Reclaiming Conscience in Healthcare: Healthcare and Secularism Part 2

Video available at: https://youtu.be/DAKwNuVV2WI

0:00:04.100,0:00:09.330
.....and I'm delighted to introduce the first
of today's specialist speakers. Please do

0:00:09.330,0:00:14.460
hold on to questions until the end of
each session. It's my great pleasure to

0:00:14.460,0:00:18.720
introduce Michael Thomson the Professor
of Health Law at Leeds University whose

0:00:18.720,0:00:22.320
research interests span the fields of
health law, children's rights and legal

0:00:22.320,0:00:27.270
and political theory. Michael's work is
underpinned by an exploration of the

0:00:27.270,0:00:32.789
relationship between health and social
justice. He's written extensively on the

0:00:32.789,0:00:37.100
legal regulation of reproduction,
non-therapeutic genital cutting and

0:00:37.140,0:00:43.860
conscientious objection. So, over to
Michael to talk to us about reclaiming
conscience in healthcare.

0:00:50.640,0:01:02.460
Thank you very much Antony and thank you
very much for the opening speech which sets
up what I want to
do very well.

0:01:02.460,0:01:06.800
.....and I was really delighted to be asked
by Antony to take part in this

0:01:06.810,0:01:11.910
conference. I think it's an incredibly
important conversation that we'll have

0:01:11.910,0:01:16.229
today and one that has some growing
importance actually and some of the

0:01:16.229,0:01:23.250
things that Antony mentioned today are
increasingly pressing. What I'm going

0:01:23.250,0:01:27.869
to talk to you today is drawing on some
work with my colleague Sheelagh McGuinness
who

0:01:27.869,0:01:32.640
was unable to be with us today but I
really want to acknowledge the fact that

0:01:32.640,0:01:39.060
this research has been carried out by
both of us. So conscientious objection to

0:01:39.060,0:01:44.030
activities that are required by law has
achieved a particular place in our

0:01:44.030,0:01:49.530
culture and academics have responded
enthusiastically to what's often

0:01:49.530,0:01:54.630
characterized as a conflict of rights
that goes to a sense of our self-worth

0:01:54.630,0:02:00.000
as liberal and inclusive - very warm often

smug idea.

0:02:00.000,0:02:05.010
So lawyers, political theorists, ethicists and others have debated how we best

0:02:05.010,0:02:09.810
negotiate the tensions that can exist between private beliefs and public

0:02:09.810,0:02:15.989
obligations. In a significant and growing body of literature they devise models

0:02:15.989,0:02:22.019
that aim to accommodate difference and yet keep it bounded. In debating

0:02:22.019,0:02:25.950
conscience objection in this way academics have been complicit in

0:02:25.950,0:02:30.989
enabling those who wish to be exempted from the delivery of lawful, otherwise

0:02:30.989,0:02:36.660
legally guaranteed services, to set the agenda. Thus, our understanding has been

0:02:36.660,0:02:40.980
narrowed and conscience in healthcare has come to mean moral disquiet

0:02:40.980,0:02:47.820
and how we might then accommodate the objections of individuals. My central

0:02:47.820,0:02:51.870
argument, this is, is that this is an impoverished view of the place of

0:02:51.870,0:02:55.890
conscience in health care. As claims to conscience become ever more deeply

0:02:55.890,0:03:01.230
embedded in current culture wars, my argument that our task is not to debate

0:03:01.230,0:03:06.000
the personal rights and freedoms of those who wish to object but to reset

0:03:06.000,0:03:10.200
the terms of the debate, reclaiming conscience as part of the moral

0:03:10.200,0:03:14.160
reasoning of those who deliver services and those who seek those

0:03:14.160,0:03:18.390
services and I'm pleased to say that I seem to have
caught on to what the secular society is

0:03:18.390,0:03:23.070
doing in terms of looking at reclaiming
- the conference next year is about

0:03:23.070,0:03:33.090
reclaiming religious freedom. So, in order to argue for a reorientation of how we

0:03:33.090,0:03:37.650
debate conscience in healthcare, so to bring it back from a place of exception,

