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What Might Have Been: Contraception and Religious Liberty

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ARTICLE

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The bishops of the Roman Catholic Church approved the *Declaration on Religious Freedom, Dignitatis Humanae* (hereinafter "DH"), at the last session of the Second Vatican Council, in December 1965. DH changed prior Catholic teaching by affirming that religious liberty is the right of every human person, not a right of Catholics only.[1] The lead drafter of the declaration was the New York Jesuit John Courtney Murray, who had written about Catholicism and church-state relations since the 1940s.

Murray told reporter Robert Blair Kaiser in 1965 that the "resolution of the religious liberty issue had 'transferential implications' for those trying to work out the birth control question."[2] The "birth control question" asked if the church should revise its prohibition on artificial contraception. After some Protestant churches had voted during the 1920s to allow contraception, Pope Pius XI had issued a vigorous condemnation of that practice in his 1930 encyclical letter *Casti Connubii.* By the 1960s, however, new forms of contraception, including "the pill," were available, and many Catholics wondered if the church would change its teaching on contraception as it had changed its teaching on religious liberty.

Before the Second Vatican Council, the Catholic Church condemned the separation of church and state and taught that only Catholics had the right to public worship. From 1940-1965, in a series of nuanced essays, Murray developed a historical argument that the prohibition on separation

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1. Before Vatican II, the Church taught that only true religions have the right to religious freedom, on the theory that "[e]rror does not have the same rights as truth." Because Catholicism was the one true religion, only Catholics had an authentic right to religious liberty. Thomas T. Love, *John Courtney Murray: Contemporary Church-State Theory* 28 (Doubleday & Co., Inc. 1965).

2. Robert Blair Kaiser, *The Politics of Sex and Religion: A Case History in Development of Doctrine, 1962-1984* 133 (Leaven Press 1985).

was not a timeless, universal norm, but was best understood as a response to the anticlerical liberalism of modern Europe.[3] The historical context of the United States was different. Its "separationism,"[4] promulgated in the establishment and free exercise clauses of the First Amendment, in fact protected the freedom of the church against encroachment. Hence, Murray concluded, American Catholics could favor the separation of church and state even though Rome (mistakenly) opposed it.

This Catholic debate about religious freedom was resolved at Vatican II, when the Council Fathers overwhelmingly approved DH, which affirmed that religious freedom is a right of every human person, not of Catholics only. The Council, however, did not address the subject of contraception. Pope John XXIII reserved that topic to a Papal Commission for further study. Although Pope John died before the Commission met, it held five meetings from 1963 to 1967, during the papacy of John's successor, Pope Paul VI.[5]

John T. Noonan, Jr. became a consultant to the fourth (1965) session of the Papal Birth Control Commission. Noonan was then a professor at the University of Notre Dame.[6] At the first session of that meeting, he provided the Commission's members with a thorough, two-hour oral survey of the history of Catholic teaching on contraception. Harvard University Press would publish his comprehensive book on that subject in 1966.[7] The Commission members worked diligently to overcome disagreements, and eventually voted to recommend a change in the church's teaching about contraception. Noonan's explanation of how the teaching on contraception had developed in different historical contexts was influential in convincing some Commission members to vote for change.[8]

In April 1967, two reports of the Commission were leaked to the press. A so-called Majority Report recommended a change in the church's teaching. Meanwhile, a minority argued that change would undermine the church's authority by contradicting prior papal statements that contraception was always immoral.[9] That concern about protecting church authority was dramatically represented in Jesuit Father Marcelino Zalba's question to

3. For Murray's writings on religious freedom, see John Courtney Murray, *Religious Liberty: Catholic Struggles with Pluralism* (J. Leon Hooper, ed., Georgetown U. Press 1993) and articles listed in bibliography, *id.* at 245-61.

4. Recent scholarship challenges the idea that the First Amendment protected "separation of church and state." *See e.g.* Philip Hamburger, *Separation of Church and State* (Harvard U. Press 2002).

5. Kaiser, *supra* n. 2, at 20; Garry Wills, *Papal Sin: Structures of Deceit* 89-93 (Doubleday 2000).

6. Kaiser, *supra* n. 2, at 78.

7. *See generally* John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Harvard U. Press 1986).

