

Threats to the Protection of Conscience in Catholic Health Care

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ABSTRACT: This article provides background on the moral foundations of Catholic healthcare and then discusses recent federal threats to conscience protection. It concludes with a review of some recent actions by Catholic organizations that could undermine claims for comprehensive conscience protection.

THERE ARE ONGOING THREATS to the free exercise of conscience by Catholic healthcare workers and institutions in the United States and other Western societies. These threats have been precipitated by a cultural shift away from the sanctity of life ethic toward a quality of life ethic. The result has been an ever widening gap between secular and Catholic views on issues such as contraception, abortion, sterilization, and euthanasia. It is probable that threats to conscience will continue to escalate in the future. Thus the preservation of autonomy for Catholic healthcare institutions will require constant vigilance and resistance to the ever present temptation to de-emphasize Catholic distinctiveness in order to preserve government funding and bolster the bottom line. This will, in turn, require a unity of purpose between the Bishops and Catholic healthcare leaders.

The difficulty that both institutional and individual healthcare providers face in successfully seeking exemption from laws mandating their involvement in the provision of reproductive services prohibited by Catholic teaching is exacerbated by the contemporary secular view of conscience as a judgment that is based on one's own life experiences rather than on objective moral truth. Indeed, in the United States, where ethical relativism has become the prevailing public philosophy, an appeal to conscience based on objective moral truth is likely to be met with hostility. There is a clear divergence between secular and Catholic

views of conscience. In discussing conscientious objection, James Childress has stated: “Conscience is personal and subjective; it is a person’s consciousness of and reflection on his own acts in relation to his standards of judgment. It is a first person claim, deriving from standards that he may or may not apply to the conduct of others.”¹ In contrast, the Catholic view of the exercise of conscience, as developed by John Paul II in *Veritatis Splendor*, is that it involves the application of the precepts of the natural law to particular situations and is premised on the existence of objective moral norms. He states:

The judgment of conscience is a *practical judgment*, a judgment which makes known what man must do or not do, or which assesses an act already performed by him. It is a judgment which applies to a concrete situation the rational conviction that one must love and do good and avoid evil.... Conscience thus formulates *moral obligation* in the light of the natural law: it is the obligation to do what the individual, through the workings of his conscience, *knows* to be a good he is called to do *here and now*.²

Furthermore, as John Paul II observed in *Evangelium Vitae*, ethical relativism is viewed in contemporary Western societies as “an essential condition of democracy, inasmuch as it alone is held to guarantee tolerance, mutual respect between people and acceptance of the decisions of the majority, whereas moral norms considered to be objective and binding are held to lead to authoritarianism and intolerance.” The unfortunate tendency of the alliance between ethical relativism and liberal democracy is its potential “to remove any sure moral reference point from political and social life, and on a deeper level make the acknowledgment of truth impossible.” But John Paul II also emphasized that it is never permissible to cooperate with evil.³ He treated the right

¹ James F. Childress, *Appeals to Conscience*, 89 *Ethics* 315, 318 (1979).

² *Veritatis Splendor* §59.

³ *Evangelium Vitae* §74 states: “Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God’s law. Indeed, from the moral standpoint, it is never licit to cooperate formally in evil. Such cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person

to conscientious objection as a basic human right.⁴

Recently there have been a number of controversies involving threats to conscience protection from the actions of state and federal governments as well as professional groups. Indeed, Lynn Wardle notes that there has been a shift in tactics by pro-choice activists. Originally, they “argued that they merely desired to give women the private choice to select abortion,” but now “they try to compel hospitals, clinics, provider groups, and health care insurers to provide facilities, personnel, and funding for abortion.”⁵ But not all threats are external. Unfortunately, in some instances the colorability of claims for conscience protection has been undermined by the actions of Catholic organizations.

The Moral Foundations of Catholic Health Care

Although the discipline of secular bioethics did not fully emerge until the early 1970s,⁶ it has already largely supplanted religiously-based approaches to ethical issues in medicine. There has been an attempt by

committing it. This cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it.”

