The Unaddressed Role of Religious Beliefs and Emotional Damage in Violations of Informed Consent for Medical Procedures

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On my honor as a University Student, I have neither given nor received unauthorized aid on this assignment as defined by the Honor Guidelines for Thesis-Related Assignments

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Introduction

Between 40 and 50 million major surgeries are performed in the United States every year, each of which require receiving explicit informed consent from the patient (Dobson, 2020). Although heralded as the cornerstone of medical ethics, issues with the implementation of informed consent have resulted in thousands of lawsuits being filed and certain groups being unaddressed and misrepresented. One pertinent example occurs in rulings on emotional harm in informed consent, which results in suppression of religious beliefs and first amendment rights. These rulings have sparked controversy amongst social and political groups that need to be compiled to understand the complexity of this issue and find an equitable solution for everyone involved.

The specific ruling on emotional harm in informed consent came from the case of *Salandy v. Bryk* (2008). It states that lawsuits for misconduct for breach of informed consent cannot be filed against a physician unless a threat of physical harm was present, regardless of the emotional harm that the patient sustained. This ruling has sparked massive controversy about the rights of patients and physicians and what the meaning of medical malpractice should be. On one side, religious groups and civil rights activists believe that emotional harm wrought by a violation of informed consent should be valued as highly as physical harm is (Butzier & Stevenson, 2014; Katz et al., 2016). Conversely, physicians, lawmakers, and the court system feel that allowing punishment for emotional harm would be impossible to implement effectively and create more harm than good in the medical field (Hanna & Vanclay, 2013; Henderson et al., 2019). To better understand the outcome of *Salandy v. Bryk*, this research project will evaluate the stances of each social group on the court's ruling and the effect said ruling has had on them.

Compiling this data, the current implementation of informed consent will be analyzed to see how each group's competing interests have shaped the laws and practices that are seen today.

Background

Laws about informed consent in non-routine medical procedures have been enacted in America since 1914. In its current form, the five required elements that must be explained during informed consent discussions are: "(1) the nature of the procedure, (2) the risks and benefits of the procedure, (3) reasonable alternatives, (4) risks and benefits of alternatives, and (5) assessment of the patient's understanding of elements 1 through 4" (Shah et al., 2022). The requirement to obtain explicit informed consent can be superseded if the patient is incapacitated, in need of immediate life-saving interventions, or voluntarily waives their informed consent rights. Additionally, some groups have been deemed incapable of giving informed consent. These groups include children under the age of 17, mentally impaired people, and people too sick to fully comprehend what they are consenting to (Shah et al., 2022). When any of the principles of informed consent are violated, patients can sue physicians for medical malpractice on the grounds of informed consent violation. However, recent a recent court ruling has made compensation for these violations impossible in certain situations.

In 2008, the elements of informed consent were explained to Joan Salandy, a patient of Kingsbrook Jewish Medical Center who underwent knee replacement surgery from Dr. Eli Bryk. Salandy consented to the knee operation but stated she refused to get blood transfusions as they went against her beliefs as a Jehovah's Witness (Gohel et al., 2005; *Salandy v. Bryk*, 2008). When blood transfusions were performed anyways, Salandy sued Kingsbrook and Bryk for violating her right to informed consent and causing her emotional distress (Dikic et al., 2013). In

a contentious verdict, it was decided that Salandy had no grounds for the suit since damages cannot be awarded without fear of physical harm or injury.

The *Salandy v. Bryk* ruling closely resembles that of another set of guidelines employed in America: the COVID-19 vaccine mandates. However, unlike *Salandy v. Bryk*, this law ruled in favor of religious rights and the 1st Amendment. Laws enacted in 45 states and upheld by the Equal Employment Opportunity Commission (EEOC) have required exemptions from the vaccine based on religious beliefs to be made (Gostin et al., 2021). The justification for these laws is the 1st Amendment freedom of religion, which legislators have found would be breached if vaccines were required for everyone regardless of their beliefs. This parallel law to that of emotional harm in informed consent brings up a very interesting dilemma. In the case of informed consent, it was ruled that physical safety is more important than a violation of the patient's religion, which is why emotional harm endured does not constitute medical malpractice. Yet, in regards to vaccines, religious freedom was placed above the physical safety, as unvaccinated individuals pose a threat not only to themselves but to those around them when it comes to spreading COVID-19. These conflicting cases highlight the fact that the issue of physical vs. emotional harm does not have a definitive answer. It is because of this that the research presented in this paper to illuminate both sides of the issue is necessary to help determine what steps could be taken to improve the current situation.

