

Selling conscience short: a response to Schuklenk and Smalling on conscientious objections by medical professionals

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ABSTRACT

In a thought-provoking paper, Schuklenk and Smalling argue that no right to conscientious objection should be granted to medical professionals. First, they hold that it is impossible to assess either the truth of conscience-based claims or the sincerity of the objectors. Second, even a fettered right to conscientious refusal inevitably has adverse effects on the rights of patients. We argue that the main problem with their position is that it is not derived from a broader reflection on the meaning and implications of freedom of conscience and reasonable accommodation. We point out that they collapse two related but distinct questions, that is, the subjective conception of freedom of conscience and the sincerity test. We note that they do not successfully show that the standard norm according to which exemption claims should not impose undue hardship on others is unworkable. We suggest that the main reason why arguments such as no one is forced to be a medical professional are flawed is that public norms should not constrain citizens to choose between two of their basic rights unless it is necessary. In fine, Schuklenk and Smalling, who see conscience claims as arbitrary dislikes, sell freedom of conscience short and forego any attempts at balancing the competing rights involved. We maintain the authors neglect that most of legal reasoning is contextual and that the blanket restriction of healthcare professionals' freedom of conscience is disproportionate.

Udo Schuklenk and Ricardo Smalling published a contrarian view of the alleged right of physicians to be exempted from providing certain medical services on the

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basis of conscience-based reasons.¹ This is not a minor ethical issue.¹ Freedom of conscience and religion is a basic human right. Freedom of conscience is grounded in the deep interest humans have in being ethically independent in Ronald Dworkin's sense, that is in being in a position to freely deliberate on the meaning of the good and the just, as well as to lead one's life in accordance with his/her basic beliefs, values and commitments. Moral agency requires the right to freedom of conscience.

The general and most troublesome problem with Schuklenk and Smalling's plea is that it is not located firmly enough within a broader reflection on the meaning, implications and limits of freedom of conscience and of the corollary legal obligation to offer, under specific circumstances, reasonable accommodation measures to disadvantaged citizens. The alleged right to conscientious refusals of medical professionals cannot be severed from the broader moral and legal issues surrounding freedom of conscience. The authors agree, but omit important aspects of that broader context.

Schuklenk and Smalling sum up their basic argument in the following way:

Limiting conscientious objection accommodation to defensible claims seems impossible to us, unless we overcome the two problems mentioned: demonstrate the truth of the foundations of the conscientious objection and demonstrate evidence that objectors actually genuinely hold the views they claim to hold. Failing that, as we will show, the inevitably ensuing arbitrary accommodation demands will have harmful real-world consequences as far as healthcare outcomes and patient access to care is concerned.¹

Their argument is twofold. First, it is impossible to assess the truth of (inherently subjective) conscience-based claims as well as the sincerity and good faith of the objectors. Second, even a fettered or

¹For an insightful analysis of the Canadian legal landscape with regard to physicians' conscientious objection claims, see ref. 2.

qualified right to conscientious refusal inevitably has adverse effects on the right of patients to have timely access to care which, in turn, affects healthcare outcomes negatively. We will first try to show that these two arguments fail to justify the a priori restriction of physicians' freedom of conscience implied by Schuklenk and Smalling. We will then suggest that they neglect to ponder the consequences of their position on the medical professionals' equality rights.

THE SUBJECTIVITY AND SINCERITY OF CLAIMS OF CONSCIENCE

Although there are exceptions,³ many liberal egalitarians argue that a legal obligation to offer reasonable accommodation measures to the members of specific groups allows for a greater realisation of more general rights such as freedom of conscience/religion and non-discrimination rights.⁴⁻⁶ A legal obligation to accommodate is triggered when a prima facie neutral norm distributes opportunities in an uneven way or proves to be disproportionately burdensome to the members of a group. Statutory holidays generally coincide with the religious holidays of the majority, dress codes that prescribe a uniform or prohibit headcovers is far more burdensome to those for whom wearing religious garment is not seen as optional, the absence of a vegetarian option in environments where people are fully or partially captive (prisons, hospitals, schools, airplanes) burdens vegetarians disproportionately, etc. It is in such situations of adverse effect or indirect discrimination that accommodation measures are required by justice.⁷⁻⁹ In many cases, an accommodation measure will enable a person to both respect her deepest convictions and avail herself of an opportunity or of a collective good (finding employment, having access to education or healthcare, etc).