0:03:37.650,0:03:42.300
I want to address the question of abortion. Section 4 of the abortion act

0:03:42.300,0:03:47.670
provides, with qualifications, that no person shall be under any duty, whether

0:03:47.670,0:03:52.770
by contract or any statutory or other legal requirement, to participate in any

0:03:52.770,0:04:00.870
treatment authorized by the Act to which he has a conscience objection. Well, claims to

0:04:00.870,0:04:05.190

conscience are of course seen across a range of different health services and

0:04:05.190,0:04:09.960
quite worryingly increasingly in medical education, conscience is most often

0:04:09.960,0:04:14.970
associated with the delivery of abortion care. Abortion is treated differently

0:04:14.970,0:04:19.620
from other health services in law and the ability of a health provider to

0:04:19.620,0:04:24.510
recuse themselves from the delivery of otherwise legally sanctioned service was

0:04:24.510,0:04:30.169
historically part of and contained to this abortion exceptionalism

0:04:30.169,0:04:35.040
yet this breaching of fundamental understandings of the duty to respond to

0:04:35.040,0:04:40.110
medical needs regardless of personal moral position has moved from part of

0:04:40.110,0:04:44.970
this exceptionalism to the conscience creep that we see in health policy and

0:04:44.970,0:04:56.970
practice and moves to extend statutory protections. So, to build my argument I

0:04:56.970,0:05:01.020
want to revisit some key moments in the development of abortion law that

0:05:01.020,0:05:05.070
illustrate different understandings of conscience and help us to understand

0:05:05.070,0:05:08.820
what's embedded in the current right to conscience in section 4 of the abortion

0:05:08.820,0:05:14.669
act 1967 and I'll be using Antony's 'retrospectascope' to do this, which I will

0:05:14.669,0:05:22.400
steal for further use. So first I want to revisit the case of Rex v. Bourne from

0:05:22.400,0:05:28.080
1938 and this is a pivotal moment in the development of abortion law in the UK,

0:05:28.080,0:05:32.850
and the case saw the extension of lawful abortion provision and created the

0:05:32.850,0:05:38.370
conditions of possibility for the 1967 Act and this was driven by Alex Bourne's

0:05:38.370,0:05:43.580
belief that he was conscientiously required to provide abortion care

0:05:43.580,0:05:47.479
unfettered by the interference of the criminal law.

0:05:47.479,0:05:52.200
Secondly I'm then going to look briefly at the passage of David Steele's private

0:05:52.200,0:05:57.600
member's bill and specifically the emergence of section 4 and here we see

0:05:57.600,0:06:02.070
that the right to conscientiously object emerged from

0:06:02.070,0:06:07.380
those opposed to reform measures who wish to see, who wished to limit the

0:06:07.380,0:06:12.060

impact of the legislation. And the measure was also supported by members of

0:06:12.060,0:06:16.050
the profession who sought to protect clinical discretion and saw the bill as

0:06:16.050,0:06:21.350
an attack on professional autonomy.

0:06:23.529,0:06:28.059
Sorry, I realized the type is quite small on the screen but I hope

0:06:28.059,0:06:34.059
people can see the other screen. And third, I'm going to move on to the relatively

0:06:34.059,0:06:37.929
recent case of Doogan and Woods - the Scottish midwives case that many people

0:06:37.929,0:06:42.999
will be familiar with and this is a relatively recent and very authoritative

0:06:42.999,0:06:49.869
statement of conscientious objection, section four and its potential reach. So

0:06:49.869,0:06:52.689
these three moments help us to problematize how conscience has come to

0:06:52.689,0:06:57.969
be understood and the limitations of the current debates. It talks to current, very

0:06:57.969,0:07:02.049
important debates, around the decriminalization of abortion and the

0:07:02.049,0:07:06.579
removal of statutory clauses but most importantly it helps us to think

0:07:06.579,0:07:10.959
differently about conscience in health care and I mean health care more broadly

0:07:10.959,0:07:16.679
beyond the example of abortion services.