⁴ *Evangelium Vitae* §75 states: “To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right... What is at stake therefore is an essential right which, precisely as such, should be acknowledged and protected by civil law. In this sense, the opportunity to refuse to take part in the phases of consultation, preparation and execution of these acts against life should be guaranteed to physicians, health-care personnel, and directors of hospitals, clinics and convalescent facilities. Those who have recourse to conscientious objection must be protected not only from legal penalties but also from any negative effects on the legal, disciplinary, financial and professional plane.”

⁵ *Abortion Non-Discrimination Act, H.R. 4691, before the House Energy and Commerce Subcommittee on Health*, 11 July 2002, available at 2002 WL 20318915, Statement of Professor Lynn Wardle, J. Reuben Clark Law School, Brigham Young University.

⁶ Edmund D. Pellegrino, “Bioethics at Century’s Turn: Can Normative Ethics Be Retrieved?” in *Journal of Medicine & Philosophy* 25 (2000): 659 discussing Warren T. Reich, “The Wider View: Andre Hellegers’s Passionate, Integrating Intellect and the Creation of Bioethics,” *Kennedy Institute of Ethics Journal* 9 (1999): 25.

some secular bioethicists to construct a cross-cultural, universal morality to facilitate consensus on bioethical issues, but this endeavor has not generally been deemed a success.⁷ David Smolin has argued that the field of secular bioethics has been dominated by an academic discourse pervaded by skepticism and ethical relativism. Its rejection of moral absolutes has been coupled with an emphasis on patient autonomy.⁸ Sometimes, as in the case of Peter Singer, there has been a very explicit rejection of Christian values, i.e., the rejection of a sanctity of life ethic in favor of a quality of life ethic.⁹

John Paul II responded to this cultural shift toward a quality of life ethic in two of his encyclicals. *Veritatis Splendor* (1993)¹⁰ was primarily concerned with dissent inside the Church. It was issued for the purpose of responding to the crisis in moral theology precipitated by dissenting theologians. *Evangelium Vitae* (1995)¹¹ was written to combat the prevalence of a “culture of death.”

The restatement of the basic truths of moral theology in *Veritatis Splendor* was seen as a necessary response to the widespread public dissent from traditional teachings and the rejection of the authority of the *Magisterium*. It clearly affirms the authority of the *Magisterium* to establish specific absolute norms governing moral conduct. The encyclical rejects the emphasis on individual autonomy in contemporary moral discourse and condemns the work of moral theologians who subvert absolute moral norms. *Veritatis Splendor* reaffirms the existence of specific moral absolutes governing human conduct that are valid

⁷ Pellegrino, p. 656.

⁸ David M. Smolin, “Does Bioethics Provide Answers? Secular and Religious Bioethics and Our Procreative Future,” *Cumberland Law Review* 35 (2005): 473.

⁹ Peter Singer, *Practical Ethics*, 2nd ed. (New York NY: Cambridge Univ. Press, 1993), p. 14.

¹⁰ Pope John Paul II, *Veritatis Splendor* (1993) [hereinafter *VS*], http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html.

¹¹ Pope John Paul II, *Evangelium Vitae* (1995) [hereinafter *EV*], http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

always and everywhere.¹² It rejects arguments that moral norms are the product of particular cultural contexts and thus changeable rather than immutable.¹³ It also criticizes the use of “pastoral solutions” to undermine absolute norms.¹⁴ And by rejecting the emphasis of some moral theologians on the primacy of the individual conscience in making moral decisions, it emphasizes the preeminent role of the teachings of the Church in forming the consciences of Christians.¹⁵

Evangelium Vitae focuses on abortion, euthanasia, and the death penalty. It was written to combat the prevalence of a “culture of death” that is “excessively concerned with efficiency” and accordingly devalues the lives of those who impose burdens on others.¹⁶ *Evangelium Vitae* refers to the unleashing of a “conspiracy against life.”¹⁷ It traces the current attacks on human life to an excessive emphasis on individual autonomy and the rejection of traditional authority.¹⁸ It refers to an ongoing struggle between a “culture of life” and a “culture of death.”¹⁹

As Edmund Pellegrino has pointed out, there is a significant tension between Catholic bioethics and the secular bioethics movement. While Catholic bioethics is based on scripture and the natural law as revealed in the work of moral theologians and the teachings of the *Magisterium* including papal encyclicals, secular bioethics finds its origins in the Enlightenment, rejects religion and metaphysics, and focuses primarily on autonomous human reason.²⁰ Catholic bioethics can also be distinguished from a post-modernist approach that rejects modernist rationalism and any attempts at constructing a coherent, over-arching moral philosophy.²¹ While secular bioethics is concerned more with

¹² *VS* §52.

