

Compliance with Contraceptive Insurance Mandates

Licit or Illicit Cooperation in Evil?

Peter J. Cataldo

Since 1997 twenty states have adopted laws that mandate insurance coverage for contraceptives, in addition to coverage for federal employees insured under the Federal Employees Health Benefits Program.¹ There is every reason to believe that this trend will continue. These laws pose a serious moral dilemma to Catholic institutions that offer health-care insurance to employees (as well as to individual Catholic employers). In the effort to offer health-care benefits to employees as an obligation of justice and to secure the good services provided by a Catholic institution, does a Catholic employer illicitly cooperate in contraception by complying with a contraceptive insurance mandate? Catholic institutions are morally bound both to provide just working conditions for employees and to avoid illicit cooperation in evil, which in this instance is the intrinsic evil of contraception. Can a Catholic employer fulfill these moral obligations under a contraceptive insurance mandate from the state?

This article will examine this dilemma by presenting a recent contraceptive mandate adopted in Massachusetts which will serve as an example of what is required by such laws. This will provide the starting point for an analysis which will apply the traditional moral principle of cooperation to the issue of compliance with

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¹Cynthia Dailard, "The Cost of Contraceptive Insurance Coverage," *Issues in Brief* (The Alan Guttmacher Institute) 2003.4 (2003): 1–2.

contraceptive insurance mandates. In particular, compliance with these laws will be examined first in terms of formal and material cooperation in contraception and in terms of how formal cooperation might be avoided. The issue of the substantial burden that these laws place on the religious and moral beliefs of Catholic employers will then be considered. I will argue that the possibility of avoiding illicit cooperation does not vitiate the substantial burden that these laws place upon the Catholic employer or the obligation of Catholic employers to pursue a legal exemption from such laws.

The Massachusetts Act

The recent “Act Providing Equitable Coverage of Services under Health Plans” was approved by the legislature of the Commonwealth of Massachusetts on March 7, 2002, and became law on January 1, 2003.² Section 5 of the Act states:

This act shall apply to all policies, contracts, plans, and certificates of insurance issued or delivered within the commonwealth on or after January 1, 2003, and to all policies, contracts, agreements, plans, and certificates of insurance in effect before that date upon renewal on or after January 1, 2003.

The Act pertains to the following items and entities: a) “any individual ... and group blanket policy of accident and sickness insurance”; b) “any contract between a subscriber and the corporation under an individual or group hospital service plan”; c) “any subscription certificate under an individual or group medical service agreement”; and d) “any individual or group health maintenance contract.” The benefits for items b) and c) shall be provided to “all individual subscribers and members within the commonwealth and to all group members having a principal place of employment within the commonwealth.” The benefits for item d) shall be provided to “residents of the commonwealth and to persons having a principal place of employment within the commonwealth.” The Act states that any of the defined policies, contracts, certificates of insurance, and health plans which provide benefits for outpatient services or prescription drugs and devices, shall provide these benefits for hormone replacement therapy for peri- and postmenopausal women and for “services,” drugs, and devices related to contraception.³

The Act defines “outpatient contraceptive services” in the following way: “Outpatient contraceptive services shall mean consultations, examinations, procedures, and medical services provided on an outpatient basis and related to the use of all contraceptive methods to prevent pregnancy that have been approved by the United States Food and Drug Administration.” Covered benefits for outpatient prescription contraceptive drugs or devices under this Act must be for those “approved by the United States Food and Drug Administration.” The Act also states that out-

²Commonwealth of Massachusetts, Chapter 49 of the Acts of 2002.

³The word “services” in this context is a term of art and has a specific meaning in law and medicine. However, the term is placed in quotation marks to indicate that ethically considered, contraceptive “services” are not true services because they are contrary to the dignity of the human person. The words “support” and “procedures” will be used as a morally appropriate substitutes for “services” in this context.

patient contraceptive procedures, drugs, and devices must be provided “under the same terms and conditions as for such other” services or prescription drugs or devices. This means that benefits for these items cannot be offered with special restrictions.

The Act does not apply to policies, contracts, certificates of insurance, and health plans as defined in the Act if purchased by a subscriber or “employer that is a church or qualified church-controlled organization, as those terms are defined in 26 U.S.C. section 3121(w)(3)(A) and (B)”;

 that definition in the United States Code is as follows:

(A) For purposes of this subsection, the term “church” means a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches.

(B) For purposes of this subsection, the term “qualified church-controlled organization” means any church-controlled tax-exempt organization described in section 501(c)(3), other than an organization which

(i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and

(ii) normally receives more than 25 percent of its support from either

(I) governmental sources, or

(II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.

The Act does not apply to self-insured entities. Hence, excluding such entities, the Catholic institutions that are potentially affected by the Act are “fully insured” (nonself-insured) hospitals, nursing homes, colleges and universities, social service centers, residential and other centers of persons with disabilities, and nondiocesan secondary and elementary schools, all of which might not be considered “church or qualified church-controlled” organizations. This analysis will only focus on fully insured Catholic employers for whom self-insured plans are not financially feasible, but owners of private companies which are not church or qualified church-controlled organizations, and have moral or religious objections to the Act, will also be interested in these moral and legal options. The Massachusetts law provides a helpful example of the various elements of contraceptive insurance mandates and lays out the moral problem that these mandates pose for Catholic employers. What the moral problem is and how it may be resolved follows.

The Moral Problematic

Health-care insurance benefits for hormone replacement therapy are a morally unproblematic issue because they pay expenses related to treatment for a legitimate pathology. However, benefits for contraceptive support, procedures, drugs, or devices is a different matter. Catholic moral teaching holds that contraception is an intrinsically evil act. Quoting from *Humanae vitae*, n. 14, the *Catechism of the*

Catholic Church states: “‘every action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible’ is intrinsically evil.”⁴ Does compliance with contraceptive insurance mandates like the Massachusetts Act by fully insured Catholic employers constitute immoral cooperation in contraceptive acts performed by those individuals who utilize the offered benefits?

Catholic moral teaching and tradition has developed the principle of cooperation as a guide to assess actions that assist in the evil of another.⁵ The term “cooperation” refers to any specific assistance knowingly and freely given, either as a means or an end, to a morally evil act principally performed by another individual or institution. The person or institution that assists in this manner is known as the cooperator and the person or institution whose act is assisted is known as the principal agent.⁶ An act of cooperation assists either a contemporaneous or future specific evil act of the principal agent in some particular way. Does such a concurrence in the contraceptive acts of individuals occur through the mandated provision of insurance coverage for contraceptive support, procedures, drugs, or devices? A Catholic

⁴*Catechism of the Catholic Church*, 2nd ed., trans. United States Conference of Catholic Bishops (Vatican City: Libreria Editrice Vaticana, 1997), n. 2370; see also “Catholic Teaching on Contraception” below.

⁵For explanations of the principle of cooperation in the health-care context see Peter J. Cataldo and John M. Haas, “Institutional Cooperation: The ERDs,” *Health Progress* 83.6 (November–December 2002): 49–57, 60; Peter J. Cataldo, “A Cooperation Analysis of Embryonic Stem Cell Research,” *National Catholic Bioethics Quarterly* 2.1 (Spring 2002): 35–41; Russell E. Smith, “Formal and Material Cooperation,” *Ethics & Medics* 20.6 (June 1995); idem, “The Principles of Cooperation and Their Application to the Present State of Health Care Evolution,” in idem, ed., *The Splendor of Truth and Health Care* (Braintree, MA: The Pope John Center, 1995), 217–231; idem, “Ethical Quandary: Forming Hospital Partnerships,” in idem, ed., *The Gospel of Life and the Vision of Health Care* (Braintree, MA: The Pope John Center, 1996), 109–123; see also National Catholic Bioethics Center Ethicists, “Cooperation with Non-Catholic Partners,” *Ethics & Medics* 23.11 (November 1998): 1–5.

