

## **RELIGIOUS EMPLOYERS AND STATUTORY PRESCRIPTION CONTRACEPTIVE MANDATES**

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*“There’s a growing consensus in this country that all women should have access to contraceptives because it’s a basic healthcare need.”<sup>1</sup>*

*“[A] civil mandate that a church agency pay in its own workplace for what the church preaches against is one of the most serious invasions of church autonomy imaginable.”<sup>2</sup>*

Over the past decade, at least twenty states have passed laws mandating the coverage of prescription contraceptives for employees.<sup>3</sup> These statutory mandates take the form of insurance law provisions requiring that insurance plans providing any prescription coverage must also provide coverage for prescription contraceptives. That is, the statutes do not actually require that all employers provide employees with contraceptive coverage. Rather, the statutes say that if an employer provides medical benefits to its employees through an

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<sup>1</sup> Alexandra Marks, *Legal Battles Over “Contraceptive Equity,”* CHRISTIAN SCIENCE MONITOR, Dec. 4, 2003, at USA1 (quoting Eve Gartner, senior staff attorney at Planned Parenthood Federation of America).

<sup>2</sup> Brief of Amici Curiae National Religious Organizations, *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 2004 Cal. LEXIS 1667 (Cal. Mar. 1, 2004) (No. S099822), available at <http://www.usccb.org/ogc/amicuscuriae5.htm> (last visited Apr. 4, 2004).

<sup>3</sup> See The Alan Guttmacher Institute, *State Policies in Brief: Insurance Coverage of Contraceptives* (Feb. 1, 2004), available at [http://www.agi-usa.org/pubs/spib\\_ICC.pdf](http://www.agi-usa.org/pubs/spib_ICC.pdf).

insured plan and if the plan provides for any prescription coverage, it must also cover prescription contraceptives.<sup>4</sup>

Some state statutes mandating coverage of prescription contraceptives contain no “conscience clause” excusing churches and other religious employers from complying with the statute.<sup>5</sup> Others do contain some conscience exception for religious employers, but define the term “religious employer” very narrowly. Thus, for example, mandatory prescription contraceptive coverage statutes passed by New York<sup>6</sup> and California<sup>7</sup> define as religious employers, and therefore exempt from the operation of the statute, only entities that meet the following four-part test: (1) the purpose of the organization must be to inculcate religious values; (2) the organization must primarily employ persons of the same faith; (3) the organization must primarily serve persons of the same faith; and (4) the organization must be organized as a non-profit under section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code, rather than section 501(c)(3).<sup>8</sup>

The definition of “religious employer” in statutes like New York’s and California’s is deceiving. It appears to give respect for religion, by carving out from the reach of the statute those

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<sup>4</sup> The reason the laws proceed in this way is that the Employee Retirement Income Security Act (ERISA), the federal statute that regulates most employee benefit plans of private employers preempts state laws relating to employee benefit plans but contains an exception from preemption for state insurance law. 29 U.S.C. § 1144 (2000). This has the effect of forbidding states from imposing direct mandates on an employer to provide certain benefits and of permitting indirect regulation of employer benefit plans that operate through insurance under state law mandates. See *infra* notes 35–39 and accompanying text.

<sup>5</sup> See The Alan Guttmacher Institute, *supra* note 3 (identifying individual states that have no religious exemptions). Congress, which has required coverage of prescription contraceptives in health plans providing benefits to federal employees since 1998, has taken this approach in its proposed legislation to impose on private employers a federal contraceptives coverage mandate. Similar to state laws, the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), first proposed in 1997, would require private health plans to provide equitable coverage for prescription contraceptives. The bill, both as originally introduced in 1997 and as reintroduced in July 2003, contains no religious employer exemption. The bill has been referred to committee in both the House and Senate and is awaiting further consideration. See S. 1396, 108th Cong. (2003).

<sup>6</sup> New York Women’s Health and Wellness Act, N.Y. INS. LAW §§ 3221(16)(A)(1), 4303(cc)(1)(A) (Consol. Supp. 2003).

<sup>7</sup> Women’s Contraception Equity Act, CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering Supp. 2004); CAL. INS. CODE § 10123.196(d)(1) (Deering Supp. 2004).

<sup>8</sup> See *supra* notes 6–7.

employers engaged in certain religious activity. Appearances can be deceiving, however, and as applied to the Catholic religion, the definition of “religious employer” is troubling with respect to this particular issue and for the potentially dangerous precedent it sets for further incursions on religion. The latter makes this a cause for concern regardless of one’s religion or one’s agreement or disagreement with the Catholic Church’s position on contraception.

