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Helen M. Alvare

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# BISHOPS V. NUNS IN JEEPS? WHY A FACIALLY “INTRA-CATHOLIC” HEALTH CARE DISPUTE MATTERS

HELEN M. ALVARÉ\*

## INTRODUCTION

The debate surrounding the passage of the Patient Protection and Affordable Care Act (PPACA)<sup>1</sup> in early 2010 publicly pitted the policy-making body of the U.S. Catholic Bishops (the United States Conference of Catholic Bishops or “USCCB”) against several independent, self-identified Catholic entities, notably the Catholic Health Association (CHA) (led by Sister Carol Keehan of the Daughters of Charity), *Commonweal* and *America* magazines, and “Network” (a liberal political lobbying organization of religious sisters).<sup>2</sup> Eventually, the USCCB “regretfully” and “wish[ing] it were otherwise” opposed PPACA on the grounds that the Act increased governmental cooperation with abortion and decreased extant protections for religious conscience.<sup>3</sup> On the other hand, the independent, self-identified Catholic entities (listed above) supported the law. The press revealed in what they perceived to be a David and Goliath internecine battle in the Catholic Church, no one more so than Nicholas D. Kristof, as witnessed by his *New York Times* piece, where he sided firmly with the “coolest people in the world,”

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.) [hereinafter PPACA]. For ease of reference, PPACA as used here also includes amendments made to it by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2. See generally *Network: A National Catholic Social Justice Lobby*, NETWORK, <http://www.networklobby.org/> (last visited Jan. 21, 2011).

3. Press Release, U.S. Conference of Catholic Bishops, President of U.S. Bishops Says Cost is Too High, Loss is Too Great for Health Care Bill Not to be Revised (Mar. 15, 2010), available at <http://www.usccb.org/comm/archives/2010/10-043.shtml> (statement made on behalf of the United States Conference of Catholic Bishops).

nuns in jeeps (referring to sisters who minister abroad to the poor), against a “rigid all-male Vatican hierarchy . . . obsessed with dogma and rules and distracted from social justice.”<sup>4</sup>

Yet, there is ultimately a more important reason to look more closely at this seemingly internal Catholic squabble. From the exchanges between the USCCB and these various Catholic entities emerged the hierarchy of principles and the methods by which one of the largest institutional religious actors in the United States would evaluate legislation directly affecting human welfare, in an area where secular and religious organizations routinely interact, and disparate social justice issues arise. Just by way of example, in 2004 alone, 562 Catholic hospitals treated over 85 million patients, Catholic elementary and high schools educated over 2 million students, Catholic colleges nearly 800 thousand, and Catholic Charities served over 8.5 million unduplicated individuals.<sup>5</sup> Other religious institutions, which also serve large numbers of Americans, are affected by social welfare legislation as well. Jewish Social Services Agencies, for example, served over 25 thousand persons in the Washington, D.C. metropolitan area alone in the past year.<sup>6</sup> Lutheran Social Services provides aid to thousands of residents across the United States in areas ranging from adoption to disaster recovery.<sup>7</sup> In other words, the judgments and the fates of religious institutions in the public square are important even if one only considers the vast numbers of Americans employed or served by them. There is also the likelihood that in our increasingly regulatory state, the number and variety of encounters between religious institutions offering human services—whether education, health care, or social services—and various state bureaucracies will grow.

Furthermore, more than a few pieces of legislation today contain both provisions consistent with religious values concerning respect for life and religious freedom, and provisions inimical to these values. These laws might arise in the field of gender equality, mandatory employer benefits, health care, education,

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4. Nicholas D. Kristof, *A Church Mary Can Love*, N.Y. TIMES, Apr. 18, 2010, at WK11.

5. *The Catholic Church in the United States at a Glance*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/comm/catholic-church-statistics.shtml> (last visited Jan. 21, 2011).

6. *See About Us*, JEWISH SOCIAL SERVICE AGENCY, <http://www.jssa.org/about-us> (last visited Jan. 21, 2011).

7. *See generally* LUTHERAN SOCIAL SERVICES, <http://www.lssnca.org/> (last visited Jan. 21, 2011) (providing more information on the organization and the services they provide).

or foreign aid, to name just a few.<sup>8</sup> Finally, legislators and interest groups have recently begun framing issues such as abortion, birth control access, or same sex-marriage, in the language of human rights.<sup>9</sup> These developments signal a potentially higher level of tension between governmental and religious institutions. Religious individuals or institutions opposing these practices are cast as bigots and enemies of human rights.<sup>10</sup> It is not an overstatement, therefore, to suggest that in some cases, the continued existence of Catholic and other charitable, educational, and health care institutions may be at stake. Examples already abound. A Catholic adoption agency in Boston was forced to close due to its unwillingness to adopt children out to same-sex couples.<sup>11</sup> Catholic social services in Washington, D.C. ceased

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8. These would include, for example, state or federal laws seeking to mandate contraceptive coverage in health insurance policies or mandating provision of the “morning after” pill, on the grounds of equal protection. *See, e.g.*, Robert Pear, *Officials Consider Requiring Insurers to Offer Free Contraceptives*, N.Y. TIMES, Feb. 3, 2011, at A20. Historically, there have also been proposals to condition foreign aid in poorer nations on the acceptance of contraception. *See, e.g.*, Nicholas Kristof, *Birth Control for Others*, N.Y. TIMES, Mar. 23, 2008, at BR14 (reviewing MATTHEW CONNELLY, *FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION* (2008)).

9. *See, e.g.*, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, FAMILY PLANNING: A MORAL GOOD, A HUMAN RIGHT, [http://www.rcrc.org/pdf/family\\_planning.pdf](http://www.rcrc.org/pdf/family_planning.pdf); Human Rights Watch, *Rulings Support Same-Sex Marriage*, HRW.ORG, Aug. 10, 2010, <http://www.hrw.org/en/news/2010/08/10/rulings-support-same-sex-marriage> (last visited Jan. 7, 2011); Kenneth T. Trofater, Jr., *Contraception—A Basic Human Right*, HEALTHLINE, (May 15, 2007), [http://www.healthline.com/blogs/pregnancy\\_childbirth/2007/05/contraception-basic-human-right.html](http://www.healthline.com/blogs/pregnancy_childbirth/2007/05/contraception-basic-human-right.html); Michael A. Jones, *Rev. Jesse Jackson Joins With Marriage Equality USA to Condemn Proposition 8*, CHANGE.ORG (Dec. 6, 2010, 1:30 EST), [http://gayrights.change.org/blog/view/rev\\_jesse\\_jackson\\_joins\\_with\\_marriage\\_equality\\_usa\\_to\\_condemn\\_proposition\\_8](http://gayrights.change.org/blog/view/rev_jesse_jackson_joins_with_marriage_equality_usa_to_condemn_proposition_8) (discussing Rev. Jesse Jackson’s speech equating racial and sexuality discrimination as both protected under equal protection).

10. *See generally* Shahra Razavi & Anne Jenichen, *The Unhappy Marriage of Religion and Politics: Problems and Pitfalls for Gender Equality*, 31 THIRD WORLD Q. 833 (2010).

‘[P]rivate’ issues, related to the family, sexuality and reproduction, have become sites of intense public contestation between conservative religious actors wishing to regulate them based on some transcendent moral principle, and feminist and other human rights advocates . . . . [C]laims of ‘divine truth’ justifying discriminatory practices against women [are] hard to challenge . . . .

*Id.* at 833. *See also* ECON. & SOC. COUNCIL, UNITED NATIONS, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF RELIGIOUS INTOLERANCE (2000) (observing how different countries handle certain human rights issues, such as those related to conscientious objectors).

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

offering health insurance to employees rather than obey a mandate to recognize same-sex marriages, in accordance with local insurance law.<sup>12</sup> The American Civil Liberties Union filed a complaint with the U.S. Department of Health and Human Services (HHS) seeking to cut off federal funds from Catholic healthcare institutions refusing to provide abortions.<sup>13</sup> Given these ongoing events and outcomes, it is important to know how a leading religious institutional player such as the Catholic Church makes its legislative case and how its argument fares.

Some might take a particular interest in the Catholic Church's arguments concerning the PPACA for a different reason: the Church is an increasingly unique voice in the political and legislative arena. It is self-consciously and vocally nonpartisan. Its public statements are framed in the language of American ideals and openly rely upon available empirical data as well as ethical and philosophical argumentation. For instance, the USCCB's materials tend to include lengthy references to respected primary sources within the discipline under discussion, ordinarily law or science. The USCCB is also known to engage in legislative advocacy which might one day please Democrats and another day Republicans, always according to the Church's own social justice criteria and not the playbooks of either political party. Presently, there is no political party, and there are few interest groups, which operate similarly. Interestingly, according to leading Catholic reporter John Allen, it is quite likely that America's Hispanic Catholic population's future will strike a similar balance; that is, with views that tend "left" on economic issues and "right" on matters affecting human sexuality, marriage, and the family.<sup>14</sup> In the 2010 health care debate, this constellation of values resulted in the USCCB's general support for the provisions of the PPACA that extended health insurance and health care to previously excluded populations and in its rejection of provisions supporting abortion or weakening religious freedom.