¹³ *VS* §53.

¹⁴ *VS* §56.

¹⁵ *VS* §64.

¹⁶ *EV* §12.

¹⁷ *Ibid.*

¹⁸ *EV* §19-20.

¹⁹ *EV* §21.

²⁰ Edmund D. Pellegrino, “Secular Bioethics and Catholic Medical Ethics: Moral Philosophy at the ‘Margins’” in *The Bishop and the Future of Catholic Health Care*, ed. Daniel P. Maher (Boston MA: Pope John Center, 1997), p. 30.

²¹ Pellegrino, p. 31.

procedural issues, Catholic bioethics is concerned with the principles of good moral decision-making rather than with the identity of who makes the decision.²²

The Catholic bishops in the United States have consistently upheld the view that there are absolute moral norms that limit the role of Catholic hospitals in providing access to prohibited services. In 1971, the National Conference of Catholic Bishops adopted a revised version of the *Ethical and Religious Directives for Catholic Health Facilities*²³ as a response to continuing pressures on Catholic hospitals to provide sterilizations, contraception, and artificial insemination.²⁴ Several well-known Catholic moral theologians criticized the approach taken by the 1971 document and particularly the prohibition on the performance of direct sterilizations in Catholic hospitals.²⁵ It would not have been surprising if some bishops had balked at adopting the standards of the 1971 document in light of this criticism, but after *Roe v. Wade* was decided in 1973, there was concern that Catholic hospitals would be forced to provide abortions and sterilizations because of their receipt of federal funding under various programs.²⁶ Adoption of the 1971 standards was also facilitated by a decision by a U.S. District Court Judge in Montana that resulted in the issuance of an injunction compelling a Catholic hospital to permit a physician to perform a tubal ligation on a patient in the hospital.²⁷

²² Pellegrino, pp. 30-31. See also “A Statement of the Catholic Bishops of Pennsylvania, Nutrition and Hydration: Moral Considerations” (revised edition, 1999; first issued, 12 December 1991).

²³ *Ethical and Religious Directives for Catholic Health Facilities* (1971), reprinted in Thomas J. O’Donnell, S.J., *Medicine and Christian Morality* (New York NY: Alba House, 1976).

²⁴ Christopher J. Kauffman, *Ministry and Meaning: A Religious History of Catholic Health Care in the United States* (New York NY: Crossroad, 1995), p. 290.

²⁵ Leonard J. Nelson, III, “Diagnosis Critical: The Urgent Threats Confronting Catholic Health Care” (2009): 61-64, discussing Richard McCormick and Warren Reich.

²⁶ Kevin D. O’Rourke, Thomas Kopfensteiner, and Ron Hamel, “A Brief History,” *Health Progress* (November–December 2001): 82.

²⁷ *Taylor v. St. Vincent’s Hospital, Billings, MT c-1090*, U.S. District Court, Montana (October 27, 1972).

The 2001 version of Ethical and Religious Directives²⁸ continues the prohibition of direct abortions,²⁹ direct sterilizations,³⁰ and contraception.³¹ But there are some significant changes concerning cooperative arrangements entered into by Catholic hospitals. The 2001 document removed an appendix from the 1995 version and a new directive (§70) was adopted for the purpose of making it more difficult for Catholic hospitals to utilize cooperative arrangements with non-Catholic providers to offer prohibited procedures.³² Directive §70 provides: “Catholic health care organizations are not permitted to engage in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization.”³³

In the case of Catholic hospitals and healthcare plans, the principles concerning material cooperation should be interpreted to preclude their involvement in cooperative arrangements to provide access to direct sterilizations and direct abortions. But even if they are not interpreted in this way, the scandal that would arise from these arrangements would seem to be unacceptable. Directive §71 of the 2001 version provides as follows:

The possibility of scandal must be considered when applying the principles governing cooperation. Cooperation, which in all other respects is morally licit, may need to be refused because of the scandal that might be caused. Scandal can sometimes be avoided by an appropriate explanation of what is in fact being done at the health care facility under Catholic auspices. The diocesan bishop has final responsibility for assessing and addressing issues of scandal, considering not only the circumstances in his local diocese but also the regional and national implications of his decision.³⁴

²⁸ *Ethical and Religious Directives for Catholic Health Care Services* (4th ed. 2001) [hereinafter 2001 ERDs].

