BAPTISTS, CONSCIENCE, AND THE MORAL MARKETPLACE

C. BEN MITCHELL

Catholic Archbishop Timothy Cardinal Dolan has charged that the Obama administration's 2012 contraception mandate "is egregiously unfair, and as such, it cuts against the grain of what it means to be American."[1] He certainly seems to have history on his side. After all, it was Roger Williams (c. 1603-1683) the founder of Providence foundation—which later became Rhode Island—who called the violation of someone's conscience "the rape of the soul." Williams was banished from the Massachusetts Bay Colony because he left the established church of the colony, believing instead, that the sanctity of the human conscience demanded a free church in a free state. In 1644, he published his desideratum, *The Bloudy Tenent of Persecution, for the Cause of Conscience, Discussed in A Conference Between Truth and Peace, Who, In All Tender Affection, Present to the High Court of Parliament, (as the Result of Their Discourse) These (Among Other Passages) of Highest Consideration*. In this manifesto he accused British Parliament—through its mandate of religious uniformity—of committing "a greater rape, then [sic] if they had forced or ravished the bodies of all the women in the World."[2] Although he may be accused of overblown rhetoric, he was making a point he did not want to be misunderstood, viz., forcing a person through the power of the state to violate his or her own conscience was a monstrous harm.

Williams was not alone in his advocacy for liberty of conscience. Baptists in England and American were also vocal apologists for religious liberty and freedom of conscience for every person. According to one historian, "Baptists did not turn toward the idea of 'a free conscience.' They began in the seventeenth century screaming and agitating for liberty of conscience."[3] They valued religious freedom because they had suffered the pain of persecution in the jail cells, stockades, and whipping posts of Europe.

Thomas Helwys (c 1575-1615), for instance, co-founded the first Baptist church on English soil in the early 17th century in Spitalfields, London. In 1612, he published *A Short Declaration of the Mystery of Iniquity* arguing for liberty of conscience and forwarding a copy to King James I. In his inscription he wrote: "The king is a mortal man and not God, and therefore hath no power over the immortal souls of his subjects to make laws and ordinances for them and to set spiritual Lords over them." Both Helwys and his wife, Joan, suffered for the cause of conscience and Thomas died in Newgate Prison at the age of 40.

Like Roger Williams, Obadiah Holmes (1607-1682) was also banished from Massachusetts because of his Baptist beliefs, settling in Newport, Rhode Island. In 1651, Holmes and two friends, John Clarke and John Crandall, traveled back to Massachusetts to visit an aged and blind friend. After receiving Christian communion in the friend's home, they were arrested for unlawful worship. They were convicted and sentenced to either a fine or whipping.

Clarke and Crandall paid their fines or let friends pay it for them. Holmes, however, refused to pay, nor would he allow anyone to pay it on his behalf. He thus remained in prison. The law required that alternative to payment be exacted, namely; the guilty party was to be "well whipped." On 6 September 1651, Obadiah Holmes, a Baptist glassworker, was beaten with thirty stripes. As his clothes were being stripped from his back, Holmes declared, "I am now come to be baptized in afflictions by your hands, that so I may have further fellowship with my Lord. [I] am not ashamed of His sufferings, for by His stripes am I healed." One commentator says he was whipped "unmercifully." Yet following his beating, Holmes turned to the

magistrates and said, "You have struck me with roses." Governor Jenks observed that "for many days, if not some weeks, he could take no rest but upon his knees and elbows, not being able to suffer any part of his body to touch the bed whereupon he lay."

Speaking of his punishment later, Holmes testified, "As the strokes fell upon me I had such a spiritual manifestation of God's presence as the like thereof I never had nor felt, nor can fleshly tongue express; and the outward pain was so removed from me that indeed I am not able to declare it, yea, and in a manner felt it not, although it was grievous, as the spectators said, the man striking with all his strength (yea, spitting in his hand three times, as many affirmed) with a three-corded whip, giving me therewith thirty strokes."