As applied to the Catholic religion, the four-fold definition of “religious employer” is one that would excuse from the statutory mandate churches themselves, meaning that employees who work in churches, parish rectories, diocesan chanceries, and seminaries would not have to be provided coverage. The definition, however, would fail to exclude from the statute’s coverage entities such as Catholic Charities, Catholic hospitals or nursing homes, or Catholic institutions of higher learning, a fact that has led religious groups in both New York and California to bring litigation challenging the constitutionality of the statutes on First Amendment grounds.<sup>9</sup> In attempting to force such entities to comply with the statutory mandate to provide prescription contraceptive coverage, the statutory definition reflects a fundamental misunderstanding of, and therefore lack of respect for, what it means to be Catholic and what constitutes Catholic religious activity.

First, defining a religious employer as an entity with the primary purpose of inculcating religious values or beliefs misperceives the impossibility for Catholics of separating worship and acts of charity and social justice, ignoring the pervasiveness of the Catholic religious mission. For the Catholic Church, running hospitals, nursing homes, schools, and other social services is not a secular activity, not something separate from or unrelated to its core religious mission.

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<sup>9</sup> See *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 2004 WL 370295 (Cal. Mar. 1, 2004) (rejecting constitutional claims and holding that Catholic Charities must provide contraceptive coverage to its employees); *Catholic Charities of the Diocese of Albany v. Serio*, No. 8229-02 (N.Y. Sup. Ct. Nov. 25, 2003) (granting defendant’s motion for summary judgment and dismissing plaintiffs’ complaint). This essay is not concerned with the constitutional questions raised in these litigations. In view of the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the New York lower court and the California Supreme Courts’ rejection of the plaintiff’s constitutional claims is not surprising.

In the Gospel of Matthew, Jesus defines as the one criterion for choosing who will be blessed in God's kingdom: "I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me."<sup>10</sup> When asked by confused followers when it was that they fed him and cared for him, he responded, "[W]hatever you did for one of these least brothers of mine, you did for me."<sup>11</sup> As theologian Michael Himes explains, "the criterion of judgment has nothing to do with any explicitly religious action. The criterion is not whether we were baptized, or prayed, or read Scripture, or received the Eucharist,"<sup>12</sup> that is, not the things that fall into a narrow view of what constitutes religious activity but rather, caring for those in need.<sup>13</sup>

This teaching of Jesus is one of the basic elements of Catholic social teaching today, expressed in the notion of "the option or love of preference for the poor."<sup>14</sup> In the words of Pope John Paul II:

The many initiatives on behalf of the elderly, the sick and the needy, through nursing homes, hospitals, dispensaries, canteens providing free meals and other social centers are a concrete testimony of the preferential love for the poor which the Church in America nurtures. She does so because of her love for the Lord.<sup>15</sup>

In offering health and other social services, far more than merely satisfying material needs, the Church proclaims the Gospel; it "shows forth God's infinite love for all people and becomes an effective way of communicating the hope of salvation which Christ has brought into the world, a hope which glows in a special way when it is shared with those abandoned or rejected by society."<sup>16</sup>

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<sup>10</sup> *Matthew* 25:35–36 (New American).

<sup>11</sup> *Id.* at 25:40.

<sup>12</sup> MICHAEL J. HIMES, *THE MYSTERY OF FAITH: AN INTRODUCTION TO CATHOLICISM* 9 (2004).

<sup>13</sup> See, e.g., *James* 1:27 ("Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction . . .").

<sup>14</sup> JOHN PAUL II, *ENCYCLICAL LETTER SOLLICITUDO REI SOCIALIS* ¶ 42 (1987). See PAUL VI, *ENCYCLICAL LETTER POPULORUM PROGRESSIO* ¶ 23 (1967).

<sup>15</sup> JOHN PAUL II, *POST-SYNODAL APOSTOLIC EXHORTATION ECCLESIA IN AMERICA* ¶ 18 (Jan. 22, 1999).

<sup>16</sup> *ECCLESIA IN AMERICA*, *supra* note 15.

Thus, when religious organizations care for the elderly or the sick or provide for education, they are performing acts as religious as those that take place inside a church building. This is a fact that has been recognized and respected by the law in other instances, with courts recognizing, for example, that the provision of “outdoor sleeping space for the homeless effectuates a sincerely held religious belief”<sup>17</sup> and that religious activities protected by the Free Exercise clause include “charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor.”<sup>18</sup>

Statutes with narrow definitions of “religious employer” fail to recognize this reality. They are built on a congregational model that sees religious activity as largely confined to a worship hall, that sees religion as fundamentally a private relationship between an individual and God. The problem is that that view of religion sees as secular activity that which under the Catholic faith is part of its core religious mission.

The state’s attempt to force Catholic religious belief and practice into a model not its own raises important issues of Church self-determination. It is for the Church, not the state, to define what the Church is and what its mission is—what it means to be Catholic. For the state to determine that certain activities required by the Church’s faith are not sufficiently religious is to interfere with religion to an unwarranted extent and to attempt to prevent the Catholic faithful from acting in accordance with their faith.

