



*Office of the  
General Counsel*

Anthony Picarello  
United States Conference  
of Catholic Bishops  
3211 4<sup>th</sup> Street, NE  
Washington, DC 20017  
Phone: 202-541-3300  
Fax: 202-541-3337  
apicarello@usccb.org

# ***Lingering Legal and Moral Issues in Health Care Reform***

*3<sup>rd</sup> Annual Symposium  
for Catholic Medical Professionals*

*St. Joseph's Medical Center  
Saturday, March 12, 2011  
Towson, MD*



# Introduction

- Moral Problems Other Than Abortion Funding
  - Conscience protection beyond abortion
  - Justice for immigrants
- Persistent Doubts on Abortion Funding
  - The commingling question
  - The executive order question
  - The high risk pool question
- The Distinct Roles of Lawyers and Bishops



# Problems Other Than Abortion

- Conscience protection beyond abortion (gen'l)
  - What procedures? Sterilization, in vitro fertilization, gender change surgery, contraception and others (*i.e.*, more than just Catholic concerns)
  - What problems? New mandates to provide coverage for certain procedures without room for accommodating objections of insurers, plan sponsors (employers), plan purchasers (employees), and service providers (hospitals/Drs)
  - What solutions? Make clear that the new law does not prevent accommodations / preserve *status quo*
  - What response? Zip



# Problems Other Than Abortion

- Conscience protection beyond abortion (partic.)
  - Where has the problem materialized? Regulatory definition of “preventive services” mandate
  - What is the precise problem? Planned Parenthood has announced it will push to include all contraceptive drugs as “preventive services” for women
  - What solutions? USCCB has provided comments w/reasons not to add contraception / sterilization, which would fix the problem here, but not broadly
  - What response? TBD...



# Problems Other Than Abortion

- Justice for immigrants
  - Prevents *illegal* immigrants from buying in with their own funds, without subsidy (House bill would have allowed this)
  - Prevents *legal* immigrants from participating in Medicaid for five years (existing rule that could have been changed, but wasn't)



# Doubts on Abortion Funding

- Why we expect PPACA to fund abortions
  - Courts read laws funding broad categories of services to require funding of abortion, unless statute carves out
  - PPACA funds broad categories, and contains some restrictions on abortion funding, but limited in scope (Stupak Amt would have covered the whole Act)
  - One of the funding streams *not* covered by PPACA's limited funding restrictions is funding for CHCs
  - The Hyde Amt does not take up the slack, because it covers only the annual appropriation to HHS, and PPACA contains its own, separate appropriations
  - Regulations that implement the Hyde Amt are ineffective for the same reason



# Doubts on Abortion Funding

- Doesn't the commingling of PPACA funds with Hyde-restricted funds extend the restriction to the PPACA funds?
  - There is no general rule that mixing annual Hyde-restricted funds with unrestricted funds extends the restriction—accountants have no trouble keeping track
  - The Hyde amendment *can* extend its restriction to other funds, but only under limited circumstances—when Hyde-restricted funds are “appropriated to” a “trust fund” containing unrestricted funds
  - Here, PPACA funds are appropriated to a new fund that is not apparently a “trust fund,” and Hyde funds are not “appropriated to” that new fund in any event



# Doubts on Abortion Funding

- Doesn't the executive order cure any shortcomings of the statute re funding?
  - The President may only act within the realm of what the statute authorizes; separation of powers prevents the EO from contradicting the statutory mandate
  - Where the EO purports to implement the Stupak Amendment—which the Senate explicitly rejected—it is legally invalid





# Doubts on Abortion Funding

- Doesn't the recent "high risk pool" dispute show that the statute and the EO are enough?
  - NM, MD, PA submitted regs to HHS for program to cover those at "high risk" of denial, and coverage in those programs would have included abortion
  - HHS initially approved the state programs, and when the abortion funding issue was raised, HHS initially denied the problem existed
  - But after public outcry, HHS back-pedaled, pledging that the programs would not fund abortion



# Doubts on Abortion Funding

- No, the “high risk pool” dispute proves the opposite: that the statute and EO do not block, and actually authorize, abortion funding
  - States and—before they were called on it—HHS approved programs that explicitly covered abortion
  - Add’l administrative action was required—if the statute and EO were enough, add’l HHS action would be unnecessary
  - That additional HHS action has a distinct statutory basis, which does not undergird the EO
  - That additional action, even with colorable statutory basis, has yet to be tested in court
  - Congressional Research Service confirmed no limitation on abortion funding in the statute or EO



