

STUDIES IN CATHOLIC HIGHER EDUCATION

A POLICY SERIES GUIDED BY THE PRINCIPLES OF EX CORDE ECCLESIAE

October 2009

Contraceptive Mandates and Immoral Cooperation

by Marie T. Hilliard, JCL, Ph.D., R.N

About the Author

Marie T. Hilliard, JCL, Ph.D., R.N., is the director of Bioethics and Public Policy for the National Catholic Bioethics Center. Dr. Hilliard holds a Ph.D. in Professional Nursing Higher Education Administration from the University of Connecticut and a Canon Law Licentiate from The Catholic University of America in Washington, D.C. She has served as executive director of the Connecticut Catholic Conference and adjunct professor in the Department of Nursing at Sacred Heart University in Fairfield, Connecticut. She is the Past-Chair of the National Advisory Council to the United States Conference of Catholic Bishops and a full colonel in the U.S. Army Reserves.

Executive Summary

Contraceptive and other mandates have been levied on Catholic institutions by American legislators and courts, which argue that the “right” to contraception takes precedence over religious freedom. Future government mandates are likely to include assisted suicide and recognition of same-sex marriages. By agreeing to these mandates, Church representatives risk grave imputability in the wrongs of others, as defined by canon law. Sponsors of employee benefit plans which include contraceptive coverage risk canonical penalties because payment contributions indicate immediate material cooperation with an intrinsic evil. Furthermore, by collaborating even under protest, the Church encourages further government intrusions on religious freedom.

This paper is reprinted with permission from the National Catholic Bioethics Center. It was originally published as “Contraceptive Mandates and Immoral Cooperation,” in *Catholic Health Care Ethics: A Manual for Practitioners*, ed. Edward J. Furton (Philadelphia, PA: National Catholic Bioethics Center, 2009).

Center Leadership

David B. House, Ph.D.
Senior Fellow & Interim Director

Center Advisory Board

William H. Dempsey, Esq.
President, Project Sycamore

John P. Hittinger, Ph.D.
Professor of Philosophy
Center for Thomistic Studies
University of St. Thomas (Houston)

Rev. Leonard A. Kennedy C.S.B., Ph.D.

Former President, Assumption College,
Univ. of Windsor; and St. Thomas More
College, Univ. of Saskatchewan

Rev. Joseph Koterski, S.J., Ph.D.

Associate Professor of Philosophy,
Fordham University

Msrgr. Stuart W. Swetland, S.T.D.

Vice President for Catholic Identity
and Mission, Mount St. Mary's University

Hon. Kenneth D. Whitehead

Former Assistant Secretary for Postsecondary
Education, U.S. Department of Education

Cardinal Newman Society Executive Staff

Patrick J. Reilly
President and CEO

Thomas W. Mead
Executive Vice President

9415 West Street
Manassas, Virginia 20110
703-367-0333

www.CatholicHigherEd.org

Contraceptive Mandates and Immoral Cooperation

by Marie T. Hilliard, JCL, Ph.D., R.N

October 2009

This paper is available online at The Center for the Study of Catholic Higher Education's website, www.CatholicHigherEd.org

About The Center

The Center for the Study of Catholic Higher Education is the research division of The Cardinal Newman Society. Its mission is to promote the ongoing renewal of Catholic higher education by researching and analyzing critical issues facing Catholic colleges and universities, and sharing best practices. The Center's work is guided by the principles of *Ex corde Ecclesiae* and the Magisterium of the Catholic Church.

Copyright © 2009 The National Catholic Bioethics Center. All Rights Reserved. Reprinted with permission.

Permission to reprint is hereby granted provided no modifications are made to the text and it is identified as a product of The Center for the Study of Catholic Higher Education, The Cardinal Newman Society or both.

Note: the views expressed herein are those of the author and not necessarily those of The Center for the Study of Catholic Higher Education or The Cardinal Newman Society.

