# Religious Beliefs, the Courts, and Healthcare Decision-Making

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Religious beliefs have a powerful, important and often health-promoting role in medicine: Patients and families derive great comfort from their beliefs – in their faith in God's power and, in end-of-life cases, in the assurance about the afterlife that typically comes with such belief. Further, there is some empirical confirmation that prayer is efficacious in promoting health (http://www.webmd.com/balance/features/can-prayer-heal).

Religious beliefs, however, can also be toxic to good health care: They can discourage people from seeking the best available treatments – for themselves or, worse, for incapacitated loved ones – and they can be used as a contrivance to achieve other, more self-serving, goals.

Put differently, not all religious beliefs are created equal, even though they have an equal, or nearly so, influence on how health care professionals (HCP's) respond to family requests – in largest part because there is no systematic way of distinguishing morally and religiously sound or legitimate beliefs from unsound, illegitimate ones. As I will show below, the courts have, on the whole, sidestepped all questions of legitimacy. This should be no surprise: Religious beliefs would seem, by their very nature, to preclude something like a rational analysis of their validity, with such skepticism serving as the underlying premise of the "Establishment Clause" of the First Amendment: We are a nation that legally respects, or at least tolerates, a wide range of beliefs.

The one, very limited, exception the courts have been willing to address is when beliefs, and their corresponding actions, represent a serious threat of harm to *others*, particularly vulnerable others like children. Even in those cases, however, the courts have focused on the *impact* of beliefs, as opposed to an evaluation of their legitimacy. What counts as sufficiently 'harmful' is obviously a slippery concept, and the widely variant court rulings have matched that tenuous characterization. In some contexts, though – e.g., surrogate health care choices – the harm can be obvious, direct and significant. Despite this, again as I will discuss below, those beliefs are rarely questioned, let alone given the scrutiny that harm-causing secular beliefs routinely receive.

In what follows I will discuss the general approach the courts have taken, using last year's Supreme Court *Hobby Lobby* ruling as an exemplar. I will then compare that to other legal standards, here using California's Conscience Clause as the model. From there I focus on some

particularly troubling cases I have encountered as a clinical ethicist and show that these reveal why, in certain contexts, it is appropriate to evaluate the rational coherency of religious beliefs.

*The Courts and Religious Standards*

The *Hobby Lobby* case was groundbreaking for a number of reasons, including that it extended corporate personhood status to include protection of the company's religious beliefs. You'll recall the case was brought by Hobby Lobby, owned by the Evangelical Christian Green family, and Conestoga Wood Products, owned by the Mennonite Hahn family. They argued their companies should be given a religious exemption from the contraceptive mandate clause of the Affordable Care Act (ACA) because it violated their religious beliefs. The sharply divided court agreed, but took some pains to restrict its impact by declaring that it applied only to "closely held" corporations.

While women's rights groups decried the negative impact on their health care choices (www.huffingtonpost.com/lisa-bloom/why-the-hobby-lobby-decis_b_5565115.html), many pundits' initially argued that the "closely held" restriction meant it would apply only very narrowly, to a very few companies (www.star-telegram.com/2014/07/01/5943406/a-narrow-decision-on-hobby-lobby.html). Within days, however, the Court had already extended its effect by granting a similar exemption to Wheaton College – hardly a closely held company – while also ordering appellate courts "to reconsider cases in which [those courts] had rejected challenges from corporations that object to providing insurance that covers *any* contraceptive services at all" (http://www.thenation.com/blog/180509/supreme-court-has-already-expanded-its-narrow-hobby-lobby-ruling).

Within weeks, in fact, over 80 other companies had indicated they too would file legal papers seeking comparable exemptions. Some commentators have suggested that thousands, even tens of thousands, of companies could claim the mandate violates their religious beliefs, potentially affecting millions of employees (www.thedailybeast.com/articles/2014/06/30/after-hobby-lobby-these-77-corporations-will-drop-birth-control-coverage.html?utm_medium=email&utm_source=newsletter&utm_campaign=cheatsheet_morning&cid=newsletter;email;cheatsheet_morning&utm_term=Cheat).

I won't address here what many progressives consider the most troubling aspect of this ruling and its predecessor, *Citizens United*: namely, the granting of legal personhood and thus Constitutional protection to corporations.[i] Most of the public analysis has focused on that issue and, in particular, just what the Court meant by "closely held." The Court initially defined it as companies in which more than 50 percent of the stock is owned by five or fewer individuals; as the extensions described above show, however, they very quickly moved beyond that narrow characterization. To whom the protections provided by *Hobby Lobby* apply, in short, is and will continue to be a moving target.