Schuklenk and Smalling collapse two closely related but distinct questions in their understanding of conscience-based claims, that is, the subjective conception of freedom of conscience/religion and the sincerity test.ⁱⁱ They write:

just as we cannot test the plausibility of the ideological dicta that lead to conscientious objections (there is no test for the existence of 'God', for instance, or truth of the Bible), it is also impossible to ascertain whether conscientious objectors actually hold the views they profess to hold.¹

ⁱⁱSee chapters 7 (Sincerity) and 8 (Saying What Counts as Religious) in ref. 8.

What courts restrain from doing is, indeed, assessing the truth or plausibility of religious and other metaphysical claims. On what grounds could they do it, given that such claims are not judgements of fact and that courts need to draw solely on secular positive law—and, if one is a Dworkinian, on principles of political morality—to arbitrate legal disagreements? The restraint showed by the courts is itself derived from the principles of political secularism: if we think that state and church ought to be somehow separated and that the state has to be neutral with regard to religion, then it follows that public institutions do not have the authority to establish what is core and peripheral to religious traditions, to stake a stand on the plausibility of one's religious creed and to settle doctrinal disagreements within religious communities.¹⁰ Freedom of conscience and religion is therefore subjective in the sense that what matters from the point of view of public authority is what the agent sees as her deepest beliefs and commitments.

As a consequence, courts cannot fall back on an objective conception of freedom of conscience/religion to assess the claims made by objectors. What they do instead—and this is what the authors omit—is to probe the sincerity of the claimants. The conscientious objector has to explain why a given belief or practice is meaning-giving in a significant way or crucial to his moral integrity. Although the courts have rightly stressed that anyone is free to change one's mind and that the requirement of consistency in the claimant's past should not be too stringent, the objector still needs to explain what the belief means to her and how she tries to honour her commitments in practice. No one denies that the sincerity test is fallible, but assessing the credibility of witness testimony is a standard task of tribunals. Not anything goes.

Hence, the authors' inference is unwarranted. Conscience-based claims are indeed subjective, but we do not need to shrug and conclude that it is impossible to ascertain whether conscientious objectors actually hold the views they profess to hold.¹¹ It is impossible epistemically speaking to know for sure what is buried in another person's mind, but objectors have a duty to justify their claim. We can grant to the authors that managers in healthcare settings do not have the skills and resources that courts have to assess sincerity but, as the Bouchard-Taylor Report on reasonable accommodations suggested, all professional milieus can implement tailor-made procedures to

manage accommodation claims in a fair and efficient manner.ⁱⁱⁱ

The authors quote the American Supreme Court in *Employment Division v. Smith* to support their conclusion. This is unwarranted, as the Court just makes the case for the subjective conception of freedom of religion. It does not say that sincerity cannot be probed:

What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is central to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims... it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds... courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.¹²

One also wonders why the authors rely so heavily on the possibility that a significant number of healthcare professionals will regularly make a strategic and insincere use of their right to freedom of conscience, but we will not pursue this line of argument here.

A LIMITED RIGHT TO CONSCIENTIOUS OBJECTION

Schuklenk and Smalling's second main argument against conscientious objection in healthcare is based on their belief that even a fettered right to accommodation is doomed to be detrimental to the rights of patients.