Second, by defining a religious employer by reference to whether it serves and employs only members of its own faith, the statute ignores the evangelization role of the Catholic Church. The Catholic Church and its affiliated entities, just as all Catholics, have an obligation to make Jesus known in the world. Jesus sent his disciples off to make followers of all nations<sup>19</sup> and Catholics are called to do the same. In *Christifideles Laici*,<sup>20</sup> Pope John Paul II wrote:

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<sup>17</sup> Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 575 (2d Cir. 2002).

<sup>18</sup> Espinosa v. Rusk, 634 F.2d 477, 481 (10th Cir. 1980), *aff’d*, 456 U.S. 951 (1982).

<sup>19</sup> See *Matthew 28:19* (New American).

<sup>20</sup> JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *CHRISTIFIDELES LAICI* (Dec. 30, 1988).

The entire mission of the Church, then, is concentrated and manifested in *evangelization*. Through the winding passages of history the Church has made her way under the grace and the command of Jesus Christ: "Go into all the world and preach the gospel to the whole creation. . . and lo, I am with you always, until the close of the age." "To evangelize," writes Paul VI, "is the grace and vocation proper to the Church, her most profound identity."<sup>21</sup>

As the Pope's words make clear, the Church's central and fundamental evangelization vocation requires that Catholics go out into the world among those who do not share its faith to proclaim the Gospel. Given this vocation, one can hardly be surprised to learn that, in fulfilling their religious mission to serve the needy, Catholic institutions both serve and hire non-Catholics. They do so as part of their evangelizing vocation, standing on its head the statutory assumption that an entity can only be a religious employer if it both employs and serves exclusively or even primarily members of its own faith.

There is no ambiguity about the Church's position on contraception. The Catechism of the Catholic Church labels as "intrinsically evil" any "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."<sup>22</sup> In 1930, in his encyclical *Casti Connubii*, Pope Pius XI reaffirmed earlier Church statements that procreation was the primary end of human sexuality and that the use of means to deprive the sexual act of its power of procreating life violates "the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin."<sup>23</sup> Despite recognizing the substantial opposition

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<sup>21</sup> *CHRISTIFIDELES LAICI*, *supra* note 20, ¶ 33 (internal citations omitted); see *ECCLESIA IN AMERICA*, *supra* note 15, ¶ 1 (calling evangelization the "fundamental task" of the Church).

<sup>22</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2370, at 570 (United States Catholic Conference ed., 2d. ed. 1994) (quoting PAUL VI, ENCYCLICAL LETTER *HUMANAE VITAE* ¶ 14 (July 25, 1968)).

<sup>23</sup> PIUS XI, ENCYCLICAL LETTER *CASTI CONNUBII* ¶ 56 (Dec. 31, 1930). Although the Church now speaks of the unitive and procreative aspects of marriage and sexuality as being equally important, thus moving away from the position that human sexuality is primarily procreative, it continues to reaffirm the ban on artificial birth control. See JOHN PAUL II, ENCYCLICAL LETTER *VERITATIS SPLENDOR* ¶ 80 (Aug. 6, 1993) (describing the use of contraceptives as "intrinsically evil"); JOHN PAUL II, APOSTOLIC EXHORTATION *FAMILIARIS CONSORTIO* ¶ 32 (Dec. 15, 1981) (discussing the unitive and procreative aspects of marriage and proscribing

to the Church's teachings on birth control,<sup>24</sup> Pope Paul VI reiterated the position in *Humanae Vitae*, his 1968 encyclical on the regulation of birth, firmly stating that there are certain "insurmountable limits to the possibility of man's domination over his own body and its functions; limits which no man . . . may licitly surpass" and which are expressly imposed because of the "respect due to the integrity of the human organism and its functions."<sup>25</sup> Consistent with these teachings, the Ethical and Religious Directives for Catholic Health Care Services,<sup>26</sup> developed by the National Conference of Catholic Bishops to provide authoritative guidance on moral issues facing Catholic health care,<sup>27</sup> include a provision that Catholic hospitals may not promote or condone contraceptive practices.<sup>28</sup>

Evangelization requires that Catholic institutions act in accordance with their beliefs. From the perspective of a Catholic entity, forcing it to provide contraceptive coverage to its employees forces it to facilitate and pay for what it believes to be morally evil. To argue, as some have, that mandatory contraception coverage statutes do not require religious organizations to endorse contraceptive use, that employers are

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the use of contraception); *HUMANAE VITAE*, *supra* note 22, ¶¶ 12, 14 (describing the fundamental connection between the unitive meaning and the procreative meaning of the conjugal act and declaring "that the direct interruption of the generative process already begun . . . [is] to be absolutely excluded as [a] licit means of regulating birth"); SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS ¶ 10, at 11 (Dec. 29, 1975) (stating that the use of artificial birth control constitutes a "mortal sin").

