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SYMPOSIUM

**WHEN CONSCIENCE CLASHES WITH
STATE LAW & POLICY:
CATHOLIC INSTITUTIONS**

SUSAN J. STABILE†

There has been a lot of public attention of late to issues involving a clash between the conscience of Catholic institutions and state law and public policy. The issue of a Catholic institution's conscience can arise in a number of different circumstances. Does a religious employer have to provide contraception coverage for its employees? Does a Catholic hospital have to provide access to emergency contraception and must it provide abortion services? Must a Catholic adoption agency allow gay persons or same-sex couples to adopt children?

Another area where the issue has come up—although this is not one I will address in this talk—is the question of whether religious employers have to hire people who practice or hold views antithetical to Catholic teaching. Where this has received public attention recently has been in the context of faith-based programs that receive federal funds in connection with their services—ranging from job placement to addiction treatment to

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provision of children's services—and who want to hire only people of the faith of the group in question. There was also press not long ago about the Salvation Army's requirement that employees, as a condition of employment, pledge support of the organization's mission to "proclaim the Gospel of Jesus Christ." At another level, there is also the question of whether a religious employer who hires a homosexual employee must be forced to provide benefits to same-sex partners. That last issue arose several years ago in Maine, when Portland passed an ordinance that any employer who accepted certain city grants had to provide such benefits. Both Catholic Charities and the Salvation Army lost substantial city funds when they refused to provide such benefits.

I want to distinguish questions of institutional conscience from questions of individual conscience, such as, for example, the question of whether an individual pharmacist can decline to fill a prescription because it is for something he has religious objection to. Although it is the refusal of pharmacists to fill prescriptions for emergency contraception that has received the most recent attention, the pharmacist conscience issue first arose in the context of pharmacists in Oregon concerned about taking part in assisted suicide. Oregon, as many of you know, has a state law—the Death with Dignity Act¹—that allows terminally ill Oregon residents to obtain a physician's prescription and use it to obtain and administer lethal medications. The statute has a number of requirements, but a patient who meets those requirements ends up with a prescription that then has to be filled. The pharmacist conscience issue has also come up in other contexts as well, such as death penalty lethal injection and the example of the pharmacist in Texas who refused to fill a prescription for Ritalin for a child.

Individual conscience cases raise equally important questions of the balance between consumers' right to medical services and prescriptions and the moral concerns of individual pharmacists, physicians, and other providers. However, those issues are beyond the scope of my comments this evening.

Why are these questions about conscience clashes arising with such frequency? I think there are two explanations. The first is the fact that we are very quick in American society to

¹ OR. REV. STAT. §§ 127.800–.995 (2005).

move from negative rights to positive rights, that is, to move from saying that the law should not interfere with someone's ability to do something to saying the law—and everyone else—must affirmatively support the person's ability to do that thing. Thus, with respect to contraception, we have moved from saying individuals ought to be free to use contraceptives without interference from the law—forming the basis of passing laws decriminalizing the use of contraceptives—to saying, "I can't pay for my contraceptives (or I don't want to pay for them), someone must pay for me." With abortion, we have moved from saying there is not a sufficient state interest for the law to make abortions illegal in all circumstances to saying that law and society must facilitate one's right to obtain an abortion. With respect to homosexual relationships, the move is from saying no discrimination to no one can make any distinctions between heterosexuality and homosexuality for any reason. I think it is important to recognize this easy movement that we make as a society because it means we are on a slippery slope that will continue.

The second explanation for the frequent rise of conscience clashes is that many of these areas involve the Church's position on matters sexual, which has become a lightning rod for many people. As a result, although the law has traditionally afforded religious institutions a level of freedom of conscience, there is a move to erode that freedom. Thus, while Catholic health care institutions have been protected from being required to perform medical procedures to which they object, such as abortion, these protections have come under increasing attack by those concerned that they result in an unwarranted restriction on the availability of reproductive health services. An argument increasingly voiced is that Catholic hospitals operate in the public sector and receive public funds and therefore should not impose restrictions on the availability of reproductive health services. The result has been proposals to deny federal funds to Catholic hospitals that refuse to provide certain reproductive health services and the enactment by several states of laws requiring all hospitals, including Catholic hospitals, to provide emergency contraception to rape victims. The same opposition to conscience protection is evident in other areas as well.

The clash between institutional conscience and state law and policy raises a number of interesting questions. Should the law

protect religious institutions from the operation of generally applicable laws where compliance with the law would force an institution to violate its conscience? What kind of burden on religion is sufficient to give rise to an exclusion from otherwise generally applicable state laws? How should we balance the burden on religion against the state public policy goals that conflict with religion? Even where the burden on religion does not meet the standard for an Establishment Clause violation, should the state nonetheless find ways less intrusive on religion to achieve public policy goals? If there should be some protection and respect, how should we define a religious institution for these purposes?