0:07:18.329,0:07:23.529
So, Alec Bourne was a prominent obstetrician and gynaecologist who

0:07:23.529,0:07:28.119
worked in London in the early part of the 20th century. Bourne typified the

0:07:28.119,0:07:32.649
establishment - he was Cambridge educated, held a number of prestigious hospital

0:07:32.649,0:07:38.229
appointments, served as a military doctor and upon his upon his return from the

0:07:38.229,0:07:41.110
war and in conjunction with these hospital appointments started the

0:07:41.110,0:07:46.239
well-known consultancy on Harley Street. However in 1938, Bourne found himself

0:07:46.239,0:07:50.139
before the Criminal Court for performing a termination on a fourteen-year-old

0:07:50.139,0:07:54.999
girl who had been gang-raped by a number of soldiers. What prompted Bourne to perform

0:07:54.999,0:08:00.249
this operation and strategically challenge the absolute criminal law

0:08:00.249,0:08:04.809
prohibition on abortion was a view that doctors must be allowed to provide the

0:08:04.809,0:08:09.639
care that they believed to be in the interest of their patients. Bourne was

0:08:09.639,0:08:15.159
acquitted and although it was not
enacted until some thirty years later,

0:08:15.159,0:08:19.089
the abortion act enshrines many of the
features of the case for example the

0:08:19.089,0:08:26.289
necessity of two doctors to validate an
abortion decision. The case also has an

0:08:26.289,0:08:30.710
interesting legacy in how we might
understand conscientious objection.

0:08:30.710,0:08:35.540
It seems from his summing up in the case
that Mr. Justice Macnaghten had some

0:08:35.540,0:08:41.690
sympathy with Alec Bourne's view on
authority and medical discretion - his

0:08:41.690,0:08:45.710
clear, he clearly respected Bourne's
professional status as a man of the

0:08:45.710,0:08:50.150
highest skill and distinguished his
ability to perform abortions where he

0:08:50.150,0:08:55.250
believes them to be necessary from cases
and I quote 'performed by a person of no

0:08:55.250,0:09:00.050
skill with no medical qualifications and
where there is no pretense that it is

0:09:00.050,0:09:04.850
done for the preservation of the life of
the mother' . Here Macnaghten seems to

0:09:04.850,0:09:09.650
endorse Bourne's view that there
are areas of medical practice which are

0:09:09.650,0:09:16.130
not subject to the ordinary requirements
of the law. However, importantly, Mr.

0:09:16.130,0:09:20.390
Justice Macnaghten moves beyond this to
comment on the extent to

0:09:20.390,0:09:27.430
which medical obligation could ever be
legitimately trumped by personal beliefs.

0:09:27.430,0:09:34.210
He states that to provide care in
circumstances as outlined in the case

0:09:34.210,0:09:40.880
is not simply a matter of discretion
but one of duty, the dereliction of which

0:09:40.880,0:09:47.630
could be subject to legal sanctions. So
sorry - slightly text-heavy slide for

0:09:47.630,0:09:53.150
you. So, Macnaghten said there are
people who, from what are said to be

0:09:53.150,0:09:56.900
religious reasons, object to the operation
being performed at all in any

0:09:56.900,0:10:00.560
circumstances.
A person who holds such an opinion ought

0:10:00.560,0:10:05.780
not to be a doctor practicing in that
branch of medicine for if a case arose

0:10:05.780,0:10:09.380
where the life of the woman could be
saved by performing the operation and

0:10:09.380,0:10:13.430
the doctor refused to
perform it because of some religious

0:10:13.430,0:10:18.050
opinion and the woman died he would be in grave peril of being brought before

0:10:18.050,0:10:24.230
this court on a charge of manslaughter by negligence. He would be in no better

0:10:24.230,0:10:28.640
defense than would a person who again from some religious reason refused to

0:10:28.640,0:10:33.890
call a doctor to attend his child where a doctor could have been called in and

0:10:33.890,0:10:37.430
the life of the child saved. If the father for so-called religious reason

0:10:37.430,0:10:41.750
refused to call on a doctor he also would be answerable to the criminal court

0:10:41.750,0:10:46.610
for the death of a child and here Macnaghten deftly refutes any