Contraceptive Mandates and Immoral Cooperation

As the largest provider of nongovernmental, nonprofit health care in the United States, Catholic health care is susceptible to being viewed as just another secular institution engaged in the welfare of the larger society, and at its behest. Those who wish to deny the ministerial nature of Catholic health care have capitalized on this misperception for their own political agendas. Advocates for abolishing sexual mores, for providing abortion on demand and for redefining the human being as a bearer of rights have engaged political structures in their pursuit of reshaping Catholic health care in their own image. They have made some subtle and some blatantly obvious attempts at changing the public perception of the purposes of Catholic health care. These have escalated into legislative initiatives that attempt to force Catholic health care to violate the tenets of the Catholic Church in the delivery of health care.

First, there is a need to correct the misperception that the delivery of health care is a secular endeavor. The Christian woman Fabiola, who established a hospital in Rome around the year 390, was the earliest forerunner of today's nurse. Her decision to dedicate her wealth and her life to the care of the sick poor was grounded in her Christian faith. St. Benedict founded the Benedictine nursing order, based on the Christian ethic, around the year 500. The very names of the oldest foundations of health care, which continue to exist today—including the Hotel-Dieu in Paris, founded in 660—reflect the religious tradition of health care delivery. A structure for the delivery of nursing care was created by the Christian religious order the Hospitallers of Saint John of Jerusalem in 1113. This historically is considered to be the first organized structure for the delivery of health care. The first identified nurse in the territory that was to become the United States was Catholic friar Juan de Mena, from Santo Domingo of Mexico. He arrived on the shores of the southern Texas coast in 1554. The friar was known for his humility and his charity toward the sick.

The second oldest public hospital in continuous existence in the United States, Charity Hospital in New Orleans (1736), despite being a public hospital, was under the administration of the Daughters of Charity from 1834 to 1970. The oldest hospital west of the Mississippi was established in St. Louis, Missouri, in 1828 by St. Elizabeth Seton's Sisters of Charity. Today, through the centuries of initiatives to apply the Gospel imperatives in the service of neighbor, Catholic health care is the largest provider of nongovernmental, nonprofit health care in the United States. With this stunning history of health care in the ministry in the Catholic tradition, it is disingenuous to identify Catholic health care as a secular function of society. Yet, state by state, there have been legislative initiatives to define Catholic health care ministries as secular endeavors, not protected by the free exercise clause of the First Amendment of the United States Constitution.

The Secular Redefinition of Catholic Health Care

The escalation of legislated health care mandates illustrates this trend to secularize Catholic health care. (See the regularly updated "Table of Legal Mandates State by State" at www.ncbcenter.org.) The majority of states mandate that contraceptive coverage, including prescription drugs and devices, be included in employee insurance plans that offer prescription coverage. Of these mandating states, few provide a true religious or conscience exemption. Increasingly states are mandating the administration of emergency contraception in emergency departments to victims of sexual assault, even when there is an indication that the medication would function as an abortifacient. Only in rare

cases are states providing conscience exemptions for the health care agency. Pharmacists have been more successful in securing refusal provisions that protect them from having to violate their consciences in the dispensing of emergency contraception. Increasingly, however, they have had to seek court injunctions to protect their rights of conscience.

Of significant concern is the redefinition, in statutes or through the courts, of a religious employer. Arizona, Arkansas, California, Hawaii, New York, North Carolina and Oregon are examples of states which have narrowly defined a religious employer to include only nonprofit agencies (which would include Church ministries) that serve or employ primarily members of their own faith (which would not include the majority of Church ministries). Here rests the example of a revisionist's view of the role of religion in society and the protections that should be provided to religious entities.

To define a religious employer as primarily hiring or serving its own members is the antithesis of the historical role of a religious ministry. The classic example of this can be seen in the parable of the Good Samaritan (Luke 10: 29-37). In defining who is one's neighbor, who we are to love as we love ourselves, Jesus tells a young legal scholar the story of the compassionate Samaritan who, unlike a priest and Levite, stopped and ministered to a man who was beaten and robbed along the road to Jericho. The Samaritans were despised by the Jews. Jesus asks, "Which of these three, in your opinion, was neighbor to the robbers' victim?" The scholar answers, "The one who treated him with mercy," and Jesus tells him to "go and do likewise." Church ministries answer this call. They are not created to be self-serving and self-employing, but to care mercifully for those in need, regardless of their religion, ethnicity, gender, social status, vocational or marital status, or ability to pay. History supports this purpose of Church ministry.

