

Current Jewish Questions

Contraception

United We Stand for Religious Freedom

ObamaCare's contraception mandate stands the First Amendment on its head

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<http://online.wsj.com/article/SB10001424052970204136404577211601075404714.html>

Stories involving a Catholic, a Protestant and a Jew typically end with a punch line. We wish that were the case here, but what brings us together is no laughing matter: the threat now posed by government policy to that basic human freedom, religious liberty.

Last month the federal Department of Health and Human Services announced that the Affordable Care Act requires employers to pay for insurance coverage for abortion-inducing drugs, sterilizations and contraception. What made the announcement especially troubling is that HHS specifically declined to exempt religious institutions that serve those outside their own faiths, such as hospitals and schools.

Coverage of this story has almost invariably been framed as a conflict between the federal government and the Catholic bishops. Zeroing in on the word "contraception," many commentators have taken delight in pointing to surveys about the use of contraceptives among Catholics, the message being that any infringement of religious freedom involves an idiosyncratic position that doesn't affect that many people.

Nothing could be further from the truth. The Catholic Church's teaching on contraception (not to mention abortion and surgical sterilization) has been clear, consistent and public. HHS Secretary Kathleen Sebelius's decision would force Catholic institutions either to violate the moral teachings of the Catholic Church or abandon the health-care, education and social services they provide the needy. This is intolerable.

And while most evangelicals take a more permissive view of contraception, they share with Catholics the moral conviction that the taking of human life in utero, whether surgically or by abortifacient drugs, violates the basic human right to life. Evangelical nonprofits such as Prison Fellowship would therefore also have to choose between violating their consciences or paying fines that would ultimately destroy their ability to help the people they are committed to helping.

Even worse than the financial impact is the breach of faith represented by Ms. Sebelius's decision. Her notion of an "appropriate balance" between religious freedom and "increasing access" to "important preventive services" stands the First Amendment on its head.

In 1790, George Washington exchanged letters with Moses Seixas, the warden of the Hebrew Congregation of Newport, R.I. Seixas praised the newly formed United States for "affording to All liberty of conscience, and immunities of citizenship." People who knew all too well what it meant to be deprived of the "invaluable rights of free Citizens" held religious liberty and freedom of conscience most dear.

In reply, Washington wrote that U.S. citizens had a "right to applaud themselves" for setting an example of "an enlarged and liberal policy" that enshrined freedom of conscience. He added that the ability of members of one faith to seek the benefit of all Americans is the foundation of America's civic strength.

We see evidence of that strength all around us: If a working mother's child needs to visit the emergency room, there's a good chance the hospital is a Catholic one. If an ex-offender needs help readjusting to life outside of prison, there's a good chance help will come from a Christian ministry like Prison Fellowship.

Yet instead of encouraging the different faith communities to continue their vital work for the good of all, the Obama administration is forcing them to make a choice: serving God and their neighbors according to the dictates of their respective faiths—or bending the knee to the dictates of the state.

For Jews, George Washington's letter has always been cherished. It embodies the promise extended by America not only to them, but to all citizens. That is why many in the Jewish community are alarmed to see the very religious freedom Washington praised centuries ago endangered by Washington's successor. "May the children of the stock of Abraham who dwell in this land," Washington wrote, "continue to merit and enjoy the good will of the other inhabitants."

At this critical moment, Americans of every faith, as guardians of their own freedom, must, in the words of the First Amendment, "petition the government for the redress of grievances." That's why over the past two years more than 500,000 people have signed the "Manhattan Declaration" in defense of religious liberty. They believe, as do we, that under no circumstances should people of faith violate their consciences and discard their most cherished religious beliefs in order to comply with a gravely unjust law.

That's something that this Catholic, this Protestant and this Jew are in perfect agreement about.

Before the Committee on Oversight and Government Reform United States House of Representatives “Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?”

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http://oversight.house.gov/images/stories/Testimony/2-16-12_Full_HC_Mandate_Soloveichik.pdf

On Friday, in an op ed in the Wall Street Journal, I joined Catholic and Protestant leaders in protesting a violation of religious freedom stemming from the Department of Health and Human Services' new directive obligating religious organizations employing or serving members of other faiths to facilitate acts that those religious organizations consider violations of their religious tradition. Later the same day, the administration announced what it called an “accommodation”: not religious organizations but rather insurance companies would be the ones paying for the prescriptions and procedures that a faith community may find violative of its religious tenets. This putative accommodation is, however, no accommodation at all. The religious organizations would still be obligated to provide employees with an insurance policy that facilitates acts violating the organization's religious tenets. Although the religious leaders of the American Catholic community communicated this on Friday evening, the administration has refused to change its position, thereby insisting that a faith community must either violate a tenet of its faith, or be penalized.

