Medical Licensure: Rendering to Caesar What Is God's?

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This article was transcribed and edited from a presentation given at a medical ethics conference in Pittsburgh, 1992.

Originally Published in
Journal of Biblical Ethics in Medicine, Vol. 9, No. 1

Republished by Lonang Institute
https://lonang.com

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Jesus taught that one has to be careful not to assume that because someone is ill, that person has committed a particular sin which has caused that illness. Jesus addressed that issue with regard to the man who was born blind. The question was, "Who sinned, this man or his parents?" He answered, "Neither, it's for the glory of God." That fact does not in any way indicate that illness and sin are *disconnected*. It just means that the connection between illness and sin is a rather complex one; there is no question that there is a connection. Mark 2:3-12 records the story of the man whom Jesus not only forgave of his sin but whose body he healed. Further, in John 5:2-15 there is presented the 38-year-old man at the pool who always tried to get into the healing waters but couldn't quite make it.

Jesus asked the man the question, "Will you be whole?" And He said, "Rise up and take up thy bed and walk." In the close of the encounter with the man, Jesus said, "... Sin no more, lest a worse thing come upon thee." In the ministry of Jesus we can see a close connection between the problem of sin and the problem of illness. Proverbs 17:22 says, "A merry heart doeth good like a medicine, but a broken spirit drieth the bones." Proverbs 3:7-8 says, "Fear the Lord and depart from evil; it shall be health (or medicine) to thy navel and marrow to thy bones." This connection between the spiritual dimension of man - the image-bearing nature of man, his sinful condition, and his physical body - is proved throughout the Old and the New Testaments.

As an example, remember what Jesus said in Mark 1:44, after He healed the leper, "Go ... show yourself to the priest." This requirement affirms the relationship between the priesthood - the priests were the leaders of the spiritual life in Israel - and the problem of disease in Israel. Indeed, in Leviticus chapters 13 and 14 we find a close connection between leprosy and the exercise of the priestly authority and a close connection between the physical and the spiritual. There is a physical diagnosis, a hygienic prescription, and a sacrifice of a turtle dove, or other animal. Notice that it is all handled by the same official.

This trail of evidence leads toward something - that in the nation of Israel there was recognition that what we call the practice of medicine really belonged to the priests. For Old Testament Israel, God says in II Chronicles 19:11, "And behold, Amariah, the chief priest is over you in all matters of the Lord. And, Zebediah, the ruler of the house of Judah, for all the king's matters." Notice that disease was a matter for the priest. If you had a sickness, whether it was spiritual or physical or a combination, you went to the priest. This practice was carried out because the priest was given authority by God in that particular area; he had the authority to deal with that. It did not belong to the king.

The king is the representative of the State. He is the one who has civil authority. He is comparable to a governor, a legislator, or a president. In the Old Testament, matters of spiritual health and physical health belonged to God, and God ordained priests as the ones who had authority to minister to those needs of the people. Another way of putting it is that medicine belongs to the Lord and is administered through the priesthood rather than through the king. Medicine is administered through the Church, not through the state, to use modem terms.

What has happened to that concept in 20th-century America? Medicine has been divorced from the Church. Medicine as a profession has been developing a dichotomy of the physical from the spiritual. The State licensure system is the centerpiece of that divorcement of physical from spiritual. When state licensure came in the early 20th century, it divorced the physical health of the people from their spiritual health. Could we, by contrast, envision in America a licensing system for the pastors of churches? Imagine the outrage across this land if state authorities were to institute a licensing system as to whether someone could preach the gospel of Jesus Christ! Everyone would be upset - even the American Civil Liberties Union.

This system would introduce a state orthodoxy of spiritual health. Yet, what we have today through the state licensure system of physicians is a state orthodoxy of physical health. The only justification for that is if one can truly divorce the physical from the spiritual - that what God said belonged to the priesthood in the Old Testament Israel no longer belongs to the priesthood but now belongs to the state. That change is the key issue raised by state licensing of the medical profession.

Prior to licensure in the United States (for example, in the 1847 American Medical Association [AMA] statement concerning ethics), there was recognition of a diversity of opinion as to what was the proper standard with regard to health. There were various schools; three major ones were the regular school, the eclectic, and the homeopathic. People of that day recognized that differences of opinion existed as to what was a standard of care for one's physical health. When a state licensure system is introduced, the state necessarily will sort out the schools of physician care and will determine which practices satisfy the state. Therefore, diversity of opinion is no longer allowed, unless, of course, the state itself accepts such diversity in its standard for the practice of medicine.

