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HHS Mandate: Can We Live With This?

Michael Sean Winters | Feb. 4, 2013 Distinctly Catholic

Now that we have all had the weekend to consider the revisions announced to the HHS contraception mandate, where do we stand? Is this good enough? Does more need to be done?

My friend E.J. Dionne this morning writes, ?This war has been bad for everyone involved.? I do not agree. A year and one-half ago, when the HHS mandate was first announced, the issue of religious liberty was not really on my radar screen. Like most Americans, I correctly understood that in comparison to most of the rest of the world, and indeed compared to most times in our own nation?s history, America?s commitment to religious liberty was as clear as day. But, though better than the rest, I was wrong about the "clear as day" bit. I have learned in the past eighteen months that our First Amendment jurisprudence is a hash, and a specific kind of hash, one that for decades emphasized the Establishment Clause of the First Amendment and only in the past two decades has begun to wrestle seriously with the Free Exercise Clause. I have learned that efforts like the Faith-Based Initiative, launched by President George W. Bush and both furthered and strengthened by President Barack Obama, represents an innovation in our nation?s approach to social problems, recognizing the value of non-state actors in the provision of social services, more closely following the model of those countries which had the great blessing of Christian Democratic parties in power in the post-war era, and recognizing, implicitly at least, the autonomy and integrity of religious organizations, the libertas ecclesiae or freedom of the Church, which still has no real recognition in U.S. law, but to which Associate Justices Samuel Alito and Elena Kagan gave a big hat-tip to in their concurring opinion in Hosanna-Tabor v. EEOC. So, in important ways, I think this ?war? has been beneficial, alerting many Americans to a concern that was real if unseen, and potentially dangerous if unaddressed.

What of the specific provisions of the revisions announced on Friday? The fact that there is some uncertainty about the provisions does not speak well for the lawyers at HHS. This uncertainty could be seen in the headlines. An article in ?The Hill? was titled ?HHS rejects broader exceptions to contraception mandate? while an article at CNN had the contrary headline, ?Obama proposal would let religious groups opt out of contraception mandate.? Well, which is it?

In the seventh century, St. Isidore of Seville wrote that one of the characteristics of law is that it be ?clearly expressed.? St. Thomas Aquinas agreed and cited Isidore in his own writings on law. (h/t to Cathy Kaveny citing this passage of Isidore's in her new book which I hope to review next week.) I do not appeal to these great theologians because they are Catholic, or because their antiquity raises their arguments to a different level of dignity. I appeal to them in this instance because this observation ? that law should be clearly expressed ? seems self-evidently smart. Yet, in our litigious and complicated society, it is not easy to clearly express, in legal language, norms that cover a wide variety of situations. There are many different Catholic institutions that self-insure, but they so not all self-insure in the same manner. The language in the new rules regarding the self-insured is very conditional not firm, aspirational not final. This is a missed opportunity for HHS to have figured this out already. That said, rather than complain about it, stakeholders should ask themselves a simple question: What will work? Will a given approach work for the manner in which this or that institution self-insures. Until that kind of detail is worked, there is no ?deal? but such a deal will only be had if everyone approaches the

?comment period? of the next few months as a time to fix the problems, to dot the i?s and cross the t?s, and not as an opportunity to grandstand.

In the event, the Becket Fund seems intent on grandstanding. ?Today?s proposed rule does nothing to protect the religious freedom of millions of Americans. For instance, it does nothing to protect the rights of family businesses like Hobby Lobby,? began Becket?s General Counsel, Kyle Duncan, in a press release on Friday. Not, ?we applaud the administration?s efforts to wrestle with this nettlesome issue, and are determined to resolve the remaining tensions? which might have been the way St. Thomas More would have put it. Not, ?we applaud the HHS for removing the pernicious four-part definition of what constitutes an exempt religious organization but still have problems with the legal mechanisms.? No, they led with Hobby Lobby. I wish Becket and Hobby Lobby well with their suits, but the issue of private, for-profit employers and their exemptions is not the principal concern of the Catholic Church in this matter and, as I have argued repeatedly, the idea that any employer can opt out of a given law on conscience grounds feeds the beast of individualism in our culture that is at the root of so many of our problems. If, God willing, Roe v. Wade is someday no longer the law of the land, can someone cite their conscience rights to procure an abortion anyway? I am far more interested in the libertas ecclesiae than in the libertas Hobby Lobby.

