The New Intolerance: Our Rights of Conscience Under Attack

Richard M. Doerflinger

Annual Diocesan Conference
Diocese of Reno, Nevada
January 6, 2018

What is conscience?

- It is “a judgment of reason whereby the human person recognizes the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed.” [*Catechism of the Catholic Church*, no. 1778]

- “[M]an has in his heart a law inscribed by God… His conscience is man’s most secret core and his sanctuary. There he is alone with God whose voice echoes in his depths.” [*Gaudium et spes*, no. 16, emphasis added]

- It has also what has made medicine a profession devoted to health and life, not just a technical specialty (see Hippocratic Oath).

Even the Supreme Court has said…

Roe v. Wade (1973): The Court affirmed freedom for the physician as well as for the woman seeking abortion.

Harris v. McRae (1980):"Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."

Later decisions: The Court speaks simply of respecting the "life" of the unborn.

Now the right of conscience is under attack, even from within medicine:

- "In some circumstances, respect for conscience must be weighed against respect for particular social values… [W]ith professional privileges come professional responsibilities to patients, which must precede a provider's personal interests…. Physicians and other health care professionals have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that their patients request."
- [ACOG Committee on Ethics, "The Limits of Conscientious Refusal in Reproductive Medicine," November 2007]

Turning medical ethics upside down

- ACOG says conscientious refusals fail when they conflict with “moral values – and duties – that are central to medical practice.”

- But it is the refusal to practice (for example) abortion and assisted suicide that has been central to medicine as a profession. Now facilitating access to these (even against conscience) is called “central.”

- Pro-abortion groups abandoning “choice,” now cite “access” --which all must help ensure

More recent attack in a prestigious medical journal

- Ronit Stahl and Dr. Ezekiel Emanuel in the New England Journal of Medicine (April 6, 2017):
- Abortion as “a standard obstetrical practice.”
- “To invoke conscientious objection is to reject the fundamental obligation of health care – the primary duty to ensure patients’ continued well-being.” Objectors must comply or “leave the profession.”

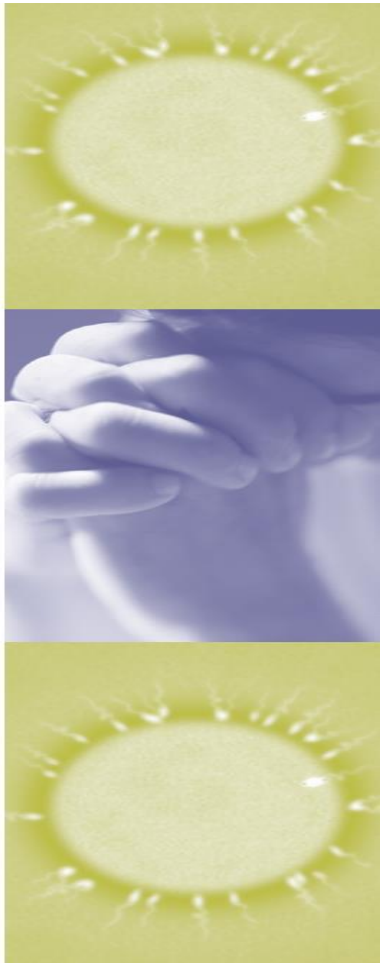
How credible is the claim that abortion is "standard" health care?

- ACOG's own study found: While 95% of ob/gyns have been asked to do abortions, **86%** don't provide them. *[Obstetrics & Gynecology, Sept. 2011]*

- By about the same percentage:
  - Most hospitals don't provide them
  - Most U.S. counties have no abortion provider

- Abortion is "stigmatized" by most doctors, done chiefly in free-standing clinics isolated from the rest of medicine – abortion advocates would change this by force of law.

Catholic and other religious hospitals especially under attack



ACLU's view of religiously affiliated health care:

- Churches may pray and preach as they wish, *but*:

"When . . . religiously affiliated organizations move into secular pursuits—such as providing medical care or social services to the public or running a business—they should no longer be insulated from secular laws. In the public world, they should play by public rules. The vast majority of health care institutions--including those with religious affiliations—serve the general public. They employ a diverse workforce. And they depend on government funds."

