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## **A CATHOLIC PERSPECTIVE ON THE DEPARTMENT OF HEALTH AND HUMAN SERVICES MANDATE CONCERNING CONTRACEPTION**

*Tom Judge*\*

I serve as a Chaplain at a large, diverse Catholic university. In this capacity, I have the opportunity to engage with our community by meeting and counseling with students, faculty and staff about their faith and spirituality; teaching and speaking to groups on matters of religion, self and society; and by serving in an administrative capacity (organizing programs, being present at University events and serving on committees) that hopefully helps to sustain and deepen our University's faith-based identity and mission.

This is a privileged place to be. And, when I am truly conscious of it, a humbling role to play. I have witnessed people grappling with their questions about God, religion and self in ways that give bold evidence of the spark of the Divine – and its vulnerability – in each person and moment. On occasion, I have been present in situations where idealized theory is required to become imperfect practice and our institution's ancient mission is being hammered out in the forges of a 21st century pluralistic world. All the while these personal and communal tensions are working themselves out, I try to be mindful that my role is no different than anyone else's: that while I am here, I am called to draw myself and others closer to our Creator; to assist in shining the light of truth, justice and love into as many corners as possible; and to return my life back to its Source and to the rest of creation in the form of self-gift.

Now, as part of my job, I am invited to explore issues of religious freedom, procreation, and human dignity as they apply to health insurance at faith-based organizations. This exploration will take the form of a brief paper about the Obama Administration's Department of Health and Human Services (hereinafter DHHS or HHS) Mandate (hereinafter the Mandate), which requires most health plans in the United States to cover contraceptives, abortifacients, sterilization procedures, and related education and counseling.<sup>1</sup> While the subject is broad, this paper will be

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narrow. I will review two Catholic teaching documents (*Humanae Vitae* and *Dignitatis Humanae*)<sup>2</sup> for their guidance on contraception and religious freedom and their insight into human morality. I will then briefly review objections to the Mandate from a Catholic moral and legal perspective and then I will propose thoughts to consider based on my understanding of the authority and my experience at a Catholic university.

### ***HUMANAE VITAE*** **ON MARRIAGE, PROCREATION AND CONTRACEPTION**

In 1968, Pope Paul the VI introduced *Humanae Vitae*, an encyclical on Christian marriage, procreation and contraception. This document resulted from work and study by two Papal committees convened to study the issues – as well as the input of other clergy and independent experts – over the course of several years. *Humanae Vitae* affirmed traditional Church teaching on marriage and marital relations and condemned the use of artificial contraception. As a result, it was met with some controversy and disagreement – although its teaching continues to be supported by the Magisterium<sup>3</sup> and many of the faithful to this day.

*Humanae Vitae* begins where Vatican II left off – by taking a look at the “signs of the times” as Paul VI recognizes important and varied changes occurring in society and provides five explicit reasons why the issue of procreation was timely to address. First, he recognizes growing concern about population control and the challenges that over-population may create. Second and related, Paul VI acknowledges the difficulties that large and growing families face with regard to providing for the economic and educational needs of all their members. Third, Paul VI appropriately

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master of divinity degree at the University of Chicago. Prior to entering Divinity School, he practiced law in the state of Iowa. Since returning to graduate school he has worked in ministry at St. Clement Catholic Church and at Northwestern Memorial Hospital.

1. I will use the terms “mandate” or “contraceptive mandate” to refer to the Department of Health and Human Services (HHS) requirement that plans cover the aforementioned items. I will use the terms “contraception” or “contraceptive coverage” to mean coverage of all of these items.

