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**HOBBY LOBBY AND BEYOND: CONSIDERING MORAL  
RESPONSES TO THE HHS MANDATE LITIGATION<sup>1</sup>**  
*“Hobby Lobby” y más: considerando respuestas morales  
al mandato contraceptivo*

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**Resumen:** El artículo analiza la situación creada por el mandato contraceptivo en los Estados Unidos en lo que concierne a una Universidad Católica y la expectativa creada por la inminencia de una decisión de la Corte Suprema de ese país en un grupo consolidado de casos que incluye el denominado “Little Sisters of the Poor”. El mandato contraceptivo, en su diseño original, requiere que los empleadores provean productos y servicios de la llamada “medicina preventiva” para sus empleados, incluyendo contracepción, abortivos (es decir, drogas que inducen el aborto) y esterilización, aunque el empleador sea una institución o empresa religiosa que se opone a tales prácticas como una cuestión de fe, moral y doctrina religiosa. El artículo evalúa las posibilidades

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1 Nota de los editores: El presente artículo fue recibido y aprobado para su publicación con anterioridad a la decisión tomada por la Corte Suprema de los Estados Unidos en la causa “David A. Zubik, et al., petitioners 14–1418 v. Sylvia Burwell, Secretary of Health and Human Services, et al.” el día 16 de mayo de 2016. En esta sentencia, que unifica varios expedientes, la Corte Suprema decidió dejar sin efecto las decisiones de las Cortes de Apelaciones que habían intervenido y mandó dictar nuevas sentencias en las que se pueda llegar a un acuerdo que no afecte la libertad religiosa de las instituciones peticionantes.

de “acomodar” el mandato y los litigios que han surgido, y divide estos litigios en dos grupos. Primero, los que involucran a entidades con fines de lucro y empresas, como Hobby Lobby. En segundo lugar, los litigios que involucran a entidades afiliadas a instituciones religiosas y aquellas sin fines de lucro, como las Hermanitas de los Pobres (Little Sisters of the Poor). Se analizan los diferentes escenarios y las posibles reacciones de las entidades sin fines de lucro en caso de una decisión de la Corte Suprema que no sea favorable.

**Palabras clave:** Mandato contraceptivo – Libertad religiosa – Objeción de conciencia.

**Abstract:** The article analyzes the situation created by the HHS Mandate concerning a Catholic University and the expected Supreme Court decision in a group of granted and consolidated cases including *Little Sisters of the Poor*. The HHS Mandate, as originally designed, required that all employers provide so-called preventative health care products and services to their employees that includes contraception, abortifacients (that is, abortion inducing drugs), and sterilization, even if the employer is a religious institution or business that opposes such practices as a matter of faith, morals and religious doctrine. The article evaluates the accommodations and related litigation, and divides the litigation pertaining to the Mandate into two groups. First, the litigation involving for-profit entities and businesses, such as *Hobby Lobby*. Second, the litigation involving religiously affiliated entities and nonprofits, such as Little Sisters of the Poor. Different scenarios are analyzed and the possible reactions of non-profits entities to an unfavorable Supreme Court decision are evaluated.

**Keywords:** Contraceptive Mandate – Religious Freedom – Conscientious Objection – HHS Mandate.

About two years ago I stepped down as President and Dean of Ave Maria School of Law in Naples, Florida, and returned to the classroom full-time as a law professor. I am very grateful and happy to be back in the classroom teaching students. One of the most important decisions I confronted during my service as Dean was what to do about the HHS Mandate<sup>2</sup>. You see, Ave

<sup>2</sup> See 45 C.F.R. § 147.130(a)(1)(iv) (2011). The mandate does not specifically define the benefits to be covered, but rather delegates authority to the Department of Health and Human Services to define “preventive care and screenings [as] provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administra-

Maria School of Law is an authentically Catholic school that integrates the Natural Law and the Catholic Intellectual Tradition into the classroom and, in reality, everything we do<sup>3</sup>. It is an integral and defining aspect of our institutional identity and culture, and our school was recently named the number 1 school in the country for devout Catholics<sup>4</sup>. In addition, national publications have rated our school the most conservative law school in the country<sup>5</sup>. Among other things, this means that our faculty believes in the plain meaning of the Constitution, which necessarily means that we believe in religious liberty and limited government.

