

HHS Mandate: Can We Live With It?

Michael Sean Winters | Jul. 1, 2013 Distinctly Catholic

The Department of Health and Human Services issued its final rule on the controversial contraception mandate on Friday. Reportedly, the administrative committee of the United States Conference of Catholic Bishops will be having a conference call sometime today to frame their response.

The first thing the bishops need to ask themselves is whether or not they are asking themselves the right question. The question is no longer whether or not the rule could be improved, although it may be possible to get a few remaining difficulties tweaked. The question now is whether or not our Catholic institutions can live with this rule.

I have stated repeatedly my hope that the lawsuits against the mandate filed by several dioceses and related Catholic institutions prosper. I think the mandate, and specifically its conscience exemptions, were poorly done from the start, and failed to recognize the freedom of the Church, which has more often been a political recognition than a legal one in the United States. Legally, there are many churches and what is good for one must be good for all. Politically, the government has shown great deference to the churches in crafting legislation. Sadly, this particular rule falls across a fault line that greatly divides not only the nation but the Church as well, contraception. I cannot think of a worse issue upon which to have this far more important fight over the scope of religious freedom in our society, for reasons that should be obvious to all and which have only become more obvious as the debate unfolded over the previous two years.

The bishops, however, must ask themselves what the dangers are in pursuing a legal strategy. The first danger is obvious: We could lose and then the rule would be backed by a court precedent. It is doubtful, according to people more learned in the law than me, that the Supreme Court would overturn the Religious Freedom Restoration Act: They struck it down as applied to the states in *City of Bourne v. Flores* (1997) but upheld the law, unanimously, in *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal* (2006). It is unclear how the justices would rule should the HHS mandate come before them, indeed, it is difficult to predict how this court will rule on almost any case! If you doubt that, see how many people predicted Chief Justice Roberts would be writing the majority opinion upholding the Affordable Care Act.

There is a deeper, and more insidious, danger in continuing to pursue a legal strategy in the absence of a convincing argument that compliance with the law is morally illicit. The leaders of the Church are all of them concerned with the secularization of our society. Of course, secularization is an easy word to say, and some people think it is an easy thing to diagnose, when in fact the sources of secularization are many and complicated, in our own time as in previous times. That said, I would suggest to the bishops, again, that they have two models of confronting secularization before them. The first we can dub the Becket Fund model: We dig in, we fight in the courts, we are pugnacious, we join the culture war. The second model was exemplified by Pope Francis when he knelt down and washed the feet of a group of incarcerated youth, including a Muslim girl, on Holy Thursday night. I would submit that it is the second model, precisely because it is based on the example of the Lord, and not on a particular reading of the Federalist Papers, that should commend itself to the bishops.

You can't do both. Repeat, you can't do both. If the bishops appear to the culture like culture warriors or politicians, they will not only blend into the divisive, nasty, brutish world of contemporary politics, they will be treated as culture warriors and politicians, not as pastors. You cannot mount a sharp-elbowed political or legal strategy and then claim that the meek will inherit the earth. Frankly, I do not think the forces of secularization stand a chance against the Francis model of combatting secularization but we are destined to lose the legal-political strategy, maybe not in this round, but over time.

So, back to the question ? can we live with the rule? The short answer is yes. I am disappointed that HHS did not make one tweak that is, I think, important. Under the Advanced Notice of Proposed Rule Making (ANPRM), that came out last year, if a Catholic institution that is separately incorporated, say a local high school, gets its insurance via the local diocese, if the diocese is exempt from the mandate, all those institutions that get their insurance from the diocese would also be exempt. In the NPRM announced in February, that was no longer the case and that local Catholic high school might have to find a new insurance policy. To be clear, that local Catholic high school would be able to claim the accommodation from the mandate, and so would not have to provide insurance coverage for the objectionable procedures and pills. It is possible that they might be able to continue to get their insurance through the diocese, and simply notify the insurance company that they are an accommodated, rather than an exempt, institution. An official at HHS said only that this issue would be dealt with on an ?employer by employer? basis, which does not give much guidance. This is a burden on a school or a charity, most of which already operate on tight budgets. I wish the USCCB had spent the last two years focusing on getting these kind of common sense changes in the rule, instead of worrying about Hobby Lobby and other private, for-profit companies and their supposed right to determine what insurance their employees get.