It is the same thing that would happen if you had a licensing system for the preaching of the Gospel. In that case people would have to figure out what the true Gospel is. The history of the Church has been divided on that question. There are so many denominational views in the midst of even the *orthodox* Christian community, much less the question of what is a cult and all other kinds of questions with regard to those matters! It is important to recognize that one cannot avoid this conflict over truth with regard to a standard of practice by introducing a licensure system. A licensure system invokes the principles that are embodied in the prohibition against the establishment of religion and the free exercise thereof.

Today, we have forgotten what religion really means, because we find ourselves accepting definitions that are essentially sociological or psychological. As an example, on the one occasion in which the United States Supreme Court attempted a definition of religion, it came up with what was essentially a psychological definition. That definition is, "... those things that are ultimate in one's belief system." Lawrence Tribe, a constitutional scholar at my *alma mater*, Harvard, likes a sociological definition. He likes to talk about "religious views." Indeed, he'll make a distinction between communion and transcendental meditation, because sociologically, communion in America is religious. But, sociologically, transcendental meditation in America can be non-religious, because we're not living in a Hindu society in which transcendental meditation is inevitably religious. So, he uses a sociological definition. Christianity is always at the short end of the stick with a sociological definition of religion.

That is *not* what "religion" means in a legal and political document. The first amendment of the

United States Constitution says, "Congress shall pass no law establishing a religion or prohibiting the free exercise thereof.'' The Constitution is a legal document and, therefore, we must understand that the term "religion" in it is a legal word. Indeed, it is a political-legal word. It is placed in a political-legal document for the purpose of determining those things that do not belong under the civil government's authority.

This principle is spelled out in the Virginia Constitution, Article 1, Section 16, which says, "Religion, or the duty that we owe to our Creator enforceable by reason and conviction, not by force or violence ..." **Thus we say that it is the nature of the duty that determines whether or not it is religion.** Notice that the Virginia Constitution adds to the political and legal dimension a theological dimension. **Ultimately, law and politics are theological.** Ultimately, that is where we must go - to theology. There is a distinction between a duty that is enforceable by nature, by reason, and by conviction and one enforceable by coercion or violence.

Why is there this distinction? Romans 13:4 tells us that God authorized the civil government to use force as a sanction for wrongdoing. The very nature of civil power is force. Do we pay our taxes voluntarily? We know what would happen if we did not pay our taxes. What about our tithe? We know the same thing doesn't happen if we don't tithe. We know that we can not pay our tithe and get away with it, at least with human authority. We know we can't refuse to pay our taxes. They'll get us somehow. There is a distinction between the nature of the duty to pay a tax as contrasted to the nature of the duty to pay a tithe. A tithe, by definition, must be paid out of one's reason and conviction - voluntary choice - else what good is a tithe but wood, hay, and stubble?

We don't pay our tax because we love the government.

Romans 13, by contrast, says that one should pay his taxes because he *owes* it, not because he loves the IRS. We should love IRS *agents*, but we don't pay our tax because we love the government. It is not an obligation of love. It is a debt service. It is an obligation that can be backed up by sanctions. This is the key in understanding the nature of the authority of the state. **Any licensing system of physicians lines the state up with certain schools of thought on what is "appropriate medical practice."** Necessarily, it means that the state backs up a certain position with regard to what is a right way to practice medicine and what is a wrong way. It forces state-sanctioned authority upon what ought to be a matter of *voluntary* choice. It's a matter that belongs to God exclusively.

Return to the II Chronicles 19:11 passage mentioned above. Even in Israel - theocratic Israel - were some things that belonged exclusively to God and which were to be administered through the priesthood of Aaron. (Many people are erroneously afraid of theocratic states because they presume liberty to be precluded from them.) These things did *not* belong to the king. One of those things was the practice of medicine, because medicine rightfully understood was intimately and inextricably intertwined with the spiritual life of man. One couldn't be divorced from the other. Therefore, it wasn't a matter that should be subject to state licensure but, rather, it would be *immune* from state licensure just as would be the case with regard to the licensing of pastors.

What we understand to be the nature of medicine and its relationship to the image-bearing nature of man, and what we understand to be the nature of authority and the distinction between authority that God has given to civil society as contrasted to what God gives to the Church, is absolutely

critical in assessing whether or not the state has authority to license physicians.