It is these attributes - our religious identity, our respect for the Constitution, and our belief that the dignity of each person transcends the limited and enumerated powers that a government can legitimately exercise - that ultimately caused me to recommend to our Board of Governors that our school sue the Obama Administration to prevent the imposition of the HHS Mandate upon us. Our Board agreed, and so we sued. Our Board did not make this decision lightly - it is comprised of patriotic Americans who take no joy in suing their government. And, quite frankly, I waited as long as I thought I prudently could before recommending we sue in the hopes that an acceptable accommodation would be forthcoming. But when it was not and we could wait no longer, our school sued because we believed this was the only available recourse that was consistent with our religious identity and respect for the Constitution.

Our school filed suit in federal court in 2013<sup>6</sup>. Our case is currently pending in the Eleventh Circuit Court of Appeals. We have obtained injunctive relief - in other words, the Mandate will not be applied to us, if at all, until there is a substantive resolution of the case<sup>7</sup>. Our fate in the courts will ultimately be determined by an expected Supreme Court decision in

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tion”. *Id.* (alteration in original). These guidelines include contraceptive methods to cover “[a]ll Food and Drug Administration approved contraceptive methods” and “sterilization procedures.” *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, U.S. Dep’t. of Health & Hum. Serv’s, Health Res, <http://www.hrsa.gov/womensguidelines/>. (last visited: Sept. 13, 2012).

3 See *Mission Statement*, Ave Maria Sch. of Law <http://www.avemarialaw.edu/campus-life/catholic-law-schools/>. (last visited: Feb. 14, 2016) (“Our teaching integrates the moral and social teachings of the Catholic Church with the more conventional aspects of legal education and forms persons capable of leading flourishing lives through their vocation in the law”).

4 See Wilson, A. *Ave Maria, Catholic University of America “Best Law Schools for the Devout”*, The Cardinal Newman Society, <http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/2885/Ave-Maria-Catholic-Univ-of-America-Best-Law-Schools-for-the-Devout.aspx>. (last visited: Jan. 16, 2014).

5 See Martin, L. *Most Liberal and Conservative Law Schools* *The Nat’l Jurist* (Oct. 6, 2015), <http://www.nationaljurist.com/content/most-liberal-and-conservative-law-schools>.

6 See *Ave Maria Sch. of Law v. Burwell*, 63 F. Supp. 3d 1363 (M.D. Fla. 2014).

7 *Id.* at 1368.

a group of recently granted and consolidated cases including *Little Sisters of the Poor*<sup>8</sup>. I regret to say, however, that our destiny in the courts may already be sealed and not in our favor. I will explain what I mean by this in a moment when I address recent litigation.

First, let me say a few words about the Mandate itself. The Mandate is an executive order promulgated by the Department of Health and Human Services (HHS) intended to help implement the Affordable Care Act, commonly known as Obamacare<sup>9</sup>. The HHS Mandate, as originally designed, required that all employers provide so-called preventative health care products and services to their employees that includes contraception, abortifacients (that is, abortion inducing drugs), and sterilization, even if the employer is a religious institution or business that opposes such practices as a matter of faith, morals and religious doctrine<sup>10</sup>. I say “as originally designed” because several so-called accommodations have been issued since the Mandate was first published<sup>11</sup>. Under the Mandate, even as modified by the accommodations, the only religious- or conscience-based exemption that was allowed was extremely narrow and applies, in essence, exclusively to entities such as churches, seminaries and convents<sup>12</sup>. To the contrary, religious hospitals, charities, universities, and law school such as Ave Maria, are not entitled to an exemption. And, of course, for-profit businesses are not entitled to an exemption.

This denial of religious-based exemptions for businesses and most non-profit entities is based on the Mandate’s premise that in order to qualify for

8 See *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 136 S. Ct. 446 (2015).

9 See 42 U.S.C. § 18001 (2010).

10 See 42 U.S.C.A. § 300gg-13(a)(4)(2010) (without “religious employer” exception). See also Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act 75 Fed. Reg. 41,726 (IV)(B)(1)–(2), <https://www.federalregister.gov/articles/2010/07/19/2010-17242/interim-final-rules-for-group-health-plans-and-health-insurance-issuers-relating-to-coverage-of>.