8. Robert McClory, *Turning Point* (The Crossroad Publg. Co. 1995).

9. Kaiser has pointed out that it is a mistake to call these "majority" and "minority" reports. Kaiser, *supra* n. 2, at 178 ("The commission's episcopal members had agreed not to submit major-

other members of the Commission: "*What then with the millions we have sent to hell, if these norms were not valid?*"[10] Church officials feared that a "change in the church's teaching might damage the church's credibility."[11]

In July 1968, Pope Paul VI released *Humanae Vitae* (hereinafter "HV"), the encyclical letter that, siding with the minority, reiterated the church's traditional ban on artificial contraception. In 1965, Murray's historical analysis of religious freedom had influenced the Roman Catholic Church to change its teaching on religious liberty. In contrast, Pope Paul VI ignored Noonan's masterly exposition of the history of contraceptive ethics in HV. The implications were profound for the life of the church.[12]

Murray did not comment extensively on contraception, having focused his work during the 1960s on the battles over religious freedom. Moreover, he died in August 1967, after the publication of the Commission's reports but before HV was issued. Nonetheless his lectures and letters provided a framework for reshaping the church's teaching on contraception in light of its new understanding of religious liberty. In this article I pursue Murray's remark to Kaiser about the "transferential implications" from religious liberty to contraception. In Part I, I identify three such implications, namely the importance of historical consciousness, the distinction between private and public morality, and the meaning of religious freedom. HV, however, ignored those implications, with a resulting profound influence on American Catholicism. In Part II, I argue that the ban on birth control has had "reverse transferential implications" for the church's understanding of religious liberty. In other words, today the church's teaching on contraception undermines instead of undergirds religious liberty. These reverse transferential implications are most evident in the church's lobbying and litigation against the efforts of many states to protect women's equality through passage of Women's Contraception Equity Acts.

As the church opposes women's equality in the name of religious freedom, American Catholics can only wonder what might have been had the church heeded Murray's insights about freedom, and Noonan's history of contraception, instead of defending its own authority.

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ity and minority reports, just one report of the commission. But Ford and Ottaviani felt they had a right and a duty to warn the pope away from it." So the minority gave its own paper to the pope.).

10. Patty Crowley's response is even better: "Father Zalba, do you really believe God has carried out all your orders?" Patty Crowley was a member of the Papal Birth Control Commission. McClory, *supra* n. 8.

11. Kaiser, *supra* n. 2, at 167, 219 ("It was power. The point was not to teach, but to rule." "Some theorized that the curia was using the birth control issue as a pawn in an old clerical chess game. Object of the game: to recoup some power lost during the decentralizing moves begun by bishops at the council.").

12. Andrew Greeley, *Crisis in the Church: A Study of Religion in America* (The Thomas More Press 1979); Wills, *supra* n. 5, at 73 ("he dealt the most crippling blow to Catholicism in our time").

I. THE TRANSFERENTIAL IMPLICATIONS: FROM RELIGIOUS FREEDOM TO CONTRACEPTION

A. *Historical Consciousness*

As stated above, Murray devoted many years to the scholarly exposition of the church's understanding of religious freedom. If one interpreted the church's teachings on religious liberty in historical context, he argued, American Catholics could support the separation of church and state because it protected religious freedom. Murray's numerous critics rebuked his argument by quoting papal authority; in response, he repeatedly cited the church's history.

History was also the theme of Murray's reflections about the Papal Birth Control Commission's accomplishments. Murray defended the Majority Report in a talk to priests and ministers in May 1967.[13] He described the need for the church to move from a "classical consciousness" to a "historical consciousness."[14] The former prizes objective, unchanging truth, while the latter recognizes that one's view of truth is always influenced by history. The first values certainty; the second understanding.[15] In 1965, historical consciousness had triumphed when, under Murray's direction, the Council changed the Catholic teaching on religious freedom. In contrast, the church's opposition to contraception was ahistorical. As Murray said: "'The church reached for too much certainty too soon, it went too far. Certainty was reached in the absence of any adequate understanding of marriage.'"[16] In other words, the church emphasized certainty and truth instead of human experience and history.

Murray's understanding of history had already influenced the author of the Catholic history of contraception. Judge Noonan has described an afternoon that he spent with Murray at Woodstock, Maryland before the Council. Their conversation included a discussion of religious freedom. Murray told Noonan: "The papal encyclicals must be seen in context. They spoke against the background of an anticlerical politics. They did not speak for all time."[17] Noonan left the meeting with a "large question" in the "back of his mind," namely, the "relation of history to the teaching of the church."[18] In

13. *Murray Says Church Was Too Sure*, Natl. Catholic Rptr. 3 (May 17, 1967). This argument is stated in detail in John Courtney Murray, SJ, *Appendix: Toledo Talk*, in *Bridging the Sacred and the Secular: Selected Writings of John Courtney Murray, SJ* 336-37 (J. Leon Hooper, SJ ed., Georgetown U. Press 1994) [hereinafter Murray, *Toledo Talk*].

14. For this distinction, Murray relied on a 1966 draft of Bernard F. Lonergan, SJ, *The Transition from a Classicist World View to Historical-Mindedness*, in *A Second Collection* 1 (William F.J. Ryan & Bernard J. Tyrrell eds., The Westminster Press 1974); *see* Murray, *Toledo Talk*, *supra* n. 13, at 334 n. 2.