Furthermore, Church hiring practices are based on the ministry being provided. In a Catholic school, where beliefs are imparted to the next generation, teachers of certain disciplines may be required to be Catholic. For the majority of ministries, competence in and adherence to the mission of the ministry are the usual criteria for employment. Finally, there are no client eligibility conditions (such as conversion to the Catholic faith) applied to recipients of Church ministry. However, states such as New York and California require that to be considered a religious employer one must have as a purpose the inculcation of religious values. It would be very interesting to see the response of state legislatures if Church ministries attempted to apply the very criteria that these legislatures have stated define a religious ministry: that is, for a Catholic hospital to hire only Catholic workers and to treat only Catholic patients, or those willing to be evangelized in the faith.

Not only have state legislatures redefined Church ministries, but so have the courts. In 2006, the New York State Court of Appeals, by a unanimous vote, upheld two lower court decisions requiring the Church to include contraceptive drugs and devices (including abortifacients) in their employee prescription drug plans. Religious or faith-based ministries may be exempted only if they evangelize, and employ and provide services primarily to their own members. Thus, while employers of Catholic schools and chanceries may be exempted, most other ministries may not be. In the decision, it was evident that what was viewed as the need to remedy a bias against women took precedence over the rights of people of faith. In considering the constitutionality of the narrow legal definition of a "religious employer," the justices acknowledged the reasoning of the New York legislature: "Those favoring a narrower exemption asserted that the broader one would deprive tens of thousands of women employed by church-affiliated organizations

of contraceptive coverage. Their view prevailed.”¹ In other words, the pro-contraception/pro-abortion agenda prevailed over religious freedom. This agenda was supported by the New York State Court of Appeals: “Finally, we must weigh against plaintiffs’ interest in adhering to the tenets of their faith the State’s substantial interest in fostering equality between the sexes, and in providing women with better health care.”²

A similar bias was demonstrated by the Supreme Court of California. This court concluded that the California legislature did not violate the “free exercise [of religion] clause” of the California Constitution when mandating that Catholic Charities of Sacramento include contraceptive drugs and devices in its employee prescription coverage plan. The justices found that it is within the legislature’s competence to identify subtle forms of gender discrimination, by which they referenced discrimination based on pregnancy, childbirth or related medical conditions: “Certainly the interest in eradicating gender discrimination is compelling. We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution... and... triggers the highest level of scrutiny.”³ Again, the pro-contraception/pro-abortion agenda prevailed over religious freedom.

The First Amendment of the U.S. Constitution states that Congress will make no law respecting a religious establishment. However, it immediately follows with a prohibition against violations of the free exercise of religion. These provisions have been described as the separation of church and state. However, no other concept of constitutional protections has been more misunderstood or misused by those with their own political agendas. The constitutional scholar Stephen Carter addresses this misperception: “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 principle task of the separation of church and state is to secure religious freedom.”⁴

Clearly, there has been a redefinition by the courts of the meaning of the First Amendment since its adoption in 1791. The mandate for demonstrating a prevailing state interest before passing a law that infringes on a religious freedom has been marginalized. When rights conflict (as in this case), the balance has tragically shifted from religious freedom to “reproductive rights.” In the *Oregon v. Smith* decision in 1990, public employees who smoked peyote as part of a religious ritual were held to not be protected by the free exercise clause of the First Amendment.⁵ The impact of the decision is that the state has no obligation to demonstrate a prevailing state interest if a legal mandate or prohibition is applied to all persons. This negates the very purpose of the free exercise of religion clause. As Carter states, “If the state bears no special burden to justify its infringement on religious practice, as long as the challenged statute is a neutral one, then the only protection a religious group receives is against legislation directed at that group. But legislation directed at a particular religious group, even in the absence of the free exercise clause, presumably would be prohibited by the equal protection clause.”⁶

1. *Catholic Charities of the Diocese of Albany v. Gregory V. Serio*, New York Court of Appeals, no. 110 (October 19, 2006), 4.