Because early Baptists were preachers before they were professors, much of what they had to say about liberty of conscience was couched in sermons. But these were sermons very unlike what most of us have ever heard in our lifetimes. For instance, John Leland (1754-1841), was a Baptist minister in both Massachusetts and Virginia. He preached in Orange County, Virginia from the nation's founding in1776 to1791. During that time he became friends with James Madison, Thomas Jefferson, and other American founders. Part of a campaign promise Madison made to Leland and several other Baptists led to the adoption of the Bill of Rights as amendments to the Constitution, especially the free exercise clause of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In a sermon preached in 1791, Leland declared,

> The word conscience signifies common science, a court of judicature which the Almighty has erected in every human breast; a *censor morum* [moral judge] over all his actions. Conscience will ever judge right when it is rightly informed, and speak the truth when it understands it. But

to advert to the question—"Does a man upon entering into social compact surrender his conscience to that society to be controled by the laws thereof, or can he in justice assist in making laws to bind his children's consciences before they are born?" I judge not, for the following reasons:

1. Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience. If government can answer for individuals at the day of judgment, let men be controled by it in religious matters; otherwise let men be free.

2. It would be sinful for a man to surrender that to man which is to be kept sacred for God. A man's mind should be always open to conviction, and an honest man will receive that doctrine which appears the best demonstrated; and what is more common than for the best of men to change their minds? Such are the prejudices of the mind, and such the force of tradition, that a man who never alters his mind is either very weak or very stubborn. How painful then must it be to an honest heart to be bound to observe the principles of his former belief after he is convinced of their imbecility? and this ever has and ever will be the case while the rights of conscience are considered alienable.

3. But supposing it was right for a man to bind his own conscience, yet surely it is very iniquitous to bind the consciences of his children; to make fetters for them before they are born is very cruel. And yet such has been the conduct of men in almost all ages that their children have been bound to believe and worship as their fathers did, or suffer shame, loss, and sometimes life; and at best to be called dissenters, because they dissent from that which they never joined voluntarily. Such conduct in parents is worse than that of the father of Hannibal, who imposed an oath upon

> his son while a child never to be at peace with the Romans.
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> 4. Finally, religion is a matter between God and individuals, religious opinions of men not being the objects of civil government nor any ways under its control.

Another, slightly more recent example, comes from the famous Texas Baptist, George W. Truett (1867-1944), whose sermon preached in the nation's Capitol is included *in toto* this issue. Truett was pastor of First Baptist Church, Dallas from 1897, until his death in 1944. In the shadow of World War I, on Sunday, May 16, 1920, during the annual meeting of the Southern Baptist Convention held in Washington, D.C., Truett spoke from the steps of the Capitol to 10,000-15,000 people. J. B. Gambrell, then president of the Southern Baptist Convention, said of Truett's sermon, "Since Paul spoke before Nero, no Baptist speaker ever pleaded the cause of truth in surroundings so dignified, impressive and inspiring."

What did Truett say with such prophetic boldness? He called to his hearers: "in the shadow of our country's Capitol, compassed about as we are with so great a cloud of witnesses, let us today renew our pledge to God, and to one another, that we will give our best to church and to state, to God and to humanity, by his grace and power, until we fall on the last sleep."

For Truett, the "best" that Baptists could give to their country was to work tirelessly to preserve religious liberty and the separation of church and state.

> Indeed, the supreme contribution of the new world to the old is the contribution of religious liberty. This is the chiefest contribution that America has thus far made to civilization. And historic justice compels me to say that it was pre-eminently a Baptist contribution. The impartial historian, whether in the past, present or future, will ever agree with our American historian, Mr. Bancroft, when he says: "Freedom of conscience, unlimited freedom of mind, was from the first the trophy of the Baptists." And such

> historian will concur with the noble John Locke who said: "The Baptists were the first propounders of absolute liberty, just and true liberty, equal and impartial liberty." Ringing testimonies like these might be multiplied indefinitely. . . .

These texts remind us that, on the one hand, what professors Daniel Dreisbach and Mark David Hall have called "the sacred rights of conscience," were secured at a tremendous price. On the other hand, they remind us that, as Truett said, although it was largely "a Baptist achievement," it was for the common good. So, although the protection of liberty of conscience may have been an achievement of a particular religious group during a particular moment in history, its benefits accrued then, and now, to everyone. Thus, in his own folksy way Mark Twain declared, "It is by the goodness of God in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them."