15. Murray, *Toledo Talk*, *supra* n. 13, at 336.

16. *Id.*

17. John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 29 (U. of Cal. Press 1998).

18. *Id.*

subsequent years, he "returned again and again"[19] to the church's history, writing authoritative books on the church's historical teaching about first, usury, and later, contraception.[20] Like Murray's investigations of religious liberty, Noonan's writings demonstrated that the church's history permitted development of doctrine. *Contraception* showed in exhaustive detail how the understanding of contraception had been influenced by historical context throughout the centuries.[21]

After *Humanae Vitae* appeared, Noonan led a news conference of Commission members in October 1968, where he too observed a link between religious liberty and contraception. "Some day, he said, the church would repudiate *Humanae Vitae* as it already had repudiated *Mirari Vos* (1832), which condemned freedom of conscience, and *Quanta Cura* (1864), which asserted that religious liberty, even in the civil arena, was a delirium."[22]

Some day. But not yet. In the year 2004, the church continues to promote its classical teaching on contraception.

B. The Distinction Between Private and Public Morality

Murray also commented on the efforts in Massachusetts to decriminalize contraception. He wrote a 1965 letter to Boston's Richard Cardinal Cushing that addressed the proposed changes in Massachusetts law.[23] Under existing law, anyone who sold or distributed contraceptives, or who advertised or disseminated information about contraception, could be fined or imprisoned.[24] Naturally the church, which believed that the use of contraceptives was intrinsically immoral, could be expected to approve such a legal ban. Murray supported the new proposal, which allowed doctors to prescribe contraception and health personnel to distribute contraceptive information to married persons.[25] He wrote to Cardinal Cushing that

19. *Id.*

20. John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Belknap Press of Harvard U. Press 1966); John T. Noonan, Jr., *The Scholastic Analysis of Usury* (Harvard U. Press 1957).

21. McClory, *supra* n. 8, at 8-17.

22. Kaiser, *supra* n. 2, at 207.

23. The proposed change can be found at Mass. Gen. Laws Ann. ch. 272, §21A (West 2000). John Courtney Murray, SJ, *Memo to Cardinal Cushing on Contraception Legislation*, in *Bridging the Sacred and the Secular: Selected Writings of John Courtney Murray, SJ* 81 n. 1 (J. Leon Hooper, SJ, ed., Georgetown U. Press 1994) [hereinafter Murray, *Memo to Cardinal Cushing on Contraception Legislation*].

24. Mass. Gen. Laws Ann. ch. 272, §§ 20-21 (West 2000). *See Cmmw. v. Gardner*, 15 N.E.2d 222, 222-233 (Mass. 1938) (describing original Massachusetts law), *overruled*, *Griswold v. Conn.*, 381 U.S. 479 (1965); *see also Cmmw. v. Baird*, 247 N.E.2d 574 (Mass. 1969).

25. Mass. Gen. Laws Ann. ch. 272, §§ 21A. This 1966 amendment was passed in response to the United States Supreme Court's invalidation of the Connecticut birth control laws in *Griswold*, 381 U.S. 479. The Supreme Court later ruled that § 21 and § 21A of the Massachusetts statute were unconstitutional. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

Catholics "may and should approve" the change in the law for two reasons.[26]

The first of Murray's "two general lines of argument" for decriminalization distinguished between private and public morality.[27] According to Murray, civil law should not "prescribe everything that is morally right and . . . forbid everything that is morally wrong."[28] Instead, civil law protects public morality and private morality is "left to the personal conscience."[29]

Was contraception private or public? Murray concluded that contraception was a matter of private morality and so not subject to civil law. Civil law should not be used to enforce moral norms that were alien to the community's conscience. Murray based his conclusion in part upon the evidence that religious people disagreed about contraception. For that reason, it would be erroneous to conclude that widespread contraceptive practice was due to a pervasive immorality that needed to be limited by law. Instead, in his words, "It is difficult to see how the state can forbid, *as contrary to public morality*, a practice that numerous religious leaders approve as morally right."[30] Even if Catholics "lamented" the *moral* approval of contraception by other religious groups, Catholics' private morality should not determine the content of public *law*.

The core principle in this argument is that law must be based on public, not private, reasons, that is, according to the "norm of 'generally accepted standards.'"[31] Religious disagreement may demonstrate that there is no public consensus on a subject. In those circumstances, the state may not enforce one private viewpoint as the law for everyone. The civil law should not regulate private morality.

