

The HHS Mandate: A Question of Religious Freedom or the Life Issues?

Peter J. Colosi

ABSTRACT: This article will discuss (1) the approach of the U.S. bishops toward the HHS Mandate, while respectfully noting a certain oversight in their approach; (2) some reasons not often mentioned for which the Obama Administration enacted the HHS mandate; and (3) some ideas on how most wisely to approach the question of contraception in the midst of the fight for religious freedom. Originally written in 2012, this article has a new preface that outlines important developments in the years between 2012 and 2015 and that explains the importance of understanding where we were at that time.

THIS ARTICLE WAS ORIGINALLY WRITTEN in 2012 as a three-part series in *Crisis Magazine Online*¹ as part of that web magazine's participation in the first Fortnight of Freedom called by the U.S. Conference of Catholic Bishops (USCCB).² Later that year it was presented at the twentieth-anniversary conference of the Society of Catholic Social Scientists under the title "The HHS Mandate: A Question of Religious Freedom or the Life Issues?" and it was also presented at the 22nd annual conference of the University Faculty for Life at Brigham Young University (June 1–2, 2012). Much has

¹ This article was originally published as "The HHS Mandate: A Question of Religious Freedom or the Life Issues?" in *The Catholic Social Science Review* 20 (2015): 53–73. It is reprinted here, with minor revisions, with permission. A portion to that paper appeared as a three-part series in *Crisis Magazine* (June 27, June 28, and July 2, 2012) during the first Fortnight of Freedom declared by the USCCB. <http://www.crisismagazine.com/2012/the-hhs-mandate-a-question-of-religious-freedom-or-the-life-issues>; <http://www.crisismagazine.com/2012/the-hhs-mandate-this-is-about-contraception>; <http://www.crisismagazine.com/2012/the-hhs-mandate-what-now-in-light-of-the-supreme-court-ruling>.

² See <http://www.usccb.org/issues-and-action/religious-liberty/fortnight-for-freedom/>.

happened in the meantime on the religious freedom front, some victories and some losses. Two of the most notable victories for religious freedom at the Supreme Court have been: *Hosanna-Tabor v. Equal Employment Opportunity Commission*³ and *Hobby Lobby v. Burwell*.⁴ Another success related to *Hobby Lobby* is the March 9, 2015 Supreme Court decision to vacate “a 7th Circuit judgment against the University of Notre Dame, sending the case back to the lower court with instructions that the 7th Circuit reconsider it in light of the recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*”⁵ There have also been failures related to religious freedom – for example, the decisions *United States v. Windsor*⁶ (DOMA) and *Hollingsworth v. Perry*⁷ (Proposition

³ See <http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc/>.

⁴ The U.S. Supreme Court ruled 5-4 in favor of David and Barbara Green and their family business, *Hobby Lobby*, in their suit against the HHS Mandate. While this is positive, it is nonetheless true that *Hobby Lobby* is in favor of providing coverage for the majority of the contraceptives covered by the HHS Mandate. *Hobby Lobby* was opposed to four life terminating drugs and devices. So, while this represents a victory in the skirmishes for religious freedom, it seems to me that *Hobby Lobby*, which is a retail chain and not the Conference of Catholic Bishops, is not making any anthropological or cultural argument. They were just asserting that they do not want to pay for killing early embryos. So, one could argue that the case is a positive step but does not really help with respect to the cultural question that I am addressing. For the details of the case, see <http://www.hobbylobbycase.com/>.

⁵ Margaret Datiles Watts, “Supreme Court Sends Message to Lower Courts in Notre Dame Case: Pay Attention to Religious Liberty,” Culture of Life Foundation (March 31, 2015), <http://cultureoflife.org/e-brief/supreme-court-sends-message-lower-courts-notre-dame-case-pay-attention-religious-liberty>.

⁶ See <http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/>. The Supreme Court held that “Section 3 of the Defense of Marriage Act is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.”

⁷ See <http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/>. The Supreme Court held: “The proponents of California’s ban on same-sex marriage did not have standing to appeal the district court’s order invalidating the ban.”

8). At the writing of this preface, the Supreme Court has not yet heard the oral arguments concerning four new cases in which “[t]he Court said it would rule on the power of the states to ban same-sex marriages and to refuse to recognize such marriages performed in another state.”⁸ One of the two questions that the Court will hear arguments about is this: “Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?”⁹ If the Court rules that the Fourteenth Amendment does require States to issue marriage licenses to two people of the same sex, that could represent a serious defeat for religious freedom, for ministers and priests may be legally liable under anti-discrimination laws if they refuse to celebrate same-sex weddings.

Many have noted that what is at stake in almost all of the religious freedom cases is an irresolvable conflict between the principle of religious freedom and the tenets of the sexual revolution. In an aptly titled piece Andrew Walker expressed the point well that a society that simultaneously attempts to enact robust religious freedom laws and to maintain the tenets of the sexual revolution is “Willing Incompatible Worlds.”¹⁰ One side must win and one side must lose, for most religions hold views that conflict with the tenets of the sexual revolution. That is the situation on the legal front, but there is a deeper issue, a pastoral issue.

The point of republishing this essay – in slightly revised form – is that I think that from 2012 until now, even though excellent initiatives have arisen, a greater opportunity has been missed, not so much on the legal front as on the evangelization front. In *The Joy of the Gospel* Pope Francis recalled the work of the Synod of Bishops (October 7-28, 2012) that dealt with the theme “The New Evangelization for the Transmission

⁸ Lyle Denniston, “Court will rule on same-sex marriage” (Jan. 16, 2015), <http://www.scotusblog.com/2015/01/court-will-rule-on-same-sex-marriage/>.

⁹ See http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf. The oral arguments were to be heard April 28, 2015, with a decision set to follow sometime in June 2015.