⁶Traditionally, the principle of cooperation was applied to the individual, but institutions are included here because the actions of corporate persons contribute to the evil of principal agents in ways that are analogous to individual cooperation. The account of the parts of the principle of cooperation given here is consistent with St. Alphonsus Liguori, the manualist tradition, and contemporary explanations; for example see: Alphonsus Liguori, *Theologia Moral*, vol. 1 (Rome: Ex Typographia Vaticana, 1905), lib. II, tr. III, cap II, dub. V, *scandalo* n. 63; H. Noldin, S.J., *Summa Theologiae Moral*, vol. 2, *De praeceptis Dei et Ecclesiae* (Innsbruck, Austria: F. Rauch, 1914); A. Vermeersch, S.J., *Theologiae Moral*, vol. 2, *De Virtutum Exercitatione* (Rome: Scuola Tipografica Pio X, 1924); B.H. Merkelbach, O.P., *Summa Theologiae Moral*, vol. 1, *De Principiis* (Paris: Desclée de Brouwer, 1938); Josef Aertnys, C.Ss.R., and C.A. Damen, C.Ss.R., *Theologia Moral* (Turin, Italy: Marietti, 1944); John A. McHugh, O.P., and Charles J. Callan, O.P., *Moral Theology: A Complete Course*, rev. ed. (New York: Joseph F. Wagner, 1958); Bernard Häring, C.Ss.R., *The Law of Christ: Moral Theology for Priests and Laity*, vol. 2, *Special Moral Theology*, trans. Edwin G. Kaiser, C.P.P.S., (Westminster, MD: The Newman Press, 1964); Roger Roy, C.Ss.R., “La Cooperation selon Saint Alphonse de Liguori” *Studia Moralia* 6 (1968); and Germain Grisez, *The Way of the Lord Jesus*, vol. 2, *Living a Christian Life* (Quincy, IL: Franciscan Press, 1993).

employer agrees to a contract with a health insurance carrier(s) to pay premiums at certain rates for coverage of various health-care services and drugs for different categories of employees. Under a contraceptive insurance mandate, this coverage will include insurance benefits related to contraception. The contraceptive acts of the employee who makes use of contraceptive support and procedures or purchases contraceptives covered by the plan is assisted by the Catholic employer when a claim is submitted and paid through the insurance plan. Providing the plan enables the employee to have greater financial access to the covered support, procedures, and contraceptives and, as a result, enables the employee to make use of them once they are obtained. Thus, by providing a health insurance plan which covers contraceptives, a Catholic employer is giving particular assistance to the contraceptive acts caused by the support, procedures and contraceptives purchased through the plan.

Formal Cooperation and Compliance

Is cooperation in the provision of contraception coverage by a Catholic employer moral or immoral? Cooperation is divided into two main types, formal and material. Cooperation is formal if it intends the evil act of the principal agent. Formal cooperation is explicit if the cooperator directly intends the evil act. It is implicit if a good end is intended by the cooperator but is accomplished by intending the principal agent's act as a means to that end. The assistance given in implicit formal cooperation may be limited to a specific component of the principal agent's act, or it may be the sort that establishes the very conditions by which the principal agent's act is possible. Formal cooperation in evil, whether explicit or implicit, is never morally permissible. Institutions are susceptible to formal cooperation because they operate on the level of governance, management, and finance, all of which represent institutional intention and involve the implementation of that intention.

Does compliance with contraceptive insurance mandates involve Catholic institutions in formal cooperation in contraceptive acts?⁷ If so, does compliance with contraceptive insurance mandates by a Catholic employer constitute explicit formal cooperation? If a contract with an insurance carrier expressly covers, without qualification, what the contraceptive insurance mandate specifies (namely, contraceptive support, procedures, drugs, and devices related to the prevention of pregnancy), then the cooperation is explicit formal. The same result obtains if this coverage is

⁷See *Catholic Charities of Sacramento, Inc. v. Superior Court of the State of California*, no. S099822 (Supreme Court of the State of California, November 13, 2001), 4: "Catholic Church institutions may never directly or indirectly participate in, facilitate, support, or materially cooperate with conduct that its religious beliefs adjudge as being immoral or sinful." This application of the principle of cooperation differs from the view argued above. This interpretation seems also to be contrary to part 6 of the *Ethical and Religious Directives for Catholic Health Care Services* on the subject of collaborative arrangements, and in particular contrary to directive 69: "participation in such activities [activities of another organization "judged morally wrong by the Church"] must be limited to what is in accord with the moral principles governing cooperation." United States Conference of Catholic Bishops (USCCB), *Ethical and Religious Directives for Catholic Health Care Services* (Washington, D.C.: United States Conference of Catholic Bishops, 2001).

listed in a summary of the plan benefits, or if reference is made in the contract to a separate formulary of covered drugs which included contraceptive medications. The fact that these drugs may in some instances be prescribed for genuine therapeutic purposes is not sufficient to avoid explicit formal cooperation in deliberate contraceptive acts, because the Catholic employer is agreeing in this instance to any and all of the purposes for which the covered drugs are prescribed.

What might implicit formal cooperation look like in the context of providing health insurance for contraception? Under circumstances other than those considered here, a Catholic employer would engage in implicit formal cooperation by offering coverage for contraceptives and related items through a rider in its health benefits plan which it negotiates with a carrier. The fact that employees who purchase contraceptives through the rider pay the premiums themselves notwithstanding, the Catholic employer has nevertheless arranged for the rider, and therefore intends that financial access to contraceptives is a good to be secured. Moreover, if financial access to contraceptives is implicitly considered a good by the Catholic employer, then the contraceptive acts for which they are used must also be implicitly intended as a good by the Catholic employer in this instance.

Is there a way for Catholic employers who comply with the contraceptive insurance mandates to show that they do not intend, explicitly or implicitly, the contraceptive acts which occur as a result of insuring expenses related to contraceptive support, procedures, drugs, or devices? In other words, is there a way in which Catholic employers could both avoid formal cooperation and comply with contraceptive insurance mandates? One step toward demonstrating that the Catholic employer does not intend any contraceptive acts which might occur as a result of the coverage is for employers to include statements in contracts with insurance carriers that coverage for items related to contraception are provided only because of the legal requirements of the contraceptive insurance mandate. The following disclaimer is recommended as a model statement which should appear in contracts with carriers and in the employer's health-plan literature:

Any benefits covered by this plan which are related to contraception are provided solely and exclusively by reason of legal requirement as set forth in [legislative act information]. Contraception is contrary to Catholic moral teaching and [name of employer] does not endorse, approve, or intend contraception by complying with the aforementioned legal mandate.⁸

Such a disclaimer by a Catholic employer is not sufficient by itself to avoid illicit cooperation. A disclaimer is morally valid only if an exemption from a contraceptive insurance mandate is aggressively sought, because such a law is nevertheless a substantial burden on the religious beliefs of Catholic institutions and individu-

⁸It is important to note that licit cooperation is not possible, and the disclaimer cannot be used to justify compliance with a contraceptive insurance mandate, if the employer's coverage includes drugs or devices whose primary mechanism of action is abortifacient (see "Cooperating and the Abortifacient Effects of Contraceptives" below). Because licit cooperation is contingent upon legal efforts being made to obtain an exemption from a contraceptive insurance mandate, it is also advisable that the appropriate authorities publish explanations of these legal efforts (see "The Moral Necessity of Legal Action" below).

als even if formal cooperation is avoided. It must first be clear that compliance with the law is the only way in which a Catholic employer may preserve the important good of its work. What the Catholic employer demonstrates under these circumstances is an intention to continue to provide morally legitimate health-care benefits to its employees as a matter of justice. Providing coverage of contraceptives is not what the Catholic employer intends in and of itself, but rather is something compelled by an extrinsic, legal authority.

This set of circumstances is essentially different from the case in which a Catholic hospital engages in implicit formal (or immediate material) cooperation in direct sterilizations due to so-called duress which comes not from an independent or extrinsic source but from pressures largely of its own making. A Catholic hospital which endeavors on its own initiative to establish the conditions (e.g., governance, management, or financing) by which direct sterilizations are performed by other health-care providers as part of a collaborative arrangement is essentially different from a Catholic employer complying with a law not of its own making and which is imposed as a legal mandate. In the former case, the Catholic institution, in order to achieve certain goals, implicitly seeks either to establish an immoral procedure which did not previously exist or to reconfigure the provision of an already existing immoral procedure. In the latter case the Catholic institution is forced by a government mandate to alter an otherwise morally good service, which it had been providing all along to its employees, by incorporating a component that will assist in what the Church considers an immoral act. In the one case the cooperator is actively securing the principal agent's immoral act and in the other the cooperator's long-standing activity is corrupted by a legal mandate.

The desire to preserve morally good goals is present in both cases, but it is not being suggested here that this desire of itself avoids implicit formal cooperation. Rather, what the cooperator does in each of these cases to assist the principal agent determines whether the cooperation is implicit formal. The case of providing sterilizations through a collaborative arrangement is an example of implicit formal cooperation because the Catholic hospital achieves its morally good goal of preserving its mission only by endeavoring to secure the immoral goal of its other-than-Catholic partner. Providing health insurance coverage for contraception in the way recommended here is not an example of institutional implicit formal cooperation. It is not true in this case that the Catholic employer achieves its goal of attracting employees so that it can remain in existence only by designing the conditions under which the immoral act of contraception may be performed. The Catholic employer plays no part in fashioning the conditions by which contraception will take place; that has already been accomplished by the legislature which has imposed these conditions upon the Catholic employer.

