



## Protection of Conscience Project

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# Take two aspirin and call me after the election

Responding to R. Alta Charo: “Warning: Contraceptive Drugs May Cause Political Headaches” (*Perspective*, N Engl J Med. 2012 Mar 14)

Sean Murphy, Administrator  
**Protection of Conscience Project**

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“Take two aspirin and call me after the election” is the kind of advice one would expect from former members of President Obama’s transition and HHS review teams in response to protests about the HHS birth control mandate, so the closing words of Professor R. Alta Charo in her NEJM *Perspective* column are not unexpected.<sup>1</sup>

Consistent with her previous service to the President, Professor Charo observes that the Obama administration will ‘win’ if the current controversy can be framed as a dispute about contraceptives, and then loyally attempts to do just that.

“Let’s recognize,” she writes, “that the current debate is about public health and contraception.”

Actually, at root, the current debate is about who should pay for contraceptives. (And surgical sterilization and embryocidal drugs and devices, but leave those aside for the moment.)

. . . it is possible to achieve the administration’s goal of having someone else pay for women’s contraceptives without forcing unwilling religious believers to foot the bill. . .

The policy of the Obama administration is that women who use contraceptives should *not* have to pay for them. Unfortunately, contraceptives cost money. If women are not to pay for them, someone else must do so. President Obama decided that the buck should stop with employers, but this caused a firestorm of protest from employers with strong moral objections to contraception.<sup>2</sup> The President then promised to force insurance companies rather than employers to pay in some circumstances. The details are to be worked out some time in the future - after the election, it seems:<sup>3</sup> hence Professor Charo’s prescription for aspirin.

This has not had the desired effect. The dispute about who should be made to pay for contraceptives continues unabated, and it is not certain that stocks of aspirin will last until November. Religious believers refuse to allow federal bureaucrats to decree what ‘counts’ as an expression of religious belief, or to substitute FDA-approved moral reasoning for their own.<sup>4</sup>

However, it is possible to achieve the administration’s goal of having someone else pay for women’s contraceptives without forcing unwilling religious believers to foot the bill, without becoming entangled in complex and contentious evaluations of moral complicity, and without triggering legal

challenges under the First Amendment. All that the administration and its supporters need do is pass a law that forces pharmaceutical companies and other manufacturers of contraceptives to produce and distribute their birth control products without charge to women as a condition of doing business in the United States. The companies would be expected to swallow the associated costs as business expenses, or as charitable donations that can be deducted from their taxes.

It is possible that the companies might (as some would have it) declare a “war on women” by refusing to provide contraceptives free of charge, but a President who is willing to stand firm against religious believers and their beliefs would surely take at least as strong a stand against pharmaceutical companies and their profits. In any case, the requirement would not violate the First Amendment, since the companies clearly have no moral or religious objections to their own products.

However, it is not clear from her NEJM *Perspective* column that this arrangement would satisfy Professor Charo. Beyond ensuring that women don’t have to pay for contraception, her interests extend to what she describes as “the more enduring question” about to what extent religious believers should be free to act in “our public space.” (emphasis added) This seems to imply that “public space” properly belongs only to the non-religious, or those who share Professor Charo’s views. Alternatively (or additionally) she may mean that religious believers acting outside the confines of “houses of worship” must conform to the dominant ethos, or the demands of the state, even if this means forcing them to do what they believe to be wrong.

Thus, despite her attempt to “reframe” the controversy so that the administration can ‘win,’ Professor Charo ultimately demonstrates that freedom of conscience is central to the discussion, even if not in precisely the way that it is central in particular cases involving more direct complicity in morally contentious acts. It is difficult to see how it could be otherwise, as long as the administration’s answer to the question, “Who should have to pay for contraceptives?” is “Those who think they are immoral.”

## Notes

1. Her participation is not mentioned in her NEJM disclosure forms, but is noted on her profile at University of Wisconsin Law School, R. Alta Charo. (<http://law.wisc.edu/profiles/racharo@wisc.edu>) Accessed 2012-03-17
2. Protection of Conscience Project, *"It was a pretty extraordinary situation . . .": White House Press Secretary downplays revolt against HHS contraceptive mandate*. Extracts from news conference, 31 January, 2012. (<http://www.consciencelaws.org/issues-background/social-political/socialpolitical11.html>)
3. Protection of Conscience Project, *White House Promises for 2013: “FACT SHEET: Women’s Preventive Services and Religious Institutions.”* The White House, Office of the Press Secretary, February 10, 2012. (<http://www.consciencelaws.org/issues-legal/legal065-002b.html>)
4. See, for example, *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?* US House of Representatives Committee on Oversight and Government Reform, 16 February,

2012 (<http://www.consciencelaws.org/issues-legal/legal065-005.html>)