Health-Care Reform and the Catholic Medical Professional

Impacting Religious Liberty in America*

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Abstract

There has been a steady and escalating attack on the religious liberty of health-care providers; currently, as we focus on the Patient Protection and Affordable Care Act and the more recent rescinding by President Barack Obama of major parts of President George W. Bush's Conscience Rule, this attack is never so evident. The culture of secular relativism increasingly is becoming hostile toward conscience rights and religion, especially the Roman Catholic Church, which is the largest nongovernmental provider of health care in this country. Our Holy Father, Pope Benedict XVI, in his recent visit to Westminster Hall of the United Kingdom addressed the "proper place of religious belief in the political process." He stated, "These are worrying signs of a failure to appreciate not only the rights of believers to freedom of conscience and freedom of religion, but also the legitimate role of religion in the public square."¹

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This presentation provides an overview of the threats to conscience faced by health-care professionals, particularly with a focus on the myriad of attacks at the state level, as they are potentiated by both the Patient Protection and Affordable Care Act and the revised Conscience Rule. Health-care professionals increasingly find that, when attempting to exercise their First Amendment rights to the free exercise of religion in health care, they are accused of violating the principle of the separation of church and state. Tragically, the very government, born out of a need to secure liberty, including religious freedom, is imposing policies that impact, the rights of not only the most vulnerable, but also those dedicated to caring for them.

Your Excellency, Archbishop O'Brien, thank you for your insight into the importance of this topic, especially right here in the Archdiocese of Baltimore, where there is such a wonderful presence of Catholic health care. Due to your personal experiences in protecting the rights of pregnancy crisis centers,² and I might add, winning, you are well aware that protecting the conscience rights of health-care providers is the bell weather topic for freedom. In this beautiful state of Maryland, historically the bedrock of religious liberty, you hold fast to the right to the free exercise of religion, at a time when increasingly those who claim that right are accused of violating the principle of the separation of church and state. Nothing could be further from the truth, as the Yale constitutional law scholar Stephen Carter stated, "For the most significant aspect of the separation of church and state is not, as some seem to think, the shielding of the secular world from too strong a religious influence; the principal task of the separation of church and state is to secure religious freedom."³ Tragically, the very government, born out of a need to secure liberty, including religious freedom, is imposing policies that impact, the rights of not only the most vulnerable, but also those dedicated to caring for them.

There has been a steady and escalating attack on the religious liberty of health-care providers; today, as we focus on the Patient Protection and Affordable Care Act,⁴ and the more recent rescinding by President Barack Obama of major parts of President George W. Bush's Conscience Rule ("2011 Final Rule"),⁵ this attack is never so evident. The culture of secular relativism increasingly is becoming hostile toward conscience rights and religion, especially the Roman Catholic Church, which is the largest nongovernmental provider of health care in this country. Recent statistics demonstrate that the 561 Catholic hospitals in the United States treat over 86.5 million patients annually. Furthermore, their other 2,331 health-care ministries care for almost eight million persons annually.⁶ The Catholic Church is not only the largest, but also the oldest provider of organized health care in the world. In 500 A.D., St. Benedict founded the Benedictine nursing order, recognized as the first organized form of nursing care. The oldest organized health-care delivery system in the world was developed by the Hospitallers in 1113.⁷ The first hospital west of the Mississippi was founded by Baltimore's

own Saint Elizabeth Seton in 1830.⁸ These are ministries in response to the Gospel imperative cited in the parable of the Good Samaritan. Yet the government is treating Catholic ministries as agents of the state, subject to state mandates that violate the very tenets that brought Catholic health care into existence.

It is undeniable that the act monies not only fund programs that will provide elective abortions, but also likely provide for the direct funding of elective abortions through other programs—that is, community health centers, cooperative grants, and high-risk pool programs. Furthermore, President Barack Obama’s executive order clearly states, “This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees or agents, or any other person.”⁹ Thus, it does not create new law, where none existed. In fact, the act mandates that “essential health benefits” be provided in every region of the country. These benefits, as defined in the law, include provisions similar to those in the Medicaid Act. Courts have construed such Medicaid provisions to include abortion: “Abortion fits within many of the mandatory care categories, including ‘family planning,’ ‘outpatient services,’ ‘inpatient services,’ and ‘physicians’ services.’”¹⁰ Thus, the Hyde Amendment was enacted to prevent public funding with federal dollars of abortion.¹¹ However, any federal health-care legislation must specifically invoke the Hyde Amendment on all options within the bill to assure its applicability, which the act does not. Every meaningful amendment offered to remove abortion from the act failed. Currently, there are several bills in Congress to remedy this problem.