Recently, a leading Catholic cardinal, Belgian Cardinal Godfried Danneels, suggested that condoms could be used in a situation where one partner in a relationship is HIV positive, drawing a distinction between the use of condoms to prevent conception and the use of condoms to prevent death. See John Hooper & Andrew Osborn, *Cardinal Backs Use of Condoms*, THE GUARDIAN (LONDON), Jan. 13, 2004, at 2; John L. Allen, Jr., *Cardinal Danneels on Condoms*, NAT'L CATHOLIC REP. (Jan. 16, 2004), available at <http://nationalcatholicreporter.org/word/pfw011604.htm>.

<sup>24</sup> *HUMANAE VITAE*, *supra* note 22, ¶ 18.

<sup>25</sup> *HUMANAE VITAE*, *supra* note 22, ¶ 17.

<sup>26</sup> National Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services (4th ed. June 15, 2001) [hereinafter NCCB Directives], available at <http://www.usccb.org/bishops/directives.htm>.

<sup>27</sup> The Directives have a twofold purpose: "[f]irst, to reaffirm the ethical standards of behavior in health care that flow from the Church's teaching about the dignity of the human person; second, to provide authoritative guidance on certain moral issues that face Catholic health care today." *Id.* at Preamble.

<sup>28</sup> *Id.* no. 52.

still free to convey to their employees their moral opposition to the use of the contraceptives the employer is making available,<sup>29</sup> attempts to create a bifurcation that ignores the need to act consistently with belief. Evangelization requires not just conveying moral positions but acting in accordance with them. One evangelizes not merely by what one says but, more importantly, by what one does, by witness as much as by teaching. It is thus necessary that how a Catholic institution acts reflects the Gospel and Christ.

Thus, although the failure of religious employers to cover prescription contraception is framed as an attempt to force others to accept its religious views,<sup>30</sup> from the perspective of a religious entity, forcing it to provide contraceptive coverage to its employees is to force it to participate in sin by forcing it to facilitate sin. As Martin Luther King, Jr. once observed, “noncooperation with evil is as much a moral obligation as is cooperation with good.”<sup>31</sup> Although one is accustomed to thinking of issues of conscience as individual matters, here the issue is of institutional or corporate conscience: the conscience of the Catholic entity. The Catholic Church is committed to the view that artificial contraceptives are a moral evil; the statute forces it to implicitly endorse this evil by providing it as part of a benefit package to employees.

The concern expressed by the state in articulating a requirement that an organization hire members of its own faith in order to be considered a “religious employer” is to avoid a burden on employees who do not share the same faith. The argument made is that the failure of a religious employer to cover contraceptives imposes a burdensome consequence of its beliefs on a religiously diverse workforce.<sup>32</sup>

There is some truth to this argument. If non-Catholics take employment with Catholic employers, there may be points where the Catholic nature of the employer causes it to act in ways that are inconsistent with the preferences of the non-Catholic employee.

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<sup>29</sup> See, e.g., Brief of Amici Curiae New York Civil Liberties Union and American Civil Liberties Union at 23, *Catholic Charities of the Diocese of Albany v. Serio*, No. 8229-02 (N.Y. Sup. Ct. Sept. 19, 2003) [hereinafter NYCLU/ACLU Amicus Brief].

<sup>30</sup> See *infra* note 32 and accompanying text.

<sup>31</sup> Martin Luther King, Jr., *Love Your Enemies* (1957), Martin Luther King, Jr. Memorial Institute Essay Series.

<sup>32</sup> NYCLU/ACLU Amicus Brief, *supra* note 29, at 26.

One way to deal with that clash is to make sure employees who take employment with Catholic employers understand that the religious nature of their employer has certain consequences. Thus, for example, physicians hired by Catholic hospitals sign statements that they understand and will abide by the NCCB Ethical and Religious Directives for Catholic Health Care Services.<sup>33</sup> Other employees are told at orientations that they are expected to conduct themselves in a manner not inconsistent with core Catholic values.<sup>34</sup> In the context of this contraception issue, employees who take employment with a Catholic employer do so with the understanding of the Church's position and with no expectation that the Church will act in a way inconsistent with its beliefs.

That prior understanding lessens the clash, but it remains nonetheless. The question, however, is how one balances the two infringements in a situation where one freedom must give way to another. Given a choice between forcing a Catholic employer to act contrary to one of its basic moral beliefs by facilitating what it believes to be a grave sin and asking that non-Catholic employees seek alternative means of securing contraception, I would argue the better balance is in favor of permitting Catholic

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<sup>33</sup> The Directives require that Catholic health care services "adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel." NCCB Directives, *supra* note 26, no. 5. I understand from my discussions with several persons involved in Catholic health care administration that physicians hired by Catholic hospitals are required to indicate their agreement to abide by the directives in writing. See Rob Boston, *Emergency: How a City-Owned Hospital in Florida Wound up Operating Under the Catholic Bishops' Control - and What Americans United and Its Allies Are Doing About It*, CHURCH & STATE, Oct. 2000, at 4; Janet Gallagher, *Religious Freedom, Reproductive Health Care, and Hospital Mergers*, 52 J. AM. MED. WOMEN'S ASS'N 65, 66 (1997); Lois Uttley, *Sorry, No Emergency Abortions; We're Part of the Catholic System*, (Westchester Coalition for Legal Abortion, Inc.), available at [http://www.wcla.org/\\_98-summer/su98-17.html](http://www.wcla.org/_98-summer/su98-17.html) (last visited Feb. 19, 2004).