2. *Humanae Vitae* is a papal encyclical issued in 1968 by Pope Paul VI. In contemporary history, an encyclical is a letter written by the Pope that addresses and explains some form of Catholic doctrine. *Humanae Vitae* addresses Christian marriage, procreation and birth control. POPE PAUL VI, *HUMANAE VITAE: ENCYCLICAL LETTER OF PAUL VI (1968)*, available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html). *Dignitatis Humanae* is the Second Vatican Council’s Declaration on Religious Freedom and was promulgated in 1965. It details the Church’s support for religious liberty. POPE PAUL VI, *DIGNITATIS HUMANAE: DECLARATION ON RELIGIOUS FREEDOM (1965)*, available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vatii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vatii_decl_19651207_dignitatis-humanae_en.html).

3. The Magisterium is the teaching office or authority of the Catholic Church.

concedes that the growing recognition of the dignity of women and their place in society challenges us to consider more directly their role and wishes when it comes to procreation. Fourth, the Pope acknowledges the importance of conjugal love (and not just procreation) within marriage and sexual relations and, finally, Paul VI recognizes the enormous progress humanity has made to the point that marital couples face the possibility of unparalleled control over matters of conception and procreation.<sup>4</sup>

This new state of things gave rise to new challenges to traditional teaching. For example, Paul VI asks, might it be time to recognize that it is not necessary for every marital act of sexual intimacy to be open to new life as long as the totality of the couple's marriage is lovingly open to and desirous of new life. And, also, due to growing emphasis the Church placed on the dignity and freedom of the human being, might it be time to allow the transmission of life to be regulated by the intelligence and will of married couples rather than the specific rhythms of their bodies.<sup>5</sup>

Before applying Church doctrine to these issues,<sup>6</sup> Paul VI affirms that the Catholic Church is indeed the correct interpreter of Natural Law and scripture and conveyor of orthodox teaching around marriage, procreation and conception.<sup>7</sup> To support this position, but also underscore the role of the laity and other voices in the discernment process, Paul VI reminds us that this encyclical resulted from the work of various commissioners and experts before being carefully reviewed by himself as Pope.

### DOCTRINAL PRINCIPLES OF *HUMANAE VITAE*

In beginning his analysis of Church teaching on contraception, Paul VI looks at marriage as an institution created and intended by God – and not just a relationship controlled by chance or biology. While it is natural for a man and woman to be drawn to an intimate relationship, the elements of an authentic Christian marriage are deeper and more holistic, and they include: that the relationship be an act of free will involving total and generous sharing between husband and wife; that it be faithful and exclusive; fecund or life-producing; and that it be an example of mutual,

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4. Paul VI, *supra* note 2, at 2.

5. *Id.* at 3.

6. Note that since the Catholic Church teaches that sexual relations are only appropriate between a man and woman within the institution of marriage; the issue of contraceptive use by non-married individuals is always morally wrong and not taken up in this encyclical.

7. Natural Law – the belief that God's moral law is communicated to humanity naturally and may be discerned by us through use of our reason – and the Bible are the two primary sources of the substance of the Catholic faith, along with Catholic Teaching and human experience.

self-giving love.<sup>8</sup> Married love also requires husband and wife to demonstrate the attributes of responsible procreation and parenthood, including: exerting some self-control over their own innate desires and emotions when it comes to sexual intimacy; making prudent and loving decisions over having more or less children; and recognizing their responsibilities toward God, themselves, their families and society when making procreative and other decisions.<sup>9</sup>

Paul VI then moves into discussing Natural Law<sup>10</sup> and sexual activity. He begins by recognizing that although not every sexual act results in procreation, it is God's intention and humanities' responsibility to insure that every sexual act within marriage be open to the possibility of new life. This particular doctrine is based on the inseparable connection between the unitive significance of sexual behavior and the procreative significance of sexual behavior, which are both inherent in marriage. Fundamentally, marriage is about both uniting the husband and wife as well as being the source of new life. If one of these attributes is inhibited then Natural Law – God's will – is being circumvented. Within marriage then, sexual acts must not only be mutual, respectful and loving – but they must be naturally open to new life. Summarily, according to *Humanae Vitae*, the direct interruption of God's plan and the Natural Law by methods intended to prevent pregnancy - including abortion and sterilization but also including artificial birth control before, during or after sexual relations – is morally wrong.

