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Also in this issue: "Conscience Rights under the New HHS Rule," by Marie T. Hilliard, RN

TEN HARMS OF THE "EQUALITY" ACT

Jozef Zalot

On May 17, 2019, the United States House of Representatives passed the Equality Act (H.R. 5, 116th cong. [2019]) by a vote of 236 to 173. This bill is touted by supporters as a necessary measure to protect individuals from unjust discrimination based on sexual orientation or gender identity. Yet when one reads the bill it very quickly becomes evident that it goes far beyond this stated claim. There are many harms that arise from the so-called Equality Act; here are ten that every citizen needs to know.

- *Sex* no longer means male or female. The Civil Rights Act of 1964 banned discrimination based on sex, clearly understood as biological sex. The Equality Act expands the understanding of sex to include sexual orientation and gender identity. These would now be protected classes. The act makes this change to the Civil Rights Act (in 13 different sections), the Civil Reform Act of 1978, the Government Employee Rights Act of 1991, and the Congressional Accountability Act of 1995.
- *Sex* is defined as "a perception or belief, even if inaccurate, concerning the . . . sex (including sexual orientation and gender identity) of the individual" (§1101[a][1][B]). This new definition of sex raises three startling concerns. First, it classifies sex as a perception (or belief) that one has of oneself, a perception that may or may not have any basis in reality—let alone logic. One wonders when the government will redefine race, age, and handicap to mean whatever an individual wants them to mean. Second, it maintains that a person's perception of his or her sex is "correct" and will be recognized (and protected) by federal law, even when it is demonstrably untrue. Third, the definition completely rejects biological reality, the objective fact that men and women are differentiated by XX/XY chromosomes, genitalia, and capacity for reproduction.
- The act states that its purpose is to "*expand*, as well as clarify, confirm and create greater consistency in the protections and remedies against discrimination on the basis of all covered characteristics and *to provide* guidance and *notice* to individuals, organizations, corporations, and agencies regarding their *obligations under the law*" (§2[b], emphasis added). In addition to "expanding" sex-discrimination protections to sexual orientation and gender identity, the act "provides notice" to all—particularly those who question or have religious or moral objection to homosexual acts or gender "transitioning"—that they must conform to new, government-imposed obligations that carry the weight of federal law. In short, the act creates a protected class based solely on *belief* while empowering the federal government to punish *disbelief*.[1]
- With respect to the rules governing the practical application of this new notion of sex, the act states, "An individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, *that is in accordance with the individual's gender identity*" (§1101[b][2], emphasis added). Because gender identity is defined as whatever one wishes it to mean (perception, belief), federal law is opening formerly sex-specific facilities to anyone who wants to use them, including sexual predators who have used similar state and local ordinances to gain access to such facilities.[2] My wife and daughter will be forced to share a bathroom with these people.
- Under "Findings and Purpose," the act states that "discrimination against a married same-sex couple could be based on the sex stereotype that marriage should only be between a heterosexual couple" (§2[a][2]). This language means that under federal law it will be discriminatory to believe that marriage is between one man and one woman. The redefinition of marriage would now be complete.
- In the same section, the act states that "conversion therapy" constitutes a form of discrimination against lesbian, gay, bisexual, transgender and gender-queer identifying people" (§2[a][7]). This means that

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mental health professionals will now be barred from (1) exploring the reasons for a patient's (including a child's) perception that he or she is the "wrong" gender, (2) determining any underlying mental health issues, (3) identifying possible contributing factors such as social media use or social contagion, and (4) helping the patient to accept his or her bodily reality.[3] It is important to note that numerous state and local jurisdictions have already passed laws banning such therapy.[4]

- This section also states that it is discriminatory for "child placing agencies to refuse to serve same-sex couples and LGBT individuals" (§2[a][19]). Federal law will now compel foster care and adoption agencies (including Catholic agencies) to place children in households where they will be denied father–mother parenting. It also compels them to place children with people who self-identify as lesbian, gay, bisexual, transgender, or genderqueer.
- Under "Public Accommodations," the act states that its nondiscrimination provisions apply to "any establishment that provides a good, service, or program," including health care (§208[1] and §2[a][3]). The clear implication of this language is that bakers will be forced to make cakes for same-sex "weddings," and clinicians and health care institutions (including Catholic ones) will be compelled to provide the full range of medically accepted "treatments" for gender dysphoria. These treatments include affirming psychotherapy, puberty-blocking and cross-sex hormones, and sex reassignment surgeries.
- Under "Claims," the act states that the Religious Freedom Restoration Act of 1993 "shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title (of this Act)" (§1107). This means that federal religious liberty protections are voided with regard to any issue dealing with sexual orientation or gender identity. The federal government can force the cake maker to bake the cake and the Catholic (or any) hospital to provide "transitioning" services.
- Under "Unlawful Employment Practices," the act states, "In a situation in which sex is a bona fide occupational qualification, individuals are recognized as qualified in accordance with their gender identity" (§701A[b][3]). This means that the teacher who monitors the girls' locker room at your child's school, or the officer who conducts private pat-down screenings for women at the airport, can now be a biological man who identifies as a woman.

