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Do No Evil: Unnoticed Assumptions in Accounts of Conscience Protection

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Abstract In this paper, I argue that distinctions between traditional and contemporary accounts of conscience protections, such as the account offered by Aulisio and Arora, fail. These accounts fail because they require an impoverished conception of our moral lives. This failure is due to unnoticed assumptions about the distinction between the traditional and contemporary articulations of conscience protection. My argument proceeds as follows: First, I highlight crucial assumptions in Aulisio and Arora's argument. Next, I argue that respecting maximal play in values, though a fine goal in our liberal democratic society, raises a key issue in exactly the situations that matter in these cases. Finally, I argue that too much weight is given to a too narrow conception of values. There are differences between appeals to conscience that are appropriately categorized as traditional or contemporary, and a way to make sense of conscience in the contemporary medical landscape is needed. However, the normative implications drawn by Aulisio and Arora do not follow from this distinction without much further argument. I conclude that their paper is a helpful illustration the complexity of this issue and of a common view about conscience, but insofar as their view fails to account for the richness of our moral life, they fail to resolve the issue at hand.

Keywords Conscience · Autonomy · Liberty · Ethics · Moral life · Values

Introduction

In a thoughtful paper published in HEC Forum in September, 2014, "Speak No Evil? Conscience and the Duty to Inform, Refer or Transfer Care", Aulisio and Arora argue that there is a difference between contributing to (that is, being complicit in)

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evil[1] and performing an evil action. Relying on arguments rooted in respect for the autonomy of others, they claim that a newer understanding of conscience protections in medicine is quite different from the older, well-established understanding of conscience protections. The older or *traditional* understanding is exemplified by cases where an agent seeks to avoid the performance of an evil action, whereas the newer or *contemporary* understanding of conscience protection involves worries about being complicit in an evil act. The authors argue that the contemporary understanding (and the claims of conscience protection which fall into this category) relies on an account of autonomy and, thus, on a conception of what it is to act according to one's own values. Autonomy, they argue, is a problematic foundation for contemporary appeals to conscience because it undermines the very claims that appeals to contemporary conscience protection are meant to protect. In other words, if a medical practitioner relies on others leaving space for her to exercise her own autonomy, and in turn her values, then the medical practitioner must act similarly with respect to a patient's autonomy, and in turn his values.

I argue that Aulisio and Arora's account fails because it requires as a component an impoverished conception of our moral lives. This failure is due to unnoticed assumptions about the distinction between the traditional and contemporary articulations of conscience protection. My argument proceeds as follows. First, I highlight crucial assumptions in Aulisio and Arora's argument, an argument which is illustrative of common thinking on this issue. I explain why these assumptions must be articulated in a more explicit fashion and what is missing. Next, I argue that respecting maximal play in values, though a fine goal in our liberal democratic society, raises a key issue in exactly the situations that matter in these cases. It restricts, without sufficient argumentation, aspects of our moral lives, in particular, connections between persons and their actions. Finally, I argue that Aulisio and Arora give too much weight to a too narrow conception of values. There are differences between appeals to conscience that are appropriately categorized as traditional or contemporary, and a way to make sense of conscience in the contemporary medical landscape is needed. However, the normative implications drawn by Aulisio and Arora do not follow from this distinction without further argument. I conclude that their paper is a helpful illustration of the complexity of this issue and of a common view about conscience, but insofar as their view fails to account for the richness of our moral life, they fail to resolve the issue at hand.

Crucial Assumptions in Thinking About Conscience Protection

One of the crucial assumptions of "Speak No Evil…" is the reliance of Aulisio and Arora on the context of our liberal democratic society.[2] One of the strengths of their

[1] For the purposes of this paper, I use these terms interchangeably. I also do not take care to distinguish evil and possibly evil actions, evil acts, actions and omissions, and the like. The issue under consideration involves the connection between what a medical professional does or fails to do, as rooted in her scheme of values, and what course of treatment a patient is in need of or asks for given his scheme of values.

[2] Their interpretation of such a society might be interpreted as Rawlsian, though the authors make no explicit appeal to the work of John Rawls.

paper is that they put into words what I take to be a common view of conscience protections. We might refer to this common approach as the *consistency approach.* Call this approach CA, for short. If we abide by CA, then the very protections that a medical professional, for example, a physician, seeks in a well-established conscience clause is protection against her being forced to do something that goes against her values. This claim generates a duty for that physician to treat others similarly, that is, consistently. Notice that CA included consistency in application given a set of values of individuals, and values alone. We might refer to this important aspect of CA as its *values only* aspect, or VO, for short. The physician, so this interpretation of CA goes, should defer to the patient and to her values, just as the physician sought similar deference in seeking the protection of her own conscience. Call this interpretation and its aspect CA (VO), for short. In other words, the physician should not foist her own values upon the patient, especially given that deference to the values of others is the foundation of the very protection of conscience that the physician asks for herself.

