to positive claims of conscience as "P-duties." The "*Moral Asymmetry Thesis*" (MAT) advances claims with respect to N-duties and P-duties corresponding to familiar claims about negative and positive duties:

1) Violations of N-duties are morally worse or more serious than violations of P-duties.
2) Agents who violate N-duties are more culpable or blameworthy than agents who violate P-duties.
3) N-duties are stricter or stronger than P-duties.

There are several strategies for attempting to establish moral asymmetry between negative and positive duties, and similar strategies, such as the following, might be used to defend MAT: (1) A common strategy is to compare cases involving one kind of duty with cases involving the other kind of duty and

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evaluate them in relation to considered moral judgments or moral intuitions.[14] (2) A second strategy is to identify characteristics or features that are said to distinguish the two kinds of duties and establish or ground their moral asymmetry. Alleged bases for distinguishing between negative and positive duties, such as the following, might also be invoked to support MAT: (a) Whereas duties of one type require *omissions*, duties of the other type require *acts*.[15] (b) Whereas duties of one type prohibit *causing harm*, duties of the other type require *preventing harm* or *benefiting*.[16] (c) Only one of the two types of duties is *rights based*.[17] (d) Whereas duties of one type can be *discharged completely*, duties of the other type cannot.[18] (e) Duties of one type are *less burdensome* and *less restrictive of liberty* than duties of the other type.[19] (f) Responsibility for background conditions is greater in relation to one of the two types of duty.[20] (3) A third strategy is to ground moral asymmetry in ethical theory (e.g., contractarian or rights-based theories).[21]

Regardless of which strategy is used to defend MAT, it clearly is unacceptable. Consider Case 1 and Case 2:

> **Case 1:** Marvin witnesses a boating accident. He is unable to rescue the survivors himself, but he could call the Coast Guard on his cell phone. Had he done so, the Coast Guard would have been able to rescue the survivors. Marvin had a P-duty to call the Coast Guard, but he decided not to because he would have incurred a roaming charge of $1.50. The survivors died.
> **Case 2:** On her way home, carrying a bag of tomatoes, Marjorie walks by a protest. She disagrees with the politics of the protestors and violates an N-duty by throwing tomatoes at them.

Contrary to MAT: (1) Marvin's violation of his P-duty is morally worse than Marjorie's violation of her N-duty. (2) Marvin is more culpable or blameworthy for violating his P-duty than Marjorie is for violating her N-duty. (3) Marvin's P-duty is stricter than Marjorie's N-duty. That is, Marvin requires a stronger reason to justify violating his P-duty than Marjorie requires for violating her N-duty.

In response, it might be suggested that MAT should be revised to compare *corresponding* N-duties and P-duties. For example, an N-duty corresponding to the P-duty in Case 1 might be a duty *not to kill*.[22] Consider Case 3:

> **Case 3:** Frank violates an N-duty by deliberately killing the survivors of a boating accident.

Unlike Case 1 and Case 2, Case 1 and Case 3 appear to be consistent with MAT, which suggests revising it to contrast *corresponding* N-duties and P-duties. MAT* is the result of a revision along these lines:

1) Violations of N-duties are morally worse or more serious than violations of *corresponding* P-duties.
2) Agents who violate N-duties are more culpable or blameworthy than agents who violate *corresponding* P-duties.
3) N-duties are stricter or stronger than *corresponding* P-duties.

But consider Cases 4 and 5:

> **Case 4:** Ethan violates an N-duty by unintentionally but negligently killing the survivors of a boating accident.

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> **Case 5:** Stephanie violates a P-duty by deliberately failing to throw a life preserver to Jacob, her husband, after their sailboat capsized due to a sudden violent wind burst. She wants him to die because he has had extramarital affairs with both of her sisters.

It is not implausible to claim that (1) Stephanie's violation of her P-duty is morally worse than Ethan's violation of his N-duty. (2) Stephanie is more culpable or blameworthy for violating her P-duty than Ethan is for violating his N-duty. (3) Stephanie's P-duty is stricter than Ethan's N-duty.

Cases 4 and 5 suggest that if the moral asymmetry thesis is not to be rejected outright, a much more nuanced formulation of it is required. In particular, an ''all other things being equal'' qualifier appears to be needed to account for possible morally significant differences in motive, intention, burdensomeness, and so forth. MAT** is a revised moral asymmetry thesis that incorporates this condition:

All other things being equal,

1) Violations of N-duties are morally worse or more serious than violations of corresponding P-duties.
2) Agents who violate N-duties are more culpable or blameworthy than agents who violate corresponding P-duties.
3) N-duties are stricter or stronger than corresponding P-duties.

