Catholic Social Teaching and the Women's Preventive Health Services Mandate

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Introduction

IN AN EFFORT to reform the inadequacies of the health care delivery system in the United States, congressional leadership and the presidential administration of Barack Obama enacted the Patient Protection and Affordable Care Act on March 23, 2010 and its amendment, the Health Care and Education Reconciliation Act of 2010 (collectively, the Affordable Care Act) on March 30, 2010. Section 2713, paragraph four, of this legislation stipulates:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—. . .
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> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[1]

Directed under this paragraph, the Department of Health and Human Services (HHS), the administrative body authorized to implement the

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[1] *Patient Protection and Affordable Care Act*, L. No. 111–148, § 2713 (a), (4). Paragraph (1), which paragraph (4) references, states that coverage shall be provided without any cost-sharing requirements for "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force." Ibid. (1)

regulations established in the bill, collaborated with a committee of medical and research professionals at the Institute of Medicine, which describes itself as "an independent, nonprofit organization that works outside of government to provide unbiased and authoritative advice to decision makers and the public," to develop recommendations for "closing the gaps" in coverage of "preventive health services" for women.[2] The Institute crafted recommendations and submitted them to the secretary of HHS for review and commentary. After a period of open public commentary on the interim guidelines, which were posted on August 1, 2011, secretary Kathleen Sebelius, announced on January 20, 2012, that HHS would adopt the recommendations from the Institute of Medicine as part of the mandatory comprehensive guidelines for all health insurance plans.[3]

Under these guidelines, this mandate required all health insurance plans, including those provided by Catholic employers such as hospitals, universities, and charity organizations, to cover sterilizations and contraceptives, including some abortifacients, at no cost to the insured.[4] This essay will argue, from within the tradition of Catholic social teaching,

[2] Institute of Medicine, "About the IOM," available online at www.iom.edu/About-IOM.aspx (accessed August 19, 2012); IOM, "Clinical Preventive Services for Women: Closing the Gaps" (2011): 1. This "Clinical Health Services for Women" report was submitted by the Institute as a recommendation to HHS. In addition to the objectionable recommendations that all FDA approved contraceptives and sterilization procedures be covered free of charge, the report also contains several recommendations regarding insurance coverage of procedures that are not inconsistent with Church teaching, e.g., well-woman exams. Preventive health services were defined by the Institute report as "measures—including medications, procedures, devices, tests, education and counseling—shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." Ibid. Given this definition, some might argue that, by including contraceptives and sterilization as preventative services, pregnancy, especially those that are unintended, is seemingly considered a disease or something like a disease. Indeed, the Guttmacher Institute, a research institute with strong ties to Planned Parenthood that seeks to advance a strongly pro-abortion, pro-contraceptive agenda, offered an argument that would support the HHS mandate because it would increase access to "highly effective" methods of contraceptives and thereby aid females "at risk for unintended pregnancy." R. K. Jones and J. Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use* (New York: Guttmacher Institute, 2011), 3, 8.

[3] Kathleen Sebelius, "A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius," (2012), www.hhs.gov/news/press/2012pres/01/20120120a.html (accessed April 23, 2012).

[4] Department of Health and Human Services, "Women's Preventive Services: Required Health Plan Coverage Guidelines" (2011), www.hrsa.gov/womensguidelines/ (accessed April 23, 2012). For further reading about the abortifacient mechanism of action of two of these contraceptives, see K. McKeage and

ithat the mandate undermines respect for two of the foundational pillars of a just society: the basic rights of conscience and religious freedom. Section I introduces the problem posed by the women's preventive services mandate to Catholic employers and insurance providers. Section II discusses key arguments both in support of and in opposition to the mandate. Section III draws upon Catholic social teaching to, first, refute the claim that Catholic institutions discriminate against women by not covering sterilization and contraceptives and, second, to demonstrate that by contravening the rights of conscience and religious freedom, the mandate thwarts the common good. This mandate, because it requires employers and insurers to fund behaviors they consider immoral and threatens the Church's self-governing authority to define both itself and its own free exercise of religion, violates the basic tenets of a just society.

