Response to: 'Why medical professionals have no moral claim to conscientious objection accommodation in liberal democracies' by Schuklenk and Smalling

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ABSTRACT

The recent essay by Schuklenk and Smalling opposing respect for physicians' conscientious objections to providing patients with medical services that are legally permitted in liberal democracies is based on several erroneous assumptions. Acting in this manner would have serious harmful effects on the ethos of medicine and of bioethics. A much more nuanced and balanced position is critical in order to respect physicians' conscience with minimal damage to patients' rights.

The recent essay by Schuklenk and Smalling[1] is striking in its one-sidedness and dogmatism. The authors start by setting up a straw man, implying that the use of the Nazi analogy is the major argument used by those in favour of giving status to physicians' conscience demands. They proceed to criticise this argument, and then they turn the focus on the situation in the 'liberal democracies'. Their arguments are based on several erroneous assumptions, and their conclusions have serious and harmful implications for the ethos of medicine and for bioethics.

First, liberal democracies are not immune to behaviours and legislation which may be seriously unethical. Just a few examples will suffice. The USA, Canada, Sweden and other countries, widely and appropriately considered as liberal democracies, have carried out involuntary sterilisations over many decades, and physicians were the ones asked to perform the actions. Even today there are activities such as capital punishment, torture and forced feeding of prisoners carried out by 'liberal democracies'. Even the horrors carried out by the German government, such as involuntary euthanasia, were carried out by a government voted into power by democratic elections. *Vox populi* is by no means a guarantee of ethical conclusions, as can be demonstrated by some grossly unethical laws passed in liberal democratic countries. In addition, there are numerous examples of medical research carried out on human subjects and approved by ethics committees composed of reputable bioethicists that have been shown in hindsight to be ethically problematical. Unethical clinical practices in leading institutions in liberal democracies have not infrequently been exposed by 'whistleblowers' whose consciences could not be silenced by the establishment.

Second, conscientious objections to certain treatments are not the exclusive characteristics of 'religious' individuals. As an individual who is personally religiously observant, I recognise and respect the consciences of atheists as well. How would the authors react to physicians who refuse to perform genital mutilations such as circumcision, either male or female, which may be part of the services offered by the health agencies of liberal democracies? Should gynaecologists not be permitted to refuse in vitro fertilisation (IVF) to women >60 years because of their own conscientious objections? Would the authors insist that the physicians provide such services just because they are legal and covered? Should physicians be required to provide care that they consider futile, or that may not be in the best interests of the patient, if the law requires that they respect the wishes of certain surrogate decision makers?

Third, in liberal democracies the permitted and promoted norms may change rapidly with each election. In the Northern Territories of Australia, active euthanasia was permitted for a number of years and then again forbidden. Acts of euthanasia on non-terminal patients, specifically forbidden for many years in the Netherlands, have now become permitted, but there is a strong push now to revise the regulations and make them more restrictive. Are the physicians to change their ethically permitted and forbidden activities repeatedly, based on the change in the political party in office at the moment? In New York City, until 30 June 1970 abortions were illegal. One week later after abortions were legalised, the local municipal hospitals were under direct pressure by municipal authorities to perform a prescribed number of abortions each week. In the USA in the area of abortion, the laws differ from state to state and are in constant flux, which can lead to 'vertigo of conscience'. In the USA, physicians who practice in more than one state may find themselves in a situation in which the two states may have diametrically opposing positions on an issue. Koshland, the former editor of the journal, *Science*, in a now classic editorial,[2] referred to the concept of 'cassette principles' in which the ethical principles change to suit the particular political leanings and convenience of the proposers.

Fourth, where does physician autonomy fit into the picture? Is the physician merely a provider of services to anyone who approaches him/her for such services as long as they are legal, and thus he/she becomes a mere technician? If a Vincent van Gogh were to approach a physician with a request to amputate his ear, would the physician be required to do so or should his conscience permit him to refuse? Will a physician opposed to capital punishment be required to participate in the killing because the sentence is legal in that state or country? Should physicians who oppose infant circumcision and/or surgical restoration of virginity in jurisdictions in which they are legal be obligated to perform these procedures according to Schulenk and Smalling? What would be the authors' position in a situation in which the law takes one position and the particular physician's specialty organisation considers such an act unethical? Who decides?

A number of decades ago during the era of the civil rights protests, US Supreme Court Justice Abe Fortas wrote a small monograph[3] on the limits of legitimate civil disobedience. The monograph was written during the protests by individuals of conscience against racial discrimination and other violations of human rights in the Southern USA. He concluded that it is even legitimate to violate laws that in the eyes of the beholder are unethical if three conditions are met. The issue must be serious and not trivial. The violator must be willing to accept the punishment. The protest must not be violent. In this spirit, I believe that physicians too should have no less the right, and indeed perhaps the duty, to refuse to perform acts that they consider

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unethical. Even in the armed forces in liberal democracies, a soldier is *required* to violate a command that is obviously illegal/unethical. A physician should not have lesser rights. The physicians as a result of their training and professional status have a special role in society. Sieghart, in this very journal,[4] several decades ago called upon professions to act as the 'conscience of society'.

Clearly a much more nuanced position than expressed in the article is called for. In a liberal democracy, there must be a balanced approach to the issue. Obviously not every conscientious objection, religious or otherwise, should be given absolute preference over patient requests in the practice of medicine. That would result in anarchy and in deprivation of services to many patients. But to reject any accommodation to physicians' conscience would be an unfortunate message. I am certain that thoughtful and ethical societies can reach a rational and ethical *modus vivendi* respecting both physician conscience and patient rights.

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