Reasonable accommodation is a legal obligation in some jurisdictions. However, accommodation claims need to be reasonable. The reasonableness of an accommodation claim depends on its likely effects on the rights of others, on the cost, on the functioning of the organisation and on the latter's capacity to fulfil its role and achieve its goals. In healthcare settings, agreeing to an accommodation demand cannot entail that the rights of patients or of other professionals are infringed upon or that the functioning of the organisation is disrupted in a serious way. In the Canadian jurisprudence, accommodation claims are deemed unreasonable if they engender undue hardship or excessive constraints.¹³ The purpose of reasonable accommodation is to enable those who are excessively burdened by

otherwise valid rules to enjoy what John Rawls called equal freedom of conscience. This, of course, should not be done at the expense of the basic rights of others. To quote Schuklenk and Smalling, an accommodation measure that translates into inequitable load of work for professionals who are willing to provide the service is unreasonable. The deciders need to go back to the drawing board and find another way to conciliate the conflicting rights.

Let us take the example used by Schuklenk and Smalling: a female Muslim doctor refusing to see a male patient would not be granted a conscientious objection exemption, whereas a pharmacist refusing to sell contraceptives in some countries might.¹ Female or male Muslims or Jewish doctors cannot refuse to see patients of the other sex no more than a business owner can ban access to lesbians, gays, bisexuals and transgenders or non-whites. Discrimination based on gender, sexual identity and ethnicity is prohibited in liberal democracies. Moreover, going back to the notion of reasonableness: given that refusing to see patients of a specific gender amounts to turning down half of the patients, it is also highly likely that the ones who are dismissed will have to wait longer and that the loss in efficiency for the organisation will be significant. As for the pharmacist who sees abortion as morally wrong, his conscience can be accommodated if women can get contraceptive pills from one of his colleagues or from a pharmacy nearby. If, in a given situation, a woman cannot have timely access to contraception or morning-after pill, the exemption claimed by the pharmacist should be denied. But the goal should be to try to balance the competing rights involved. The theoretical flaw in the authors' argument here is that most of legal reasoning is contextual. The blanket and a priori restriction of healthcare professionals' freedom of conscience is disproportionate.

Relying on the review of hundreds of legal cases reported in Brian Leiter's book *Why Tolerate Religion?*, the authors state that 'respect for conscience in the 21st century translates into a fairly one-sided affair: it is fought for and demanded by religious healthcare professionals without much regard for actual patient care and health outcomes, or indeed respect for these patients' moral choices. We simply note here that Leiter does not refer at all, as far as we are aware, to 'healthcare professionals' in the relevant passage of his book. He rather discusses the kind of cases brought by conscientious objectors

ⁱⁱⁱSee chapter 8 in ref. 11.

who are ‘atheists or agnostics’ and concludes that these cases are most of the time non-establishment rather than free exercise cases.¹⁴ There is no evidence in Leiter’s book that exemption claims by medical professionals in the USA have unduly harmed patients.^{iv} And if this were an accurate portrayal of the empirical situation, the solution would not be to curtail the freedom of conscience of conscientious objectors in all cases, but to design better procedures, based on clear and sound principles, for handling conscientious objection claims.

Perhaps the issue that best illustrates why physicians should have a limited right to exemption is medical assistance in dying. In Canada, as in a growing number of jurisdictions, physician-assisted dying has been decriminalised, and it is now a constitutional right for all Canadians who suffer from an irreversible chronic illness and who are capable of giving their informed consent.¹⁶ While we fully support that decision, one has to acknowledge that medical professionals can have deep, conscience-based reasons not to participate in this procedure. Such reasons can be secular or religious, as we explored elsewhere. A physician practising palliative medicine, for instance, can have good reasons for believing that medical assistance in dying is at odds with the basic philosophy of palliative care, which involves, from her standpoint, controlling pain and offering psychosocial support to the dying patient and his family. Other physicians believe that the time of death should stay in the hands of God or that they have a deontic obligation not to voluntarily perform a medical act that leads to the death of a patient.^{17 v} We are dealing here with strong evaluations or meaning-giving beliefs and commitments that weigh heavily in the agent’s moral deliberation and provide moral orientation. The agent is likely to feel that she will lack integrity or fail to be the kind of person she wants to be if she does not act in accordance with her most important convictions and commitments.^{19–21}