I. The Mandate

The Health and Human Services women's preventive services mandate announced on January 20 required employers to cover the costs of contraceptives and sterilization but included an exemption for entities that meet the definition of religious employer.[5] The narrow definition, however, excluded most Catholic universities, charitable organizations and health

J. D. Croxtall, "Ulipristal Acetate: A Review of Its Use in Emergency Contraception," Drugs 71, no. 7 (2011); Paul Fine et al., "Ulipristal Acetate Taken 48–120 Hours after Intercourse for Emergency Contraception," *Obstetrics & Gynecology* 115, no. 2, Part 1 (2010); María Elena Ortiz and Horacio B. Croxatto, "Copper-T Intrauterine Device and Levonorgestrel Intrauterine System: Biological Bases of Their Mechanism of Action," *Contraception* 75, no. 6 (2007).

[5] The definition of religious employer for exemption purposes was originally released by HHS on Aug. 1, 2011, with the interim guidelines that were open for public commentary. The exemption stipulates: "Group health plans sponsored by certain religious employers, and group health insurance coverage in connection with such plans, are exempt from the requirement to cover contraceptive services. A religious employer is one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under Internal Revenue Code section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii). 45 C.F.R. §147.130(a)(1)(iv)(B)." Services., "Guidelines." (accessed April 23, 2012). Among the many problems raised by this definition of religious employer, one might note a latent hostility toward that essential element of the Christian religion, evangelization. According to the HHS definition, an institution is religious only if it employs believers for inculcating religious values in persons who already adhere to the faith. Hence, the HHS definition evinces a particular vision of what constitutes a religion that contrasts strongly with the essence of Christianity. Following her Lord, the Catholic Church has always lived under "*the missionary mandate*. Having been divinely sent to the nations that she might be

care institutions. American Catholics and Catholic organizations, including the United States Conference of Catholic Bishops (USCCB), appealed to the presidential administration to rescind the HHS mandate, arguing it violated well-established rights of conscience (by forcing people to cooperate in the immorality of abortion, sterilization and contraception through funding them) and religious freedom (by its narrow definition of religious employer).[6] In reaction to the sustained outcry, President Obama announced on February 10 that insurance companies, not employers, would be required to cover contraceptives and sterilizations. He did not, however, alter the narrow definition of religious employer.[7] To accommodate those employer institutions with religious objections that did not qualify under the narrow definition of religious employer, the administration offered in the final regulations a "temporary enforcement safe harbor."[8] This extended by a year the compliance date for the mandate for not-for-profit entities that did not already provide coverage for contraceptives and sterilizations.

The Obama administration lauded the mandate as a justified effort to expand respect for women's health. The administration also claimed that the mandate managed to strike an appropriate balance with those who would morally object, since they were not "directly providing insurance that covers contraceptive services for their employees."[9] After examining the revised regulation, the USCCB expressed that the mandate's revised

the 'universal sacrament of salvation,' the Church, in obedience to the command of her founder and because it is demanded by her own essential universality, strives to preach the Gospel to all men." *Catechism of the Catholic Church*, 849, quoting *Ad gentes* (emphasis in the original). Likewise, "Because she believes in God's universal plan of salvation, *the Church must be missionary*." *CCC*, 851 (emphasis mine).

[6] For voices across the spectrum see, Michael Sean Winters, "Updated: White House Refuses to Expand Conscience Exemption," *National Catholic Reporter* (2012), ncronline.org/blogs/distinctly-catholic/updated-white-house-refuses-expand-conscience-exemption (accessed April 23, 2012); Catholic Health Association, "Catholic Health Association Disappointed with Decision Regarding Women's Preventive Services Regulations"(2012), www.chausa.org/Pages/Newsroom/Releases/2012/Catholic_Health_Association_Disappointed_with_Decision_Regarding_Womens_Preventive_Services_Regulations/ (accessed April 23, 2012); and United States Conference of Catholic Bishops, "U.S. Bishops Vow to Fight HHS Edict," (2012), usccb.org/news/2012/12-012.cfm (accessed April 23, 2012).

