Might a conscience clause be used for non-moral or prejudiced reasons?

Zuzana Deans

There have been various suggestions of what the criteria are for a justified conscientious refusal (eg, reasonable[1 2] and genuine[3]), but none of them could be assessed with confidence.[4] Cowley[5] makes a case against using tribunals as a means of assessing the defensibility of physicians' conscientious refusals, arguing that they would be a pointless bureaucratic exercise and instead supports the current British arrangement of not requiring objecting doctors to formally defend their position. He details two reasons for this: a predicted low number of cases in which an objector would have non moral reasons and a tribunal's inability to determine whether an objector's claim was genuine or reasonable. I want to focus on the first claim. Following this, I suggest approaching this matter by asking what the purpose of tribunals would be.

Cowley claims that the number of cases in which an objector's reasons for objecting are non-moral or based on prejudice would be too few to justify the cost of tribunals. This may be the case, though without carefully gathered empirical evidence we cannot be sure. Cowley's claim is that there is little scope for doctors to misuse a conscience clause to object to termination of pregnancy for non-moral or prejudiced reasons. He claims that an objection to performing a termination would be based on genuine moral conviction (even if simply the 'beginnings' of a moral reason), since practitioners are unlikely to find termination more gory than other surgical procedures and would not base their refusals on prejudice. He claims that this leaves room to disagree only about moral or metaphysical aspects of the facts. However, it seems to me a real possibility that doctors could use the conscience clause inappropriately, including in termination of pregnancy.

First, professionals may resist performing terminations for reasons beyond being physically repulsed by the surgical procedure itself. Some procedures (gory or otherwise) may be more difficult to face than others, and the conscience clause might provide an individual with a means of avoiding this discomfort. This has been reported anecdotally in relation to abortion in the UK.[6] A person may believe that she would be morally justified, or even morally obliged, to commit an act and yet find it too distressing to perform that action. Consider cases in which people overcome their discomfort in order to act morally: a whistle-blower, a person on strike or someone turning a friend into the police. In these cases the individual may feel that she is in some sense betraying those around her, but may nevertheless believe she is ultimately doing the right thing. If she were to avoid doing so because of discomfort, she would lack the courage of her convictions. Those who lack the courage to perform termination despite believing it to be their moral duty may use the conscience clause against its intended purpose.

Second, Cowley also dismisses the possibility of 'unjustified biases' because, he claims, the objector is non-discriminatory in her refusal. He claims that her refusal applies across the board as she will not perform a termination of pregnancy on anybody. However, even a blanket refusal to perform terminations of pregnancy is not entirely universal; it is a refusal given only to women. Of course a refusal to perform a termination could only be directed at women, but that is not to say that an objection could not be based on prejudice, or a lack of empathy and understanding for women who find themselves with an unwanted pregnancy. It is also possible that a doctor could hold prejudices against particular groups of women. A doctor could object to some terminations but not others, if she thinks a particular situation justifies it. In a parallel professional setting, there is evidence that some pharmacists make conscientious objections to the supply of emergency hormonal contraception depending on the woman's perceived social background,[7] thus reaffirming that women's access to reproductive healthcare continues to be influenced by stereotypical constructs of female sexuality.[8]

Thus, we cannot be sure that an objector's refusal to perform a termination of pregnancy is not based on unjustified prejudice or non-moral reasons.

Finally, I suggest that in attempting to assess whether tribunals are the answer, we should establish what the problem is and what would be the purpose of a tribunal. The desire to test the justification for an objector's refusal is presumably driven by a perceived need to ensure that an individual's decision is morally justifiable. In other words, the reasons for the objection matter. But note that healthcare professionals are not required to justify their reasons for actions that are in line with practice. The assumption in these circumstances is that either their reasons for complying are morally sound or there is no need to check the reasons because the practice itself is deemed to be morally sound. The conscience clause is a conventional compromise;[9] an objecting doctor must refer the patient to a non-objecting colleague and the objection must not 'compromise patient care'.[10] If we do not think we need to ask for reasons for acting in line with practice, partly because it does not affect the outcome for the patient, then perhaps we do not need to ask for reasons for conscientious refusals when it does not affect the outcome for the patient. This is not to say that the reasons do not matter, only that a tribunal may not be necessary to meet the overall objectives of providing good patient care. In his paper, Cowley makes the assumption that the conscientious refusal does not impede the patient from accessing the service she requires (in other words, the refusal is in keeping with the conventional compromise). The next question to ask, then, is what, if any, formal procedures should be in place for those who conscientiously object and refuse to follow the conventional compromise.

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Correspondence to Dr Zuzana Deans, Centre for Ethics in Medicine, School of Social and Community Medicine, University of Bristol, Canynge Hall, 39 Whatley Road, Bristol BS8 2PS, UK; Zuzana.Deans@Bristol.ac.uk

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