In sum, because of the characteristics of Catholic institutions as service-providers and as citizens, the Church's approach to evaluating legislation matters on a broad scale. Individual citi-

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12. William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, WASH. POST (Mar. 2, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html>.

13. See CitizenLink Staff, *ACLU, HHS Try to Force Catholic Hospitals to Perform Abortions; Becket Fund Threatens Lawsuit*, CITIZENLINK (Aug. 20, 2010), <http://www.citizenlink.com/2010/08/aclu-hhs-try-to-force-catholic-hospitals-to-perform-abortion-becket-fund-threatens-lawsuit/>.

14. JOHN L. ALLEN, *THE FUTURE CHURCH: HOW TEN TRENDS ARE REVOLUTIONIZING THE CATHOLIC CHURCH* 23–25 (2009).

zens and institutions of different faith traditions, citizens who receive or value the services provided by a religious charitable provider, persons concerned about the future of religious freedom, and those with an interest in abortion law or the ethical foundation of laws generally might readily take an interest in what was revealed during the PPACA debate about the Catholic Church's principles and methods for evaluating proposed laws.

Early in the course of the health care debate, the USCCB laid out their priorities for health care reform. These included: "affordable and accessible health care for all, especially the poor and marginalized," "inclusion of all immigrants," and "protecting human life and conscience."<sup>15</sup> Throughout the process, they issued legal and moral analyses of various iterations of reform. They did not, however, at any time in the course of the debate, separately articulate a formal hierarchy of principles governing their analyses or the rationale therefor. At the same time, the subjects they explicated and their ultimate judgments about the bill revealed a good deal about the contents of this hierarchy, though less about its rationale.

Not surprisingly, the USCCB's principles and methods closely correlate with the principles and methods for evaluating public policies set out in Pope Benedict XVI's encyclical *Caritas in Veritate* (Charity in Truth),<sup>16</sup> as well as in a variety of other important and complementary documents issued universally by the Catholic Church. This correlation was not explicit; an examination of the USCCB's exchanges with the various Catholic publications and entities that eventually supported PPACA is helpful for revealing it.

Catholic groups that supported PPACA claimed that their final decision was informed by their differing statutory interpretation of the bill. While this article does not primarily examine statutory interpretation differences between the competing parties, a discussion of the USCCB's final conclusions about the effects of PPACA is necessary in order to fully describe its principles and methods. The intra-church disagreement is of interest in this piece primarily because it forced the USCCB to state its case repeatedly, publicly, and increasingly precisely. In the end,

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15. Letter from Bishop William F. Murphy, Daniel Cardinal DiNardo, & Bishop John Wester, U.S. Conference of Catholic Bishops, to United States Senate (Nov. 20, 2009), available at <http://www.usccb.org/sdwp/national/2009-11-20-ltr-usccb-health-care-to-senate.pdf>.

16. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* (June 29, 2009) [hereinafter *Caritas in Veritate*], available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html).

the USCCB's decision to oppose passage of the PPACA turned on its legal claims that the bill did not respect the life of the unborn and did not sufficiently preserve religious freedom for various actors in the health care field. The USCCB scrutinized the PPACA primarily by means of a rigorous and transparent analytical method within the discipline in question—in this case, the law pertaining to statutory interpretation and to executive orders.

In order to elucidate the USCCB's method for evaluating legislation affecting human life and social welfare, Part I of this paper will identify the principles and methods that emerged during the health care debate by examining USCCB documents issued in response to that debate. It will supplement this analysis with discussion about how these topics are further explicated in various documents of the universal Church, particularly Benedict XVI's *Caritas in Veritate*,<sup>17</sup> John Paul II's *Veritatis Splendor*<sup>18</sup> and *Evangelium Vitae*,<sup>19</sup> and Pope Paul VI's *Dignitatis Humanae*.<sup>20</sup> Part I will also describe how the USCCB tested specific provisions of PPACA against the principles found in these documents and ultimately concluded that PPACA could not satisfy the norms of respect for life and for religious freedom. Where helpful in sharpening our understanding of the USCCB's legal or moral analysis, Part I will also describe the competing views of the bill put forward by independent Catholic entities. The conclusion, Part II, offers a brief commentary upon the strengths and weaknesses of the USCCB's articulation of its principles and methods, particularly in light of current political and cultural trends.

## I. PRINCIPLES AND METHODS: WHAT WAS SAID AND WHAT MORE MIGHT HAVE BEEN

The USCCB did not set forth in one place its entire set of principles and methods for evaluating legislation affecting human life or well-being during the course of the health care

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17. *Id.*

18. Pope John Paul II, Encyclical Letter, *Veritatis Splendor* (Aug. 6, 1993) [hereinafter *Veritatis Splendor*], available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html).

19. Pope John Paul II, Encyclical Letter, *Evangelium Vitae* (Mar. 25, 1995) [hereinafter *Evangelium Vitae*], available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).

20. Pope Paul VI, Declaration on Religious Freedom, *Dignitatis Humanae* (Dec. 17, 1965) [hereinafter *Dignitatis Humanae*], available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_1965\\_1207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_1965_1207_dignitatis-humanae_en.html).

debate. This is to be distinguished from the USCCB clearly setting forth its hopes for health care reform legislation, which generally, it did. For example, the USCCB regularly issued memoranda about the topics of universal coverage, respect for life, and the inclusion of immigrant populations,<sup>21</sup> each replete with statutory interpretation of proposed legislation and/or amendments. Regularly, these documents discussed the Church's social justice norms in a medium comprehensible to legislators and the public. Over the course of their engagement with lawmakers and independent Catholic entities such as CHA and the *Commonweal* and *America* magazines, the USCCB's principles and method for evaluating legislation containing both favorable and unfavorable provisions emerged. In particular, the USCCB's disagreements with several independent Catholic groups led its staff to write a good deal of detailed, publicly available legal material.

A look at the entire exchange shows that the principles and methods adopted by the USCCB largely tracked Pope Benedict XVI's presentation in his encyclical letter, *Caritas in Veritate*, as

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21. See, e.g., OFFICE OF DOMESTIC SOC. DEV., U.S. CONFERENCE OF CATHOLIC BISHOPS, AFFORDABILITY & COVERAGE IN THE HEALTH CARE REFORM BILLS: A COMPARISON (2010), [http://www.usccb.org/healthcare/Affordability\\_Issue\\_chart.pdf](http://www.usccb.org/healthcare/Affordability_Issue_chart.pdf); OFFICE OF THE GEN. COUNSEL, U.S. CONFERENCE OF CATHOLIC BISHOPS, LEGAL ANALYSIS OF THE PROVISIONS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT AND CORRESPONDING EXECUTIVE ORDER REGARDING FUNDING AND CONSCIENCE PROTECTION (2010), <http://www.usccb.org/healthcare/03-25-10Memo-re-Executive-Order-Final.pdf> [hereinafter GEN. COUNSEL, LEGAL ANALYSIS]; SECRETARIAT OF PRO-LIFE ACTIVITIES, U.S. CONFERENCE OF CATHOLIC BISHOPS, CURRENT POLICY ON FEDERAL ABORTION FUNDING: WHAT IS THE STATUS QUO? (2009), [http://www.usccb.org/prolife/issues/healthcare/abortion\\_funding\\_102309.pdf](http://www.usccb.org/prolife/issues/healthcare/abortion_funding_102309.pdf); SECRETARIAT OF PRO-LIFE ACTIVITIES, U.S. CONFERENCE OF CATHOLIC BISHOPS, THE SENATE HEALTH CARE REFORM BILL: FUNDING ABORTIONS AT COMMUNITY HEALTH CENTERS (2010), <http://www.usccb.org/healthcare/communityhealthcenters.pdf>; U.S. CONFERENCE OF CATHOLIC BISHOPS, COMPARISON OF SENATE AND HOUSE BILLS ON IMMIGRATION (2010), [http://www.usccb.org/healthcare/Comparison\\_Senate\\_House\\_Bills\\_Immigration.pdf](http://www.usccb.org/healthcare/Comparison_Senate_House_Bills_Immigration.pdf); Letter from Bishop William F. Murphy, Daniel Cardinal DiNardo, & Bishop John Wester, U.S. Conference of Catholic Bishops, to the United States House of Representatives (Jan. 26, 2010), available at <http://www.usccb.org/healthcare/HC-Letter-to-Congress-012610.pdf> (discussing universal coverage, human life and conscience, and health care for immigrants); Letter from Bishop William F. Murphy, Daniel Cardinal DiNardo, & Bishop John Wester, U.S. Conference of Catholic Bishops, to the United States Senate (Dec. 22, 2009), available at <http://www.usccb.org/healthcare/letter-to-senate-20091222.pdf> (same); Letter from Bishop William F. Murphy, Daniel Cardinal DiNardo, & Bishop John Wester, U.S. Conference of Catholic Bishops, to the United States Senate (Dec. 7, 2009), available at <http://www.usccb.org/sdwp/national/2009-12-7-ltr-usccb-health-care-to-senate.pdf> (discussing the "Nelson" amendment and abortion coverage).