[7] Federal Register, "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act: Final Rules," 77, no. 31 (February 15, 2012), 8726.

[8] Ibid., 8727.

[9] Barack Obama, "Remarks by the President on Preventive Care" (2012), www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-

administrative design did not address the concerns they expressed originally regarding respect for the rights of conscience and religious freedom.[10] Accordingly, they reaffirmed their judgment that total rescission of the mandate was the only satisfactory solution.

II. Arguments

The USCCB has consistently based their opposition to the mandate on efforts to safeguard the rights of conscience and, in particular, religious freedom. For one, the USCCB maintains that the mandate breaks with longstanding precedent by requiring persons who have moral objections to pay for abortifacient drugs.[11] The bishops hold that the mandate also breaks with precedent and coerces persons to violate their right of conscience by paying to support behaviors such as contraception and sterilization that they consider immoral. Finally, the bishops hold that the government has inserted itself into the internal life of the Church and thereby violated the Church's right of religious freedom. Cardinal Timothy Dolan summarized the USCCB's position: "This is not just about sterilization, abortifacients, and chemical contraception. It's about *religious freedom*, the sacred right of any Church to define its own teaching and ministry."[12]

The bishops emphasize the mandate's threat to the right of religious freedom for two reasons. First, through the compulsory weight of the mandate and the narrow definition of religious employer, the government has effectively decreed which institutions do (e.g. parish churches) or do not (e.g. hospitals, universities, charities) constitute ministries of the

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care/ (accessed April 23, 2012). For the response of supporters of the mandate see, NARAL Pro-Choice America, "Obama Administration Ensures Access to Contraceptive Coverage for Millions of Women" (2012), www.prochoiceamerica.org/media/press-releases/2012/pr01202012-bcrefusal.html (accessed April 23, 2012); National Women's Law Center, "HHS Decision on Contraceptive Coverage an Important Milestone: HHS Reaffirms Contraceptive Coverage without Co-Pays and Leaves Religious Employer Exemption in Place" (2012), www.nwlc.org/press-release/hhs-decision-contraceptive-coverage-important-milestone (accessed April 23, 2012); and Planned Parenthood, "Planned Parenthood Applauds HHS for Ensuring Access to Affordable Birth Control" (2012), www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-applauds-hhs-ensuring-access-affordable-birth-control-38582.htm (accessed April 23, 2012).

[10] United States Conference of Catholic Bishops, "Recission of Contraception Mandate Is the Only Complete Solution," *Origins* 41, no. 37 (2012): 593–97.

[11] Ibid.

[12] Cardinal Timothy Dolan, "From the Office of the President" (2012): 2. Available online at www.usccb.org/issues-and-action/religious-liberty/upload/Dolan-to-all-bishops-HHS.pdf (accessed August 19, 2012).

Catholic Church. This power of internal self-governance to define an institution as a part of the institutional Church is a power the Church reserves to herself alone.[13] Given their distinctive role in the internal self-governance of the Church, the bishops are uniquely sensitive to the government's intrusion in this regard and are therefore particularly concerned with turning back this assault on religious freedom. Secondly, the administration has effectively decreed that providing valuable services to the public—such as health care, education, and charitable services—does not qualify as the type of free exercise of religion that is protected by the first amendment. In stark contrast, the Church holds:

> Included in the right to religious freedom is the right of religious groups not to be prevented from freely demonstrating the special value of their teaching for the organizations of society and the inspiration of all human activity. . . . Rooted in the social nature of man and in the very nature of religion is the right of men, prompted by their own religious sense, to hold meetings or establish educational, cultural, charitable and social organizations.[14]

Thus, because the government has effectively dictated to the Church what constitutes authentic practice of the faith and also saw fit to determine which institutions are or are not part of the institutional Church, the bishops have stressed that the mandate is a serious affront to the right of religious freedom.