Although conflicts of conscience are episodic and relatively limited, they are becoming increasingly frequent as our society becomes more pluralistic. For instance, several years ago in Minneapolis, Minnesota, approximately two-thirds of taxi drivers were Muslims from Somalia. Some clerics maintain that the Koran's prohibition against consuming alcohol extends to transporting alcohol. Thus, some Muslim cab drivers at the Minneapolis airport refused to transport passengers visibly carrying alcohol from the duty-free airport stores. This was presumably based on religious conscience.

In April 2007, the Minnesota Airports Commissioners unanimously decided that a taxi driver must transport passengers carrying alcohol or face a thirty day suspension. A subsequent refusal would result in a two-year suspension. The Minnesota Court of Appeals heard the case and in September 2008 ratified a lower court's ruling on the grounds that the drivers did not suffer irreparable harm. Is this really the best we can do? Must every appeal to conscience result in endless trials? As one commentator says, this seems like an "unenlightened, unimaginative resolution of the dispute."[4]

INEVITABLE CONFLICTS OF CONSCIENCE IN HEALTH CARE

Turning to health care, recent controversies over the refusal of physicians and pharmacists to prescribe emergency and other contraceptives have ignited an on-going debate. University of Chicago physician-ethicist Farr Curlin and colleagues point out that historically doctors and nurses have not been required to participate in procedures that violated their consciences, e.g., to participate in abortions or assist in suicides.[5] In fact, legislation in states where those practices are legal have, more often than not, included conscience clauses to protect health care professionals. Ironically, in some cases those protocols require physicians to refer patients to another doctor who will perform a procedure they find unconscionable (perhaps better characterized as a conscience clause without a conscience!).

More recently, controversies over emergency contraceptives have led some to criticize the existence of these conscience clauses. For instance, Alta Charo, the out-spoken professor of law and bio-ethics at the University of Wisconsin at Madison, suggests "that the conflict about conscience clauses 'represents the latest struggle with regard to religion in America,' and she criticizes those medical professionals who would claim an 'unfettered right to personal autonomy while holding monopolistic control over a public good.'"[6] Even more stridently, Oxford ethicist Julian Savulescu has ranted, "a doctor's conscience has little place in the delivery of modern medical care . . . if people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors."[7] Nevermind that most of these ethicists would affirm physicians who invoke the conscience exception to participating in capital punishment or war.

What Curlin, et al., demonstrate empirically is that physicians themselves are divided about the role of conscience in clinical practice. In their study of more than one thousand physicians (n=1144), they found that most physicians believe it is ethically permissible for doctors to explain their moral objections to patients. Sixty-three percent thought that explaining their moral objections to certain procedures was not a violation of the physician-patient relationship.

Eighty-six percent believed that doctors are obligated to present all options to patients, even those the doctor thinks are morally dubious and 71% thought they should refer a patient to another clinician who does not object to the procedure. Furthermore, 52% reported objections to abortion for failed contraception and 42% objected to prescribing contraception for adolescents without parental consent.

Curlin and colleagues suggest that conflict about the role of conscience in health care might be understood "in the context of perennial debates about medical paternalism and patient autonomy."[8] They rightly worry that, if their results are accurate, in many cases a patient's right to informed consent is jeopardized by physicians' refusal to provide information about medical procedures they themselves find problematic but are nonetheless consistent with standards of care. "If physicians' ideas translate into their practices," they say, "then 14% of patients—more than 40 million Americans—may be cared for by physicians who do not believe they are obligated to disclose information about medically available treatments they consider objectionable. In addition, 29% of patients—or nearly 100 million Americans—may be cared for by physicians who do not believe they have an obligation to refer the patient to another provider for such treatments."[9] *So it is becoming increasingly important that we understand what we are claiming when we claim protection of freedom of conscience.*

What do we say, for instance, when under invocation of conscience:

- a lab tech refuses to dispose of frozen embryos at a fertility clinic?
- a cardiologist refuses to deprogram a dying patient's ICD or pacemaker?
- a respiratory tech refuses to turn off a ventilator?
- a physician refuses to prescribe Viagra to a widower?
- an administrator refuses to approve funds for research she finds morally objectionable?
- under a regime of legalized assisted-suicide, a physician in Oregon, Washington, or Montana refuses to prescribe a lethal overdose requested by a patient?