There are many other shortcomings with the Equality Act—including its treatment of nondiscrimination regarding "pregnancy . . . or a related medical condition" (read abortion)—but the focus of this essay is sexual orientation and gender identity. This is a very harmful bill. My hope is that the Senate will reject the "Equality" Act, as will the president. But who knows?

Notes

1. Chad Felix Greene, "How the So-Called Equality Act Threatens Speech, Religion, and Women's Rights," *The Federalist*," April 1, 2019, https://thefederalist.com/.
2. See Bre Payton,"Five-Year-Old Allegedly Sexually Assaulted in School Bathroom Because of Secret Transgender Policy," *The Federalist*, October 4, 2018, https://thefederalist.com/; and Steve Mayes, "Cross-Dressing Sex Predator Sentenced for Clackamas Aquatic Park Crimes," *The Oregonian*, October 27, 2011, https://www.orewgonlive.com/.
3. Walt Heyer, a biological male who "transitioned" to a woman and then "transitioned" back, states that bans on so called "conversion therapy" exist because transgender advocates do not want children (and adults) to desist from their transgender perceptions. See Heritage Foundation, "The Medical Harms of Hormonal and Surgical Interventions for Gender Dysphoric Children," panel discussion, March 28, 2019, https://www.heritage.org/gender/event/the-medical-harms-hormonal-and-surgical-interventions-gender-dysphoric-children/.
4. Movement Advancment Project, "Conversion Therapy Laws," accessed June 7, 2019, https://www.lgbtmap.org/equality-maps/conversion_therapy/.

Conscience Rights under the New HHS Rule

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The reason many of our ancestors came to America, long before the United States was founded, was for religious freedom. The very first amendment to the United States Constitution protects not only the freedom to worship as one wishes, but the free exercise of religion within society (the Establishment and Free Exercise clauses, respectively). But increasingly, some medical ethicists, and clearly many employers, are coercing health care providers to leave their religious beliefs in the locker when they don their scrubs or lab coats.[1]

This is documented in a list of conscience violations reported in a survey of the members of the Catholic Medical Association, and presented to the federal government in support of the final rule protecting conscience rights in health care recently promulgated by the US Department of Health and Human Services (HHS).[2] The examples are staggering: in states where physician-assisted suicide is legal, palliative care physicians are told that they must

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implement such procedures; medical students are given poor grades for refusing to participate in sterilizing procedures; and in egregious violations, employers coerce nurses to participate in abortion.[3]

These violations of conscience and religious freedom have continued to occur in violation of various existing federal laws, such as the Church Amendments.[4] Administrative recourse is necessary because of the inability of any private right of action to resist such discrimination.[5] The federal government, under this final rule, is able to withdraw HHS-appropriated funds from entities that discriminate against the exercise of conscience, moral convictions, and sincere religious beliefs in the provision of health care.

The new rule protects not only health care providers, but other health care entities as well. These include post-graduate physician-training programs, hospitals, medical laboratories, entities engaging in biomedical or behavioral research, pharmacies, provider-sponsored organizations, health maintenance organizations, health insurance issuers, health insurance plans, and plan sponsors and third-party administrators.[6]

An Enforcement Mechanism

The violations of the rights of sponsors of health care ministries is best exemplified by the continuing harassment of the Little Sisters of the Poor, who despite receiving relief from the Supreme Court, continue to find themselves faced with attempts by state legislatures to coerce them to provide contraception to their employees.[7] In fact, this final rule protects not only health care entities, but also the patients they serve, who may object to certain procedures. The health care community is a moral community, dedicated to the vocation of healing, not mutilation and death.

Without conscience protection, how are providers able to address the best-interest needs of their patients, or function as patient advocates and whistle-blowers when patient best interests are violated? Health care providers are not automated vending machines simply responding to the autonomous wishes of patients. This violates not only patient best interests, but also the professional dictate to do no harm. And of even greater concern is what will happen to the health care ethos when only those willing to engage in mutilating and death-inducing procedures are allowed into the healing professions.

The final rule does not create new law. It prevents violations of existing legal protections of conscience under the Church, Coates-Snow, and Weldon amendments; Affordable Care Act; Public Health Service Act; and certain Medicaid and Medicare provisions in the implementation of federally funded health care. The 2011 HHS rule addressed only three federal conscience-protections laws. This final rule implements approximately twenty-five provisions.

It gives examples of protections against coercion to pay for, perform, facilitate, refer for, assist in, provide training for, or provide coverage for abortion, sterilization, and assisted suicide. It also cites protections against performing or assisting in "any lawful health service or research activity" or "any part of a health service program or research activity" that violate sincere religious beliefs or moral convictions.[8]

Furthermore, it sets up procedures, similar to other civil rights laws, for enforcing these protections. These include methods of remediating the discrimination—including acts of intimidation and retaliation—by withholding federally appropriated funds from public, private, or nonprofit entities, including universities and schools that provide health care training. It also requires certification of compliance, appropriate record keeping, and assurances of non-retaliation against complainants.