¹⁰ Andrew Walker, “Willing Incompatible Worlds,” *First Things* online (Mar. 30, 2015), <http://www.firstthings.com/blogs/firstthoughts/2015/03/willing-incompatible-worlds>.

of the Christian Faith”: “The Synod re-affirmed that the new evangelization is a summons addressed to all and that it is carried out in three principal settings.” The second of these settings is “that of ‘the baptized whose lives do not reflect the demands of Baptism.’ ... The Church, in her maternal concern, tries to help them experience a conversion which will restore the joy of faith to their hearts and inspire a commitment to the Gospel.”¹¹

We can find a striking illustration of Pope Francis’s point in a new study of millennials by the Public Religion Research Institute. This report found that what millennials are deeply seeking is love, support, and companionship. Yet the study also found that seventy-one percent of millennials consider contraception morally acceptable. When broken down by religious and ethnic groups, the data shows that seventy-two percent of white Catholics and seventy-four percent of Hispanic Catholics said that “safe sex and contraception is more effective than abstinence.”¹² Those statistics and the desire for love, support, and companionship point to the presence of an inner contradiction that millennials do not perceive within their lives. As *Humanae Vitae* says, “[M]an cannot attain that true happiness for which he yearns with all the strength of his spirit, unless he keeps the laws that the Most High God has engraved in his very nature. These laws must be wisely and lovingly observed.”¹³ It is not possible for the faithful to wisely and lovingly observe the truth unless they understand its goodness and beauty.

Most people know that the Catholic Church prohibits various types

¹¹ Pope Francis, *The Joy of the Gospel* §14-15 (italics in original): http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html#_ftnref12.

¹² See Carol Zimmermann, “New survey shows millennials’ attitudes about contraception, abortion,” Catholic News Service (Mar. 30, 2015), http://catholicphilly.com/2015/03/news/national-news/new-survey-shows-millennials-attitudes-about-contraception-abortion/?utm_source=CatholicPhilly+Newsletter&utm_campaign=ccd5c8b7a9-Newsletter_vol_3_no_63+03-31-15&utm_medium=email&utm_term=0_e0d5b43f94ccd5c8b7a9-96039453.

¹³ *Humanae Vitae* §31. http://w2.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

of action. In *Veritatis Splendor*, St. Pope John Paul II makes a somewhat surprising statement that exhibits a striking humility on the part of the Church:

While recognizing the possible limitations of the human arguments employed by the Magisterium, moral theologians are called to develop a deeper understanding of the reasons underlying its teachings and to expound the validity and obligatory nature of the precepts it proposes, demonstrating their connection with one another and their relation with man's ultimate end.... Working together in cooperation with the hierarchical Magisterium, theologians will be deeply concerned to clarify ever more fully the biblical foundations, the ethical significance and the anthropological concerns which underlie the moral doctrine and the vision of man set forth by the Church.¹⁴

I would express the relationship this way: God has given us an amazing gift in the Magisterium because we can get the right answer in the form of a straightforward yes or no on certain difficult moral questions. But after we receive the answer, there remains the need for faithful obedience. There is also the task of bringing to light for people those underlying anthropological truths that can enable the faithful to embrace the moral call and challenge with a joyful effort because we see for ourselves its link to genuine happiness in our lives and relationships.¹⁵ Since the 1960s, much work has been accomplished in this area, but knowledge of these truths remains to be transmitted to the faithful. It is one thing to identify various moral prohibitions and to ask civil

¹⁴ *Veritatis splendor* §110.

¹⁵ In the conclusion of its 1987 document *Donum Vitae*, dealing with moral questions related to beginning of life issues, the Magisterium makes this point explicit: "The precise indications which are offered in the present Instruction are not meant to halt the effort of reflection but rather to give it renewed impulse.... [T]he Congregation for the Doctrine of the Faith addresses an invitation with confidence and encouragement to theologians, and above all to moralists, that they study more deeply and make ever more accessible to the faithful the contents of the teaching of the Church's Magisterium in the light of a valid anthropology in the matter of sexuality and marriage and in the context of the necessary interdisciplinary approach. Thus they will make it possible to understand ever more clearly the reasons for and the validity of this teaching."

authorities not to be required to participate in them. But to do that is not yet to offer pastoral care or personal concern. Pastoral care and personal concern take great effort, and unless that effort is forthcoming, the legal demands will not make sense to many people.

If we are going to win these cases before the law, we need lawyers like those at the Becket Fund for Religious Freedom and others leading the way. But if we are not also simultaneously re-catechizing the faithful, our efforts on the legal front will fail in the long run. The lawyers have their role, and they are fulfilling it with world-class professionalism and admirable courage.¹⁶ I respectfully submit that the bishops have a different role to play than the lawyers and the politicians. That role is leading and teaching their flocks.¹⁷ The USCCB submitted an *amicus curiae* brief to the U.S. Supreme Court for its April 28, 2015 hearing.¹⁸ It is very well-done and I applaud it. But with utmost respect, I urge them to develop a thorough plan to teach the faithful the truth at a parish level in a way that they can experience its goodness. If the faithful do not understand for themselves the teachings of the Church and come to embrace those teachings out of a conviction about their goodness, then no Fortnight of Freedom will be able to motivate people to defend a notion of religious freedom if the teachings of their Church seem to them to contradict their lived experience. People of today yearn for an abiding happiness and for true love, but they need a Church with the courage and an overall plan to teach them how to achieve that.

¹⁶ Yet, I sometimes wonder whether even on the legal front there is not a problematic dimension such that truth is considered irrelevant in favor of a weak notion of freedom.

¹⁷ One recent example of that is the pastoral letter of Bishop David D. Kagan of Bismarck ND, entitled “And The Two Shall Become One.” See “Bishop: Marriage sacrament allows man and woman to carry out God’s will,” Catholic News Service (Mar. 30, 2015), <http://catholicphilly.com/2015/03/news/national-news/bishop-marriage-sacrament-allows-man-and-woman-to-carry-out-gods-will/>. The document is excellent, though most lay Catholics do not read such documents, and so the implementation of a plan to transmit its content to those in the pews would be a good next step.

¹⁸ See <http://www.usccb.org/about/general-counsel/amicus-briefs/upload/Obergefell-v-Hodges.pdf>.

This article presents a picture of the situation as it was in 2012. It means to express gratitude and admiration for the unified front offered by the bishops against the HHS Mandate. But it also points out a problem in that approach and offers a suggestion.¹⁹ Perhaps it can be helpful to look again at where we were a few short years ago and to compare that to where we are now. Much time has been lost, but it is not too late.