Methods

To properly define the problem, court cases and subsequent legislative documents on emotional harm in informed consent were analyzed. Only cases and laws that resulted in a significant change to the implementation of emotional consent in America were considered. With the problem defined, the next step was to determine how relevant groups have been affected by

it. Separate data was collected for each of the five groups that will be discussed in this paper. Information was filtered by year of publication, with papers that came out after the *Salandy v. Bryk* case being deemed more relevant to this project. However, some papers before this case were considered if they helped provide additional context to the current stances of the groups. Special emphasis was put on religious groups and physicians, as these two groups are most directly impacted by emotional harm laws. For these groups, scholarly articles on medical opinions and outcomes as well as opinion pieces will be compiled to fully capture the effect emotional harm laws have. The other three groups: civil rights activists, the courts, and lawmakers, have opinions formed based on previous laws or precedents. Because of this, the main sources of information will come from cited precedent, scholarly work, and lobbying statistics that has given rise to the stances these groups are taking.

Results and Discussion

Stare Decisis or Ideological Bias: The Court Ruling on Emotional Harm

The outcome of the *Salandy v. Bryk* case acted as the catalyst for the debate on the role of emotional harm in informed consent. The court's verdict on this case was said to be determined by a precedent that was set in 1961 by the *Battalla v. State of New York* case (1961). In *Battalla v. State of New York,* it was ruled that a plaintiff may only be compensated for emotional distress caused by a physician's negligence if they had a reason to fear harm or physical injury (Tebano, 2008). Since Salandy was in no physical danger, the violation of her religious beliefs and subsequent emotional distress were irrelevant to the case. In all cases heard by the Supreme Court, precedent is an important deciding factor based on the doctrine of *stare decisis,* which states the courts will uphold previous decisions when ruling on cases unless there is "special justification or strong grounds" not to do so (Nigro, 2022; *Stare Decisis*, 2021). The presiding

court at the time did not deem the emotional harm caused to Joan Salandy as strong enough grounds for overruling precedent, and therefore sided against Salandy and with Dr. Bryk.

While the Supreme Court is meant to act as a unbiased guardian and interpreter of the Constitution (*The Court and Constitutional Interpretation*, n.d.), it is well known that ideological bias plays a large role in the decisions the Justices make. In 2008, during the ruling of *Salandy v Bryk*, the court was made up of five conservative-leaning justices and four liberal ones (*Martin-Quinn Scores : Measures*, n.d.). These political leanings perfectly mirrored the 5-4 decision made by the court and reflect the major differences in opinion held by the conservative and liberal justices. As stated in the conservative-written majority opinion:

> In this case, the plaintiff's claim to recover damages for emotional distress flowing from the receipt of a medically indicated and properly performed autotransfusion has no merit in the complete absence of any allegation that any act by Kingsbrook endangered her physical safety or caused her to fear for her own safety . . . Instead, the plaintiff's bill of particulars identifies the personal injuries she sustained as "anger, anxiety, depression and religious conflict." (2008)

On the other hand, the liberal justices' dissent noted:

> We respectfully disagree with our colleague's conclusion that emotional distress damages are not compensable in this situation absent any indication that the actions of Kingsbrook endangered the plaintiff's physical safety or caused her to fear for her physical safety. "All there need be to recover for emotional injury here is breach of a duty owing from [Kingsbrook] to plaintiff that results directly in emotional harm, and evidence sufficient to guarantee the genuineness of the claim" (2008)

This information illuminates a secondary factor in the court's decision on this case: ideological bias. If the court had a different political makeup, the *Salandy v. Bryk* case may have had a different outcome. However, since the court remains majority conservative, it is unlikely this case will be reversed anytime soon.

