Conscientious Objection Based on Patient Identity: A Virtue Ethics Argument Against LGBTQ+ Discrimination

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INTRODUCTION

Across the country, states are enacting legislation that curtails LGBTQ+ rights and liberties.[1] In March 2021, Arkansas enacted Senate Bill 289, titled the Medical Ethics and Diversity Act (the "Act").[2] The Act permits medical practitioners, healthcare institutions, and insurance companies to refuse to treat, or, in the case of insurance companies, to cover, a non-critically ill person if treating the individual violates their religious or personal beliefs. Though masked as protecting religious liberties, the Act discriminates against LGBTQ+ patients. While the Act purports to protect different types of healthcare workers, I frame my discussion of the Act to discuss the physician's obligations given the changes to Arkansas law.

Even if legally permissible, I believe virtuous physicians do not consider patients' sexual orientation or gender identity when deciding whether to treat them. I will explain why a virtuous physician would never conscientiously object to treating a patient based on the patient's sexual orientation or gender identity, even if allowed, like in Arkansas. Conscientious objection based on sexual orientation or gender identity, even if permitted under state law, is always unvirtuous.

I. Senate Bill 289 and the LGBTQ+ Patient

On March 29, 2021, Governor Hutchinson adopted the Act by signing Senate Bill 289 into Arkansas state law. To protect a "right of conscience" in health care, the Act invokes traditions of the United States and the Hippocratic Oath, stating:

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> *[t]he right of conscience was central to the founding of the United States, has been deeply rooted in the history and tradition of the United States for centuries, and has been central to the practice of medicine through the Hippocratic Oath for millennia.*

As used in the Act, conscience means "religious, moral, or ethical beliefs." The Act protects medical practitioners, healthcare institutions, or healthcare payors when they act from their conscience and extends this protection to include the following: (1) the right not to participate in a healthcare service that violates his, her, or its conscience; (2) no requirement to participate in a healthcare service that violates his, her, or its conscience; and (3) no civil, criminal, or administrative liability for declining *to participate in a healthcare service that violates his, her, or its conscience.*

The Act limits which services physicians can refuse to perform: it permits conscientious objection only if the patient requires non-emergency care. Under Arkansas state law, an emergency is defined as an "immediate threat to the life or health of a patient."[3]

Before the Act, conscientious objection was limited in medical practice in the United States. The American Medical Association's ("AMA") Code of Medical Ethics states physicians can act as moral agents. The AMA's code supports conscientious objection if it is based on a moral objection to a treatment rather than discrimination against patients.[4] From the Church Amendments to the Affordable Care Act, federal law has protected practitioners' rights to object to participating in treatments contrary to their religious or moral beliefs, such as abortions, sterilization, euthanasia, or physician-assisted suicide.[5] However, the language of these laws emphasizes treatment-based objection; the laws protect healthcare workers who are unwilling to participate in medical practices based on a moral objection to a treatment. In addition, the laws specifically name procedures like sterilization, euthanasia, or physician-assisted suicide as permissible grounds for objection.

The Act extends physicians' rights to conscientious objection by removing the treatment-specific language. In Arkansas, the broad language of the law could permit conscientious objection based on a patient's LGBTQ+ identity because it does not limit objections based on type of treatments. The Act broadened conscientious objection in Arkansas to include treatment-based and patient-based objections.

II. Virtue Ethics

Virtue ethics is an ethical framework that focuses on the character of the individual performing actions during the individual's life and career. In *Nicomachean Ethics,* Aristotle writes that virtue is a state of being, such as a courageous or amiable person, rather than a system for ethical action selection.[6] Society understands these virtues as falling at the mean—or between— a deficiency and an excess. For example, the virtue of courage lies between the deficiency of cowardness and excess of rashness, never in abundance or excess.

A virtuous person exemplifies the virtues required of the person's role and performs the required functions well. Aristotle writes, "[w]e become just by doing just actions, temperate by doing temperate actions, brave by doing brave actions." In this way, we must live our virtues to become virtuous.

A. The Virtuous Physician

The virtuous physician exemplifies virtue and practices medicine in congruence with medicine's ethos. Since an individual can practice and learn virtue, it provides a unique ethical framework to distinguish between the virtuous or "good" physician and the unvirtuous or "bad" physician. Aristotle writes that life's

virtues are courage, temperance, generosity, magnificence, magnanimity, mildness, amiability, truthfulness, wit, and shame.[7] Individuals possessing these traits are virtuous, but virtuous physicians must also demonstrate traits integral to their professional duties. A virtuous physician's qualities include empathetic listening, emotional sensitivity, and respect for patients. These additional qualities create trust and comfort patients.[8] Also, the virtuous physician exemplifies trustworthiness, integrity, discernment, compassion, patience, and conscientiousness.[9] Others even include theological virtues such as faith, hope, and charity as important characteristics in a physician's practice.[10] While not an exhaustive list of the values that compose a virtuous physician, these standards are the basic requirements for physician to exemplify virtue and perform the job's functions well.