Largely absent from the Court's ruling, though, as well as from resulting commentary is whether there are grounds upon which one may legitimately challenge what counts as a *qualifying religious belief*. The Court, on the whole consistent with its previous rulings on this point, was silent: All a company need do is sign a declaration noting that compliance with the ACA's contraception provision violates its religious beliefs; it need not explain *what* those beliefs are or from what tradition they emerge. They need simply state that they have them.

And sure enough, also within days of the ruling, The Satanic Temple used *Hobby Lobby* to claim a religious exemption against mandated information provisions when women seek an abortion. They argued that these requirements, present in many states, run contrary to a scientific understanding of the world and thus violate their religious beliefs. They drafted "a letter for women who are considering an abortion. The letter explains our position and puts the care provider on notice that a failure to respect our call for an exemption from state-mandated informed consent materials constitutes a violation of our religious liberty"[i] (www.theatlantic.com/politics/archive/2014/07/satanists-troll-the-hobby-lobby-decision/375268/).

The *Hobby Lobby* ruling is hardly unique in its avoidance of qualifying standards. The courts have, on the whole, granted wide latitude on what sorts of beliefs should be legally protected.[ii] The only recent case in which the Supreme Court made an attempt to characterize legitimate belief – their 1990 decision that Native Americans may not use peyote for religious ritual (*Employment Division v. Smith*) – was roundly criticized and was the motivation for Congress passing, in 1996, the Religious Freedom Restoration Act: the very law that served as the basis for the *Hobby Lobby* ruling.

The source for the reluctance to determine standards is of course the "establishment clause" of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Who is Congress (or the Court) to be the judge of whether someone's particular beliefs meet their requirements? How did they get the lock on religious truth? Such sensibilities have never stopped politicians from declaring their access to said truth,[iii] but fortunately the Court has consistently rejected such silliness.

*States and Conscience Clauses*

This same reluctance also informs how most every state approaches its respective Health Care Conscience Clause. Such clauses allow a HCP to opt out of certain controversial medical procedures, particularly physician assisted suicide (where otherwise legal) and reproductive care. California's version is typical: It allows HCP's to simply sign a declaration that they object to participation in the procedure on "moral, ethical, or religious grounds."

I have argued elsewhere[iv] that the special duties attached to professional status mean that HCP's should, in fact, have to justify the exemption, much as one has to justify

conscientious objection from military service. In both cases, there is an important social good at stake, with corresponding professional or citizenship duties, and thus exemption should demand more than just the equivalent of "no thanks."[v] But that demand would generally mean merely being able to show that one is a genuine adherent of a faith that rejects such procedures or that one's other moral beliefs and actions are generally consistent with the request for exemption. That is, and again much like military conscientious objection, the demand calls for evidence of the associated belief system and general consistency therein.

Reaction to that publication included the same sort of reluctance as above: Who are we to question someone's beliefs? If they say they have them, shouldn't that be enough?

It is enough when those beliefs are strictly private (or as strictly so as they can be within a social environment) and when one has not voluntarily taken on special role-based duties to provide expert service to others, e.g., when one becomes a professional. When there are, however, such duties, and when there is a clear and direct connection between beliefs and harm to others, government must balance the good of respecting a range of beliefs against a reduction of those harms. To use an extreme example, no court would allow that religious beliefs are sufficient justification for human sacrifice. But what about refusal to have one's children immunized? Or to refuse live-saving blood products for a minor child? Or to refuse a potentially life-saving surgical procedure to remove a bone tumor?[vi]

Court rulings on related questions have been varied and wide-ranging—to the point of being inconsistent. For example, they have long said parents generally may not refuse the provision of life-saving blood products to minor children, in Jehovah's Witness cases, but they've been much more reticent to intervene with Christian Scientists. And, in California, parents may refuse to immunize their children against a range of diseases simply by signing a form that declares they have an opposing "personal belief."[vii]

*Religious Beliefs and Clinical Ethics*

In short, legal standards here are of limited help to someone trying to work out the appropriate response when a religiously-based reason is given for an action that causes harm to others. If the courts cannot determine how to balance the competing considerations, how can a physician or other HCP?