<sup>34</sup> See Boston, *supra* note 33 (describing a Florida hospital's requirement that all employees abide by the "health-care regulations promulgated by the Catholic bishops"). Even those employees who are not required to sign such statements are typically instructed during employee orientations of what the Directives require. The Directives make clear that all employees of Catholic health care institutions "must respect and uphold the religious mission of the institution and adhere to these Directives. They should maintain professional standards and promote the institution's commitment to human dignity and the common good." NCCB Directives, *supra* note 26, no. 9.

institutions to act consistently with their core beliefs. The former involves intrusion into a deeply held religious belief; the latter simply makes it more expensive or inconvenient to obtain contraception.

The foregoing suggests that, in ignoring both the pervasiveness of the Catholic religious mission and the centrality of evangelization to Catholicism, mandatory prescription contraceptive statutes that fail to contain a broader exclusion for religious employers reflects a fundamental misunderstanding of the Catholic faith. Several things make this fundamental misunderstanding particularly troubling. First, it effects a major incursion on religious belief with little guarantee that it will achieve the goal it seeks. Second, it creates a threat of further, greater incursions on religion in the future, creating a threat not only to Catholics but also to members of all religions.

To understand the first concern, it is necessary to understand how statutory mandates that religious employers provide contraceptive coverage will play out in the real world if legal challenges to the statutes fail and courts uphold statutes with no conscience clauses or narrowly drafted ones. As already discussed, legal mandates that private employers provide prescription contraception coverage take the form of state insurance law requirements that insurance plans that provide for any prescription coverage must also cover prescription contraceptive coverage. This form of state law mandate is dictated by the Employee Retirement Income Security Act of 1974 (“ERISA”),<sup>35</sup> the primary federal statute regulating employee benefit plans of private employers. Desiring to promote a uniform scheme for the regulation of employee benefit plans, ERISA contains a broad preemption provision, preempting any and all state laws that relate to an employee benefit plan.<sup>36</sup> Since Congress, however, in enacting ERISA did not wish to interfere with state law’s traditional function in regulating insurance, the statute excepts from the reach of its preemption provision state laws regulating insurance.<sup>37</sup>

Thus, states are prohibited by ERISA from directly mandating that employers provide certain benefits to their employees. By virtue of their ability to regulate insurance

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<sup>35</sup> 29 U.S.C. §§ 1001–1461 (2000).

<sup>36</sup> *Id.* § 1144(a).

<sup>37</sup> *Id.* § 1144(b)(2)(A).

products, however, states have the ability to indirectly regulate employee benefit plans *to the extent* that such plans provide benefits through insurance.<sup>38</sup> Therefore, employers who provide medical benefits to their employees through insured plans are subject to the state law provisions mandating contraceptive coverage for all insurance plans that provide any prescription coverage. The Supreme Court has made clear that state insurance law provisions cannot be applied to employers who provide medical benefits through self-funded plans rather than through insured plans without violating ERISA's preemption provision.<sup>39</sup>

This means that those religious organizations, such as some of the larger Catholic health care systems, that provide medical benefits to their employees through self-funded plans are not subject to the mandates of the statute. Those entities, however, that provide benefits through insured plans—and whose size does not make self-insurance an option—must decide how to deal with these statutory mandates. Moreover, if proposed federal legislation to require private health plans to provide coverage of prescription contraceptives<sup>40</sup> is enacted, all religious employers will face this issue, since self-insurance will no longer exempt them from the law's mandate. They will be unable to provide prescription contraceptive coverage to their employees without participating in what the Catholic Church views as an intrinsic evil. Their inability to do so forces them to consider alternative options and these alternatives may not have desirable consequences.<sup>41</sup>

One possible response is that a religious employer may decide to forego providing any prescription coverage to its employees. Statutes mandating prescription contraception are not framed as direct mandates to employers. Rather, the statutes provide that *if* an employer offers its employees any prescription coverage, it must also offer coverage for FDA-approved contraceptives. Thus, an employer wishing to avoid

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<sup>38</sup> See *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 758 (1985) (holding that a Massachusetts statute mandating minimum mental health benefits, as applied to insured employer plans, was not pre-empted by ERISA).

<sup>39</sup> See *id.* at 746–47.