The Moral Asymmetry Thesis and Selectively Protecting Negative Claims of Conscience

MAT** requires that duties be considered *in pairs*: a particular P-duty and a corresponding N-duty. For the sake of argument, let us accept MAT** and assume that, all other things being equal, for each P-duty and corresponding N-duty, a violation of the latter is morally worse or more serious than a violation of the former. It still would not follow that no claims of conscience that are based on P-duties warrant protection. It would follow only that:

C_1) For each claim of conscience that is based on a P-duty, if there is a corresponding N-duty, its violation would be morally worse or more serious.

Suppose, for example, a Pennsylvania physician has a pregnant patient who lacks decision-making capacity and who has an advance directive. Honoring the advance directive in the clinical circumstances would require withdrawing life-sustaining treatment, which is prohibited by Act 169. The physician has a conscience-based objection to that law because she believes that she has an ethical obligation to honor her patient's advance directive. C_1 does not support the inference that the physician's conscience-based objection lacks sufficient moral weight to warrant protection. If it is assumed that a violation of a duty that is morally worse or more serious provides a basis for an appeal to conscience with more moral weight, at most C_1 implies that a conscience-based objection to withdrawing life-support from a pregnant patient would have *more* moral weight. A similar analysis and conclusion are supported if we accept MAT** and assume that, all other things being equal, agents who violate N-duties are more culpable or blameworthy than agents who violate corresponding P-duties.[23]

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If we accept MAT** and assume that, all other things being equal, for each P-duty and corresponding N-duty, a stronger reason is required to justify a violation of the latter than the former, it would follow that:

C_2) For each claim of conscience that is based on a P-duty, if there is a corresponding N-duty, it requires a stronger reason to justify its violation.

Consider a pharmacist who is employed by a pharmacy that has a strict policy against dispensing EC. The pharmacist has a conscience-based objection to that policy because he believes that unless there is a clear clinical counterindication in a particular case, he has a duty to provide EC to all women who present a valid prescription for it. At first sight, it does not appear that C_2 even is relevant, because the pharmacist is not seeking to justify *violating* a P-duty. Instead, he seeks an exemption from the pharmacy policy to enable him to *fulfill* a P-duty. However, suppose it is assumed that an obligation that requires a stronger reason to warrant its violation provides a basis for an appeal to conscience with more moral weight. Then C_2 would support the conclusion that a conscience-based objection to dispensing EC by a second pharmacist, one who works in a pharmacy that dispenses EC and believes that she has an ethical obligation *not to dispense* it, would have *more* moral weight than the conscience-based objection of the first pharmacist. However, C_2 still would not support the inference that the first pharmacist's conscience-based objection lacks sufficient moral weight to warrant protection. Accordingly, neither C_1 nor C_2 justifies selectively protecting negative claims of conscience.

There is one additional reason for questioning whether MAT** can justify selectively protecting negative claims of conscience. MAT** is a moral principle, and it might be rejected by healthcare professionals who advance positive appeals to conscience. If a healthcare professional rejects MAT**, its use to justify failing to protect a positive appeal to conscience might undermine the agent's moral integrity, the safeguarding of which is an important objective of the practice of recognizing and protecting claims of conscience.

Additional Reasons for Selectively Protecting Negative Claims of Conscience

There are two additional arguments that might be advanced to justify selectively protecting negative claims of conscience.

Permission to Violate the Law

One argument is based on the claim that whereas healthcare professionals who advance positive claims of conscience seek permission to *violate* the law, healthcare professionals who advance negative claims of conscience only seek protection from being required to provide legally permissible goods and services and do not seek permission to break the law. For example, a physician who has a conscience-based objection to Pennsylvania Act 169 seeks permission to violate the law. By contrast, a pharmacist who has a conscience-based objection to dispensing EC only seeks permission to refrain from engaging in a legally permissible activity. Hence, it is argued, insofar as it is inappropriate to endorse or condone law breaking, it is warranted to selectively protect negative claims of conscience.

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Putting aside the issue of when it is or is not appropriate to endorse or condone law breaking, there are two problems with this line of reasoning. First, it does not apply to all positive claims of conscience. It applies only when healthcare professionals advance positive claims of conscience in relation to laws that prohibit them from fulfilling a (perceived) ethical obligation. However, as the example of the pharmacist employed by a pharmacy with a policy against dispensing EC illustrates, healthcare professionals who advance positive claims of conscience need not seek permission to break a law. The pharmacist who believes he has a duty to dispense EC merely seeks permission to engage in lawful and professionally permitted behavior.

Second, the foregoing line of reasoning begs the question because the issue is precisely whether legal and institutional rules should recognize and protect conscience-based objections. If Pennsylvania Act 169 were to recognize conscience-based exemptions, it would not be unlawful for physicians to honor the refusal directives of pregnant women. Conversely, if pharmacists were legally required to dispense EC to all patients with valid prescriptions unless there is a clinical counterindication in a particular case, then pharmacists with conscience-based objections to dispensing EC would seek permission to violate the law (or a legal exemption from the law).