What the Fight *Is* and *Is Not* About

It is wonderful to see the unity, work, and leadership of the bishops in the fight for religious freedom. We should both thank God for them and join with them in their focused attention on the wrongheaded principles that they identify as built into the HHS mandate: (1) an unwarranted government definition of religion,²⁰ (2) a mandate to act against the teachings of our religion, and (3) a violation of personal civil rights. Regardless of the specific provisions of this mandate in regard to contraception, these general principles violate the nature of freedom and conscience, and they violate the laws and customs of this country.²¹ The

¹⁹ In addition to the proposal suggested below, in the meantime I have been asked by the Archdiocese of Philadelphia Office of Evangelization to write what we are calling “Homily Ideas” once a month from November, 2014 through August 2015 in Preparation for the World Meeting of Families which will be held in Philadelphia in September 2015. The Homily Ideas are posted on the Office of Evangelization webpage and also on the official World Meeting of Families webpage. The Homily Ideas are related to the Catechesis that was prepared especially for this event. These homily ideas are presented respectfully and they cover a number of topics in the general areas of Church teaching on marriage, family, chastity and related topics; they are offered from the perspective of a lay person in the pews, and are available from the author.

²⁰ By this the Bishops mean both that it is beyond the role of a government to define a religion and also that the definition of a “religious employer” given by the government in the HHS Mandate is false. That definition is that religious employer is one who hires and serves primarily members of its own faith. For their development of this two part meaning of “unwarranted government definition of religion,” see <http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm>.

²¹ U.S. Conference of Catholic Bishops, Administrative Committee,

same thing would be true if the government had begun its attack on religious freedom by forcing the Amish to participate in car sales in ways that violated their beliefs. To isolate and name such erroneous principles is necessary and the bishops have done this in a way that seems unprecedented in our recent history.

The emphasis on identifying such principles within the mandate has led to many statements asserting what the fight is *not* about. This too, the bishops have stated:

This is *not* about access to contraception, which is ubiquitous and inexpensive, even when it is not provided by the Church's hand and with the Church's funds. This is *not* about the religious freedom of Catholics only, but also of those who recognize that their cherished beliefs may be next on the block. This is *not* about the bishops' somehow "banning contraception," when the U.S. Supreme Court took that issue off the table two generations ago. Indeed, this is *not* about the Church wanting to force anybody to do anything; it is instead about the federal government forcing the Church – consisting of its faithful and all but a few of its institutions – to act against Church teachings. This is *not* a matter of opposition to universal healthcare, which has been a concern of the Bishops' Conference since 1919, virtually at its founding.²²

Although the concern that the bishops are raising is not about *access to* contraception in the sense of *banning* it, the moral problem with contraception remains. There are many recent statements by bishops that this fight is not about contraception. For example, in a recent high-profile interview, Cardinal Timothy Dolan stated: "We have to be very vigorous in insisting that this is not about contraception. It's about religious freedom."²³ In a *Wall Street Journal* interview he emphasized the point by stating: "We've grown hoarse saying this is not about

"Statement on Religious Freedom and HHS Mandate" (March 14, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm>.

²² Ibid.

²³ Catholic News Agency, "Cardinal Dolan: We Bishops Will 'Vigorously' Continue Fight Against HHS Mandate," *National Catholic Register* (March 30, 2012): <http://www.ncregister.com/daily-news/cardinal-dolan-we-bishops-will-vigorously-continue-fight-against-hhs-mandate>.

contraception, this is about religious freedom.”²⁴

For the Administration, the issue *is* – even primarily so – about freedom to obtain and use contraception and only secondarily about religious freedom. Now, while it is correct that the Church should not force people to do anything, it does need to teach people its moral doctrine. There is all the difference in the world between forcing and explaining. Pope John Paul II once famously said: “The Church proposes, She imposes nothing.”²⁵ By deliberately trying to focus the discussion exclusively on religious freedom, the proposing of the Good News of the Church’s teaching on matters related to the specific content of the mandate concerning morality (contraception, sterilization, and abortion) is left unaccomplished in settings where it should be addressed in some way.

After reading the bishops’ statement of what this controversy is *not* about, it is perfectly legitimate for a thoughtful reader to ask what those Church teachings are that are in contradiction with the governmental mandate, and whether they are good or bad. To avoid dealing with that question has deleterious effects not only on human relationships but also on this very fight for religious freedom.

Parables and Analogies

Archbishop William Lori of Baltimore is also chairman of the U.S. bishops’ Committee on Religious Liberty. In his testimony before Congress on February 16, 2012, he used what he called “The Parable of the Kosher Deli” to make his point. If the government were beginning its assault on religious freedom by making orthodox Jews participate in serving pork in their delis, any person of good will would easily grasp both the reason why religious freedom should be respected and the

²⁴ James Taranto, “When the Archbishop Met the President,” *Wall Street Journal* (March 31, 2012), <http://online.wsj.com/article/SB10001424052702303816504577311800821270184.html#articleTabs%3Darticle>.

²⁵ Pope John Paul II, encyclical *Redemptoris missio*, On the Permanent Validity of the Church’s Missionary Mandate (1990) §39, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio_en.html.

silliness of not respecting it, for people can easily buy pork (or contraceptives) inexpensively at the grocery store next door.²⁶ This analogy is helpful in that it serves to highlight a very serious general dimension of the dilemma we are currently facing: the complete dismantling of the First Amendment, which would open the door to legal intrusions on religious freedom in many other areas. The parable is also excellent in that it aids in gaining a broad coalition of concerned citizens, many of whom have no qualms about using contraception but share the concern about this very worrisome precedent. Archbishop Lori's parable is a very important part of this fight, and I applaud it.

As a Catholic Christian, I know that the Torah contains various proscriptions that God gave to the Jewish people. The divine directive not to eat pork does not apply to me as a Christian, for Jesus dispensed His followers from it. But since I know the truth about the origin of the command that God gave to the Jews, I have full respect for the obedience to it that many Jewish people want to practice and that they have practiced for millennia. As an American citizen who believes in religious freedom, I also have deep respect for the decision of the Amish to not drive cars, and I understand the rationale behind their choice.