*Humanae Vitae* goes onto explain, however, that steps taken to prevent pregnancy by limiting sexual relations during times of fertility – called Natural Family Planning or NFP – are permissible because they do not offend the moral principles of Natural Law. In other words, NFP is considered to be a *natural* means of limiting family size and not a direct and intentional attempt to circumvent God's plan for marriage and procreation.

After laying out the Church's doctrine on procreation and reaffirming teaching against contraception, Paul VI acknowledges challenges involved in following these guidelines and reviews various consequences of using

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8. *Id.* at 8–9.

9. *Id.* at 10.

10. Natural Law, briefly, is the belief that human reason may be used to analyze human nature and activity in order to determine binding rules of moral behavior. A characteristic of natural law is a belief that certain values are universal, objective, and unchanging. Roman Catholic theology teaches that a system of Natural Law is part of God's Divine plan and thus should be considered a source of moral norms. While Natural Law is not the only source or system of authority that has influenced Catholic theology it has been of great influence.

unnatural means for preventing pregnancy.<sup>11</sup> Paul VI foretold an increase in infidelity and lower moral standards if artificial birth control became the norm. Moreover, he expressed fear that if artificial birth control (specifically, that which is orally ingested by the woman) became widely used it could result in the man growing accustomed to its use and thus forgetting the reverence due to women. Finally, some might say presciently, Paul VI warns that with a growing use of birth control by families, public officials, in an attempt to resolve larger societal issues, may feel emboldened to encourage or even impose the use of artificial contraceptives on the population as a whole. This fear – that government would intervene in the most personal and intimate responsibilities of husband and wives to compel use of contraception – seems, at first blush, to resonate with the present-day concerns of the Church in response to the current DHHS mandate.

*Humanae Vitae* concludes with the Pope appealing to all members of the Christian/Catholic family who are somehow involved in decisions on birth control and procreation: married couples, doctors and nurses, priests and bishop to each play their role in contributing to the teaching and acceptance of Catholic doctrine. To his credit, Paul recognizes challenges in accepting the Church's decision and encourages those in a pastoral position to act with compassion and mercy around the subject.

*Humanae Vitae* remains a controversial encyclical, albeit one that presents a clear statement of the magisterial teaching on birth control. And, it informs our review of the DHHS mandate – some 45 years after its promulgation – for multiple reasons. First, it provides authority for the contention that from a hierarchical standpoint at least a principled tenet of Catholic doctrine is opposition to artificial contraception – thus, bolstering the claim that the DHHS Mandate creates a conflict of conscience for Catholics. And, second, in issuing a warning about the moral threat of contraception use and empowering Catholic faithful to witness to the truth of this doctrine, *Humanae Vitae* provides a direct link and support to those today who argue the illegality and immorality of the HHS mandate on contraception.

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11. *Id.* at 17–30.

***DIGNITATIS HUMANAE***  
**DECLARATION ON RELIGIOUS FREEDOM**

The second Church teaching document relevant to the issue of this paper is *Dignitatis Humanae* (hereinafter *DH*). *DH* was the last – and in some people’s eyes one of the most important – documents to come out of the momentous Vatican II Council.<sup>12</sup> It laid out the Church’s position on religious freedom in a radically new way and also, relevant to the topic at hand, set forth standards for how the Church should relate to civil authorities in a secular society. Although much has been presented on these same topics in the almost 50 years since *DH* was unveiled it remains the touchstone for religious liberty in the age of pluralism.