11 45 C.F.R. § 147.130(a)(1)(iv)(A) (2014) [stating the HRSA “may establish exemptions” for religious employers (emphasis added)]. The Act defines “religious employer” as:

[A]n organization that meets *all* of the following criteria:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization [under sections of the code that refer to churches, integrated auxiliaries, and conventions or associations, as well as to the exclusively religious activities of any religious order].

*Id.* at § 147.130(a)(1)(iv)(B) (alteration in original) (emphasis added).

12 *Id.*

such an exception, the entity’s membership and activities must, for all practical purposes, be limited exclusively to persons belonging to a single religious denomination<sup>13</sup>. Since religious universities, charities and hospitals employ and serve the needs of a diverse range of people, they do not qualify for an exemption. Businesses, for obvious reasons, would likewise fail this test. As a consequence, religious hospitals, charities, and universities must comply with the Mandate and thus must offer morally objectionable products and services for all of their employees or suffer substantial fines. These consequences reflect an impoverished and sadly mistaken understanding of religion, religious freedom, and the traditional role of religious entities. Think about this - it appears that Jesus Christ himself and his apostles would not qualify for an exemption under the Mandate because they ministered to people of many religious traditions as well as non-believers.

Why would such a narrow religious-based exemption be adopted? In my judgment, it is part of a larger project to relegate religious expression and influence to the confines of houses of worship, and thereby to separate religion and its influence from the broader culture. According to the government’s minimalistic conception of religious freedom, people of faith are permitted to gather on Sunday’s and engage in quaint rituals and sing hymns without excessive government regulation and intrusion; however, their beliefs and convictions are not allowed to venture into the public square where they might influence the broader culture. This impoverished conception of religion takes the fabricated doctrine of “separation of church and state” (which, by the way, is not in the Constitution contrary to popular belief)<sup>14</sup> and puts it on steroids. This reductionist view of religion comports with the rhetoric we so often hear from the left, including President Obama, when they cleverly refer to freedom of worship rather than freedom of religion<sup>15</sup>.

It is in this larger context that the accommodations and related litigation should be evaluated. I will begin by dividing the litigation pertaining to the Mandate into two groups. First, there is the litigation involving for-profit entities and businesses, such as *Hobby Lobby*<sup>16</sup>. Second, there is the litigation involving religiously affiliated entities and nonprofits, such as

13 See 45 C.F.R. § 147.130(a)(1)(iv)(A) (2014). The Act defines religious employer as: “[...] the organization primarily employs persons who share the religious tenets of the organization”.

14 See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). In the words of the Court, “a wall of separation between church and state” has been erected.

15 See *Imbody, J. Imbody: Obama “Freedom to Worship” Assaults First Amendment*, Wash. Times (Jan. 28, 2013), <http://www.washingtontimes.com/news/2013/jan/28/obama-freedom-to-worship-assaults-first-amendment/?page=all>.

16 See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

*Little Sisters of the Poor*<sup>17</sup>. I would summarize the litigation as follows: for businesses and for-profits, people of faith won an important but limited victory. As for the nonprofits, the results are far less than desired but probably tolerable. Let me explain what I mean.

The landmark case relating to for-profit businesses is commonly referred to as the *Hobby Lobby* case. It is actually the consolidated cases of *Burwell v. Hobby Lobby Stores*<sup>18</sup> and *Conestoga Wood Specialties v. Sebelius*<sup>19</sup>. I will refer to it as *Hobby Lobby*. In this case, the Supreme Court ruled in a 5–4 vote that closely-held corporations cannot be required to provide contraception coverage for their employees<sup>20</sup>.

Justice Alito, writing for the majority, decided the case under the Religious Freedom Restoration Act<sup>21</sup>, or RFRA, and not directly based on the First Amendment’s religious liberty provision<sup>22</sup>. RFRA essentially applies strict scrutiny to legislation and executive orders that burden the exercise of religious freedom<sup>23</sup>. In assessing the Mandate through the RFRA lens, the Court wrote that the Obama Administration failed to show that the contraception Mandate is the “least restrictive means of advancing its interest” in providing birth control at no cost to women<sup>24</sup>. Thus, the Court held that under RFRA it must be struck down.