well as in other leading Church documents, all addressing how to evaluate public laws and policies affecting human life and development. The USCCB did not generally refer to these documents in their public materials, but instead, spoke to Congress and the public in the language ordinarily used in the United States to influence important policies—the language of values such as “human dignity,” care for the “poorest and most defenseless among us,” maintenance of “essential conscience protections,” and the protection of “life, dignity, conscience and health of all, from the child in the womb to those in their last days on earth.”<sup>22</sup> In a few cases, the USCCB’s interventions neglected to raise arguments suggested in *Caritas in Veritate*, which might have strengthened its moral and political position and could have been proposed in a manner comprehensible to both nonreligious and religious minds. These include, for example, arguments about the logical and practical links between banning killing and supporting the dignity of born lives, the human rights case for religious freedom, and the necessity of truthful legal arguments as a condition for respecting citizens. This paper will discuss the contents of these additional arguments in the course of considering what the USCCB did argue and in the concluding comments.

It will be helpful to have a brief introduction here to *Caritas in Veritate*, the most recent document of the universal Church, which set forth at length the criteria by which social policy is evaluated in light of Catholic teachings. In *Caritas in Veritate*, Pope Benedict XVI hoped to clarify the “great principles that show themselves to be indispensable for building human development.”<sup>23</sup> He called the collected body of such principles “charity in truth” or “integral development,” defined as development extending to “the whole man and all men.”<sup>24</sup> Benedict has discussed “integral development” elsewhere, sharpening our understanding of its content by distinguishing it from: neglecting either half of its formula, setting either half against the other, or claiming to magnify people’s “well-being or the common good”<sup>25</sup> with legislation that approves of the destruction of human life.

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22. Statement of Francis Cardinal George, U.S. Conference of Catholic Bishops, Universal Health Care (Mar. 23, 2010), available at <http://www.usccb.org/healthcare/cardinal-george-healthcare-statement.pdf>.

23. Pope Benedict XVI, On the 3rd Encyclical, Address at Paul VI Hall (July 8, 2009), in ZENIT, July 8, 2009, <http://www.zenit.org/article-26410?l=English>.

24. *Caritas in Veritate*, supra note 16, ¶ 8.

25. No “Social Conquests” Without Respect for Life, Warns Pope, ZENIT (June 18, 2004), <http://www.zenit.org/article-10394?l=english>.

Frequently, in his public writings and addresses, Pope Benedict XVI speaks about the fundamental status of both the right to life and the right to religious freedom,<sup>26</sup> deriving the latter from the “natural religious sense of humanity” which inclines the human person to strive for truth and for God.<sup>27</sup> Theologian David Schindler, an expert in the writings of both Pope John Paul II and Pope Benedict XVI, concludes that these priorities—respect for life and for religious freedom—are “presupposed in, and lie[ ] at the heart of, all that Pope Benedict XVI proposes regarding political-constitutional order.”<sup>28</sup>

To these two, *Caritas in Veritate* adds the requirement of love “in truth.” While this is not an easily described or cabined principle, *Caritas in Veritate* indicates that it contains at least two senses. First, love in truth requires respect for the reasoning and the competence of whatever field might be relevant or even determinative, when evaluating policies engaging that field.<sup>29</sup> Second, it proposes that actions are loving only if they respect truths about the human person and the human community, which truths are accessible to reason, even while they are not purely matters for empirical investigation.<sup>30</sup> Rather, wisdom is also available from experiential and religious sources.<sup>31</sup> Examples of such truths include: that all human beings are created equal and by a higher power whom we long to know,<sup>32</sup> that human beings feel themselves made for the give-and-take of relationships, both with God and with our fellow human beings,<sup>33</sup> and that our bodies are not separate or autonomously disposable entities, but integral parts of our persons and our destinies.<sup>34</sup>

In the USCCB’s health care materials, it is not difficult to see its reliance upon and application of these basic principles, beginning with its articulation of its hopes and goals for health care reform, including: extending benefits to all human persons, not facilitating the destruction of the human body, and maintaining

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26. *Pope Calls for Promotion of Universal Human Rights*, ZENIT (May, 4, 2009), <http://www.zenit.org/article-25787?l=english>.

27. See David L. Schindler, *The Embodied Person as Gift and the Cultural Task in America: Status Quaestionis*, 35 COMMUNIO: INT’L CATH. REV. 397, 429–30 (2008) (citing JOSEPH RATZINGER & MARCELLO PERA, WITHOUT ROOTS 129 (2006)).

28. See *id.* at 431.

29. *Caritas in Veritate*, *supra* note 16, ¶ 30.

30. *Id.* ¶ 77.

31. *Id.*

32. *Id.* ¶ 19.

33. *Id.* ¶¶ 15, 54.

34. *Id.* ¶¶ 28, 44.

religious freedom.<sup>35</sup> It is worth noting here that, generally speaking, these proposals are attractive on their face to many persons outside the Catholic faith. They resonate with many people's moral intuition, experiences, and aspirations for themselves and their immediate communities. They also resonate in some sense with a sort of idealized meaning of "America." In the words of theologian David Schindler, they harmonize with an idea of America as a "place of generosity, solidarity and achievement."<sup>36</sup> Benedict XVI also urges that they are consonant with other religious traditions. He is fond of quoting Mahatma Gandhi's observation in this vein that "the Ganges of rights flows from the Himalaya of duties."<sup>37</sup> In other words, we are givers first and then rights-bearers.

#### A. *First Principle: Respect for Life*

Benedict XVI and John Paul II have identified respect for life as the foundation of all good social policy.<sup>38</sup> John Paul II explains this further by breaking down abortion into several component parts as follows: it is a rejection of the entirety of a human life by the human being to whom the child is first and completely entrusted for protection; the killing occurs at possibly the most physically vulnerable moment of a person's life, when they have no means of self-defense; and it is done not with the grudging acceptance of law, but via enshrining it as a human right.<sup>39</sup> The USCCB in 1995 highlighted one additional irony regarding abortion: the killing of a person who is *not* your child is forbidden everywhere.<sup>40</sup>

Benedict XVI, then Cardinal Ratzinger, further reflected on the Church's weighing of abortion by observing that children in their mothers' wombs are "simply a very graphic depiction of the essence of human existence in general" such that rejecting a child is symbolic of rejecting human beings generally and the

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35. See, e.g., Letter from Bishop William F. Murphy, Comm. on Domestic Justice and Human Dev., U.S. Conference of Catholic Bishops, to Members of United States Congress (July 17, 2009), available at <http://www.usccb.org/sdwp/national/2009-07-17-murphy-letter-congress.pdf>.

36. Schindler, *supra* note 27, at 431.

37. Pope Benedict XVI, Pope's World Day of Peace Message, Address to the World Day of Peace (Jan. 1, 2007), in ZENIT, Dec. 13, 2006, <http://www.zenit.org/article-18442?l=english>.

38. *Caritas in Veritate*, *supra* note 16, ¶ 53; *Evangelium Vitae*, *supra* note 19, ¶ 4.

39. *Evangelium Vitae*, *supra* note 19, ¶¶ 20–21.

40. U.S. CONFERENCE OF CATHOLIC BISHOPS, FAITHFUL FOR LIFE: A MORAL REFLECTION (1995) [hereinafter FAITHFUL FOR LIFE].

human condition.<sup>41</sup> Further, children are literally interwoven with the being of the mother, utterly dependent upon her for survival. Accepting this dependency symbolizes the “creaturely being’s deepest and most proper . . . nature” as a being for another.<sup>42</sup> This was the identity of Christ, the perfect human, and is the model for our own human identity, whether male or female.<sup>43</sup>

A reflection of this type—about abortion’s symbolic referencing of human openness to others’ lives—might have strengthened the USCCB’s argument regarding PPACA. The health care debate was often depicted as a struggle between those who cared about the vulnerable (supporters of PPACA) and those who did not (opponents). Promoting reflection about the larger meaning of the legal sanction of abortion might at least have blunted the edges of this critique.