There is, of course, a *difference in kind* between the argumentation that is supportive of the Catholic teaching that using contraception is immoral and the argumentation used in the Amish and Jewish prohibitions on driving and on eating pork. This difference derives from the fact that one can show the immorality of contraception on the basis of the natural moral law and its roots in human nature. Perhaps in a brief congressional testimony, it was wise for Archbishop Lori to develop the analogy only as far as he did. Strictly speaking, however, Archbishop Lori's parable does not provide a telling argument against the position of those who are not swayed by religious claims and who hold that there is a moral imperative to "reproductive rights." If you asked the authors of the HHS mandate whether they think Orthodox Jews are being

²⁶ Keith Fournier, "The Parable of the Kosher Deli: Bishop Lori Before Congress Defending Religious Liberty," *Catholic Online* (February 21, 2012), http://www.catholic.org/national/national_story.php?id=44808.

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immoral in not allowing their people to eat pork, or whether they think the Amish are *immoral* in not teaching their children to drive cars, they would likely say, “No, those things are not immoral.” They do, however, think that the Catholic Church is committing an *immoral, irrational, and inhuman* act – indeed, an *abuse* against women – in morally prohibiting contraception. To leave that charge unaddressed is to tacitly imply that it is accurate.

Warning about Future Ramifications

Another approach is that taken by the late Cardinal Francis George of Chicago, who wrote:

If you haven’t already purchased the Archdiocesan Directory for 2012, I would suggest you get one as a souvenir. On page L-3, there is a complete list of Catholic hospitals and healthcare institutions in Cook and Lake Counties. Two Lents from now, unless something changes, that page will be blank.²⁷

Here too I applaud Cardinal George’s letter. Besides accurately foretelling what very well could happen in the near future, it was also supposed to rally the people to get up and do something to prevent hospital closures. I wonder, though, whether without an in-depth and personal awareness of the truth and goodness of Church teaching on morality, most readers of this quote will see it as hyperbole. Explanations must accompany quotations like this, and readers are right to look for them. Cardinal George also wrote: “I expect to die in bed, my successor will die in prison, and his successor will die a martyr in the public square.” In the rest of the passage, often left out in citations of his remarks, he continued, “His successor will pick up the shards of a ruined society and slowly help rebuild civilization, as the Church has done so often in human history.”²⁸ We need to do something similar and rebuild

²⁷ Thomas Cloud, “Cardinal George: Catholic Hospitals Will Be Gone in ‘Two Lents’ Under Obamacare Regulation,” *CNSNews.com* (February 28, 2012), <http://cnsnews.com/news/article/cardinal-george-catholic-hospitals-will-be-gone-two-lents-under-obamacare-regulation>.

²⁸ Francis Cardinal George, “The Wrong Side of History,” *Catholic New*

the public's perception of and knowledge of Church teaching on human sexuality. The most promising place to begin is with our own people in the pews.

Explaining the view that this struggle is not about contraception

In a recent interview about the HHS mandate in *National Review Online*, Archbishop Charles Chaput of Philadelphia was asked about the fact that many Catholics use contraception and support abortion rights. He answered:

That's the wrong question. Plenty of self-described Catholics also commit adultery and cheat on their taxes. That doesn't make them right, and it doesn't make their behaviors "Catholic." The central issue in the HHS-mandate debate isn't contraception. Casting the struggle as a birth-control fight is just a shrewd form of dishonesty. The central issue in the HHS debate is religious liberty. The government doesn't have the right to force religious believers and institutions to violate their religious convictions. But that's exactly what the White House is doing.²⁹

This answer thus adds another important dimension to the complexity of the debate. The Archbishop is saying that the Administration is trying to focus the public discussion on contraception but that this tactic is a form of dishonesty, for the controversy is really about religious freedom. He is correct to point this out, for the Administration *is* trying to focus the fight on contraception with the specific purpose of making the opponents of the mandate seem out of touch with contemporary people and thereby to deflect attention from the danger posed by efforts to dismantle the First Amendment. I agree with that aspect of his answer, and it is very important that the wider public understand it.

Yet, there is an irony in this tactic, for the Administration really does see the controversy as primarily about access to abortion,

World (October 21, 2012), <http://www.catholicnewworld.com/cnwonline/2012/1021/cardinal.aspx>.

²⁹ Kathryn Jean Lopez, "Ring a Bell for Liberty," *National Review Online* (April 2, 2012), <http://www.nationalreview.com/articles/294990/ringing-bell-liberty-interview>.

sterilization, and contraception. Their willingness to attack religious freedom arises from embracing it as a powerful means to achieve their real goal, since many religions oppose the mandate's coverage of one or more of these practices. Thus, asking about the fact that many Catholics use contraception is a legitimate one, and not, strictly speaking, the wrong question. This widespread and well-known discrepancy between Catholic practice and Catholic teaching is one key foundation for the success of the Administration's approach and it also constitutes a genuine obstacle to the success of our side in this particular battle for religious freedom. We must begin to address it directly.

The relation between religious freedom and the content of the mandate

What I am about to say should not be understood as a criticism of this important work of unity and speech in the public sphere by the Bishops in defense of religious freedom. Yet, all of the above approaches have in common the complete separation of the threat to religious freedom from the specific content of the mandate itself. This is mistaken from the point of view of truth, and it endangers the success of the fight for religious freedom. The complete separation of these two dimensions contains the following false (but presumably unintended) premise: *that there is no link whatsoever between the specific content of the mandate and the threat to religious freedom that we face because of it.* That is false. There are, in fact, numerous links, and we ignore them at our peril.