I'd like to focus on several of these questions. Before I do, let me say at the outset that my consideration of these questions proceeds from two foundational assumptions. The first is that religion is special. By that I mean that, although there are many reasons one may be opposed to something, opposition to a particular practice based on the claim that the practice is inconsistent with one's religious beliefs is something that is deserving of special consideration. I say this at the outset because I recognize that it is not something with which everyone would agree; some would argue that there is nothing special about religious objections. My starting point is that the law should provide certain protections for religious beliefs that it need not necessarily provide for other beliefs.

My second foundational assumption is that, to warrant protection, it is sufficient that the religious institution's opposition to a practice is a sincere part of its religious belief. That is, it is irrelevant whether or not I, or anyone else, agree with the position of the Catholic Church on the issues of contraception, abortion, or homosexuality. That these are deeply held religious beliefs is enough. It is my firm conviction that debates about the extent to which the law ought to protect the conscience of institutions should not turn into a referendum on the Church's position on these matters. Again, I say this at the outset because I know that it is difficult for some people not to make the issue about the soundness of Church doctrine—particularly when it comes to the Church's position on contraception, with which so many people, including many Catholics, disagree.

One other thing I should add as a preliminary matter is that I am not primarily talking about a constitutional question here. The clash with religion that we are talking about here is not likely to create a First Amendment violation. At least under current Supreme Court jurisprudence, as a constitutional matter, the state does not have to carve out special protection for religious institutions from laws that have the effect of violating conscience.

In its 1990 decision in *Employment Division, Department of Human Resources v. Smith*,² the Supreme Court refused to apply strict scrutiny to neutral laws of general applicability, even if those laws carry the incidental effect of burdening a particular religious practice. Accordingly, a state need not establish a compelling state interest in support of laws that result in incidental burdens on religious practices. Although Congress attempted an end run around *Smith*, adopting the Religious Freedom Restoration Act (“RFRA”) in 1993 to restore the compelling state interest test, in *City of Boerne v. Flores*³ the Supreme Court held RFRA unconstitutional as applied to state and local legislation.

Those two decisions make it easy for a state to enact broad-based legislation that has the effect of burdening religions. Thus, for example, based on *Smith*, courts in both California and New York have rejected claims that statutes in California and New York that require employers to provide prescription contraceptive coverage for their employees violate the First Amendment.⁴ Although I am not a constitutional law scholar, I think those are predictable results given *Smith*. If one could demonstrate that laws are motivated by animus towards Catholics, or appear to single out Catholic institutions, perhaps an argument could be made that strict scrutiny is appropriate. However, given the state’s ability to put forward plausible public health and equal protection justifications for such laws—albeit justifications I do not find persuasive, as I will suggest a little later in my talk—that is an unlikely result.

² 494 U.S. 872 (1990).

³ 521 U.S. 507 (1997).

⁴ See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 73–74, 82 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 518, 521–22, 859 N.E.2d 459, 461, 463–64, 825 N.Y.S.2d 653, 655, 657–58 (2006).

Thus, I will not be speaking in constitutional terms. Rather, I want to focus on the normative question of how we should deal with clashes between the conscience of religious institutions and law and public policy. I will do that by considering three questions.

QUESTION 1: ASSUMING THE LAW SHOULD PROTECT THE CONSCIENCE OF RELIGIOUS INSTITUTIONS, HOW SHOULD WE DEFINE A RELIGIOUS INSTITUTION FOR THESE PURPOSES?

The question here is: Who should law be protecting? To give some specific content to this question, consider state statutes that mandate prescription contraceptive coverage. Most, but not all, of these statutes contain some exclusion for churches and other religious organizations. Those exclusions are framed in various ways. Although some statutes exempt church groups and church-controlled organizations, others are drafted substantially more narrowly. Illustrative of the narrow approach that creates difficulties for Catholic organizations are the statutes passed by California and New York, the California Women's Contraception Equity Act,⁵ which was enacted in 1999, and the New York Women's Health and Wellness Act,⁶ which went into effect in January 2003.

Both the New York and the California statutes require all commercial health insurance plans that offer prescription drug coverage to provide coverage of prescription contraceptives. The New York and California statutes both also impose a four-part test for whether an entity qualifies as a religious employer and thus is excluded from the mandate of the statutes. To qualify for the religious employer exclusion, (1) the purpose of the organization must be to inculcate religious values; (2) the organization must primarily employ persons of same faith; (3) the organization must primarily serve persons of same faith; and (4) the organization must be organized as a non-profit under Internal Revenue Code section 6033(a)(2)(A)(i) or (iii), rather than section 501(c)(3). This four-fold definition of religious employer excuses churches themselves from the statutory mandate, meaning that employees who work in churches, parish

⁵ CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering 2007); CAL. INS. CODE § 10123.196(d)(1) (Deering 2007).