Though this account of protection of conscience, its foundation, and its normative implications are sensible, the account simplifies the interaction between patient and physician. Without delving deeply into the great amount of work on the relationship between medical professionals and their patients, we can still notice that the situations in which consideration of conscience protections are most challenging are where there exist conflicts between the physician and the patient. If a patient and a physician agree on a course of treatment, then even though the protection is in place, there is no need for appeals to a conscience clause. Problems arise in instances where in order to abide by CA (VO) a physician is required to do something that is against her values. The cases of not fully informing Ms. Means of her medical situation and the Little Sisters of the Poor versus the Affordable Care Act, discussed by Aulisio and Arora, are excellent examples.[3] It illustrates the complexity of situations of conflict and the complicated web of issues that are in play, including claims of professional standards of treatment, obligation, beneficence, and disagreement, to name only a few.

What is the appropriate response in situations in which the values of a physician and the values of a patient might conflict? We can see an answer in the form of a two-step argument in the work of Aulisio and Arora. First, they distinguish between traditional and contemporary understandings of conscience protection. This allows

[3] For a full description of these cases, see Aulisio and Arora (2014). The most relevant passage reads: "In December, the ACLU brought a lawsuit against the United States Conference of Catholic Bishops (USCCB) on behalf of Tamesha Means alleging that physicians at Mercy Health Partners in Muskegon, Michigan failed to give Ms. Means accurate information regarding fetal viability or provide the standard of care when her water broke at 18 weeks, placing her health at serious risk, because they thought that doing so would violate the Catholic mission of the institution by potentially encouraging her to terminate the pregnancy. More recently, the Little Sisters of the Poor, a Roman Catholic religious order, won the extension of a Supreme Court injunction issued by Justice Sotomayer against their having to comply with the so-called "Birth Control Mandate" of the Affordable Care Act (ACA) while the case is pending before a federal appeals court. At issue is the Order's objection to having to sign a form that, in the words of their lawyer, commits them to "authorizing and instructing their benefits administrator to provide contraceptives" in conflict with their Catholic mission" (p. 258, see this page for further context, argument, and citations).

them to place contributions with evil in a different category than the performance of evil. Second, by relying on the argument from autonomy (which fits well with the backdrop of a liberal democratic society) as justification for the physician's conscience protection in the first place, they employ the same justification to support the deference to the values of the patient. The thought is something like this: if the physician wishes her values to be respected (for example, if she is not required to perform procedures or engage in treatment options, which she finds morally objectionable, that is, *which go against her values*), then the patient *and his values* for a similar reason ought to be respected, that is, he should be allowed to undergo the procedure or engage in the treatment.

The conception of liberty operating in the background of this argument is important, especially as it relates to a person's values. Aulisio and Arora conceive of liberty, at least in part, as allowing for "maximal play to live in accord with values while not avoiding values" (p. 260).[4] This is a common way to interpret liberty and, as I noted above, one of the benefits of Aulisio and Arora's account is a similarity with a commonly held view. However, this raises two questions. First, how much work does the distinction between the traditional and contemporary understanding of conscience protection do and, relatedly, is this work supported by the arguments given? Second, what does respecting maximal play in terms of value amount to? I take up each in turn.

A Problem with the Argument for Traditional over Contemporary Conscience Protections

Consider the distinction between the traditional and contemporary accounts of what falls under the protection of conscience clauses. Now, it is the case that physicians, and other medical professionals, might seek protection not only from requirements to perform evil actions, but also protection from being associated with evil actions in certain ways, that is, to be complicit in an evil action or to contribute to evil. The distinction between traditional and contemporary might be an accurate reflection of a change in the appeals of physicians, and other medical professionals, and we can surely distinguish between instances in which one performed an evil action and in which one contributed to the performance of an evil action. I do not find fault with the distinction, but rather with the role it plays in the argument. I worry that thinking of contributing to a possibly evil act as in a different category than committing a possibly evil act does more work than has been argued for, and for two reasons.