H. Tristram Engelhardt, Jr., has famously argued that we live in a society of moral strangers who lack a shared, content-full, morality.[10] Whether or not the situation is quite as dire as he suggests, Engelhardt is obviously correct in pointing out that we live in a pluralistic culture. When it comes to life, health, illness, disease, aging, disability, death—and many other existential aspects of our experience as human beings—we have diverse beliefs, values, and concerns. This complex of beliefs, values, and concerns both shape and reflect our individual consciences.

Generally speaking, conscience may either function judicially or legislatively. Our judicial conscience is that faculty of our moral psychology that may evoke guilt when we do something we believe to be wrong, as when we speak of "pangs of conscience." But conscience may also be legislative when it informs our decision making prior to acting. So we sometimes say, "let conscience be your guide" when making decisions. My guess is that our legislative consciences would lead some of us to different answers to the questions above than others of us.

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However diverse our consciences may be, we also need a distinction between idiosyncratic— or what I might call solipsistic conscience—and other conceptions of conscience. University of St. Thomas School of Law professor Robert Vischer quite convincingly argues that with respect to the protections of the state, conscience is not a lone, renegade "black box," as though when someone says, "my conscience tells me thus or so" we cannot inquire further. Conscience claims should not serve as a political trump card. When someone invokes "conscience" as a reason for either acting or refusing to act, we must distinguish between one's individual, atomistic, idiosyncratic reasons and a genuine appeal to conscience, says Vischer. In other words, there is a difference between individual preferences and conscience. "Conscience," he argues, "should not be used as legal shorthand for an individual's liberty from government coercion on matters pertaining to her core moral convictions.

The cause of conscience encompasses individual liberty from state coercion, to be sure, but it should not be defined solely as such."[11]

Conscience, Vischer maintains, corresponds to our social nature, and is not merely an expression of our personal identity. If taken seriously, it requires the maintenance of venues where the dictates of conscience can be discerned, articulated, lived out, and can flourish. Says Vischer,

> Its [conscience's] claims are formed, articulated, and lived out along paths that transcend the individual. The vibrancy of conscience thus depends on more than the law's protection of individual autonomy; it also depends on the vitality of associations . . . against which the right of conscience is currently being invoked. Put simply, if our society is to facilitate an authentic and robust liberty of conscience, it cannot reflexively favor individual autonomy against group authority; it must also work to cultivate spaces in which individuals come together to live out the shared dictates of conscience.[12]

He goes on,

> Conscience, by its very nature, directs our gaze outward, to sources of formation, to communities of discernment, and to venues for expression. When the state closes down avenues by which persons live out their core beliefs—and admittedly, some avenues must be closed if peaceful coexistence is to be possible—there is a cost to the continued vitality of conscience.[13]

One important example he provides is the Civil Rights Act of 1964 which prohibits discrimination based on race by employers and places of public accommodation, including restaurants, schools, and hotels. Some readers are old enough to remember the social turmoil, especially in the South, over the legislation. Essentially, the government imposed "a collective vision of racial equality on public

and private actors alike."[14] Despite any individual's or any group's appeal to conscience, the state mandated compliance with the law.

Vischer makes an interesting observation. Though he agrees it was necessary in this case, he wonders whether the Civil Rights Act "short-circuited" the bottom-up conversation over the common good by imposing a top-down solution, enshrining one set of claims as binding law, and effectively shutting down the moral marketplace. Again, ultimately, he says, enforcement of the Civil Rights Act was the right thing to do. But lawmakers must carefully calculate the costs of making such decisions.

> The point is that figuring out how best to protect conscience without jeopardizing the common good, the law must pay attention to the substance of conscience's claims and to their impact on the state's legitimate pursuit of the common good . . . .The basis and content of conscience's claims matter, not because they provide bright-line boundaries of legitimacy, but because protecting conscience in a pluralistic democracy is a messy business, requiring ongoing conversations that are nuanced, widely engaged, and substantive. These may be obvious points with which few will disagree (I hope), but our legislatures and courts must work to identify and articulate more carefully the relationship between a proposed state incursion on conscience and the common good.[15]

To complicate matters, as Dan Sulmasy, Professor of Medicine and Ethics in the Department of Medicine and the Divinity School at the University of Chicago, has opined, health care institutions are also moral agents.[16] That is, health care institutions, like hospitals, nursing homes, pharmacies, and the like, are more than mere aggregates of persons. They are, Sulmasy says, organizations with identifiable purposes and identity. "Almost all have explicit mission statements. They act intentionally. They make decisions for which they may receive praise or blame. They have recognized institutional structures by which the decisions of some (e.g., the Board of

Trustees, the CEO, the Dean of the School of Nursing, or the Chair of Medicine) count as the decisions of the institution."[17]

And if health care institutions are moral agents, they too must be understood to have consciences. So, institutional conscience—with its fundamental commitment to act consistently with its conception of morality—must also be respected by the law. Messy business made yet messier.

