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SOCIAL SHUTDOWNS AS AN EXTRAORDINARY MEANS OF SAVING HUMAN LIVES

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T*error on every side!* These frightening words are from the prophet Jeremiah (Jer. 20:10, NABRE). Jeremiah served God during the reigns of Judah's last kings. King and people sadly resisted Jeremiah's life-giving message. The chapters of his book are filled with accounts of the verbal and physical attacks he had to endure. In spite of such dire circumstances, Jeremiah remains confident of God's help, as he proclaims, "The Lord is with me, like a mighty champion" (Jer. 20:11).

These days we again hear dire warnings of "terror on every side!"

We might say that this has been the message repeated almost 24/7 since March 2020 regarding the coronavirus pandemic. Yes, the prospect of serious illness and possible death from a novel virus for which we do not have a vaccine can be terrifying. So the question is whether we still believe and can confidently proclaim, as Jeremiah did, that "the Lord is with me, like a mighty champion."

In the Gospel of Matthew, Jesus reminds his disciples of the refrain we hear throughout the Scriptures, "Be not afraid." But on one occasion he adds more specificity: "Do not be afraid of those who kill the body but cannot kill the soul; rather, be afraid of the one who can destroy both soul and body in Gehenna" (Matt. 10:28–33). We know that Gehenna is the term used in the Bible to refer to an abyss of darkness, chains, and burning flames in a valley of unquenchable fire—in other words, what we call hell.

In recent months we have heard regular briefings coming from the White House and governors' offices across the country where government officials and health experts have been giving dire warnings about a virus that can kill the body. But we have heard very few warnings about moral hazards that can kill the soul. Some, for example, have said that access to liquor, cannabis, casinos, and abortion is essential, but going to church and access to the sacraments are not.

We have also taken the extraordinary and unprecedented step of shutting down a major portion of our economy for the past several months, telling people to stay home, not to go to work, and not to go to school. The US Department of Commerce said in July 2020

that the gross domestic product fell at a seasonally and inflation-adjusted 32.9 percent annual rate in the second quarter of 2020, or a 9.5 percent drop compared with the prior quarter. The figures were the steepest declines in more than seventy years of record keeping. Meanwhile, unemployment claims rose to 1.43 million people.¹

So as we look back at what we have done and look forward to consider how we will respond in the future if there should be a second wave of COVID-19 or if some other novel virus should sweep the world, I think it would be helpful to call to mind some Catholic moral principles to help illuminate how to address a pandemic.

Assessing Extraordinary Means

First, while we recognize that our human life is one of our greatest gifts, it is not a moral absolute and in fact is secondary to the eternal life of our immortal soul. In our fallen though redeemed state, our human life on earth is limited; it is passing. We have the responsibility to treat our life, and the lives of all others, with respect and reverence; and as a general rule, we are obliged to maintain its health and strength at all times, intervening with the blessings of scientific medicine and skilled care when necessary for its continuation. But things like martyrdom, or attempting to save the life of another, are examples of where even our human life on earth can be rightly placed at the service of a higher good.

Second, recognizing that our human life is passing, there are circumstances when it is just to decline medical treatments because they would be considered extraordinary to the situation. Some of the reasons why they could be termed extraordinary include the following: they do not have a significant expectation of success; they are judged to be too burdensome for the benefit they offer; they only prolong suffering and do not give reasonable expectation for recovery based on the suffering they would cause; they are too expensive or exhaust the resources that could be better used to save others; or they only prolong the inevitable (and approaching) death. Deciding to forgo such treatments is in no way a refusal of life, but is rather a recognition that even life is passing. This is quite separate from the always-immoral actions that intentionally hasten death and are undertaken with that intention, such as euthanasia and physician-assisted suicide.

Third, medical professionals work with those in competent authority over others—in some cases family members with medical power of attorney for those who cannot make the decision themselves—to make prudent decisions regarding which treatments to utilize or to decline.

Fourth, medical science and government leaders are called to act in a way that protects the health of our population.