⁶ N.Y. INS. LAW §§ 3221(l)(16)(A)(1), 4303(cc)(1)(A) (McKinney 2007).

rectories, diocesan chanceries, and seminaries would not have to be provided coverage, but it does not provide protection for entities such as Catholic Charities, Catholic hospitals or nursing homes, or Catholic institutions of higher learning, which serve and employ people without regard to religion.

In my view, the New York and California approach reflects a fundamental misunderstanding of, and therefore lack of respect for, what it means to be Catholic and what constitutes Catholic religious activity. I say that for two reasons. First, the narrow definition of religious institution ignores the pervasiveness of the Catholic religious mission. Second, it ignores the Church's evangelization role. Let me say a little about each of those because I think both are relevant for deciding what we mean by a Catholic institution.

Defining a religious employer as an entity with a primary purpose to inculcate religious values or beliefs misperceives the impossibility for Catholics of separating worship and acts of charity and social justice and ignores 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.

In the Gospel of Matthew, Jesus defines as the sole criterion for choosing who will be blessed in God's kingdom: "For 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."⁷

When asked by his confused followers when it was that they fed him and cared for him, his response was: "[W]hatever you did for one of these least brothers of mine, you did for me."⁸ 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,"⁹ that is, not the things that fall into a narrow view of what constitutes religious activity but rather, caring for those in need.

⁷ *Matthew* 25:35–36 (New American).

⁸ *Matthew* 25:40.

⁹ MICHAEL J. HIMES, *THE MYSTERY OF FAITH: AN INTRODUCTION TO CATHOLICISM* 9 (2004) (emphasis omitted).

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.”¹⁰ In the words of Pope John Paul II, “[t]he 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”¹¹ 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 to the world, a hope which glows in a special way when it is shared with those abandoned or rejected by society.”¹²

Thus, when a Catholic organization cares for the elderly or the sick, or provides for education, it is performing an act 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 holding that a Catholic Church’s provision of outdoor sleeping space for the homeless, or their activities of feeding the hungry and offering clothing to the poor, are religious activities protected by the Free Exercise clause.¹³ Similarly, courts have held that the Boy Scouts of America is a religious organization and that Catholic healthcare entities are religious organizations for purposes of exemptions from state fair employment statutes.¹⁴ With respect to Catholic Charities, the subject of the California litigation, one federal court has held that an employee benefit plan maintained by Catholic Charities was a “church plan[]” within the meaning of ERISA. It reasoned that

¹⁰ JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* ¶ 42 (1987).

¹¹ JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *ECCLESIA IN AMERICA* ¶ 18 (1999).

¹² *Id.*

¹³ See *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 572 (2d Cir. 2002); *Espinosa v. Rusk*, 634 F.2d 477, 479, 482 (10th Cir. 1980), *aff’d*, 456 U.S. 951 (1982).

¹⁴ See *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1270 (S.D. Cal. 2003) (holding the Boy Scouts to be a religious institution); *McKeon v. Mercy Healthcare Sacramento*, 965 P.2d 1189, 1189–91, 1195 (Cal. 1998) (holding Mercy Healthcare to be a religious employer), *superseded by statute*, California Fair Employment and Housing Act, CAL. GOV’T CODE § 12926.2(c) (Deering 2007), *as recognized in* *Silo v. CHW Med. Found.*, 45 P.3d 1162 (Cal. 2002).

Catholic Charities “has close ties with the Roman Catholic Church in that it has membership, governing bodies, trustees and officers in common with the Roman Catholic Diocese of Portland [Maine] . . . and aims to implement the social teachings of the Catholic Church.”¹⁵ As a result, the court concluded that the plans maintained by Catholic Charities were established and maintained by the church for its employees.

Jesus does not teach his followers to provide care only for those who have accepted his teaching. The mission of those who would follow Christ is to feed all who are hungry and care for all those who are in need. Thus, the fact that Catholic organizations serve members of other faiths as well as their own is part of its calling. Precisely because it is part of the religious mission to serve all, the fact that health and other social services are provided by Catholic organizations to members of other faiths does not transform the provision of such services from a religious to a secular act.

Statutory definitions such as those contained in the New York and California statutes fail to recognize this reality. They are built on a congregational model that sees religious activity as largely confined to the worship hall, that sees religion as fundamentally a private relationship between the individual and God. They thus define as secular, rather than religious, activity that under the Catholic faith is part of its core religious mission. As one commentator observed, under such a view, “Mother Teresa’s Missionaries of Charity are ‘secular’ employers because they do not limit their care of AIDS victims to Catholics.”¹⁶

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 is its mission—what it means to be Catholic. For the state to determine that certain activities that are required by a Church’s faith are not sufficiently religious is to interfere with religion to an unwarranted extent.