The Controversy Is about Contraception

As we all know, there are forces at the highest level of global politics and industry working towards the goal of spreading "reproductive rights." In 1995 in *The Gospel of Life* (§16–17), Pope John Paul II described the situation like this:

The Pharaoh of old, haunted by the presence and increase of the children of Israel, submitted them to every kind of oppression and ordered that every male child born of the Hebrew women was to be killed (cf. Ex. 1:7–22). Today not a few of the powerful of the earth act in the same way. They too are haunted by the current demographic growth, and fear that the most prolific and poorest

peoples represent a threat for the well-being and peace of their own countries. Consequently, rather than wishing to face and solve these serious problems with respect for the dignity of individuals and families and for every person's inviolable right to life, they prefer to promote and impose by whatever means a massive program of birth control....

Aside from intentions, which can be varied and perhaps can seem convincing at times, especially if presented in the name of solidarity, we are in fact faced by an objective "conspiracy against life," involving even international institutions, engaged in encouraging and carrying out actual campaigns to make contraception, sterilization, and abortion widely available..., which present recourse to contraception, sterilization, abortion and even euthanasia as a mark of progress and a victory of freedom, while depicting as enemies of freedom and progress those positions which are unreservedly pro-life.³⁰

It is urgent to focus the legal battle on the question of religious freedom in order to secure the protection of the First Amendment and to prevent the flood of future attacks on religious freedom that will occur if this mandate stands. But at the very same time that we are doing this, the government of the U.K. as well as the Bill and Melinda Gates Foundation are hosting a Family Planning Summit in London, whose goal is "to generate unprecedented political commitment and resources from developing countries, donors, the private sector, civil society, and other partners, to meet the family planning needs of women in the world's poorest countries by 2020."³¹ Events like this show us why such absolute statements as "this has nothing to do with contraception, it is exclusively about religious freedom" are inaccurate.

Discerning the View of the Administration

As stated above, I would suggest that one of the primary

³⁰ Pope John Paul II, encyclical *Evangelium vitae* On the Value and Inviolability of Human Life (1995) §16–17, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

³¹ United Kingdom Department for International Development, "Family Planning: UK to Host Summit with Gates Foundation" (March 6, 2012), <http://www.dfid.gov.uk/News/Latest-news/2012/Family-planning-UK-to-host-summit-with-Gates-Foundation/>.

motivations for the mandate is the promotion of “reproductive rights.” The Administration sees an attack on religious freedom as a powerful means to achieve that goal, since many religions oppose one or more of the practices to be covered by the mandate. Consider Kathleen Sebelius’s press release of January 20, 2012. There she said: “I believe this proposal strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services.”³²

In the passage quoted above, John Paul II spoke of an “objective conspiracy against life.” His phrase connotes the idea of people with evil intent trying to sterilize and abort the world into some sort of utopia. Perhaps Sebelius has conscious evil intent, and perhaps she does not – I don’t know. There is another possibility. Some people genuinely believe that contraception, sterilization, and abortion are the way to make the world a better place. They are wrong in this, but they genuinely believe it. If we assume that Sebelius genuinely believes it, then her statement can be read as an attempt to balance two goods. On that assumption, perhaps the following analogy would be an expression of her mind on the matter. Jehovah’s Witnesses believe that blood transfusions are immoral. The conventional wisdom on dealing with that issue is to require the children of Jehovah’s Witnesses who need blood transfusions to receive them, even against their parents’ wishes by means of a court order, but to allow adult Jehovah’s Witnesses to refuse blood transfusions because they are of the age of consent.³³ Now, to people who are not Jehovah’s Witnesses, this practice seems tragic and wrong, but it is allowed. I think that Sebelius sees the Catholic prohibition of contraception as like the Jehovah’s Witnesses’ prohibition of

³² U.S. Department of Health and Human Services, “A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius,” news release (January 20, 2012), <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>.

³³ For a helpful discussion of this situation see, Rev. Albert S. Moraczewski, O.P., “Religious Freedom and Pastoral Care” in *Catholic Health Care Ethics, A Manual for Practitioners*, ed. Edward J. Furton (Philadelphia PA: The National Catholic Bioethics Center, 2009), pp. 247-50 at pp. 249-50.

blood transfusions. Just as society limits to the bare minimum those who can refuse blood transfusions, she wants to limit to the bare minimum those who do not receive free access to FDA-approved contraceptives and abortifacients.

At this juncture, to argue against Secretary Sebelius by saying that contraceptives are already easily accessible and inexpensive simply means that one is ignorant of the importance that the other side puts on “reproductive rights.” They think of contraception and Catholicism in the exact same way as the readers of this article may think of blood transfusions and Jehovah’s Witnesses. In this view, contraception and blood transfusions are simply sources of good health that make the world a better place. Anyone who has a principled opposition to either of those things is odd, if not outright mistaken.

A Stark Contrast concerning Contraception and the Common Good

Thus, the Obama Administration believes that the Catholic position prohibiting contraception is both irrational and immoral, for they see widespread access to contraception as the solution to some of the world’s problems. Pope Benedict XVI, however, writes: “When a society moves towards the denial or suppression of life, it ends up no longer finding the necessary motivation and energy to strive for man’s true good.”³⁴ The contrast could not be starker. We need the leaders of the Church to explain why this statement of Pope Benedict is true.

That explanation will perhaps not be given widespread coverage on television news interviews. But an all-out effort is needed right now to explain it to people in the pews, and this is important for the fight on behalf of religious freedom. Many Catholics have accepted the false premises that contraception is a kind of healthcare and that it promotes the common good. This stance makes it difficult for them to grasp the threat to religious freedom and to join the fight. A recent poll by the

³⁴ Pope Benedict XVI, encyclical *Caritas in veritate* On Integral Human Development in Charity and Truth (2009) §28, http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

Public Religion Research Institute indicated that six in ten Catholics (and 56% of the general public) do not believe that their religious liberty has been threatened by the mandate.³⁵ The same poll found that 55% of Americans and 58% of Catholics agree with this statement: “Employers should be required to provide their employees with healthcare plans that cover contraception and birth control at no cost.”

In this regard, I am struck by Pope Paul VI’s rhetorical question in *Humanae vitae*: “Who will blame a government which in its attempt to resolve the problems affecting an entire country resorts to the same measures as are regarded as lawful by married people in the solution of a particular family difficulty?”³⁶ If everyone thinks that contraception is helpful in their own personal lives, then we have lost any basis on which to blame a government for using it to solve larger problems. That is my main reason for thinking that in *this particular* religious freedom fight, leaving *that false premise* unchallenged undermines our entire effort. And, unless I am reading him wrong, Pope Paul VI thinks so too.

