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More on the Mandate

Michael Sean Winters | Feb. 21, 2013 Distinctly Catholic

My post yesterday on Archbishop William Lori?s letter to Congress earned me quite a few emails. When I got back from the vet ? Bernie had an ultrasound yesterday on his shoulder and neck area ? my inbox was full with comments. As well, two new posts on the web look at the issue and are worthy of note.

One friend, who is a lawyer who tends to take a dim view of anything coming from the Obama administration, said that I was wrong to claim that this concern about employees being ?automatically? enrolled for contraception coverage was a new concern. He pointed out that it was one of the items listed in a document produced by the USCCB [1]last April. That document can be found here. It is true that this concern is Item #4 on that list. It is also true that the USCCB raised the concern in its detailed comments on the proposed rule filed last May. Fair enough.

In a technical sense, then, I was wrong, in the same way people who say Hitler was a German are technically wrong because he was actually an Austrian. The fact that the USCCB lawyers set down a marker last year in a laundry list of complaints does not change the fact that this concern about ?automatic? enrollment was never part of the USCCB?s public campaign until this month. For example, it was not in any Bulletin Insert I saw. I do not recall it being at the centerpiece of the sermons I heard during the Fortnight for Freedom.

Besides, while I only vaguely remember reading this concern in the document linked to above, I am sure that I dismissed it as a stretch then as I dismiss it as a stretch now. As I have said before, the controversy over the HHS mandate is in part a legal issue, but it is also a political and cultural issue. In the past year, many of us believed that the Church was right to insist on its institutional rights, the libertas ecclesiae. The USCCB also argued that the administration?s way of dealing with religious institutions that were ?accommodated,? but not exempt entailed unacceptable cooperation with evil. I have been more ambivalent about this concern, and increasingly think it is a shibboleth of the Catholic Tea Party. The third concern consistently voiced by the USCCB, that the mandate was unfair to for-profit employers, I have always insisted was very dangerous, that in this hyper-individualistic society, we should be very wary of advancing the idea that an individual?s claims of conscience should simply and always trump public law.

Why did the USCCB not create more of a stink about this concern for ?automatic? enrollment? I have no inside information, but I suspect they think it is a stretch too and their decision to highlight it now is more of a source of desperation than anything. I also suspect they understood that the concern about ?automatic? enrollment somehow burdening the religious liberty of women at accommodated institutions was logically problematic. It runs the risk of raising the counter-argument: What about the non-Catholic women at these institutions, or Catholic women who disagree with the Church?s teaching on contraception? If we are to be up-in-arms that women are being ?forced? to ?accept? coverage ? coverage, mind you, that they need never access, won?t be paying for, and can therefore ?refuse? in any meaningful understanding of the word ? why are women?s groups wrong to be up-in-arms about being denied coverage because they work at a Catholic institution?

I reject the idea that this automatic enrollment is a threat to parental authority. Indeed, that strikes me as a scare tactic pulled right out of the Moral Majority playbook. It also strikes me as a concern raised by people who have not spent a lot of time with teenagers. If a 17-year old girl wants contraception, and if, by reason of this ?automatic? enrollment, she can get it for free under her parents? policy, and if her parents object to the use of contraception on moral grounds, I doubt very much that the girl will ask her Mom about getting the insurance company to pay the tab. I suspect she will call a friend, or go to a clinic. The fears of lawyers with a dabbling of theology, all of it drawn from a certain, narrow understanding of moral theory, should be checked by common sense and it is the bishops themselves who must make that check.

Yesterday, at Commonweal [2], Notre Dame?s Cathleen Kaveny posted a comment from her friend Marty Lederman on this topic. Lederman, who teaches at Georgetown, is way smarter than me and he is a lawyer and I find his argument persuasive. My other lawyer friend thinks Lederman only tells half the story, pulling quotes from the ?good language? in the proposed rule while ignoring the more problematic language. Ah, lawyers. Two very smart people, looking at the same text, and reaching such different conclusions. But, that is also one of the points I have been making these past few months: Yes, in this matter, it is important to consult with lawyers, but the lawyerly perspective does not exhaust the issue. There are political and other considerations as well.

This conundrum of lawyers discerning wildly different things in the same text was bothering me when Justice Sonia Sotomayor came on the PBS Newshour last night. During the interview, this exchange occurred:

JUSTICE SOTOMAYOR: *... which is, it's that people approach everything in life with its worst, and I do something very different in life. I try to find the best in everything. And if you try to find the best in people, they will usually rise up to your expectation.*

GWEN IFILL: *Well, there is ...*

JUSTICE SOTOMAYOR: *And if you look for the worst, you're going to find it, because there is no perfect thing.*

This has been one of my concerns with the bishops all along. Sadly, I think there are some bishops who have placed the HHS mandate controversy in the context of a cultural struggle in which the forces of evil and secularization are at war with the forces of good and the faith. Mind you, there really are forces of evil and secularization in the world. But, I do not share the hyper-apocalyptic version of reading contemporary American society, I do not thing the government is more of an agent of secularization than the market and the cultural consumerism that has come to define most people, and I think this dark vision of our society invites self-importance among those who espouse it and discourages them from applying the rich intellectual and moral traditions of our faith to the situation at hand. In the terms Kaveny uses in her book ? which I really will start reviewing tomorrow! ? the prophet and the pilgrim approach the world differently and both have need of the other. For too much of the past year, the USCCB has been all prophet, drawing clear lines in the sand, and no pilgrim, aware that we are on a journey that will ever remain unfinished in this lifetime.

In addition to Professor Lederman?s comments at Commonweal, I also wish to call attention to an article by Notre Dame?s Daniel Philpott [3]. He deals expressly with the issue of cooperation with evil and rightly emphasizes the need for Christian institutions to be able to witness to their faith. I think Philpott gets the cooperation with evil argument wrong. His analogy of an investor requiring that the shop he is investing in not sell naughty items is employed to make the point that money is fungible. Okay. But, then, we don?t need the HHS mandate to know that if a Catholic institution today has any kind of insurance, its premiums are going into the same insurance company coffers from which others are paying for contraception. The steps the administration has taken to insulate Catholic institutions from the coverage of contraception are, to my mind, sufficient.

They are more than sufficient, too. One of the changes introduced by the HHS mandate revisions is that Catholic institutions must ?self-certify? that they object to the contraception coverage. In other contexts, the Church has been urging our Catholic institutions to self-certify their Catholic identity. That is, essentially, what Ex Corde Ecclesiae is about, no? Now, because of the provisions in the revised mandate, a Catholic college or hospital or ministry has the chance to make a public, legal declaration of its opposition to such coverage, not just a private decision made to the insurance company. Indeed, as I have noted before, one of the great things about the HHS controversy, like the annual debates over graduation speakers at Catholic colleges, is that the controversy has shown that for us Catholics, our faith still makes demands, it still sets limits, it is still alive. One can scarcely imagine a Mainline institution having this debate. Sometimes the debates get coarse and hoary, but that does not obliterate their value.

So, the discussion continues.

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Links:
[1] http://www.usccb.org/issues-and-action/religious-liberty/upload/key-points-advance-notice-proposed-rulemaking-hhs-contraceptive-mandate-2012-04-02-1.pdf
[2] http://www.commonwealmagazine.org/blog/?p=23399
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