By way of contrast, consider that lawyers are a bit different professionally, because they hold a civil office. Namely, they are officers of the court, and one could distinguish lawyers on the grounds that, if they are officers of the court, then they should meet certain eligibility standards that civil officers should meet. In Exodus 18 Moses formed the first government of Israel before the people went into the Promised Land. There were standards of eligibility for those who were going to rule over thousands, over hundreds, and over tens. They had to be men of good moral character (we certainly could use more of those in the legal profession) and who were capable of rule. There is thus a distinction between a licensing system for lawyers and a licensing system for physicians, because lawyers hold an office in the civil order itself, as contrasted to physicians, who hold an office within the church or the voluntary portion of society that God has ordained for Himself.

The **first proposition** then is this: that the guarantee of free exercise of religion, the guarantee of no establishment of religion, contained in the first amendment of the United States Constitution and reflected in most of the other state constitutions is a guarantee that physicians are to be free from the licensing authority of the state. It is not the state's business to determine the criteria by which the art of healing is to be practiced. Physicians are engaged in the *art* of healing.

As scientific as medicine is today, it remains an art. Even when a physician brings to bear the best science to physical illness there is a spiritual dimension to practice that is absolutely crucial in order for the healing process to take place. For a physician to ignore that spiritual dimension is to fail in the art of healing. I believe that's the reason why that proverb originated in Israel, "Physician, heal thyself." Physicians had lost their way with regard to the relationship between the spiritual state of their patients and the physical manifestation of the spiritual in their bodies, whether it was individual sin or whether it was just simply the general consequence of sin.

Moving from this question of religion to the question of freedom of contract let us see that there is **another dimension** that must be addressed in assessing the freedom of physicians in the practice of the healing arts. The Declaration of Independence says that "all men are created equal and endowed by their Creator with certain unalienable rights," among which are life, liberty, and the pursuit of happiness. While the phrase "pursuit of happiness" has been much debated, it is quite defensible to argue that the pursuit of happiness means those areas of economic life that belong to the people generally, that are to be protected and secured by the government, not *usurped* by it.

Consider this language from the constitution of the Commonwealth of Virginia, written one month before the Declaration of Independence. "... that all men are by nature equally free and independent and have certain inherent rights, of which when they enter into a state of society they cannot deprive or divest their posterity, namely, the enjoyment of life and liberty with the means of acquiring and possessing property and pursuing and obtaining happiness and safety." The pursuit of happiness and the ownership of property - the right to acquire it, possess it and dispose of it - was considered to be a right given by God before human beings ever came into civil society. The civil society does not *create* the right to property. It is in civil society because it was given by God, and the purpose of civil society is to *secure* that right, not to redefine it, reshape it, and make it work for whatever purpose the civil society desires.

It is amazing in America today, after we have seen the collapse of Communism, and the socialistic

economic system that Communism supported, that we seem to be continuing in the same direction of that collapsing society. One of the main reasons is we've forgotten that the pursuit of happiness - the right to acquire, possess, and dispose of property - is a God-given unalienable right. Notice, it is unalienable; you can't even *give* it away! You certainly can't give it away for your children. This is what it says in Virginia - you can't even divest your *posterity* of that right. Yet, we find much divestiture of our posterity in America today as we mortgage ourselves into such incredible debt that our children and our children's children will have to pay when they become adults.

This particular principle of liberty of contract is found in Article 1, Section 10. of the U.S. Constitution, and the language reads thus: "No state shall pass any law impairing the obligation of contract.'' Chief Justice Marshall in the only case in which he did not concur with the majority opinion of the Court in the entire time that he sat on the court - he "lost" this case - claimed that this *obligation* of contract guarantee was a guarantee of a *liberty* of contract. The way that he put it was that every human being has the right to choose with whom and upon what terms to enter into a contract. The parties choose whether or not to agree and upon what terms.

The legislature is limited to providing, (1) remedies for breach, (2) rules regarding proof of the agreement, and (3) prohibitions against illegal purposes. Notice that a medical licensure statute by definition limits the liberty of contract because if you seek healing from someone who does not have a license from the state, you can't enter into a contract with that person, no matter how well-informed you are and no matter how good the proposed method of healing might be. You are allowed to enter into contract only with someone who has the appropriate license. It would be much the same as if the state licensed grocers.

It is true that cities do have licenses for businesses, but you are entitled as a matter of right to such a license. **Cities don't screen you to see whether or not you know something about the grocery business.** You can get into the grocery business and know nothing about the grocery business. It is left to the consumers to determine whether or not they want to buy groceries from you. In today's world we're concerned that consumers are so stupid and foolish that they don't know anything about what their needs are. The state has become big brother. We say, "We're going to make sure that you're not so foolish as to enter into a contract with someone whom we do not think would be a good one for you to contract with."