In addition to ignoring the pervasiveness of the Catholic religious mission, the definition of religious employer contained

¹⁵ *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 82–83 (D. Me. 2004).

¹⁶ Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 143 (2003).

in the New York and California statutes also ignores the evangelization role of the Catholic Church. Just as do all Catholics, institutions affiliated with the Catholic Church are obliged to make Jesus known in the world. Jesus instructed his disciples to go throughout the world to make followers of all nations and Catholics are called to do the same in the world. In *Christifideles Laici*, Pope John Paul II wrote:

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" (Mk 16:15). ". . . and lo, I am with you always, until the close of the age" (Mt 28:20). "To evangelize," writes Paul VI, "is the grace and vocation proper to the Church, her most profound identity."¹⁷

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 the Catholic 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. From the Church's side, its obligation is to nurture the spiritual growth, consistent with the Catholic faith, of all of its employees.

As my comments suggest, religious institution must be defined in a way that sufficiently reflects Catholic faith. Therefore, it is problematic for the law to enact a legal definition of religious institution that is based on who the institution employs or serves. It should be enough that the entity is affiliated with the Church, that it be accountable to ecclesiastical authorities and is committed to the moral teachings and ethical norms of the Church. In the case of Catholic hospitals, this is true even where the administration of the hospital has, due to declining ranks of sponsoring orders, been delegated to lay governing boards.

¹⁷ JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *CHRISTIFIDELES LAICI* ¶ 33 (1988).

I fully recognize that this creates an issue in a pluralist society, i.e., the fact that a Catholic institution serves or employs non-Catholics means that the Church's position is in some way being extended to non-Catholics. For example, in the contraception context, 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. If a religious employer employs persons of different faiths, the concern is that the failure of a religious employer to cover contraceptives imposes its beliefs on a religiously diverse workforce. Thus, the lower court decision in the California Catholic Charities litigation suggests that the idea behind the statutory definition is that in order to be excluded from the coverage mandate, the entity employs only persons "who, one reasonably could conclude based on the religious nature of the employment, agree with or willingly defer their personal choices to the religious tenets espoused by their employer."¹⁸

There is some basis for this concern. 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. On the other hand, employees hired by Catholic institutions are hired with the understanding that the religious nature of their employer has certain implications. Physicians hired by Catholic hospitals, for example, sign statements that they understand and will abide by the NCCB Ethical and Religious Directives for Catholic Health Care Services. Other employees are told at orientations that they are expected to conduct themselves in a manner not inconsistent with core Catholic values.

The Church's position on birth control is well-known. Employees who take employment with a Catholic employer do so with the understanding of the Church's position and with no expectation that the Catholic employer will act in a way inconsistent with its beliefs. And, of course, the Catholic employer is not forcing its employees not to use birth control; it is merely saying it is not willing to participate in the employees'

¹⁸ Catholic Charities of Sacramento, Inc. v. Superior Court, 109 Cal. Rptr. 2d 176, 190 (Ct. App. 2001), *aff'd*, 85 P.3d 67 (Cal. 2004).

acquisition of it by paying for it. Thus, the Church here is not attempting to impose its views on birth control on others. Rather, it is simply asking that it be free to maintain and act consistently with its religious beliefs.

QUESTION 2: ASSUMING THE LAW SHOULD PROTECT
THE CONSCIENCE OF RELIGIOUS INSTITUTIONS, WHAT
KIND OF BURDEN ON RELIGION IS SUFFICIENT TO GIVE
RISE TO AN EXCLUSION FROM OTHERWISE GENERALLY
APPLICABLE STATE LAWS?

Consider the potential effect of laws addressing the examples with which I started: forcing a Catholic hospital to provide an abortion; forcing a Catholic employer to pay for its employee's contraception; and forcing a Catholic adoption agency to place a child for adoption with a homosexual couple. Are these the same kind of burdens, or are there differences that should affect how the law treats the issues?

Forcing a Catholic hospital to actually perform abortions would seem the gravest threat to religious freedom. The Church's position on abortion is unambiguous and needs no elaboration. The *Catechism of the Catholic Church* states that "[h]uman life must be respected and protected absolutely from the moment of conception."¹⁹ The Catechism characterizes it as an "unchangeable" teaching that every "procured abortion" is a "moral evil."²⁰ The position of the Church is that this is not just a matter of individual conscience and sin. The Catechism goes on to state that "[t]he inalienable right to life of every innocent human individual is a *constitutive element of a civil society and its legislation*,"²¹ thus rejecting the ability to claim that abortion is a wrong but that the matter is one of individual choice. The same notion is expressed in the 1984 papal *Charter on the Rights of the Family*, which provides that "[h]uman life must be respected and protected absolutely from the moment of conception," and that "[a]bortion is a direct violation of the fundamental right to life of the human being."²² In his 1995 encyclical, *Evangelium Vitae*, Pope John Paul II characterized

¹⁹ CATECHISM OF THE CATHOLIC CHURCH ¶ 2270 (2d ed. 1997).