First, it might be the case that contributing to an evil action is something that one is responsible for and on some theories of action and some accounts of moral responsibility, it is. CA (VO) rules out this possibility, and seemingly without argument. CA (VO) appears to assume the existence of two entirely separable categories. However, just as one might aim to avoid committing evil actions, one

[4] This interpretation of liberty is fairly common. Consider, for example, the first principle of justice famously articulated by Rawls, "[E]ach person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others" (Rawls 1999, p. 53).

might also aim to avoid connecting oneself up with those evil actions if it is the case (or even in the situation where it might be the case) that one's moral responsibility for what one does or fails to do transmits to the evil action. For example, if I lend you my knife at dinner and you use it to harm someone, something I did not foresee and had no reason to foresee, I am connected up with your harming the person—I gave you the knife—but not in the way in which (at least which most of us would think) I am responsible for the harm caused. I had no idea that you would do what you did. However, if I knew that were you in possession of a knife, you would harm someone and I gave you the knife, then (at least it is plausible to think) I am responsible for the harm, at least in part.[5]

One can distinguish between the performance of evil actions and contributions to evil. One can even go so far as to place them in different categories. However, I take to have illustrated here that there might be some instances in which one might be held responsible, at least in part, for an outcome that one deems to be morally objectionable and others in which one is not. Thus, what one does is not automatically trumped by a resultant imposition of values even if the former is a contribution and not an action. In other words, the distinction is acceptable, but it does not follow immediately that conscience clauses ought only protect what falls into the traditional category.

Second, if we follow CA and its component, VO, our hands are tied, and fairly tightly, with respect to how we might understand actions. Accounts of action, moral responsibility, and how we understand ourselves existing in the world and interacting with others become impoverished. CA (VO) deals in thick lines, drawn with blunt instruments where nuance and subtlety are required.

I have claimed that reliance on the distinction between traditional and contemporary and on CA (VO) appears to rule out, without sufficient argument, the possibility that a person's values might very well be bound up with certain conceptions of moral responsibility. Before describing two ways in which my criticism might be formulated, consider an example to bolster and support my claim about the limits of CA (VO). Suppose it is that case that having thought deeply about her causal role in the world, a person views herself as deeply connected to others and to her surroundings. She sees herself as able to bring about or at least contribute to the bringing about of certain states of affairs. Thus, if it is the case that a particular state of affairs obtains, it is possible, on her view, for her to have played a causal role in the obtaining of that particular state of affairs. Though this is a very crude description, it serves my purpose of highlighting an aspect of a person's moral life, for which CA (VO) does not appear to be able to account. CA (VO) appears to ignore conceptions of moral responsibility that allow for a person to be morally responsible for states of affairs involving other persons or for actions of other persons to which a person is causally connected.

Human lives, human understandings, schemes of human values, are richer than mere articulations of discrete and isolated lists of values. However, CA (VO)

[5] I do not have space to fully articulate an account of moral responsibility here or even a full explanation of contributions with evil, but thankfully the argument does not need such full articulations. All that is necessary is that accounts of moral responsibility are reasonably part of our moral life and might be held to be important to us, that is to say they are part of what we value.

appears to require that we think about values in this manner. This is because if CA (VO) allows in richer conceptions of moral life or even allows persons to value a particular conception of moral responsibility, then it is no longer the case that the physician is dependent upon mere respect for another's values in order to demand respect for her values. Rather, the situation is more complex because a physician (or any person) may, according to her conception of moral responsibility, which she values, be responsible, at least in part, for actions that others ultimately perform. What we value is rooted in a more expansive, and surely messier, account of ourselves and of our interactions with others. How we think about values, the role that values play in the argument, and, in turn, my criticism can be understood in at least two ways.

One way to articulate this criticism would be to say that claims about conscience reliant upon CA (VO) require us to think about what we value in a discrete manner, as if values populate a list which encapsulates our moral lives. This is because if CA (VO) were to allow in considerations of moral lives, more generally, as opposed to values, it would be forced to allow in conceptions of moral responsibility, like that described briefly in the last paragraph. The interconnectedness of persons, which this conception of moral responsibility admits, makes it challenging for advocates of CA (VO) to resolve conflicts of values. The argument from Aulisio and Arora goes further, as it asks us to prioritize one value in particular: liberty. This leads to a clear and easy description of how to resolve conflicts when conscience is in play, but a description that is much too simplistic and as such fails to capture the nuance of our moral lives. On this view, it seems as though one list of values bumps into another list of values and priority is given to the agent within her sphere of liberty, to use an old term, not to act in ways contrary to her list. But, as I have said, this surely fails to account for the complexity and richness of our moral lives. We do not just compare lists of values in the abstract, but understand ourselves as valuing certain things—people, projects, pursuits, et cetera—as they are embedded both within a broader context and within the everyday interactions of our daily lives. Without this kind of understanding, it is challenging to see how these values impact our lives, and why it is we might value these things in the first place. This richer account is something that an argument reliant on CA (VO) doesn't allow us to hold.