In their 1847 code of ethics the AMA championed voluntary associations. They did not champion state licensure. They said, "Let's get those who are in a certain school of the healing arts and say we are all in agreement that this is the proper school. Our challenge is to demonstrate to the public that this is the best healing opportunity that you have." But, they recognized that there could be other competing schools and it was, of course, their responsibility to make the case that theirs was the best healing opportunity. However, they recognized that there would be healthy competition among the various schools.

Indeed, there was a commitment to a community of relationship between the doctor and patient built upon this notion of voluntary association. Chapter one of the 1847 code of ethics has this heading: "Of the Duties of Physicians to their Patients and of the Obligations of Patients to their Physician." What we have today are doctors who have duties to their patients and patients who have no obligation to the physician. It is a one-way requirement for physicians today. This is a breaking up

of the community relationship of obligation of a patient to a physician and of a physician's duty to a patient, and it comes about because they have freedom of contract. They have liberty to enter into the terms of mutual satisfaction.

Again, from the AMA's 1847 code of ethics, "A physician should be ever ready to obey the call to the sick, imbued with the greatness of his mission and of the responsibility he habitually incurs in his discharge. Those obligations are the more deep and enduring because there is no other tribunal other than his own conscience to adjudge penalties for carelessness or neglect." What happens in a licensure system is the development of a notion that holds the view, "Well, *they'll* take care of the standards. *They'll* do it." A *voluntary* association of mutual respect and mutual obligation, on the other hand, builds a community standard that comes out of the principle of self-government. Are there going to be problems? Of course! People are going to make mistakes. It is a fallen world. Man is finite. No system is going to usher in a perfect relationship in which problems are not going to arise. But, has *licensure* solved the problems?

It is much the same issue that is raised when a similar position is taken with regard to public schools. Public schools are unconstitutional and unbiblical. As Thomas Jefferson .says, "To tax a man to propagate opinions with which he disagrees is sinful and tyrannical." I am always asked the question, "Well, if you don't have public schools, what will happen to the children?" My response is, "Look what's happening to them now!" The assumption is that we must have a tax-supported public school system in order to educate children. Many people would oppose ridding the medical profession of the licensure standards on the grounds of, "What will happen? Why, we'll have all these quacks."

I'm not so sure that the current state of affairs is all that good in the relationship between physicians and their patients. The point I'm making here is really a point of principle. That is, God, in ordaining the realm of property - the realm of agreements, the realm of contracts left all that to the self-governing individuals. Each individual bearing the image of God has the capacity to make wise and informed choices. The duty of the medical profession as well as any other service-oriented profession is to make available the best possible service and to make it available in the most informed way so people can make wise choices.

What we find today is that the licensing system has ushered into the practice of medicine a code of ethics in which community is not emphasized as it was in the case in the 1847 code of ethics. Physicians know well that oftentimes things are done with a patient not because it is in the interest of the patient but because of the danger that might arise if something should go wrong and the patient would come back with a malpractice claim.

A **third principle** is at issue. There is not only a question of freedom of religion properly understood, and not only a question of liberty of contract, but also a concern about *special privileges*. There is a principle that can be found in almost every state constitution and in the United States Constitution that reflects the principle embodied in the Declaration of Independence that all men are created equal. One of the most pernicious violations of that principle was the special privileges that the king gave to his favorites. Indeed, many people occupied monopoly positions not because they had achieved it through hard work but because they had been the favorite of the king or the queen.

From the constitution of Maryland (the first constitution of that state) we have the following: "... that monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." In Virginia, it was stated this way: "... That no man or set of men is entitled to exclusive or separate privileges from the community." Or, in Maryland, that "... No title of nobility ought to be granted in this state." Indeed, the United States Constitution, both in Article 1, Section 9, and Article 1, Section 10, denies to both the state and the United States governments the authority to grant a title of nobility. On first glance, one might think that to be a quaint prohibition. After all, England still has its lords and its barons and its "Sirs." We in the United States don't have any "ladies," "lords," baronesses, or barons. On reflection, however, we *are* a nation of nobility, because there are people in America who get the benefits of having the label, "Sir" or "Lord." Indeed, I think we are the most "noble" - we're full of all kinds of noble classes.