0:10:46.610,0:10:51.640
understanding of professional conscience as having the capacity to overrule

0:10:51.640,0:10:57.140
professional obligations. So, reading Bourne's understanding of professional

0:10:57.140,0:11:02.570
conscience as part of medical discretion alongside Macnaghten's warning that

0:11:02.570,0:11:06.890
viewpoint, that personal viewpoints should be overruled by professional

0:11:06.890,0:11:12.230
obligation, provides a nuanced starting point of how we might understand

0:11:12.230,0:11:17.060
conscience and abortion. While clearly embedded in questions of professional

0:11:17.060,0:11:21.710
jurisdiction and market control, it suggests a picture of conscience that

0:11:21.710,0:11:25.220
aligns more with discourses of conscientious commitment than

0:11:25.220,0:11:33.290
conscientious objection. Conscientious commitment is often reduced to the commitment to

0:11:33.290,0:11:38.750
provide legally available medical services however Bernhard Dickens

0:11:38.750,0:11:46.220
describes it as, yeah Bernhard Dickens writes 'conscientiously committed

0:11:46.220,0:11:51.350
practitioners often need courage to act against prevailing legal, religious and

0:11:51.350,0:11:57.020
even medical orthodoxy, following the honorable medical ethic of placing

0:11:57.020,0:12:02.089
patient's interests above their own'. Understood in this way the

0:12:02.089,0:12:06.410
conscientiously committed practitioner is one who is not necessarily bound by

0:12:06.410,0:12:12.170
law but rather is prepared to transcend both law and personal beliefs in order

0:12:12.170,0:12:16.089
to serve the interests of their patient.

0:12:19.680,0:12:27.580
So, on to Section four. An examination of the parliamentary debates from the time,

0:12:27.580,0:12:33.040
evidences a complicated picture of the extent to which a specific stretch to

0:12:33.040,0:12:38.770
protection of conscience was actually believed to be necessary. David Steele

0:12:38.770,0:12:43.270
had initially considered the inclusion of such a clause in his bill but had

0:12:43.270,0:12:47.620
ultimately decided following consultation with lobbyists and medical

0:12:47.620,0:12:52.660
practitioners that this was not necessary. Against this backdrop, there are two

0:12:52.660,0:12:59.440
strands of argumentation which led to the inclusion of the clause. First it was

0:12:59.440,0:13:03.520
the anti-choice parliamentarian and key opponent of the bill

0:13:03.520,0:13:09.100
Norman St John-Stevas who during Commons debate required or requested the

0:13:09.100,0:13:13.300
insertion of the clause. St John-Stevas had made it clear from the earliest

0:13:13.300,0:13:17.590
outset of the debate that he objected on principle to David Steele's private

0:13:17.590,0:13:22.690
member's bill. However, accepting that statutory change was inevitable,

0:13:22.690,0:13:26.770
he then tabled his request for a conscience clause along with several

0:13:26.770,0:13:31.300
other amendments which were clearly designed to restrict the reach and

0:13:31.300,0:13:37.270
application of the bill. Secondly, and as I've written with Sheelagh Mc Guinness

0:13:37.270,0:13:42.310
elsewhere, the medical establishment were at best reticent about the need for

0:13:42.310,0:13:46.900
reform of the law on abortion. A key point of tension in the debates on the

0:13:46.900,0:13:50.530
introduction of the conscience clause was the extent to which a clinician

0:13:50.530,0:13:56.890
could ever be forced to provide abortion care. Here what was being resisted by the

0:13:56.890,0:14:01.780
advocates of the clause is not only patient demands but also the

0:14:01.780,0:14:06.940
encroachment by lawyers on clinical discretion and decision making and the

0:14:06.940,0:14:11.110
long history of abortion law is this negotiation between law and medicine

0:14:11.110,0:14:16.140
about who controls access to these care, to care and services.

0:14:16.140,0:14:21.540
And abortion of course isn't the only place where this tussle happens. In the

0:14:21.540,0:14:25.800
end, it was the strongly held
anti-abortion views of figures such as

0:14:25.800,0:14:32.270
Norman St John-Stevas that a specific
provision was necessary that succeeded

0:14:32.270,0:14:37.640
however it's clear that those who argued
for the clause had very mixed motives.