In a related matter, the Court rejected “any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money”<sup>25</sup>. The Court wrote that this characterization “flies in the face of modern corporate law”<sup>26</sup>, adding that by requiring religious corporations to cover contraception, “the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs”<sup>27</sup>.

While this a positive result, the *Hobby Lobby* decision is of limited scope in at least two important respects. First, it is written narrowly so as only to apply to the HHS contraception Mandate, and not to religious employers who object to other medical services such as blood transfusions or

17 See *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 794 F.3d 1151 (2015).

18 See *Burwell*, 134 S. Ct. at 2751.

19 See *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013).

20 See *Burwell*, 134 S. Ct. at 2785.

21 See Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb-1 (1993).

22 See U.S. Const. amend. I (1791).

23 See 42 U.S.C. § 2000bb-1(b)(1)(2) (1993).

24 See *Burwell*, 134 S. Ct. at 2780.

25 *Id.* at 2770.

26 *Id.*

27 *Id.* at 2775.

vaccines<sup>28</sup>. Second, it applies only to closely-held corporations<sup>29</sup>, the implication being that large and diverse corporations cannot successfully claim the capacity to exercise any particular religious purpose.

The Obama Administration responded to the *Hobby Lobby* decision in July 2015, by promulgating yet another accommodation, this time requiring closely-held businesses to operate under the same rules that apply to non-profit entities<sup>30</sup>. Accordingly, I will now turn to nonprofit entities and the so-called accommodation that applies to them.

First, recall that the Mandate provides a limited exemption for single-denomination entities such as churches, convents and seminaries. The exemption may also extend to charitable and similar organizations that are housed by a church, such as a parish St. Vincent de Paul Society. But beyond these narrow confines, no exemptions are offered to nonprofits. In particular, no exemptions are available for religious universities, charities and hospitals because, as I noted, they do not limit their employment or ministry to persons of a single denomination.

As to these more diverse nonprofit entities, a limited accommodation was promulgated that provides that while the entity itself is not required to *directly* offer objectionable services to employees, it must contract with an insurance provider who, in turn, must offer these same services at no cost to the entity's employees<sup>31</sup>. If the entity does not contract with such a provider, it will suffer a severe penalty in the form of substantial fines<sup>32</sup>. In support of the accommodation, the government argued that the insertion of “middle man” - the insurance provider - attenuates the entity's participation in objectionable matters while still accomplishing the government's goal of promoting wide access to free contraception and related services<sup>33</sup>. In response - and leaving aside the obvious fiction that the services will be provided at no cost by insurance companies - many nonprofits entities argued, correctly

28 *Id.* at 2805.

29 *Id.* at 2775 (“For all these reasons, we hold that a federal regulation's restrictions on the activities of a for-profit closely held corporation must comply with RFRA”).

30 See *Women's Preventative Services Coverage and Non-Profit Religious Organizations*, Ctrs. for Medicare & Medicaid Servs. (Mar. 2, 2016), <https://www.cms.gov/cciiio/resources/fact-sheets-and-faqs/womens-preven-02012013.html>.

31 See *Certain Preventative Services Under the Affordable Care Act* 79 Fed. Reg. 51,092 (2012), <https://www.federalregister.gov/articles/2015/07/14/2015-17076/coverage-of-certain-preventive-services-under-the-affordable-care-act>.

32 See 42 U.S.C. § 300gg-13(a)(b) (2010).

33 See Rozum, U. *The Affordable Care Act Keeps Insurance Companies as Middlemen Between Patients and Doctors*, Syracuse.Com (Mar. 2, 2016), [http://www.syracuse.com/opinion/index.ssf/2014/02/the\\_affordable\\_care\\_act\\_keeps\\_insurance\\_companies\\_as\\_middleman\\_between\\_patients.html](http://www.syracuse.com/opinion/index.ssf/2014/02/the_affordable_care_act_keeps_insurance_companies_as_middleman_between_patients.html).



in my view, that despite the accommodation, they were still forced to choose between either being complicit in morally objectionable activities or suffering devastating fines<sup>34</sup>.