Another View of Conscience: A Richer but Messier Account

Consider a second way to understand a person's values that better captures an account of our moral life, which we might contrast with the account of moral life necessary to employ CA (VO). This second way is more complex and as such complicates things. On my view, what we would have to take into consideration in situations of conflict would not only be the physician's list of values, but also what is bound up with her moral life as a whole and to compare this broader picture with a similarly broad picture of the patient. Understanding things in this way complicates them not only because this richer notion of the moral life is more

complex, but also because it simply involves more, and thus we have more to consider. If we proceed in this manner, we better understand that what matters to individuals extends beyond themselves.

What is particularly problematic with such an extension for CA (VO), as is obvious by this point in my argument, is the inclusion of things like one's own conception of moral responsibility in the broad consideration of one's moral life, one's relationships with others, and, generally, how one is to interact in the world. If liberty is our focus, if autonomy is the foundation of conscience protection, why limit this to the impoverished account of our moral lives in terms of a list of values, especially given the importance of interactions between persons? The answer is that CA (VO) lacks the resources to make sense of a more complex moral life. It must artificially reduce our lives to lists that can be compared; otherwise it is unable to prioritize one list over the other and, thus, would fail to provide an answer in questions of conflict and fail to satisfy Aulisio and Arora's aim of distinguishing between traditional and contemporary accounts. However, we should not exclude artificially or in an ad hoc manner our conceptions of moral responsibility or our relationships with others. If an account of conscience protection, even with the aims of alleviating conflict, cannot account for these and other aspects of our morals lives, the account misses out on something important.

Now if CA (VO) cannot take on board any articulation of our moral lives more complex than a discrete list of values, and I have argued that it cannot, then it misses something important. As a result, views such as Aulisio and Arora's, which rely on CA (VO), are deficient because they fail to take into account aspects of moral life that are relevant to these situations.[6] If they were to accurately account for what is a richer moral life, the situations under consideration will become more complex. This makes them more challenging to consider philosophically, but it does more accurately reflect the medical situation. When we move beyond an account of moral life which is exclusively a particular articulation of a set of values, which must be deferred to, and allow in accounts for our relationship to the elements of our actions (broadly construed), things get messier. However, this move possesses a certain amount of intuitive plausibility. Suppose I claim that I aim to produce the most good in the world; you cannot—at least not without argument—claim that I may not consider the consequences of my actions in determining what I should do. If you restrict me in this way, my analysis will miss out on something important, the results of what I do. In a similar way, if a physician (or any person) is unable to appeal to her own conception of moral responsibility, which she might value deeply, then an argument must be offered in favor of so limiting her.

[6] If this is right so far, then accounts based on CA (VO) face a serious challenge for they cannot rule out (without further argument) claims like: I value *x* and if I were to perform (or fail to perform) *y,* this performance or failure would amount to my not being true to (or violating, or being a small pulling away from or…) *x*. *x* and *y* are connected in the right sort of way such that *y*, even if it has to do with another person, reflects me (or matters to me or transmits to me), given *x*, at least in cases where my conception of moral responsibility connects them up. I think we saw, given the earlier argument that *x* and *y* might be so connected and that arguments from consideration of CA (VO) do not given us enough resources to deny this claim.

This is another way of describing what is wrong with accounts of conscience protection reliant upon CA (VO). They inappropriately restrict what is admissible.[7] It is worth noting here that CA's component, VO, is what gives the pair a bad name. If we were to substitute a richer and complete conception of the moral life for VO, then the issue would be alleviated and my criticism would no longer apply.[8] If this move is made, however, then the account we are left with is a very different account than that offered by Aulisio and Arora. A benefit of their account, of CA (VO), is that it allows for a clear distinction between the values of a physician and the values of a patient. Once we make the move to admit richer conceptions of moral lives, conceptions that allow appeals to accounts of moral responsibility, then this is no longer the case.

One might worry that this gives too much space to the physician (or any person); however, what follows from my criticism and positive claim is not that anything goes. It does not follow that one may merely claim that she is connected up in the right way with a slew of activities of others and thus infringe upon those others. One would first need to offer a defensible account of action and of moral responsibility. In fact, for the purposes of this paper, I am only arguing that eliminating accounts of action and moral responsibility from consideration is mistaken. I have not articulated an account of what might be an appropriate substitute for VO.

Cases

It is not a surprise that these issues come to the fore in consideration of medicine and claims of conscience. Medical cases are especially interesting examples because of the relationship between a physician and a patient, and the intimate nature of a person's health concerns.