NOW WHAT, AFTER THE SUPREME COURT RULING?

In this section I will (1) comment on the relation between the Supreme Court ruling and the HHS mandate, (2) outline a set of reasons given by Cardinal Dolan about why the bishops are reticent to speak on contraception and offer a comment on each of these reasons, and (3) offer some practical suggestions, many of which bishops, priests, and lay people around the country are already doing.

The Supreme Court Ruling

In light of the June 28, 2012 ruling by the U.S. Supreme Court in the decision upholding the Patient Protection and Affordable Care Act

³⁵ Cathy Lynn Grossman, “Religious Liberty Cry Fails to Rally Catholics, Survey Says,” *USA Today* (March 15, 2012), <http://content.usatoday.com/communities/Religion/post/2012/03/obama-catholic-birth-control-religion/1#.T2H5PnlLMoE>.

³⁶ Pope Paul VI, encyclical *Humanae vitae*, On the Regulation of Birth (1968) §17, http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

(ACA), we must recognize that the term “mandate” is being used to describe two distinct, yet related, legal entities:

(1) The mandate that all Americans must purchase health insurance or else be fined/taxed. This is the mandate upheld by the U.S. Supreme Court that has been part of Obamacare from the beginning. It is known as the linchpin of the law, because financially the law cannot survive without it.

(2) The mandate of Secretary Sebelius that all health-insurance policies include free coverage for contraception, sterilization, and abortion-causing pills. This second mandate was not part of the original law but was added as a later rule. This mandate is of particular concern to the bishops and the reason why they initiated the Fortnight for Freedom.

Some argue that the lawsuits filed by Catholic entities against the Executive Branch with respect to the second mandate will be unaffected by the decision of the Supreme Court to uphold the first mandate.³⁷ But the National Catholic Bioethics Center argues that “the Health and Human Services mandate [what I call the second mandate] has come to be woven into the fabric of the ACA as a post-provision.” This suggests that the lawsuits are seriously undermined by the upholding of the entire healthcare law.³⁸

Therefore, there is now even more reason for the Church (bishops, priests, and laity) to speak the truth concerning the specific content of the second mandate. Democracy functions well by means of grass roots activities, and those who constitute these grass roots act only on conviction.

Although legal challenges are very important, the other side is

³⁷ Diocese of Peoria, “Bishop Jenky responds to U.S. Supreme Court ruling,” *Catholic Post* (Peoria), June 24, 2012, <http://www.thecatholicpost.com/post/PostArticle.aspx?ID=2528>. For the current status of the law suits, see the Becket Fund, “HHS Mandate Information Central,” <http://www.becketfund.org/hhsinformationcentral/>.

³⁸ National Catholic Bioethics Center, “NCBC Response to the June 28 Ruling of the U.S. Supreme Court Upholding the Affordable Care Act” (June 28, 2012), <http://www.ncbcenter.org/page.aspx?pid=1263>.

presently in a position to dictate the law.³⁹ But on this issue even legal challenges -- and legal victories, if any come -- are not as important -- even for securing those very victories -- as bearing witness to the truth. Yet, we are not doing that if we exclude discussion of contraception and more broadly “reproductive rights.” It may seem a long shot to shut down the contraceptive industry by means of convincing people to stop purchasing contraceptives out of a deep understanding of the goodness of the truth about conjugal relations, but that is what the Church is called to do. Furthermore, lacking a critical mass of lay Catholics inspired to live according to Church teaching because they themselves understand its goodness, it will not be possible to garner their support in this fight.

Cardinal Dolan on the Reasons for Silence

In the *Wall Street Journal* interview mentioned above, Cardinal Dolan admitted quite candidly to three reasons why the bishops are silent on questions of contraception and Church teachings on human sexuality: (1) the enormity of the catechetical challenge, (2) the priestly sexual abuse scandal, and (3) the aftermath of *Humanae vitae*.⁴⁰ Here is the first quotation of Cardinal Dolan:

I’m not afraid to admit that we have an internal catechetical challenge – a towering one – in convincing our own people of the moral beauty and coherence of what we teach. That’s a biggie.... We have gotten gun-shy...in speaking with any amount of cogency on chastity and sexual morality.⁴¹

The towering challenge is a lack of catechesis on these matters among the faithful. Yet, people nowadays do have a sense that something is amiss. Many do not have an intellectual understanding concerning why this is so, but their own experience of contraception and related issues has left them aware that it is not the be-all and end-all that they had thought it would be. Maybe they are clinging to it because they do not

³⁹ See n4 above.

⁴⁰ Taranto, “When the Archbishop Met the President.”

⁴¹ *Ibid.*

think that there is an alternative. Perhaps they are afraid of change, or perhaps the wounds and possible guilt that emerges seem too difficult. I can understand the profundity of the pastoral problem, but God is infinite. He desires nothing more than to forgive us, and He can make all things new.

Cardinal Dolan seems to me to imply that this lack of catechesis constitutes a reason for which Church spokespersons, when asked about that teaching, keep saying that this is not about contraception. But I do not see when the opportune moment might be other than now. There was just such a towering catechetical challenge in 1968, and in *Humanae vitae* §30 Pope Paul VI (speaking to his fellow bishops) wrote:

We invite all of you, We implore you, to give a lead to your priests...and to the faithful of your dioceses, and to devote yourselves with all zeal and without delay to safeguarding the holiness of marriage.... Consider this mission as one of your most urgent responsibilities at the present time. As you well know, it calls for concerted pastoral action in every field of human diligence: economic, cultural, and social.⁴²

The urgency of that summons was due to the ripeness of the teaching moment. This moment right now is a reincarnation of 1968 in the sense that in both cases the whole world had – and now again has – its ears perked up concerning Catholicism and contraception. The first time there was deafening silence from the pulpit, and in two ways I think that was understandable: *I do not think they knew how to explain it*, and *I do not think people wanted to hear it*. Things are very different now. We now know more, and now we can better explain the teaching. It is like that old saying, “if I only knew then what I know now....” How often in life is any of us given a second chance like this? Additionally, people are now thirsting for this teaching. Consider Jennifer Fulwiler’s heartening account of a priest who recently gave a homily on contraception. After a few moments of pregnant silence the congregation erupted in applause.⁴³

⁴² Paul VI, *Humanae vitae* §30.