C. *The Meaning of Religious Freedom*

As suggested by his conversation with Kaiser, Murray's comments about the decriminalization of contraception also included a separate argument based on the principle of religious liberty.[32] Indeed, the letter to Cushing referred to the *Declaration on Religious Freedom*. According to DH, a government may restrain an individual from following her conscience only when her action threatens the civil order, public peace or public morality. Contraception, however, was a matter of private morality; its use did not threaten public order. Because the government may not restrain

26. Murray, *Memo to Cardinal Cushing on Contraception Legislation*, *supra* n. 23, at 81.
27. *Id.* at 82.
28. *Id.*
29. *Id.*
30. *Id.* at 83 (emphasis added).
31. *Id.*
32. Here I disagree with the Editor's Note in Murray's *Memo to Cardinal Cushing*, which asserts that the second argument on religious freedom adds little to the first on public morality. *Id.* at 84 n. 3. Both arguments are independently important.

its citizens from acting according to conscience on a private matter, Murray concluded, "laws in restraint of the practice [of contraception] are in restraint of religious freedom."[33] In the past, Catholics might have favored laws in restraint of contraception because they were consistent with the Catholic religion. Because of DH, however, Catholics should realize that non-Catholics had an equal right to religious freedom, i.e., to practice contraception without undue government interference.

Although Murray recognized the inherent difficulty in this position for Catholics, he insisted that Catholics should both live according to the church's teachings and support laws that permitted contraception. Moral law (no contraception) differed from civil law (no enforcement of private morality). Furthermore, government intrusion upon the moral law violated religious freedom. The Cushing letter's final paragraphs express Murray's respect for law, morality and religious freedom, and reflect his nuanced account of the relationship among them:

> Perhaps the essential thing is to make clear: (1) that from the standpoint of morality Catholics maintain contraception to be morally wrong; and (2) that out of their understanding of the distinction between morality and law and between public and private morality, and out of their understanding of religious freedom, Catholics repudiate in principle a resort to the coercive instrument of law to enforce upon the whole community moral standards that the community itself does not commonly accept.
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> The conclusion might be an exhortation to Catholics to lift the standards of public morality in all its dimensions, not by appealing to law and police action, but by the integrity of their Christian lives. This, to set the birth-control issue in its proper perspective.[34]

D. Implications Ignored

Just as Pope Paul VI avoided the Commission's, Noonan's, and Murray's *historical* argument in 1968, however, since 1978 Pope John Paul II has ignored Murray's insights about *public morality* and *religious freedom.* John Paul has reinforced his predecessor's teaching on contraception with all his might. Within the church, he has made the contraceptive ban as infallible as a moral teaching can be for Catholics. Moreover, because of his belief in the "necessary conformity of civil law with the moral law," he has insisted that the Catholic teaching on contraception must become the law for everyone.[35]

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33. *Id.* at 84.

34. *Id.* at 85-86.

35. Pope John Paul II's major encyclicals on these themes are *Veritatis Splendor* and *Evangelium Vitae.*

Pope John Paul has contended that modern democracies must heal their "moral relativism" and "culture of death" by promulgating into civil law the church's teaching on all the contested moral questions of life and death, beginning with contraception and ending with euthanasia. In deference to papal teaching, and in direct contrast to Murray's analysis, the American Catholic bishops have waged a relentless campaign to change the content of civil law to limit access to contraception and to limit the freedom of individuals whose moral and religious beliefs permit contraception. Over the last five years, their target has been legislation that protects women's equality in health care. The reverse transferential implication of this stance is that the church's lobbying and litigation on contraception undermine religious freedom.

II. REVERSE TRANSFERENTIAL IMPLICATIONS: FROM CONTRACEPTION TO RELIGIOUS LIBERTY

During the 1960s, while Murray and Noonan participated in the Catholic debates about religious freedom and contraception, the United States Supreme Court invalidated a Connecticut law that prohibited the use of contraceptives. *Griswold v. Connecticut* recognized a right to privacy that falls within the penumbra of the Bill of Rights.[36] There are some echoes of Murray's discussion of private and public morality in the Court's language about privacy and the Connecticut law: "Such a law cannot stand in light of the familiar principle [that] a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"[37] Under *Griswold*, sexual privacy, including contraceptive use, enjoys constitutional protection. The Court has recently reaffirmed that the states may not intrude upon privacy because of a vague interest in protecting morality.[38] The Court's decisions on privacy, old and new, echo Murray's argument that the civil law should not regulate private morality.

Today, thirty-nine years after *Griswold*, many American women still lack access to effective contraception. One reason is the disparate insurance coverage for men and women. "Women of reproductive age spend 68% more than men on out-of-pocket health care costs, largely on reproductive

36. *Griswold*, 381 U.S. at 485.

37. *Id.* (quoting *NAACP v. Ala.*, 377 U.S. 288, 307 (1964)).