This is not how things worked in Chicago under former Illinois Governor Rod Blagojevich. In 2005, the governor ordered all pharmacies serving the public to dispense "all FDA-approved drugs or devices that prevent pregnancy . . . without delay, consistent with the normal timeframe for filling any other prescription."[18] In Blagojevich's words, "Filling prescriptions for birth control is about protecting a woman's right to have access to the medicine her doctor says she needs. Nothing more. Nothing less. We will vigorously protect that right."[19] Nevermind the rights of conscience of pharmacists or the pharmacy as a moral agent. "Efforts by pharmacy chains to carve out their own policies on the issue were immediately squelched," observes Robert Vischer.[20] As syndicated columnist Ellen Goodman expressed it, "the pharmacist's license [does] not include the right to dispense morality."[21]

Draconian policies often result in other harms. For instance, I recently learned of a practice apparently common in my region. It is the pharmacy analogue to the "slow code" in a hospital. In a slow code, even though hospital policy may require that when a code is announced on the loudspeaker, signaling that a patient is having a heart event, all personnel in the area are to respond to the patient in trouble, everyone knows that if doctors, nurses, and others do not think the patient should be resuscitated, they move very slowly toward the patient's bedside; hence, a slow code. Similarly, when some pharmacists in my region receive calls asking if they have emergency contraceptives they find morally problematic, they ask the caller to hold a moment, the put down the phone, picking it up after the appropriate lapse of time and say: "No, I'm sorry, we're out of that." Of course, they had the drugs in stock, but they gamed the system, deceived the client—and, I would argue, potentially

harm their own souls by instituting a practice of lying—albeit, in order not to commit what they think is a greater evil. Although I may personally applaud their ingenuity, I think it's a bad practice to formalize. Bad policies that leave no room for conscientious objections, encourage professionals to become mendacious.

Vischer would say, in this case, that "pitting one form of individual liberty against another form of individual liberty ignores the institutional liberty that is essential for the long-term flourishing of conscience." Conscience is invoked to justify legislation that would enable individual pharmacists to refuse to fill prescriptions that violate their moral judgments. Similarly, conscience is invoked to justify legislation that would enable individuals to compel pharmacists to fill any legally obtained prescription. This is an irresolvable impasse.

Instead, for the sake of the common good we should appeal to the moral marketplace for remedy. In other words, in a free-market democracy, we should allow pharmacies (and hospitals) the opportunity to build moral claims into their corporate identities and let the market sort it out. Pharmacists will then be able to integrate their personal beliefs with their professional calling. In our setting, except in very rare situations, patients will be able to access the drugs or procedures they want. Pharmacies would be required only to make their policies known to prospective patients (in the same way some states require restaurants to post nutritional values).

Where genuine access problems exist, the state might be justified in instantiating other remedies. But these will be the exception rather than the rule. "If we value a society with morally distinct institutions," says Vischer, "we must discern between market-driven inconvenience and market-driven lack of access. The latter warrants state intervention; the former does not."

In a lovely expression, Vischer states, "Rather than making all pharmacies morally fungible via state edict, the market allows the flourishing of plural moral norms in the provision of pharmaceuticals." Furthermore, and as importantly, the sanctity of conscience would be protected. No one would be forced to fill prescriptions that they find morally repugnant or feel they are morally complicit in evil.

Admittedly, following this scheme would require some major overhauling of our health care system, not least in the arena of third-party payment. But the last time I checked, our system needed some overhauling.

(Endnotes)

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C. Ben Mitchell, Ph.D., holds the Graves Chair of Moral Philosophy at Union University in Jackson, Tennessee. His most recent volume is the forthcoming, Ethics & Moral Reasoning: A Students Guide *(Crossway, 2013).*