Professor Vischer on New Conscience Regs

by Michael Sean Winters

Distinctly Catholic

I am delighted to present an incisive look at the new conscience regulations from Professor Robert Vischer, law professor at the University of St. Thomas Law School in Minneapolis. Vischer is also the author of *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge Univ. Press 2010). (The link brings you to Amazon and, after reading Rob's essay, you will want to purchase the book!)

Here is Professor Vischer's commentary:

*What do the new Obama regulations tell us about the future prospects for conscience?*

Pity the journalists asked to cover the latest skirmish in our country's ongoing conscience battles. There has been two years' worth of smoke surrounding federal conscience protection for health care providers, but it is difficult to discern exactly where the fire is when the debate plays out on the pages of the Code of Federal Regulations. Make no mistake, there are fundamental differences in the presumptions with which Democrats and Republicans embark on the project of conscience protection these days, but the debate has become so predictably partisan that it holds very little real drama. That is a shame, if only for the fact that a robust commitment to the liberty of conscience is now widely viewed as the pet cause of a single political party.

A bit of background: In the final days of the Bush Presidency, the Department of Health and Human Services issued regulations requiring more than a half-million federally funded health care entities to certify compliance with conscience protections prescribed by federal statutes. A storm of protest ensued, and seven states filed suit to block implementation of the new rules. Connecticut's attorney general called
the new regulations ?unconscionable? and a ?ticking legal time bomb set to . . . blow apart vital constitutional rights and women?s health care.? Other critics were even more dire in their portrayal. President-elect Obama voiced his disapproval, and he rescinded the regulations soon after he took office.

After a two-year wait, the Obama Administration?s replacement regulations were made public earlier today. For observers expecting a sharply worded repudiation of the Bush regulations, the opening paragraph might be a bit of a let-down:

"Neither the [Bush] 2008 final rule, nor this Final Rule, alters the statutory protections for individuals and health care entities under the federal health care provider conscience protection statutes, including the Church Amendments, Section 245 of the Public Health Service Act, and the Weldon Amendment. These federal statutory health care provider conscience protections remain in effect."

If the underlying statutory protections have remained constant, what is there to argue about? As it turns out, plenty.

First, a right means very little without a remedy. The patchwork of relevant federal statutes lack a private right of action, meaning that workers who suffer discrimination in violation of the conscience provisions cannot bring suit to recover for their harm. The Bush regulations did not provide one either, but some observers were hopeful that, by requiring federally funded entities to certify their compliance with the statutes, the rights would have a little more ?teeth? to them than they had before. The Bush regulations also provided that individuals could file complaints with the HHS Office for Civil Rights, and then that Office could take action as it deemed appropriate. The Obama regulations preserve that avenue, though the fear is that, when action is discretionary with the agency, the corresponding rights will be left to jockey for priority with a laundry list of other regulatory initiatives and enforcement actions. Given that the Democratic base has hardly been clamoring for more aggressive enforcement in this area, one cannot help but be skeptical. To be sure, I do not know how efficacious a certification process would have been on this front, but I do predict some wringing of hands over the Obama Administration pulling back even from this enforcement measure in favor of an exclusive reliance on agency discretion.

Second, the Bush regulations were offered, in significant part, ?to define certain key terms? and to ?ensure that recipients of Department funds know about their legal obligations under these nondiscrimination provisions.? In other words, the regulations defined some terms in order to clarify the legal obligations. (The final version of the Bush regulations did not, as appears to be widely believed, define specific procedures, such as abortion, but they did define important terms such as ?assist in the performance,? ?health care entity,? and ?recipient.? ) The Obama regulations rescind the definitions entirely, explaining that ?individual investigations will provide the best means of answering questions about the application of the statutes in particular circumstances.? Again, this change is not reassuring for those who doubt the Obama administration?s commitment to conscience. By setting the terms of the inquiry, definitions provide transparency and enhance agency accountability. The Obama regulations do not disavow any of the definitions set forth in the Bush regulations; they just rescind them in their entirety. If there is disagreement about the terms by which conscience protection gains real-world traction, let?s have it out. Instead, President Obama opted to punt.