What I wish to focus on this morning is the exemption to the new insurance policy requirements that the administration did carve out from the outset: to wit, exempting from the new insurance policy obligations religious organizations that do not employ or serve members of other faiths. From this exemption carved out by the administration, at least two important corollaries follow. First: by carving out an exemption, however narrow, the administration implicitly acknowledges that forcing employers to purchase these insurance

policies may involve a violation of religious freedom. Second, the administration implicitly assumes that those who employ or help others of a different religion are no longer acting in a religious capacity, and as such are not entitled to the protection of the First Amendment.

This betrays a complete misunderstanding of the nature of religion. For Orthodox Jews, religion and tradition govern not only praying in a synagogue, or studying Torah in a Beit Midrash, or wrapping oneself in the blatant trappings of religious observance such as phylacteries. Religion and tradition also inform our conduct in the less obvious manifestations of religious belief, from feeding the hungry, to assessing medical ethics, to a million and one things in between. Maimonides, one of Judaism’s greatest Talmudic scholars and philosophers, and also a physician of considerable repute, stresses in his Code of Jewish Law that the commandment to “Love the Lord your God with all your heart” is achieved not through cerebral contemplation only but also requires study of the sciences, and engagement in the natural world, as this inspires true appreciation of the wisdom of the Almighty. In refusing to extend religious liberty beyond the parameters of what the administration chooses to deem religious conduct, the administration denies people of faith the ability to define their religious activity. Therefore, not only does the new regulation threaten religious liberty in the narrow sense, in requiring Catholic communities to violate their religious tenets, but also the administration impedes religious liberty by unilaterally redefining what it means to be religious.

I. Commandment to Procreate

<p>1a. Isaiah 45:18 For this is what the LORD says— he who created the heavens, he is God; he who fashioned and made the earth, he founded it; he did not create it to be empty, but formed it to be inhabited— he says: “I am the LORD, and there is no other.</p> <p>1b. M. Gittin 4:5 But surely the world was not created for aught but procreation as it is said, He created it not a waste, He formed it to be inhabited.</p>	<p>ישעיהו מה:יח כִּי כֹה אָמַר יְקֹנֵק בּוֹרֵא הַשָּׁמַיִם הוּא הַאֱלֹהִים יִצֵר הָאָרֶץ וְעָשָׂה הוּא כּוֹנְנָהּ לֹא תִהְיֶה בְרָאָה לְשֶׁבֶת יִצְרָה אֲנִי יְקֹנֵק וְאֵין עוֹד:</p> <p>משנה גיטין ד:ה והלא לא נברא העולם אלא לפריה ורביה שנאמר לא תהו בראה לשבת יצרה</p>
<p>2. M. Yevamot 6:6 A man shall not abstain from the performance of the duty of the propagation of the race unless he already has children [as to the number]. Beth Shammai ruled: two males, and Beth Hillel ruled: male and a female, for it is stated in scripture, male and female created he them. If a man took a wife and lived with her for ten years and she bore no child, he may not abstain [any longer from the duty of propagation]. If he divorced her she is permitted to marry another, and the second husband may also live with her [no more than] ten years. If she miscarried [the period of ten years] is reckoned from the time of her miscarriage.</p>	<p>משנה יבמות ו:ו לא יבטל אדם מפריה ורביה אלא אם כן יש לו בנים בית שמאי אומרים שני זכרים ובית הלל אומרים זכר ונקבה שנאמר (בראשית ה') זכר ונקבה בראם נשא אשה ושהה עמה עשר שנים ולא ילדה אינו רשאי ליבטל גירשה מותרת לינשא לאחר ורשאי השני לשהות עמה עשר שנים ואם הפילה מונה משעה שהפילה האיש מצווה על פריה ורביה אבל לא האשה רבי יוחנן בן ברוקא אומר על שניהם הוא אומר (בראשית א') ויברך אותם אלהים ויאמר להם פרו ורבו:</p>