Politics and Lobbying Power: Legislative Response to Salandy v. Bryk

In conjunction with the *Salandy v. Bryk* ruling, legislators on the federal and state levels have abstained from drafting any laws and regulations that would protect patients from emotional harm in informed consent. Specifically, part 46 of title 45 in the Code of Federal Regulations (45 CFR 46) deals with informed consent and the requirements under which patients can file for their consent being violated (Protections (OHRP), 2017). A major update to these regulations was made in the 2018 Common Rule, and now states that patients can sue for violation of informed consent if the violation by the physician was the "actual cause of the patient's injury" (Compliancy Group, 2023). This means that without a tangible physical or mental injury, with injury being defined as a diagnosable damage to a person, no suit can be made and no compensation gained. In other words, emotional harm on its own does not constitute an actionable violation of informed consent. The justification for these laws is that emotional harm wrought by a procedure cannot feasibly be proven or disproven as genuine, and therefore should not be used as a basis for compensation (Hanna & Vanclay, 2013). However, other decisions made by legislators have contradicted this stance and illuminate the complicated nature of this issue.

As mentioned above, one notable example of legislators ruling in favor of potential emotional harm over physical safety is the religious exemption offered for COVID-19 vaccine mandates (Gostin et al., 2021). These mandates state that if being vaccinated against COVID-19

violates any tenets of a person's religious beliefs, that person cannot legally be required to receive the vaccine by any federal establishment. Comparing religious exemptions to emotional harm in informed consent cases leads to several thoughts. First, it exemplifies the complexity of attempting to balance the competing interests of respecting diverse mental viewpoints while maintaining individual and community safety. Also, it raises questions about why different stances have been taken on two very similar issues. A potential answer to these questions is the power of lobbying within the legislative branch.

Lobbying is a practice that has been around for hundreds of years and involves non-governmental interest groups attempting to sway the decisions made by legislators. There are several ways this can be accomplished, but one of the most influential is the use of money. The largest lobbying group in America in terms of money is the healthcare and pharmaceutical industry, donating approximately $233 million dollars per year over the last 20 years (Wouters, 2020). This gives the medical field enormous sway over legislative actions, as lawmakers need to secure funding for their campaigns to get re-elected. Therefore, speculation has been made that pressure from physicians and the medical industry leads to legislators passing laws that prohibit the use of emotional harm as justification for informed consent lawsuits (Wouters, 2020). This idea comes from the fact that of all major social groups, physicians most strongly side against emotional harm in informed consent.

Physician Opposition to Emotional Harm: What is the Role of a Doctor?

Physicians and healthcare workers make up the group most adamantly against the use of emotional harm to a patient as an actionable violation of informed consent. There are several reasons that doctors feel this way, many of which are founded in the history of medicine as a profession. Looking back to the early 20th century, doctors had unchallenged power, reputation,

and autonomy (Hafferty & Salloway, 1993). The general public saw physicians as all-knowing and didn't think to question any diagnosis given to them. This gave physicians free reign over all medical decisions and meant that they would rarely be blamed for negative patient outcomes. However, informed consent served as one of the first major blows to the autonomy of doctors (Kumar, 2013). Now doctors were not only required to tell their patients what they planned and doing and why, but they could also be found liable for any injury patients suffered while under their care. This marked a shift in the doctor-patient relationship, and now most patients are much more hands-on with their care and do not blindly follow the advice of doctors. A survey of 12,000 physicians found that 84% felt their ability to do their job has been hindered by their obligation to inform the patient and respect patient autonomy (Jauhar, 2019). While a majority (97%) of those physicians viewed protecting patients from harm or injury as a legitimate reason for the modern doctor-patient relationship, significantly less (33%) believed their patient satisfaction was as important. This leads to the first major reason physicians are against emotional harm in informed consent: the job of a physician is to diagnose and treat illness and injury, not look after feelings.

Physician's view on their responsibility to the public is mainly rooted in western biomedicine. Western biomedicine is founded in the idea that medicine should be a practice of knowledge and science without influence from social or cultural factors (Chary & Sargent, 2016). In this model, the state of a patient's health is defined solely by the lack of illness or injury, with a successful doctor having a high rate of positive medical outcomes. Based on this idea, physicians do not believe that their main concern should be how a patient feels about the procedure they prescribe. This is not to say that doctors do not care about a patient's experience, but it does mean that they care a lot more about whether or not the patient is cured. In the case of

Salandy v. Bryk, Dr. Bryk did what he needed to do to save Joan Salandy and felt justified in doing so despite the violation of her informed consent. Dr. Bryk and other physicians were sympathetic to the predicament of Ms. Salandy, but all agreed that the best outcome was for her life to be saved (Heyhoe et al., 2016). But the opinion of doctors on emotional harm in informed consent stem from more than just a perception of their duty. It also comes from a fear of unwarranted repercussions due to the inability to prove emotional damage.