# Legal Analysis & Moral Teaching

- Didn't the lawyers overreach by attempting to cloak their legal analysis in the moral authority of the Bishops?
  - USCCB lawyers have no ecclesial authority, and are no more legally correct b/c they work for Bps
  - Lawyers and policy analysts are responsible for understanding *how* the law will operate, not for determining whether that operation is *morally good or bad*
  - The operation of law is only the object of moral evaluation; it is not the moral teaching itself—attorneys / analysts inform, Bishops judge



# Legal Analysis & Moral Teaching

- Didn't the Bishops overreach by usurping the role of the laity in political affairs, and by claiming legal / policy expertise they lack?
  - It is true that Bishops are not necessarily (and not generally) civil lawyers, and nothing about their charism lends special authority to their legal opinions, in healthcare or otherwise
  - But Bishops *do* have authority to morally evaluate laws, and that authority is not limited to simple laws—complexity or difference of legal opinion over what a law means does not preclude the Bishops from teaching morally about the law



# Legal Analysis & Moral Teaching

- Didn't the Bishops overreach? (cont'd)
  - Where laws are more complex, contested, or ambiguous, the only difference is an additional layer in the teaching to account for the uncertainty
  - Not simply “abortion funding is morally wrong” (when the law is clear), but “a certain level of *risk* of abortion funding is morally wrong” (when funding legally unclear/uncertain)
  - Analogy to Russian roulette: it is immoral to shoot yourself in the head; it is also immoral to take a 1-in-6 chance that you will shoot yourself in the head
  - No one doubts that the Bishops are fully within their role in declaring Russian Roulette immoral, b/c they can morally judge *risks* as well as *certainties*



# Legal Analysis & Moral Teaching

- So what happened in this case? (a lawyer's view)
  - The Bishops set a very high standard for moral acceptability—they didn't assign a percentage chance, but they required a very high level of confidence that there would *not* be abortion funding before they would declare the bill morally acceptable
  - In legal terms, the Bishops placed the burden of proof on bill proponents to prove there would not be abortion funding, and held them to a high burden of “clear and convincing evidence,” or perhaps even proof “beyond a reasonable doubt”
  - Even if laity find the standard too strict, they cannot complain that it is beyond the scope of the Bishops' authority; setting the *moral* standard by which the law is evaluated is the job of Bishops—not lawyers, analysts, lobbyists, or legislators



# Legal Analysis & Moral Teaching

- So what happened in this case? (a lawyer's view)
  - After all the legal debate, the Bishops did not remotely approach the level of confidence they wanted—our analysis had abortion funding likely, and other analyses (as opposed to mere counter-assertions) were rare and provided less detail
  - Again, in legal terms, PPACA advocates failed to meet the Bishops' high standard of proof—they probably didn't even satisfy the "preponderance" standard, but they certainly didn't satisfy the "clear and convincing" or "reasonable doubt" stds
  - Even if OGC was wrong, and there was actually a lower chance of abortion funding—an even shot, rather than a very high likelihood—the Bishops' conclusion would have been the same
  - We said there were 5 bullets in the 6 chambers of the gun, and even if there were 3, or even 1, it still would have been morally unacceptable to play the game



# Legal Analysis & Moral Teaching

- So what happened in this case? (a lawyer's view)
  - In this way, the Bishops' moral judgment did not hinge on our (or anyone else's) legal analysis—the level of risk far exceeded what the Bishops required
  - The question wasn't even close—and not because we were so confident in our legal analysis, but because the level of certainty that the Bishops required was so high, that there is no colorable argument that the other side met that high standard
  - Football analogy: on a good day for the other side, we were fighting over the 50 yard line—but they needed to get across the goal line to win, and they never even got into FG range
  - So the Bishops were not playing amateur lawyer, or hinging their teaching authority on a particular legal analysis, but instead setting a very high standard for moral acceptability





# Legal Analysis & Moral Teaching

- Turns out, we're legally right anyway
  - Now is not the time for us to back away from our legal analysis, with abortion funding and conscience problems already materializing, even sooner than we expected
  - But the point is that the lawyers don't need to be right *legally* for the Bishops to be right *morally*: even if the unlikely turns out to be true, and abortion is never funded under the law, that funding was still likely to a morally unacceptable degree at the time the bill passed