A threat to Catholic health care is a threat to health care…

- Catholic hospitals care for 1 in 6 hospitalized patients in the United States each year.

- Over 2,000 sponsors, systems, facilities, and related organizations; 725,000 employees.

- Catholic and other church-owned hospitals provide better and more cost-effective care for their patients than for-profit or secular non-profit hospitals. [*Research Brief: Differences in Health System Quality Performance by Ownership* (*Thomson Reuters*, August 2010); *Research Brief: Hospital Performance Differences by Ownership (Truven Health Analytics, June 2013*)]

How has federal law protected conscience?

- **Church amendment** (42 USC 300a-7) (1973)
- **Religious Freedom Restoration Act** (42 USC 2000bb et seq.) (1993)
- **Coats-Snowe amendment** (42 USC 238n) (Enacted 1996)
- **Religious exemption** from contraceptive mandate in federal employees' health plan, amending annual Financial Services appropriations bills (First enacted 2000)
- **Hyde-Weldon amendment** to annual Labor/HHS appropriations bills (First enacted 2004)
- **Conscience clause** to United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (2003, strengthened 2008)

Church amendment provisions

- The government cannot use the receipt of federal health funds to require participation in abortion or sterilization over a provider's moral or religious objections

- Entities receiving such funds may not discriminate in training, employment, privileges, etc. against those who are **willing or unwilling** to take part in abortions or sterilizations on moral or religious grounds

- In certain federal programs this protection applies to <u>any</u> medical practice to which there is moral or religious objection

Coats/Snowe amendment

- No federal agency or program, and no state or local government receiving federal health care reimbursements, may discriminate against an individual or institutional health care provider because the provider does not provide abortion or abortion training, did not receive such training, or does not refer for or pay for such abortions or training.

Hyde/Weldon amendment

- “(1) None of the funds made available **in this Act** may be made available to a Federal agency or program, or to a State or local government, **if such agency, program, or government 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.**

- “(2) In this subsection, the term `health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.”

[Section 507(d) of Division H of the Consolidated Appropriations Act of 2016 (Public Law 114-113)]

Yet threats have grown since 2009

- Bush administration's regulation to enforce conscience laws, countering ACOG policy, gutted under President Obama
- Catholic refugee agency lost its federal grant to help trafficking victims, for refusing to do abortion referrals (2011)
- Nancy DeCarlo case at Mount Sinai Hospital allowed to languish for years (2009-2013)
- California, New York, etc. forcing health plans to cover elective abortion; HHS interprets Hyde/Weldon extremely narrowly, refuses to enforce it against these illegal mandates (2014-present)

Why current laws are not enough

- Each law has limited scope: Covering only religious objections, limited to particular federal programs, etc.

- All enforcement is by HHS Office for Civil Rights – no "private right of action" allowing victims of discrimination to file suit. HHS can refuse to act, reinterpret the law narrowly, or even be the perpetrator itself.

- Hyde/Weldon: The only penalty cited in the law is said to be unconstitutionally broad; some terms unclear; no right to sue; must be renewed each year.

Needed: “Conscience Protection Act”

- Introduced as HR 644 (128 House sponsors) and S. 301(27 Senate sponsors)
- Allows “right of action” for victims when Hyde/Weldon, Church, or Coats/Snowe violated
- Protects full range of health care providers (including sponsors and providers of health coverage, and social service providers that do health care referrals) from governmental discrimination when they decline involvement in abortion
- Passed House in 2016 and Sept. 2017 as part of consolidated appropriations bills; not yet accepted by Senate

Responses to the challenge

- Encourage parishes, schools, other Catholic institutions to educate on conscience rights and religious freedom – see U.S. bishops' "Fortnight for Freedom"

- Be informed! See www.usccb.org/conscience

- Join the public debate! Op-eds, letters to the editor, blogs, Facebook, etc. Personal testimonials showing the need for better conscience protection are especially important

- Support needed legislation! See www.humanlifeaction.org/ for help writing to your members of Congress