Just like any employed professionals, doctors need to consider the consequences their decisions will have on themselves. In particular, any major mistake made by physicians could result in their license being stripped and their livelihood being taken away. While hesitancy to perform certain operations already exists due to the potential physical ramifications, adding the possibility of emotional harm as an actionable offence would heighten this even further. Data collected from two different studies showed that when told that they could be found responsible for the emotional harm done to their patients, over 50% of physicians opted out of performing preventative lung cancer screenings that could save lives (Ersek et al., 2016; Henderson et al., 2019). These physicians cited self-preservation as the primary reason for their decision, not improved health outcomes or patient considerations. In addition to hindering their ability to do their job, doctors also dislike emotional harm in informed consent because it is impossible to predict or prove after the fact. What would stop people from claiming they were emotionally harmed by a certain procedure after hearing there was a violation of informed consent, regardless of whether or not harm was actually inflicted? What metrics would be used to classify the severity of emotional harm suffered by the patient to determine the appropriate punishment for the physician? These are questions that doctors feel are impossible to answer. Therefore, most physicians would feel safest avoiding high-risk procedures in order to mitigate the potential for

emotional harm cases, even if they felt that said procedures were the best chance a patient had to survive (Dikic et al., 2013). All of these things are extremely troubling to the medical field and are the basis for its opposition to enacting emotional harm laws in informed consent cases.

Suppression of Beliefs: Religious Groups Feel Dismissed and Ignored

Religious groups constitute the main opposition to the *Salandy v. Bryk* ruling on emotional harm in informed consent. During her trial, Joan Salandy stated that she would rather have died than received the blood transfusions that saved her life (2008). This is because of her strong religious beliefs as a Jehovah's Witness. Jehovah's Witnesses believe that consuming blood in any form is a mortal sin that will eternally damn one's soul after death (West, 2014). While not willingly committing this sin, Joan Salandy did receive blood transfusions which are considered a form of "blood feeding" in this religion, meaning her chance for salvation in the afterlife had been stripped away. After the verdict was given by the courts, both Salandy and the Jehovah's Witness community were outraged. They stated that emotional harm suffered by Salandy in this case was far worse than any physical or earthly pain she could have sustained (Katz et al., 2016; West, 2014). This pain would affect her forever, even after her human life came to an end. This highlights the main contention religious groups have with the ruling on emotional harm: it dismisses and disregards their religious beliefs, which for most devout people is more important than their lives.

Religious groups in America have felt persecuted and suppressed for many years. In recent times, movements towards social inclusivity have clashed with traditional religious values, pushing the latter aside in favor of the former. In tandem with the increasing secularization of America, this has made religious groups feel extremely dismissed and underrepresented as a minority group. The problem for religious groups is that the general public

in America does not believe that this dismissal is actually happening. A poll conducted by the Public Religion Research Group found that only 42% of Americans believe that religious freedom is being threatened (Boston, 2021). Additionally, a majority of Americans report that religious beliefs are not an acceptable excuse for the mistreatment of LGBTQ+ individuals or the refusal of service to a customer. Due to this, various religious leaders believe modern America has become an afterthought when compared to the rights of other minority groups (Davis, 2010; De Gree, 2022). And according to them, the *Salandy v. Bryk* ruling is just another example of this, with a violation of religious beliefs and other emotional harm being trumped by physicians' fear of scrutiny.