There are only two provisions within the act protective of the conscience and religious liberty of health-care providers: opt-outs for participating in assisted suicide and abortion. The problem is in the definition of such terms. Historically, and accurately, abortifacients were defined as any drug or device that caused the expulsion of an embryo or fetus after fertilization. However, the medical community has redefined conception to mean implantation of the conceived embryo, not fertilization.¹² Thus, preventing the implantation of a conceived human being is no longer considered abortion. Furthermore, states that have legalized assisted suicide present the same problems in definition of terms. Oregon and the state of Washington specifically prohibit listing of assisted suicide as the cause of death on death certificates. The Oregon statute specifies that actions taken in accordance with the Oregon Death with Dignity Act do not constitute suicide, mercy killing, or homicide under the law.¹³ Thus, any conscience protections in the act could be hollow protections. Furthermore, without the protections of the Hyde/Weldon Conscience Protection Amendment, missing from the act, any conscience protection is tenuous at best.¹⁴ This scenario becomes more ominous with the recent rescinding by President Obama

of the major protections of the conscience rule (“2008 Final Rule”) promulgated by President George W. Bush.¹⁵ This was done despite that fact that, of the over three hundred thousand comments received on the proposed rescinding of the “2008 Final Rule,” nearly 187,000 were opposed to such rescinding.¹⁶ The “2011 Final Rule” does not reference the provision of conscience protections beyond sterilizations and abortions, whereas the “2008 Final Rule” cited applicability to any lawful health service or research activity.¹⁷ Now there is an effort to mandate that “preventive services” referenced in the act include contraceptive drugs and devices, which would include abortifacients.¹⁸

The impact on all health-care providers and agencies, particularly Catholic health care, is significant. This is particularly true in regions of the country where Catholic health care is the only provider in a region. Thus, not only is the right to life in great jeopardy, but also the right to religious liberty. Yet, we have heard that there is no need to be concerned because existing laws will protect health-care providers of conscience. The facts contradict such a statement.

A Catholic hospital was sued for initially refusing to provide breast augmentation surgery to a transgendered person.¹⁹ A fertility practice that limited its practice to married couples was ordered by the California Supreme Court to provide this service to homosexuals, despite the religious objections of the physicians.²⁰ In another instance it took four years for a nurse to receive justice after losing her full-time position for refusing to administer emergency contraception.²¹ Nineteen states have legal mandates for the administration of emergency contraception, which could also serve as an abortifacient, for a sexual assault. We know of a New York nurse who was forced to assist in a not immediately life-threatening abortion, after having given all the appropriate notice of such objections even in her job interview. She was threatened by her supervisor with actions against her registered nurse license. It was determined that the nurse had no right of private action against her employer.²² Professional associations, such as the American College of Obstetricians and Gynecologists, have stated that conscience only can be accommodated after the duty to the patient is met. Specifically, physicians of conscience not only must refer to other providers of morally illicit procedures, but, in resource-poor areas, must locate their practices in proximity for such referrals to occur and, in an emergency, must violate conscience in the providing of such a morally illicit procedure.²³ However, in a case at the Nassau University Medical Center, New York, eight nurses were supported by their labor union for refusing to assist at abortions.²⁴ The American Medical Association’s Board of Trustees issued a statement saying, in part,

Our [American Medical Association] supports legislation that would require individual pharmacists and pharmacy chains to fill legally valid prescriptions or to provide immediate referral to an appropriate alternative dispensing pharmacy without interference.²⁵

And only nine of the twenty-five states with pharmacist mandates in the dispensing of emergency contraception provide true conscience protections; and five of these twenty-five states require a pharmacist to fill all legal prescriptions. Even the Religious Coalition for Reproductive Choice admonishes that the law should not be overridden by positions of conscience that are based in religious beliefs.²⁶