⁴³ Jennifer Fulwiler, “Father, We’re Ready for that Homily on

The second reason that Cardinal Dolan gives for the current silence of the bishops is the priestly sexual abuse scandal:

[It] intensified our laryngitis over speaking about issues of chastity and sexual morality, because we almost thought, “I’ll blush if I do.... After what some priests and some bishops, albeit a tiny minority, have done, how will I have any credibility in speaking on that?”⁴⁴

To this I would respectfully submit that for those bishops and other Church spokespersons who are not among the tiny minority of those who have committed these crimes, this scandal does not constitute a reason to remain silent on these matters; quite to the contrary.

In addition, the saints of old sought out humiliations as a source of holiness. Perhaps some humiliations will come if the bishops begin to teach on these matters, but one must be careful not to let the fear of such humiliations function as an excuse to avoid speaking the truth “in season and out of season” (2 Tim. 4:2).

With great candor, Cardinal Dolan also offered a third reason for the silence of the bishops when he says that *Humanae vitae*:

brought such a tsunami of dissent, departure, disapproval of the Church, that I think most of us – and I’m using the first-person plural intentionally, including myself – kind of subconsciously said, “Whoa. We’d better never talk about that, because it’s just too hot to handle.” We forfeited the chance to be a coherent moral voice when it comes to one of the more burning issues of the day.⁴⁵

The Cardinal casts this reason in the past tense. There may have been some understandable reasons forty years ago for a reticence to speak, but now there are many reasons to speak with confidence. Pope John Paul II thematized his papacy with the words “Do not be afraid,” and now is the time to apply those words to this topic.

Contraception Now,” *National Catholic Register* (February 22, 2012), <http://www.ncregister.com/blog/jennifer-fulwiler/father-were-ready-for-that-homily-on-contraception-now>.

⁴⁴ Taranto, “When the Archbishop Met the President.”

⁴⁵ Ibid.

Some Practical Suggestions

Consider this argument of the Administration when presenting its “accommodation”:

[I]f a woman’s employer is a charity or a hospital that has a religious objection to providing contraceptive services as part of their health plan, the insurance company – not the hospital, not the charity – will be required to reach out and offer the woman contraceptive care free of charge, without co-pays and without hassles.⁴⁶

This carefully crafted statement implies that the religious objection represents the opposite of “reaching out” and “offering care” and is therefore immoral. It also clearly suggests a lack of charity in the religious objection by mentioning “hassles,” which are deemed irrational, as is the rejection of free “contraceptive care.”

Statements like that should not be left unchallenged. According to Catholic social teaching, the State *does* have a role to regulate society.⁴⁷ To take an extreme example, if there were a religion carrying out human sacrifices, the State would be playing its rightful role in stopping that practice and legislating against it. And so, rather than standing by and silently allowing the false premises in the above statement to sink into the minds of those who hear it, those premises must be exposed, debunked, and replaced with the truth. Otherwise the public will think that the State is playing its proper role of regulation with the HHS mandate.

The three false premises are: (1) that contraception is healthcare, (2) that contraception is good for society, and (3) that to oppose contraception is immoral. The Church (bishops, priests and laity) should proclaim with confidence and joy the many dimensions of the good news

⁴⁶ White House, Office of the Press Secretary, “Remarks by the President on Preventive Care” (February 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>.

⁴⁷ See *Compendium of the Social Doctrine of the Church* (2006) §351–55 and §393–98, http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

of Church teaching on love and procreation: the blessings of children, responsible parenthood and NFP,⁴⁸ the benefits of waiting until marriage,⁴⁹ and the Catholic view of the goodness of the body.⁵⁰ We should point out the many risks that contraception poses to relationships,⁵¹ health,⁵² the common good,⁵³ and respect for women.⁵⁴ Also, there is an under-reported epidemic of the human papillomavirus (HPV), particularly among young girls, against which the Pill does nothing.⁵⁵

⁴⁸ FertilityCare, Philadelphia, <http://www.fertilitycarefriends.org/>.

⁴⁹ Bridget Maher, "Why Wait: The Benefits of Abstinence until Marriage," Family Research Council (February 15, 2006), <http://www.freerepublic.com/focus/f-chat/1589051/posts>.

⁵⁰ Peter J. Colosi, "Christian Personalism and Theology of the Body" (April 18, 2012), <http://peterjcolosi.com/christian-personalism-and-theology-of-the-body/>.

⁵¹ Janet E. Smith, "Contraception: Why Not?" (2005), <http://www.catholiceducation.org/en/controversy/common-misconceptions/contraception-why-not.html> and <http://www.catholiceducation.org/en/controversy/contraception/contraception-why-not-revised.html>.

⁵² Maricela P. Moffitt, M.D., Mary Keen, M.D., Rebecca Peck, M.D., Kathleen M. Raviele, M.D., Laura G. Reilly, M.D., "CMA Women Physicians Respond to Women Senators' Column" (February 22, 2012), http://www.athmed.org/issues_resources/blog/cma_women_physicians_respond_to_women_senators_column/.

⁵³ Mary Eberstadt, "The Vindication of *Humanae Vitae*," *First Things* (August/September 2008), <http://www.firstthings.com/article/2008/07/002-the-vindication-of-ihumanae-vitaei-28>.

⁵⁴ Valerie Pokorny, "Opinion: Contraception Denigrates Me as a Woman," *CNN* (February 5, 2012), <http://inamerica.blogs.cnn.com/2012/02/15/contraception-denigrates-me-as-a-woman/>.

