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Conscience or Disobedience? Comments on Dov Fox, “The Lopsided Law of Medical Conscience”

SAMUEL C. RICKLESS

I am grateful to have been asked to comment on Dov Fox’s excellent and thought-provoking paper. Fox argues that “the conscience regime that governs American healthcare is broken.”¹ By this, he means that whereas conscientious healthcare deniers are protected in various ways by state legal systems, conscientious healthcare providers are not similarly protected. This, argues Fox, is both morally unjust and legally indefensible. Instead, he claims, we should replace our tattered and unjust conscience regime with one that vindicates most forms of conscience, whether they involve denial or provision of healthcare, for those who invoke it in good faith, though this may sometimes require that conscientious providers pay to offset the harms of accommodation.²

The major restrictions on the invocation of conscience in the healthcare arena Fox accepts are: respect for informed consent, no discrimination on the basis of morally arbitrary characteristics, such as race, sex, and age, and no abandonment in emergencies.³

I agree with Fox that our current conscience regime is broken. But I find myself disagreeing with Fox’s reasons for taking this position and with his prescription for how to fix the problem.

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2. Id. See Dov Fox, The Lopsided Law of Medical Conscience, 25 J. CONTEMP. LEGAL ISSUES 115 (2024).
3. See Fox, Medical Disobedience, supra note 1 (end of section 1).
As Fox reads the situation, there is no principled moral or legal difference between refusing to provide healthcare on grounds of conscience and providing healthcare on grounds of conscience. To assess this claim, we need to know what conscience is. Fox writes: “Conscience that’s invoked in good faith consists of deeply held moral beliefs, the kind that center individuals to the commitments they cherish most.”

Now, especially in the legal context, I want to know more about how to distinguish between the deeply held moral beliefs that should be respected in a conscience regime, and other forms of belief that do not deserve acceptance.

Fox writes that “conscience is characteristically anchored to a source of ethical wisdom that’s bigger than oneself and independent of what an individual believes,” and among these sources Fox counts religion, philosophy, and the practice of medicine, which is grounded in the goals of healing, promotion of health, and relief of suffering. Importantly, though, as Fox defines it and as it has been treated in law, conscience is a matter of an individual’s potentially idiosyncratic moral beliefs, whatever their source, whether “derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible.”

Now the first thing that should be noted is that the only legitimate source of moral belief is moral reasoning, which is part of philosophy. Religion is not a legitimate source of moral beliefs, even if many moral beliefs also find an important place in religious worldviews; and the practice of medicine, by itself, justifies no moral beliefs, unless it is itself given a moral justification. If a religion tells me that persons with skin of a certain color are naturally inferior or that wives should submit to their husbands, then that aspect of the religion is immoral. And if the practice of medicine in a particular area of the world says that death by exposure of female infants (as happened in some places in antiquity) is morally justified or that physicians should refuse to help pregnant women terminate their pregnancies at any stage (as the classic Hippocratic Oath requires), then the practice of medicine, in these respects, is immoral.

Back, though, to Fox’s main thesis, which is that a conscience regime that respects healthcare refusal should also respect healthcare provision. As I understand Fox’s argument, this is the default position: if no principled difference can be found between healthcare refusal and healthcare provision, then, modulo issues of cost and a few other matters, both should be treated similarly. This is a reasonable position, and I agree with it. The question, then, is whether there is a principled difference. Fox considers three proposals:

4. See Fox, Lopsided Law, supra note 2.
5. Id. See also Fox, Medical Disobedience, supra note 1.
the first is that there is a morally significant difference between medical doings and medical allowings, so that “forcing clinicians to perform care that they morally oppose is worse than preventing them from supplying care their scruples command them to”; the second is that conscientious refusal requires less of third parties than conscientious provision; and the third is that it is possible for a government to respect conscientious medical refusal without sacrificing its interests, whereas it is impossible for a government to respect conscientious medical provision without undermining its own interests.

Fox offers replies to all three of these proposals. I agree more or less with his replies to the second and third proposals, so I will concentrate on his reply to the first.

One thing Fox says about the doing/allowing distinction in morality and the law is that, at least according to consequentialists, it may be the product of cognitive bias. As an example, Fox suggests that it is an irrational form of “omission bias” for parents to be more concerned about having their children vaccinated against whooping cough than it is for them to be concerned about the result of leaving their children unvaccinated, especially when they know that “getting the shots pose[s] far less danger than declining to act by not vaccinating.”