The question is therefore whether the freedom of conscience of medical professionals can be harmonised with the constitutional rights of patients who meet the

criteria for medical assistance in dying. The most obvious way in which this can be achieved is by referring patients to other colleagues or facilities where they will have timely access to the procedure. As Schuklenk and Smalling point out, some Canadian physicians argue that their conscientious objections extend to the obligation to refer. Like them, we also disagree.^{17 vi} The obligation to refer to a colleague or to help patients get reliable information promptly allows the conciliation of the parties’ constitutional rights.²

REAL EQUALITY OF OPPORTUNITY

Another argument in favour of reasonable accommodation that Schuklenk and Smalling do not consider is an equality of opportunity-based argument. Nobody, they write, is forced to join a particular profession.¹ They rightly point out that membership in the healthcare profession entails duties and limits to one’s freedom. Being a physician or a nurse implies, for instance, that one treats patients regardless of their gender, ethnicity or sexual identity. It also entails that one’s clinical judgement is first and foremost evidence-based rather than grounded in one’s metaphysical outlook or moral beliefs. That said, choosing a career does not involve forfeiting one’s guaranteed rights. When a professional’s fundamental rights are restricted, the restriction has to be justified by a valid objective and has to be as minimal as possible.

One point that Schuklenk and Smalling overlook is that the rights that we hold intersect. The main reason why arguments such as no one is forced to become a medical professional are flawed is that norms and institutions should not constrain citizens to choose between two of their basic rights unless it is absolutely necessary. There ‘is a powerful reason’, Kent Greenawalt observes in his reflections on the American jurisprudence on conscientious objections in healthcare, “not to force people to choose between offending their conscience or foregoing a major vocational option”.⁸ It is true that the obligation to choose between one’s rights is sometimes necessary. When one accepts a position as a civil servant, one thereby accepts significant limitations on his freedom of speech. But exemptions and other forms of accommodation are required precisely to lift some pressure

off the shoulders of individuals who belong to a minority group. A pregnant woman should not have to choose between holding on to her job and having a proper medical follow-up during pregnancy. Her work schedule might have to be adapted so that she can go to her medical appointments and the nature of her work might have to change during pregnancy. Schools can have good reasons for prohibiting students from wearing headcovers in class, but a Jewish teacher should not have to choose between wearing the kippa and having a job in a public school. He should benefit from an exemption. As Jonathan Quong persuasively argued, exemptions are often required by the principles of (real) equality of opportunity and fairness. We maintain that this applies to medical professionals who morally object to a procedure or service.²²

CONCLUSION

The authors agree that freedom of conscience is a basic human right, but then sell it short. For them, freedom of conscience for healthcare professionals is fine as long as it remains a purely negative, non-interference right and does not generate any positive demands. Because of their subjective character, conscience-based claims are seen as facetious: ‘given the intractability of conscience claims, it is not unwarranted to characterise them as essentially arbitrary dislikes’.¹

We rather endorse a more generous conception of freedom of conscience and believe that a crucial aspect of moral agency is the capacity to set apart core values and commitments from other subjective preferences. We see conscientious convictions as strong evaluations and meaning-giving beliefs that are central to the agent’s moral identity. We argue that a cogent theory of rights needs to show how we can best conciliate the rights of conscientious objectors, patients and other professionals. A blanket and a priori restriction on the freedom of conscience of medical professionals is not acceptable.¹⁶ Refusing or accepting an exemption claim requires a contextual demonstration.

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^{iv}For a balanced and forceful critique of Leiter’s book, see ref. 15.

^vWe disagree with Daniel Weinstock (see ref. 18), who argues that physicians whose conscientious objections are derived from secular rationales can be accommodated if their claims are reasonable, but not those who have irreducibly religious beliefs.

^{vi}Our argument is based on the distinction between direct and indirect responsibility as well as on a version of the doctrine of double effect.

Response

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