Let me say that I value the work the Becket Fund has done over the years. But, let me also say that, like all single issue advocacy organizations, Becket?s opinions lack the breadth of vision that the bishops must now exercise. Becket evidences the old maxim ? if you only have a hammer, every problem must be treated as a nail. But, the issue of the HHS mandate arises at the intersection of law, politics, medicine and culture. The bishops need to inform their decisions based on all four considerations, and not make the mistake of forgetting that the lawyers work for them, not the other way round, a mistake that many people often make. And, in addition to the narrowness of any legal lens, Becket brings a further narrowing of focus because, let?s admit it, the group is embedded within a network of conservative and almost exclusively Republican advocacy organizations and, just so, brings a certain ideological focus to its legal analysis. Nothing wrong with that, and their opinions stand on their own and cannot be dismissed because of the partisan leanings of their friends or their benefactors. But, it turns out that on both sides of the nation?s ideological divide, groups are increasingly listening only to like-minded politicians and pundits, and their ability to grasp political and cultural realities becomes a bit distorted, every issue is seen against the backdrop of a larger cultural and political struggle, apocalyptic language begins to infect even minor issues, the possibility of honest compromise is lost as everyone?s first impulse is to dig in, not to dig out. I need scarcely point out that such a posture ill befits a bishop.

On to the details. We are told that the administration?s decision to remove the four-part definition of an exempt religious organization and, instead, use a long-established part of the IRS code is a distinction without a difference. The Becket Fund?s Mr. Duncan said the change was not ?meaningful.? Really? For the past year and one-half we have been told that the four-part definition was ?unprecedented.? Was it or wasn?t it unprecedented? We have all lived with the IRS Code for some time without any worries about religious liberty. Again, if you only have a hammer. The danger of the four-part definition, as I perceived the danger, was that it seemed aimed directly at the Catholic Church and threatened to be a dangerous precedent. The HHS said, ?No, this is not a precedent,? but that was as convincing as Justice Scalia?s insistence that Bush v. Gore was not a precedent. I say it was aimed directly at the Catholic Church not only because the underlying mandate had to do with contraception, but because the Catholic Church has the most extensive range of institutions ? charitable, educational and medicinal ? that would have been affected by it. The removal of the four-part definition is not nothing and shame on Becket and others for saying so.

There is the related issue of whether a religious institution is permitted to avoid covering contraception because it is exempt or because it is subject to an accommodation. This is a ?you say ?to-May-to? and I say ?to-Mah-to?? conundrum. Of course, the federal government treats different ministries of the Catholic Church differently. Our universities receive federal funds through grants and student aid, but not through Medicaid reimbursements.

Our hospitals don?t get student loan money, but they do get the Medicaid reimbursements. The key point ? and a point made repeatedly by Chiquita Brooks-LaSure, Deputy Director of Policy and Regulation at the Center for Consumer Information and Insurance Oversight at the U.S. Department of Health and Human Services, on the conference call with reporters Friday ? is that no religious institution that objects to paying for contraception will have to do so. Period. When the first "accommodation" was announced last February, I said I was ambivalent about it because it retained the pernicious four-part definition in distinguishing between exempt organizations and those to be accommodated. That is now gone, so I do not object to the idea that churches are "exempt" and hospitals are "accommodated." A hospital is not a church, a university is not a hospital, etc.

