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## Back to the HHS Mandate

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Distinctly Catholic

The other day a friend reminded me that the filing deadline for official comments on the HHS contraception mandate rule was fast approaching. In all the excitement of the conclave and the election of Pope Francis, I had almost forgotten about the HHS mandate. Almost. Returning to the subject is not easy. Suddenly, it seems like small potatoes compared to the apostolic zeal we have witnessed in the person of Francis.

When the Obama administration released its latest iteration of the rule at the beginning of February, I encouraged the bishops to essentially embrace the changes. Yes, we still needed to work out a precise way of dealing with the self-insured, although the new rule will have to accomplish that in some form or another. Yes, I would have preferred that the administration chose an alternate route for honoring the conscience rights of the Catholic Church, but they eliminated the pernicious four-part definition of what constitutes an exempt organization which was, to my mind, the central concern. Nonetheless, the fact that some religious groups are "exempt" and others are "accommodated" is not the kind of thing that should impede a settlement, and the on-going concern of the USCCB for the conscience rights of individuals and for-profit corporations has always troubled me.

I reminded the bishops and their staff at the USCCB that an election had taken place since they drafted their statements on religious liberty, and those who opposed any concessions to the Church had backed Mr. Obama and several bishops had suggested it was a mortal sin to vote for Mr. Obama, and Mr. Obama had won and won decisively. In addition to the legal issues, there was a political reality that had to be acknowledged. And, since the election, I have not seen the Republicans lining up to take a stand on the issue, have you? Of course not. The last thing the Republicans need now is to be seen as anti-

contraception.

Now, another election has taken place, an election in Rome. The new pope has called the entire Church to be less self-referential, to go out and to meet the poor and to serve them. The response to Pope Francis has been almost universal enthusiasm, the sense that a new day has dawned, and that our old, often tired Church may have gotten a fresh bit of wind, and that wind is not in our face but at our back. So, bishops must ask themselves: How will it look if the new pope calls us to reach out to the poor and, come August, when the HHS mandate goes into effect, some U.S. bishops start closing down ministries that serve the poor? If they continue to rebuff the attempts to accommodate their concerns, who will listen? I will bet any amount of money that Georgetown is not planning on closing up shop if the mandate takes effect. No, it will be those ministries that most cherish their Catholic identity, the Little Sisters of the Poor, Mother Teresa's hospices. Is this what the bishops want?

I am not a lawyer. But I know that lawyers can take almost any law and tell you why it won't work or they can take that same law and tell you why it will work. Last night I had dinner with a lawyer friend who said he begins his first year lectures by explaining to his students that the reason they have just received a 2,000 page book of case law is because two sets of very smart people examined the same set of circumstances and came to different conclusions. It is time for the bishops to instruct their legal team: Make it work. I would add that while I admire the Becket Fund and their work, like all single interest groups, they view reality through a narrow focus. They do not have to live with the consequences of closed ministries. They do not have to be concerned with preaching the Gospel. The USCCB cannot become an arm of the Becket Fund and its politics, but one is hard-pressed to look at the statements coming from both groups and find any daylight between them.

So, too, must the bishops re-evaluate the moral theology that has so far informed their assessments. Some moral theologians contend that the current mandate constitutes impermissible material cooperation with evil. Others, whom I find more persuasive, have pointed out that the concept of moral cooperation with evil does not easily apply to insurance policies which, like taxes, entail pooling money with those who make different moral calculi. The bishops, as successors of the apostles, should risk all that they have and are in defense of the Creed. But, they are ill-advised to bet the house on a theological opinion, especially a moral theology opinion on which there are persuasive arguments on all sides, and which, like all moral theology, must be applied. It is obvious that even the bishops do not agree among themselves on this issue. Let it be said clearly: One can disagree with the experts at the National Catholic Bioethics Center on these matters and still be a good Catholic. The fact that major stakeholders in Catholic ministries do disagree with the NCBC should give the bishops pause. The temptation for certainty is rarely healthy in such muddy circumstances. And one does not have to be a probabilist to disagree with the NCBC.

What does it mean to bet the house? Again, while there is a legal reality here, and a moral theology reality, and a political reality, there is first and foremost an ecclesial reality. The bishops are not lawyers or even moral theologians, they are pastors, and part of their job, as Francis has been pointing out, and Popes Benedict and John Paul II and Paul VI before him too, the central part of their job is to evangelize. This has become especially urgent as we Catholics come to wrestle with the fact of secularization. Every decision the Church makes must be seen through this prism: Does this or that decision help us to bring the Gospel to the world?

