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Conscience clause and its potential applicability in reproductive medicine

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Abstract

The advent of assisted reproductive technologies (ARTs) reshaped medical, social, and cultural landscapes and, most notably, led to the emergence of planned lesbian, gay, bisexual, transgender, and questioning (LGBTQ) families. Nevertheless, LGBTQ persons have had for many years limited rights and faced discrimination in various domains of social life, including reproductive medicine. Sometimes, national regulations may give specific rights to these patients that can enter into conflict with the personal belief system of the attending physicians. Physicians can refuse to perform certain procedures on religious or moral grounds unless the refusal harms the patient, which can be avoided by applying the conscience clause. Based on a recent United States court case, this article will discuss the concept and analyze the application of the conscience clause in ARTs used by atypical family cores.
Keywords: *conscience clause, assisted reproductive technologies, procreative beneficence, justice*

Introduction

For many years, persons with non-standard sexual orientation were confronted with various types of rights limitations, in areas such as establishing a family creation, employment, religion, and military service. Nowadays, many couples - lesbian, gay, bisexual, transgender, and questioning (LGBTQ) - are using non-coital technologies to procreate, including artificial insemination, *in vitro* fertilization (IVF), surrogacy, and genetic tests for selection of the most viable embryo[1-5], among others.

Sometimes, national regulations may give specific rights to patients that can enter into conflict with the personal belief system of the attending physicians[6-9]. When this is the case, they recognize the right of the physician to refuse to perform certain procedures, based on religious, moral or ethical grounds, unless the refusal generates a harm to the patient that can only be avoided through a positive action from the physician, a concept coined "conscience clause."

According to Edmund Pellegrino, the conscience clause generates a moral dilemma between the striving to reach moral integrity, which should be a fundamental right of any society that is tolerant of freedom of choice, *freedom of religion, and neutrality in respect to religious beliefs*, and the potential limitation of legal rights, moral beliefs or social entitlements of other persons[10]. Mason Pope argues that there are two main types of conscientious objection laws, which could potentially enforce a conscience clause in healthcare: (1) laws allowing physicians to refuse to provide certain healthcare services based on ethical, moral or religious grounds, and (2) laws forcing physicians to provide healthcare services to which they could have moral, ethical, or religious objections[11].

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In this article, we will analyze the application of the conscience clause in assisted reproductive technologies (ARTs) used by atypical family cores like LGBTQ, based on a recent court case from the United States.

The Conscience Clause in the Context of Reproductive Technologies

Usually, the conscience clause has been analyzed in the context of reproductive technologies, such as sterilization, contraception, stem cell-based therapies, or abortion. Mason Pope grouped the most important legal conscientious laws in eight main groups: (1) right to refuse abortion; (2) duty to provide abortion; (3) right to refuse contraception; (4) right to provide contraception; (5) right to refuse sterilization; (6) fertility, human immunodeficiency virus, vaccines, and counseling; (7) right to refuse end-of-life measures, and (8) comprehensive laws allowing a right to refuse[11], such as the Oklahoma Freedom of Conscience Act. Based on this act, any healthcare provider has the right to "perform, practice, engage in, assist in, recommend, counsel in favor of, make referrals for, prescribe, dispense, or administer drugs or devices or otherwise promote or encourage certain healthcare services (...). A physician, physician's assistant, registered nurse, practical nurse, pharmacist, or any employee thereof, or any other person who is an employee of, member of, or associated with the staff of a health care facility in which the performance of an activity specified in Section 3 of this act has been authorized, who in writing refuses or states an intention to refuse to participate in the activity on moral or religious grounds shall not be required to participate in the activity and shall not be disciplined by the respective licensing board or authorized regulatory department for refusing or stating an intention to refuse to participate in

the practice with respect to the activity"[12]. The conscience clause has expanded to other controversial medical issues, including aiding terrorists, transplantation from brain-dead patients[13] or euthanasia[14].

White-Domain argues that all conscience clauses must be understood through four axes: (1) the individuals/entities protected by the law (physicians, hospitals, insurance companies); (2) the healthcare services, that form the basis of the protected objection (abortion, contraception, IVF); (3) the activities that a person/entity can refuse (e.g., performing the abortion) and (4) the reason given for the objection (religious, moral ethical)[15]. Mason Pope similarly approached the issue and argued that conscientious objection laws, irrespective of their type, have four main properties: (1) they affect certain types of healthcare providers, (2) specific categories of healthcare services, (3) they have specific patient circumstances, and (4) certain conditions under which a right or obligation can be triggered[11].