In their reflections upon public policy norms, both Benedict XVI and John Paul II regularly highlight the link between respect for vulnerable unborn life and the willingness to help born, vulnerable life. *Caritas in Veritate* and other leading documents assert the existence of practical, logical, and ethical connections between the disposition toward unborn lives and a willingness to care about disadvantaged born persons. In *Caritas in Veritate*, Benedict calls the acceptance of another’s right to life “basic” and the “centre of true development.”<sup>44</sup> He elaborates upon this idea in a statement to the United States Ambassador to the Holy See, emphasizing that there is an “indissoluble bond between an ethic of life and every other aspect of social ethics.”<sup>45</sup> He decries the current tendency to disconnect these, stating that the question of “*respect for life* . . . cannot in any way be detached from questions concerning the development of peoples,” from our “concept[s] of poverty” and “underdevelopment.”<sup>46</sup> “How,” he writes, “can we be surprised by the indifference shown towards situations of human degradation, when such indifference extends even to our attitude towards what is and is not human?”<sup>47</sup> Quoting John Paul II, Benedict has further said that society

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41. See Schindler, *supra* note 27, at 404 (citing Joseph Ratzinger, *Truth and Freedom*, 23 COMMUNIO: INT’L CATH. REV. 16, 27 (1996)).

42. See *id.* at 404–05.

43. See *id.* at 404 (citing Joseph Ratzinger, *Ox and Ass at the Crib*, in THE BLESSINGS OF CHRISTMAS 65, 76 (Ignatius Press, 2007)).

44. *Caritas in Veritate*, *supra* note 16, ¶ 28.

45. Press Release, U.S. Conference of Catholic Bishops, *supra* note 3.

46. *Caritas in Veritate*, *supra* note 16, ¶¶ 52–53.

47. *Id.* ¶ 75.

lacks solid foundations when, on the one hand, it asserts values such as the dignity of the person, justice and peace, but then, on the other hand, radically acts to the contrary by allowing or tolerating a variety of ways in which human life is devalued and violated, especially where it is weak or marginalized.<sup>48</sup>

He suggests that these contrary positions will play out practically in people's real world willingness to be "of mutual help" and in their finding the "necessary motivation and energy to strive for man's true good."<sup>49</sup> He calls particularly upon privileged members of society to "cultivat[e] openness to life," as a part of understanding better the needs of the less privileged.<sup>50</sup>

One can see in the United States the practical relationship between our abortion laws and the situation of the most marginalized populations. Students of abortion law will recall Justice Blackmun's majority opinion in *Roe v. Wade*, wherein he declined to engage the question of the humanity or personhood of the child, opting instead to call unborn life "potential life."<sup>51</sup> This position, what Benedict would call "an indifference . . . toward what is and is not human,"<sup>52</sup> seems to be reflected in U.S. statistics on abortion and poverty. The very same populations who suffer poverty, family disruption, educational inadequacy, and many other ills also experience the highest rates of abortion.<sup>53</sup> These include African Americans, the disabled, and our newest immigrant groups. Furthermore, wealthier, more highly educated, and majority white Americans favor legal abortion more than the poor, more than those with less privileged educations, and more than African Americans and Hispanic Americans.<sup>54</sup>

Catholic teaching urges that a relationship between the issues of abortion and care for born persons exists at the spiritual and philosophical levels, as well. Abortion uniquely raises the fundamental question—in the words of theologian David Schin-

48. *Caritas in Veritate*, *supra* note 16, ¶ 15 (quoting *Evangelium Vitae*, *supra* note 19, ¶ 93).

49. *Id.* ¶ 28.

50. *Id.*

51. *Roe v. Wade*, 410 U.S. 113, 150, 154, 156, 163 (1973).

52. *Caritas in Veritate*, *supra* note 16, ¶ 75.

53. Helen M. Alvaré, *The Consistent Ethic of Life: A Proposal for Improving Its Legislative Grasp*, 2 U. ST. THOMAS L.J. 326, 336 (2005) (citing Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*, 34 PERSP. SEXUAL & REPROD. HEALTH 226, 228 (2002)); see also KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MARRIAGE BEFORE MOTHERHOOD (2005).

54. Alvaré, *supra* note 53, at 336.

dlar—whether or not we are as creatures “characterized . . . from the very beginning, by the relationality with the other-beyond-the-self.”<sup>55</sup> It poses the question, in the words of *Caritas in Veritate*, whether human progress, virtue, and maturity grow out of living interdependently or rather from gaining independence, especially via technology, efficiency, and material accumulation.<sup>56</sup> From the beginning to the present, the judges who crafted a constitutional right to abortion in the United States answered the question in one way: abortion is a foundation for women’s independence, self-preservation, and autonomy.<sup>57</sup>

In their 1995 document *Faithful for Life*, the U.S. Bishops proposed this same link between the logic of respect for life and the logic of social justice. After retelling the Good Samaritan parable, they wrote:

We are all journeying down from Jerusalem to Jericho, and this story haunts us, for it flatly contradicts the strong persuasion so widely held today that our loyalties and our obligations are owed only to those of our choice. On the contrary, we owe fidelity to those we choose and, beyond them, to others we do not choose. It is We who have been chosen—to go out of our way for them.<sup>58</sup>

The health care debate would seem to have been a very likely venue for this sort of argument, but the USCCB did not offer it at any length.

Within the context of the Church’s insistence on the foundational importance of the abortion issue, this paper now turns to the way the PPACA treats abortion. As a whole, the PPACA increases federal support for abortion. It authorizes funding that could well be used for “elective” abortions, a term used here for convenience only, to indicate abortions other than those sought for rape, incest, or to save the mother’s life. Only the latter three categories are eligible for federal funding under the terms of the Hyde Amendment, which is a rider to the annual Labor/HHS Appropriations Act. This amendment provides that “[n]one of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in the Act, shall be

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55. Schindler, *supra* note 27, at 402 n.8.

56. See *Caritas in Veritate*, *supra* note 16. See also Pope Benedict XVI, Address to Charity Organizations, Address at Charitable Organizations Meeting at Fatima, Port. (May 13, 2010), in ZENIT, May 13, 2010, <http://www.zenit.org/article-29245?l=english>.

57. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

58. FAITHFUL FOR LIFE, *supra* note 40, at 1.

expended for any abortion.”<sup>59</sup> It also states that “none of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in the Act, shall be expended for health benefits coverage that includes coverage of abortion.”<sup>60</sup>

PPACA does not contain an amendment like the Hyde Amendment governing all of the mandates and funding contained in that legislation, although it does contain some specific restrictions on abortion. The Senate rejected the attempt to insert such language—dubbed the Nelson Amendment—into the bill that was eventually passed by the Senate and then the House.<sup>61</sup> While the final law excludes abortion from the category of “essential health benefits,”<sup>62</sup> it does not explicitly exclude abortion from the category of “preventive” services for women<sup>63</sup> or from the other categories of mandated services to be populated by the Secretary of HHS, such as “ambulatory patient services”<sup>64</sup> or “prescription drugs.”<sup>65</sup> PPACA also forbids the use of a particular federal tax credit to pay for abortion coverage in qualified health plans, and it requires that plans segregate separately-paid abortion premiums from premiums paid for other covered services.<sup>66</sup>

On the other hand, PPACA authorizes the expenditure of seven billion dollars in the first year, and more thereafter, for Community Health Centers (CHCs), which are required to provide services such as “family medicine,” “internal medicine,” “obstetrics,” “gynecology,” and “family planning services.”<sup>67</sup> No abortion restrictions attach to these CHC funds. This is significant for two reasons. First, CHCs are an important vehicle for the delivery of health care to millions of Americans. A recent article on CHCs in the *New England Journal of Medicine* reported that five percent of Americans currently rely on CHCs

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59. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2009, Pub. L. No. 111-8, § 507(a), 123 Stat. 524, 802.

60. *Id.* § 507(b), 123 Stat. at 802.

61. Michael O’Brien, *Senate Tables Nelson’s Abortion Amendment 54-45*, THE HILL’S BLOG BRIEFING ROOM (Jan. 8, 2009, 17:33 EST), <http://thehill.com/blogs/blog-briefing-room/news/71239-senators-table-nelsons-abortion-amendment>.

62. PPACA, Pub. L. No. 111-148, § 1302, 124 Stat. 119, 163–64 (2010).

63. *Id.* § 1001, 124 Stat. at 131.

64. *Id.* § 1302(b)(1)(A), 124 Stat. at 163.

65. *Id.* § 1302(b)(1)(F), 124 Stat. at 164.

66. *Id.* § 1303, 124 Stat. at 168 (This was the so-called “Nelson-Boxer Amendment” to PPACA).