²⁹ *Ibid.* at Directive 45.

³⁰ *Ibid.* at Directive 53.

³¹ *Ibid.* at Directive 53.

³² *Ibid.* at Directive 36.

³³ *Ibid.* at Directive 70.

³⁴ *Ibid.* at Directive 71.

Recent Federal Threats to Conscience

At the federal level, recent threats to conscience protection may be seen in the decision of the Obama administration to rescind conscience protection regulations adopted in the waning days of the Bush Administration, the possible enactment of the Freedom of Choice Act (FOCA), and the passage of the Patient Protection and Affordable Care Act (PPACA) with only limited conscience protection.

Provider Conscience Regulations

Provider conscience regulations were promulgated in December 2008 by the Bush administration to bolster existing statutory conscience clause provisions.³⁵ Their adoption was motivated in part by a November 2007 Opinion issued by the American College of Obstetricians and Gynecologists [ACOG] requiring doctors that refuse to perform abortions to refer patients to abortion providers.³⁶ This was followed by regulations issued by the American Board of Obstetricians and Gynecologists that appeared to link board re-certification to compliance with the ACOG referral requirement.³⁷ The provider conscience regulations were designed to ensure compliance with statutory bans on discrimination against healthcare providers with a conscientious objection to specific medical procedures, e.g., abortions and sterilizations. On 10 March 2009, the Obama administration published a notice in *The Federal Register* announcing its intention to rescind the provider conscience regulations in their entirety and seeking comments “to aid our consideration of the many complex questions surrounding the issue and the need for regulation in this area.”³⁸ This notice mentioned

³⁵ 73 Fed. Reg. 78072 (Dec. 30, 2008).

³⁶ “The Limits of Conscientious Refusal in Reproductive Medicine,” ACOG Committee Op. No. 385 (Nov. 2007), http://www.acog.org/from_home/publications/ethics/co385.pdf.

³⁷ The ABOG regulations provide for revocation of a diploma when “the physician shall have violated any of ‘The Ethical Considerations in the Practice of Obstetrics and Gynecology’ currently published by The American College of Obstetricians and Gynecologists and adhered to by the Board.” *ABOG Bulletin for 2008, Maintenance of Certification* at 31, <http://www.abog.org/pdf/MOC2008.pdf>.

³⁸ 74 Fed. Reg. 10207 (Mar. 10, 2009).

concerns about denials of access to procedures particularly in rural areas were.³⁹

Freedom of Choice Act

Identical versions of the Freedom of Choice Act (FOCA) were introduced in both the House and Senate in the 110th Congress but never passed.⁴⁰ If enacted, FOCA would override federal conscience clause protection. It has not yet been introduced in the 111th Congress although a spokesman for Rep. Jerrold Nadler (D-NY) indicated that Nadler intends to introduce it “sooner rather than later.”⁴¹ During his campaign, President Obama promised to sign FOCA.⁴² In his Notre Dame speech he stated: “Let’s honor the conscience of those who disagree with abortion and draft a sensible conscience clause, and make sure that all of our health care policies are grounded in clear ethics and sound science, as well as respect for the equality of women.”⁴³

At this time, FOCA has not been introduced in Congress and the Obama Administration has indicated it is not a priority.⁴⁴ The efforts of the Bishops in spring 2009 in mustering opposition to FOCA may have had a beneficial impact in heading off attempts to pass FOCA or similar legislation.⁴⁵ A more likely scenario is a series of incremental moves as a part of healthcare reform that will undermine the distinctive nature of

³⁹ Ibid. at 10209.