Now I grant that there may be such a thing as omission bias. But it doesn’t follow that the doing/allowing distinction has no place in morality or law. As a result of some gentle prodding from me, Fox now (rightly!) accepts that the doing/allowing distinction does not tell us that every single instance of doing harm is worse or more difficult to justify than every single comparable instance of allowing harm, even when the harm is the same. This is a familiar point from the famous work of Philippa Foot, who points out, for example, that it is no counterexample to the doing/allowing distinction to point out that Alan drowning his nephew in the bathtub is no more difficult to justify, or no worse, or no more horrifying, than Ben watching his nephew slip and fall in the bathtub and drown, while holding his hand above the water in case the nephew

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7. See Fox, Lopsided Law, supra note 2.
8. Id.
9. Id.
10. See Fox, Medical Disobedience, supra note 1.
What is sufficient to support the doctrine is that there be some instances of doing harm that are more difficult to justify than equally harmful instances of allowing harm in similar circumstances: thus, as Foot argues, if a fellow wounded soldier whom you cannot move to safety before being overrun by the enemy does not want you to kill him, even to protect him from being tortured before his death, then you are not morally permitted to kill him; but if he demands that you give him a drug that will keep him alive until the enemy arrives, then you are not morally required to provide it: there is, then, a morally significant difference between killing and letting die. Trolleyology suggests as much: for example, it is more difficult to justify sending a trolley that you know will crush one person in order to stop another trolley from crushing two than it is to justify allowing the same already moving trolley to crush one in order to save two.

Now Fox recognizes, rightly, that the doing/allowing distinction “runs deep in our moral and legal culture,” and I just want to add that it’s a good thing too. Even if it is sometimes the case that harmful allowings are just as bad or just as difficult to justify as harmful doings, our legal system should reflect a principle of morality of this level of importance.

But now Fox points out, rightly again, that even if the doing/allowing distinction tells us that conscientious refusal deserves more protection, it doesn’t follow that conscientious provision should get none. True enough, I say. But surely this depends greatly on the scenario. For if the doing/allowing distinction really does matter morally, then there may be situations in which it would be morally permissible to refuse to provide care and quite different situations in which it would be morally impermissible to provide care. And, indeed, if the legal system should happen to protect all and only those conscientious healthcare refusals that are morally permissible and fail to protect all and only those conscientious healthcare provisions that are morally impermissible, then it would be hard to argue that the conscience regime is broken.

But Fox now makes another very important observation, which is that the moral and legal distinction between doing and allowing “has less purchase in the healthcare context.” The reason for this, Fox claims, is that medical professionals owe a professional fiduciary obligation to

12. See Foot, Euthanasia, supra note 11, at 48.
13. See Fox, Lopsided Law, supra note 2.
14. Id.
15. Id.
their patients.\(^\text{16}\) This obligation involves fulfilling the roles that define the practice of medicine: healing, promotion of health, and relief of suffering.\(^\text{17}\) Thus, if a government forbids a form of medical treatment that a physician thinks would be the best medical option for her patient, then she would be violating her professional oath and failing to discharge her positive fiduciary duty if she did not engage in conscientious provision. Fox concludes that clinical role obligations make what’s morally good and legally required a function of what promotes the patient’s interests, not whether it constitutes a \textit{doing} or an \textit{allowing}.\(^\text{18}\) What follows, he says, is that the significance of the line between doing and allowing “is diminished, making conscientious provision and refusal look more alike than different.”\(^\text{19}\)

Now I agree with Fox that the fact that medical personnel have positive role obligations supports conscientious provision if the fact that the same personnel have negative obligations, whether defined by their role or by the state, supports conscientious refusal. But here we need to be careful. For suppose that conscientious provision of healthcare to one person also harms someone, whether that person or another. As I see it, genital cutting of any kind is both harmful to the patient and violates their autonomy. Similarly, I would argue that body integrity identity disorder justifies care and therapy, but not amputation, even if the patient tells their physician that they will find some way to amputate their unwanted limb(s) themselves.\(^\text{20}\) And, of course, there is also the case of pregnancy termination. One central question here is whether the fetus, at this or that stage of embryonic development, is a being with the kind of moral status (having interests or rights) that stand in the way of a medical procedure that would lead to its destruction. If the fetus has that kind of moral status, then the physician’s fiduciary duty to help her pregnant patient clashes with her duty not to harm the fetus (at least in cases in which the pregnancy is fully voluntary and relatively uncomplicated). And if it is more difficult to justify doing harm than allowing harm, then, morally speaking, the case for conscientious provision in such cases turns out to be weak. I agree, though, that the existence of positive moral duties

\(^{16}\) See also Fox, \textit{Medical Disobedience}, supra note 1.