Patient Rights

A second argument alleges that protecting positive appeals to conscience will result in the infringement of important patient rights. This reason applies in some, but not all cases. For example, it applies in relation to physicians who are conscientiously opposed to forgoing tube feeding in compliance with advance directives because they believe that they have an ethical obligation to provide it. To recognize such positive appeals to conscience would authorize physicians to provide treatment against the explicit wishes of patients. However, this objection does not apply to a positive appeal to conscience in relation to Pennsylvania Act 169. Arguably protecting a physician's positive claim of conscience in this context would enable a physician to *respect* the rights of pregnant women.

Conclusion

None of the reasons considered justify selectively protecting negative claims of conscience. Unless other reasons can be offered, it is inconsistent to protect negative claims of conscience while failing to offer any protection to positive claims of conscience. Because the healthcare professional's moral integrity is at stake in either case, insofar as it is a value worth protecting in relation to negative claims of conscience, it is also worthy of protection in relation to positive claims of conscience.

To be sure, claims of conscience might have different moral weights, and they must be balanced against competing claims, such as professional obligations and the rights and interests of patients, institutions, employers, and coworkers. However, classifying appeals to conscience as either negative or positive may not be a decisive criterion for determining their moral weight. Moreover, when attempting to strike an appropriate balance, it is essential to recognize the moral weight of both types of claims of conscience.

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Notes

1. 42 USCS § 300a-7 (1973).
2. Wardle LD. Protecting the rights of conscience of health care providers. *The Journal of Legal Medicine* 1993;14:177–230.
3. Division F, Title B, Section 508d, 1-2 of the Consolidated Appropriations Act of 2005 (Pub. L. No. 108-447, 118 Stat. 2809).
4. 20 PA. CONS. STAT. ANN. § 54.
5. South Dakota HB 1215 added sections 17-7 through 17-12 to S.D. Codified Laws § 22-17 and repealed sections 23-A-2 to 23-A-5 of S.D. Codified Laws § 34-23. These changes were rejected by a November 7, 2006, referendum. HB 1215 defined ''unborn human being" as ''an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation and childbirth.''
6. The proposed bill is available at: http://www.govtrack.us/congress/billtext.xpd?bill=h109-4437; accessed May 28, 2008.
7. Cohen SA. Global gag rule: Exporting antiabortion ideology at the expense of American values. *Guttmacher Report on Public Policy* 2001:1–3. Available at: http://www.guttmacher.org/pubs/tgr/04/3/gr040301.pdf; accessed May 28, 2008.
8. Wicclair MR. Conscientious objection in medicine. *Bioethics* 2000;14(3):205–27.
9. Singer MG. Negative and positive duties. *The Philosophical Quarterly* 1965;15(59):98–9.
10. Narveson J. Positive/negative: Why bother? *Tulane Studies in Philosophy* 1985;XXXIII:51.
11. Malm HM. Between the horns of the negative–positive duty debate. *Philosophical Studies* 1991;61:187.
12. Belliotti RA. Negative and positive duties. *Theoria* 1981;47:82.
13. Davis N. The priority of avoiding harm. In: Steinbock B, ed. *Killing and Letting Die*. Englewood Cliffs, NJ: Prentice-Hall, Inc.; 1980:179.
14. Malm exemplifies this approach. See note 11, Malm 1991.
15. See, for example, Abelson R. To do or let happen. *American Philosophical Quarterly* 1982;19(3):219–28.
16. See, for example, Gorr M. Some reflections on the difference between positive and negative duties. *Tulane Studies in Philosophy* 1985;XXXIII:93–100; Green OH. Killing and letting die. *American Philosophical Quarterly* 1980;17:195–204.
17. See, for example, Wreen M. Breathing a little life into a distinction. *Philosophical Studies* 1984;46:395–402.
18. See, for example, Trammell RL. Saving life and taking life. *The Journal of Philosophy* 1975;72(5):131–7.
19. See, for example, Fitzgerald PJ. Acting and refraining. *Analysis* 1967;27(4):133–9; Trammell RL. A criterion for determining negativity and positivity. *Tulane Studies in Philosophy* 1985;XXXIII:75–81.
20. Trammel exemplifies this approach. See note 18, Trammel 1975.
21. Narveson offers a contractarian account. See note 10, Narveson 1985.
22. For the purpose of considering whether the selective protection of negative claims of conscience is justified, it is not necessary to specify criteria for identifying N-duties that correspond to P-duties. Moreover, nothing relevant to this issue turns on whether the N-duties and P-duties that are cited as examples of corresponding duties satisfy the appropriate criteria.
23. That conclusion requires the additional assumption that a violation of a duty for which an agent is more culpable or blameworthy provides a basis for an appeal to conscience with more moral weight.

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