67. See *id.* § 10503, 124 Stat. at 1004.

for their health care, a figure that could balloon to 40 million people under the new law.<sup>68</sup>

Second, as argued persuasively and in detail in USCCB legal memoranda, federal courts interpreting broadly worded federal health care mandates such as those in the CHC authorizing legislation (e.g. “obstetrics,” “gynecology,” etc.) have held that an abortion is required to be provided in the absence of specific limits attaching to these mandates. The USCCB’s formal Legal Analysis provided a full treatment of this matter:

This question originally arose in the context of Medicaid in the 1970s. In the years before the Hyde Amendment was first enacted by Congress in 1976, Medicaid was required to pay for about 300,000 abortions a year. “Because abortion fits within many of the mandatory care categories, including ‘family planning,’ ‘outpatient services,’ ‘inpatient services,’ and ‘physicians’ services,’ Medicaid covered medically necessary abortions between 1973 and 1976,” even though the Medicaid statute itself never used the word “abortion.” If broad language of this type were not read as mandating payment for abortion, there would have been no need for Congress to include the Hyde Amendment in the Labor/HHS appropriations bill each year for the last 34 years. In the more than thirty years since, courts have repeatedly and consistently interpreted statutory language that describes relatively broad categories of medical services to compel—not just allow, but compel—abortion funding . . . .<sup>69</sup>

The USCCB analyses therefore concluded this subject by opining: “[C]ourts are highly likely to conclude that the CHC program *must* provide tax-funded abortions unless Congress attaches to the CHC funds a Hyde-type limitation.”<sup>70</sup>

A recent interpretation of PPACA by several states further confirms the principle that abortion is understood by lawmakers to be included within general categories of health services—unless it is excluded. During the summer of 2010, Pennsylvania, New Mexico, and Maryland announced the establishment of new high-risk insurance programs under § 1101 of the PPACA. Each state described the program as including virtually unlimited abortion services on the basis that this service was included

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68. Eli Y. Adashi et al., *Health Care Reform and Primary Care—The Growing Importance of the Community Health Center*, 362 NEW ENG. J. MED. 2047 (2010).

69. GEN. COUNSEL, LEGAL ANALYSIS, *supra* note 21, at 2 (quoting *Planned Parenthood Affiliates v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996)).

70. *Id.* at 3.



within more general categories of services required to be provided such as “hospital/facility services,” or “routine maternity,” “preventive care,” or “physician services.”<sup>71</sup> After an outcry by pro-life groups, HHS directed these states to exclude abortion services from high-risk insurance coverage on the grounds that § 1101 of the PPACA specifically empowered HHS to do so. Section 1101 allows the Secretary of HHS to require high-risk pool grants to meet “any other requirements determined appropriate by the Secretary.”<sup>72</sup> Crucially, the language of § 1101 does not have broad application across PPACA and does not apply to CHCs. It was precisely because the high-risk insurance pools were not governed by Hyde language that states assumed that their federal grants should cover elective abortions. This was the conclusion also reached by the Congressional Research Service,<sup>73</sup> which wrote that neither the PPACA, nor the Hyde Amendment, nor the President’s Executive Order<sup>74</sup> issued simultaneously with the PPACA (in exchange for the votes of several recalcitrant pro-life Democratic Congresspersons), nor any other law, forbade high-risk insurance pool funds from funding elective abortions.

*Commonweal* magazine published an article in June 2010 by Professor Timothy Jost, a health-law professor, disputing the USCCB’s legal conclusion that the PPACA would result in federally funded abortions at CHCs.<sup>75</sup> It would be fair to observe at this point that *Commonweal* enthusiastically supported the opinions of Professor Jost. Matthew Boudway, *Commonweal*’s editor,

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71. See Press Release, Pa. Ins. Dep’t, PA Insurance Commissioner Announces Federal Approval of High-Risk Plan (June 28, 2010), available at <http://tinyurl.com/icrelease>. See also Trip Jennings, *NM Move to Cover Abortion in High Risk Pools Prompts Feds to Ban Coverage*, THE N.M. INDEP. (July 19, 2010, 10:00 AM), <http://newmexicoindependent.com/59761/nm-move-to-cover-abortion-in-high-risk-pools-prompts-feds-to-ban-coverage> (noting that New Mexico originally planned to cover abortions in high-risk insurance pools before a ban became part of federal rules); *Taxpayer-funded Abortions in High Risk Pools*, FACTCHECK (July 22, 2010), <http://www.factcheck.org/2010/07/taxpayer-funded-abortion-in-high-risk-pools/> (discussing Pennsylvania, New Mexico and Maryland plans).

72. PPACA § 1101(c)(2)(D), 124 Stat. at 142.

73. Memorandum from Mark Newsom & Jon O. Shimabukuro of the Congressional Research Service to the Senate Committee on Health, Education, Labor, and Pensions (July 23, 2010), available at <http://www.nrlc.org/AHC/CRSReportAbortionandHighRiskPools.pdf> (discussing high risk pools under PPACA and the coverage of elective abortion services).

74. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

75. Timothy Stoltzfus Jost, *Episcopal Oversight: How the Bishops Conference Gets Health-care Legislation Wrong*, COMMONWEAL, June 4, 2010, at 8 [hereinafter *Episcopal Oversight*].

writing about an earlier memo by Jost rebutting the USCCB, stated that Jost's piece was the "best analysis of the Senate bill's abortion language I had seen" and the best critique of the USCCB's memo.<sup>76</sup> In contrast, Boudway derided the USCCB's legal work as "feverish speculation."<sup>77</sup> Jost published regularly with *Commonweal*, most often to criticize the USCCB, and seemed to be the legal opinion upon which *Commonweal* exclusively relied. When I wrote an article contradicting Jost's analysis,<sup>78</sup> *Commonweal* not only published Jost's rebuttal,<sup>79</sup> but also posted a similar editorial of its own.<sup>80</sup>

Jost claimed that the judicial opinions interpreting earlier health care laws "have no relevance" because abortion would be forbidden by extant federal regulations governing CHCs and by the president's Executive Order.<sup>81</sup> But the federal regulations he cited were regulations affecting the monies given to CHCs via the Labor/HHS Appropriations Act, and therefore monies by definition restricted by the Hyde Amendment. They have no application to the CHC funds appropriated directly by the PPACA. In fact, both the PPACA and the Executive Order issued by President Obama state that a "new" fund for CHCs is being both created and funded by the PPACA.<sup>82</sup> Jost insisted that the funds appropriated by the PPACA for CHCs would not be segregated from funds appropriated under the Labor/HHS law and would therefore be restricted by Hyde.<sup>83</sup> But PPACA gives no evidence that the funds it appropriates will be effectively commingled with funds appropriated by the latter law, and thus limited by Hyde.

Law professor Thomas Berg offered an additional theory on behalf of Democrats for Life regarding how money appropriated

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76. Matthew Boudway, *Jost Answers the USCCB's Prolife Office*, DOTCOMMONWEAL (Mar. 15, 2010, 18:36 EST), <http://www.commonwealmagazine.org/blog/?p=7280>.

77. *Id.*

78. Helen M. Alvaré, *A Health Care Challenge to Commonweal and Timothy Jost*, THE PUB. DISCOURSE (July 16, 2010), <http://www.thepublicdiscourse.com/2010/07/1423>.

79. Timothy Stoltzfus Jost, *Devil's Advocates: Why Do Some Proifiers Insist that Health-Insurance Reform Will Mean More Abortions?*, COMMONWEAL (July 19, 2010), <http://commonwealmagazine.org/devils-advocates> [hereinafter *Devil's Advocates*].

80. *Jost Jousts*, DOTCOMMONWEAL (July 19, 2010, 20:14 EST), <http://www.commonwealmagazine.org/blog/?p=9146> (discussing Jost's "joust" with Prof. Alvaré).

81. See Jost, *Episcopal Oversight*, *supra* note 75.

82. PPACA, Pub. L. No. 111-148, § 10503, 124 Stat. 119, 1004 (2010); Exec. Order No. 13,535 § 3, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

83. See Jost, *Episcopal Oversight*, *supra* note 75.

to CHCs by PPACA might be limited by Hyde.<sup>84</sup> He wrote that because § 10503 of PPACA orders the Secretary of Health and Human Services to “transfer amounts in the CHC Fund to accounts within the Department of Health and Human Services,”<sup>85</sup> such funds will become subject to Hyde restrictions by becoming part of “existing accounts” already covered by Hyde.<sup>86</sup> But the phrase “existing accounts” does not appear in the law he cites. While Berg made a more complete attempt than Jost to address the relevant questions, his conclusion also flies in the face of the plain language of the Hyde Amendment, which states that it applies only to funds “appropriated by this Act” (the Labor/HHS Appropriations Act) or to “funds in any trust fund to which funds are appropriated in this Act.”<sup>87</sup> The Labor/HHS law does not appropriate the new CHC fund, nor does PPACA require the CHC fund to flow to a trust fund receiving Labor/HHS monies.