2. *Ibid.*, 16.

3. *Catholic Charities of Sacramento v. Superior Court (Dept. of Managed Care)*, Supreme Court of California, no. S099822 (March 1, 2004), 41-42.

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

5. *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

6. Carter, *Culture of Disbelief*, 127.

In response to the *Oregon v. Smith* decision, advocates of religious freedom succeeded in securing passage of the Federal Religious Freedom Act of 1993. This legislation prohibited the government from limiting religious freedom in the absence of a compelling government interest, and even then the limitation had to be the least restrictive. In 1997, however, in the decision *Boerne v. Flores*, the U.S. Supreme Court overturned the law on the basis that it interfered with states' rights.⁷

In his analysis of the changing perception of the First Amendment, Carter cites the legal scholar Harold Berman, who asserts that contemporary thinking on the First Amendment is sharply discontinuous with that of the Founding Fathers. Berman further asserts that the establishment clause of the First Amendment should be understood to allow "government support of theistic and deistic belief systems more nearly comparable to the government support which is permitted to be given to agnostic and atheist belief systems."⁸ While Berman's analysis addresses government support for faith-based endeavors, he identifies a phenomenon which some would consider to be a bias against religions by the very state(s) charged with protecting religious rights. Clearly, recent actions of legislatures and the courts have demonstrated this phenomenon. To fail in vigorously opposing such actions can have long-term and catastrophic implications for people of faith. Carter forecasts, "The potential transformation of the Establishment Clause from a guardian of religious freedom into a guarantor of public secularism raises prospects at once dismal and dreadful."⁹ All one has to do is analyze the burgeoning list of mandates against religious freedom to understand the proportions of this very real threat. (See "Table of Legal Mandates" at www.ncbcenter.org.)

It will not end there. Ever-increasing threats exist, such as mandated assisted suicide and the recognition of same-sex unions, to name two examples. The question is, can the Church acquiesce under the misnomer of "the greater good?" Analyses of this conundrum have centered on proportionality of evil to good. There is a risk in refusing to comply with the legislative mandates (refusing to be complicit with evil) of losing one's right to engage in the social and health care ministries of the Church. There is also the real concern that if the Church responds to the only morally tenable option – given the rulings in New York and California, for example – it would have to discontinue all prescription benefit coverage for employees. However, providing coverage for contraceptives and abortifacients may, in canonical terms, cause representatives of the Church to commit gravely imputable acts by cooperating with evil.

Grave Imputability

The concept of grave imputability relates to external violations of Church law. Canon 1321 §1 provides an insight into the nature of grave imputability: "No one is punished

7. *City of Boerne v. Flores, Archbishop of San Antonio*, 521 U.S. 507 (1997). Interestingly, this case involved the Archdiocese of San Antonio, which challenged a town historic property ordinance that prevented the archdiocese from demolishing part of a church in Boerne, Texas. The challenge was based on the Religious Freedom Restoration Act of 1993, which this decision overturned.

8. Harold J. Berman, "The Religious Clauses of the First Amendment in Historical Perspective," in *Religion and Politics*, ed. W. Lawson Taitte (Dallas: University of Texas Press, 1989), 72, cited in Carter, *Culture of Disbelief*, 119-120.

9. Carter, *Culture of Disbelief*, 122-123.

unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence.” Thus, one is accountable for violations of the law through both intentional commissions (malice) and omissions of which they are culpable (negligence).¹⁰ The question is, could representatives of the Church be committing gravely imputable acts by allowing their employee benefit plans to pay for contraceptive drugs and devices, including abortifacients? Specifically, could they be considered in violation of canon 1282, which states, “All clerics or lay persons who take part in the administration of ecclesiastical goods by a legitimate title are bound to fulfill their functions in the name of the Church according to the norm of law?”