0:14:37.640,0:14:42.840
For some it was an attempt to restrict
the scope of the act, for others it was

0:14:42.840,0:14:47.490
important because of the strongly held
personal views of some clinicians but

0:14:47.490,0:14:51.180
for the great majority it was a
mechanism for maintaining control over

0:14:51.180,0:14:55.590
abortion decision-making processes.
Section 4 therefore results from an

0:14:55.590,0:14:59.700
intermingling of the desire to
maintain clinical

0:14:59.700,0:15:05.610
control of the abortion process and
broader anti-choice aims. And this is

0:15:05.610,0:15:08.520
reflected in the breadth given to
understandings of conscience and the

0:15:08.520,0:15:13.650
freedom to exercise it. Indeed what
conscience might be, is largely left

0:15:13.650,0:15:18.750
without discussion or consideration. It's
described in Hansard by the

0:15:18.750,0:15:24.930
parliamentarians variously as and to
quote 'a medical objection, a moral

0:15:24.930,0:15:30.720
and scrupulous objection, a
feeling, an unwillingness or freedom of

0:15:30.720,0:15:37.290
choice' and the reach of this can be
illustrated in the robust, unsuccessful

0:15:37.290,0:15:41.460
challenge in the House of Commons to a
House of Lords amendment that proposed

0:15:41.460,0:15:46.020
that a person claiming an objection had
the burden of proof - so that how we

0:15:46.020,0:15:52.110
would normally procedurally manage a
claim to exception. Many

0:15:52.110,0:15:56.610
members believe that there should be no
need for anyone relying on the provision

0:15:56.610,0:16:03.870
to justify or prove the nature .....and here
we have Gurden saying

0:16:03.870,0:16:07.920
'Here we are concerned with the freedom of
choice of the individual who has to do the
work.

0:16:07.920,0:16:12.000
I should have thought that it would not be

0:16:12.000,0:16:17.660
necessary to have any proof of conscientious
objection. Choice should be enough.'

0:16:17.660,0:16:22.200
and significantly the amendment was tabled
in order to avoid a situation in which a

0:16:22.200,0:16:26.170
negligent physician who failed to
provide appropriate care

0:16:26.170,0:16:31.330
could retrospectively claim an objection
to providing that appropriate care .....and

0:16:31.330,0:16:35.370
it's interesting to see the hierarchy of
concerns that win out.

0:16:40.200,0:16:44.470
So, Bourne - if we go back to Alec Bourne -
Alec Bourne was confident that his

0:16:44.470,0:16:51.490
professional discretion had primacy over
legal rules of general application and

0:16:51.490,0:16:55.330
we should be mindful at this point of
Macnaghten's warning that the deference

0:16:55.330,0:17:00.820
afforded to Bourne was not an endorsement
of professional interest trumping public

0:17:00.820,0:17:05.500
and professional obligations. Yet it's
arguable that the governance of

0:17:05.500,0:17:09.790
contemporary expressions of conscience
do translate the deference afforded to

0:17:09.790,0:17:14.650
professionals to define the boundaries
of their own professional practice into

0:17:14.650,0:17:21.160
the protection of conscientious beliefs -
So, personal authority over actions in

0:17:21.160,0:17:26.860
the context of public obligations. Such
conscience claims involve a call to law

0:17:26.860,0:17:31.450
for protection rather than a preemption
of it in the best interests of the

0:17:31.450,0:17:35.590
patients. I just want to touch on this a
little bit further in the recent case of

0:17:35.590,0:17:41.440
Doogan and Wood. So, as many people
will know, this involved the case of two

0:17:41.440,0:17:46.240
midwives working as labour ward
coordinators. Their role involved the

0:17:46.240,0:17:50.710
delegation, supervision and support of
both patients and nursing staff who

0:17:50.710,0:17:55.780
participated in the termination of
pregnancies. Whilst both parties accepted

0:17:55.780,0:17:58.950
that the role was largely administrative,
the midwives had a long-standing

0:17:58.950,0:18:04.480
objection to the provision of this
aspect of care. Due to the closure of a

0:18:04.480,0:18:08.440
local fetal medicine unit the number of
terminations for fetal anomaly happening

0:18:08.440,0:18:12.210
quite late in pregnancies had increased
on their ward.