Regarding the Executive Order, Professor Jost claimed it would prevent CHCs from spending federal dollars on abortions. But it is a fundamental aspect of the separation of powers that the President does not have the constitutional authority to contradict a piece of legislation as authoritatively interpreted by the judiciary. Presidents are empowered to enforce the law, not to change or contradict it.<sup>88</sup>

A new status quo respecting direct federal subsidizing of insurance plans that cover abortion also arose as a result of PPACA. PPACA allows federal subsidies to flow to health plans covering abortions. While it is true, therefore, that PPACA pro-

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84. Thomas Berg, *Abortion and Key Provisions of the Patient Protection and Affordable Care Act (PPACA)*, DEMOCRATS FOR LIFE OF AMERICA (July 12, 2010), [http://www.democratsforlife.org/index.php?option=com\\_content&view=article&id=717:abortion-and-key-provisions-of-the-patient-protection-and-affordable-care-act-ppaca-by-thomas-c-berg-&catid=24](http://www.democratsforlife.org/index.php?option=com_content&view=article&id=717:abortion-and-key-provisions-of-the-patient-protection-and-affordable-care-act-ppaca-by-thomas-c-berg-&catid=24).

85. PPACA § 10503, 124 Stat. at 1004.

86. Berg, *supra* note 84.

87. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2009, Pub. L. No. 111-8, § 507(a), 123 Stat. 524, 802.

88. In its Legal Analysis of this point, USCCB effectively marshals the relevant case law as follows:

*Minnesota v. Mille Lacs Band Chippewa Indians*, 526 U.S. 172, 188-89 (1999). *See also* *The Confiscation Cases*, 87 U.S. 92, 112-13 (1873) (“No power was ever vested in the President to repeal an act of Congress.”). Finally, it is the Judicial Branch, not the Executive Branch, that has the final word on what the law means. *See* U.S. CONST. art. III; *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

GEN. COUNSEL, LEGAL ANALYSIS, *supra* note 21, at 5.

vides that certain kinds of federal monies cannot pay for an abortion directly,<sup>89</sup> and individual plan subscribers will pay separate premiums for abortion procedures,<sup>90</sup> a line has nevertheless been crossed. Pre-PPACA, the federal government would not support insurance plans including coverage for abortion. This was the direct result of the second provision of the Hyde Amendment: “None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in the Act, shall be expended for health benefits coverage that includes coverage of abortion.”<sup>91</sup> Post-PPACA, federal monies will flow to health benefits coverage that includes abortion. This represents a move off the status quo respecting federal involvement with abortion.

This review of the law indicates how the USCCB applied its respect for life principle in evaluating PPACA. USCCB concluded that it could not support legislation that on its face expanded the level of governmental support or cooperation with abortion as compared with current levels.

#### B. *Second Principle: Religious Freedom*

The USCCB also called for PPACA to respect religious freedom. Its several memoranda on this subject analyzed specific provisions of PPACA and compared them with religious freedom protections previously offered in the context of federal health care law.<sup>92</sup> They did not explain in any detail their understanding of the relationship between religious freedom and the rights or dignity of the human person generally, although they did speak to religious freedom as an American value. President of the USCCB, Francis Cardinal George, O.M.I., stated: “No government should come between an individual person and God—that’s what America is supposed to be about. This is the true common ground for us as Americans.”<sup>93</sup> Documents of the universal Church including *Caritas in Veritate*, the Second Vatican Ecumenical Council’s Declaration on Religious Freedom

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89. PPACA § 1303(a)(2)(A), 124 Stat. at 170.

90. *Id.* § 1303(a)(2)(B), 124 Stat. at 170.

91. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2009 § 507(a), 123 Stat. at 802.

92. See SECRETARIAT OF PRO-LIFE ACTIVITIES, U.S. CONFERENCE OF CATHOLIC BISHOPS, CURRENT FEDERAL LAWS PROTECTING CONSCIENCE RIGHTS (2008), <http://www.usccb.org/prolife/issues/abortion/crmay08.pdf>; Letter from Murphy, DiNardo, & Wester, *supra* note 15.

93. *Catholic Senators Vote Against ‘Conscience Law,’* CATHOLIC NEWS AGENCY (Apr. 3, 2009), [http://www.catholicnewsagency.com/news/catholic\\_senators\\_vote\\_against\\_conscience\\_law/](http://www.catholicnewsagency.com/news/catholic_senators_vote_against_conscience_law/).

(*Dignitatis Humanae*), and the Congregation for the Doctrine of the Faith's *Doctrinal Note on Catholics in Political Life*<sup>94</sup> do, however, flesh out Catholic claims about the necessity of religious freedom in a way that helps to clarify why the USCCB believed that it was necessary to object to PPACA's treatment of the subject.

*Caritas in Veritate* argues that human beings are oriented toward seeking out the ground of our being—the meaning of our life in this world.<sup>95</sup> It states further that it is not speaking merely about this or that particular person's subjective disposition regarding the search for the transcendent, but speaking rather about the nature of all human beings.<sup>96</sup> It claims that humans are “impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth,” and then “to adhere to [it]”<sup>97</sup> when they find it. Pope Benedict has distinguished this view of the human person from one he labels “Promethean,” which understands the human person as self-contained, as the “absolute author of his own destiny,” who might find all the answers he or she is seeking within purely material and technical boundaries.<sup>98</sup> Popes Benedict XVI and John Paul II, in fact, claim further that human beings cannot really claim to know themselves if they do not come to understand who they are meant to be in light of God. In Pope Benedict's pithy phrases, “[a] humanism which excludes God is an inhuman humanism”<sup>99</sup> or, alternatively, “a person's development is compromised if he claims to be solely responsible for what he becomes.”<sup>100</sup>

Practically speaking, the Catholic Church teaches that religious freedom entails the State's refraining from forcing any person of any faith to act in a manner contrary to his or her beliefs.<sup>101</sup> It includes a right to conscientious objection,<sup>102</sup> which generally speaking means avoiding cooperation in matters that are contrary to the law of God. At a minimum, it means also that

94. CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL NOTE ON SOME QUESTIONS REGARDING THE PARTICIPATION OF CATHOLICS IN POLITICAL LIFE ¶ 8 (2002) [hereinafter DOCTRINAL NOTE], available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20021124\\_politica\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html) (Then-Cardinal Ratzinger is one of the authors.).

95. *Caritas in Veritate*, *supra* note 16, ¶ 29.

96. *Dignitatis Humanae*, *supra* note 20, ¶ 2.

97. *Id.*

98. Pope Benedict XVI, On the 3rd Encyclical, *supra* note 23.

99. *Caritas in Veritate*, *supra* note 16, ¶ 78.

100. *Id.* ¶ 68.

101. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 198–201 (2004).

102. *Id.*

religious persons should not be discriminated against in their service to a community, but it must go far beyond this, to providing a “climate of freedom” for religion’s “public role.”<sup>103</sup>

The Church also acknowledges “due limits” to religious freedom, including the limit of “public order.”<sup>104</sup> Interestingly, Pope Benedict has encouraged societies to exercise “discernment” about the bounds of religious freedom “based upon the criterion of charity and truth” which includes the willingness, demonstrated by a particular faith, to contemplate and serve “[t]he whole man and all men.”<sup>105</sup> This contemplates that some religious practices will not meet such a test.

In a relatively recent address to the British Parliament at Westminster in September 2010, Pope Benedict also included within the ambit of religious freedom the recognition that reason and religion can and should provide mutual assistance.<sup>106</sup> He proposed that political and secular reasons are not omnipotent, but are rather prone to settle on positions formed only out of consensus or ideology.<sup>107</sup> Reason could therefore benefit from the assistance of religion, which has the capacity to “purify and shed light upon [its] application . . . to the discovery of objective moral principles.”<sup>108</sup> Religion, on the other hand, “always needs to be purified by reason” so as to “show its authentically human face.”<sup>109</sup> The two should work together, in other words, as cooperators for the common good.<sup>110</sup>

With this background, it is not difficult to understand why the USCCB found the PPACA lacking in religious freedom. The law scaled back the degree of religious freedom for religious players in the health care field. While there are many relevant health care conscience protections in federal law, the Hyde/Weldon Conscience Protection Amendment (“Weldon Amendment”) provided the most relevant standard. The Weldon Amendment, which has been a part of the Labor/HHS Appropriations Bill every year since 2004, provides that

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103. *Caritas in Veritate*, *supra* note 16, ¶ 11.

104. *Dignitatis Humanae*, *supra* note 20, ¶ 2.

105. *Caritas in Veritate*, *supra* note 16, ¶ 55.

106. Pope Benedict XVI, Address to Politicians, Diplomats, Academics and Business Leaders, Address at Westminster Hall (Sept. 17, 2010), in THE PAPAL VISIT, Sept. 19, 2010, <http://www.thepapalvisit.org.uk/Replay-the-Visit/Speeches/Speeches-17-September/Pope-Benedict-s-address-to-Politicians-Diplomats-Academics-and-Business-Leaders> [hereinafter Address at Westminster Hall].

107. *Id.*

108. *Id.*

109. *Caritas in Veritate*, *supra* note 16, ¶ 56.