These principles of clinical decision making can be applied analogously to the societal response to a pandemic. In this regard, Catholic medical ethics has used the standard of ordinary and extraordinary means of preserving life since it was first articulated

in these terms by Pope Pius XII in his November 24, 1957, address to Catholic physicians and anesthesiologists. The Holy Father said,

Normally one is held to use only ordinary means—according to the circumstances of persons, places, times and culture—that is to say, means that do not involve any grave burden for oneself or another. A stricter obligation would be too burdensome for most men and would render the attainment of the higher, more important good too difficult. Life, health, all temporal activities are in fact subordinated to spiritual ends. On the other hand, one is not forbidden to take more than the strictly necessary steps to preserve life and health, as long as he does not fail in some more serious duty.²

In other words, while one may *voluntarily* take on an extraordinary burden to preserve life, one has no moral obligation to do so. It is not a sin to decline a treatment, for example, because it is too expensive and one does not have the financial resources. Moreover, it is not a sin to decline artificial life support machines for a terminally ill person when such treatment would only prolong the suffering of a person who is in the active stage of dying. When Pope St. John Paul II was dying, for example, he was not rushed to the hospital to be kept on life support indefinitely. Rather the Holy Father, who was staunchly pro-life, was allowed to die peacefully and gave us a powerful example of how to die naturally.

John Paul II addressed this question himself in his 1995 encyclical *Evangelium vitae*, considered to be the seminal document on the protection of the life and dignity of the human person. In this encyclical, John Paul II made the distinction between euthanasia and forgoing aggressive medical treatment:

Euthanasia must be distinguished from the decision to forgo so-called “aggressive medical treatment,” in other words, medical procedures which no longer correspond to the real situation of the patient, either because they are by now disproportionate to any expected results or because they impose an excessive burden on the patient and his family. In such situations, when death is clearly imminent and inevitable, one can certainly in conscience “refuse forms of treatment that would only secure a precarious and burdensome prolongation of life, so long as the normal care due to the sick person in similar cases is not interrupted.”³

Implications for the Pandemic

It is important to keep Catholic principles such as these in mind when considering the societal response to a pandemic or, for that matter, to any threat to human life. If we have a moral obligation to use every possible means, even extraordinary means, to preserve life, then we should not even get into our cars, since there is a risk that we could be killed, given the fact that over thirty-five thousand people have died nationwide in auto accidents every year since 1951.⁴ We do not stop driving, however, and there is no moral imperative to stop driving, because we recognize that it would be an extraordinary burden on everyday life if people could not get to where they need to be for work, school, family, and other obligations to which they must attend. Instead we take safety precautions to minimize the risk, such as using seat belts, installing air bags, and following the rules of the road.

Similarly in the face of a pandemic, do we have a moral obligation to shut down our society, require people to stay at home, put employees out of work, send businesses into bankruptcy, impair the

food supply chain, and prevent worshippers from going to church? I would say no. That would be imposing unduly burdensome and extraordinary means. While some people may voluntarily adopt such means, only ordinary means that are not unduly burdensome are morally required to preserve life, both on the part of individuals as well as society as a whole.

The burdens of lockdowns and other restrictions on normal human interactions are not just economic but also social. While I do not like the term *social distancing*, it is not altogether incorrect. I do not like the term because *social distancing* seems to imply *social isolation*. But that seems to be precisely what is happening in our society. People are becoming isolated from each other as they shrink in fear of human interaction. I prefer to use terms such as *safe distancing* or *physical distancing* to describe the practice of keeping an adequate distance from others to reduce the risk of contagious contamination while trying to maintain social interaction as much as possible.

A striking example of the detrimental effects of locking things down occurred when my father's older sister, my Aunt Marian Jacobs, who is also my godmother, turned 102 years old on March 25. Aunt Marian lives in her own independent living apartment within a retirement community near Chicago's O'Hare International Airport. She is mentally sharp and physically doing pretty well for her age.

Normally, I would have said she celebrated her 102nd birthday, but this year it was not much of a celebration. When I called that morning to wish her a happy 102nd birthday, she answered the phone, but I could tell she was crying. I asked her what was wrong. She said it was a very sad day. So I asked why. She said her daughter Pamela had come with her husband and Aunt Marian's great granddaughter to wish her a happy birthday; but the staff of the retirement home would not let them come through the front door because of the safety restrictions put in place to help prevent the spread of the coronavirus.