0:18:12.210,0:18:16.540
They sought reassurances from Greater
Glasgow and Clyde Health Board that they

0:18:16.540,0:18:21.700
would be able to continue to exercise
their objection. The health board

0:18:21.700,0:18:25.480
objected to the midwife's claim stating
that their activities were not proximate

0:18:25.480,0:18:30.010
enough - the standard test- to the
termination to qualify under Section

0:18:30.010,0:18:34.750
four and they also importantly claimed
that if the midwives were successful, it

0:18:34.750,0:18:37.890
would cause a
level of administrative burden as to

0:18:37.890,0:18:42.659
pose a risk to patient care. And the
midwives sought judicial review of this

0:18:42.659,0:18:48.450
decision. The Court of first instance
held for the trust. This was appealed who

0:18:48.450,0:18:53.100
held for the midwives and we ended up in the
Supreme Court where,

0:18:53.100,0:19:00.960
again, the trust's decision was upheld. The
case and it's fallout provides an

0:19:00.960,0:19:05.820
insight into the difficulties and
tensions of the application of section 4

0:19:05.820,0:19:12.030
and illustrates a further transformation
in how conscience is articulated and

0:19:12.030,0:19:16.020
deployed. It's clear both from the
interjections of the supreme court

0:19:16.020,0:19:20.070
justices in oral arguments and from
their decisions that conscience is

0:19:20.070,0:19:26.450
solely taken as an issue of religious or
moral judgment. Concerns regarding

0:19:26.450,0:19:31.380
deference to
professional integrity had completely

0:19:31.380,0:19:36.419
fallen away. So, again we've entered the
endpoint in terms of this

0:19:36.419,0:19:41.250
narrowing of what conscience means
within health care. So Doogan and Wood

0:19:41.250,0:19:46.950
illustrate many of the problems that are
intrinsic to statutory protections of

0:19:46.950,0:19:51.960
this sort - not least, they require a
particular identifiable group

0:19:51.960,0:19:57.240
of individuals - here abortion seeking
women - to bear the burden of religious or

0:19:57.240,0:20:02.580
moral sanctions - convictions of another.
Throughout the hearing it was evident

0:20:02.580,0:20:06.240
that the Supreme Court justices were
frustrated by the lack of any attempt on

0:20:06.240,0:20:10.679
the part of counsel for the trust or the
midwives to take seriously the balancing

0:20:10.679,0:20:15.630
of interests of the midwives against the
impact on the services of having to

0:20:15.630,0:20:20.429
accommodate such a wide-ranging claim to
conscience. The case largely

0:20:20.429,0:20:26.159
overlooked human rights arguments. A final point of discussion in the oral

0:20:26.159,0:20:30.450
hearing in Doogan was the potential that the claimants' case had to impact on the

0:20:30.450,0:20:37.110
2004 regulations that require health care providers to refer, to refer people

0:20:37.110,0:20:40.650
seeking services on to another health provider.

0:20:40.650,0:20:45.660
The midwife's barrister accepted that the breadth of protection

0:20:45.660,0:20:49.260
that was being claimed by the midwives could potentially impact on the

0:20:49.260,0:20:54.210
requirement of referral. While unsuccessful, Doogan and Woods divided the

0:20:54.210,0:20:59.400
judiciary and it illustrates both the fragility of some provision models and

0:20:59.400,0:21:02.670
the potential of the current impoverished understanding of conscience

0:21:02.670,0:21:15.020
to undermine care both in the context of abortion and more broadly. I'm not sure who the chap is but it seems sinister enough.