<sup>40</sup> See *supra* note 5.

<sup>41</sup> It may be that bishops of different dioceses respond differently. Thus, it is not necessarily the case that there will be a single response by Catholic employers as a whole.

complying with the statutory mandate is free to do so by refusing to provide its employees with any prescription coverage. Indeed, it is this fact that leads those who support statutes with a narrow definition of "religious employer" to argue that the statute imposes no restriction on free exercise and both the lower court in New York and the California Supreme Court appeared to find this argument persuasive.<sup>42</sup>

From the standpoint of the Catholic employer, this is not a happy option. The position of the Catholic Church is that employers have a moral obligation to consider the well-being of employees and to pay them just wages and benefits.<sup>43</sup> On this ground, the Church has taken the position in litigation that it is obligated morally to provide health care benefits, including prescription coverage to its employees.<sup>44</sup> When, however, forced to confront the choice between participating in an intrinsically evil act and attempting to satisfy its obligation to pay just wages and benefits in another manner, some institutions may very well decide that ceasing to provide any prescription coverage is the lesser evil.

All employees of Catholic institutions would be worse off if this option is chosen. It will be little solace to a female employee of a Catholic employer to be told that she is being treated equally with male employees when the way that equality is achieved puts her in a worse position than when she was theoretically being treated less equal.

Another adverse consequence of a Catholic institution being forced to discontinue providing prescription coverage to its employees is that it will be less competitive with other employers.<sup>45</sup> Generally those working for Catholic health and other service agencies are not the most well-compensated employees in terms of salaries, with the result that benefits are very important to them. Therefore, a decision by a Catholic

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<sup>42</sup> See *Catholic Charities of the Diocese of Albany v. Serio*, No. 8229-02 (N.Y. Sup. Ct. Sept. 19, 2003); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 10 Cal. Rptr.3d 283 (Cal. 2004).

<sup>43</sup> See, e.g., Petitioner's Brief on the Merits at \*2, *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 2001 WL 1700664 (Cal. Ct. App. Nov. 13, 2001) (No. S099822).

<sup>44</sup> See *id.* at \*3.

<sup>45</sup> It has been suggested to me that there are some who fear that statutes such as the ones discussed herein are part of a larger strategy aimed precisely at driving Catholic health care institutions out of the market.

employer to refuse to provide any prescription coverage will make it less able to hire competent staff, resulting in a decline in the quality of care provided.

The second option for a Catholic employer is to either cease operations completely or to provide social services on a drastically reduced scale, serving and employing only those persons of its own faith in private facilities. This is obviously a drastic step, one that could not be taken lightly given the Church's teachings and probably not the most likely to be adopted. Still, it is at least worth noting the consequences of an absence of a Catholic presence in areas such as health care and nursing homes given the possibility that the effect of the statute is to drive Catholic-affiliated entities out of the business either directly or because the law makes them less competitive. Those consequences are potentially quite severe. In some areas, Catholic social service providers may be the only ones offering such a service. If the Catholic provider disappears, who will take its place? Even if there are secular alternatives, religion may enhance the capacity of social service organizations to better serve the needs of individuals and their families. Because religious institutions view it as their charge to treat the entirety of the person—spiritual as well as physical needs—they may provide for faster and fuller recovery for their patients, as evidenced by the recent interest in holistic health and the mind/body relationship.<sup>46</sup> In the provision of other social services, religious groups have also demonstrated significant success.<sup>47</sup>

Thus, the mandatory contraceptive coverage statutes infringe on religious beliefs without necessarily achieving their statutory aim. Although some religious employers will certainly

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<sup>46</sup> See Rich Barlow, *Pondering the Powers of Prayer*, BOSTON GLOBE, Aug. 9, 2003, at B2; Karen Mellen, *Nuns Heal Stressed, Suffering Through Touch; A Relaxed Mind More Open to Spirituality, Sisters Say*, CHI. TRIB., June 27, 2003, at 10; Karen S. Peterson, *Is All That Stress Killing You?; Probably. But Taking Stock Can Mitigate the Damage*, USA TODAY, May 27, 2003, at D6; Sarah Treffinger, *Embarking on the Quiet Path; Many Faiths and Philosophies Seek the Insights of Meditation*, PLAIN DEALER, Aug. 10, 2003, at L1.

<sup>47</sup> See Peter Steinfels, *Religious Organizations Have Long Had a Role in Providing Social Services to the Needy. Does a New California Law Threaten It?*, N.Y. TIMES, Mar. 13, 2004, at A13 (discussing advantage of strong religious component in the provision of social services).

choose to simply comply with the law, others are likely to adopt one of the alternative options suggested above.