With my cousins standing in the foyer while my Aunt Marian was in the lobby, separated by the glass windows and doors, all they could do was wave at each other. The most I could do was assure her that I would come and celebrate with her as soon as the situation improves and visits are permitted again. At this point, however, I worry more that my Aunt Marian will die of a broken heart rather than from the coronavirus. Indeed with very limited family visits since March, she has declined rapidly and has been moved from her apartment to assisted living.

Painful scenes like this are playing out across the world. A couple of days after my aunt's birthday, I received an email from a former Swiss Guard who wrote, “The virus took my dad Alberto in just 3 days. My parents live in [northern Italy], I'm an only child, my poor mom can't go out, nobody can go in, they took my dad's body and told my mom they will bring her some ashes in a month or so. Awful!”

Yes, this is awful. Even spouses within the same nursing home have been confined to separate spaces and not allowed to see each other for months.⁵ As we all try to cope as best we can under these circumstances, it is crucial that we not forget the role that our faith can and must have in the midst of a crisis such as this. While attention rightfully focuses on the advice of health care experts and the decisions that government officials must make to protect public health and safety, we must at the same time keep God front

and center in our awareness and maintain a vigorous life of prayer, trusting in God's providence to deliver us from evil and affliction.

A more favorable outcome occurred with the ninety-two-year-old father of a sixty-three-year-old man whom I ordained to the priesthood this past June. The father's family was making plans for him to watch the ordination and first mass of his son via livestream rather than in person. The father told me, "I am ninety-two years old. I have had a good life. If it is the last thing I do, I am going to be at my son's Ordination and First Mass." He attended both events in person with appropriate safety precautions, and thanks be to God, he suffered no ill effects by doing so.

The Law Follows Theology

In the canon law courses that I teach at Notre Dame Law School, I emphasize the principle that *law follows theology*. The canons are not composed arbitrarily in a vacuum but are based on an underlying theology. All of the canons dealing with the sacraments, for example, flow from the sacramental theology which undergirds them.

A similar principle is involved in the formulation of civil law, which should not be posited simply as a ruthless imposition of authority simply because a government official has the power to do so. Civil law should be based on and flow from natural law, which is the innate sense of right and wrong written into our hearts by God and which can be discerned through the use of right reason. Thus civil law flows from ethics. Not all moral values need be legislated or coerced as legally binding, but laws are normally enacted because they flow from ethical principles that are recognized and accepted by the community as being necessary to protect the common good. This can be seen in the criminalization of murder, rape, theft, and perjury. These are crimes not simply because they violate various prescriptions of the Ten Commandments, but because they are universally recognized as harmful to the common good of society. But not everything that may cause harm need be or should be proscribed. Burdens and benefits must be weighed along with competing claims of rights.

I saw an illustration of this in a television interview with a teacher who was trying to make her case that schools should not be reopened, because she thought it would be too risky to do so. When the interviewer pointed out that young children as a group are not at high risk of becoming seriously ill with COVID-19 and they have not shown high rates of transmission of the novel coronavirus, the teacher responded, "Well, even if the rates are low, the risk is still there," and then she added—apparently thinking this was the clincher of her moral argument—"Somebody could die."

If *somebody could die* were the sole criterion for deciding to engage in any given behavior, we would be paralyzed by fear of doing anything. If *somebody could die* were the simple moral standard that could disqualify partaking in any given human activity, then I should not be running marathons or playing hockey, even though mortality rates are low for these activities. On the other hand, physical inactivity is a morbidity factor for heart disease, some cancers, and stroke, so staying in bed all day is not a morally acceptable alternative either. So what is a person to do?

It is here that the distinction between ordinary and extraordinary means of preserving life is important, for if a means is extraordinary—that is, if the burdens outweigh the benefits—then it is not morally obligatory and should not be coerced by state power.