0:21:25.120,0:21:31.520
So, the critique of section 4 that Sheelagh and I are offering is not just

0:21:31.530,0:21:36.660
directed at its continued presence and operation but also recent moves to

0:21:36.660,0:21:42.180
translate or transplant the provision to other areas of practice and we've seen

0:21:42.180,0:21:46.710
this for example in proposals before Parliament both Westminster and in

0:21:46.710,0:21:50.150
Holyrood to legalize physician assisted suicide.

0:21:50.150,0:21:54.960
Interestingly, whilst a large body of literature exists on the problems of

0:21:54.960,0:22:00.320
translation between jurisdictions, little attention is paid to this domestic

0:22:00.320,0:22:07.920
equivalent. However, Alan Stokes argues that the use of existing provisions to

0:22:07.920,0:22:14.210
regulate a new area carries its own operational and ideological baggage. Any

0:22:14.210,0:22:19.140
attempt at replicating provisions is problematic because the presumed

0:22:19.140,0:22:24.390
application of existing measures entails more than the replication of regulatory

0:22:24.390,0:22:29.100
requirements - it also involves the transmission of traditions and

0:22:29.100,0:22:33.510
assumptions in-built in the regulatory regime. So the argument is that we need

0:22:33.510,0:22:37.860
to know what's packed into section 4

before we move it into other areas of

0:22:37.860,0:22:42.090
healthcare and partly using the 'retrospectorscope' I've tried to look

0:22:42.090,0:22:46.950
at some of the dubious and questionable motivations for section 4 and how we are

0:22:46.950,0:22:52.060
pushing this forward.
So Section four marked a watershed in

0:22:52.060,0:22:57.340
changing the legal relationship between doctor and patient. For the first time it

0:22:57.340,0:23:02.790
formally enabled a doctor to object to meeting a clinical need of a patient.

0:23:02.790,0:23:06.960
David Owen, supporting the clause, nevertheless recognized this

0:23:06.960,0:23:12.480
exceptionality in the context of traditional medical practice and ethics.

0:23:12.480,0:23:19.000
He stated in Parliament it is quite wrong for any doctor to put his ethical

0:23:19.000,0:23:23.890
reasons before the consideration of his patient but I suppose this would be the

0:23:23.890,0:23:29.020
only case in which we would refuse an operation on these grounds. And yet, this

0:23:29.020,0:23:34.990
exception has become normalized and unquestioned in many regards. Subsequent

0:23:34.990,0:23:38.590
to Doogan and Woods, the Doogan and Woods
decision being handed down, we see

0:23:38.590,0:23:42.940
further attempts to extend the reach of section 4 with potentially similar

0:23:42.940,0:23:51.040
effects. As Antony mentioned, Baroness Nuala O'Loan has introduced a private

0:23:51.040,0:23:55.390
member's bill - the conscientious objection (medical activities) bill - which

0:23:55.390,0:23:59.230
seeks to expand the range of statute protections for refusal to

0:23:59.230,0:24:04.900
provide certain forms of medical care. Section 1 sets out three areas of

0:24:04.900,0:24:09.160
medical practice that clinicians with a conscientious objection should not be

0:24:09.160,0:24:18.490
under a duty to participate. ..... on the first part of the slide... So it's the withdrawal of life-sustaining treatment,

0:24:18.490,0:24:23.890
any activity under human fertilization and Embryology Act and any activity

0:24:23.890,0:24:29.380
under the abortion act 1967. As such, it broadens the range of activities that

0:24:29.380,0:24:34.720
would be subject to statutory protection yet it's really section 2 where it

0:24:34.720,0:24:38.320
becomes apparent that this is a clear attempt to extend the scope of practices

0:24:38.320,0:24:43.090
which a clinician can refuse to provide
and the wording of the bill reflects

0:24:43.090,0:24:46.660
exactly the failed arguments that were
put forward in the case of Doogan and

0:24:46.660,0:24:51.850
Wood. So, section 2 defines
participating in any activity as including

0:24:51.850,0:24:56.260
supervision, delegation, planning or
support of staff in respect to that

0:24:56.260,0:24:59.470
activity.
So this broadens the scope of the

0:24:59.470,0:25:03.100
protection afforded by section 4 and
could have serious potential to impact