As an aside, for purposes of this discussion, I have accepted the state's articulation of its aim, that of promoting equal treatment of women and preserving public health. I would be remiss, however, if I did not at least observe that both of these positions are debatable. The claim that the failure to cover prescription contraception discriminates against women is questionable given both the fact that most employer plans do not cover elective, non-medically necessary treatments and that the failure to include contraception applies to both sexes.<sup>48</sup> Similarly, despite its widespread acceptance as a political matter, the claim that prescription contraception is a basic health care need is hardly self-evident given the existence of both non-artificial and non-prescription means of birth control. The fact that prescription birth control pills may be a more convenient means of birth control than condoms or natural birth control<sup>49</sup> does not equate with a claim that that they should be considered basic health care, especially given the potential health risks they pose to their users.<sup>50</sup> One can accept the proposition that it is medically undesirable for a woman to have twelve to fifteen pregnancies over the course of her fertile years without concluding that prescription contraceptive coverage is a necessary means to address that concern.

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<sup>48</sup> The decision of many employer plans to provide coverage for Viagra, which set the stage for fights over contraceptive coverage, is not analogous; Viagra is designed to treat a medical disorder — impotence. See Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES, June 30, 1999, at A1 (discussing link between coverage of Viagra and fight for coverage of contraception coverage); Amy Goldstein, *Viagra's Success Fuels Gender Bias Debate*, WASH. POST, May 20, 1998, at A1 (discussing link between arguments over birth control coverage and coverage of Viagra and noting that health plans typically pay for Viagra only where it is being used to address impotence and not to enhance sexual performance).

<sup>49</sup> An amicus brief filed on behalf of the American College of Obstetricians and Gynecologists and others in the New York litigation argues that choosing a contraceptive method is a "personal and private matter" and must suit "a particular woman's lifestyle." Brief of Amici Curiae American College of Obstetricians and Gynecologists, *New York District et al.* at 11, *Catholic Charities of the Diocese of Albany v. Serio*, No. 8229-02 (N.Y. Sup. Ct. Sept. 19, 2003).

<sup>50</sup> For example, side effects of the pill include blood clots that can cause strokes, heart attacks, pulmonary embolisms, nausea, and depression. See, e.g., Jan P. Vandenbroucke et al., *Oral Contraceptives and the Risk of Venous Thrombosis*, 344 NEW ENG. J. MED. 1527 (2001).

The second troubling aspect of the failure of these statutes to properly understand religion is the threat of greater incursions on religious freedom in the future. The Church's position on birth control is not a stand-alone item. From the Church's perspective, its position on birth control is part and parcel of its commitment to the inviolability of life. Life, because it is a gift from God and because humans are made in the image and likeness of God, is viewed as sacred from the moment of conception until the moment of death. Pope John Paul II has forcefully expressed the notion that "if *the right to life*, the most basic and fundamental right and the condition for all other personal rights, is not defended with maximum determination," then all other claims of human rights, such as the right to health, to home, and to work, become "false and illusory."<sup>51</sup> This need to defend the right to life from beginning to end manifests in a cohesive body of beliefs that starts with contraception and runs through abortion, death penalty, and assisted suicide. Thus, an attack on any part of that core set of beliefs strikes at the heart of what is sacred to the Church.

Statutes mandating that religious employers provide prescription contraceptives are a dangerous first step toward even greater infringement on the Church and its core beliefs. As a first step, it is important to realize that many of the state statutes mandating coverage of prescription contraceptives require that a plan providing any prescription coverage provide coverage of all FDA-approved methods of birth control.<sup>52</sup> Among the FDA-approved prescription contraceptives are several that are abortifacients, that is, they operate post-conception to inhibit the implantation of an embryo.<sup>53</sup> These include intrauterine

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<sup>51</sup> JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *CHRISTIFIDELES LAICI* ¶ 38 (Dec. 30, 1988).

<sup>52</sup> Thus, for example, the New York statute provides that "[e]very group or blanket policy which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices approved by the federal food and drug administration." N.Y. INS. LAW § 3221(l)(16) (Consol. 2003). See *id.* § 4303 (c). Many other states use similar language. See, e.g., CAL. INS. CODE § 10123.196 (Deering Supp. 2004); CONN. GEN. STAT. ANN. § 38a-503e (West Supp. 2003); DEL. CODE ANN. tit. 18, § 3559 (Supp. 2002); MD. CODE ANN., INS. § 15-826 (Supp. 2002); NEV. REV. STAT. ANN. 689A.0415 (Michie Supp. 2003).