Such cases have been among the most wrenching in my work as a clinical ethicist – parents refusing a relatively simple and life-saving surgical intervention for their adult, if incapacitated child, because it would require a blood transfusion; family keeping a loved one in a permanent, and thus incurable, vegetative state – despite the patient's previously stated wishes to the contrary – because they are convinced God will intervene; family insisting on aggressive, and thereby harm-causing, medical interventions that merely delay death, again because "God will save her;" even a case in which a family member refused pain medications for his dying, and suffering, mother because he was concerned God would be offended at the (slight) potential

that her respiratory capacity would be reduced. These cases create for HCP's a terrible bind, what ethicists call "ethical distress:" knowing, or at least being very confident about the right choice, but being unable to act upon it because of structural conditions (e.g., the law, economic constraints, power dynamics).

Now, such harm-causing decisions occur every day in hospitals across the country, with families in denial, or trying to work out guilt, or dealing with a whole host of other mainly secular reasons. In those situations, the treating team will typically work stridently with the family to help them move past the psychological barrier to do right by their loved one, and frequently with great success. And when they fail, they will even sometimes seek a court order to change the patient's legal representative, so as to protect the rights and well-being of their patient.

Strikingly, however, when religious beliefs are invoked, the common reaction from HCP's is to back off and accede to the decision, even when they are dismayed by the choice and the harm it will cause their patient. They do so for the same reasons noted above: Who are they to question, let along aggressively challenge, someone's religious beliefs? Confused medical facts or psychological impediments, yes; "the miracle will happen," very rarely. They will continue to counsel and try to educate, but almost never directly challenge; and I've never seen a hospital pursue a court order under these conditions.[viii]

To make matters worse, it is not unusual for such religious appeals to be invoked insincerely. Savvy decision-makers with ulterior motives – I've seen everything from financial gain, to fear, to denial, to sibling rivalry, to maleficence – pretty quickly pick up that they don't get push-back on the religious reason and that becomes their dominant argument. And the treating team becomes largely paralyzed.

*Possible Standards?*

It is no surprise that the courts have stayed as far away from these questions as possible, given the Establishment Clause and our culture of tolerance. Hence HCP's, and others in a similar position, are left in that terrible bind: They are unable to fulfill their primary professional duty to protect the well-being of their patient, but also unable to change the conditions that produce the harms.

Those harms to patients are often so great, however, as is the psychological trauma for HCP's, that I have proposed a compromise: A very minimal standard of rationality – internal coherence – can and should be applied to religiously-based choices that cause harm to others.

The details of this argument are explained elsewhere,[ix] but the key principles are these—each necessary and all three sufficient:

1. When the decision is about a primarily secular issue – such as health care – primarily secular justifications should be used to determine the best course of action. Note, this does not mean that the range of spiritual concerns associated with the ramifications of health care must be subsumed under secular rationales, just that the primary *treatment* choices must be chiefly based on the secular.
2. When the choices have the clear potential of directly and significantly impacting the well-being of another, and when that person does not have the capacity or authority to choose otherwise, the reasons given must be chiefly rooted in widely accepted ethical standards.
3. Among such standards is that the system of beliefs in which the justification is rooted must meet minimal rational standards of internal coherency; one cannot rationally hold views that are mutually contradictory and one cannot ethically cause harm to others when the justifications provided do not meet the standard of internal consistency.

In at least one of the cases alluded to above, the justifications failed the coherency standard: The family member was expressing values ("honor thy parents") while making choices that were at the same time disrespectful (of his father) and harmful (to his mother). But these inconsistencies were always couched in religious verbiage and thus the treating team felt impotent to address them.

Now, given the absence of clear legal guidelines, even if this coherency standard had been in place as part of hospital policy, the treating team would not have been able to use the *law* to coerce the decision-maker. They *would*, however, have been empowered to use the same educational and counseling techniques as they would if the decision-maker had been relying on irrational secular reasons. Would it have made a difference? In this particular case, probably not: There was, as there almost always is, far more going on in the decisional and family dynamic than religious beliefs only. But it *might* have and given the suffering the mother was experiencing, every option should have been explored. Further, it might make a difference in a future case.

Admittedly, this standard cannot resolve all related questions: just as decision-makers sometimes use religious language to mask true motives, so also will such persons figure out to verbalize more coherent reasoning. But it will help with *some*, particularly when decision makers want to do the right thing but sometimes just need more directed motivation to help them get there.

Hence the importance of the *empowerment* point: Some HCP's, e.g., those in palliative care or hospice, are masterful at the counseling, educating, and hand-holding that helps family members move past (secular) psychological and emotional impediments to act rightly on behalf of their loved ones; they truly are *extraordinarily* skillful and caring. This proposed standard would simply give HCP's grounds to use those skills in cases in which irrational religious justifications dominate.

