

Justifying Positive Appeals to Conscience: The Debate We Can't Avoid

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Abstract: The literature on conscientious objection focuses primarily on negative appeals to conscience: cases in which a health care provider refuses to provide some legal service on the basis of deeply held ethical or religious commitments. In recent years some have contended that we must also countenance *positive* appeals to conscience: cases in which a health care provider feels obligated to provide a service that is illegal. Kyle Fritz argues that the relevant criteria for protecting negative appeals to conscience in cases of abortion can, suitably modified, be equally well-satisfied in cases of positive appeals. Furthermore, Fritz maintains that this symmetry can be established without delving into the abortion debate. However, the justification of positive appeals to conscience regarding abortion depends upon contested claims in the debate over the moral permissibility of abortion. If we are to establish positive appeals to conscience in these cases, we can't avoid the debate.

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The literature on conscientious objection focuses primarily on negative appeals to conscience: cases in which a health care provider (HCP) refuses to provide some legal service on the basis of deeply held ethical or religious commitments. In recent years some have contended that we must also countenance *positive* appeals to conscience: cases in which an HCP feels obligated to provide a service that is illegal (Wicclair 2011). Whether there are symmetries between negative and positive appeals in particular cases, however, is an open question. Kyle Fritz takes up this question with respect to abortion, arguing that the relevant criteria for protecting negative appeals to conscience can, suitably modified, be equally well-satisfied in cases of positive appeals (Fritz forthcoming). If sound, this argument yields a provocative conclusion: there is at least as much reason to allow HCPs to *provide* an abortion on the basis of conscience (where the

abortion is illegal) as there is for HCPs to *refuse* to perform an abortion on the basis of conscience (where the abortion is legal).

Protecting claims of conscience can function to fairly balance burdens or interests among relevant parties without having to first resolve an underlying and intractable moral disagreement. Put simply, they can provide a way of agreeing to disagree. Fritz maintains that positive appeals to conscience can serve this function with respect to abortion: “[t]he moral permissibility of abortion is clearly hotly contested...Yet we can respect conscientious objections even when the underlying debate has not been settled” (23). In what follows I argue that this is mistaken: symmetry in appeals to conscience regarding abortion cannot be established without first settling underlying debates concerning the moral permissibility of abortion itself.

Among the criteria Fritz discusses for protecting negative appeals to conscience (provided by Magelssen 2012) are that the “burdens to the patient are acceptably small” and that the “burdens to colleagues and healthcare institutions are acceptably small.”¹ To establish that these criteria can be equally well-satisfied in cases of positive appeals to conscience as in cases of negative appeals, it must be shown that the burdens brought about by allowing an HCP to *perform* an abortion (where the abortion is illegal) are *as small or smaller* than the burdens brought about by allowing for an HCP’s conscientious *refusal* to perform an abortion (where the abortion is legal). But if abortion brings about the death of an individual with interests comparable to a child or an infant, as pro-life advocates maintain, it’s implausible that this standard is met. Consequently, establishing symmetry with respect to the relevant criteria seems to require establishing at least one of the following three claims:

- (i) The fetus is not a patient and burdens to others are irrelevant.²

¹ I take burdens to include difficulties, sacrifices, or harms.

² I use “fetus” to apply to all stages of prenatal development.

(ii) The fetus does not have interests (i.e., it cannot be benefitted or harmed).

(iii) The fetus is not significantly harmed by being killed.

The problem for Fritz's symmetry argument is that (i) is implausible for more general reasons, while both (ii) and (iii) are contested in debates over the moral permissibility of abortion.

Consider (i). If the fetus is not a patient, and burdens to others (including the fetus) are irrelevant, then they can be excluded from consideration. However, since Fritz reasonably takes the relevant criteria to apply to burdens on society more generally, there is no principled reason to deny that burdens to other individuals *are* relevant. Consequently, harm to the fetus cannot be excluded from consideration simply on the grounds that the fetus isn't a patient. In what follows I set aside (i).