This has been seen blatantly in two cases, in which the highest courts of California²⁷ and New York²⁸ agreed with the state legislatures that Catholic Charities, Catholic hospitals, and similar institutions must include in their employee prescription benefit plans contraceptives and abortifacients. What was deemed to be discrimination in health care of women trumped religious liberty. Furthermore, to be eligible as a religious employer for an exemption to these contraceptive coverage mandates, the California and New York courts ruled that the religious employer must meet these states' narrow definitions of what constitutes a religious employer—that is, have as a purpose the inculcation of religious values; primarily employ people who share its religious tenets; and serve primarily people who share the organization's religious tenets.²⁹ Most disturbingly, seven states define a religious employer as narrowly as New York and California. Can you imagine what would happen if we required baptismal certificates for admission to our Catholic hospitals?

Where is Thomas Jefferson when we need him? “Our rules can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.”³⁰

Our Holy Father, Pope Benedict XVI, in his recent visit to Westminster Hall of the United Kingdom addressed the “Proper Place of Religious Belief in the Political Process.” He spoke of the integrity of Saint Thomas More in following his conscience and the “perennial question of the relationship between what is owed to Caesar and what is owed to God.” Benedict states, “Each generation, as it seeks to advance the common good, must ask anew: What are the requirements that governments may reasonably impose upon citizens, and how far do they extend?” He noted,

I cannot but voice my concern at the increasing marginalization of religion, particularly of Christianity, that is taking place in some quarters, even in nations which place a great emphasis on tolerance. There are those who would advocate that the voice of religion be silenced, or at least relegated to the purely private sphere.... And there are those who argue—paradoxically with the intention of eliminating discrimination—that Christians in public roles should be required at times to act against their conscience. These are worrying signs of a failure to appreciate not only the rights of believers to freedom of conscience and freedom of religion, but also the legitimate role of religion in the public square.³¹

Clearly, as Stephen Carter, the Yale constitutional scholar whom I quoted as I began this presentation, states, “The potential transforma-

tion of the Establishment Clause from a guardian of religious freedom into a guarantor of public secularism raises prospects at once dismal and dreadful.”³²

Notes

¹ Vatican Information Service, “Proper Place of Religious Belief in the Political Process,” quoting Pope Benedict XVI, address to Representatives of Civil Society, Westminster Hall, London, UK (September 17, 2010), <http://abyssum.wordpress.com/2010/09/19/benedict-xvi-on-the-proper-role-of-religion-in-political-life/>.

² *Archbishop Edwin F. O’Brien et al. v. Mayor and City Council of Baltimore et al.*, Fourth Circuit Court, Maryland District Court, filed March 29, 2010, 1:2010cv00760, <https://www.care-net.org/newsroom/article.php?id=95>.

³ Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993), 107.

⁴ Pub.L. 111-148, 124 Stat. 119, to be codified as amended at scattered sections of the Internal Revenue Code and in 42 U.S.C., <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/content-detail.html>.

⁵ U.S. Department of Health and Human Services, “Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, Final Rule,” 45 CFR Part 88, RIN 0991-AB76, *Federal Register* 76 (2011): 9968–9977.

⁶ *The Official Catholic Directory 2010* (New Providence, NJ: P.J. Kenedy & Sons, 2010), General Summary.

⁷ Charles Moeller, “Hospitallers of St. John of Jerusalem,” *Catholic Encyclopedia*, vol. 7 (New York: Robert Appleton Company, 1910), <http://www.newadvent.org/cathen/07477a.htm>.

⁸ Grace L. Deloughery, *History and Trends of Professional Nursing*, 8th ed. (St. Louis: Mosby, 1977), 68.

⁹ President Barack Obama, “Executive Order 13535: Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act,” *Federal Register* 75 (2010): 15600, sec. 4(c).

¹⁰ *Planned Parenthood Affiliates v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996).

¹¹ National Committee for a Human Life Amendment, “Hyde Amendment” (2008), NCHLA Fact Sheets, <http://www.nchla.org/factdisplay.asp?ID=41>: “The Hyde Amendment is a rider to the annual Labor/Health and Human Services/Education appropriations bill which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. It is named after Rep. Henry J. Hyde (R-IL) who, as a freshman legislator, first offered the amendment.”