38. *Lawrence v. Tex.*, 123 S.Ct. 2472, 2480 (2003) ("For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" (citation omitted)).

health care services."[39] For this reason, over the last five years, twenty-one states have passed "contraceptive equity acts" that help women gain equal access to reproductive health care.[40] These acts require insurance plans that offer prescription drug coverage to include contraceptive drugs and devices in their coverage. The California legislature, for example, enacted the Women's Contraception Equity Act in order to protect "health and safety concerns" as well as "to promote and protect fundamental personal rights of individual employees to privacy and free expression, to free exercise of their respective religious and moral beliefs, and to equal protection in their access to prescription medications."[41] Similar legislation, the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), is pending in the United States Congress.[42]

A. *Lobbying for Private Morality to Become Civil Law*

The Catholic Church has been the steadiest opponent of such legislation. Women's Equity Acts stalled in the legislatures of two of the largest states, California and New York, because of Catholic opposition.[43] Following John Paul's teaching that the civil law must reflect the moral law, and resisting the constitutional right to privacy, the church has opposed any laws that permit contraception for American citizens, Catholic or non-Catholic.[44] These lobbying efforts are the starkest contradiction of Murray's argument that Catholics should not attempt to enact their private morality into civil law.[45]

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39. Center for Reproductive Rights, *Contraceptive Equity Bills Gain Momentum in State Legislatures*, http://www.reproductiverights.org/pub_fac_epicchart.html (accessed Dec. 18, 2003) [hereinafter *Gain Momentum*].

40. Center for Reproductive Rights, *Contraceptive Equity Laws in the States*, http://www.reproductiverights.org/st_equity.html (accessed Dec. 18, 2003) (identifying Ariz., Cal., Conn., Del., Ga., Haw., Ill., Iowa, Me., Md., Mass., Mo., Nev., N.H., N.M., N.Y., N.C., R.I., Tex., Vt., and Wash., as having such laws).

41. Br. of Amici Curiae Jackie Speier & Robert Hertzberg at 6, *Catholic Charities of Sacramento, Inc. v. Super. Ct. of Sacramento County*, 31 P.3d 1271 (Cal. 2001) (2002 WL 985444). *See also Catholic Charities of the Diocese of Albany v. Serio*, Index No. 8229-02, slip op. at 4 (N.Y. Sup. Ct., County of Albany Nov. 25, 2003) (copy on file with St. Thomas Law Journal) ("The legislative history of the WHWA contained in the Assembly Memorandum in Support of Legislation indicates that the WHWA constitutes a comprehensive approach to ending discrimination against women by expanding access by women to vital preventative healthcare.") [hereinafter *Serio*].

42. *Gain Momentum*, *supra* n. 39, at http://www.reproductiverights.org/pub_fac_epicchart.html.

43. *See Serio*, Index No. 8229-02, slip op. at 3 ("Passage of the WHWA was delayed by an inability to agree upon the extent and scope of an exemption, if any, for religious employers.").

44. U.S. Catholic Bishops, Office of Government Liaison, *Pro-Life Legislation: Our Legislative Concerns in the 108th Congress*, http://www.usccb.org/ogl/prolife.htm (accessed Dec. 22, 2003) [hereinafter *Legislative Concerns*]; *see e.g.* California Catholic Conference, Legislative Update, Summer 1999, http://www.cacatholic.org/n1/su99/su99update.html (accessed Jan. 24, 2003).

45. *Legislative Concerns*, *supra* n. 44, at http://www.usccb.org/ogl/prolife.htm ("Support reclassifying certain drugs that can act as abortifacients so they are not routinely treated as contraceptives.").

Murray believed that law must be based on public reasons, that is, on the "norm of 'generally accepted standards.'"[46] In contrast, the church's lobbying against contraceptive coverage has been based on a Catholic interpretation of contraception instead of public contraceptive morality.[47] Specifically, the United States Catholic Conference has dismissed extensive legislative findings that contraception is important to women's health and equality.[48] Instead it has concluded that there is a medical need for Viagra but not for contraception![49] In the bishops' minds, contraception is *not* "basic health care," but is "elective" and "non-therapeutic" and so not worthy of insurance coverage.[50] In the church's judgment, American women do not need access to contraception, even if their legislatures rule otherwise.

The same style of argument has also been evident in the church's recent efforts to block emergency contraception legislation. The Catholic Conference has insisted that those laws should be based on its theological definitions of life (e.g., beginning at conception, not implantation), and of contraceptives and abortifacients rather than on the medical definitions promulgated by the Food and Drug Administration.[51]

In 2004, as in Murray's era, contraception remains a matter of private morality. American public morality supports sexual privacy and contraceptive use.[52] As the Supreme Court has recently reiterated, "our laws and tradition afford constitutional protection to personal decisions relating to

46. Murray, *Memo to Cardinal Cushing on Contraception Legislation*, *supra* n. 23, at 83.

47. *See e.g.* Cathy Deeds, *Forced Choice?* (Mar. 3, 2000), in U.S. Conf. of Catholic Bishops, Life Issues Forum, http://www.usccb.org/prolife/publicat/lifeissues/03032000.htm (accessed Dec. 22, 2003) ("The Church objects to contraceptive coverage laws *not only* because it has moral objections to contraception itself.") (emphasis added).