*DH* begins by examining the signs of the times during which it was being drafted – and recognizes the reality of a growing consciousness around the dignity of the human person. In the wake of crumbling colonial empires, social movements aimed at empowering marginalized members of society (women, racial and ethnic minorities) and increased opportunities for growth and advancement in many areas a new importance was being placed on the right to freedom for the individual and for groups within society. Much of the theology of *DH* is taken from the life’s work of the American Jesuit priest, John Courtney Murray. Murray drew insight about human freedom – particularly freedom of conscience – from his examination of the American experiment of a religiously diverse, pluralistic society. His insight, which found its way into the spirit of *DH*, was that through respecting the individual’s right to freely follow their conscience, society is affirming their God-given dignity and also empowering them to seek out, discover and follow the Truth.

The wisdom upon which *DH*’s claim to religious freedom is based begins, fundamentally, with the belief that human beings are endowed with an inalienable, inherent dignity. Unearned, this dignity is explained, in part, through the creation story of Genesis as it is revealed that humanity is made in the “image and likeness of God.” Our abilities to reason and love, our gift of free will and discernment all reflect the uniqueness of humanity and the intention of God that in using these gifts we become more authentically and essentially human.

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12. *MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS* (Kenneth B. Himes et al. eds., Georgetown University Press (2004)). Vatican II was the Church council called by Pope John XXIII that met from 1962 – 1965. This gathering of the world’s Catholic bishops, preeminent theologians, experts, advisors and observers was intended to review, in a fresh way, how the Church related to the world by paying particular attention to the “signs of the times.”

The dignity inherent in our very humanity brings with it a need for, an entitlement to, freedom – used responsibly, to be sure – most particularly a human being’s freedom to arrive at their own religious convictions. With a free and unfettered conscience, the Church teaches that humanity will naturally be able to discern and respond to God’s law written on our hearts<sup>13</sup> (i.e. the human conscience) and resonate with the wisdom and truth found within God’s other various means of communicating with us (Scripture, Church teaching) to better serve God and humanity.

Put another way, according to Christian faith, human nature has within it a spark of the Divine. If this spark is recognized and tended to, it will naturally lead us to the Truth – to God’s Divine Plan. But, this can only happen if we have the freedom and autonomy to nurture, pay attention to, and act upon our own conscience. As Catholics, we’re also taught that the conscience should be shaped by other sources of God’s truth including Revelation (the Bible), Catholic Teaching (encyclicals, other Church documents) Natural Law (human reason and wisdom put toward the task of uncovering God’s plan) and deep attention to the human experience itself as a source of God’s communication.

But, according to *DH*, in order for all of this to occur – human beings must be free from coercion, from all forms of external restraint – so that they may follow their conscience. This, indeed, was the new ground to which *Dignitatis Humanae* led the Church. For, not only must individuals be free from government or societal coercion but, we must also be free from manipulation and forced control by religion. This, indeed, is the nature of true freedom as God intended it: we must be free from force, either from the government or any other source, so that we are able to find and freely choose God.

*Dignitatis Humanae* goes further to assert that not only should government respect the right of the individual to arrive at their own religious truth but, they (government) should go further and work to create a community where it is safe and encouraged for humanity to pursue this end. In other words, as long as public order is maintained and individual autonomy respected, religion should be given free rein to be present and active within the human journey. Ultimately, the presence of religion will benefit society. For, not only does this ensure a respect for human dignity, but freedom *for* (not from) religion will allow us to more clearly discern God’s will and live according to it. Thus, the message of *Dignitatis*

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13. Romans 2:14-15 (NIV).

*Humanae* is two-fold when it comes to religious liberty: freedom *from* coercion and freedom *for* religion.

Admittedly, greater religious liberty will probably reveal the authentic diversity of religious belief within the human community. For, as history shows, when given free and equal opportunity not all people will make the same choices when it comes to faith and religion. Religious pluralism brings with it its own tensions. Historically, most of the world's great religious traditions have not been models of tolerance – let alone affirmation – when it comes to living alongside other faith traditions. This was and is certainly true of the Catholic faith. However, given the growth in democratic societies and, more importantly, the deepening commitment to the dignity of the human being, the Church at the time of Vatican II and *DH* had moved to a place where it was able to recognize the legitimacy of multiple religious communities peacefully coexisting and perhaps even complementing each other.