In this regard, a good example of properly weighing the burdens and benefits or reopening schools can be seen in a report that appeared on *NBC Nightly News* on July 12, 2020, in which five pediatricians from across the country unanimously and emphatically agreed that the benefits of children's being back at school outweigh the risks.⁶

With regard to government orders that shut down religious services, the US Court of Appeals for the Sixth Circuit got it right in enjoining the governor of Kentucky and all other commonwealth officials "from enforcing orders prohibiting drive-in services at the Maryville Baptist Church if the Church, its ministers, and its congregants adhere to the public health requirements mandated for 'life-sustaining' entities." As the court explained, "The breadth of the ban on religious services, together with a haven for numerous secular exceptions, should give pause to anyone who prizes religious freedom."⁷

In contrast the US Supreme Court got it wrong in *South Bay United Pentecostal Church v. Newsom*, with five justices refusing to overturn the lower court's denial of a temporary restraining order and a preliminary injunction restraining enforcement of the governor's order that discriminated against houses of worship by placing numerical restrictions on public gatherings. In his dissenting opinion, Justice Brett Kavanaugh was joined by Justices Clarence Thomas and Neil Gorsuch in saying,

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID-19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.⁸

Similarly, in a five-to-four decision on July 24, 2020, the Supreme Court refused to intervene in aid of a church's challenge to Nevada's limit on congregation sizes, where state law permitted larger in-person gatherings in casinos, restaurants, and other businesses than in churches. Calvary Chapel challenged the state's limit of fifty people at worship services, while other places were allowed to operate at 50 percent capacity during the pandemic.

Justice Samuel Alito, writing a dissent joined by Thomas and Kavanaugh, said, "The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance."⁹ Gorsuch, in his own dissent, said the current pandemic "poses unusual challenges," but he said the Constitution does not permit the state of Nevada to "favor Caesars Palace over Calvary Chapel."¹⁰ As the dissenting opinions argue so well in these two cases, there is a troubling trend of government officials' subordinating the free exercise of religion to other less morally compelling considerations.

Salus Animarum Suprema Lex

In canon law, the highest good is expressed in the phrase *salus animarum suprema lex*, which is found in the very last canon of

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the 1983 *Code of Canon Law*.¹¹ This phrase is based on the maxim of Roman law, as articulated by Marcus Tullius Cicero, *salus populi suprema lex* (the health of the people is the highest law).¹² The adaptation of this maxim in canon law is translated as, “The salvation of souls is the supreme law.” Physical health is important, but the highest good is eternal life. The free exercise of religion and access to the means of salvation established by Christ through the Church must have priority in the moral and legal order.

As we reflect on our moral obligations in light of the coronavirus pandemic, we do well to remember these basic teachings of Catholic moral theology as well as the words of Jesus himself: “Do not be afraid of those who kill the body but cannot kill the soul; rather, be afraid of the one who can destroy both soul and body in Gehenna.”

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Notes

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3. John Paul II, *Evangelium vitae* (March 25, 1995), n. 65, citing Congregation for the Doctrine of the Faith, *Declaration on Euthanasia* (May 5, 1980), IV.
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6. *NBC Nightly News*, “Five Pediatricians on the Safety of Schools Amid Pandemic,” July 12, 2020, video, <https://www.nbcnews.com/nightly-news/video/5-pediatricians-on-the-safety-of-schools-amid-pandemic-87569477784>.
7. *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 9 (6th Cir. 2020).
8. *South Bay United Pentecostal Church v. Newsom*, 509 U.S. ____ (2020), slip op. at 1 (Kavanaugh, J., dissenting).
9. *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. ____ (2020), slip op. at 1 (Alito, J., dissenting).
10. *Calvary Chapel*, 591 U.S., slip op. at 1 (Gorsuch, J., dissenting).
11. Canon Law Society of America, *Code of Canon Law: Latin-English Edition* (Washington, DC: CLSA, 1983), can. 1752. “In cases of transfer [of a pastor], the prescriptions of can. 1747 are to be applied, with due regard for canonical equity and having before one’s eyes the salvation of souls, which is always the supreme law of the Church.”
12. Marcus Tullius Cicero, *De legibus*, trans. C. W. Keyes, Loeb Classic Library 213 (Cambridge, MA: Harvard University Press, 1928), 466.



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