⁵⁵ The Center for Disease Control and Prevention (CDC) states: "About 79 million Americans are currently infected with HPV. About 14 million people become newly infected each year. HPV is so common that most sexually-active men and women will get at least one type of HPV at some point in their lives." In the FAQ section there is this question: "How can I avoid HPV and the health problems it causes?" For those sexually active, the CDC recommends: getting vaccinated, noting that this can only prevent some of the diseases that result from HPV (it cannot prevent contracting HPV); using condoms, which it admits will not give full protection against contracting HPV; and "Be in a mutually

Something very heartening is that priests and lay people have started speaking on all of these topics, and precisely because of this very debate. One of my favorites is a talk that Gloria Purvis delivered at the Catholic Information Center on February 27, 2012.⁵⁶ I also noticed two recent homilies online, one by Philadelphia priest Fr. Philip Forlano (given on March 4, 2012 at St. Stanislaus in Lansdale)⁵⁷ and the other by Fr. Ben Cameron of the Confraternity of Our Lady of Mercy (in Auburn, Kentucky).⁵⁸ Both of these homilies combined boldness, clarity, and compassion. Tom Hoopes, a layman, gives a moving personal testimony.⁵⁹ There is also a unique website (“1Flesh”) that explains many of the facts in a catchy way, with depth.⁶⁰ I recommend that bishops invite speakers from The Culture Project to their Dioceses.⁶¹ There is also the important, widely used, and easily accessible work of Dr. Janet E. Smith.⁶² Dr. Christopher Tollefsen presents a clear quick-read version of the New Natural Law approach.⁶³ “The Vindication of *Humanae Vitae*” in *First Things* by Mary Eberstadt is a gripping article constituting a sort of definitive proof that Pope Paul VI was right on

monogamous relationship -- or have sex only with someone who only has sex with you.” See, <http://www.cdc.gov/std/HPV/STDFact-HPV.htm#a7>.

⁵⁶ Gloria Purvis, “HHS Mandate Is Anti-Woman: Catholics Need to Speak Up,” video (March 7, 2012), http://www.youtube.com/watch?feature=player_embedded&v=UvoBPVsjdog.

⁵⁷ Katie van Schaijik, “A Priest Lays Out the Wrong of the HHS Mandate” (March 6, 2012), http://www.thepersonalistproject.org/comments/a_priest_explains_the_objection_to_the_hhs_mandate.

⁵⁸ Fathers of Mercy, “Artificial Birth Control,” video (January 6, 2008), <http://www.youtube.com/watch?v=IBjxtXJQXFg&list=UUdLDRDAIpQ10MuyRn0kfNOA&index=17&feature=plcp>.

⁵⁹ Tom Hoopes, “Contraception Opposed Me First,” *Catholicvote.org* (April 2, 2012), <http://www.catholicvote.org/discuss/index.php?p=28627>.

⁶⁰ 1Flesh, “The Problem with Contraception,” <http://www.1flesh.org/category/arguments/>.

⁶¹ See <http://www.restoreculture.com/>.

⁶² Smith, “Contraception: Why Not?”

⁶³ Christopher Tollefsen, “Contraception and Catholicism,” *National Review Online* (February 6, 2012), <http://www.nationalreview.com/articles/291220/contraception-and-catholicism-christopher-tollefsen>.

every count.⁶⁴ And from the medical point of view, there is the work of the Pope Paul VI Institute.⁶⁵ I recommend the book *Love, Marriage & the Catholic Conscience* by Dietrich von Hildebrand.⁶⁶ A video of my own modest attempt at explaining this teaching from the perspective of personalism and *Theology of the Body* is also available.⁶⁷

Pope Paul VI was right when he said: “We believe that our contemporaries are particularly capable of seeing that this teaching is in harmony with human reason.”⁶⁸ Now is the time to explain that harmony. A source of hope in this regard is that many people of today, particularly Catholics in the pews, want to hear this teaching. In the *Wall Street Journal* interview, Taranto reported that Cardinal Dolan “sees a hunger, especially among young adults, for a more authoritative Church voice on sexuality.”⁶⁹ The cardinal is right about this. People today want explanations, and they listen intently. Talks by lay people on these matters are very helpful, yet preaching from the pulpit has great impact too. The best would be if we had both, working together.

In order for a specific truth to have a positive impact on the culture, there has to be a critical mass of people who grasp that truth deeply and live it because of what they grasp. That critical mass does not exist on this teaching, and it needs to be fostered. In addition to his warning, Pope Paul VI also made some positive predictions in *Humanae vitae*:

If simultaneous progress is made in these various fields, then the intimate life of parents and children in the family will be rendered not only more tolerable,

⁶⁴ Eberstadt, “The Vindication of *Humanae Vitae*.”

⁶⁵ Pope Paul VI Institute for the Study of Human Reproduction, Omaha, Nebraska, <http://www.popepaulvi.com/>.

⁶⁶ Dietrich von Hildebrand, *Love, Marriage & the Catholic Conscience: Understanding the Church's Teachings on Birth Control* (Bedford, NH: Sophia Institute Press, 1998), <http://shop.sophiainstitute.com/Search.aspx?k=hildebrand>.

⁶⁷ Start at time marker 6:35 for English. Frei Nuno Allen, “Teologia do Corpo—Conferência de Peter Colosi, PhD, na Universidade Católica Portuguesa,” <http://www.youtube.com/watch?v=6yvnM8UwBcM>.

⁶⁸ Pope Paul VI, *Humanae vitae* §12.

⁶⁹ Taranto, “When the Archbishop Met the President.”

but easier and more joyful. And life together in human society will be enriched with fraternal charity and made more stable with true peace when God's design which He conceived for the world is faithfully followed.⁷⁰

Conclusion

The purpose of this article was to go through the approaches of various bishops to the HHS mandate, to express gratitude and admiration for all of those achievements, and then to point out one important dimension of this complex issue that needs more direct attention. Studying the resources cited above will provide the means to build a case for speaking truth to power about the Catholic teaching on human sexuality, which can be proclaimed with courage and joy.⁷¹

⁷⁰ Pope Paul VI, *Humanae vitae* §30.

⁷¹ This article originally appeared in *The Catholic Social Science Review* 20 (2015): 53-73. It is reprinted here with permission.