<sup>53</sup> See J.C. Willke, M.D., *Abortifacients: American College of Obstetrics and Gynecology Changes Definition*, Life Issues Institute, Inc., available at <http://www.lifeissues.org/abortifacients/index.html> (last visited Apr. 4, 2004); see also Charles M. Mangan, *Christian Morality: Abortifacients* available at

devices (IUDs), mifepristone, often called the “abortion pill”; and RU-486, the “morning-after pill.”<sup>54</sup>

Thus, although they speak in terms of contraceptive coverage, the effect of many of these statutes is to blur the line between birth control and abortion, forcing religious organizations to provide coverage for procedures that are abortive, thereby violating a deeply held moral principle against killing. As is the case with birth control, there is no ambiguity about the Church’s position on abortion: abortion is an “abominable crime,”<sup>55</sup> that offends “against the human person and against God the Creator and Father”<sup>56</sup> and “a senseless impoverishment of the person and of society itself.”<sup>57</sup> The Catechism characterizes it as an “unchangeable” teaching that every “procured abortion” is a “moral evil.”<sup>58</sup>

The possibility that mandatory contraceptive statutes, with this blurring of the line between contraception and abortion, represent only a first step is highlighted by the fact that a bill was introduced in the New York State legislature last year to require that any insurance policies that offer maternity care coverage must also cover abortions.<sup>59</sup> If a mandatory

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<http://www.catholic.net/rcc/Periodicals/Faith/11-12-98/Morality5.html> (Nov. 12, 1998).

<sup>54</sup> Although there are some who claim that the morning-after pill prevents conception, many argue that it inhibits implantation of an already conceived embryo. See Mangan, *supra* note 53. See also KEITH L. MOORE & T.V.N. PERSAUD, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 58 (6th ed. 1998) (“The administration of relatively large doses of estrogens (“morning after” pills) for several days, beginning shortly after unprotected sexual intercourse, usually does not prevent fertilization, but often prevents implantation of the blastocyst.”).

<sup>55</sup> CNN, *Pope: Abortion an ‘abominable crime,’* available at <http://www.cnn.com/WORLD/9710/04/brazil.pope/> (Oct. 4, 1997); Catholic World News, *Pope Greets 1.5 Million Faithful at Rio Mass*, available at <http://www.cwnews.com/news/viewstory.cfm?recnum=5973> (last visited Feb. 10, 2004); Reuters, *Pope Calls Abortion Shame of Humanity*, available at <http://www.mosquionet.com/~prewett/abortionshameofhum.html> (Oct. 5, 1997). See CATECHISM OF THE CATHOLIC CHURCH ¶ 2271–72, at 548 (United States Catholic Conference ed., 2d. ed. 1994).

<sup>56</sup> CIN, *On Combatting Abortion and Euthanasia* (May 19, 1991) (letter of Pope John Paul II to All the World’s Bishops), available at <http://www.cin/org/jp2ency/aboreuth.html>.

<sup>57</sup> Pope John Paul II, *Homily at Santa Clara* (Jan. 22, 1998) (speech in Cuba), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/travels/documents/hf\\_jp-ii\\_hom\\_2201199](http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii_hom_2201199); see Lisa MacDonald, *Feminism, Communism and Catholicism*, GREEN LEFT WKLY. (Feb. 4, 1998) (discussing the Pope’s speech).

<sup>58</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2271.

<sup>59</sup> See N.Y.A. 2611, 226<sup>th</sup> Sess. (2003), available at <http://assembly.state.ny.us/leg/?bn=A02611&sj=t>.

prescription contraception statute is acceptable, will the law be able to force Catholic employers to provide abortion coverage for its employees? Similarly, will the law be able to force Catholic hospitals to provide abortions to its patients?

This suggests that even those who do not agree with the position of the Catholic Church on birth control have reason to be troubled by the state's approach here. If the state can act to require that a Catholic entity act inconsistently with its moral convictions and provide birth control, what limit is there on further incursions into any religious entity's practice of its religion? These are legitimate concerns for all religions. A state mandate that religious employers provide contraception coverage opens the door to even greater intrusions on religion in the future.

Thus, whatever one's personal views of the Church's position on birth control, an attempt by the state to force religious entities to provide prescription contraception is cause for concern. While it may be tempting to argue that if religious entities want to provide social services to the public they should be bound by general laws<sup>60</sup> and that statutes that do not exempt religious employers may survive constitutional challenge,<sup>61</sup> the statutes create consequences that are undesirable from both the standpoint of religious organizations and that of the public.

Legislators would do well to rethink their approach. If they believe that prescription contraception is a basic health need, then they ought to consider a means of providing prescription contraceptive coverage outside of the employment context. Not only would that offer a way of meeting the perceived health need without creating an issue of serious religious conflict both with respect to this particular issue and in setting a dangerous precedent, it would also be a more effective approach. Not only do the statutes as currently in force have no applicability to self-funded plans, but significant numbers of women do not have access to employer-provided health care either because they are not employed, and not covered as a beneficiary under a spouse's or parent's plan, or because their employers do not provide for health care. These facts make the significant lack of

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<sup>60</sup> Clearly there are some general laws to which all institutions, Catholic or otherwise, should be held. An obvious example is laws that address the quality of service provided, such as licensing standards.

<sup>61</sup> See *supra* note 9.

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understanding of and respect for religion evidenced by the statute even more troubling.