48. *See Serio*, Index No. 8229-02, slip op. at 6 (religious groups "submitted an affidavit from a single board-certified obstetrician-gynecologist which challenges the need for prescription contraceptives. The affidavit and submissions do not show that the affiant's opinions are generally accepted, nor do they indicate that generally accepted medical authority holds prescription contraceptives to be unnecessary. At best they show the existence of a difference of medical opinions on the subject. Plaintiffs have therefore failed to raise an issue of fact with respect to whether prescription contraceptives are necessary to the provision of effective women's healthcare under the 'beyond a reasonable doubt' burden of proof.").

49. U.S. Conf. of Catholic Bishops, Secretariat for Pro-Life Activities, *Fact Sheet: Contraceptive Mandates* (June 3, 2003), http://www.usccb.org/prolife/issues/abortion/contfac2.htm (accessed Dec. 22, 2003) ("But Viagra, used properly, treats a medical condition and restores reproductive function while contraception does just the opposite.").

50. *Id.* ("Myth: *Contraception is basic health care.* Facts: Contraception is an elective intervention that stops the healthy functioning of healthy women's reproductive systems. Medically it is infertility, not fertility, that is generally considered a disordered to be treated."); *see also* Ltr. from Exec. Dir. Gail Quinn to Sens. (July 25, 2002) (available at http://www.usccb.org/prolife/issues/abortion/epicc.htm) (contraception is "purely elective" and "non-therapeutic").

51. *See e.g.* Deeds, *supra* n. 47 ("This has been approved as a method of 'contraception' by the FDA."); *Drive to extend rape-victim contraception policy in U.S. slows*, Women's Health Weekly 57 (Oct. 23, 2003) ("Hawaii lawmakers passed a bill [on emergency contraception], but Gov. Linda Lingle vetoed it out of concern that it would be challenged by Catholic hospitals.").

52. *See Lawrence*, 123 S.Ct. 2472; *Griswold*, 381 U.S. 479.

marriage, procreation, [and] contraception."[53] Numerous state legislatures have concluded that access to contraceptive coverage is essential to women's health. Moreover, even Catholics have disobeyed *Humanae Vitae*, choosing contraception in the same proportions as other Americans.[54] "The church teaches us a lot of things we don't practice," stated Denver Archbishop Charles J. Chaput, conceding recently that only four percent of married Catholics use natural family planning. Nonetheless, he announced a new campaign by the American bishops against contraception.[55]

In this atmosphere, and against Murray's advice, the church's hierarchy, which has not been able to convince Catholics that HV is correct, has "resort[ed] to the coercive instrument of law to enforce upon the whole community moral standards that the community itself [including the Catholic community] does not commonly accept."[56]

B. Misunderstanding Religious Freedom

Once church lobbyists realized that they could not block these contraceptive equity laws from passage, they lobbied the legislatures for church exemptions from these laws. They demanded that the exemptions apply, not only to Catholic parishes and churches, but also to all the church's schools, universities, hospitals and social service organizations and their non-Catholic employees. In New York, for example, the Senate's and the Assembly's disagreement over the need for a religious exemption from a proposed Women's Health Bill delayed the bill's passage.[57] Cardinal Egan and the New York Catholic Conference lobbied against contraceptive coverage for women and threatened a lawsuit against the state while the bill was debated.[58]

In California, the Catholic Church was the *only* religious group to lobby against the Women's Contraception Equity Act.[59] Without its intervention, the legislation would not have included an exemption.[60] In re-

53. *Lawrence*, 123 S.Ct. at 2481.

54. *See e.g.* McClory, *supra* n. 8, at 147-50; Wills, *supra* n. 5, at 95-96.

55. Daniel J. Wakin, *Bishops Open a New Drive Opposing Contraception*, 153 N.Y. Times A20 (Nov. 13, 2003).

56. Murray, *Memo to Cardinal Cushing on Contraception Legislation*, *supra* n. 23, at 85-86.

57. Erik Kriss, *'Conscience Clause' A Hitch in Hoffmann's Women's Health Bill*, Syracuse Post-Standard A6 (Mar. 13, 2002); David Pilla, *New York Assembly Passes Women's Health Bills*, Best's Ins. News, 2002 WL 4524012 (Feb. 5, 2002); *see* N.Y. Ins. Law § 4303(cc) (West 2003); N.Y. Ins. Law § 3221(7)(16) (West 2003); *see also Serio*, Index No. 8229-02, slip op. at 3-4.

58. Tom Precious, *Bishops Irate at GOP Shift on Covering Birth Control*, Buffalo News A6 (Feb. 5, 2002). Of course this is the lawsuit they just lost, in *Serio*.

59. *Catholic Charities of Sacramento, Inc. v. Super. Ct. of Sacramento County*, 109 Cal. Rptr. 2d 176, 191 (Cal. App. 3rd Dist. 2001); Cal. Health & Safety Code § 1367.25; Cal. Ins. Code § 10123.196.