A related message coming out of *DH*, and one that bears on our topic today, is that all the freedom to which an individual is entitled is also due to human groups or communities. The Vatican II Council recognized the inherent sociability or relational nature of human beings. Our nature will draw us to the Other and then, through community, we will help the Other (who will help us) to become more fully human. This desire for and self-actualization through community plays a role in our religious development, too, for God's Divine Law will also be revealed to us through community. With this in mind, the same right to freedom enjoyed by the individual is also a right to be enjoyed by a group – in particular a group that has a faith-based or religious identity.

### **SOME CATHOLIC OBJECTIONS TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES MANDATE**

While there are many opinions about the DHHS mandate and one hesitates to identify a definitive Catholic perspective, there are both moral and legal objections that Catholics (and, presumably, others) might make regarding the requirement about contraception. Below, I will summarize several of these.

First, from a moral perspective, any initiative that encourages the use of or makes more accessible artificial contraception would fly in the face of official Catholic teaching. This is because, as stated above, the use of birth control intentionally and unnaturally circumvents God's plan for procreation. To the extent other behaviors that are against Church

teaching are encouraged or made accessible (in this case sterilization or abortifacients in addition to contraception) then this would add to the harm of the initiative. These behaviors close off the possibility of life and violate the procreative (and perhaps the unitive) nature of human marriage. They violate the dignity of the human being by eliminating its most intrinsic right – the right to life.

Secondly, from a moral perspective, an increase in the use of artificial contraception would potentially lead to a decline in the moral values of society including an increase in infidelity and resulting harm to the family. Moreover, if birth control becomes a “given” then married partners might no longer need to communicate about and act as thoughtfully around questions of sexual intimacy and procreation. This too could detract from the dignity and respect that are essential to a healthy relationship.

Combined legal and moral objections to the Contraception Mandate also exist. First, arguably the mandate violates the constitutional and legislative right to freedom of religion<sup>14</sup> by requiring Catholic organizations to provide access to contraception in their health care coverage. It is a principle of Catholic doctrine that birth control offends God’s law. If then a Catholic organization is forced to provide coverage for birth control they would be forced to violate their consciences. This is as true for a faith-based organization as it is for an individual.

Secondly, from a legal and moral standpoint although the Mandate provides for an exemption from contraceptive coverage for some faith-based organizations this exemption is too narrow and serves to create a 2nd class of religious organizations that is treated unequally and unfairly. The mandate exempts religious organizations that employ and serve a majority of people who adhere to the organizations’ faith identity. But, if an organization employs and serves a wide diversity of people – from many different faith traditions – that organization is not entitled to an exemption but only an “accommodation.” This accommodation would merely shift the cost of contraception coverage from the insured to the insurer. But, there would be multiple ways (including increased premiums) for the insurer to shift the cost back to the insured. In effect, the religious organization would still then be paying for and facilitating contraception coverage, in violation of their conscience.

This scenario applies to such organizations as faith-based schools, hospitals and social service agencies. In the words of the United States

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14. The United States Conference of Catholic Bishops asserts that the DHHS mandate violates religious liberty as it is understood under the First Amendment of the Constitution, the Religious Freedom Restoration Act and the Administrative Procedures Act.

Conference of Catholic Bishops “generally the nonprofit religious organizations that fall on the “non-exempt” side of this religious gerrymander include those organizations that contribute most visibly to the common good through the provision of health, educational, and social services.”<sup>15</sup> Granted a majority of their employees or people being served may not be members of their own faith tradition – but, the existence of the organization and the service it performs owes largely to its faith-based mission.

Third, no exemption or accommodation from the Mandate is made for employers in the private/for-profit world who due to their religious beliefs may find mandatory coverage of contraception in their health care plans to be a violation of their conscience. As a result, virtually all Americans who enroll in a health plan will ultimately be required to have contraceptive coverage for themselves and their dependents, whether they want it or not.