The Right of Marital Status and Sexual Orientation

ARTs should be made available to everyone in need if the national regulations allow them. However, sometimes this right has been denied to patients based on their marital status or sexual orientation, based on the conscience clause. Such an example was presented in the North Coast Women's Care Medical Group v Ct.App. 4/1 D045438 San Diego County Superior Court. The plaintiff, Guadalupe Benitez, was a lesbian living with her partner, Joanne Clark, in San Diego, California. They wanted GB to become pregnant, and decided to use intravaginal self-insemination with sperm obtained from a sperm bank. After several unsuccessful attempts, GB was diagnosed with the polycystic ovarian syndrome and was referred to North Coast Women's Care Medical Group for fertility treatment. Her obstetrician and gynecologist, Christine Brody, explained to the patient that she might need intrauterine insemination, but that she could not go forward with the procedure for religious reasons (the patient previously informed her of her sexual orientation). However, she recommended two other physicians, from the same medical institution, who could perform it. For the procedure, GB wished to use fresh sperm from a friend, a procedure which was not routinely done at the clinic, due to legal issues. As a consequence, GB accepted to use sperm from a sperm bank for the procedure. CB went on a vacation, and the case was taken over by dr. Douglas Fenton, who was also against the procedure. DF was not informed by the decision to use sperm from a sperm bank, and believed that the parties agreed to use fresh sperm; he was the only physician from the Center who was licensed to perform the needed tasks for IVF with fresh sperm. As a consequence, he referred the patient to Dr. Kettle, from another center, who finally performed the procedure. Soon after, GB sued the North Coast Center and its physicians based on several issues, including sexual orientation discrimination[16,17]. The court ruled against the physicians, and excluded from the decision-making process any arguments appertaining to medical ethics. More explicitly, conscience clause was considered as not being applicable in this instance as (1) the Center accepted GB as the patient, and therefore entered in a contractual relationship and (2) the Center did not have a specific issue with the procedure (intrauterine insemination), but with the sexual orientation of the plaintiff[16]. Therefore, from an ethical point of view, we should regard the conscience clause as an average of three ethical/moral principles - personal autonomy of the physician versus reproductive autonomy of the patient and justice, which should be closely balanced in clinical practice to minimize the risks of potential malpractice suits. The personal autonomy of the physician can be manifested in two main areas in his/her relation with the patient: (1) in accepting to enter a physician-patient relationship and (2) in accepting or refusing to perform various medical procedures. The acceptance of the initiation of the physician-patient relationship is voluntary, unless there is an emergency, case in which this relationship enters in force automatically (the physician has an absolute duty to aid those who, without a prompt medical intervention, will have a high risk or mortality or other significant adverse health-related consequences). Once the physician-patient relationship has been established, the physician has a moral duty to aid his patient, as much as she/he possibly can, from a medical point of view. If something appears during the physician-patient relationship, that renders the physician unable to fulfill this moral duty (such as medical non-competence, diverging opinions regarding the therapeutic management, or issues appertaining to the conscience clause), he can terminate, in certain conditions, the relationship. In this case however, the first physician delayed significantly this procedure, which potentially delayed the pregnancy, which can be interpreted as maleficence, and therefore against the established norms of medical ethics.

According to the principle of justice, we should treat equals equally, and unequals, unequally[18]; the inequality in treatment should be however based on elements that are relevant to the generation of an unequal treatment, and not on subjective criteria such as race, sexual orientation, gender, political or religious affiliation, and so on.

In the case mentioned above, the physicians did not accept to perform the procedure due to the sexual orientation of the patient but accepted to perform similar procedures in heterosexual couples. The unequal treatment was not generated by a morally relevant inequality, which could have been, for example, the presence of additional pathologies that would have been able to decrease the success odds. Therefore, we believe that the principle of justice was not respected in this instance and that the action of the physician was not morally acceptable. The conscience clause cannot overpass basic ethical norms of medical practice, such as justice.

Conclusions

In conclusion, ARTs should not be restricted to atypical family cores as it contradicts the basic principle of justice, and can generate maleficence. ■

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