60. See prior bills that were vetoed by Governor Wilson; *see* Howard Mintz, *State Supreme Court to hear Catholic Charities Case Tuesday*, N. County Times (Nov. 28, 2003), available at http://www.nctimes.com/articles/2003/11/29/news/state/11_28_0322_33_37.txt (accessed Dec. 1, 2003) ("former Republican Gov. Pete Wilson vetoed the measure three times during the 1990s").

sponse to the church's concerns, the Act's sponsors included an exemption for religious employers, but an exemption much narrower than the church desired. The church wanted all Catholic employers—churches, hospitals, schools, universities, and social service agencies—to be exempt from the insurance requirement. The legislature limited the exemption to religious employers "whose primary purpose is religious worship, religious teaching and religious service,"[61] in other words, primarily churches, synagogues and mosques but not employers who offer secular services. The legislature crafted a narrow instead of a broad exemption because

> permitting secular institutions . . . and the growing number of large hospitals and universities loosely affiliated with the Catholic Church to be exempt from the Act would deprive literally thousands of employees in th[e] state of access to nondiscriminatory health and disability insurance coverage. It would also effectively permit such organizations to *impose their internal religious views* on their largely non-Catholic employees, *limiting the employees in the exercise of their own compelling free exercise interests.*[62]

The legislature had good reason to protect employees of Catholic institutions; Catholic hospitals alone employ over fifty-two thousand people in the state of California.[63] In New York, "Catholic affiliated secular health businesses employ over 50,000 persons, with health insurance coverage provided to as many as 500,000."[64]

Finally, when church lobbyists failed to block the laws and were unable to get the exemptions they wanted, Catholic organizations went to court, arguing that the First Amendment required the exemption that the legislature had denied.

Local Catholic Charities organizations have led the litigation. Catholic Charities of Sacramento, for example, is a nonprofit organization that provides social services to the poor without regard to religious background.[65]

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61. *See* Cal. Ins. Code § 10123.196(d)(1) ("(1) For purposes of this section, a "religious employer" is an entity for which each of the following is true:
(A) The inculcation of religious values is the purpose of the entity.
(B) The entity primarily employs persons who share the religious tenets of the entity.
(C) The entity serves primarily persons who share the religious tenets of the entity.
(D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."); Br. of Amici Curiae Jackie Speier & Robert Hertzberg at 1, *Catholic Charities of Sacramento*, 31 P.3d 1271 (Cal. 2001).

62. Real Parties in Interest's Ans. on the Merits at 4-5, *Catholic Charities of Sacramento*, 31 P.3d 1271 (2002 WL 985444) (emphasis added).

63. *Id.* at 5 n. 15.

64. *See Serio*, Index No. 8229-02, slip op. at 17; *see also* David Kravets, *Courts Will Examine Contraceptive Laws* (Nov. 30, 2003) (available in WL, APWIRES) (published as David Kravets, *Church seeks limits on contraceptive law*, The Boston Globe (Nov. 30, 2003)) ("Catholic Charities directly employs more than 1,000 workers in California and New York, but a ruling favoring the charity could also prevent more than 100,000 employees at 77 church-affiliated hospitals in California and New York from benefiting from the laws.").

65. *Catholic Charities of Sacramento*, 109 Cal. Rptr. 2d at 181.

In California, Catholic Charities "spends about $80 million a year on social services. About 60 percent of that money comes from taxpayers,"[66] and "74 percent of its employees are not Catholic."[67] "Catholic Charities of Albany . . . relies on government funding for more than 75 percent of its operating expenses."[68] Sacramento Charities filed suit to enjoin the application of the Women's Contraception Equity Act (hereinafter "WCEA") to its health insurance plan. The opening sentence of its brief in the California Supreme Court captured both Charities's core argument and the intensity of its opposition to the Women's Act: "This case arises as a result of an *unprecedented assault* upon the religious freedom rights of the Catholic Church in California."[69] A similar lawsuit was filed against the New York Women's Health Act, with church supporters using the identical language of "assault."[70]

Charities's *legal* argument is that the First Amendment, California, and New York Constitutions protect Charities and all other Catholic institutions from such assault by granting them a complete exemption from these laws. That argument may have a certain intuitive appeal to religious organizations who believe that free exercise allows the churches to operate beyond or outside the law. Under the leading free exercise case (*Employment Division v. Smith*), however, the churches are subject to neutral laws of general applicability.[71] Exemptions from such laws must be awarded by the legislatures, not the courts. The California Supreme Court refused to exempt Charities from WCEA under either *Smith* or the California Constitution because it would "sacrifice[ ] the affected women's interest in receiving equitable treatment with respect to health benefits."[72]

Charities's argument contradicts the premise of *Smith*, namely that the churches are not above the law but are subject to its demands.[73] The recent Catholic sex abuse scandal has confirmed *Smith's* wisdom that the free exercise clause does not exempt the churches from civil and criminal liability or from neutral laws. On the subject of contraception, the neutral law of general applicability is women's equality. Organizations like Catholic

66. Don Lattin, *Catholicism and the Pill: Vatican pushes birth control edict despite court ruling*, The San Francisco Chronicle A4 (July 8, 2001).