There is no question that the use of contraceptives, even by married couples, is gravely and intrinsically evil. Pope Paul VI states, “It is a serious error to think that a whole married life of otherwise normal relations can justify sexual intercourse which is deliberately contraceptive and so intrinsically wrong.”¹¹ The *Catechism of the Catholic Church* states that contraception, even to regulate births, is morally unacceptable: “The regulation of births represents one of the aspects of responsible fatherhood and motherhood. Legitimate intentions on the part of the spouses do not justify recourse to morally unacceptable means (for example, direct sterilization or contraception).”¹²

What accountability, then, is borne by those who facilitate such use of morally unacceptable means? Pope Paul VI states that to make it easy for another to commit this intrinsic evil also is “an evil thing”: “Not much experience is needed to be fully aware of human weakness and to understand that human beings—and especially the young, who are so exposed to temptation—need incentives to keep the moral law, and it is an evil thing to make it easy for them to break that law.”¹³ Causing another to break the law is, in and of itself, scandal, which is morally illicit.¹⁴ Furthermore, the scandal is grave when it is caused by a representative of the Church, “who by nature or office [is] obliged to teach and educate others.”¹⁵

This grave nature of the matter is compounded by the fact that almost all state contraceptive mandates include insurance coverage for “devices” such as intrauterine abortifacient devices. Abortion is one of the most serious violations of the law. “A person who procures a completed abortion incurs a *latae sententiae* excommunication” (can. 1398). A *latae sententiae* penalty is one that is incurred *ipso facto* when the specific external violation of the law is committed (can. 1314). Abortion includes the destruction of the embryo or fetus any time after conception (fertilization).¹⁶ The *Ethical and Religious Directives for Catholic Health Care Services* are consistent with this interpretation of the meaning of abortion. Directive 36 states, in part, “It is not permissible, however, to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction or interference with the implantation of a fertilized ovum.”¹⁷ Therefore, initiating or rec-

10. Canon Law Society of America, *Code of Canon Law: Latin-English Edition, New English Translation* (Washington, D.C.: CLSA, 1999).

11. Paul VI, *Humanae vitae* (July 25, 1968), n.17.

12. U.S. Conference of Catholic Bishops, *Catechism of the Catholic Church*, 2nd ed. (Washington, D.C.: USCCB, 1997), n.2399.

13. Paul VI, *Humanae vitae*, n.17.

14. *Catechism*, n.2284.

15. *Ibid.*, n.2285.

16. Pontifical Council for Legislative Texts, *Interpretationes Authenticae* (can. 1398), AAS 80 (1988), 1818.

17. U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 4th ed. (Washington, D.C.: USCCB, 2001), n.36.

ommending the use of abortifacient drugs or devices is also prohibited.

Canon 1329 addresses the imputability as it pertains to accomplices without whose assistance the delict (external violation of the law) would not have been committed:

§1. If *ferendae sententiae* [imposed, not *latae sententiae*] penalties are established for the principal perpetrator, those who conspire together to commit a delict and are not expressly named in a law or precept are subject to the same penalties or to others of the same or lesser gravity.

§2. Accomplices who are not named in a law or precept incur a *latae sententiae* penalty attached to a delict if without their assistance the delict would not have been committed, and the penalty is of such a nature that it can affect them; otherwise, they can be punished by *ferendae sententiae* penalties.

Given these laws, are representatives of the Church accomplices when, under legal mandate, they allow their employees to receive contraceptive coverage, including coverage for abortifacient devices, through the Church's employee benefit plans? A relevant factor that exempts one from a penalty for a delict is coercion. However, there are provisions to this exemption. One relevant exemption pertains to "a person who acted coerced by grave fear, even if only relatively grave, or due to necessity or grave inconvenience unless the act is intrinsically evil or tends to the harm of souls" (can. 1323, 4^o). The presence of legal coercion is a fact in contraceptive mandate laws, but the act of facilitating contraception and the use of abortifacients is "intrinsically evil" and "tends to harms souls." The bishops of the United States have issued a statement addressing the harm done to couples, in *Married Love and the Gift of Life*: "Suppressing fertility by using contraception denies part of the inherent meaning of married sexuality and does harm to the couple's unity."¹⁸ Thus, this exemption from imputability does not apply.