\(^{17}\) See \textit{id}.

\(^{18}\) \textit{Id}.

\(^{19}\) \textit{Id}.

\(^{20}\) For discussions of genital cutting and body integrity identity disorder, see Fox, \textit{Medical Disobedience}, supra note 1.
to care for patients that results from their role means that the doing/allowing distinction does not, on its own, justify treating conscientious refusal in general differently from conscientious provision in general. Whether this or that form of conscientious refusal or provision is morally justified in a particular case will depend on the application of all relevant moral principles to that case. Sometimes those principles will speak in favor and sometimes they will speak against the refusal or the provision. And in this sense, I agree with Fox that the current conscience regime does not provide an all-purpose justification for privileging conscientious refusal over conscientious provision as a general matter.

Suppose, then, that Fox is right that conscientious provision should not be treated any differently from conscientious refusal, modulo issues such as cost, non-discrimination, and emergencies. As Fox sees it, the answer is for judges not to penalize conscientious provision, given that they permit conscientious refusal. 21 But what I would like to suggest, somewhat more radically, is that if conscientious provision and conscientious refusal are on a par then the best policy is for government to make room for neither, rather than making room for both. For in a liberal society that strives for justice, the case for legal permission of conscientious behavior is weak. One reason for this is that many of the moral arguments that are commonly used by conscientious agents are poor: religious arguments, as I have already pointed out, have no moral significance by themselves; idiosyncratic arguments based on revelation, or upbringing, or study, or something incomprehensible are no better; and the right place for moral arguments in a liberal society is the public square.

But is there a good case for protecting conscience in the practice of medicine? Fox says yes. I say no. Fox claims, first, that one main reason to protect a physician’s conscience is “to respect her agency or preserve her integrity.” 22 Forcing a doctor to act or omit against her conscience “takes a psychological toll” that is “bad in itself” and that “can burn specialists out, driving them to move states, change fields, or quit healthcare altogether.” 23 I agree, of course, that this is a toll, but it is a toll that we all pay when we agree to live and participate in a system governed by laws of general applicability. I have strenuous objections to my tax dollars being used for all sorts of unjust purposes, and yet I am compelled to contribute to the funding of unjust activities. That too takes a toll. I am required not to interfere when a police officer repeatedly slams a suspect’s head against the sidewalk. That too takes a toll. I am required to stand

21. See Fox, Medical Disobedience, supra note 1. See also Fox, Lopsided Law, supra note 2.
22. See Fox, Lopsided Law, supra note 2.
23. Id.
by while the Federal government separates the children of refugees from their parents. And that takes a toll. In a republic, every law that has general application and that in some way contravenes the strongly held moral beliefs of some citizens will fail to respect their agency and fail to preserve their integrity. Why? Because that is how law works. We all agree to be bound by agency-disrespecting and integrity-nonpreserving laws because the alternatives, namely anarchy and tyranny, are worse.

Fox claims, second, that vindicating conscience also reflects a “larger spirit of openness to dissent that sustains a diverse society and dynamic profession.” When majorities win out, carve-outs for conscience can preserve objections as “a repository for potentially worthy reforms in the future.” But objections, especially those based on antiquated and unjustified religious views and those based on idiosyncratic reasons grounded in tradition or one’s own “research,” are even more likely to serve as a repository of moral reprehensibility; and the proper place for dissent in an open, democratic, liberal society is in the public square, not in the form of a carve-out.

It’s not that I’m inimical to respecting agency or integrity, and it’s not that I don’t value diversity and dynamism. But inasmuch as I live in a liberal democratic republic governed by the rule of law, I agree to be bound by the law and suffer the consequences of breaking it and it would be unjust for me to demand that the law make a special exception for me on grounds of conscience. The function of law is to serve as a publicly ascertainable set of general behavioral restrictions. For law itself to exempt people from its purview on grounds of idiosyncratic conscience is contrary to law’s central purpose. Once we have a carve-out scheme, I don’t see a principled way to avoid generalizing carve-outs in other areas; and if the carve-out scheme generalizes, then the rule of law, and the republic governed by it, are dead.