II. Contraception in the Talmud: Forms and Situations

<p>3a. Genesis 38:8-10 8 Then Judah said to Onan, “Sleep with your brother’s wife and fulfill your duty to her as a brother-in-law to raise up offspring for your brother.” 9 But Onan knew that the child would not be his; so whenever he slept with his brother’s wife, he spilled his semen on the ground to keep from providing offspring for his brother. 10 What he did was wicked in the LORD’s sight; so the LORD put him to death also.</p> <p>3b. B. Niddah 13a But why all these precautions? — Because otherwise one might emit semen in vain, and R. Johanan stated: Whosoever emits semen in vain deserves death, for it is said in Scripture. And the thing which he did was evil in the sight of the Lord, and He slew him also. (Gen. 38:9-10) R. Isaac and R. Ammi said. He is as though he shed blood, for it is said in Scripture. Ye that inflame yourselves among the terebinths, under every leafy tree, that slay the children in the valleys under the clefts of the rocks; (Is. 57:5) read not 'that slay' but 'that press out'. (interchange of the sibilants shin and sin) R. Assi said: He (who emits semen in vain) is like one who worships idols; for here it is written, 'Under every leafy tree' and elsewhere it is written, upon the high mountains ... and under every leafy tree.</p>	<p>3. בראשית לח (ח) וַיֹּאמֶר יְהוָה לְאוֹנָן בֶּאֱלֵאֶשֶׁת אָחִיךָ וַיְבִים אֹתָהּ וְהָקָם זָרַע לְאָחִיךָ : (ט) וַיֵּדַע אוֹנָן כִּי לֹא לוֹ יִהְיֶה הַזָּרַע וְהָיָה אִם בָּא אֵל אֵשֶׁת אָחִיו וְשָׁחַת אֶרְצָה לְבִלְתִּי נָתֹן זָרַע לְאָחִיו : (י) וַיִּרְעַע בְּעֵינָיו יְקִיָּק אֲשֶׁר עָשָׂה וַיָּמָת גַּם אוֹתוֹ :</p> <p>תלמוד בבלי נדה יג א: וכל כך למה? מפני שמוציא שכבת זרע לבטלה; דא"ר יוחנן: כל המוציא שכבת זרע לבטלה חייב מיתה, שנאמר +בראשית ל"ח+ וירע בעיני ה' (את) אשר עשה וימת גם אותו. רבי יצחק ורבי אמי אמרי: כאילו שופך דמים שנאמר +ישעיהו נ"ז+ הנחמים באלים תחת כל עץ רענן שוחטי הילדים בנחלים תחת סעיפי הסלעים, אל תקרי שוחטי אלא שוחטי. רב אסי אמר: כאילו עובד עבודת כוכבים, כתיב הכא תחת כל עץ רענן וכתוב התם +דברים יב+ על ההרים הרמים ותחת כל עץ רענן.</p>
<p>4. B. Yevamot 65b Judah and Hezekiah were twins. The features of the one were developed at the end of nine months, and those of the other were developed at the beginning of the seventh month. Judith, the wife of R. Hiyya, having suffered in consequence agonizing pains of childbirth, changed her clothes [on recovery] and appeared before R. Hiyya. 'Is a woman', she asked, 'commanded to propagate the race'? — 'No', he replied. <u>And relying on this decision, she drank a sterilizing potion.</u> When her action finally became known, he exclaimed, 'Would that you bore unto me only one more issue of the womb!' For a Master stated: Judah and Hezekiah were twin brothers and Pazi and Tawi twin sisters</p>	<p>4. תלמוד בבלי יבמות סה ב-סו א: יהודה וחזקיה תאומים היו, אחד נגמרה צורתו לסוף תשעה, ואחד נגמרה צורתו לתחלת שבעה; יהודית דביתהו דר' חייא הוה לה צער לידה, שנאי מנא ואתיאי לקמיה דר' חייא, אמרה: אתתא מפקדא אפריה ורביה? אמר לה: לא. אזלא אשתיא סמא דעקרתא, לסוף איגלאי מילתא, אמר לה: איכו ילדת לי חדא כרסא אחרייתא; דאמר מר: יהודה וחזקיה אחי, פזי וטוי אחוותא.</p>
<p>5. B. Ketuvot 37a A contradiction, however, was also pointed out between two rulings in relation to a captive. For it was taught: Proselytes, captives, or slaves who were ransomed, or proselytized or were manumitted, must wait three months [Before she is permitted to marry] if they were older than three years and one day; so R. Judah. R. Jose permits immediate betrothal and marriage. [The other] remained silent. 'Have you,' he said to him, 'heard anything on the subject?' — 'Thus', the former replied. 'said R. Shesheth: [This is a case] where people saw that the captive was seduced'. If so [That there is definite evidence against her chastity] what could be R. Jose's reason? — Rabbah replied: <u>R. Jose is of the opinion that a woman who plays the harlot makes use of an absorbent in order to prevent conception.</u> This is intelligible in the case of a proselyte, who, since her intention is to proselytize, is careful. [To have an absorbent in readiness in order to avoid conception and the mixing of legitimate] It is likewise [intelligible in the case of] a captive [who is also careful] since she</p>	<p>5. תלמוד בבלי כתובות לז א: והתניא: הגיורת שנתגיירה וראתה דם, ר' יהודה אומר: דיה שעתה, ר' יוסי אומר: הרי היא ככל הנשים, ומטמאה מעת לעת ומפקדה לפקידה; וצריכה להמתין ג' חדשים, דברי ר' יהודה, ר' יוסי מתיר ליארס ולינשא מייד: אייל: גיורת אשבויה קא רמית? גיורת לא מנטרא נפשה, שבויה מנטרא נפשה. ורמי שבויה אשבויה; דתניא: הגיורת, והשבויה, והשפחה, שנפדו ושנתגיירו ושנשתחררו יתירות על בנות ג' שנים ויום אחד - צריכות להמתין ג' חדשים, דברי ר' יהודה, ר' יוסי מתיר ליארס ולינשא מייד! אשתיק. אייל: מידי שמיע לך בהא? אמר ליה, הכי אמר רב ששת: שראוה שנבעלה. א"ה, מאי טעמא דר' יוסי? אמר</p>