110. Address at Westminster Hall, *supra* note 106.

[n]one of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”<sup>111</sup>

The Senate did not incorporate the Weldon amendment into its version of the PPACA. Senate Majority Leader Harry Reid failed to include it in the Senate health care bill he drafted behind closed doors. Senator Coburn’s proposed Amendment,<sup>112</sup> which would protect against discrimination by any state program or any health entity receiving federal financial assistance, was rejected along party lines. Instead, scattered and less comprehensive provisions on religious freedom were placed in the bill. These include, for example, § 1304(b)(4) of the PPACA, which prohibits plans that qualify to participate in state health insurance exchanges from discriminating against any health care provider or facility because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.<sup>113</sup> This section, however, provided no protection for refusals to *train* for abortions (an important demand pressed by abortion rights groups in recent years as the number of abortion providers has dwindled), or, even more importantly, protection for providers or health care entities against discrimination by various governmental entities or institutions receiving federal funds. PPACA also offers protections for religious conscience with respect to end-of-life care: § 1553, for example, prohibits governments at all levels from discriminating against conscientious objectors respecting assisted suicide, mercy killing, and euthanasia; it did not, however, cover other medical services.<sup>114</sup> PPACA further failed to state that the federal law does not preempt existing state conscience protections, even while it did protect against federal preemption of state abortion laws regulating abortion or abortion coverage.<sup>115</sup> Additionally, PPACA failed to assure individuals or institutions

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111. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2008, Pub. L. No. 110-161, § 508(d)(1), 121 Stat. 1844, 2209.

112. S. Amend. 2967 to H.R. 3590, 111th Cong. (2009), *reprinted in* 155 Cong. Rec. S12629 (daily ed. Dec. 7, 2009).

113. PPACA, Pub. L. No. 111-148, § 1303(a)(3), 124 Stat. 119, 171 (2010) (creating provider conscience protections).

114. *Id.* § 1553, 124 Stat. at 259.

115. *Id.* § 1303(b)(1), 124 Stat. at 171 (“Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements

the ability to purchase health insurance consistent with their moral or religious conscience.

The political and cultural context in which PPACA was debated and passed justified the USCCB's concerns about the incomplete religious freedom protections of the law. As noted above, in recent years and continuing, groups supporting the widest possible access to birth control, "morning after" pills, and abortion have been arguing that the Catholic Church's refusal to offer these services, or include them in their health insurance benefits, particularly violate women's rights. Additionally, many supporters of PPACA, perhaps most significantly President Obama, were signatories (while in the Senate) to a 2008 letter addressed to HHS which opposed regulations protecting the consciences of health care providers as impairing the "health care needs of women."<sup>116</sup>

Furthermore, since the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>117</sup> held that religious citizens were not entitled as a matter of Free Exercise to exemptions from "neutral laws of general applicability,"<sup>118</sup> religious institutions must either win such exemptions in the legislature, or go without them. The judiciary is not obligated to grant them.

On the matter of the PPACA and religious freedom, therefore, the USCCB concluded that while the PPACA did not repeal existing federal protections regarding abortion and other morally disputed medical procedures, it did "impose some new mandates that represent new threats to conscience without providing corresponding protection against those threats."<sup>119</sup> Because of these concerns, the USCCB, in a statement issued shortly before the House vote on the Senate bill, concluded that the bill remained "deeply disturbing."<sup>120</sup> CHA, Network, *Commonweal*, and *America*, on the other hand, endorsed the law. CHA concluded, without supporting citations, that: "[w]e are confident that the reform law . . . keeps in place important conscience protections for caregivers and institutions alike."<sup>121</sup> The USCCB's

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on abortions, including parental notification or consent for the performance of an abortion on a minor.").

116. See James C. Capretta, *Health Care with a Conscience*, NEW ATLANTIS, Fall 2008, at 69.

117. 494 U.S. 872 (1990).

118. *Id.* at 900.

119. GEN. COUNSEL, LEGAL ANALYSIS, *supra* note 21.

120. Press Release, *supra* note 3.

121. *Catholic Health Association Congratulates Nation's Leaders for Enacting Historic Health Reform*, CATHOLICHEALTHCARE (Mar. 21, 2010), <http://www.catholichealthcare.org>



detailed legal analyses of the bill's conscience flaws went unanswered by each of these organizations and publications, both before and after PPACA's passage. To the extent that *Commonweal's* analyst, Professor Timothy Jost, addressed conscience issues in PPACA, he wrongly concluded that "the Senate bill like the House bill prohibits federal agencies and programs, and state and local governments that receive federal funding, from discriminating against health care providers or professionals on the basis of their unwillingness to provide, pay, provide coverage or refer for abortions."<sup>122</sup> The USCCB pointed out Jost's confusion, noting that he mistook the Senate's reference to the Hyde amendment as a general restriction, when in fact the bill referenced it "only to provide the list of abortions that are eligible or ineligible for direct federal funding . . . . It does not reference any part of the separate Hyde/Weldon amendment to the annual Labor/HHS [sic] bill, on abortion nondiscrimination."<sup>123</sup> Jost did not acknowledge this correction, but rather made the new claim that the Executive Order could effectively apply the Weldon amendment to PPACA, ignoring that Weldon applies only to programs funded by "this Act [the Labor/HHS Appropriations Act]," and not to those created or funded by PPACA.<sup>124</sup>

### C. *Third Principle: Truth in Love*

Caritas in Veritate ("charity in truth") can be understood as both a principle and a method for evaluating proposed policies affecting human development. Summarized more briefly than its size and importance deserve, it can be broken down into at least two elements—the first of which was explicitly manifested in the USCCB's response, and the second implicitly. The first element of "charity in truth" is the method of employing rational, truthful arguments in service of one's claimed message of love for the human person. It includes respecting the discipline in which the argument is embroiled, whether that be law, medicine, or any other discipline. The second element of "charity in truth" involves the recognition that actions and arguments are truly loving only to the extent that they correspond with authentic human flourishing. Arguments and actions may appear loving or humanitarian on their face; they may traffic in the vocabulary of

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catholichealthcare.us/ (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

122. U.S. CONFERENCE OF CATHOLIC BISHOPS, WHAT'S WRONG WITH THE SENATE HEALTH CARE BILL ON ABORTION? A RESPONSE TO PROFESSOR JOST (2010), <http://www.usccb.org/healthcare/jost-response.pdf>.

123. *Id.*

124. See Jost, *Devil's Advocates*, *supra* note 79.

love, but they do not always, in truth, serve the good of the human person as it can be understood by means of reason, experience, and reflection in the light of faith.

With regard to the first aspect of this principle, *Caritas in Veritate* and *Veritatis Splendor* speak of the need for truth as an element of public discourse. *Veritatis Splendor*, in particular, calls for truthfulness from those who shape public policy as a corollary not only of the right functioning of the state, but also due to the “transcendent value of the person” who is owed the truth.<sup>125</sup> *Caritas in Veritate* also includes truth as a condition for respectful dialogue when it requires people of faith to “acknowledg[e] and respect[ ] the specific competence of every level of knowledge” involved.<sup>126</sup> The opposite is rejected, i.e., “prescinding from the conclusions of reason, [or] contradicting its results. Intelligence and love are not in separate compartments.”<sup>127</sup>

In the debate over PPACA, the USCCB’s adherence to the first aspect of the principle of truth in love was evident: legal experts at the USCCB produced comprehensive, publicly available legal analyses of the health care bills as they moved from introduction to final passage. These conformed to the norms of legal analysis accepted in the legal field at issue, particularly the fields of statutory interpretation and executive power. In the context of a federal health care bill, this required not only interpreting the bill’s plain text, but also attending to judicial decisions interpreting similar, relevant statutes, as well as interpretations of statutes that PPACA amended, referenced, or replaced. It involved comparing language (particularly on abortion and religious freedom) incorporated into the bill with language proposed but rejected by members of the U.S. Senate. Furthermore, because this law came “attached to” a related executive order, it involved knowledge about the law of executive orders—what they may and may not do—as well as parsing the meaning of this particular executive order. All of this was required in order to come to a conclusion about whether the PPACA represented an advance, a retreat, or preservation of the status quo on the matters of federal cooperation with abortion, and on religious freedom.

Those Catholic groups supporting PPACA did not engage fully or publicly in this level of legal analysis. Neither CHA nor Network produced comprehensive, publicly available legal analyses of their own. *Commonweal* and *America* acted similarly.

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125. *Veritatis Splendor*, *supra* note 18, ¶ 101.

126. *Caritas in Veritate*, *supra* note 16, ¶ 30.