One also can look at the meaning of "malice" in canon 1321 §1: the Latin text uses the word *dolo*, meaning "deliberate intent to violate the law."¹⁹ One can also examine factors in cooperation with evil: "The term 'cooperation' refers to any specific assistance knowingly and freely given, either as a means or an end, to a morally evil act principally performed by another individual or institution."²⁰ In formal cooperation in evil, the cooperators in the evil act have the same intent as the principal agents of the act. For the representatives of the Church to engage in explicit formal cooperation in providing contraceptives and abortifacient devices to their employees, they must have the same intent as the medical professionals who provide these prescriptions or services. The intent could also be implicit, in giving assistance for a specific portion of the immoral act or in providing prerequisite assistance to enable the immoral act to occur.

There is much evidence to support the fact that bishops and other representatives of the Church have opposed contraceptive mandates as a violation of the moral teachings of the Church. Thus, there is no malice or deliberate attempt to violate Church law by complying with contraceptive mandates.

18. U.S. Conference of Catholic Bishops, *Married Love and the Gift of Life* (Washington, D.C.: USCCB, Nov. 14, 2006), 3.

19. Thomas J. Green, "Sanctions in the Church," in *New Commentary on the Code of Canon Law*, eds. John P. Beal, James A. Coriden and Thomas J. Green (Mahwah, NJ: Paulist Press, 2000), 1540.

20. Peter Cataldo, "Compliance with Contraceptive Insurance Mandates: Licit or Illicit Cooperation in Evil?" *National Catholic Bioethics Quarterly* 4.1 (Spring 2004): 106.

Ethicists have examined the other levels of cooperation pursuant to adhering to contraceptive mandates. Peter Cataldo differentiates these levels as follows:

Cooperation is material if the act of the principal agent is not intended. The act of the cooperator in material cooperation is itself good or morally indifferent. Material cooperation can be either immediate or mediate. Immediate material cooperation contributes to the essential circumstances, and mediate material to the nonessential circumstances, of the principal agent's act. Mediate material cooperation can be either proximate through a direct causal influence, or remote through an indirect causal influence, upon the act of the principal agent. Immediate material cooperation by an institution in an intrinsically evil act such as contraception is never morally permissible. Mediate material cooperation can be morally tolerated if there is a great good to be preserved or a grave evil to be avoided.²¹

The question is whether enabling payment for the prescription constitutes an essential circumstance, making the immoral act possible.

There are numerous permutations of employee benefit plans used by Church corporations. Employee benefit plans are funded in part by the employer and in part by all of the employees participating in the plan. There is nothing more essential to the completion of an act than the payment for the act, which would not be completed without such payment, thus making the material cooperation immediate. Even if one did not agree with this premise, and held that cooperation with contraceptive mandates constitutes mediate material cooperation, one would have to analyze the good being preserved and the grave evil to be avoided in determining whether the cooperation is licit. As stated earlier, there are goods to be preserved: the continuance of the health care and social ministries of the Church, and the continued employment of thousands of persons provided with prescription coverage. However, to preserve these goods requires cooperation in the intrinsically evil acts of contraception and abortion (through abortifacient devices). While canon 1324 §1,5° provides for a tempering of a penalty if a violation is perpetrated under coercion, and 1324 §3 precludes a *latae sententiae* penalty under such circumstance, canon 1323, 4° states that one is still subject to a penalty for violating a law, even if coerced, if the act is intrinsically evil or tends to harm souls.