There are other factors which demonstrate the absence of formal cooperation. The fact that the Catholic employer is paying the carrier an administration fee for processing claims, including claims related to contraception under a mandate, does not entail formal cooperation. The good intention of the Catholic employer in paying the fee is preserved for the same reason that the employer's intention in complying generally with the contraceptive insurance mandate is preserved: the

employer's morally good practice of ensuring that health-care claims are processed by the carrier is misused in a way that is truly beyond its control.

Receiving periodic reports from an insurance carrier under a contraceptive mandate also does not involve formal cooperation. The various reports which a Catholic employer receives from a carrier regarding, for example, renewal rates and methodologies, or drug calculations, consist of general categories and aggregate numbers. Individual claims for specific services or drugs are not identified in the reports handled by the employer. The same is true for any claims made under a contraceptive insurance mandate for contraceptive support, procedures, drugs, or devices.

Payment of premiums to a carrier for coverage which includes claims for contraceptives under a contraceptive insurance mandate also does not necessitate formal cooperation. Any part of the premiums that pays for contraceptives is not intended for that purpose by the Catholic employer, but rather is intended to fulfill the legal requirement. Morally relevant also is the fact that the premiums are calculated on the basis of projected totals of all claims within a given general category. Payments by a Catholic employer are made for these aggregate amounts and are not made for individual contraception claims. Lastly, it is morally significant that this payment system is not devised by the Catholic employer to ensure the provision of contraception coverage by indirect means, but is the established system for all health insurance premiums.

Material Cooperation and Compliance

If formal cooperation can be avoided in complying with a contraceptive insurance mandate, does a Catholic employer engage in illicit material cooperation by complying with such a law? Cooperation is material if the act of the principal agent is not intended. The act of the cooperator in material cooperation is itself good or morally indifferent. Material cooperation can be either immediate or mediate. Immediate material cooperation contributes to the essential circumstances, and mediate material to the nonessential circumstances, of the principal agent's act. Mediate material cooperation can be either proximate through a direct causal influence, or remote through an indirect causal influence, upon the act of the principal agent. Immediate material cooperation by an institution in an intrinsically evil act such as contraception is never morally permissible. Mediate material cooperation can be morally tolerated if there is a great good to be preserved or a grave evil to be avoided.

Unlike the case of direct sterilizations being performed in a Catholic hospital in which the hospital contributes circumstances that are essential to the sterilizations, complying with a contraceptive insurance mandate does not entail an essential contribution to the act of contraception. The circumstances essential to this act are the contraceptive drug or device itself, the actions of the patient, the writing and filling of prescriptions for them, and certain other actions of a health-care provider in cases of contraceptive devices. How the contraceptives are paid for is not a circumstance essential to the act of contraception itself.

Compliance by a Catholic employer whose contract and plan literature contain the disclaimer language recommended above, constitutes licit mediate material co-

operation. The circumstance to which the Catholic employer contributes is financial access to contraceptive support, procedures, drugs, and devices through its general health plan, from which plan the employee otherwise receives many morally good benefits. Any contribution that this circumstance makes to contraceptive acts is unintended under the recommended disclaimer. The circumstance of providing financial access is, as has been pointed out, nonessential to the act of contraception. This mediate material cooperation by the Catholic employer is remote and not proximate. The Catholic employer's mediate material cooperation in contraceptive acts is remote because there are many intervening causes between offering a health insurance plan and the contraceptive acts themselves. Finally, the real threat to a Catholic employer of losing employees and the possible termination of the organization if health-care benefits are not offered is a proportionately grave reason for the mediate material cooperation.

An individual employee who objects in conscience to being a member of a Catholic employer's plan because it includes contraception coverage, and objects to paying a percentage of the premiums, licitly cooperates for the same reasons that the employer licitly cooperates. This employee indirectly participates in the contraception portion of the plan only because of the legal requirement in the plan, not because he or she intends the contraceptive acts of the principal agents. All of the reasons why the Catholic employer participates in remote mediate material cooperation in contraception also apply to the employee. The prospect of not being able to provide health insurance for oneself and one's family, because no plans are available that exclude contraception coverage, is a proportionately serious reason for the employee to engage in remote mediate material cooperation.

Cooperating and the Abortifacient Effects of Contraceptives

Compliance with contraceptive insurance mandates under the conditions recommended above does not constitute mediate material cooperation in abortion as contemplated by directive 45 of the *Ethical and Religious Directives for Catholic Health Care Services*. Regarding cooperation in abortion, directive 45 states:

Catholic health-care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health-care institutions need to be concerned about the danger of scandal in any association with abortion providers.

Pro-life physicians disagree about the possible abortifacient effects of oral contraceptives. Nevertheless, physicians on both sides of the issue agree that the primary mechanism of oral contraceptives is the suppression of ovulation.⁹ It is

⁹See Walter L. Larimore, M.D., and Joseph B. Stanford, M.D., "Postfertilization Effects of Oral Contraceptives and Their Relationship to Informed Consent." *Archives of Family Medicine* 9.2 (February 2000): 126–133; Susan A. Crockett, M.D., et al., "Using Hormone Contraceptives Is a Decision Involving Science, Scripture, and Conscience," in *The Reproduction Revolution: A Christian Appraisal of Sexuality, Reproductive Technologies, and the Family*, eds. John F. Kilner, Paige C. Cunningham, and W. David Hager (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2000), 192–201; John B. Wilks, "Response to Joel Goodnough, M.D., 'Redux: Is the Oral Contraceptive Pill an Abortifacient?'" *Ethics & Medi-*

recognized to one degree or another that oral contraceptives have a secondary mechanism of preventing the implantation of an embryo, whether the contraceptive is used on a continuing basis or as part of a treatment protocol to prevent pregnancy after sexual assault. This action of the drug could be interpreted as an abortion under Directive n. 45 of the *Ethical and Religious Directives*:

Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo.

However, the changes and alterations to the endometrium or to the fallopian tubes, which occur as *secondary* mechanisms of oral contraceptives, need not qualify in and of themselves as “the directly intended termination of pregnancy before viability.”

The termination of pregnancy before viability must be the “sole immediate effect” of a procedure or drug in order to be identified as an abortion according to directive 45. The reason for this is that some procedures and drugs have two immediate effects—one good and one bad. A hysterectomy of a gravid uterus may have the immediate effects of curing or ameliorating cancer and the termination of pregnancy. Similarly, the use of cancer drugs on a pregnant woman can have the direct effects of curing the pathology and harming the unborn child. In such cases the principle of the double effect may justify the act if all conditions of the principle are fulfilled. However, if the sole immediate effect of a drug is the taking of innocent human life, then the first condition of the principle is violated and the act cannot be morally justified. The fact that most oral contraceptives have two effects (namely, their primary and secondary mechanisms of action), indicates that such drugs cannot be defined in the category of “sole immediate effect” as described in directive 45. This interpretation is consistent with the language of directive 36 which states:

It is not permissible, however, to initiate or recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.

It may be the case that the secondary mechanism of an oral contraceptive has the effect of the removal, destruction, or interference with the implantation of a fertilized ovum, but as a secondary mechanism, this effect cannot properly be described

cine 17.2 (Summer 2001): 103–109; William F. Colliton Jr., M.D. “Response to Joel Goodnough MD, ‘Redux: Is the Oral Contraceptive Pill an Abortifacient?’” *Ethics & Medicine* 17.2 (Summer 2001): 110–113; Chris Kahlenborn, Joseph B. Stanford, and Walter L. Larimore. “Postfertilization Effect of Hormonal Emergency Contraception,” *Annals of Pharmacotherapy* 36.3 (March 2002): 465–470; Gerald McShane, M.D., “Pregnancy Prevention After Sexual Assault: The Medical Case in Favor of Postcoital Anovulatory Hormonal Treatment” in *Catholic Health Care Ethics: A Manual for Ethics Committees*, eds. Peter J. Cataldo, Ph.D., and Albert S. Moraczewski, O.P., Ph.D. (Boston: The National Catholic Bioethics Center, 2002), 11/1–11/7; and Julie Michelson, M.D., “Pregnancy Prevention After Sexual Assault: The Medical Case against Postcoital Anovulatory Hormonal Treatment,” in *Catholic Health Care Ethics*, eds. Cataldo and Moraczewski, 11/8–11/12.

as the “sole immediate effect,” “purpose,” or “direct effect” for which the drug was designed.