More broadly, the Obama regulations avoid any language that explains, much less expands upon, the underlying statutes. They simply set forth the purpose (enforcing the conscience protection statutes) and the mechanism for bringing complaints (tasked to the HHS Office for Civil Rights). Apparently, the less said on the subject, the better. The problem, of course, is that Congress has never been especially astute at crafting user-friendly legislation. The implementing regulations, at their best, can provide a roadmap of the relevant legal rights, privileges, and obligations. Forsaking the opportunity to provide any sort of roadmap fosters doubt as to how seriously one takes the corresponding obligations.
Perhaps this line of criticism is unfair to President Obama. After all, even though some of his supporters recoil at the notion, he did not shirk away from reinforcing a provider?s right not to participate in abortions. In introducing the replacement regulations, the HHS makes clear that it ?supports clear and strong conscience protections for health care providers who are opposed to performing abortions.?

The implicit corollary to that, however, is that the right not to participate in other morally controversial procedures may be a little murkier in the Administration?s eyes. Indeed, the Washington Post?s Rob Stein reports that the Obama regulations leave in place ?only long-standing federal protections for workers who object to performing abortions or sterilizations,? rather than the more sweeping protections afforded by the Bush regulations for ?doctors, nurses, pharmacists, or other employees who refused to participate in care they felt violated their personal, moral or religious beliefs.?

Stein?s account sparks a couple of immediate questions: first, what is the basis for this characterization if both sets of regulations do not alter the underlying statutes? One of the Church Amendments ? 42 U.S.C. § 300a-7(d), for those keeping score at home ? provides:

"No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by [the Department] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions."

This language seems to suggest protection for a provider?s conscience beyond abortion and sterilization. Perhaps the existing law puts greater constraint on current office-holders than culture war combatants would wish?

The second question: how did rolling back ? or at least holding the line on ? conscience protections become a hallmark of a progressive political agenda? This is a much trickier inquiry than parsing regulatory language. One relevant development is progressives? tendency to conceive of freedom ? and the government?s responsibility to safeguard that freedom ? in terms of positive liberty, not just negative liberty. Negative liberty requires protection against interference with the pursuit of basic goods; positive liberty requires affirmative assistance in securing basic goods. As progressives have tended to expand the range of goods for which the government?s affirmative assistance is required, the potential for conflict with a provider?s liberty becomes greater. Nowhere is this trend more pronounced than in the debates over reproductive rights. Arguments for conscience protection emerge from a long tradition of negative liberty; arguments for guaranteed access to a particular good or service ? backed up in many cases by state power ? emerge from a much more recent tradition of positive liberty.

A closely related development is a shifting view of professional licenses. Generally the state?s licensing authority has been viewed as a means by which to ensure a provider?s competence. As access to goods and services becomes an essential dimension of meaningful liberty (in progressives? eyes), there is a stronger justification for viewing licensed providers as quasi-public officials, and the license becomes a means of ensuring that governmental objectives are met.

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Progressives are quick to rally to the defense of a student forced to violate her conscience by participating in the pledge of allegiance. Few progressives have rallied to the defense of pharmacists required by state law to sell the morning-after pill. In my view, this is a progressive blind spot that stands in tension with the overarching progressive commitment to freedom from state coercion in matters comprising a person?s moral identity and integrity. Progressives have shown a steady shift in their willingness to accept
incursions on conscience in order to further other socially desirable goals. Progressives may eventually come to regret this shift?state power unbounded by conscience protections is not necessarily captive to progressive causes?but so far there is very little indication of remorse. President Obama's foray into the debate, though certainly not a disastrous turn of events, shows little indication that the partisan presumptions about conscience will change anytime soon.

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