There are some religious groups that not only have an issue with the ruling on emotional harm in informed consent, but also take offense to the requirement of informed consent itself. Two prominent examples are Buddhists and Christian Scientists. Buddhism mainly clashes with informed consent because of the idea that informed consent needs to be an individual, autonomous decision. Buddhists believe that life is holistic and that the individualistic nature of informed consent goes against their existence as a collective with the rest of life (Zhang, 2021). However, this does not mean that Buddhists do not want to be given knowledge about the treatments they may be receiving; it is just that they do not feel capable of giving consent to said treatments. This can sometimes lead to informed consent needing to be waived and Buddhists patients being forced to blindly trust their physician's decision. Christian Scientists believe that all issues will be healed thanks to spiritual means and not technological ones (Battin, 2005). Therefore, if they are to seek medical treatment from a hospital, it will be because prayer has led them to do so. Since religion and faith guides Christian Scientists, they will waive their right to informed consent and even sign a form relieving the physician of any liability in the event of a

negative outcome. The issue is that in many cases, doctors will take shortcuts on treatments knowing that they cannot be punished for bad results (Swan, 2020). Christian Scientists see this as unfaithful individuals ignoring the will of God, thereby ruining the spiritual healing they had been seeking. While these examples are not directly related to *Salandy v. Bryk*, they have been used by religious groups to bolster the argument that the court's ruling is an example of religious persecution in the medical field.

The First Amendment: Civil Rights Activists Fight for Patients' Rights

In conjunction with religious groups, civil rights activists have argued against the ruling in *Salandy v. Bryk*. However, whereas religious groups have a personal issue with the outcome, civil rights activists believe it is constitutionally incorrect and violates the first amendment right to freedom of religion. Specifically, the beginning of the first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (*The Bill of Rights,* 2015). As with most of the constitution, this phrase is fairly vague and can be interpreted in many ways. The residing opinion amongst civil rights activists is that any legal action that obstructs a person's ability to practice their religion should be considered unconstitutional (Butzier & Stevenson, 2014). Following this definition, the verdict of *Salandy v. Bryk* should be considered unconstitutional and be overturned. By absolving physicians of any liability for emotional harm done to a patient, this case gives one person the right to prohibit another's right to freely exercise their religion. Joan Salandy's right as a Jehovah's Witness to avoid the consumption of blood in any form was unjustly taken away from her without her consent. Civil rights activists believe that this should have been a violation of her first amendment rights, and to avoid a similar situation happening, emotional harm should be included in the list of scenarios where action can be taken against a physician.

Another issue civil rights activists have with the *Salandy v. Bryk* ruling is the precedent that was cited. The job of court justices is to interpret and apply the Constitution to the cases they hear. Following precedent has become a central tenet of the court because it reduces decisions being overturned and laws needing to be constantly changed. Yet, it is also important for justices to evaluate the precedent they are using to see whether or not it still aligns with the current interpretation of the Constitution (*The Supreme Court's Overruling of Constitutional Precedent*, 2018). For *Salandy v. Bryk*, the precedent came from *Battalla v. State of New York* case of 1961. The ruling in this case was that emotional distress due to physician negligence could not be acted on unless a reasonable fear of physical harm was present (*Battalla v. State of New York*, 1961). According to most civil rights activists, this ruling is outdated and reflects a time before mental and emotional health was a prominent issue. It was not until the mid-1960s that mental and emotional health became a serious issue, with an increase in diagnoses and treatment options that has cascaded into the modern practice of psychiatry (Nolan, 2021). Therefore, while the *Battalla v. State of New York* ruling made sense at the time, our new understanding of the severity emotional harm can have on people overrides the court's previous logic. Because of this, the only constitutional thing to do would be to overturn the *Battalla v. State of New York* precedent and rule in favor of emotional harm as an actionable violation of informed consent.

Conclusion

Consensus and Future Steps

Evaluating the stances of the court, legislators, physicians, religious groups, and civil rights activists gives light to why emotional harm in informed consent is such a controversial issue. *Salandy v. Bryk* has made it so that emotional harm is not an actionable violation of informed consent. This is the ideal outcome for some groups, particularly physicians and

healthcare workers, but fully dismisses the viewpoint of others, mainly religious organizations. This research project has started to address this issue by illuminating both sides to the emotional harm argument. With that in mind, much work still needs to be done to find a solution that equitably encompasses the concerns of every party involved and ensures no group is being prejudiced against. If this can be accomplished, a greater connection and understanding between religion and medicine could be achieved, resulting in a more inclusive community for all parties.

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