Given these points, directive 45 appears to apply to surgical abortion and to drugs such as RU-486 (whose primary mechanism of action is the evacuation of an unimplanted or implanted embryo) which are forbidden within a Catholic health-care institution. Consistent with directive 45, the specific and expressed prohibition of certain rape treatments in directive 36 seems to apply only to drugs such as RU-486. However, directive 36 also indirectly prohibits contraceptive drugs that under certain circumstances are known with a moral certitude not to suppress ovulation but to act as abortifacients.¹⁰

We have seen that the compliance of a Catholic employer with a contraceptive insurance mandate constitutes mediate material cooperation in the evil acts which result from an employee using the covered drugs or devices. Thus, if the contraceptive insurance mandate includes drugs such as RU-486, or contraceptives in particular cases in which it is known with moral certitude that are likely to act as abortifacients, then a Catholic employer engages in mediate material cooperation in abortion or its moral equivalent. This is illicit cooperation and not permissible according to Catholic teaching. In order for a Catholic employer to comply with a contraceptive insurance mandate in a morally licit manner as recommended above, drugs such as RU-486, abortifacient devices, and contraceptives used in certain circumstances of rape treatment must be expressly excluded from the coverage benefits.

The Moral and Religious Burden of Mandates at Law

Licit material cooperation by a Catholic employer notwithstanding, a legislative mandate to provide insurance for contraceptives does indeed pose a grave burden on Catholic employers who are legally responsible to comply with the law. Demonstrating this burden is important for two reasons. First, showing how such mandates burden these institutions is instructive for an understanding of the specific reasons why the Catholic Church teaches that contraception is immoral and how cooperation in this evil is morally wrong. Second, proof of the burden is critically important for at least one legal theory that could be utilized in seeking a legal exception from these mandates. What that legal theory is and the importance of demonstrating the burden of these mandates for the success of the theory will now be briefly examined. My purpose here is not to provide a legal analysis, but only to outline the general legal context in which a moral and theological case for the Church’s teaching on contraception and cooperation in evil becomes an important task.

An article by Edward T. Meckmann, “Illusion or Protection? Free Exercise Rights and Laws Mandating Insurance Coverage of Contraception,” is very helpful for understanding the law governing the issue of contraceptive mandates and the

¹⁰For a treatment of the question of moral certitude in the administration of anovulants for rape victims see Peter J. Cataldo and Albert S. Moraczewski, O.P., “A Moral Analysis of Pregnancy Prevention after Sexual Assault,” in *Catholic Health Care Ethics*, eds. Cataldo and Moraczewski, 11/12–11/18.

legal options for seeking exemptions to those mandates that are available to Catholic employers, dioceses, and conferences.¹¹ Mechmann sets the context of the legal precedents influencing the jurisprudence for cases involving protection from laws that are claimed to violate freedom of religion as guaranteed by the First Amendment to the U.S. Constitution:

Prior to 1990 it was generally understood that the Free Exercise Clause of the First Amendment required that the government not impose a substantial burden on conduct motivated by religion, unless it can show that there is a compelling government interest and that the law is narrowly tailored to achieve that interest. This rule was established in the case of *Sherbert v. Verner*....

However, in *Employment Division v. Smith*, the Supreme Court ruled that states are not required by the First Amendment to recognize religious exceptions to laws of general applicability.¹²

Laws of general applicability are those that serve a general purpose and are not constructed such that their implementation aims at a particular group or mode of conduct. In this sense, laws of general applicability are considered “neutral” towards religious practices. The chances of a litigant being granted an exemption from a law based solely upon a claim of substantial burden to religious practice or faith under the *Smith* rule are minimal. U.S. Supreme Court Justice Antonin Scalia, writing for the majority of the Court in *Smith*, argued that the state of Oregon could impose criminal penalties on the use of peyote by Native Americans because this prohibition of their exercise of religion was an incidental effect of a generally applicable law. The effect of the law was no different for someone who believes that support of government is sinful but is nevertheless legally obliged to comply with a law for the collection of a general tax. Moreover, with respect to the *Sherbert* test, Scalia argued, citing *Reynolds v. United States*,¹³ that to make compliance with a law contingent upon an individual’s religious beliefs where there is no compelling state’s interest, is for each person “to become a law unto himself.” Judges would be put in the position of having to evaluate the centrality of a prohibited conduct to a person’s religious faith in order to determine a compelling interest, when there is no rational basis, according to Scalia, for a judge “to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith.”¹⁴

Even though relief from contraceptive insurance mandates under the *Smith* rule is doubtful, Mechmann points out that relief under the *Sherbert* rule might be

¹¹Edward T. Mechmann, “Illusion or Protection? Free Exercise Rights and Laws Mandating Insurance Coverage of Contraception,” *Catholic Lawyer* 41.2 (Fall 2001): 145–167.

¹²*Ibid.*, 148; *Sherbert v. Verner* 374 U.S. 398 (1963); *Employment Division v. Smith* 494 U.S. 872 (1990).

¹³98 U.S. 145 (1878).

¹⁴*Employment Division v. Smith* 494 U.S. 872 (1990). Mechmann, 150, points out that the Supreme Court allowed three exceptions in *Smith* which pertain either to the deliberate infringement upon religious practices, or when a neutral, generally applicable law is barred not because of the Free Exercise Clause alone but because the affected action also involves some other constitutional protection.

possible for Catholic parties in state courts.¹⁵ In order for the courts to establish that religious belief is substantially burdened according to the *Sherbert* test, it must be clearly and convincingly shown that the beliefs are sincerely held and that the conduct affected by the law is central to the litigant's faith. Mechmann strongly recommends that Catholic parties attempting to prove a substantial burden imposed by contraceptive insurance mandates should in a sense catechize courts about Catholic teaching on contraception: "The court must be convinced that it is not dealing with mere technical disciplinary rules, but instead with integral parts of core Catholic doctrine that are given by divine revelation."¹⁶ Ironically, this case must be argued not as if it were presented within the impartial context of a court of law, but with the full force of evangelization in order for the court to understand and appreciate the teaching of the Church from within. However, Mechmann's recommendation to give a robust explanation of Catholic teaching on contraception is one part of an integrated two-part strategy. The other part is to demonstrate that the burden of contraceptive mandates upon the Catholic faith is a felt burden, one that does not force a violation of the tenets of the faith in the abstract but causes real individuals to act contrary to those tenets in their own lives: "It should be stressed that the failure to grant conscience protection means that thousands of Catholics will be forced to pay for medicines and procedures they find morally repugnant."¹⁷

While it is true that the burden imposed by the law is borne by individuals, two important points must be recognized. First, the religious faith of individuals is burdened only to the extent that the objective content of what they believe in has been violated by a law. Second, religious institutions may also be burdened in the same way insofar as a religious institution is responsible for upholding religious beliefs, in its work, which may be negatively affected by a law. Thus, there is a subjective and objective component to a burden resulting from compliance with a law for both individuals and institutions. There must be a subject of the burden, either an individual or an institution, which experiences the burden in some sense. However, the subject of the burden is affected only to the extent that the law has an impact upon some delimited content of the faith held by the subject. The subjective burden is made intelligible by the conflict between the law and the objective tenets of the faith. Proving burden to individuals is a necessary but not a sufficient indicator of a burdened religious belief. Finding a threshold number of individuals who are negatively affected by a law cannot be the sole test of burden to religious belief.

This incorrect quantitative criterion of burden is in fact assumed by the proponents of contraceptive insurance mandates. For example, the American Civil Liberties Union in its publication *Religious Refusals and Reproductive Rights* argues that the proper approach to the issue centers on an assessment of burden relative to

¹⁵Mechmann, "Illusion or Protection?" 153–154.

¹⁶*Ibid.*, 158.

¹⁷*Ibid.*

the sharing or not sharing of the religious belief in question.¹⁸ The important questions for the ACLU in determining this issue are: what is the burden to those persons who share the religious belief if they are not exempted from a law, and what is the burden to persons who do not share the religious belief if an exemption is allowed. This approach is consistent with the California Women's Contraception Equity Act which, in an attempt to define a religious employer, essentially defines religious belief itself and does so in terms of persons who share in a belief.¹⁹

A number of dissident "Catholic" groups also assess the burden from contraceptive insurance mandates on the religious beliefs of Catholic employers on the basis of individual Catholic opinion and the particular practices of Catholic institutions.²⁰ These groups cite three quantitative facts as standards for assessing the issue of burden: 1) the many Catholic health-care institutions that have devised and implemented strategies for making contraceptives available to patients; 2) theological disagreement over the morality of contraception; and 3) the opinion and practice of many individual Catholics which is contrary to Catholic teaching on contraception.