¹² See Christopher M. Gacek, “Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of Conception and Pregnancy,” *National Catholic Bioethics Quarterly* 9 (2009): 543-557, originally published by Family Research Council.

¹³ Oregon Revised Statute 127.800-127.995, <http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx>.

¹⁴ The Hyde/Weldon Conscience Protection Amendment (2004) prohibits discrimination against health-care providers who decline to provide, pay for, provide coverage of, or refer for abortions. The amendment was incorporated into the conference report on the Fiscal Year 2005 Omnibus Appropriations Bill H.R. 4818, which was signed into law on December 8, 2004 (Public Law 108-447).

¹⁵ U.S. Department of Health and Human Services, "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law; Final Rule," 45 CFR Part 88, *Federal Register* 73 (2008): 78071, <http://edocket.access.gpo.gov/2008/E8-30134.htm>.

¹⁶ U.S. Department of Health and Human Services, "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, Final Rule," 9971.

¹⁷ Nancy Frazier O'Brien. "USCCB Official Has Mixed Reaction to HHS Conscience Rule Revision," *Catholic News Service*, February 22, 2011.

¹⁸ Hearings are being held by the Institute of Medicine, Board on Population Health and Public Health Practice, on what constitutes "Preventive Services for Women." The Institute of Medicine convened an expert committee to review what preventive services are necessary for women's health. Virtually all invited experts who spoke on this issue support that pregnancy is to be considered something to be "prevented."

¹⁹ "Catholic Hospital Sued for Refusing Breast Implants to 'Transgendered,'" *Catholic News Agency*, January 9, 2008), http://www.catholicnewsagency.com/news/catholic_hospital_sued_for_refusing_breast_implants_to_transgendered/.

²⁰ *North Coast Women's Care Medical Group v. Superior Court*, 44 Cal. 4th 1145 (August 18, 2008).

²¹ *Lemly v. St. Tammany Parish Hospital District No. 1*, 22nd Judicial District for the Parish of St. Tammany, Louisiana, filed June 2005.

²² *Cenzon-Decarlo v. Mt. Sinai Hospital*, No. 09-CV-3120 RJD, 2010 WL 169485 (E.D.N.Y., January 15, 2010).

²³ American Congress of Obstetricians and Gynecologists, Committee on Ethics, "The Limits of Conscientious Refusal in Reproductive Medicine," Committee Opinion 385 (2007).

²⁴ Sid Cassese, "Hospital Apologizes to Nurses," *Nassau County CSEA Local 830*, April 27, 2010, http://www.csea830.com/MediaCenter/CSEANewsDirectory/tabid/76/selectedmoduleid/434/ArticleID/84/title/Hospital_Apologizes_to_Nurses/Default.aspx.

²⁵ American Medical Association, Board of Trustees, "Preserving Patients' Ability to Have Legally Valid Prescriptions Filled," reaffirming Policy H-120.947, *Proceedings* (June 17, 2008).

²⁶ Religious Coalition for Reproductive Choice, *In Good Conscience: Guidelines for the Ethical Provision of Health Care in a Pluralistic Society* (Washington, D.C.: RCRC, 2007).

²⁷ *Catholic Charities of Sacramento v. Superior Court (Dept. of Managed Care)*, Supreme Court of California, no. S099822 (March 1, 2004), 41–42, <http://caselaw.lp.findlaw.com/data2/californiastatecases/s099822.pdf>.

²⁸ *Catholic Charities of the Diocese of Albany v. Gregory V. Serio*, New York Court of Appeals, no. 11 0 (October 19, 2006), 4, <http://caselaw.findlaw.com/ny-court-of-appeals/1116832.html>.

²⁹ See New York Insurance Law §3221 [1][16][A][1]; See California Health and Safety Code section 1367.25, subdivision (b); Insurance Code section 10123.196, subdivision. (d).

³⁰ Thomas Jefferson (1743–1826), U.S. President. Notes on the State of Virginia (1787), query 17, ed. William Peden (1954), 159, http://quotes.dictionary.com/our_rules_can_have_authority_over_such_natural.

³¹ Pope Benedict XVI, “Proper Place of Religious Belief in the Political Process,” address to Representatives of Civil Society, Westminster Hall, London, UK (September 17, 2010).

³² Carter, *The Culture of Disbelief*, 122–123.