The social teaching of the Catholic Church, natural law reasoning, and the American political tradition all influence the bishops' position. According to Pope John XXIII, Catholic social teaching holds that,

> this too must be listed among the rights of a human being, to honor God according to the sincere dictates of his own conscience, and therefore the right to practice his religion privately and publically.[15]

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[13] *Code of Canon Law: Latin-English Edition*, New English trans. Canon Law Society of America (Washington, DC: Canon Law Society of America, 1998), n. 216; Second Vatican Council, "*Apostolicam Actuositatem*," in *Vatican Council II. Vol. 1, the Conciliar and Postconciliar Documents*, ed. Austin Flannery (New York: Costello, 1996), n. 24.

[14] Second Vatican Council, *Dignitatis Humanae,* in *Vatican Council II. Vol. 1, the Conciliar and Postconciliar Documents*, ed. Austin Flannery (New York: Costello, 1996), no. 4. Moreover, the Church teaches that the practice of the faith cannot be circumscribed to one's private life: "faith should show its fruitfulness by penetrating the whole life, even the worldly activities, of those who believe"; and the "impact which the Church can have on modern society amounts to an effective living of the faith and love." Council, *Gaudium et Spes*, nn. 21, 42. Also, see for example the Council's *Gravissimum Educationis,* n. 1.

[15] Pope John John XXIII, *Pacem in Terris*, n. 14.

The state, the Church teaches, is responsible for fostering the common good by protecting these rights that the pope mentions.[16] However, both Church teaching and natural law reasoning recognize that, while these moral rights are unalienable, "in exercising their rights individual men and social groups are bound by the moral law to have regard for the rights of others, their own duties to others and the common good of all."[17] As John Courtney Murray, S.J. illustrates, in a pluralistic society like America, the respect that Catholics attribute to the practice of their own faith implies respect for the rights of conscience and religious freedoms of others in society.[18] However, this need for balance, which is also recognized in the American political tradition, applies to all members of the political community and not just Catholics. Indeed, since the passage of *Roe v. Wade* in 1973, a strong precedent has been set that protects not just Catholics but all people with moral objections from being coerced to pay for or cooperate in the performance of acts such as abortion and sterilization.[19] On this basis, the bishops have consistently called upon America's political tradition to argue in defense of respect for rights of conscience and religious freedom.[20] Based on their vision of rights, the bishops see the mandate as undermining the necessary conditions for a just society that are expressed in the rights of conscience and religious freedom.

[16] Cf. *Compendium of the Social Doctrine of the Church* (Washington, DC: United States Conference of Catholic Bishops, 2004), nn.152–59, 68–70.

[17] *Dignitatis Humanae*, no. 7. See also, Johannes Messner, *Social Ethics: Natural Law in the Western World* (St. Louis: B. Herder, 1965), 326–27.

[18] Cf. David Hollenbach, "Religious Freedom, Morality and Law: John Courtney Murray Today," *Journal of Moral Theology* 1, no. 1 (2012): 90; John Courtney Murray, "Freedom of Religion: The Ethical Problem," *Theological Studies* 6, no. 2 (1945): 273–76. For a larger view of Murray's influential thought regarding the interface between the Catholic faith and the modern American state see, John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (Kansas City, MO: Sheed and Ward, 1988).

[19] Leonard J. Nelson, *Diagnosis Critical: The Urgent Threats Confronting Catholic Health Care* (Huntington, IN: Our Sunday Visitor, 2009), 131–33.

[20] For instance, the significant place that respect for conscience holds in the American tradition is represented in the words of Thomas Jefferson: "No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority." Letter to the Society of the Methodist Episcopal Church at New London, Connecticut, February 4, 1809. Available online at www.au.org/files/images/page_photos/with-sovereign-reverence.pdf (accessed April 23, 2011). For further discussion regarding the relationship between religious freedom, rights of conscience, and conscience protections under the law in the American tradition, see S. D. Smith, "What Does Religion Have to Do with Freedom of Conscience?" *University of Colorado Law Review* 76, no. 4 (2005); Daniel L. Dreisbach and Mark David Hall, *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding* (Indianapolis: Liberty Fund, 2009).