One may argue that theological virtues like faith, hope, and charity support the conscientious objection because physicians are virtuous when they are faithful, or loyal to their religious beliefs. However, this argument fails to consider the four principles of medical ethics. Using conscientious objection to withhold care from even non-critically ill patients can cause harm that is physical and emotional. A physician cannot act virtuously and simultaneously undermine non-malfeasance and beneficence.

The virtuous physician must also practice medicine in congruence with medicine's ethos, acting for the patient's benefit and taking a patient-centered approach. The patient's benefit has multiple elements, such as the medically defined good outcome, the patient's definition of a good outcome, what is dignifying to the patient, and what is considered universally good.[11] If a physician acts against a patient's good or the physician does not exemplify virtue in their own life, the physician would be considered unvirtuous.

B. Unvirtuous Conscientious Objection Through the Act

Conscientious objection is a debated topic. Some argue that physicians' values should not influence the care they provide.[12] In addition, the legalization of conscientious objection is seen by some to violate medicine's central ethos of caring for the patient.[13] Others do not view conscientious objection as wholly wrong.

Despite the debate over the role of conscientious objection in the physician's practice, conscientious objection based on a patient's LGBTQ+ identity under the Act is unvirtuous. The Act extends the understood norm of treatment-based objections to objections based on any component of health care, including a patient's LGBTQ+ identity. This patient-based objection is discriminatory and unrelated to the patient's requested medical service which may conflict with the physician's morals.[14] A virtuous physician would never refuse to treat a patient based on the patient's race, color, religion, sex, sexual orientation, gender identity, or national origin. Refusing to treat a patient because of the patient's LGBTQ+ identity is unvirtuous because it defies a physician's duty, is discriminatory, and displays a lack of respect for patients, amiability, and compassion. Even if permitted under the Act, a virtuous physician must never object to treating a patient based on the patient's sexual orientation or gender identity.

One may argue a physician can be virtuous while conscientiously objecting if the physician clearly communicates all limitations and refers the patient to another medical provider. This is the American College of Obstetricians and Gynecologists' view.[15] Under this view, physicians maintain respect for themselves as agents but ultimately provide proper care for the patient, even if their hands do not perform the service. However, to be virtuous, this objection must never be discriminatory. Even with prerequisites, objection based on gender identity and sexual orientation is discriminatory and indicates deficiencies in the physician's virtue. The simple act of objection can cause psychological pain to a patient. LGBTQ+-based discrimination and rejection causes unnecessary physiological harm like anxiety, depression, and suicidal

ideations, whereas social acceptance increases feelings of self-esteem.[16] The virtuous physician would never cause pain to the patient, as this violates the principle of non-maleficence. Regardless of actions taken before or after the objection, a physician is unvirtuous when the physician inflicts pain on a patient by conscientiously objecting to treating the patient based on LGBTQ+ status.

CONCLUSION

To avoid discrimination, a physician must have a valid reason for employing conscientious objection. The Medical Ethics and Diversity Act extends physicians' rights from treatment-based objection to patient-based objection. Arkansas's LGBTQ+ community is at risk of suffering from discriminatory healthcare practices. The physician who objects based on LGBTQ+ identity is unvirtuous because the physician's action causes psychological harm to the patient, displays deficiencies in virtues, and opposes the central ethos of medicine.

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[1] For examples of Senators and State Representatives passing laws affecting LGBTQ+ rights to protect religious liberties and fairness, see ACLU. (2021). *Legislation Affecting LGBTQ Rights Across the Country 2021.* https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2021

[2] Medical Ethics and Diversity Act, Ark. Acts 462 §§17-80-501-06 (2021). https://www.arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2021R%2FPublic%2F&file=462.pdf&ddBienniumSession=2021%2F2021R

[3] Emergency Medical Care Act, Ark. A.C.A. § 20-9-309

[4] AMA. (n.d.) *Physician Exercise of Conscience.* https://www.ama-assn.org/delivering-care/ethics/physician-exercise-conscience

[5] U.S. Department of Health and Human Services (2021). Your Conscience Rights. https://www.hhs.gov/conscience/conscience-protections/index.html

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