The fact that many Catholic health-care institutions have entered into collaborative arrangements with other-than-Catholic institutions which allow for the provision of contraceptives indicates one of two possibilities—either the Catholic institutions are engaged in illicit cooperation, or the cooperation is licit but does not assume the level of burden that contraceptive insurance mandates represent.²¹ In either case these arrangements have no relevance for the burden that contraceptive insurance mandates place upon the responsibility of Catholic employers to uphold Catholic teaching on contraception in particular, and to do so consistent with the teaching on the nature of religious belief itself.

Theological dissent from Catholic teaching on contraception does not disprove burden, because the dissent has no effect on the truth of what is taught or on the fact that the teaching is validly taught by the ordinary and universal magisterium of the Church for observance by the faithful.²² Whether individual dissenting theo-

¹⁸American Civil Liberties Union, *Religious Refusals and Reproductive Rights* (New York: American Civil Liberties Union, 2002), 6, 8–9. The ACLU used the same assumptions about religious burden in its *amicus curiae* brief: *Brief of the American Civil Liberties Union of Northern California and the American Civil Liberties Union Reproductive Freedom Project as Amici Curiae in Support of Real Parties in Interest*, no. C037025 (Court of Appeal of the State of California in and for the Third Appellate District, January 18, 2001), 2–3.

¹⁹Cal. Health and Safety Code, § 1367.25(b)(1); Cal. Ins. Code, § 10123.196(b)(1).

²⁰See Catholics for a Free Choice, et al., brief of *amicus curiae*, no. C037025 (Court of Appeal of the State of California Third Appellate District, January 19, 2001).

²¹Many collaborative arrangements have been judged illicit by the episcopate, and many more that are probably illicit have not received adequate review. Those arrangements which involve licit cooperation do not represent the same burden as contraceptive insurance mandates because they do not involve even indirect management or financing of contraception coverage under the coercion of the state.

²²See Pope Paul VI, *Humanae vitae, On the Regulation of Births* (1968); *Catechism of the Catholic Church*, nn. 2034, 2036, and 2037.

gians support the use of contraception, or which individual Catholics (and non-Catholics) are actually using contraception, has no moral relevance for the truth and authority of Catholic teaching on contraception. Therefore neither do they have relevance for the question of whether Catholic employers should cooperate. The truth of the Church's teaching is not dependent upon the agreement or disagreement of individuals, because the truth of the teaching is part of the ontological and moral order of reality itself. Therefore, the moral question of whether Catholic employers should be exempt from contraceptive insurance mandates is determined by the objective moral status of contraception, not by the subjective disposition of those individuals who are affected by such an exemption.

The arguments of the proponents of contraceptive insurance mandates view religious belief strictly as religious affectation and impose that view on Catholic employers. However, the Catholic Church teaches that an act of religious belief has both subjective and objective dimensions:

Faith is a personal adherence of the whole man to God who reveals himself. It involves an assent of the intellect and will to the self-revelation God has made through his deeds and words.

“To believe” has thus a two-fold reference: to the person and to the truth: to the truth, by trust in the person who bears witness to it.²³

When a Catholic institution claims that its religious beliefs are burdened by compliance with a law, part of that burden involves the specific teaching affected, but also what the Church teaches about the nature of religious belief itself. The Church's teaching that religious belief is not measured solely by the affectations of believing individuals, but also by the objective content of faith, is itself burdened when the religious impact of a particular law is assessed only in relation to the numbers of people affected. A Catholic institution can validly claim that its religious beliefs are substantially burdened when a law causes Catholic individuals and institutions to violate specific teachings, irrespective of the numbers of individuals who personally share those teachings. The affectational view of religious belief does not take into account the fact that a Catholic institution has the religious responsibility to uphold the objective component of the religious beliefs its members profess. What the objective component of Catholic belief about contraception is, and why compliance with a contraceptive insurance mandate constitutes a substantial burden on Catholic employers and individuals, will now be explored.

Catholic Teaching on Contraception

In order to understand adequately the substantial burden that contraceptive insurance mandates place upon the religious beliefs of affected Catholic employers, it is necessary to explain the integral nature of Catholic teaching on contraception. This requires an understanding of how the teaching is rooted in Christian anthropology, the natural moral law, the Christian meaning of human sexuality, and the sacra-

²³*Catechism of the Catholic Church*, nn. 176 and 177; see also nn. 160, 170, and 171; Vatican Council II, *Dei Verbum*, *Dogmatic Constitution on Divine Revelation*, n. 10; and *idem*, *Lumen Gentium*, *Dogmatic Constitution on the Church*, n. 17.

ment of matrimony. Proof of the substantial burden caused by contraceptive insurance mandates requires that the actual teaching of the Church be given maximum exposure and that theological and moral interpretation be held to a minimum. To that end, the account which follows will provide generous quotations from magisterial texts.

The central principle of the Christian anthropology of the Catholic Church is that all human life is a gift from God the Creator and Father. In 1987 the Congregation for the Doctrine of the Faith issued its *Donum vitae, Instruction on Human Life in Its Origin and on the Dignity of Procreation*, which was approved by Pope John Paul II. *Donum vitae* reiterated this tenet of the Catholic faith that human life is a gift from God, and indicated that there are responsibilities inherent in the gift of life:

The gift of life which God the Creator and Father has entrusted to man calls him to appreciate the inestimable value of what he has been given and to take responsibility for it.²⁴

In this gift of life God shares something of Himself with human beings. God's gift of life is an act of sharing, not an act of surrender which releases the recipient from any responsibility for what belongs to God. Pope John Paul II makes this critical point in his encyclical *Evangelium Vitae, The Gospel of Life* (1995): "The life which God offers to man is a gift by which God shares something of himself with his creature."²⁵ Pope John Paul II states that "man's life comes from God; it is his gift, his image and imprint, a sharing in his breath of life."²⁶ As a result of sharing in God's life, human life is sacred and inviolable because the human being is formed in God's image and likeness which "reflects the inviolability of the Creator himself."²⁷

As *Donum vitae* emphasizes, human beings are "entrusted" with the gift of life. The gift places moral obligations on the receiver to protect and preserve it according to God's laws that are intrinsic to the gift. There is something about the gift which makes demands upon the receiver, something for which we are asked to "take responsibility." We are entrusted with the gift of life because it is not entirely our own. "The *Gospel of life*," John Paul II states

is both a great gift of God and an exacting task for humanity. It gives rise to amazement and gratitude in the person graced with freedom, and it asks to be welcomed, preserved, and esteemed, with a deep sense of responsibility. In

²⁴Congregation for the Doctrine of the Faith (CDF), *Donum vitae, Instruction on Human Life in Its Origin and on the Dignity of Procreation*, introduction, 1, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

²⁵Pope John Paul, II, *Evangelium vitae, The Gospel of Life* (1995), n. 34, original emphasis, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

²⁶*Ibid.*, n. 39.

²⁷*Ibid.*, n. 53.

giving life to man, God demands that he love, respect, and promote life. *The gift thus becomes a commandment, and the commandment is itself a gift.*²⁸

Because life is something shared from God and entrusted to human beings, life ought not be subject to domination by human beings and become an object of manipulation. Rather, the responsibility inherent in the gift of life is to respect its specific nature: “Life is indelibly marked by *a truth of its own*. By accepting God’s gift, man is obliged to *maintain life in this truth* which is essential to it.”²⁹ By not respecting the nature of human life, John Paul II points out, “life itself becomes a mere ‘thing,’ which man claims as his exclusive property, completely subject to his control and manipulation.”³⁰

The truth that indelibly marks human life is that human existence is present through a composite unity of body and soul. Body and soul are not two separate things in the human being but two principles by whose unity a human individual is able to exist. This substantial union of body and soul is explained in numerous authoritative documents of the Catholic Church, for example:

Though made of body and soul, man is one. Through his bodily composition, he gathers to himself the elements of the material world; thus they reach their crown through him, and through him raise their voice in free praise of the Creator.³¹

By virtue of its substantial union with a spiritual soul, the human body cannot be considered as a mere complex of tissues, organs, and functions, nor can it be evaluated in the same way as the body of animals; rather it is a constitutive part of the person who manifests and expresses himself through it.³²

The unity of soul and body is so profound that one has to consider the soul to be the “form” of the body: i.e., it is because of its spiritual soul that the body made of matter becomes a living, human body; spirit and matter, in man, are not two natures united, but rather their union forms a single nature.³³

It is through the human spiritual soul that human beings have the powers of intellect and free will. By use of these powers a human being is able to know and pursue the various ends or purposes of human nature. The most basic moral norms by which this active pursuit of human fulfillment ought to be measured are found in the natural moral law:

The natural moral law expresses and lays down the purposes, rights, and duties which are based upon the bodily and spiritual nature of the human person. Therefore this law cannot be thought of as simply a set of norms on the

²⁸Ibid., n. 52, original emphasis.