The litigation concerning nonprofits has not yet reached a final resolution. Seven circuit courts of appeal have decided against the nonprofits<sup>35</sup> and two circuit courts of appeal have cases before them but have not yet decided the matter<sup>36</sup>. To date, no court has issued a decision in favor of the nonprofits.

Most significantly, the United States Supreme Court has not decided a case concerning the nonprofits. Some time ago, the Supreme Court issued a stay in the *Little Sisters of the Poor* case<sup>37</sup>. On November 6, 2015, the Supreme Court granted review in and consolidated all seven outstanding HHS mandate cases including *Little Sisters of the Poor*<sup>38</sup>. This means that these cases would likely be argued in October, 2016, with a final decision on the merits for non-profit entities issued by June, 2017.

The *Hobby Lobby* decision notwithstanding, most of the experts I have talked with are pessimistic that the nonprofits will win on the merits before the Supreme Court. They predict that the Court will rule that the latest accommodation, which treats the nonprofits the same as the closely-held businesses, sufficiently attenuates the nonprofit's connection to the objectionable services and thus avoids any First Amendment or RFRA violation.

Assuming these pessimistic predictions are true, how should the nonprofits react to an unfavorable Supreme Court decision? What should they do? Should they (1) close the entity to avoid complying with the Mandate, (2) comply with the Mandate under protest or (3) stay open, refuse to comply with the Mandate, and pay the resulting fines?

In response, I will begin by observing that for most nonprofits there are only two realistic choices. Choice number 3, which includes paying the fines,

34 See *Nat'l Fed'n of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

35 See, e.g., *Michigan Catholic Conference and Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015).

36 See, e.g., *Sharpe Holdings, Inc. v. U.S. Dep't. of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015).

37 See *Do Little Sisters of the Poor Have a Case Against Obamacare?*, U.S. News (Mar. 2, 2016), <http://www.usnews.com/debate-club/do-the-little-sisters-of-the-poor-have-a-case-against-obamacare> ("On New Year's Eve, Supreme Court Justice Sonia Sotomayor issued a stay that temporarily blocked the contraception mandate in the Affordable Care Act from applying to religious-affiliated organizations. A group of nuns from Colorado called the Little Sisters of the Poor asked for the delay because they object to the law's contraception requirements").

38 See *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 794 F.3d 1151 (U.S. 2015).

is not a genuine option. Most nonprofits cannot afford to pay the fines<sup>39</sup>. And, even if the entities could initially afford to pay the fines, there is no guarantee that they would not later be raised to unaffordable levels. For most nonprofits – indeed, perhaps for all of them – there are only two real choices: comply with the Mandate or close down the institution.

As President and Dean, I seriously considered both options when I thought about what I would recommend to our Board if this situation should come to pass. Would I recommend complying with the Mandate? Or, would I recommend closing down the law school?

Here are my thoughts. Let me be absolutely clear at the outset that what I am going to express now are my personal thoughts about the subject and they in no way represent the official position of Ave Maria School of Law.

Refusing to participate in Mandate and closing the school would clearly a moral choice. Doing this would absolutely avoid any connection, proximate or actual (but for), with providing morally objectionable services. If the law school decided to close, my instinct is go down with a roar and not a whimper. At a minimum, this means the school should widely tell its story through the press. It might even include civil disobedience, such as not paying fines and ultimately forcing the government to close the school. I hesitate to recommend this course of action without further study, however, as it would be irresponsible for me to recommend a course of action without a better understanding of the potential legal and financial exposure and other possible adverse consequences that might be suffered by students, Board members, officers, faculty and staff.

But what about the other alternative - that is, staying open and complying with the Mandate as modified by the accommodations. Is this also a moral choice? While I believe that it can be, it does present important issues involving formal and material cooperation as well as scandal, which must be considered and addressed. Let me explain what I mean.

First, with regard to cooperation<sup>40</sup>, I acknowledge that the line between culpable material cooperation and non-culpable remote involvement is often difficult to draw. Given the moral implications of such distinctions, however,

39 See *Frequently Asked Questions: Little Sisters of the Poor*, The Becket Fund for Religious Liberty <http://www.becketfund.org/faqlittlesistersofthepoor/#f8> (last visited Feb. 29, 2016) (The Little Sisters “would face the prospect of up to \$70 million in government fines per year unless they provided services contrary to Catholic teachings”).