The Obama administration approached the controversy from a perspective different from that of the USCCB. For the administration, the mandate addressed a concern for the health of women and ensured "that every woman has access to the care that she needs."[21] This included contraceptives and sterilization. That is, the portion of the mandate pertaining to contraceptives and sterilization was seen, in the eyes of the administration, as a so-called women's health issue. The preventive services mandate and its narrow exemption clause for providing coverage were therefore intended to limit what the administration saw as restrictions on access to contraceptives and sterilizations, thereby "closing the gaps" as the Institute of Medicine suggested.[22] The policies of certain employers like Catholic health care institutions were seen as limiting access and keeping open the gaps. "No woman's health should depend on who she is or *where she works* or how much money she makes," President Obama argued in condemnation of these alleged gaps, "Every woman should be in control of the decisions that affect her own health. Period."[23]

The alleged limitation was seen as discriminatory against women working for religious employers. In the administration's view, the HHS mandate stood as "a law that requires free preventive care," that would "not discriminate against women."[24] The president stressed the revised mandate would counteract discrimination by ensuring equality of access: "Women who work at these institutions will have access to free contraceptive services, *just like other women*, and they'll no longer have to pay hundreds of dollars a year that could go towards paying the rent or buying groceries."[25] "Under the rule, women [would] still have access to free preventive care that includes contraceptive services—*no matter where they work*."[26]

In such statements, the legal protections of an institution's right of conscience and religious freedom are seen, by the Obama administration and those that share this viewpoint, as impediments to the rights of individual women to have to access contraceptives and sterilization, because they enable Catholic institutions not to cover contraceptives and sterilizations in their health plans.[27] For instance, bioethicist Art Caplan echoed the administration's sentiments that Catholic employers were discriminating

[21] Obama, "Remarks by the President on Preventive Care" (accessed Feb. 10, 2012).
[22] Institute of Medicine, "Closing the Gaps."
[23] Obama, "Remarks by the President on Preventive Care" (emphasis mine).
[24] Ibid.
[25] Ibid. (emphasis mine).
[26] Ibid. (emphasis mine).
[27] For instance, see www.prochoiceamerica.org/media/fact-sheets/abortion-refusal-clauses-dangerous.pdf (accessed April 23, 2012).

against women because they lacked access to contraceptives and sterilization procedures through the specific avenue of the health insurance offered by their employers. "Don't those who do not follow the teachings of the Catholic Church but work in companies, hospitals, nursing homes or hospices have any rights?" he asked rhetorically.[28]

For Caplan, Catholic employers were guilty of more than just imposing their beliefs on employees. "By fighting back against the coverage of contraception," Caplan charged, "the Bishops have declared war—on everyone else's moral and religious views who happen to work for them."[29] The "war" was not contained to the view of the employees but those of the public. In Caplan's opinion, once a company operates in the public sphere, it forfeits its ability to act according to the tenets of its religious faith or even the convictions of its own institutional conscience. Hence, he asks, "How did the imposition of an insurance mandate on companies operating in the public sphere become an act of religious intolerance?"[30] On these grounds, Caplan, the Obama administration and other supporters of the mandate attempt to argue that Catholic institutions that do not cover sterilizations and contraceptives are guilty of imposing their moral values upon their employees, discriminating against women and denying them their rights.[31]

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[28] Art Caplan, "Catholic Bishops' Birth Control Stance Harms Employees, Bioethicist Says," *Vitals* (2012), vitals.msnbc.msn.com/_news/2012/02/09/10365844-catholic-bishops-birth-control-stance-harms-employees-bioethicist-says (accessed April 23, 2012) (emphasis mine). For similar arguments that claim a religious institution cannot maintain its religious protections if it services the public, see www.prochoiceamerica.org/media/fact-sheets/abortion-refusal-clauses-dangerous.pdf (accessed April 23, 2012).