67. *Catholic Charities of Sacramento*, 109 Cal. Rptr. 2d at 184.

68. U.S. Newswire, *Planned Parenthood Praises N.Y. State Supreme Court's Ruling Upholding New York's Contraceptive Coverage Law* (Dec. 1, 2003) (available at LEXIS, news, curnws).

69. Petr's. Br. on the Merits at 7, *Catholic Charities of Sacramento*, 31 P.3d 1271 (2001 WL 1700664) (emphasis added).

70. *Serio*, Index No. 8229-02; *Lawsuit Filed to Defend Religious Liberty*, 1 Capitol Compass (Newsletter of the New York State Catholic Conference) 2 (Jan. 2003).

71. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

72. *Catholic Charities of Sacramento, Inc. v. Super. Ct. of Sacramento County*, 2004 WL 370295 at *21 (Cal. Mar. 1, 2004).

73. *Smith*, 494 U.S. at 888-89 ("we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order").

Charities, which receive taxpayers' money and employ non-Catholics, should not be exempt from those laws. Allowing a blanket exemption to Catholic organizations would change the law of California or New York, creating a zone where the Women's Contraception Equity Act, as well as the constitutional protections of equality and privacy, do not apply. Charities argues that these religious exemptions are necessary to protect religious freedom. The reality is that the exemptions would deny the religious freedom of thousands of employees, Catholic and non-Catholic alike.[74]

Charities understands that an exemption would limit its employees' religious freedom. Its *moral* argument, presented explicitly in the briefs as the basis for the legal exemption, is that contraception is morally wrong for all men and women, Catholic and non-Catholic, married and nonmarried, without regard to "whether they choose to believe or accept" the teachings of the Catholic Church.[75] According to the brief filed in California: "Neither individual choice nor the personal religious convictions of the person seeking to engage in sinful or immoral conduct are *relevant*."[76]

Personal religious convictions are not relevant? The drafter of the *Declaration on Religious Freedom* knew better. By 1966 Murray understood that sincere religious people disagree about the morality of contraception and that "laws in restraint of the practice [of contraception] are in restraint of religious freedom."[77] Today the church has ignored his lessons about freedom, using its own religious liberty to lobby and litigate to limit the liberty of those who disagree with its moral teaching about contraception.

C. *Classical Consciousness*

Murray learned the lessons of freedom by studying history; his biographer named him a "master in the school of history."[78] Murray warned the church against the unhistorical, classical mindset that preached unchanging truths without regard to human experience. The moral argument of the *Charities* litigation is classical to the core. It identifies an objective, unitary principle that applies to all persons in all circumstances: "The religious truths that underlie Catholic religious teaching apply equally to all men and women, regardless of whether they choose to believe or accept them."[79] In 2004 as in the 1960s, on the subject of contraception, "[c]ertainty [i]s

74. Real Parties in Interest's Answer on the Merits at 4-5, *Catholic Charities of Sacramento*, 31 P.3d at 1271 ("It would also effectively permit such organizations to impose their internal religious views on their largely non-Catholic employees, limiting the employees in the exercise of their own compelling free exercise interests.").

75. Petr's. Br. on the Merits at 4, *Catholic Charities of Sacramento*, 31 P.3d 1271.

76. *Id.* (emphasis added).

77. Murray, *Memo to Cardinal Cushing on Contraception Legislation*, *supra* n. 23, at 84.

78. Donald Pelotte, *John Courtney Murray: Theologian in Conflict* 106 (Paulist Press 1976).

79. Petr's. Br. on the Merits 4, *Catholic Charities of Sacramento*, 31 P.3d 1271.

reached in the absence of any adequate understanding of marriage."[80] The American bishops know that the prohibition on contraception contradicts the vast experience of married Catholics. Nonetheless, they announce that teaching anew to Catholics as well as insisting that the rule disregarded by Catholics must apply to all human persons.

III. CONCLUSION

Murray broke the classical mold in the *Declaration*, but it survives in *Humanae Vitae* and its aftermath. Indeed, at the end of John Paul's papacy, the church has returned full circle to the preconciliar, classical mindset. The laity in the church can only wonder what might have been had the church heeded the historical lessons in *Contraception* of Professor John T. Noonan, Jr., the recipient at this symposium of an award appropriately entitled *Dignitatis Humanae*. The award reminds one of that afternoon in Woodstock, Maryland, long ago, when John Murray told John Noonan, "The papal encyclicals must be seen in context . . . . They did not speak for all time."[81]

80. Murray, *Toledo Talk*, *supra* n. 13, at 336.
81. Noonan, *supra* n. 17, at 29.