40 See Russell E. Smith, *The Principles of Cooperation in Catholic Thought*, in *The Fetal Tissue Issue: Med. & Ethical Aspects* 81, 84 (Peter J. Cataldo et al. eds., 1994) (“Cooperation” in this context, is understood as “the participation of one agent in the activity of another agent to produce a particular effect or joint activity”).

it is sometimes necessary to identify these boundaries. Let me illustrate the point with an example.

Everyone would agree that a nurse who assists a doctor perform an abortion has formally cooperated in that abortion and is morally culpable for it. This is true because the nurse shares in the intention of the doctor to commit the forbidden act - the abortion<sup>41</sup>. The nurse's participation constitutes formal cooperation, and formal cooperation with evil is always morally unacceptable<sup>42</sup>.

But what about the taxi driver who takes the woman to Planned Parenthood where she will have the abortion? What about the police officer who makes sure the entrance to Planned Parenthood is not blocked? What about the utility worker who ensures that electric service is received at the Planned Parenthood facility? Are these persons morally culpable for abortions performed at the facility? Where does one draw the moral line?

In my judgment, none of these actors - the taxi driver, the police officer, or the utility worker - would have formally cooperated in abortions. None share the doctor's intent that abortions be performed.

But the question of formal cooperation does not end the moral inquiry. Assuming each actor could foresee that his action could help facilitate or assist the performance of an abortion, their cooperation is said to be "material"<sup>43</sup>. Material cooperation may be moral or immoral, depending on the circumstances. The moral acceptability of material cooperation is evaluated with regard to the remoteness of the contribution to the morally prohibited act and the countervailing good that can be achieved through the cooperation or avoided through noncooperation<sup>44</sup>. Under this approach, cooperation is morally justified if it is proportionate, i.e., if the good that is achieved through cooperation is weighty enough to counterbalance the bad action and the closeness of the actor's complicity to it<sup>45</sup>.

Using the material cooperation approach to the Planned Parenthood hypothetical, I would hold that the taxi driver, the police officer and the utility worker are all probably not morally culpable for any abortions performed there. Their participation in abortions is remote and attenuated. Further, they are likely required to perform their respective actions (driving a taxi, policing a sidewalk, providing electricity) to retain their respectable

41 See Orville N. Griese, *Catholic Identity in Health Care: Principles and Practice* 387–88 (Nat'l Catholic Bioethics Center 1st ed.1987); see also Germain Grisez, *The Way of the Lord Jesus*, Vol. 3: Difficult moral questions 872–73 (Franciscan Press 1st ed. 1997).

42 Grisez, *supra* note 40, at 873.

43 See Grisez *supra* note 40, at 388, 873.

44 *Id.* at 876.

45 *Id.*

employment and earn a living wage, which they presumably use to support families and engage in beneficial activities. Thus, the good that is directly achieved through cooperation is weightier than the bad that is remotely assisted. On the other hand, if any of these actors have the discretion to opt out of particular assignments - such as the police officer keeping Planned Parenthood accessible - then they would they would be morally obligated to avoid even remote cooperation. But if this is not an option, I do not believe that any of these actors are morally required to quit their job applying a material cooperation analysis.

The same general considerations ought to pertain to businesses and nonprofit entities that decide to comply with the Mandate rather than to close their doors. Using Ave Maria School of Law as an example, compliance with the Mandate would not constitute formal cooperation as the school would not share the government’s (and the insurer’s) intent to provide the objectionable services.

Further, I believe Ave Maria’s compelled compliance with the Mandate would not constitute prohibited material cooperation. First, the school’s participation would be indirect and attenuated, and it seems unlikely that it would ultimately result in many if any morally prohibited consequences<sup>46</sup>. Second, the school would be complying only as a consequence of the coercive threat of fatal government-imposed fines, and such compliance would occur only after the school did all it could to oppose and resist this through the courts and otherwise<sup>47</sup>. Finally, the “good” in keeping the school open substantially outweighs the “bad” resulting from remote compliance. While this “good” is in many ways incalculable, one important measure of it is the hundreds of Ave Maria Law School graduates, trained in the Natural Law and the Catholic intellectual tradition, who everyday enhance the legal and broader culture, assist clients in need, and defend life and religious freedom. Indeed, some of these graduates are leading the charge in opposition to the Mandate and similar attacks upon religious liberty.