[29] Ibid. Caplan argued further that Catholic insurance providers should not be exempt, based on an analogy that most people would not be willing to exempt Jehovah's Witnesses from covering blood transfusions in insurance plans provided by their organizations.

[30] The idea that an institution can have a conscience is highly disputed, especially among those who hold that conscience is by definition limited to autonomous moral agents. For instance, see the argument of Spencer Durland in "The Case against Institutional Conscience," *Notre Dame Law Review* 86, no. 4 (2011). Bernard Dickens argues against the concept of institutional conscience, with explicit reference to Catholic hospitals; see B. Dickens, "Conscientious Objection and Professionalism," *Expert Reviews in Obstetrics and Gynecology* 4, no. 2 (2009): 97–100, at 99.

[31] The argument that not providing coverage of contraceptives is discrimination against women is not new. For instance, "In 2000, the EEOC [Equal Employment Opportunity Commission] issued an opinion stating that the refusal to cover contraceptives in an employee prescription health plan constituted gender discrimination in violation of the PDA. Although this opinion is not binding

III. The Roots of a Just Society

In order to argue that the mandate unjustly impinges upon Catholics' rights of conscience and religious freedom, it is first necessary to refute the main philosophical claim advanced by the Obama administration against Catholic institutions. That claim can be stated: not providing coverage for sterilizations and contraceptives is discriminatory toward women and therefore unjust. It is this discrimination that the administration seeks to rectify by ensuring that women are treated equally (i.e. receive unimpeded access to sterilizations and contraceptives) "*no matter where they work*."[32] This charge of unjust discrimination is one that the Church takes very seriously. Catholic social teaching considers unjust discrimination against women based on their sex a very serious affront to human dignity.[33] Likewise, the tradition teaches that the imposition of personal beliefs and values of one person or group upon another person or group is contrary to the authentic good of human beings and undermines the common good of all.[34]

Nevertheless, contrary to the allegations of the Obama administration and others, Catholic institutions do not discriminate against women by not covering sterilizations and contraceptives, either through self-administered health insurance plans or through third party providers. Their refusal to pay for sterilization and contraceptives is based on Church teaching, which holds that both are contrary to the human dignity of all men and women.[35] Therefore, Catholic employers are morally opposed

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on federal courts, it is influential, since the EEOC is the government body charged with enforcing Title VII. This opinion led to many lawsuits against non-religious employers who refused to cover prescription contraceptives. The first federal court decision in one of these cases—*Erickson v. Bartell Drug Co*.—came less than a year after the EEOC opinion, and agreed that employers with prescription drug plans have "a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes." The Supreme Court has not ruled on the issue of contraceptive coverage. But, since Erickson, new Title VII claims have been brought against Catholic institutions." The Becket Fund for Religious Liberty, "Implications of Mandatory Insurance Coverage of Contraceptives for Catholic Colleges and Universities," *Studies in Catholic Higher Education* (October 2009): 4–5. For further reading about the EEOC's decision, see U.S. Equal Employment Opportunity Commission, *Decision on Coverage of Contraception* (Dec. 14, 2000) www.eeoc.gov/policy/docs/decision-contraception.html (accessed April 23, 2012).

[32] Obama, "Remarks by the President on Preventive Care."

[33] Pope John Paul II, *Mulieris Dignitatem* (1988), n. 12.

[34] *Dignitatis Humanae*, n. 7.