The evil of cooperating in contraception and abortion is not the only evil to be averted. By cooperating with contraceptive laws, Church employers are forcing their employees to contribute to the insurance pools that pay for the immoral prescriptions and services. There is a third evil to be averted, and it is that which was predicted by Paul VI in *Humanae vitae*. He predicted that government would impose its will in the area of contraception:

Who will prevent public authorities from favoring those contraceptive methods which they consider more effective? Should they regard this as necessary, they may even impose their use on everyone. It could well happen, therefore, that when people, either individually or in family or social life, experience the inherent difficulties of the divine law and are determined to avoid them, they may give into the hands of public authorities the power to intervene in the most personal and intimate responsibility of husband and wife.²²

By collaborating, even under protest, with contraceptive and abortifacient mandates,

21. *Ibid.*, 110.

22. Paul VI, *Humanae vitae*, n.17.

the Church is paving the way for further government intrusions. This is a grave evil to be avoided. The Church has made every legal attempt to overturn the contraceptive mandate laws. To date, all efforts to secure judicial recourse have failed. To continue to comply with such mandates can only lead to a further erosion of religious freedom. Furthermore, to acquiesce to a redefinition of our ministries as secular entities not only is historically inaccurate but also has significant implications for the future of religion in the United States. To comply now would appear to be akin to negligence.

The second criterion of grave imputability for a violation of the law, culpable negligence, is also addressed in canon 1321 §1: “No one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence [*culpa*].” To comply with contraceptive and abortifacient mandates could constitute ecclesiastical negligence pursuant to canon 1389 §2: “A person who through culpable negligence illegitimately places or omits an act of ecclesiastical power, ministry or function with harm to another is to be punished with a just penalty.” Canon 1321 §2 states that ordinary negligence due to the omission of necessary diligence is not punishable by law: “A penalty established by a law or precept binds the person who has deliberately violated the law or precept; however, a person who violated a law or precept by omitting necessary diligence is not punished unless the law or precept provides otherwise.” However, canon 1321 continues, “when an external violation has occurred, imputability is presumed unless it is otherwise apparent” (can. 1321 §3).

Need for Decisive Action

Concerning culpable negligence, no one could accuse the Church of not performing due diligence on the matter. Extensive legal resources have been expended in the pursuit of religious freedom. Now that legal remedies are being exhausted, the issue is how will the Church act in accord with its due diligence? Now is the time to act: to refuse to comply, so that no further harm can be done to the ministries of the Church, her employees and the future of religious freedom. The history of Catholic health care is being rewritten by legislatures and the courts, who are denying the ministerial nature that is its foundation. The essential meaning of religion is being redefined to deny its very essence. Furthermore, for the Church not to act will fulfill the prophecies of Paul VI, as well as those of Carter: “The potential transformation of the Establishment Clause from a guardian of religious freedom into a guarantor of public secularism raises prospects at once dismal and dreadful.”²³

Since the U.S. Supreme Court declared the federal Religious Freedom Restoration Act of 1993 unconstitutional, efforts to remedy this in Congress have stalled. In 2000, Congress passed a limited version of an RFRA, the Religious Land Use and Institutional Persons Act. This legislation restricts government intrusion into the use of religious land, and protects religious freedom of institutionalized persons. The final recourse to redress the contraceptive mandate laws and rulings of New York and California is the U.S. Supreme Court. However, in October 2004 the U.S. Supreme Court refused to hear the challenge to the decision of the Supreme Court of California; and in October 2007 the U.S. Supreme Court refused to hear a challenge to the New York Court of Appeals decision. Now what should be done?

Eventually the Church will have to say, “Enough. We will not be complicit in the violation of moral law.” This will require significant employee relations and public relations

23. Carter, *Culture of Disbelief*, 122-123.

campaigns to demonstrate the source of the problem: violation by the government of religious freedom that the drafters of the U.S. Constitution intended to protect. Sufficient notice of the intent to no longer comply, perhaps by no longer offering prescription coverage to employees, will be needed. Then the very secular society that depends on the services of the Church, which is the largest provider of nongovernmental, nonprofit health care, social services, human services and education in the United States, will be responsible for the outcome.