Allow me to apply what I have claimed thus far to the case offered by Aulisio and Arora of the physician who does not wish to perform an abortion because her values do not support such an action. Aulisio and Arora support the physician's appeal to conscience in this case as it fits the traditional model for conscience clause protection; this physician should not be forced or obliged to perform an evil action (evil according to her values, values to which others must defer). In contrast, consider the case of the pharmacist who does not wish to dispense a particular medication. Aulisio and Arora claim this case is different, but why? Here, there is again a clash of values, but the argument from autonomy which undergirds the physicians' right in the traditional case does not hold here because the pharmacist is not obliged to perform an evil action, she merely would be (according to her own values) acting in a manner complicit with evil.[9] The evil here, Aulisio and Arora would say, is not the

[7] One might construe this claim in a different manner, noting that it is possible to think of values in a very broad sense. If it is the case that values are understood as broad enough to include accounts of moral responsibility, I am happy to use the term. This use of values and my use of moral life appear to mean the same thing. I thank Tom McDonald for helpful discussion on this point.

[8] Consistency is, of course, not the issue, but rather a positive feature of the view. It is what is made to be consistent which causes the problem.

[9] One might claim that there are relevant differences between pharmacists and physicians, but I do not take up such concerns here. Additionally, one might claim that the physician or pharmacist could leave

pharmacist's to be a part of or to comment on because this is trumped by deference to the values of the person seeking the prescription. This analysis of the situation makes sense if we employ CA (VO), but as we have seen CA (VO) is not an appropriate reflection of our moral lives (and restricts consideration of what we value and our moral lives to a mere list of values, which is in need of further argument). Given the failure of CA (VO), the analysis of these cases is incorrect. If we account for the richness of moral lives, then these situations are not as clear-cut as Aulisio and Arora claim, but our account of them will be more accurate. The reason that we should not require that the physician who finds abortion objectionable to perform an abortion is not merely that she possesses a list of values which are not in accord with the performance of abortions, but also that in such an instance where she would be asked to perform one, she would be the person performing the action. She would be connected in the right sort of way to what she considers objectionable, to what violates her values. Similarly, in the case of the pharmacist, it might be that there are things a pharmacist could do which would connect her in the right sort of way with things that go against her own values.[10] Thus, even in using the language of values as Aulisio and Arora do, the problem persists.

Conclusion

All I take to have shown here is that reliance on CA (VO) is problematic. Aulisio and Arora's account is a thoughtful attempt to deal with a very challenging issue. I suspect that they put into words a fairly commonly held view on conscience clause protection and that they adequately describe two different ways of thinking about conscience protection in terms of the traditional and contemporary categories. However, in order to alleviate the conflict in cases in which conscience protections are appealed to, they reduce accounts of moral life to mere lists of values, and impoverished lists at that. After careful consideration, their simple categorization does more work than is argued for, and so, in terms of the normative implications of this distinction, the protection of the conscience in the traditional sense is not so clearly distinguished from the contemporary sense. Thus, we are left with the usual challenging cases of how to navigate the responsibilities of providers with the needs of patients when there is disagreement on what is needed and who is responsible.

To conclude, I have argued that Aulisio and Arora's analysis of conscience protection is inadequate. By rooting the protection in values, and thinking of what we value as comprising a discrete list, they attempt to justify a particular set of limits on conscience protections. Their argument fails because it requires us to think

Footnote 9 continued
room for the patient's values but not be required to assist in the achievement of those values. What is important here would be the avoidance of thwarting the values of the patient, which the physician or doctor might be rightly said not to be doing even if they fail to offer assistance. I thank Mark Cherry for helpful clarification on this point.

[10] It should be noticed that we can say all of this without prescribing certain values or certain conceptions of responsibility to others. Also notice that we can say all of this without making particular value judgments about what the seeker of the filling of the prescription wishes to do.

about values and about our moral lives in an impoverished, and ultimately overly restrictive, manner. They rule out accounts of action that are necessary for making sense of what we value and, more generally, our moral lives, which include interactions and relationships with others. That consideration of more than mere isolated lists of values makes the situation more complex, and messier, is not a good enough reason to ignore these other considerations. CA is defensible, but it involves a slight of hand. We ought to be consistent, and deference to what another values is often appropriate. However, CA with its component VO is not defensible, as it relies on an isolated list of values, which is too simplistic of a foundation for conscience protection. Were CA (VO) a defensible foundation, Aulisio and Arora would have offered a sound argument against the new type of conscience protections. However, as this is not the case, the matter of conscience clause protection, its relation to referral, transfer, and informing, and questions about when it is permissible to appeal to considerations of conscience remain open.

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