

New healthcare regulations address abortion, conscience

Michael Sean Winters | Feb. 18, 2011 | Distinctly Catholic

[The Obama Administration just announced](#) [1] this morning its new rules regarding conscience protections for healthcare workers.

The new rules came about because of a lawsuit and other challenges to the previous rules issued by President George W. Bush a few days before he left office.

Critics asserted that the old rules were overly broad and did not meet constitutional muster. The new rules are sure to ignite controversy and, in the midst of controversy, it is good to return to first principles.

Here is the central issue: The right of a woman to procure an abortion cannot trump the conscience rights of a woman doctor who declines to perform one.

The First Amendment, in fact, is only, repeat only, about restrictions on government's ability to infringe on the rights of citizens -- about negative liberty, a "freedom from" government interference. The rights of conscience embodied in the First Amendment can and should extend to the licensing power by which the government regulates hospitals and hospital employees.

There is little doubt that the debate over the new rules will be cast principally as a fight between pro-life Catholics and pro-choice women's groups. The most contentious points have to do with reproductive health care issues.

Catholics run many hospitals and women's groups want to insure the availability of legal procedures such as abortion and contraception in those hospitals.

In simplest terms, the new conscience regulations issued today draw a bright line around abortion -- siding essentially with the stance of the Catholic bishops. They maintain the enforcement mechanisms that were part of the Bush rule, another important "win" for pro-conscience rights groups, and punted on many other issues -- allowing for a case-by-case assessment when the conscience regulations conflict with other statutory requirements.

The new rules leave it to the states to enact whatever conscience protections they desire. On balance, I suspect that NOW and NARAL will be more upset than the USCCB.

Additionally, and importantly, the administration announced a new program to ensure that health care workers are actually instructed about their rights, and how to protect them from infringement. Health care workers should know what their rights are and how to defend themselves -- something that was completely unaddressed by the Bush administration.

But the issue is not really about health care. The issue is conscience and how our Constitution does or does not protect the rights of conscience.

I am not a constitutional lawyer, but I know a little bit about the history of conscience rights. See the companion article, [Liberals ? Do Your Homework!](#), [2] for more on that history.

My concerns about the new rules do not primarily spring from a sense of Catholic special pleading on behalf of our hospitals. My concern is a liberal concern -- a concern that the sanctity of conscience is inviolable and that the moment liberalism forgets this, it ceases to be liberalism.

We cannot permit the debate to be so clouded that this fact is obscured: Whatever one thinks about the right to privacy and what that right does or does not permit, there is no doubt that the First Amendment to the Constitution gives the Catholic Church in its hospital ministries, and Catholic health care workers in particular, the right to decline to perform procedures they find morally objectionable.

Conversely, I believe a private, non-Catholic hospital has the right to refuse to hire someone who refuses to perform certain parts of the job description that hospital creates: Conscience must be willing to pay the price of such non-employment.

But the government has no business using its licensing power to coerce the conscience of Catholic or other health care workers. This is not only a due deference to religious freedom. It is a recognition that for Catholic health care workers, performing an abortion is not only morally repugnant -- it is not health care.

If NOW and NARAL object, let them build their own hospitals and do there what they wish. And, shame on liberals if they permit NOW and NARAL to make them stupid about their own history, a history that was born of the struggle to defend the rights of conscience.

Finally, one of the contentious issues -- Plan B, the distribution of emergency contraception after a rape -- has already been dealt with and dealt with brilliantly by the Catholic Bishops in Connecticut.

In 2007, the state legislature passed a law requiring all hospitals in the state to distribute emergency contraception, including Catholic hospitals. The Catholic bishops fought the bill, but once it passed, [they found a way to abide by the new law](#) [3].

?To administer Plan B without an ovulation test is not an intrinsically evil act,? the bishops said in a statement at the time.

Without an ovulation test, it is impossible to know if contraception has occurred, and without that knowledge, one cannot intend the use of the drug as an abortifacient.

This is casuistry at its best. Casuistry got a bad name during the Reformation, but casuistry at its best acknowledges the rigor of moral argument and is suspicious of attributing the proper absolutism of our principles to the application of those principles in often conflicting and conflicted circumstances.

We can be certain about the moral law, but our certainty lessens as we apply that law, and there is no shame in trying to find ways to allow the widest range of human action, provided that action does not entail immoral acts. Casuistry may not always be pretty, but it is humane.

In the next few days, including possibly over the weekend when I normally do not post, I will be featuring comments from some leading legal scholars about the new conscience regulations, so check back often.

This is an important issue, and not just for the Church. It is imperative that NOW and NARAL do not further pull liberals away from their own best tradition of protecting the rights of conscience.

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[1] http://www.ofr.gov/OFRUpload/OFRData/2011-03993_PI.pdf

[2] <http://ncronline.org/blogs/distinctly-catholic/liberals-do-your-homework>

[3] <http://www.newstimes.com/news/article/Bishops-change-Plan-B-stance-84445.php>