I recommend that if an entity is considering remaining open and complying with the Mandate, it should consult with a respected theologian about its decision. Further and if possible, the entity should solicit from the theologian a formal opinion that addresses, among other things, how the

46 Ave Maria School of Law attracts faculty and staff who support the School’s Mission. Accordingly, it seems unlikely that compliance with the Mandate will actually result in these persons engaging in many, if any, immoral acts relating to abortion, contraception, and sterilization.

47 Ave Maria School of Law resisted the Mandate in many ways besides the lawsuit. As President and Dean, I wrote legislators urging them remove the Mandate, and I spoke and published widely in opposition to it.

doctrine of formal and material cooperation applies to its particular circumstances. Tapping into such expertise and obtaining guidance would have many obvious benefits. It would help provide assurance to decision makers that they have acted morally and consistent with their religious principles. From a practical standpoint, it could also help decision makers prudently navigate the troubled waters they would surely confront. Finally, it could help reassure internal and external constituencies that the entity has not abandoned its core religious and moral principles.

The second major is consideration with regard to a decision to remain open involves the possibility of scandal. When used in this context, “[s]candal is an attitude or behavior which leads another to do evil”<sup>48</sup>. Catholic tradition forbids scandal, especially when caused “by those who by nature or office are obliged to teach and educate others”<sup>49</sup>. Given its status as a law school, Ave Maria has a special obligation to avoid scandal.

To this end, Ave Maria School of Law should unambiguously proclaim to its internal audience and more widely to the general public through the media that it strenuously objects to being coerced into compliance with the Mandate contrary to its religious beliefs and in contravention of its constitutional rights and protections. It should make clear that the school fought against the Mandate in court but lost there, and that its remaining choices are either to comply under protest or close down. It must publicly explain that it will continue to oppose the Mandate and do all that it can to change the requirement for compliance. This position must be clearly and repeatedly expressed, and the school must follow up on all the promises it makes.

There are broad public policy values that support a decision to remain open. I recoil at the idea of religious entities being bullied out of the public square by secular bureaucrats wielding offensive regulations like cattle prods. Surrendering this valuable turf to those who are religiously indifferent and intolerant would harm people of faith and the people they serve, and it certainly would damage American culture. I am confident I do not need to cite examples in support of this position.

While I believe that compliance under protest after exhausting legal recourse would be a moral choice, I understand and respect that there will be some men and women of conscience who will disagree and contend that the entity should close its doors rather than comply. I hope that good people who disagree with an entity’s decision to remain open would direct their enmity where it belongs: not toward the entity and its decision makers, but rather toward a government and its leaders who would trample upon God-given and

<sup>48</sup> See *Catechism of the Catholic Church* ¶ 2284 (1994).

<sup>49</sup> *Id.* at ¶ 2285.

constitutionally protected rights to score political points, advance the culture of death, and sequester religious expression to houses of worship.

One last observation: if our experience thus far with Mandate has taught us nothing else, it has made it abundantly clear that we cannot take religious freedom for granted. Religion is threatened in contemporary America. Nothing is guaranteed, including our most basic and inalienable constitutional rights. I have no doubt that secularists will continue their efforts to confine religious expression to the inside of churches and, perhaps, even try to exercise some control over what happens within their sacred walls. This must be vigorously opposed, each time and always. The stakes could not be higher.

Let me end on a positive thought. Some may ponder these troubling times and despair. I choose instead to embrace the challenges presented to us all and seize the opportunity to stand up in support of my faith and in support of a faithful interpretation of the Constitution. I believe we live in a time when each of us, each in our own way, can make real difference about something that really matters. We should be grateful to God for this opportunity to stand up for Him and for our country. I have great respect for any faith-based entity that chooses to remain open and persevere as an agent for change, rather than to close down and become yet another casualty of our post-Christian, secular culture.