<p>does not know whether they would take her.[She makes provision (cf. preceding note) against the possibility of being sold to an Israelite master who might set her free.] It is similarly [intelligible in the case of] a bondwoman [who might also be careful] when she hears from her master [of her impending liberation]. What, however, can be said in the case of one who is liberated on account of the loss of a tooth or an eye? And were you to suggest that R. Jose did not speak [I. e., did not maintain his ruling that a period of three months must be allowed to pass] of an unexpected occurrence, [Lit., 'of itself', when, as in the case of the loss of a tooth or an eye. the woman was not likely to have been possessed of an absorbent.] [it might be retorted,] there is the case of a woman who was outraged or seduced which may happen unexpectedly and yet it was taught: A woman who has been outraged or seduced must wait three months; so R. Judah, but R. Jose permits immediate betrothal and marriage! [Which shows that even when the unexpected happens R. Jose requires no waiting period] — The fact, however, is, said Rabbah, [The reading in the parallel passage (Yeb. 35a) is 'Abaye'] <u>that R. Jose is of the opinion that a woman who plays the harlot turns over in order to prevent conception.</u> [No absorbent is needed. Similarly in the case of a liberated captive or slave. Hence the ruling of R. Jose that no waiting period is required] And the other? [Why does he require a waiting period] — There is the apprehension that she might not have turned over properly. [And conception might have taken place.]</p>	<p>רבה, קסבר ר' יוסי : אשה מזנה משמשת במוך שלא תתעבר. בשלמא גירות - כיון דדעתה לאיגורי מנטרא נפשה, שבויה נמי - דלא ידעה היכא ממטו לה, שפחה נמי - דשמעה מפי מרה, אלא יוצאה בשן ועין מאי איכא למימר? וכי תימא, כל ממילא לא א"ר יוסי, הרי אנוסה ומפותה דממילא, ותניא : אנוסה ומפותה - צריכות להמתין ג' חדשים, דברי ר' יהודה, ר' יוסי מתיר ליארס ולינשא מיד! אלא אמר רבה, קסבר ר' יוסי : אשה מזנה מתהפכת כדי שלא תתעבר.</p>
<p>6. B. Yevmot 12b R. Bebai recited before R. Nahman: Three [categories of] women may (debate if means "may" or "should") use an absorbent [hackled wool or flax] in their marital intercourse: [To prevent conception] A minor, a pregnant woman and a nursing woman. The minor, because [otherwise] she might become pregnant, and as a result might die. A pregnant woman, because [otherwise] she might cause her fetus to degenerate into a sandal. A nursing woman, because [otherwise] she might have to wean her child prematurely [Owing to her second conception] and this would result in his death. And what is the age of such a minor? [Who is capable of conception but exposed thereby to the danger of death] From the age of eleven years and one day until the age of twelve years and one day. One who is under, [When no conception is possible] or over this age [When pregnancy involves no fatal consequences] must carry on her marital intercourse in the usual manner. This is the opinion of R. Meir. The Sages, however, say: The one as well as the other carries on her marital intercourse in the usual manner, and mercy will be vouchsafed from heaven, [To save her from danger] for it is said in the Scriptures The Lord preserveth the simple. [those who are unable to protect themselves]</p>	<p>6. תלמוד בבלי יבמות יב: תני רב ביבי קמיה דרב נחמן, שלש נשים משמשות במוך : קטנה, מעוברת, ומניקה ; קטנה - שמא תתעבר ושמא תמות, מעוברת - שמא תעשה עוברה סנדל, מניקה - שמא תגמול בנה וימות ; ואיזו היא קטנה? מבת י"א שנה ויום אחד עד י"ב שנה ויום אחד, פחות מכאן ויתר על כן - משמשת כדרכה והולכת, דברי ר"מ ; וחכ"א : אחת זו ואחת זו - משמשת כדרכה והולכת, ומן השמים ירחמו, משום שנאמר : +תהלים קט"ז+ שומר פתאים ה'.</p>

Further Reading

Feldman, David M. *Birth Control in Jewish Law: Marital Relations, Contraception, and Abortion as Set Forth in the Classical Texts of Jewish Law*. Northvale: Jason Aronson Inc. 1998.