²⁹Ibid., n. 48, original emphasis.

³⁰Ibid., n. 22.

³¹Vatican Council II, *Gaudium et spes, Constitution on the Church in the Modern World*, n. 14, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html.

³²CDF, *Donum vitae*, introduction, n. 3.

³³*Catechism of the Catholic Church*, n. 365.

biological level; rather it must be defined as the rational order whereby man is called by the Creator to direct and regulate his life and actions and in particular to make use of his own body.

A first consequence can be deduced from these principles: an intervention on the human body affects not only the tissues, the organs, and their functions but also involves the person himself on different levels. It involves, therefore, perhaps in an implicit but nonetheless real way, a moral significance and responsibility.³⁴

In the Catholic moral tradition the natural law is man's apprehension of God's ends, the goods of human nature, and man's governance of his actions in fulfillment of those goods. The natural moral law extends to the nature of human sexuality and to the use of the reproductive powers in particular. Making reference to Catholic teaching on the natural moral law regarding sexual intercourse, the Congregation for the Doctrine of the Faith in 1975 stated (with the approval of Pope Paul VI):

It is respect for its finality that ensures the moral goodness of this act [the sexual act].

This same principle, which the Church holds from Divine Revelation and from her authentic interpretation of the natural law, is also the basis of her traditional doctrine, which states that the use of the sexual function has its true meaning and moral rectitude only in true marriage.³⁵

The finality of sexual intercourse to which the CDF refers is twofold. It is the mutually inclusive procreative and unitive ends or goods of sexual intercourse that are realized only in the conjugal act of spouses in marriage. Vatican Council II recapitulates Catholic teaching on the inextricable link between the goods of marriage and the goods of the conjugal act:

The intimate partnership of married life and love has been established by the Creator and qualified by his laws, and is rooted in the conjugal covenant of irrevocable personal consent.... By their very nature, the institution of matrimony itself and conjugal love are ordained for the procreation and education of children, and find in them their ultimate crown. Thus a man and a woman, who by their compact of conjugal love "are no longer two, but one flesh" (Mt 19:6), render mutual help and service to each other through an intimate union of their persons and of their actions. Through this union they experience the meaning of their oneness and attain to it with growing perfection day by day. As a mutual gift of two persons, this intimate union and the good of the children impose total fidelity on the spouses and argue for an unbreakable oneness between them.³⁶

The teaching of Vatican Council II echoes the teaching of Pope Pius XI in his encyclical *Casti Connubii, On Christian Marriage* (1930):

Thus amongst the blessings of marriage, the child holds the first place. And indeed the Creator of the human race Himself, Who in his goodness wishes to

³⁴CDF, *Donum vitae*, introduction, n. 3.

³⁵CDF, *Persona humanae, Declaration on Certain Questions Concerning Sexual Ethics*, n. 5, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html.

³⁶Vatican Council II, *Gaudium et spes*, n. 48.

use men as his helpers in the propagation of life, taught this when, instituting marriage in Paradise, He said to our first parents, and through them to all future spouses: "Increase and multiply, and fill the earth."³⁷

These, then, are the elements which compose the blessing of conjugal faith: unity, chastity, charity, honorable noble obedience, which are at the same time an enumeration of the benefits which are bestowed on husband and wife in their married state, benefits by which the peace, the dignity, and the happiness of matrimony are securely preserved and fostered. Wherefore it is not surprising that this conjugal faith has always been counted amongst the most priceless and special blessings of matrimony.³⁸

The Church teaches that the unitive and procreative purposes of marriage ought to be instantiated in each and every conjugal act between husband and wife. The conjugal act is constituted by a procreative purpose or meaning and a unitive purpose or meaning. Both meanings are inseparable, that is, they are fulfilled in and through each other. The *procreative meaning* is fulfilled in and through the unitive meaning insofar as the complete, reciprocal gift of the spouses to each other necessarily includes the mutual gift of their procreative capacity, and the *unitive meaning* is fulfilled in and through the procreative meaning insofar as the conjoining of the spouses' generative powers makes for a complete interpersonal union. This inseparability is explained by Pope Paul VI in his encyclical *Humanae vitae*, *On the Regulation of Births* (1968):

[T]he fundamental nature of the marriage act, while uniting husband and wife in the closest intimacy, also renders them capable of generating new life—and this as a result of laws written into the actual nature of man and of woman. And if each of these essential qualities, the unitive and the procreative, is preserved, the use of marriage fully retains its sense of true mutual love and its ordination to the supreme responsibility of parenthood to which man is called. We believe that our contemporaries are particularly capable of seeing that this teaching is in harmony with human reason.³⁹

In his apostolic exhortation *Familiaris consortio*, *The Role of the Christian Family in the Modern World* (1981), Pope John Paul II eloquently explains the mutuality of the two meanings of the conjugal act and shows how they are inextricably bound up with the composite nature of sexuality, body and spirit:

[S]exuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concerns the innermost being of the human person as such. It is realized in a truly human way only if it is an integral part of the love by which a man and a woman commit themselves totally to one another until death. The total physical self-giving would be a lie if it were not the sign

³⁷Pope Pius XI, *Casti connubii*, *On Christian Marriage*, n. 11, http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

³⁸*Ibid.*, n. 30.

³⁹Pope Paul VI, *Humanae vitae*, *On the Regulation of Births*, n. 12, http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

and fruit of a total personal self-giving, in which the whole person, including the temporal dimension, is present: If the person were to withhold something or reserve the possibility of deciding otherwise in the future, by this very fact he or she would not be giving totally.

This totality which is required by conjugal love also corresponds to the demands of responsible fertility. This fertility is directed to the generation of a human being, and so by its nature it surpasses the purely biological order and involves a whole series of personal values. For the harmonious growth of these values, a persevering and unified contribution by both parents is necessary.⁴⁰

Later in *Familiaris consortio*, John Paul II evaluates contraception in light of the notion of the reciprocal nature of the conjugal act. He also contrasts contraception to the prevention of conception through a method that respects the reciprocity of the procreative and unitive meanings of the conjugal act:

When couples, by means of recourse to contraception, separate these two meanings that God the Creator has inscribed in the being of man and woman and in the dynamism of their sexual communion, they act as “arbiters” of the divine plan and they “manipulate” and degrade human sexuality—and with it themselves and their married partner—by altering its value of “total” self-giving. Thus the innate language that expresses the total reciprocal self-giving of husband and wife is overlaid, through contraception, by an objectively contradictory language, namely, that of not giving oneself totally to the other. This leads not only to a positive refusal to be open to life, but also to a falsification of the inner truth of conjugal love, which is called upon to give itself in personal totality.

When, instead, by means of recourse to periods of infertility, the couple respect the inseparable connection between the unitive and procreative meanings of human sexuality, they are acting as “ministers” of God’s plan and they “benefit from” their sexuality according to the original dynamism of “total” self-giving, without manipulation or alteration.⁴¹

The institution of marriage and the conjugal love between spouses (which is ordered toward marriage) are strengthened by the sacrament of matrimony. This function of the sacrament is described in the following texts from Vatican Council II and from Pope John Paul II respectively:

For as God of old made Himself present to his people through a covenant of love and fidelity, so now the Savior of men and the Spouse of the Church comes into the lives of married Christians through the sacrament of matrimony. He abides with them thereafter so that just as He loved the Church and handed Himself over on her behalf, the spouses may love each other with perpetual fidelity through mutual self-bestowal.⁴²

⁴⁰Pope John Paul II, *Familiaris Consortio*, *The Role of the Christian Family in the Modern World*, n. 11, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html.

⁴¹*Ibid.*, n. 32.

⁴²Vatican Council II, *Gaudium et spes*, n. 48.

The Spirit which the Lord pours forth gives a new heart, and renders man and woman capable of loving one another as Christ has loved us. Conjugal love reaches that fullness to which it is interiorly ordained, conjugal charity, which is the proper and specific way in which the spouses participate in and are called to live the very charity of Christ, who gave himself on the cross....

Spouses are therefore the permanent reminder to the Church of what happened on the cross.⁴³

It is on the basis of the constant teaching of the Catholic Church regarding the nature of the human being, the natural moral law, the nature of human sexuality, and the sacrament of matrimony that the Church absolutely forbids contraception:

The Church ... in urging men to the observance of the precepts of the natural law, which it interprets by its constant doctrine, teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life.⁴⁴

[To] be condemned, as the magisterium of the Church has affirmed on many occasions, is direct sterilization, whether of the man or of the woman, whether permanent or temporary.

Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation—whether as an end or as a means.⁴⁵

The gravity of the offense of contraception in Catholic teaching was powerfully captured in these words from Pope Pius XI (later adapted in *Humanae vitae*):

any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin.⁴⁶

As the foregoing sampling of Catholic teaching shows, contraception is regarded by the Church as a radically disordered act for several reasons: it is contrary to the good of human nature as it directly prevents the inherent purposes of the reproductive powers; it is contrary to human sexuality because it contradicts the mutually inclusive procreative and unitive meanings of the conjugal act; it is contrary to the natural-moral-law obligation to respect the unitive and procreative meanings of the conjugal act; and it offends the charity of Christ represented in the sacrament of matrimony. Because contraception is radically disordered, it is an intrinsically evil act and no circumstance may justify it. In his encyclical, *Veritatis splendor*, *The Splendor of Truth* (1993), Pope John Paul II reiterates the teaching of Pope Paul VI in *Humanae vitae* that contraception is intrinsically evil, explaining that intrinsically evil acts “remain ‘irremediably’ evil acts; per se and in

⁴³Pope John Paul II, *Familiaris consortio*, n. 13.

⁴⁴Pope Paul VI, *Humanae vitae*, n. 11.

⁴⁵*Ibid.*, n. 14.

⁴⁶Pope Pius XI, *Casti connubii*, n. 56.

themselves they are not capable of being ordered to God and to the good of the person.⁴⁷

Contraceptive insurance mandates coerce Catholic employers to assist in an action that is contrary to the Church's most fundamental beliefs about the nature of the human being, love, and marriage. Given the gravely evil nature of contraception in Catholic teaching, for Catholic employers to cooperate even remotely in contraception constitutes a substantial moral burden on them. Moreover, not only does the Church cooperate in the gravely evil act of contraception itself, but the gravity of this evil is compounded by the fact that Catholic employers assist in the evil on a wide scale. Because a Catholic employer is an institutional cooperator providing insurance coverage for a multitude of individuals for an indefinite period of time, the impact of the cooperation is proportionately serious. The gravity of the evil of contraception is such that it places a heavy moral burden on those who might have a morally acceptable reason to engage in material cooperation with it. However, this reason cannot be morally legitimate until and unless Catholic employers affected by a contraceptive insurance mandate seek legal exemption from it.

The Moral Necessity of Legal Action

Seeking exemption from compliance with contraceptive insurance mandates is morally obligatory based on the fact that what might otherwise be morally tolerable cooperation in evil should be avoided if reasonably possible. The Catholic moral tradition has always maintained that mediate as well as immediate material cooperation in the evil act of another is in itself morally wrong, that is, considered apart from particular circumstances and simply as assistance to evil. The unintended effect of assisting the evil act of another in material cooperation is in itself wrong because it promotes evil rather than avoids it. This fact is consistent with the two moral sources of the principle of cooperation. One source is the natural moral law, which obligates us to pursue and do good and avoid evil. The principle of cooperation is a guide for avoiding evil to the extent possible given the circumstances under which one acts. The avoidance of evil is not something to which we are only partly obligated if complete avoidance is reasonably possible. The other source from which the principle of cooperation is derived is the virtue of charity or love. The Church teaches that our relations with our neighbors ought to be governed by charity.⁴⁸ Cooperation in evil is regarded in the Catholic moral tradition as contrary to the obligations of love for neighbor because charity obliges one to help others be virtuous and to use "fraternal correction," and not to assist in their evil.⁴⁹ Thus, the principle of cooperation was developed as a measure to avoid evil and approximate the obligations of charity in the particular circumstances of action. The whole prin-

⁴⁷Pope John Paul II, *Veritatis splendor, The Splendor of Truth*, n. 81, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html.

⁴⁸See *Catechism of the Catholic Church*, nn. 1822–1829.

⁴⁹*Ibid.*, n. 1829.

ciple is premised on the fact that assistance in the evil of another is contrary to what our relations with others should be.

The manualists in Catholic moral theology held that material cooperation per se was morally evil. That is, considered precisely as assistance to an evil act of another person or institution (which is contrary to love of neighbor), and preceding from all mitigating factors, material cooperation in evil is wrong. St. Alphonsus Liguori, the modern architect of the principle of cooperation, regarded cooperation in evil as contrary to charity.⁵⁰ Later manuals of moral theology consistently identified material cooperation as immoral just insofar as it assists evil. Providing texts from the manualists in which this point is made is instructive: “Material cooperation, in itself, is sinful; for charity commands that one strive to prevent the sin of another, and much more therefore does it forbid one to help in the sin of another. Material cooperation, in case of great necessity, is not sinful.”⁵¹ “Cooperatio consideranda est prout adversatur caritati” (cooperation is to be considered contrary to charity).⁵² “Cooperatio materialis per se quidem illicita est, quandoque autem, ubi adsunt requisitae condiciones, licita evadit” (material cooperation per se is indeed illicit, when however the requisite conditions are present, it proceeds licitly).⁵³ “Cooperatio ad malum generatim est illicita quia est causam ponere effectus mali” (cooperation in evil is generally illicit because it causes bad effects to be posited). “Cooperatio mediate mere materialis, licet non semper et necessario, tamen per se et ordinario est illicita” (merely mediate material cooperation, per se and ordinarily, is illicit, though not always).⁵⁴ “Materialis cooperation ipsa per se illicita est” (material cooperation itself is per se illicit).⁵⁵ “Cooperatio materialis ad peccatum alterius per se est illicita; per accidens, ex justa scil. et proportionate causa, licita evadit” (material cooperation in the sin of another is per se illicit; *per accidens*, from a just and proportionate cause, it proceeds licitly).⁵⁶

These texts from the classic manuals of Catholic moral theology indicate that the evil of material cooperation lies in the effect, not in the act of the cooperator, which act is appropriated by the principal agent for immoral purposes. An act of cooperation in evil is intelligible according to a multiplicity of aspects. One aspect is its effect of assisting in evil. This aspect remains an integral component of cooperation irrespective of the fact that cooperation may be morally tolerable on other grounds. Another aspect incorporates the circumstances under which the cooperator acts, including the reason for cooperating. This aspect forms the basis for toler-

⁵⁰Liguori, *Theologia Moral*.

⁵¹McHugh and Callan, *Moral Theology*, 620 n. 1514.

⁵²Noldin, *Summa Theologiae Moral*, 129 n. 116. I am grateful to my colleague, Germain Kopaczynski, O.F.M. Conv., for his assistance with the English translations of the Latin quotations.

⁵³*Ibid.*, 130 n. 118.

⁵⁴Merkelbach, *Theologia Moral*, 400 n. 489.

⁵⁵Vermeersch, *Theologiae Moral*, 92 n. 132.

⁵⁶Aertnys and Damen, *Theologia Moral*, 330 n. 399.

ating the assistance in evil. The principle of cooperation is a guide to determine what types of assistance in evil are never morally tolerable and what types are sometimes tolerable depending upon the circumstances. Proper use of the principle is meant to demonstrate the reasons why assistance in evil may be morally permitted or not, but this does not negate the reality of the cooperator's assistance in evil.

Due to the bad effects of assisting in evil and acting contrary to charity, the moral presumption is to avoid mediate material cooperation, if that can be reasonably achieved. This presumption is also evident from the fact that the principle of cooperation has been regarded in the Catholic moral tradition as an application of the principle of the double effect to the cooperator.⁵⁷ A parallel may be drawn between the four conditions of the principle of the double effect and the action and effects of the material cooperator. In order for material cooperation to be morally licit, all of the following conditions must be fulfilled: 1) the cooperator's act, which the principal agent appropriates, must be itself morally good or indifferent; 2) the cooperator must intend a good effect and cannot intend the bad effect of assisting the principal agent's evil act; 3) the good effect of the cooperator's act is achieved only together with the bad effect, but not by means of the bad effect (the principal agent is the primary cause of the evil act); and 4) the cooperator preserves a good or avoids an evil proportionate to the bad effect.

Condition three is particularly relevant for the claim that Catholic institutions are morally compelled to seek legal exemptions from contraceptive insurance mandates in order for any material cooperation to be licit. If the good effect can be obtained without the bad effect of assisting in the evil of another, then the third condition is violated and licit material cooperation is not achievable. Thus, this condition of the principle of the double effect, as applied to cooperation, presumes that all reasonable means of avoiding the cooperation have been attempted and that there is no reasonable way in which assistance in evil (and acting contrary to charity) can be avoided. The burden on the religious beliefs of Catholic institutions posed by compliance with a contraceptive insurance mandate is so great that the only possibility of licit cooperation is if all other alternatives to achieving the good that health insurance otherwise provides have been exhausted. This includes pursuing legal relief through an exemption from the law.

