

Abortion and Conscientious Objection

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Abstract

In this article I do not seek to discuss when, if ever, abortion is morally permissible. Rather I seek to analyse the precise legal status of the exemptions afforded under British law to those with a conscientious objection to abortion. I then argue that the legal status quo in Britain is not morally satisfactory, and that the law urgently needs to be changed.

Introduction

Christians disagree on the subject of abortion. Some Christians think that all intentional abortions are morally impermissible. Other Christians think that all intentional abortions that are not intended to save the mother's life are morally impermissible. Other Christians broaden this to include as permissible those abortions that are intended to save the mother's health, even if her life is not in danger. A few Christians think that almost all abortions up to a certain period (e.g. the current legal limit of twenty-four weeks) are permissible. Rather than entering directly into this debate here, I want to examine how far the law accommodates the consciences of those Christians (and others) that are opposed to abortion. It seems to me that even those Christians that are not opposed to abortion ought to support legal tolerance for the conscientious objections of their fellow Christians that are so opposed. This is important not just for reasons of supporting our brothers and sisters in Christ, but also because the same debate will be played out in the future concerning euthanasia, where many more Christians may find their consciences being infringed by the law.

The legal status quo

In Great Britain (but not Northern Ireland), the law on abortion is set out in the Abortion Act 1967 (hereinafter 'the Act'). The Act legalized some abortions, and it also afforded permission for conscientious objectors to opt out. The so-called 'conscience clause', Clause 4, is as follows:

4.

Conscientious objection to participation in treatment.

— (1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:

[. . .]

(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.¹

Participation

So, the current legal status in Britain is that nobody needs to 'participate in any treatment' to terminate a pregnancy if he or she has a conscientious objection and if the abortion is not necessary to save the mother's life or to prevent grave permanent injury to her physical or mental health. The question arises as to what is meant by 'participate' in this treatment, and, in fact, this question has been considered by the Courts, in the case of *Regina v. Salford Area Health Authority (Respondent) ex parte Janaway*.² Mrs Janaway was a Roman Catholic, and worked as a receptionist for a General Practice. She was asked to type a letter referring a pregnant woman seeking an abortion to a consultant. Mrs Janaway refused to do this, and was dismissed from her post. Her case went all the way to the House of Lords, where it was dismissed, with their Lordships holding that 'participate in any treatment' meant 'actually taking part in treatment administered in a hospital or other approved place'.

Referrals

So, the law holds that typing up a letter to a consultant is not covered by 'participate in any treatment' for the termination of pregnancy. The question arises of whether a GP's referring a patient to the abortion clinic or to a consultant would itself be covered by the phrase 'participate in any treatment'. The government has expressed the opinion that 'participate in any treatment' does not cover the signing of the form/certificate by the GP. Lord Warner (then Minister of State at the Department of Health) said on 20 July 2005:

The House of Lords ruled in 1988 that this exemption [the conscience clause of the Act] does not extend to giving advice, performing the preparatory steps to arrange an abortion where the request meets legal requirements and undertaking administration connected with abortion procedures. Doctors with a conscientious objection to abortion should make their views known to the patient and enable the patient to see another doctor without delay if that is the patient's wish.³

So, it would appear that the signing of the form/certificate is not covered – or would in future be

held not to be covered – by the conscience clause. Is there, though, any duty on the GP to sign the form/certificate? The National Health Service (General Medical Services Contracts) Regulations 2004 state:

- 3.
- (1) A contractor whose contract includes the provision of contraceptive services shall make available to all its patients who request such services the services described in sub-paragraph (2).
- (2) The services referred to in sub-paragraph (1) are -
[...]
- (e) the provision of advice and referral in cases of unplanned or unwanted pregnancy, including [. . .] where appropriate, where the contractor has a conscientious objection to the termination of pregnancy, prompt referral to another provider of primary medical services who does not have such conscientious objections;⁴

It will be noted that the Regulations here do not state that the GP has to sign the form sending the woman to a consultant or clinic, but *do* say that if a 'contractor' (a general practice or individual general practitioner, for our purposes) has decided to offer contraceptive services, that contractor has to be prepared to refer a pregnant woman seeking an abortion on to another GP *that does not have the conscientious objection*.

The Ethics of the Situation

We have seen the legislation and how the courts interpret it. The question arises as to whether they draw the boundaries in the right place *morally*. I shall now argue that they do not. The argument that I wish to make is put briefly by Jennifer Jackson in her *Ethics in Medicine*:

[I]s it not arbitrary to allow doctors and nurses to refuse to assist on conscientious grounds, but not to allow doctors' secretaries, pharmacists or others to refuse? Imagine a personal secretary of Josef Mengele fending off criticism of her role in arranging for more concentration camp prisoners to be delivered for use in lethal experiments, protesting: 'You can't criticize

me, I merely typed the letters'.⁵

Let us take as our starting point the ethical view held by the conscientious objector. This is a good point to start because our inquiry in this paper is not whether this view is true or false but how much, if anything, should be conceded to it legally. I shall restrict my attention in this paper to abortions in which it is not the case that the mother's life or health is in grave danger – I shall call these 'non-emergency abortions'. The view of the conscientious objector is that it is morally wrong intentionally to perform a non-emergency abortion.

Let us think about the following ethical questions:

- (1) Is it morally wrong, absent special circumstances, to refer a pregnant woman on to the hospital or abortion clinic in the knowledge that she will receive a non-emergency abortion there?
- (2) Is it morally wrong, absent special circumstances, to refer a pregnant woman on to a GP in the knowledge that she will be referred by this GP on to the hospital or abortion clinic and that she will receive a non-emergency abortion there?
- (3) Is it morally wrong, absent special circumstances, to type a letter referring a pregnant woman on to the hospital or abortion clinic in the knowledge that she will receive a non-emergency abortion there?
- (4) Is it morally wrong, absent special circumstances, to type a letter referring a pregnant woman on to a GP in the knowledge that she will be referred by this GP on to the hospital or abortion clinic and that she will receive a non-emergency abortion there?