²⁰ *Id.* ¶ 2271.

²¹ *Id.* ¶ 2273.

²² PONTIFICAL COUNCIL FOR THE FAMILY, *CHARTER RIGHTS OF THE FAMILY*, Art. 4 (Oct. 22, 1983).

laws permitting abortion as “radically opposed not only to the good of the individual but also to the common good” and as “intrinsically unjust.”²³ The Church has been vocal and consistent in both its opposition to abortion and to legal efforts in any country to permit or expand access to abortion.

Here, we are not talking about asking a Catholic institution to sit by and allow something to happen in its presence. Rather we are talking about forcing the institution to actually perform the act it views to be a moral evil. It is hard to imagine placing a graver burden on religion.

Some would argue that forcing a religious employer to provide prescription contraception coverage for its employees creates a lesser burden. If it does, it can't be because the issue is not sufficiently important to the Church. The Church's position on the use of artificial means of birth control is no less ambiguous than its position on abortion. From the 1931 publication of *Casti Connubii* by Pope Pius XI, written in response to the Anglican church's approval of birth control at their Lambeth Conference of 1930, the Church has consistently condemned the use of artificial contraception. *Humanae Vitae* reaffirmed that the use of any method of birth control other than natural family planning is prohibited. The view of the Church is that artificial contraception perverts nature and is an act contrary to the will of God.

Notwithstanding the strength of the Church's opposition to artificial contraception, those who support the application of mandatory contraceptive clauses to religious employers argue that the statutes impose no significant burden on religion because the statute only requires employers to provide access to contraceptives and religious employers are still free to convey to their employees their moral opposition to the use of contraceptives. Thus, they claim the statute involves no endorsement by the employer of the use of birth control. This is an argument that has some appeal to those who would prefer that the Church should accomplish its aims by persuasion rather than by force.

I find this argument unpersuasive. I talked earlier about the Church's evangelization role. Evangelization occurs by both direct and indirect means and requires that Catholic institutions

²³ JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶¶ 72-73 (1995).

act in accordance with their religious beliefs. One evangelizes not merely by what one says, but, more importantly, by what one does, that is, by witness as much as by teaching. "In the Christian tradition, a faith not expressed in conduct is inauthentic."²⁴ It is thus necessary that what a Catholic institution does reflects the Gospel and Christ. As Thomas Merton wrote, "[g]estures of conformity do not make a man a Christian, and when one's actual conduct obviously belies the whole meaning of the gesture, it is an objective statement that one's Christianity has lost its meaning."²⁵

The idea that "actions speak louder than words" renders unpersuasive the argument that mandatory contraception statutes do not require endorsement of birth control by religious employers. It is not enough for a religious employer say one is opposed on moral grounds to contraception if one is paying for its employees to obtain it; the condemnation of the act is inauthentic if the religious employer is paying for what it believes to be immoral. As Catholic Charities has argued,

[w]hen an organization pays for an activity, the message that is ordinarily communicated is that the organization endorses or approves of the activity. When a religious institution subsidizes particular conduct, the inescapable message is that it does not disapprove of that conduct. A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur.²⁶

The religious employer being asked to pay for prescription contraception coverage for its employees is being asked to facilitate and pay for that which it believes to be morally evil. As Martin Luther King, Jr., once observed, "noncooperation with evil is as much a moral obligation as is cooperation with good."²⁷ So, while the burden may be less than that placed on a Catholic hospital being asked to perform an abortion, it is still a substantial burden.

What about the burden on religion placed by a requirement that a Catholic adoption agency place a child for adoption with a

²⁴ Chopko, *supra* note 16, at 146.

²⁵ THOMAS MERTON, CONJECTURES OF A GUILTY BYSTANDER 95 (1966).

²⁶ Petition for Writ of Certiorari at *13-14, Catholic Charities of Sacramento, Inc. v. California, 543 U.S. 816 (2004) (No. 03-1618), 2004 WL 1243136.

²⁷ THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 14 (Clayborne Carson ed., 1998).

homosexual person or a same-sex couple? I should say at the start that this is a question to which I had not given a significant amount of thought prior to preparing for this talk. The abortion and contraception questions are ones I have talked and written about; this is one that I have only really observed at the periphery.