Conscience is the internal sense of what is right or wrong—beneficent or maleficent in care—and the freedom to choose between them and thus to act in conformity with that choice.[9] Protecting the conscience rights of health care providers also protects patients. Health care communities are moral communities, and those of us who are members of such communities must be allowed to provide care consistent with that ethos.

Limitations of the Final Rule

Patient autonomy and managerial authority create obligations as well as the threat of being charged with patient abandonment. Providers can also be prevented from exercising professional judgment as to what constitutes the best interests of the patient. Today patient autonomy appears to trump all other ethical principles. Without provisions for conscientious objection, conflicts with personal beliefs and values can lead to escalating ethical dilemmas for health care providers. The self-perception of the provider is affected, causing stress and leading to burnout. Compromising moral integrity can compromise patient care.

The final rule clearly provides for conscientious objection; however, while providing direction for entities in the delivery of health care, it is less instructive to the provider who seeks to deliver care without being charged with patient abandonment or patient assault for providing unwanted care. Similar problems face agencies charged with negligence.

How can patient autonomy be respected without compromising professional integrity? Employers, professional associations, and even lawmakers and regulators have suggested that a patient referral resolves this dilemma. But a referral involves the health care provider in morally illicit formal cooperation in the very evil which he or she attempts to avoid. The referrer continues to intend that the immoral procedure occur, but just carried out by another. That is what in fact the act of referral accomplishes. The final rule is very clear about the protections of health care providers against being forced to refer a patient for the procedures it identifies. Furthermore, it defines *referral* broadly: "Referral or refer for includes the provision of information in oral, written, or electronic form (including names, addresses, phone numbers,

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email or web addresses, directions, instructions, descriptions, or other information resources), where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving funding or financing for, training in, obtaining, or performing a particular health care service, program, activity, or procedure."[10]

Thus, being coerced to facilitate an action that violates conscience, deeply held religious beliefs, or moral convictions is discriminatory. However, employers may require a protected employee to inform them in advance of objections to referring for, participating in, or assisting the performance of specific procedures if there is a reasonable likelihood that the protected entity, including an individual, may be asked to do so. Reasonable accommodations will not be deemed discriminatory.

Another morally licit resolution, less clearly articulated in the final rule, is transfer of care, which respects the rights of patients as well as those of health care providers. The patient has a right to make decisions concerning health care and regarding how the medical record is shared. All health care agencies, as well as providers, have limitations on the types of care or procedures offered, and they have policies to address such limitations. In such cases, there is a transfer of care to another provider or agency. To avoid being complicit and cooperating in an immoral procedure, the provider or agency to which the patient is transferred is to be selected by the patient, or management, in the case of a conscientiously objecting employee. The patient continues to be provided with all life-affirming and life-sustaining care until the transfer occurs.

Fortunately, the HHS Office of Civil Rights has created a mechanism for persons to seek recourse if they have experienced discrimination in the delivery of health care. The Conscience and Religious Freedom Division receives complaints of discrimination and has been responsive to them. This resource is available to all and represents a significant awareness by the federal government of the importance of respecting the conscience, moral convictions, and religious beliefs protected by federal law and the US Constitution.[11]

Notes

1. Ronit Y. Stahl and Ezekiel J. Emanuel, "Physicians, Not Conscripts—Conscientious Objection in Health Care," *New England Journal of Medicine* 376.14 (April 6, 2017): 1380–1385, doi: 10.1056/NEJMsb1612472.
2. US Department of Health and Human Services (HHS), "HHS Announces Final Conscience Rule Protecting Health Care Entities and Individuals," press release, May 2, 2019, https://www.hhs.gov/about/news/2019/05/02/hhs-announces-final-conscience-rule-protecting-health-care-entities-and-individuals.html.
3. *Cenzon-Decarlo v. Mount Sinai Hospital*, 626 F.3d 695 (2d Cir. November 23, 2010); and Mary Ellen Kelly, "Hospital Apologizes to Nurses Who Refused to Assist in Abortion," *First Things*, May 6, 2010, https://www.firstthings.com/blogs/firstthoughts/2010/05/hospital-apologizes-to-nurses-who-refused-to-assist-in-abortion.
4. These amendments were enacted in the 1970s to protect the conscience rights of individuals and entities that objected to performing or assisting in abortions and sterilization procedures on the basis of religious beliefs or moral convictions.
5. *Cenzon-DeCarlo v. Mount Sinai Hospital*.
6. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, §88.2 (May 21, 2019).
7. Nicole Russell, "Democrats Force Little Sisters of the Poor into Court Again," *Washington Examiner*, May 21, 2019, https://www.washingtonexaminer.com/opinion/democrats-force-little-sisters-of-the-poor-into-court-again.
8. Church Amendments, §300a-7(c)(2)(B) and (d).
9. Christina Lamb, et al., "Conscience, Conscientious Objection, and Nursing: A Concept Analysis," *Nursing Ethics* 26.1 (February 2019): 37–49, doi: 10.1177/0969733017700236.
10. 84 Fed. Reg. §88.2.
11. To file a complaint, visit https://www.hhs.gov/ocr/complaints.

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