Next, consider (ii) and (iii). An individual has interests if and only if it can be benefitted or harmed. If a fetus does not have interests, it cannot be harmed, and thus the death of the fetus can be excluded from consideration of the burdens that result from protecting positive appeals to conscience in cases of abortion. Alternatively, if a fetus does have interests but is not significantly harmed via abortion, then it's plausible that any such harm is "acceptably small" in a way comparable to whatever acceptably small burdens there may be in cases of negative appeals to conscience.

If the fetus can be harmed at all, then it has interests that must be taken into consideration. Pro-life advocates standardly maintain, not only that fetuses are harmed via abortion (and thus have interests), but that the harm to the fetus via abortion (i.e., death) is usually greater than

countervailing burdens (Marquis 1989: 194, Lee and George 2005: 23-24).³ Thus, the standard pro-life position entails the falsity of (ii) and (iii).

Pro-choice advocates often deny (ii), (iii), or both. Some maintain that fetuses (at least at early stages of development) do not have interests because they are not sentient or because they are unable to take an interest in their own future (Feinberg 1974, Steinbock 2009). Others argue that, while fetuses may (at later stages of development) have interests, their death is not a significant harm to them because they are less psychologically connected to (or invested in) their own futures (McMahan 2002).

Disagreements over (ii) and (iii) are not merely incidental, but central to the debate over the moral permissibility of abortion. Indeed, many arguments for or against its permissibility depend upon the truth or falsity of (ii) or (iii). Since positive appeals to conscience can satisfy the criteria for protecting conscientious objection only if at least one of these two claims is true, Fritz's claim that symmetry can be established without delving into the abortion debate is mistaken.

In response, one might draw attention to the fact that Fritz's thesis is not that positive appeals in cases of abortion are justified, but rather that they can satisfy the relevant criteria *as well as* negative appeals. Consequently, Fritz defends the conditional claim that, *if* negative appeals should be protected, then positive appeals should also be protected (2). Perhaps, then, Fritz would grant the possibility that justifying positive appeals to conscience requires delving into the abortion debate, but nevertheless maintain that this is no more the case than it is for justifying negative appeals to conscience.

³ One well-known argument for this claim is that the death of the fetus deprives it of all of the value of its future, and that it has a valuable future comparable to our own (Marquis 1989).

The problem with this response is that there is an *asymmetry* in beliefs about the burdens resulting from negative and positive appeals to conscience. Acknowledging the presence and significance of burdens resulting from protecting negative appeals of conscience does not depend upon one's beliefs about the moral status of abortion. No one denies the obvious fact that an HCP's refusal to provide an abortion often places burdens on the woman (e.g., travel to an alternative provider, time off work). And, in cases where an alternative provider is inaccessible, a refusal may effectively prevent the woman from having an abortion. These latter cases include a number of very significant burdens: the physical toll, emotional burdens, financial costs, and loss of autonomy involved pregnancy and childbirth. In contrast, beliefs about the alleged harms to the fetus (or the significance of such harms) that result from protecting positive appeals of conscience lie at the heart of the abortion debate.

For these reasons, one can reasonably accept that negative appeals to conscience can be justified when the burdens placed on the woman fall on the lower end of the spectrum, and this is so regardless of one's stance on the moral permissibility of abortion. A negative appeal to conscience is justified in cases where the burdens to a conscientious objector (e.g., violation of one's conscience, loss of moral integrity, etc.) are plausibly greater than those to the woman (e.g., the burden of travel to an accessible alternative provider).⁴ In such cases, one's belief about the weight of the burdens on each side of the scale needn't depend upon one's stance on the moral status of abortion. In cases of positive appeals to conscience, however, one's belief about the burdens (or lack thereof) on one side of the scale in particular is inextricably tied up with one's position on this contentious issue.

⁴ While burdens resulting from negative appeals can also include shame experienced by being denied a request for an abortion, this possibility is contingent upon the manner in which a referral is made, and is therefore avoidable. There is no parallel in the case of a conscientious objector who is required to violate their own moral integrity—in such cases, the central burden just *is* their acting contrary to conscience.

If the foregoing is correct, then justifying negative appeals to conscience in cases of abortion does not require settling any underlying issues in the abortion debate, but justifying positive appeals does. This threatens to undermine one of the central functions of protecting appeals to conscience: that we can agree to disagree.

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