As with the abortion and contraception issue, there is no ambiguity regarding the Church's position on homosexuality. A 2003 document issued by the Congregation for the Doctrine of the Faith called gay adoption "gravely immoral" and said that allowing children to be adopted by same sex couples "would actually mean doing violence to these children . . ." ²⁸ The document ends by saying that gay adoptions are "gravely immoral and in open contradiction to the principle . . . that the best interests of the child, as the weaker and more vulnerable party, are to be the paramount consideration in every case." ²⁹

As a result of the 2003 document, the Catholic bishops of Massachusetts announced an intent to seek an exemption from state antidiscrimination laws to allow Catholic entities such as Catholic Charities to exclude homosexual couples as prospective adoptees. One of the core missions of Catholic Charities has been to find homes for needy and abandoned children and it historically has successfully placed some of the most difficult children to adopt. It also over the years placed a small number of children—13 out of 720—with homosexual couples; all were children who had been abused or neglected and were considered hard to place because they were older or had special needs. The decision by the bishops led to a firestorm of controversy.

Massachusetts law is equally clear. Any agency in Massachusetts that handles adoptions must obtain a state license, which prohibits them from turning down prospective parents based on sexual orientation, religion, and race, among other factors. If an agency knowingly discriminates, it could be stripped of its license to broker all adoptions. At issue is whether the Church and Catholic Charities should be exempt from this requirement.

²⁸ CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL DOCUMENT *CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS* ¶ 7 (2003).

²⁹ *Id.*

Again, the issue is not whether the Church is right in its position; many would argue against the conclusion that it is better for a child not to be adopted than to be adopted by a gay couple. The question, however, is the extent to which religion is burdened by being forced to act in a way inconsistent with its beliefs.

Clearly, to force Catholic Charities to place a child with a homosexual couple would burden its religious beliefs. The difference between the abortion situation and the contraception and adoptions situations is that in the latter two examples, the religious entity has a choice. In the case of the contraception statutes, the religious employer can choose not to provide any prescription contraception coverage, which removes it from the mandate of the statute. (To avoid the problem of preemption by ERISA, the statutes all read the same way: An employer who provides any prescription coverage must also provide prescription contraception coverage.) In the case of adoptions, the Catholic institution can avoid the burden by simply ceasing to engage in adoptions. Indeed, last March Catholic Charities of Boston announced that the agency would end its adoption activity rather than comply with state law requiring that gays be allowed to adopt. The Rev. J. Bryan Hehir, president of Catholic Charities of Boston, and Jeffrey Kaneb, chairman of the board, said that after wrestling with the issue, they could not reconcile church teaching that says placing children in gay homes is "immoral" with Massachusetts law prohibiting discrimination against gays. Hehir, announcing the decision, called it "a difficult and sad day for Catholic Charities."³⁰ Catholic Charities of California made a similar decision in August of last year.

In both cases, the response is that the religious entity is being forced to choose to act in a way inconsistent with its broader mission. The religious employer believes that not providing its employees with any prescription coverage is an act of injustice. Catholic Charities is being forced to abandon something that has been a core part of its mission. Catholic Charities of San Francisco, for example, was started 99 years ago with the stated mission to help orphan children. I leave to you to wrestle with the question of how great a burden you think that

³⁰ Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1.

is. Clearly in both cases, the burden is less than that which would be imposed if the law required a Catholic hospital to provide abortions or emergency contraception. But is it a great enough burden to warrant legal protection? My own view is yes.

QUESTION 3: HOW DO WE BALANCE THE BURDEN ON RELIGION
AGAINST THE STATE'S PUBLIC POLICY INTEREST?

This last question really involves two sub-questions: What is state interest? And should the state find means that are less intrusive on religion to achieve its public policy goals?

Let's start by identifying the state interest involved, again, sticking to the three examples I just discussed. First, when we talk about laws requiring Catholic hospitals to provide abortions, we are talking about both abortions and the administration of emergency contraception where it cannot be demonstrated that conception has not already occurred. That is, standard care for treatment of female sexual assault victims is administration of emergency contraception. The guidelines applicable to Catholic hospitals allow the administration of emergency contraception by Catholic institutions where a woman is a victim of sexual assault and where there is no evidence upon testing that conception has already occurred. Thus, the legal mandate would require administration of emergency contraception even where conception has already occurred, i.e., where the use of the emergency contraceptive is abortive. Thus, I treat the two legal mandates as essentially the same.

The state interest in requiring Catholic hospitals to provide abortion (or emergency contraception) is access to reproductive health services. Due in part to the closure of non-Catholic hospitals in rural areas and in part to mergers between Catholic and non-Catholic hospitals, there are now 76 Catholic hospitals in 26 states that are "sole providers," that is, which are located in areas where no other hospitals are easily accessible.³¹ Mergers of Catholic and non-Catholic hospitals generally result in the elimination of some, if not all, reproductive health services (including not only abortion, but sterilization, birth control drugs, devices and information, and in vitro fertilization). Thus, for

³¹ PLANNED PARENTHOOD FED'N OF AM., OPPOSING DANGEROUS HOSPITAL MERGERS 2 (1999), <http://www.plannedparenthood.org/files/PPFA/fact-hospital-mergers.pdf>.

example in California, where mergers between Catholic and non-Catholic hospitals have become especially prevalent and have threatened access for isolated rural and economically disadvantaged areas, legislators and advocates have proposed a bill that, among other things, would expressly require all hospitals to provide a full range of reproductive health services as a condition of government funding and merger approval.