[35] United States Conference of Catholic Bishops, "Ethical and Religious Directives for Catholic Health Care Services, 5th Edition" (Washington, DC, 2009), no. 53; *CCC*, 2370, 2399.

to covering sterilizations and contraceptives for *both* men and women, and they are opposed to them for exactly the same reason. While the HHS guidelines address only coverage for women (they fail to account for why they mandate coverage for contraceptives and sterilization only for women) Catholic employers cover contraceptives and sterilizations for neither men nor women.[36] Thus, Catholic employers do not fail to offer coverage based on sex but rather because the Church and Catholic institutions are opposed to funding the behaviors of sterilization and contraception in all cases. That is, they refuse based on moral principle, not on the person's sex. The Church teaches that direct sterilizations and acts of contraception are contradictory to human dignity and the authentic human flourishing of *all* human beings, men and women alike.[37]

Apart from being predicated on an erroneous claim of discrimination, the mandate actively infringes upon the right of conscience of both individuals and institutions. Even if the payment could be classified within the Catholic moral tradition as remote mediate material cooperation (and therefore potentially permissible), the mandate still *compels* individuals and institutions to contribute funding to these behaviors against the judgment and directions of their consciences.[38] The mandate thereby seriously undermines *respect* for the right of persons and institutions to behave in accord with their conscience and religious faith.

Respect for these rights is a fundamental element of a just society. For instance, Pope John Paul II explicates the importance of respect for conscience as grounds for a just society: "To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right . . . an essential right which, precisely as such, should be acknowledged and protected by civil law."[39] While this right is not absolute, the

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[36] Indeed, one could argue that, insofar as HHS is promoting contraceptives and sterilizations only for women but not for men, women are actually being discriminated against by having to bear a disproportionate and unjust degree of responsibility for ensuring that unintended pregnancy is avoided.

[37] Pope Paul VI, *Humanae Vitae*, no. 14; Second Vatican Council, *Gaudium et Spes*, n. 51.

[38] Fr. Kevin O'Rourke, O.P., explains the Catholic moral tradition's understanding of material cooperation with evil as follows: "Immediate material cooperation implies that the cooperator contributes something essential for the performance of the evil action. Mediate material cooperation implies that the cooperator contributes something antecedent or consequent to the performance of the evil action." Kevin D. O'Rourke, O.P., "Catholic Health Care and Sterilization: The 'Principle of Cooperation' Provides the Necessary Ethical Guidelines," *Health Progress* 83, n. 6 (2002): 45.

[39] Pope John Paul II, *Evangelium Vitae: The Gospel of Life* (New York: Random House, 1995), n. 74.

Holy Father follows *Dignitatis Humanae* and offers a balanced vision of how respect for conscience is constitutive of a just society:

> The State is obliged not only to recognize the basic freedom of conscience, but also to foster it, always with a view to the natural moral law and the requirements of the common good, and with respect for the dignity of every human being. It should be noted that freedom of conscience does not confer a right to indiscriminate recourse to conscientious objection. When an asserted freedom turns into licence or becomes an excuse for limiting the rights of others, the State is obliged to protect, also by legal means, the inalienable rights of its citizens against such abuses.[40]

In the Catholic tradition, "the attainment of the common good is the sole reason for the existence of civil authorities."[41] The common good consists of "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment."[42] Since the judgments of conscience are the means by which persons seek their own individual good and contribute to the common good, protecting and not violating the (limited) freedom to behave according to the judgments of conscience is a primary concern for governmental authority. However, government can limit the freedom to behave according to judgments of conscience only if the reason for doing so is actually just. Therefore, "representatives of the State have no power to bind men in conscience, unless their own authority is tied to God's authority, and is a participation in it."[43]

The promotion of sterilizations and contraceptives that include abortifacients—which either are or contribute directly to acts that are intrinsically unjust—by way of funds coerced from citizens who morally object to these acts is not just. The mandate is therefore unjust both in its means and in its end. It undermines the social conditions necessary for human flourishing by unjustly coercing citizens to act in a way that they know to be morally harmful to their moral character. Thus, because of the gravity of the right at stake, and because the reason for promulgating the rule is unjust, the Obama administration's mandate that requires persons to violate their conscience undermines the common good.