This moral tradition regarding the status of material cooperation in evil is reflected in the teaching of Pope John Paul II. In his encyclical *Evangelium vitae*, Pope John Paul II recognized that it is never morally preferable to cooperate in evil:

The passing of unjust laws often raises difficult problems of conscience for morally upright people with regard to the issue of cooperation, since they have a right to demand not to be forced to take part in morally evil actions....

To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right.⁵⁸

⁵⁷See Liguori, *Theologia Moralis*.

⁵⁸Pope John Paul II, *Evangelium vitae*, n. 74.

It does not make sense to advocate for this right unless cooperation in the evil of another, including what might be morally tolerable cooperation, is immoral, considered in itself, as assistance to evil. Indeed, in the case of elected officials' support of abortion laws, the Holy Father points out that licit support for these unjust laws is possible only "when it is not possible to overturn or completely abrogate a pro-abortion law," and only when one's opposition to them is clear and one supports proposals to limit the harm of these laws.⁵⁹ The general import of this teaching for morally tolerable cooperation in evil is threefold: 1) in itself and apart from mitigating circumstances, such cooperation is immoral; 2) there is a moral duty to avoid any cooperation in evil, formal or material; and 3) points one and two are confirmed by the fact that an act that results in cooperation with evil can be morally tolerated only if the refusal to cooperate cannot reasonably be achieved.

An analogy may also be drawn between the teaching of *Evangelium vitae* on support for abortion laws and the necessity of seeking legal exemption from contraceptive insurance mandates. The pope's conditions for supporting an abortion law presume that all reasonable attempts to overturn the legality of abortion have failed. Similarly, compliance with what the Church regards as an unjust contraception mandate is considered morally licit according to the same teaching if, and only if, legal remedies have been pursued and have failed and continue to be pursued.

The weight of the burden for the compliant employer is also demonstrated by the proportionately grave reasons for cooperating. A material cooperator may suffer the burden of assisting in evil only for a proportionate reason. Therefore, the more substantial the reason for cooperating, the more any assistance in the evil of another represents a substantial burden on the moral agency of the person or institution. The proportionate reasons of the Catholic employer for cooperating with a contraceptive insurance mandate are these: preserving the great goods of facilitating health care for employees; ensuring the continuance of the employer's work and Catholic mission; and avoiding the grave evil of losing these goods. The burden of the compliant employer must be substantial if such great goods and grave evils are at stake. The fact that the reasons for cooperating are highly important indicates that a substantial burden is placed on the employer.

The fact that compliance with contraceptive insurance mandates in the manner recommended above is licit remote mediate material cooperation does not morally excuse Catholic employers from seeking legal relief that exempts them from compliance. That a Catholic employer may licitly cooperate with a contraceptive insurance mandate according to the Catholic principle of cooperation in evil does not contradict or eliminate the fact that this cooperation nevertheless represents a serious moral burden according to Catholic moral tradition and teaching. The burden lies in the employer's assistance in what Catholic teaching regards as the grave evil of contraception. Thus, the evil effects of the Catholic employer's cooperation could be morally tolerated in this case by an application of the principle of cooperation if, and only if, all reasonable measures have been taken to avoid cooperation. This

⁵⁹Ibid., n. 73.

essential condition for cooperation, which is rooted in Catholic teaching, is fulfilled by seeking a legal remedy that exempts affected Catholic employers from complying with the contraceptive insurance mandate.

Theological Scandal and Contraceptive Mandates

An added burden upon the religious beliefs of Catholic employers that is posed by contraceptive insurance mandates is the potential for theological scandal. This burden may be incurred even if all the conditions for licit material cooperation have been met. Consider what the *Ethical and Religious Directives for Catholic Health Care Services* and the *Catechism of the Catholic Church* say regarding scandal:

The possibility of scandal must be considered when applying the principles governing cooperation. Cooperation, which in all other respects is morally licit, may need to be refused because of the scandal that might be caused. Scandal can sometimes be avoided by an appropriate explanation of what is in fact being done at the health-care facility under Catholic auspices. The diocesan bishop has final responsibility for assessing and addressing issues of scandal, considering not only the circumstances in his local diocese but also the regional and national implications of his decision.⁶⁰

The *Catechism of the Catholic Church* defines scandal as

an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor's tempter. He damages virtue and integrity; he may even draw his brother into spiritual death. Scandal is a grave offense if by deed or omission another is deliberately led into a grave offense.

Scandal takes on a particular gravity by reason of the authority of those who cause it or the weakness of those who are scandalized.... Scandal is grave when given by those who by nature or office are obliged to teach and educate others.

Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged.⁶¹

Knowing what the different types of scandal are is important for the successful avoidance of scandal.

The texts from the *Catechism* recognize what the Catholic moral tradition has identified as "active" and "passive" scandal. Scandal can be actively caused either directly with an intention to cause scandal or, if not with an intention, then indirectly by the fact of the nature of the act in question, e.g., by publicly sinning, or by doing something which has the appearance of evil.⁶² The *Catechism* also implies what is known as "passive scandal," which is caused accidentally and proceeds from weakness or ignorance on the part of the one scandalized. St. Thomas Aquinas points out that the works of mercy should not be omitted to avoid this sort of scandal, but

⁶⁰USCCB, *Ethical and Religious Directives*, directive 71.

⁶¹*Catechism of the Catholic Church*, nn. 2284, 2285, and 2287.

⁶²See Thomas Aquinas, *Summa theologiae*, II-II, Q. 43.

rather should be deferred until such time that the matter can be explained and the scandal ceases.⁶³

The *Catechism* also mentions the “scandal of the Pharisees.”⁶⁴ St. Thomas explains that this sort of scandal proceeds from malice and is taken by those who wish “to hinder ... spiritual goods by stirring up scandal.”⁶⁵ Because it arises from malice, there is no obligation to remedy a pharisaic scandal in the same way that passive scandal due to ignorance ought to be resolved.

A Catholic employer who complies with a contraceptive insurance mandate under the conditions suggested above does not intend to cause scandal and does not publicly commit a sin or do something that has the appearance of evil. Providing health-care insurance under a contraceptive insurance mandate does not have the appearance of evil. If any scandal is possible, it is passive scandal which is “taken” by those who through some weakness or from ignorance might be led to sin by the actions of a Catholic employer. These individuals might confuse the actions of a Catholic employer as approval of contraception by the Catholic Church, and engage in contraceptive acts which they would not have otherwise done if the employer did not comply with the mandate. This potential scandal might be rectified if the bishops and affected Catholic employers provide appropriate explanations of the facts and the moral reasons justifying the cooperation.

However, it is within the pastoral authority of the bishops alone to determine the potential for scandal. It is entirely reasonable, considering all of the circumstances, for a bishop to judge that theological scandal is insurmountable. The potential for scandal is an added burden upon the religious beliefs of Catholic employers that could be cited in any legal action brought by these employers to obtain exemption from contraceptive insurance mandates.

Necessity to Seek Relief

Until and unless all reasonable attempts to obtain a legal exemption from a contraceptive insurance mandate have been exhausted, a Catholic employer affected by the mandate may not morally cooperate in contraception in order to comply with the law. The possibility of morally licit cooperation does not in any way release affected Catholic employers from the moral obligation to seek legal relief from contraceptive insurance mandates. This is due to the substantial moral burden that employers suffer by complying with such laws, and the requirements of Catholic moral teaching and tradition regarding cooperation in evil. If attempts at a legal remedy fail, there continues to be a moral obligation to pursue a legal remedy. This obligation is operative during any period of morally tolerable cooperation in contraception that results from compliance with the contraceptive insurance mandate.

Should all reasonable attempts to obtain a legal remedy fail, a Catholic employer may morally comply with a contraceptive insurance mandate if, and only if,

⁶³*Ibid.*, II-II, Q. 43.7 and reply 4. In some cases works of mercy should not be deferred.

⁶⁴*Catechism of the Catholic Church*, n. 2285.

⁶⁵Aquinas, *Summa theologiae*, II-II, Q. 43.7.

disclaimer language of the sort recommended above is included in any contract with a health insurance carrier and in any of the employer's health-plan literature. This measure avoids formal cooperation because it includes appropriate statements conveying the point that coverage for contraception is provided only by reason of the legal requirements of the contraceptive insurance mandate. Due to this disclaimer, and for other reasons argued here, the Catholic employer who complies with the law in the manner recommended engages in licit remote mediate material cooperation. This analysis and conclusion also apply to a private business which is not a "church or qualified church-controlled organization," but whose owner has the same moral or religious objections to the law. Finally, the potential for scandal may, in the end, be insuperable and should be assessed by the bishop.