Why should the state care about access to abortion? It is one thing to say that the state does not have a sufficient interest to prohibit someone from obtaining an abortion. It is another to say that there is a state interest in affirmatively providing abortions.

The argument often made is that reproductive health care is an essential part of meeting public health needs. It is claimed that the health effects that result from a lack of reproductive health services or information can be dire. For example, a patient may have some medical condition or illness that would be aggravated by carrying a fetus to term, jeopardizing the woman's health or life, making abortion necessary to protect the woman's health or life. Even where there is not threat to life, access to reproductive health services may be necessary to avoid the physical and psychological effects resulting from pregnancy. Even if one accepts that in some cases there is a legitimate public health argument based on the need to protect the life and health of the mother, that is a pretty narrow interest upon which to justify broad requirements on Catholic hospitals, especially where there are other hospitals in the community providing these services.

I should add that sometimes the state interest here is framed simply as promoting autonomy. That is, for example, a rape victim has a right of privacy and autonomy that should be promoted. Here we are pitting the individual's privacy and autonomy interest against the religious institution's religious freedom. Many would argue that promotion of the privacy and autonomy interests should trump, illustrating my earlier point about the movement from negative to positive rights. This argument says: Not only can't you tell me I can't do this; you must help me do it even if it is against your religious beliefs. Effectively, my autonomy trumps yours. Phrased that way, the argument is nothing short of outrageous.

Second, when we are talking about laws requiring Catholic employers to provide prescription contraception coverage, the

articulated state interests fall into two categories: claims that such mandatory coverage promotes equal treatment of women and claims that such coverage preserves public health. Although both propositions have been accepted by courts, both are debatable.

The claim that the failure to cover prescription contraception discriminates against women is questionable. Several arguments have been advanced to support the proposition that excluding contraceptives from insurance coverage disproportionately impacts women. The first argument is that because prescription contraception must be obtained and used by women, women bear the physical risks and inconvenience that accompanies the use of prescription contraception. The second is that the result of excluding coverage for prescription contraception and including other prescription coverage is that women bear higher out-of-pocket health care costs than do men.

Regarding the first argument, it is certainly the case that women currently bear the physical risk and inconvenience of using prescription contraception, but it is not clear how that translates into an argument that employers must cover prescription contraceptives under their plan. Whether or not contraceptives are covered by insurance, women will still bear the physical risk and inconvenience. Regarding the second argument, the fact that women bear more out-of-pocket health care costs than men is hardly solely caused by the failure of insurance plans to cover prescription contraceptives. Estimates showing that women have higher health plan costs than men consider not only the cost of prescription contraceptive coverage, but the costs of unintended pregnancies. Yet, no link (significant or insignificant) has been shown to exist between unintended pregnancies and the failure of plans to cover prescription contraceptives. Moreover, without examining the totality of benefits provided by an employer's health plan to women versus men, it is impossible to demonstrate that the greater cost imposed on women results from differences in plan coverage versus different levels of illness or other usage of medical services. I have seen no analysis of total plan coverage or of comparative illness or usage levels by anyone who has made a disproportionate impact argument.

A third argument that has been advanced is that the exclusion of contraceptives discriminates on the basis of sex or

pregnancy because prescription contraceptives are used only by women. However, it is a mistake to view a health plan's exclusion of prescription contraceptives in isolation. Were prescription contraceptives the only plan exclusion, a conclusion that the plan discriminated on the basis of sex or pregnancy might be understandable. However, all plans have exclusions of various types. Although the shift to the provision of medical benefits through HMOs and other managed care providers has resulted in an increase in coverage for preventive services such as well baby care and adult physicals, depending on the plan in question, the plan may exclude various services such as cosmetic surgery, human growth hormones, hearing aids and routine foot care. Prescription contraceptives are merely one member of a class of items excluded—which class applies to both males and females alike.

In addition, the failure of health plans to include prescription contraceptives applies to both sexes. Although prescription contraception is currently available only to women, that limited availability is only a matter of timing; research suggests that the availability of male prescription contraceptives is not many years away.

My own view is that there is not a compelling argument that coverage of contraceptives is necessary to promote equal treatment of women. In reality, the genesis of this claim is the vociferous outcry that arose when health insurance plans began to cover Viagra after that drug was approved by the FDA. While it may have rankled women to see Viagra covered when birth control was not, thus setting the stage for fights over contraceptive coverage, the situations are not analogous. However else it may be used, Viagra is designed to treat a medical disorder—infertility—and plans generally pay for the drug only when it is being used for that purpose.