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[40] Pope John Paul II, "Respect for Conscience: Foundation for Peace," *Journal of Church and State* 33, n. 2 (1991): 421–22.

[41] John XXIII, *Pacem in Terris*, n. 54.

[42] *Gaudium et Spes*, n. 26.

[43] *Pacem in Terris*, n. 49.

Most significantly, in addition to undermining respect for the right of conscience and the common good, the mandate also undermines respect for the right of religious freedom by inserting itself into the internal life of the Church, claiming to define which institutions are part of the Church and which are not. Murray summarized the severity of any such situation:

> I take it that every church claims this freedom to define itself, and claims the consequent right to reject definition at the hands of any secular authority. To resign this freedom or to abdicate this right would be at once the betrayal of religion and the corruption of politics.[44]

Following Murray's position, the bishops' adamant resistance to the mandate is a struggle against the "betrayal of religion and the corruption of politics." However, conspicuously absent from the Obama administration's line of argumentation is its justification for the narrow definition of religious employer—the primary source of the bishops' claim to unjustifiable intrusion into the life of the Church—which the administration did not alter in the February 10 administrative readjustment.[45] Hence, the definition will remain a key source of contention as long as it is in place.

This battle over the definition of religious employer is not a trivial matter for either the Church or the American political community. The conflict strikes at the very heart of the founding proposition of the American political community enshrined in the first amendment.[46] Hence, the debate over the HHS mandate ultimately has implications for American society as a whole concerning the legitimate limitations on the government's posture toward citizens' rights of conscience and religious freedom.

[44] Murray, *We Hold These Truths*, xi.

[45] For instance, the final regulations published by the Federal Register make no note of complaints about the definition of religious employer more specific than "a number of comments asserted that the religious employer exemption is too narrow," Register, "Final Rules," 8727. This point, which touches on the deepest concerns about religious freedom is a point that is noted in the bishops' response to the Feb. 10 announcement. See Bishops, "Recission." This point is also recognized in a public letter signed by prominent professors and leaders opposing the mandate entitled "Unacceptable." In opposing the Feb. 10 announcement, the letter states: "It bears noting that by sustaining the original narrow exemptions for churches, auxiliaries, and religious orders, the administration has effectively admitted that the new policy (like the old one) amounts to a grave infringement on religious liberty. The administration still fails to understand that institutions that employ and serve others of different or no faith are still engaged in a religious mission and, as such, enjoy the protections of the First Amendment." www.becketfund.org/wp-content/uploads/2012/02/Garvey-Glendon-George-Snead-Levin-stmt-Feb-11-2012.pdf (accessed April 23, 2012).

[46] Murray, *We Hold These Truths*, vii–xii.

Respect for these natural, moral, pre-political rights ensures the ability of persons to use their freedom to contribute to the common good and work toward a just society. Therefore, governmental actions like the HHS mandate that actively corrode respect for these rights undermine the basis for a truly free and just society.

Conclusion

To summarize, the dispute over the HHS mandate concerns the conditions necessary for a just society. On the one hand, the Obama administration holds that unimpeded access to contraceptives and sterilization is a necessary condition for authentically respecting the rights of women to reproductive autonomy and health. On the other hand, the voices of the Catholic Church affirm two necessary conditions of justice. First, within reasonable and respectful limits, persons and institutions must remain free from being coerced to pay for behaviors they know to be immoral. Second, the Church should remain free from governmental intrusion into its internal governance and its ability to express its religious faith in ways that serve the common good. These are very different views of the conditions necessary for a just society. According to the long tradition of Catholic social teaching, the Obama administration mandate violates several central elements of a just society. Specifically, it coerces persons and groups of persons to finance acts that they know to be immoral. Thus, the mandate violates the central purpose of government, which is to foster and protect the common good and the good of the individual citizenry. Moreover, the mandate infringes upon the legitimate separation between internal governance of the Church and the authority of the State. This infringement violates the right of persons to freedom of religion, a right that is recognized as a central element of a just society from both Catholic and secular viewpoints. NV