The practice of giving someone the label "Sir" or "Lord" wasn't just the name. If one is labeled a "Lord," for example, he is given a political privilege, namely, he gets to sit in the House of Lords. The House of Lords is comparable to the United States Senate. Not only does one get a special political privilege, but one also receives special economic privileges. Oftentimes nobles receive a home and large grounds and economic benefits. Alexander Hamilton said this about the prohibition against titles of nobility, in *The Federalist, No. 84*: "This [that is, the prohibition against titles of nobility] may truly be denominated the cornerstone of republican government. For so long as they are excluded there can never be serious danger that the government will be of any other than that of the people."

Study of the U.S. government recently reveals that one of the major problems of government is special interests. We've become the government of the special interests, by the special interests, for the special interests. James Madison wrote about this prohibition against titles of nobility in *The Federalist, No. 39*: "It is essential to such a government that it be derived from the great body of the society, not from a favored class of it. ... A government that grants entitlements will be controlled by special interests and will cease to be a republican government." What is the nature of a license, especially the nature of a license that is designed to exclude by an entitlement to engage in a particular kind of occupation to the exclusion of competition that doesn't meet those standards? It is a special privilege.

This is not true of physicians only. We have "Sir" Tip O'Neill and "Lord" Carl Albert, just to name two, who today don't live like ordinary citizens. They have a special privilege. Indeed, Carl Albert, who at one time was the Speaker of the House, earns more money today than he ever did in that office. Many of those in the House of Representatives have special privileges that the remainder of us don't have. Bouncing checks without having to pay the $20 fee is one. The problem of entitlements is a problem that is *pervasive* in our society. Think of the subsidies enjoyed by senior citizens under Social Security, farmers with price supports, single mothers with dependent children, children of middle and upper middle class families who go to college.

Justice John Paul Stevens (who is not one of my favorite Supreme Court justices) wrote of the problem of titles of nobility in America today when he addressed the question of affirmative action that guaranteed a certain amount of business to minority business enterprise. He said, "The ten percent set-aside (for minority businesses) contained in the public works employment act of 1977 creates monopoly privileges in a 400 million dollar market for a class of investors defined solely by

racial characteristics."

The economic consequences of using noble birth as a basis for classification in 18th-century France, though disastrous, were nothing compared with the terror that was engendered in the name of *egalite* and *fraternite*. Our historic aversion to titles of nobility is part of our commitment of the proposition that the Sovereign must govern impartially." We have forgotten the legacy of our forefathers with regard to what happens to a nation when, through monopoly licenses and through other kinds of entitlements, we lose the sense of impartiality that comes when such entitlements are not available to special classes of people.

Not until the 1870s and the early 1900s was there a medical licensure system. It, in effect, introduced a meritocracy with monopoly privileges in a particular area of economic life. But for the fact that lawyers hold a civil office you could make the same charge with regard to them. Lawyers are officers of the court and, therefore, are much like any other civil office. There are some limitations with regard to that, but that is not so with regard to physicians if there is an important relationship between physical health and spiritual health. In the name of health and welfare, an economic monopoly has been established by law. Recent studies have emphasized that this is true. There are increasing economic barriers to entry into the medical profession. The liability insurance requirements alone in many states raise *significant* economic barriers to the practice of medicine.

Medical education is probably the most expensive in America. Even lawyers can go to school for less money than medical doctors. If you begin to factor in the various government subsidies with regard to health care in terms of establishing hospitals and Medicare and Medicaid programs you can begin to see that it is a system that is *rife* with subsidies and entitlements. The future implications, of course, are vast, including socialized medicine - the ultimate entitlement program. Socialized medicine comes when a state-created monopoly is affirmed and then those who need that service are subsidized with tax monies so everyone can afford the service of the favored enterprise.

In summary, careful evaluation of the licensure system asks these questions: Does the practice of medicine belong to the state? Should the state have the authority to set the criteria by which the art of healing is practiced? Or, is the practice of medicine so intimately and inextricably intertwined with the spiritual dimension of man that it really belongs in the realm of religion - a duty owed to the Creator enforceable by reason and conviction and not by force or violence. Secondly, of course, is the whole question of the freedom of people to make mistakes, the freedom of people to make choices, especially in the area of healing, where there *are* differences of opinion with regard to particular practices. Can we not, with the general principles of contract law, protect people from those who might take advantage of the general populace?

Finally, there is the concern that comes from any licensing system - that it will produce a system of monopoly power and all that such entails, including the ultimate loss of freedom for the masses and authority being given to those who wield the economic privilege. That is the real coot of the problem today with regard to socialized medicine. If we are going to give a monopoly license to physicians then, inevitably, we invite government subsidy and control of the entire area of the practice of medicine. Once we've crossed that line of licensure, it is inevitable.

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