I am reasonably, and regrettably, confident that the USCCB will continue to insist that the mandate forces Catholic institutions to ?facilitate or fund? the coverage in question. I think that is false. There is nothing the Catholic institution is required to do that would constitute facilitation, and the rule explicitly forbids the insurance companies from passing on the costs of the coverage to that Catholic institution. Critics complain that, of course, the insurance company will pass on the costs but the ACA makes all sorts of new demands on insurance companies, which the companies agreed to, because they are getting 40 million new customers. Contraception coverage is probably a cost-benefit for the companies unlike, say, covering those with pre-existing conditions, but insurance companies are now required to do that too.

I am also suspecting, and regretting, the likelihood that the conference will continue to insist that individual for-profit employers should be able to claim an exemption. I admit that I am generally suspicious of the morals of most businesspeople, a suspicion grounded in years of experience as a businessman myself. But, this dog was never gonna hunt. What employee wants their boss making such decisions for them? As it is, employers have too much unrestricted power over their employees, a power that is only growing as the Supreme Court's conservative majority, consisting of all Catholics, makes decisions that diminish the rights of workers in many

and varied ways, all without a peep from the USCCB I might add.

Another argument we are likely to hear is that the mandate sets a bad precedent. Sure, this time it may only be insurance coverage, but maybe next time, once government has established that it can interfere willy-nilly with our institutions, the government will deny conscience protections for those medical personnel who refuse to perform abortions. This argument is exactly wrong. We should draw a bright line around abortion and the need for conscience protections against participating in it, not because of the depth of our religious convictions, but because of the nature of the act. In the fight to end the scourge of abortion, every decision we make should have the effect of keeping the focus on the nature of the act itself. Pro-choice groups tie themselves in knots when forced to describe what abortion actually is. So, in this case, I think extending conscience protection to contraception ? and not really to contraception but to insurance policies that cover contraception (no one will be tied to a gurney and be force fed the pill after all) ? this actually diminished our argument for conscience protections regarding abortion, it does not enhance it.

So, finally, we are left with one argument against living with the rule, the argument that doing so constitutes illicit cooperation with evil. I have argued this point before but, in a nutshell, even if you believe that the mandate forces Catholic institutions to fund or facilitate the objectionable coverage, and I don't, what is being funded or facilitated is, at worst, remote material cooperation with evil of the kind all of us do everyday. Paying taxes for an unjust war is remote material cooperation with evil. Paying for a hotel that has dirty movies in the rooms is remote material cooperation with evil. (If you watch the movie, that is formal cooperation with evil and a whore of a different color!) In short, remote material cooperation with evil is almost unavoidable, which is why our great Catholic theological tradition has spent so much time analyzing the issue and coming up with clear principles that govern moral decision-making. No one, absolutely no one, has convincingly made the case that compliance with the mandate constitutes illicit material cooperation with evil.

I have no sympathy for the Obama administration on this issue. They have mishandled it from the start and I think they are wrong to be so grudging in their negotiations with the USCCB and other Catholic stakeholders. But, to be clear, it became a political winner for Obama, they know that, and politicians rarely decline to pursue a strategy that helps them at the polls. Seek joy where joy may be found, and politicians are not a joyful bunch. That said, the USCCB needs to understand that its strategy to date has been an unmitigated failure. By appearing to draw lines in the sand, by using hyperbolic and offensive language, by seeming to baptize a tendentious reading of the Founding and preach it from our pulpits, by listening to the Becket Fund without questioning their interest (they want this litigation!), in this and other ways, the USCCB indicated to the White House that there was nothing short of complete capitulation that would satisfy the conference. The bishops drank their own Kool-aid, they did not solicit voices of caution, still less those with other points of view, and they now find themselves having pursued a failed political strategy and a very unpredictable legal strategy.

Can we live with the mandate? Let me put the question differently: If nothing changes, do we need to close down our ministries because of the mandate? If the answer to that question is no, we do not need to close our ministries, then it is time to climb off the limb as gracefully as possible. Can we live with the mandate? Yes, we can. Do we wish we did not have to? Of course. But, the issue of religious liberty is important enough to begin educating our people about it away from the blinding, and distorting, bright lights of this fight over the HHS mandate. There are bigger fish to fry and better ways to fry them. The culture desperately needs evangelization. If our bishops spend the next two or three years presenting themselves to the culture as litigants, they will have a much harder time teaching our people about the importance of religious liberty, to say nothing of teaching our people about the Gospel. The legal reality and the political reality should no longer dominate the ecclesial reality. Will the bishops decide it is time to climb off the limb (and later ask themselves how they got out there, a question with some profound implications) or will they continue to stay out on the limb, preaching a particular understanding of American Constitutionalism and drowning out whatever they have to say about Jesus Christ. That is the choice the bishops face now.

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