Consider an extension of Jennifer Jackson's analogy with Josef Mengele. Would it be morally acceptable to send people on to Auschwitz, knowing what would befall them there? Or would it be morally acceptable merely to type the transfer letter for one's superior, again knowing

what would befall them there? Or would it be morally acceptable to say 'I am not morally prepared to send these people to Auschwitz, but I am morally prepared to send them on to someone less scrupulous, who, I know, will in turn send them on to Auschwitz'? Or to say 'I am not morally prepared to type a letter for my superior sending these people to Auschwitz, but I am morally prepared to type a letter sending them on to someone less scrupulous, who, I know, will in turn send them on to Auschwitz'? It seems to me clear that, absent special circumstances, none of these would be morally permissible. Nevertheless, if one had a gun to one's head it might be permissible to do one of these things to save one's life, or the lives of one's family. And it might be permissible to do one of them as part of deep cover in order to be able to save more lives in the long term by sabotaging the Nazi machine from within.

To apply the analogy, it seems to me that the conscientious objector is logically committed to answering 'yes' to (1) – (4) above. If it is not morally permissible to perform a non-emergency abortion, then, absent special circumstances, it is not morally permissible to refer the mother on directly or indirectly for a non-emergency abortion, or to play any part in assisting this referral process. Of course, if special circumstances obtained, it might be permissible: for example if the GP or the GP's family were being threatened with a gun to their heads. A more realistic example might be if the GP were keen to reduce the number of abortions and, indeed, to save lives quite generally, and thought that he or she would be struck off if he or she refused to refer on to the abortion clinic. In this case, it might be permissible for the GP, while not intending that any abortion take place, reluctantly to sign the form on one or two occasions solely in order to keep his or her job in order that more lives might be saved in the long term.

The point is, however, that these are special circumstances, and, in the context of the second example, circumstances that the state has the power to prevent. This means that it is unsatisfactory to legislate that nobody may be legally obliged to *participate in the treatment* (understood as per the courts) for a non-

emergency termination of pregnancy while simultaneously insisting that some may be legally obliged to *refer people on* for such a termination: the logically consistent person that has a conscientious objection to participating in a non-emergency abortion will also have a conscientious objection to referring on for such an abortion if the envisaged special circumstances are absent – as they usually are.

Finally we should consider the question of how far the conscientious objection should be accommodated. It seems to me, in the light of the above, that any logically consistent person opposed to a non-emergency abortion will also be opposed to being an accessory in any way to non-emergency abortions. In other words, such a person will oppose any counselling, procuring, aiding, abetting, helping, or co-operation with non-emergency abortions. For example, referring on to the abortion clinic, referring on to another GP that is known will refer on in turn to the abortion clinic, and ‘clerking in’ preparatory to an abortion, would all count as counselling or procuring or aiding or abetting or helping or co-operating with the abortion. On the other hand, the giving of medical advice or treatment concerning a *separate* condition to a woman seeking, or having just had, an abortion should not come within the ambit of the conscience clause.⁷ Even if the abortion in question were clearly immoral that would not make immoral the giving of advice or treatment for a quite separate condition (unless, of course, the advice or treatment were given with the intention of enabling the mother to receive the abortion). I conclude that the law urgently needs to be changed to allow for a consistent conscientious objection along the lines sketched out above.

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1. Abortion Act 1967, 1967 c. 87 (27th October 1967) [cited 2009 September 9]. Available from: <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1181037>.
 2. *Regina v. Salford Area Health Authority* (Respondent) ex parte Janaway [1988] 2 W. L. R. 442; HA [1988] 3 All ER 1079 249.
 3. *Hansard* [HL] vol 673 col WA20 (20 Jul 2005) [cited 2009 October 2]. Available from <http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo050720/text/50720w01.htm>.
 4. The National Health Service (General Medical Services Contracts) Regulations 2004 [cited 2009 September 9]. Available from: <http://www.opsi.gov.uk/si/si2004/20040291.htm#3a>.
 5. Jennifer Jackson, *Ethics in Medicine*, (Cambridge: Polity, 2006), p. 48.
 6. General Medical Council [Internet]. Personal Beliefs and Medical Practice [March 2008; cited 2009 September 9]. Available from: http://www.gmc-uk.org/guidance/ethical_guidance/personal_beliefs/personal_beliefs.asp#F.
 7. I'd like to thank for their help Janice Allister, James Bogle, Clare Carlisle, Jamie Dow, Charles Foster, Lucy Frith, Harry Lesser, Simon Leighton, Michael McGhee, Steve Michael, Ian Sapsford, Peter Saunders, Tom Simpson, Steve Taylor, and Demian Whiting, as well as officials from the BMA, GMC, and Department of Health. My greatest debt is to Joseph Shaw and Helen Watt, who have been extremely generous with their time and expertise to help me. Obviously, none of the above-mentioned should be held responsible for any defects in this essay.

For further reading:

- Charles Foster, *Choosing Life, Choosing Death - The Tyranny of Autonomy in Medical Law and Ethics*, Hart, 2009.
- Jennifer Jackson, *Ethics in Medicine*, Polity, 2006. [introduction]
- Helen Watt, ed., *Cooperation, Complicity & Conscience: Problems in healthcare, science, law and public policy*, Linacre Centre, 2006. [more advanced]

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