127. *Id.*

*America* chose to rely generally (without names or further details) on what it called “many other legal analysts.”<sup>128</sup> It also falsely claimed that the bishops’ “reasons for drawing their conclusion were not available for others to probe during the debate on the bill” (when they were available on the USCCB website), and referred to the USCCB’s analysis as a “tissue of hypotheticals.”<sup>129</sup>

All of the Catholic groups supporting PPACA appeared to rely considerably upon the work of Professor Jost without convincing reason. Professor Jost is not an experienced scholar on the subjects of abortion in federal law or on religious freedom. His writings concerning PPACA are notably partisan and, at times, anti-religious. In a piece for *Politico*, for example, he opposed the involvement of the Catholic bishops in the health care debate, warning that it risked turning the United States into “another Iran,” and he further opposed passage of the pro-life Stupak Amendment.<sup>130</sup> Professor Jost also signaled his party affiliations strongly in another piece in *Politico* in which he wrote how “[u]nimaginable” it would be for American voters to want Republicans back in government when, under the Democrats, the “economy has come roaring back.”<sup>131</sup>

Here and there, the Catholic groups supporting PPACA also referenced the opinion of Professor Thomas Berg, who authored a piece on health care on behalf of Democrats for Life.<sup>132</sup> In sum, Catholic supporters of PPACA did not rely on sufficiently sophisticated or sufficiently nonpartisan sources and experts for their conclusions.

*Caritas in Veritate* takes up a second aspect of “charity in truth” in connection with crafting policy supporting human flourishing: forming a correct understanding of the nature of the human person and the contents of the common good. Here, *Caritas in Veritate* discusses the importance of recognizing the human person’s search for God and of the necessity of loving interdependence with the “neighbors” given to us.<sup>133</sup> As for the common good, *Caritas in Veritate* speaks of the good of all human

128. *How Compelling?*, AM. MAG., Apr. 12, 2010, at 4.

129. *Id.*

130. Timothy Stoltzfus Jost, *Open Mic, Saturday, Feb. 27–Monday, March 1*, POLITICO (Feb. 27, 2010), [http://www.politico.com/arena/per/Timothy\\_Stoltzfus\\_Jost\\_CEC68508-DE45-492C-932B-2B97E3EDCCD9.html](http://www.politico.com/arena/per/Timothy_Stoltzfus_Jost_CEC68508-DE45-492C-932B-2B97E3EDCCD9.html).

131. Timothy Stoltzfus Jost, *Would A New House Republican Majority Operate Differently Than the Old One? Pat Buchanan’s “Diversity”?*, POLITICO (May 17, 2010), <http://www.politico.com/arena/archive/house-keys-for-the-gop.html#18D128DC-C59C-4BA9-BD6A-B9F757EE835C>.

132. See *supra* text accompanying notes 84–86.

133. *Caritas in Veritate*, *supra* note 16, ¶ 7; see also *supra* text accompanying notes 29–34.

beings, without discrimination, in light of their equal creation by God.<sup>134</sup> *Veritatis Splendor* adds that in order to assess the truth of a proposal about human development, one has to look at whether it contributes to the “concrete realization of” human and social goods “in given historical, geographic, economic, technical and cultural contexts.”<sup>135</sup>

*Caritas in Veritate* sharpens its definition of this aspect of truth in love by distinguishing it from other phenomena that routinely travel with claims of love and compassion. These include partisanship, sentimentality (a “pool of good sentiments”), emotionality, uninformed opinion, private interests or the “logic of power,” and ephemeral cultural and moral trends.<sup>136</sup> In the *Doctrinal Note*, the Congregation for the Doctrine of the Faith (under then-Prefect Joseph Ratzinger) warns also that behaviors which are the very opposite of love, such as killing, may also be proposed as loving choices.<sup>137</sup>

Independent Catholic entities supporting PPACA regularly referenced the common good in their public communications, particularly the good of universal health insurance coverage, and of guaranteed insurance for the very ill. As discussed above in Part I A and B, they did not acknowledge the likelihood that PPACA also increased federal cooperation with the killing of unborn human lives and weakened citizens’ religious freedom. There was also evidence that the Catholic entities supporting PPACA fell prey to several phenomena identified by *Caritas in Veritate* and *Veritatis Splendor* as undermining “charity in truth,” particularly partisanship and sentimentality. For example, there was the inexplicable writing-off of the very experts at the USCCB responsible over the last four decades for drafting and lobbying federal legislation concerning abortion, in favor of reliance upon partisans with no comparable record. There were partisan victory-laps when CHA’s President stood with President Obama at the Rose Garden signing-ceremony and received one of the signing pens.<sup>138</sup> Additionally, President Obama and Democrat Senator Robert Casey also appeared in a video made for CHA’s

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134. See *Caritas in Veritate*, *supra* note 16, ¶ 7.

135. See *Veritatis Splendor*, *supra* note 18, ¶ 3; see also Address at Westminster Hall, *supra* note 106.

136. *Caritas in Veritate*, *supra* note 16, ¶¶ 3–5.

137. See DOCTRINAL NOTE, *supra* note 94, ¶ 8.

138. Kendra Marr, *22 Pens: Reid, Pelosi, Keahan, More*, POLITICO (Mar. 23, 2010 16:02 EST), [http://www.politico.com/politico44/perm/0310/cap\\_tip\\_5e0ffd86-45c0-49ca-b651-0f3fe1103a6b.html](http://www.politico.com/politico44/perm/0310/cap_tip_5e0ffd86-45c0-49ca-b651-0f3fe1103a6b.html) (discussing the 22 pens President Obama used in signing PPACA into law and then gave to lawmakers and citizens, including Sister Carol Keahan of the Catholic Health Association, after the signing).

annual convention, wherein they celebrated CHA's role in the passage of PPACA.<sup>139</sup> CHA's President and Nancy Pelosi were reportedly greeted like "rock stars" when they appeared to celebrate their joint achievement at the Washington conference of a well-known liberal Catholic newspaper, The National Catholic Reporter.<sup>140</sup>

## II. CONCLUSION

There is no reason to suppose that the phenomenon of "mixed legislation" will disappear anytime soon. By this, I mean legislation which (from the perspective of some faith-based institutions) potentially advances human flourishing in some provisions, but violates human rights in others, particularly the right not to be killed prenatally and the right to religious freedom. As described above, there is a noticeable uptick in the application of human rights language to controverted individual sexual and medical choices, such as abortion, morning-after contraceptives and contraceptives, and same-sex marriage. This human rights language, along with provisions for government cooperation with such choices, might appear in legislation concerning a variety of topics of concern to faith-based institutions—from housing, to health care, to employment. The USCCB's statements during the course of the health care debate reveal how the Catholic Church might proceed regarding future pieces of mixed legislation. *Caritas in Veritate* and other authoritative statements treating the Catholic view of authentic human development supply additional understanding of the philosophical and theological rationales for the Church's approach.

The USCCB's public statements and analyses during the health care debate effectively demonstrated the Catholic method of "truthful love" in the sense of dealing honestly and in a sophisticated manner with the expert discipline at issue in the debate—the law concerning statutory interpretation and executive power. By its willingness to respond to its interlocutors fully, publicly and in a relevant manner, the USCCB tried to model *Caritas in Veritate's* prescriptions. Furthermore, despite the pressure-cooker, partisan atmosphere surrounding the final days of the health care debate, USCCB did not deviate away from positions

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139. John L. Allen, Jr., *Obama, Casey Laud Catholic Health Association*, NAT'L CATHOLIC REP. (June 14, 2010), <http://ncronline.org/blogs/ncr-today/obama-casey-laud-catholic-health-association>.

140. Cathy Lynn Grossman, *Nuns, Nancy Pelosi Are Rock Stars to Progressive Catholics*, USA TODAY (May 7, 2010, 7:37 EST), <http://content.usatoday.com/communities/religion/post/2010/05/immigration-reform-nancy-pelosi-catholic-nuns/1>.

flowing from Catholic social teaching, toward partisanship, subjective opinion, or sentimentality about the passage of an undoubtedly historic health care bill.

At the same time, the USCCB likely missed several opportunities to communicate even more effectively to the public and to their interlocutors a few of the important arguments about integral human development proposed particularly by *Caritas in Veritate*. To be sure, there were good reasons why these additional arguments were not explicated at any length; the public, members of Congress, and even the White House have limited attention spans, and there were constant demands on a limited staff to produce timely and correct legal analysis. Yet these arguments possess intrinsic powers of persuasion. In particular, both legislators and the public could have benefitted from more sustained reflections about issues including: the importance of the integrity of the human body, the link between respect for unborn life and our capacity to exercise care for vulnerable born life, the human rights case for religious freedom, the need for transparency in political discourse, and the duty of all advocates in the public square to adhere to high standards of competence in the subject matter at issue in any proposed law.

In the United States today, the path forward for religious institutions dedicated to respect for life and a broad religious freedom is not smooth. Advocates ought to advance every possible argument that might sound a theme in harmony with America's ideals of freedom, equality, fairness, transparency, and protection for the more defenseless among us.