### **PERSONAL REFLECTIONS ON THE CONTRACEPTION COVERAGE IN LIGHT OF THE MANDATE**

While I will not attempt to address the complexities of the legal argument for or against the DHHS mandate, I find myself believing that the United States government should not have taken steps to require faith-based employers to provide contraception coverage when it would violate their institutional conscience. Forcing entities to do so chills their freedom in two ways. First, placing the decision in the hands of the government removes from faith-based organizations their opportunity to discern the truth for themselves. Secondly, the government mandate prevents faith-based organizations from acting according to their deepest held principles. Taking away the right of faith-based organizations to discern and decide for themselves whether to provide this type of insurance coverage is basically preventing them from finding and living out the truth according to their understanding of it.

I object to the DHHS mandate, moreover, because it seems to distinguish between faith-based organizations that serve as “houses of worship” and faith-based organizations that perform “ministries of service” (e.g. those that provide health, education and social services).<sup>16</sup>

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15. *Catholic Bishops: HHS Mandate “Unprecedented” Religious Violation*, LIFENEWS.COM (Mar. 21, 2013), at <http://www.lifeneews.com/2013/03/21/catholic-bishops-hhs-mandate-unprecedented-religious-violation/>.

16. Office of the General Counsel, United States Conference of Catholic Bishops, Comments on the

According to the DHHS, full exemption from the contraception mandate is reserved only for faith-based organizations that serve as “houses of worship.” I agree with the US Catholic Bishops when they state that this creates a division between worship and service – with service being treated as less important than worship – where no such division is present within the tradition. In other words, according to the Catholic tradition institutions that serve as “houses of worship” and institutions that perform “ministries of service” are equally important and both perform actions of an authentically faith-based nature. Thus, both entities should be exempted from the DHHS mandate on freedom of religion grounds.

Finally, I would like to address the question of whether a faith-based (in this case Catholic) organization should provide insurance coverage for contraception regardless as to whether there exists a DHHS mandate on the matter. In other words, and taken on its own: should a Catholic organization provide contraceptive coverage to its employees as part of their insurance benefits? This question is certainly open to debate, but I would take the position that a Catholic organization – particularly one that serves and employs a diverse array of people (such as a university or a social service agency) should strongly consider providing this coverage to all their employees.

I share this opinion in the spirit of *Dignitatis Humanae* and other sources of wisdom within our tradition that recognize the dignity of the human being and the value placed on freedom of the conscience. With this wisdom in mind, it is necessary for us to acknowledge that not all people of good will agree with the Catholic teaching on contraception. Many people, after careful consideration, discern that the use of “artificial” birth control methods is morally permissible – that it does not conflict with the teaching of their religion or the dictates of their conscience.

One may argue, then, that an employer’s refusal to provide contraceptive coverage to these employees through insurance benefits will place a burden upon these employees. Not just an economic burden resulting from the lack of insurance coverage (which is real) but also, perhaps, an even greater burden: an irreconcilable coercion that restricts the person from acting upon their moral beliefs based on the free discernment of their conscience. If this is the case then one might be hard-pressed to find a substantive difference between the faith-based institution that restricts access to contraception for those employees who find it

morally permissible and any secular institution that restricts the free practice of religion, arrived at in good conscience, by its own members.

I believe that all people and entities, including the Catholic Church, should be allowed and encouraged to make use of responsible freedom to discern truth through the lens of their conscience. This, ultimately, gets to the heart of what it means to be a human being. Moreover, I believe that we are better off when institutions, such as the Catholic Church, share with their members and the world the fruits of their labors – the wisdom found within our tradition. Restriction, by government, institution or individual, of any of these freedoms - to discern, to teach, to act responsibly - diminishes the dignity of the human being and belies mistrust in their ability to find and follow God.