0:25:03.100,0:25:08.680
provision of certain sorts of care and
this is extended or heightened when we

0:25:08.680,0:25:12.970
look at section 3 - the first part, the
last part of the slide - and this provides

0:25:12.970,0:25:18.340
that an employer A, must not discriminate,
discriminate against or victimize an

0:25:18.340,0:25:25.090
employee of A, so B, who makes use of the
protections set out in this section. So

0:25:25.090,0:25:28.810
there are no limitations on the
protection against discrimination in any

0:25:28.810,0:25:32.200
employment setting in order to
facilitate the smooth running of

0:25:32.200,0:25:38.680
comprehensive services. So, and we can see
how that would clearly limit services in

0:25:38.680,0:25:45.250
key areas. So the origins of Baroness O'Loan's
bill are interesting - the bill has

0:25:45.250,0:25:50.200
attracted support from a broad
range of anti-choice politicians and as

0:25:50.200,0:25:55.060
such it's arguably an example
of conscience clauses serving larger law

0:25:55.060,0:26:00.670
reform goals in our culture war
conflicts. It's hard not to view O'Loan's

0:26:00.670,0:26:04.990
bill as part of the broader anti-choice
agenda and as such it's important to

0:26:04.990,0:26:08.290
assess the bill not just against
standards of how we protect

0:26:08.290,0:26:14.880
conscientious beliefs but also as part of
the messy politics of abortion law reform.

0:26:14.880,0:26:19.310
So, to conclude.

0:26:19.310,0:26:24.870
It's arguable that conscience has become,
has come to mean little more than the

0:26:24.870,0:26:29.010
rights of some individuals to refuse to
provide care in situations where they

0:26:29.010,0:26:34.680
object, yet conscience in health care is
of course much richer than this. As Shore

0:26:34.680,0:26:39.840
and Downy observe, whilst some may object
to service provision, other practitioners

0:26:39.840,0:26:45.750
feel equally conscientiously motivated
to provide services such as abortion by

0:26:45.750,0:26:49.500
which patients can express their
autonomy and achieve optimal health.

0:26:49.500,0:26:53.760
The latter practitioners may equally
feel harmed by having to compensate for

0:26:53.760,0:26:58.670
colleagues' conscience-related service delays
or obstruction -

0:26:58.670,0:27:03.750
potentially creating unmanageable
patient caseloads and/or rending care

0:27:03.750,0:27:09.840
more difficult, risky or costly. Shore and
Downy also referred to Justice Bertha

0:27:09.840,0:27:14.160
Wilson's judgment in the Supreme Court
of Canadian justice that recognized that

0:27:14.160,0:27:18.390
women may well have committed, considered
and conscientious-based reasons for

0:27:18.390,0:27:24.240
requesting a termination. As Justice
Wilson stated, for the state to take

0:27:24.240,0:27:29.760
sides on the issue of abortion is not
only to endorse but also to enforce one

0:27:29.760,0:27:35.550
conscientiously held view at the expense
of another it is to deny freedom of

0:27:35.550,0:27:40.650
conscience to some, to treat them as a
means to an end, to deprive them of their

0:27:40.650,0:27:46.260
essential humanity. In the context of
thinking about conscience differently,

0:27:46.260,0:27:49.410
there's value in turning to Jonathan
Montgomery's recent consideration of

0:27:49.410,0:27:53.670
conscience in healthcare where he
characterizes statutory provisions as

0:27:53.670,0:27:58.290
anomalous - rooted in very specific
settlements between society and health

0:27:58.290,0:28:03.840
professions whose legitimacy is
historically contingent. Addressing

0:28:03.840,0:28:09.140
conscience, Montgomery fore-grounds not
conflicting value systems but good faith.

0:28:09.140,0:28:13.830
For Montgomery, the conscience that
defines health care is the conscience

0:28:13.830,0:28:17.420
found in the conscientious exercise of
professional responsibilities,

0:28:17.420,0:28:21.780
conscientious reasoning and
conscientiously exercising of

0:28:21.780,0:28:27.370
discretion. ... And I'll give Jonathan the final
word. Thank you.