With respect to the second state interest asserted, despite its widespread acceptance as a political matter, the claim that prescription contraception is a basic health care need is hardly self-evident. Two arguments have been made. First, it is argued that contraception is a basic health care need based on the fact that it is medically undesirable for a woman to have 12 to 15 pregnancies over the course of her fertile years, the estimated number of pregnancies that a woman would have if she used no contraception during her child-bearing years. Second, it is

argued that adverse consequences flow from unintended pregnancies.

Even if one accepts the truth of both of the foregoing statements, neither is a persuasive argument for why employers should be forced to provide coverage for prescription contraceptives. This is true for several reasons. First, I have seen no evidence demonstrating that women who want to use prescription contraception coverage are unable to do so because their employer does not cover it. More specifically, what must be demonstrated is that significant numbers of employed women whose employer provides prescription coverage that excludes contraceptive coverage are unable to obtain contraceptives because of the cost involved. Without such a demonstration, there is no link between forcing employers to provide contraception coverage and the public health benefits sought to be achieved.

In evaluating any evidence that might be produced on this point, it is necessary to keep in mind that plans have prescription co-pays. Given the cost of prescription contraception, the out-of-pocket expenses for an employee whose employer covered prescription contraceptives could still be somewhere between \$60 and \$228 per year. Thus, in order to demonstrate any public health benefit, it must be shown that there are employed women who want to use prescription contraceptive coverage and who cannot afford to do so in the absence of coverage but who could afford the prescription co-payment if coverage is provided.

Second, there are both non-artificial and non-prescription means available to allow sexual activity without resulting in pregnancy. The fact that birth control pills may be more convenient a means of birth control than condoms or natural family planning does not equate with a claim that they should be considered basic health care. This is especially true given the potential health risks prescription contraceptives may pose to their users. Thus, one can accept the basic proposition that sexual and reproductive health are important goals without concluding that prescription contraceptives are part of basic health care that must be provided by employers.

What I have just said suggests that the state public policy interest here is hardly unassailable. Moreover, even if one were persuaded of the state's interest, isn't there a value in attempting to achieve that interest in a way less intrusive on religion? That

is especially the case here, where a less intrusive approach is more likely to be effective, that is, to provide prescription contraceptive coverage outside of the employment context. The significant advantage of a non-employment approach is that it addresses the reality that many 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 or parent's plan—or because their employer does not provide for health care coverage. A non-employment based approach would do a better job of providing coverage to those most in need of it, and offers a way of meeting the perceived health need without doing violence to respect for religion. Given the seriousness of this issue from the standpoint of the Catholic faith, to not consider approaches that would actually do a better job of meeting the state's interest than mandating that employers provide contraceptive coverage demonstrates a serious lack of respect for religion. In fact, in September of 2006, a bill was introduced in the House to require states to cover contraceptives for women with incomes up to 200% of the poverty level.³²

Finally, when we talk about laws requiring Catholic adoption agencies to place children with homosexual couples, the state interest is much simpler—it is one of nondiscrimination. It cannot be said that the state has a positive interest in seeing homosexual couples adopt children; I have not heard it suggested that it is affirmatively better to place children with same-sex couples rather than with heterosexual couples. Rather, the interest is in not discriminating against homosexuals.

Nondiscrimination is clearly an important state interest—and lack of discrimination against homosexuals, at least in some categories, is something the Church also supports. Many scholars advocate the complete elimination of discrimination based on sexual orientation. But the question is whether that goes too far. Is the interest here sufficiently great to justify the intrusion on religion, to force the religious institution to act in a way that prevents it from carrying out its religious message? That is especially important to ask here, because there are surely plenty of secular adoption agencies. There is no claim that homosexual couples are unable to adopt because Catholic

³² *Incoming Congress Should Enact Legislation to Reduce Abortion Rate*, NEWS-MEDICAL.NET, Nov. 23, 2006, <http://www.news-medical.net/?id=21106>.

agencies will not place children with them. And if the interest is large, should the state be making greater efforts to accomplish its aims in some alternative way that does not burden religion? Again, that is especially the case in those contexts where a way that is less burdensome to religion may actually do a better job of accomplishing the state's aim. I will leave that for you to debate.

I hope I've given you something to think about at least as to the three questions I've addressed: (1) How should we define a religious institution for purposes of protecting conscience; (2) What kind of burden on religion is sufficient to give rise to an exclusion from otherwise generally applicable state laws; (3) How do we balance the burden on religion against the state's public policy interest. We may not have clear answers on any of them, but I think we have enough on the table to facilitate discussion of the issues.