What, then, is to be done in the face of decisions such as Dobbs? The answer, as I see it, is a different form of dynamic dissent: civil disobedience. Civil disobedience can, of course, be motivated by conscience, that is, by strongly held moral beliefs. But it is not a carve-out system in the form of a conscience regime. To engage in civil disobedience is to publicly accept the negative consequences of one’s actions (whether in the form of fines or imprisonment), in large part in order to garner attention that will

24. Id.
25. Id.
prompt the citizenry to change the law to protect what is currently prohibited. For a medical professional, civil disobedience involves being willing to lose one’s license and possibly go to jail in defense of women’s access to reproductive health care. If the moral case for conscientious provision is strong enough, doctors and nurses should be willing to take the consequences. This is what happened during the marches and protests for civil rights, for women’s rights, for LGBTQ rights in the 1960s and 1970s. And this is what should happen now. To demand special dispensation from laws of general applicability is to risk the kind of contradiction (or, as Fox puts it somewhat euphemistically, “moral ambivalence”\textsuperscript{26}) that destroys the rule of law.

Fox worries that getting rid of carve-outs for conscience is “politically impractical.”\textsuperscript{27} Perhaps. But one part of me doesn’t care about practicality: maybe sit-ins, freedom rides, and unpermitted civil rights marches in the 1960s were not politically practical (some well-intentioned people argued as much), but that didn’t make them wrong. And the part of me that cares about the practical side of things is far more worried that expanding the conscience regime will destroy our legal system from the inside than it is about the loss of agency and integrity that follows from eliminating carve-outs in the name of conscience.

Fox also worries that risking “fines, suspension of licensure, and potential imprisonment” is “too much to expect of doctors, standing alone, and even shoulder to shoulder” and that “any doctor who’s preoccupied with trial or sitting in jail is one fewer who’s able to help care for patients.”\textsuperscript{28} But it is never too much to expect moral virtue and a commitment to justice, especially from professionals who have dedicated their professional lives to the relief of suffering. Indeed, if Fox is right, as I think he is, to emphasize the fiduciary obligations that doctors have to their patients, then doctors should be willing to do a great deal to protect their patients from suffering and make sure that their bodily autonomy is respected. Suppose, for example, that a xenophobic Congress or State legislature passed a law threatening doctors with fines, suspension of licensure, and potential imprisonment for treating undocumented immigrants. Would it really be too much to expect of doctors that they violate that law, as a form of civil disobedience? I certainly hope not. Sometimes morality is demanding, very demanding. It is unfair in many ways for doctors to be on the moral front line in the wake of \textit{Dobbs}. But that is where they are, like it or not. And this is not the time for doctors to hide or keep their heads down; it is the time for them to step up. Society has given them so much: an education,

\textsuperscript{26} See Fox, \textit{Medical Disobedience}, supra note 1.
\textsuperscript{27} See Fox, \textit{Lopsided Law}, supra note 2.
\textsuperscript{28} \textit{Id.}
prized social status, the opportunity for high income and financial security, and more. It would be morally outlandish for doctors to turn their backs on the people who need their vital services, in order to avoid sanctions that threaten a relatively comfortable (even if psychologically and physically challenging) lifestyle.

As for the worry that a doctor preoccupied with a trial or sitting in jail is not able to help patients, let me ask: What good were Alice Paul, Lucy Burns, Dorothy Day, Doris Lewis, Alice Cosu and other suffragists doing when they were incarcerated (and brutally mistreated) at the Occoquan Workhouse for peacefully protesting for the right to vote? What good was Martin Luther King Jr. doing when he was sitting in a Birmingham jail after being arrested for leading an unpermitted march urging a boycott of racist shop owners? What good was Nelson Mandela doing when he was incarcerated for twenty-seven years by the apartheid regime in South Africa? Nurses and medical doctors are among the most trusted professionals in the United States.²⁹ If they were to engage in non-violent civil disobedience in defense of the vital autonomy and health care needs of their patients, wouldn’t it be reasonable to expect strong and sustained public pressure on government to heed their message? To change unjust laws coercing pregnant women to take their pregnancies to term, it is not necessary for a large number of medical professionals to be imprisoned or lose their licenses. A small but significant and very vocal minority would probably be more than sufficient. And I am confident that the vast majority of the medical community would be more than willing to take on additional shifts to make up for the (likely, temporary) loss of these professionals. As Martin Luther King Jr. wrote in his famous Letter from Birmingham Jail: “Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny.”³⁰