One other recommendation: Pick your legal representative *very carefully*![x] In most of the cases in which these decision processes go wrong, it is because either no representative was picked in advance – in which case the most aggressive family member prevailed – or the patient had simply followed culture or tradition and picked the eldest child, regardless of his/her understanding of the patient's wishes, of his/her ability to manage the inevitable emotional whirlwind, or of his/her ulterior motives.

I urge, thus, that you give careful thought to who will be the best able to deal with that whirlwind and who will genuinely speak as *you* would, were you able. Then sit down and *talk* with that person, and any others who likely will be involved, letting them know your end-of-life values and hopes. You do them a great service by having those conversations now.

*Notes*

[i] In a previous paper I addressed similar questions, concluding that legal (and moral) accountability can rightly be ascribed to both the corporation and its principal officers, *if* it has a particular type of governance structure. See, Meyers, Christopher. "The Corporation, Its Members, and Moral Accountability," *Business and Professional Ethics Journal*, Vol. 3, #1, 1983, pp. 33-45.

[ii] Note this question is distinct from that of church-state separation; on that, the court has been all over the map, with recent rulings allowing considerable overlap – see, e.g., last year's *Town of Greece v. Galloway* in which the Court permitted town meetings to be opened with explicitly Christian prayers.

[iii] See, e.g., 2014 Georgia Congressional candidate Jody Hice's comments that Islam is not a religion and doesn't deserve First Amendment protection (www.ajc.com/weblogs/jay-bookman/2014/jun/23/first-amendment-only-christians/Government).

[iv] "An Obligation to Provide Abortion Services: What Happens When Physicians Refuse?" (with Robert Woods, J.D.), *Journal of Medical Ethics*, Vol. 22, No. 2, April 1996, pp. 115-120; and "Conscientious Objection? Yes, But Make Sure It Is Genuine," with Robert Woods. Peer Commentary on "Conscientious Objection and Emergency Contraception," by Robert F. Card *American Journal of Bioethics*, Vol. 7, #6, June 2007, pp. 19-21.

[v] In the case that motivated the publication, it appeared some physicians were opting out for economic or aesthetic reasons, not genuinely religious, moral or ethical. Their choices also put the hospital in a Catch-22, as it had a legal duty to provide reproductive services for wards of the state.

[vi] One of my earliest clinical ethics cases involved Pamela Hamilton, whose parents' religious beliefs, they argued, precluded them from allowing any "invasive" medical procedures. Pamela was eventually removed from the home by Tennessee Child Protective Services, only to die from the disease a few years later (http://articles.chicagotribune.com/1985-03-30/sports/8501180243_1_dr-frank-haraf-dr-brian-corden-pamela-hamilton).

[vii] Many of these exemptions, now present in a number of states, are based on parents' ill-founded beliefs—religious and otherwise—that vaccinations cause illnesses. One result of these choices has been a significant increase in measles cases throughout the United States (www.washingtonpost.com/opinions/as-measles-cases-increase-a-sharp-call-for-vaccinations/2014/05/29/95d0fb5a-df88-11e3-810f-764fe508b82d_story.html). See also: http://www.theatlantic.com/health/archive/2014/09/wealthy-la-schools-vaccination-rates-are-as-low-as-south-sudans/380252/.

[viii] Last year's Jahi McMath case (http://www.cnn.com/2014/01/06/health/jahi-mcmath-girl-brain-dead/) would appear to be one such example, but, first, it was the family who sought the court order to stay removal of ventilator support and, second, according to what was made public, the family did not make a religious appeal until relatively late in the conversation.

[ix] This position emerged out of research conducted with Stewart Eskew, a former CSUB Philosophy student and now ABD at Wisconsin, Madison. It was published as, "Religious Beliefs and Surrogate Medical Decision-Making," with Stewart Eskew, *Journal of Clinical Ethics*, Vol. 20, #2, 2009, pp. 192-200.

[x] Ok, first pick a legal representative to speak on your behalf in the case you are unable. That's done simply enough by filling out a Durable Power of Attorney for Healthcare. The California Attorney General's office has a good one

at: http://ag.ca.gov/consumers/pdf/AHCDS1.pdf. This version, like nearly all, allows you to select a primary and secondary agent, as well as to indicate specific or general wishes (e.g., do not attempt resuscitation if I cannot survive to a meaningful life, as determined by my legal representative).