Now, the critics shift the argument a bit. They say that the insurance policies of Catholic institutions will still be the vehicle for the objectionable contraception and so this constitutes ?material cooperation with evil.? I suspect this issue will be much discussed in Dallas this week at the meeting of the National Catholic Bioethics Center. I have never found this ?material cooperation with evil? argument very compelling for a couple of reasons. First, it is ?black letter Thomism? that you can intend the cooperation, you just can?t intend the evil. Presumably, when Catholic University offers it employees and students an insurance policy, it does so because the common good requires access to health care and because, without it, the school would scarcely be competitive in hiring or enrollment. That is their intention. Second, we are talking about insurance which always involves pooling money to cover risk. (And, remember, money is fungible as we were told repeatedly during the debate over the Affordable Care Act.) So, if on a Tuesday, someone from, say, the Archdiocese of Hartford, walks a check across the street to the headquarters of Aetna Insurance company (and the cathedral and chancery really are directly across the street from the Aetna building), to cover the premiums for the employees of the archdiocese, and Aetna deposits that check and, same day, receives a bill for someone?s contraception, did the archdiocese just cooperate with evil? Where would one draw the line? This can get silly pretty quickly.

In one area, however, it does not get silly. There is a fair amount of discussion and disagreement about some of the drugs covered by the mandate, specifically Ella, a drug that some see as emergency contraception and others see as an abortifacient. If ever there was an issue best left to the courts, here it is. The executive order that attached to the ACA specifically bans using funds for surgical or chemical abortion. If someone wants to challenge the mandate on those grounds, that is a lawsuit that should go forward. I have argued before that one of my worries in this entire debate about conscience rights regarding contraception is that we should draw a bright, bright line around abortion and the conscience rights that must pertain to that act, not because our religious liberty might be threatened, not because of the depth of our commitment on the issue, but because of the nature of the act itself. Again, here is culture mixing with law: We want to keep the focus in debates about conscience exemptions from abortion not on us and our commitment but on the heinous nature of the act itself. The pedagogical value of this is obvious.

The new iteration of the rule creates a separate revenue stream to fund stand alone contraception policies for women that work at exempt or accommodated institutions. This may be the most important part of Friday?s announcement. I do not see how anyone can still maintain that it is Notre Dame?s insurance policy that is serving as a vehicle for the coverage, when someone else is paying for it. If Father Jenkins and I both walk into, say, a deli, and order sandwiches, and my sandwich is made first and I pay for it, it is mine, not Father Jenkins?, and he needs to wait for his sandwich and pay for it. If the government is reimbursing third-party administrators, how can Notre Dame?s policy be the vehicle? The third party administrator may be hired by Notre Dame, but Notre Dame does not have a veto over the administrator?s other clients, some of whom presumably cover things to which Notre Dame objects. At some point, all that money is in one pot, in the administrator's bank account, but it does not obscure the fact that, under the new rule, the administrator is reimbursed for the stand alone contraception policy by the government, the cost is not passed on to Notre Dame. Again, the Becket Fund?s comments notwithstanding, this is a big change.

A final comment. A friend approached me yesterday after Mass and complained about my piece on Friday,

indicating that I was far too generous in my assessment. Among other things he said, ?Planned Parenthood endorsed this new rule, so that should tell you something.? Well, in the wake of the election, I did not expect President Obama to turn his back on women?s groups that helped him win. Of course whatever comes out of the administration will have to meet with the approval of women?s groups. Curious to see that Catholics for Choice, like the Becket Fund, opposed the latest iteration of the mandate. Politically, the President could have told the USCCB to go pound sand. I can assure you that there were plenty of people advocating precisely that. If the USCCB adopts a strident tone in response to this latest change, they will strengthen the Church?s enemies. That is a political, not a legal, fact but it is one that commends itself to the bishops? attention.

So, my advice to the bishops is not exactly the same as E.J.?s this morning. I do think the USCCB needs to make clear that they expect the i?s to be dotted and the t?s crossed, especially regarding the self-insured, before they award a ?placet.? But the USCCB, and other stakeholders, must stop seeing this as another battle in the culture wars and, employing the morally and intellectually serious art of casuistry, try to find a way to fix any remaining problems during the comment period on the rule. These issues of religious liberty intersecting with public policy are not easy, the competing interests and principles are difficult to resolve. Whether we find good faith on the other side or not, as Catholics we are bound to demonstrate good faith. It is time to tone down the rhetoric, listen to a range of political and legal advice, find ways to solve the problems that remain and, I believe, compliment the administration for continuing to engage our concerns.