I would submit that currently there are two prominent models for confronting secularization and evangelizing the culture. One we might call the Becket Fund model. It entails confrontation and litigation. It champions individual conscience rights and the First Amendment, without any acknowledgement that if this is the basis of your argument, you are already halfway down the secularization slope to begin with. (When the political culture of the West abandoned a substantive ethic of the good for a formal ethics of

rights, it took one big leap towards secularization, and the Becket Fund model is firmly entrenched in the thought we associate with the seraglio of the Enlightenment. Cf. my review of Brad Gregory's book "The Unintended Reformation" here.) This Becket Fund approach tends to a particular political party, the Republicans, and just so instead of presenting the concern for religious liberty as a transcendent concern, it instead makes it fodder in partisan games. This approach sets the debate about the HHS mandate in almost apocalyptic terms, in which those who disagree with us are agents of the devil, the world as we know it is coming to an end, and every issue is seized with Manichaeian significance. I am not allergic to the concern for religious liberty. I think it is more complicated than our friends at the Becket Fund allow and certainly hope that I never work for a Jehovah's Witness with the legal power to keep me from getting a blood transfusion paid for by my insurance. But this I know and know with certitude: This culture warrior approach, drowning in legalese and a particular brand of moral theology, is not the stuff of evangelization.

The other prominent model for confronting secularization and evangelizing the culture was seen in a photo of a 76-year old man, whose face had recently and quite suddenly become familiar, bent over and washing the feet of a young Muslim girl in prison. The other model of evangelization was seen in the image of a pope on a minibus with a dozen cardinals, his parked limousine empty and left behind. This alternate model of evangelization is seen in the scuffed shoes underneath the white cassock. This model of evangelization calls us to reach out to the poor, where life is often uncertain and messy, and where the pastors of the Church are called to smell like their sheep! This commitment to the poor is not primarily about social justice, although it envelops it. The Pope is calling us as Catholics to reach out to the poor because that is where we will meet Christ. I would submit that this second approach to evangelization has within it the capacity to not only renew the Church but to take on the forces of secularization in all their complexity with the utter simplicity of the Gospel. Don't take my word for it: Bishops, ask your priests! What do they hear about Francis from the people in their pews? Is there not a fresh excitement in the air? Do we not all have stories of friends who have fallen away from the Church, or stayed but with little enthusiasm, who feel rejuvenated?

If the bishops of the United States want to kill that excitement, with all its potential for evangelization, they have only to guarantee that in a few months' time the headlines read: 'Bishops Close Ministries to the Poor Over Contraception Mandate.' Yes, in the intervening time, the bishops need to negotiate with the administration. There are real issues that need to be clarified. But, intransigence cannot be the order of the day. The USCCB is well advised to follow the lead of Bishop Lynch of St. Petersburg who posted a fine statement on these issues in February (read the whole thing here) and, after calling on the bishops to exercise a bit of humility and consult with others, he closed with these words:

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*We still have time to work to smooth out some of the rough waters which lie ahead. As one member, I would hope that our episcopal conference might be as open to listening to the issues and challenges which government seems to face as I believe they have been so far in hearing our concerns. But in the end, everyone must prepare themselves for what is likely to be imperfect regulations drawn from imperfect legislation. I still am grateful that that more universal health care coverage will be the first fruit of the Affordable Care Act and I am beginning to feel that I can say to my diocesan self-insured employees, all 1400 of them, that their moral right to health care coverage will survive this moment.*

The difference in tone between Bishop Lynch's statement and, say, the most recent statement from the USCCB is noteworthy. Quick question: Which sounds more like Pope Francis? And let me remind, that since his election, Pope Francis has not made any great decision, he has not issued any encyclical, but he

has changed the tone. He sounds humble. He looks humble. He never speaks as if he just got briefed by a Catholic neo-con lawyer, or the NCBC, he speaks as someone who loves the poor. That he is quite conservative I do not doubt. But, he does not come across like someone itching for a culture war. Pope Francis sounds like someone who has spent time with the poor, encountered Christ in their midst, and wants us all to share that experience and just so give the Church a new Pentecost. It is up to the USCCB if they want to stomp on the enthusiasm the new pope has generated. It is time to hit the "reset" button: the cardinals in conclave seem to have understood this and acted accordingly. It doesn't matter what the bishops adopted last year. There are new breezes in the air. The bishops and the whole Church have the wind at their back. "Behold, I am doing something new," said the Lord God to Isaiah. "Now it springs forth; do you not perceive it?"

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