⁴⁰ S. 1173 and H.R. 1964, 110th Cong. (2007).

⁴¹ “Congressman Intends to Introduce FOCA ‘Sooner rather than later’ Spokesman Says,” Catholic News Agency (March 6, 2009), http://www.catholicnewsagency.com/news/congressman_to_introduce_foca_sooner_rather_than_later_spokesman_says/.

⁴² “Barack Obama Promises to Sign FOCA,” <http://www.youtube.com/watch?v=pf0XIRZSt8>.

⁴³ “Transcript: Obama’s Notre Dame Speech,” *Chicago Tribune* (May 27, 2009), <http://www.chicagotribune.com/news/politics/obama/chi-barack-obama-notre-dame-speech,0,6345947.story>.

⁴⁴ John Jalsevac, “Obama Flip-Flops on FOCA: Says ‘Not Highest Legislative Priority’ but Continues Extreme Abortion Push,” LifeSiteNews.com, Apr. 30, 2009, <http://www.lifesitenews.com/ldn/2009/apr/09043006.html>.

⁴⁵ See, e.g., Press Release, United States Conference of Catholic Bishops, “Massive Nationwide, Pro-Life Postcard Campaign Underway” (Feb. 4, 2009), <http://www.usccb.org/comm/archives/2009/09-032.shtml>.

Catholic healthcare providers and their commitments to the Ethical and Religious Directives.

Health Care Reform

The Patient Protection and Affordable Care Act (PPACA) could also threaten Catholic healthcare.⁴⁶ The Catholic Bishops, while generally supportive of the goals of the legislation, opposed the PPACA because of its limited conscience protection and the possibility of expanded abortion funding.⁴⁷ The PPACA contains a non-discrimination provision prohibiting qualified healthcare plans that participate in the state insurance exchanges from discriminating against healthcare facilities and providers that refuse “to provide, pay for, provide coverage of, or refer for abortion.”⁴⁸ There is also a provision that PPACA shall not be construed to have any impact on existing federal conscience protection laws.⁴⁹

Nonetheless, as Chuck Donovan at Heritage and William Saunders at Americans United for Life have pointed out PPACA does not prohibit state and federal governments from discriminating against plans that refuse to provide abortion coverage, and a bill proposing that limitation failed in a Senate Committee in September 2009.⁵⁰ Saunders further notes that such protection is included in Hyde-Weldon as part of the annual appropriation for the Department of Health and Human Services, but the Obama administration has already rescinded regulations to support that legislation and it may not be re-enacted.⁵¹ The PPACA also

⁴⁶ The Patient Protection and Affordable Care Act (P.L. 111-148), enacted Mar. 23, 2010.

⁴⁷ Press Release, United States Conference of Catholic Bishops, Statement of Cardinal George, “The Cost is too High; the Loss is too Great” (March 15, 2010), <http://www.usccb.org/comm/archives/2010/10-043.shtml>.

⁴⁸ PPACA § 1303(b) (4).

⁴⁹ PPACA § 1303(c) (1).

⁵⁰ Chuck Donovan, “The Impact of Obamacare on the Family” (April 12, 2010), <http://www.heritage.org/research/reports/2010/04/obamacare-impact-on-the-family>; William L. Saunders, “Comparison of Conscience Provisions in Health Care Reform Bills,” Federalist Society (March 8, 2010), http://www.fed-soc.org/doclib/20100318_NFIPConscienceProvisionsFINAL.pdf.

⁵¹ Saunders, *supra* n4.

prohibits discrimination by federal, state, and local governments as well as qualified healthcare plans against individual providers and healthcare entities that refuse to provide assisted suicide.⁵² But there is no protection for conscientious objection to sterilization or emergency contraception. After passage of the legislation, Cardinal George, then president of the U.S. Conference of Catholic Bishops, referred to the legislation as “profoundly flawed because it has failed to include necessary language to provide essential conscience protections (both within and beyond the abortion context).”⁵³

Questionable Actions by Catholic Organizations:

Support of CHA for Health Care Reform

In a 17 July 2009 letter to Congress on behalf the U.S. Conference of Catholic Bishops, Bishop William Murphy stated: “*The Bishops’ Conference believes healthcare reform should be truly universal and it should be genuinely affordable.*”⁵⁴ Bishop Murphy then proceeded to list some specific reforms supported by the bishops, including expansion of Medicaid and CHIP, and limitations on premiums and out-of-pocket expenses for low-income families. But he further stated: “Any legislation should reflect longstanding and widely supported current policies on abortion funding, mandates and conscience protections because they represent sound morality, wise policy and political reality. Making the legislation ‘abortion- neutral’ in this sense will be essential for widely accepted reform.”⁵⁵

While the bishops were opposed to the legislation because of its limited conscience protection and possible expansion of federal funding for abortion,⁵⁶ the Catholic Health Association (CHA) under the

⁵² PPACA §1553 (a).

⁵³ Statement of Francis Cardinal George, “Universal Health Care” (March 23, 2010), <http://www.usccb.org/healthcare/cardinal-george-healthcare-statement.pdf>.

⁵⁴ Letter from Bishop William J. Murphy, Chairman USCCB Committee on Domestic Justice and Human Development to all members of the House and Senate (July 17, 2009), <http://www.usccb.org/sdwp/national/2009-07-17-murphy-letter-congress.pdf>.

⁵⁵ Ibid.

⁵⁶ U.S. Conference of Catholic Bishops, Bulletin Insert (Mar. 11, 2010),

leadership of Sister Carol Keehan broke with the bishops and offered its enthusiastic support for the legislation.⁵⁷ Sister Carol Keehan even received a pen at the signing of the legislation.⁵⁸ Despite her contentions that the legislation provides adequate conscience protection and limitations on abortion funding,⁵⁹ a compelling legal analysis by the Office of General Counsel at the USCCB suggests otherwise.⁶⁰ Sister Carol Keehan's high profile support in defiance of the bishops suggests that the CHA may be entering a new era. It has now asserted its independence from the bishops and it cannot be counted on to faithfully support the Bishops in future conflicts with the federal government over abortion funding or conscience protection.

Caritas Christi Case

The need for Catholic health systems to remain profitable in order to compete effectively in the market place has on occasion resulted in their participation in joint ventures that have raised serious concerns about compliance with the Ethical and Religious Directives. In 2009 Caritas Christi, a Catholic healthcare system in Massachusetts, set up a joint venture to facilitate participation in the Commonwealth Care Plan, a program sponsored by the Commonwealth of Massachusetts for low

<http://www.usccb.org/healthcare/UPDATED-bulletin-insert.pdf>.

⁵⁷ Letter from Sister Carol Keehan, CEO, Catholic Health Association, to the House of Representative (Mar. 11, 2010), <http://www.usccb.org/comm/cha-letter.pdf>; see also Deal W. Hudson, "Commentary: Sister Carol Keehan Misrepresents Her Support of the Health-Care Bill," LifeSiteNews.com (May 10, 2010), <http://www.lifesitenews.com/ldn/2010/may/10051006.html>.

⁵⁸ "Sr. Keehan Receives Presidential Pen for Supporting Health Care Despite Bishops' Objections," Catholic News Agency (March 24, 2010), http://www.catholicnewsagency.com/news/sr_kehaan_receives_presidential_pen_for_supporting_health_care_against_bishops_decision.

⁵⁹ E.J. Dionne, Jr., "On Health Care, Listen to the Nuns," *Washington Post* (March 18, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702440.html>.

⁶⁰ U.S. Conference of Catholic Bishops, Office of General Counsel, "Legal Analysis of the Provision of the Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection," <http://www.nccbuscc.org/healthcare/03-25-10Memo-re-Executive-Order-Final.pdf>.

income persons not eligible for Medicaid. Caritas Christi entered into the joint venture with Centene, a for-profit healthcare company, to provide healthcare services under the Commonwealth Care Plan, and state regulators voted to accept their bid to provide coverage.⁶¹

According to an article in the *Boston Globe*, “[t]he vote followed several closed-door sessions in which officials from Centene and Caritas, the minority partner in the joint venture, assured regulators that women will have ‘ready access’ to family planning and reproductive services, an issue that sparked concerns from abortion foes and reproductive rights activists.”⁶² In response, Cardinal Sean P. O’Malley issued a statement warning that he might block the venture unless it was determined that its activities were in compliance with the ban in the Ethical and Religious Directives on material cooperation with abortion providers.⁶³ Cardinal O’Malley stated:

While I appreciate the opportunity given to Caritas Christi to serve the poor through this agreement, I wish to reaffirm that this agreement can only be realized if the moral obligations for Catholic hospitals as articulated in the Ethical and Religious Directives of the United States Conference of Catholic Bishops are fulfilled at all times.... To assure me that this agreement will provide for the integrity of the Catholic identity and practices of Caritas Christi Health Care System, I have asked the National Catholic Bioethics Center to review the agreement and to assure me that it is faithful to Catholic principles.⁶⁴

Indeed, the minutes of the Board of the Commonwealth Health Insurance Connector Authority indicate that the Caritas joint venture had committed to staffing a 24-hour hot line for family planning to facilitate access to “geographically convenient in network providers.”⁶⁵ A

⁶¹ Kay Lazar, “Mass. Regulators OK joint Caritas-Centene Healthcare Venture,” *Boston Globe* (March 13, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/03/13/mass_regulators_ok_joint_caritas_centene_healthcare_venture/.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Board of the Commonwealth Health Insurance Connector Authority Minutes for Thursday (March 12, 2009), <http://archives.lib.state.ma.us/bitstream/handle/2452/38459/ocm71834631-2009-03-12.pdf?sequence=4>. The

brochure for the Commonwealth Care Plans indicates that abortions are a covered service under all the Commonwealth Care Plans with a \$50.00 co-pay.⁶⁶ Nonetheless, Professor Todd Salzman, chairman of the theology at Creighton University, stated that it would be scandalous if “Caritas would reject cooperating with Centene in a program that would provide healthcare for the most needy and vulnerable in society.”⁶⁷

minutes state: “Secretary Kirwan noted concerns expressed by Board members regarding the ability of Commonwealth Family Health Plan (CFHP), the new entrant, ability to provide access to reproductive and family planning services and asked Mr. Kingsdale to touch on this matter. Mr. Kingsdale explained that, *after several weeks of due diligence, Caritas and Centene have demonstrated to Connector staff that the proper steps have been taken to ensure CFHP members will have ready access to geographically convenient in-network providers without the need of a referral. Caritas will direct members in need of family planning services to a customer service number that CFHP has committed to staffing 24 hours a day, seven days a week.* Mr. Kingsdale noted that the proposed solution does not differ substantially from practices that other MMCOs that are contracted with Caritas have established. Connector staff will monitor CFHP against its commitments. Celia Weislo expressed her satisfaction with the dialogue between the Connector and CFHP. She expressed appreciation for CFHP’s candor and understanding of the need to protect access to benefits. Dolores Mitchell expressed her strong commitment to protecting reproductive services and commented that she was pleased CFHP appears to share that commitment. Nonnie Burnes stated that she had reservations, particularly concerning implementation of this plan, but will support the new entrant providing Connector staff monitor compliance. Nancy Turnbull stated that the matter has been handled well and she is comfortable with the commitment made by the plan. Secretary Kirwan added that CommCare will benefit from the allowance of a new entrant.”

⁶⁶ Commonwealth Care Brochure, https://www.mahealthconnector.org/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/About%2520Us/Connector%2520Programs/Additional%2520Resources/cc_benefits1220_pt234.pdf.

⁶⁷ Michael Paulson, “Caritas Deal Gets Support of Leading Theologians,” *Boston Globe* (March 11, 2009), http://www.boston.com/news/health/articles/2009/03/11/caritas_deal_gets_support_of_leading_theologians/. The article states: “Catholic social teaching is very clear that access to healthcare should be a basic human right,” said Todd Salzman, chairman of the theology department at Creighton University in Omaha. Salzman argued that Cardinal Sean P. O’Malley’s pledge that the hospitals would not be involved in performing or financing abortions should assuage critics. “What could also cause scandal, however, is that Caritas would reject cooperating with Centene

Cathleen Kaveny, a law professor at Notre Dame, criticized opponents of the deal by noting: “For some of these prolife groups, no cooperation with evil is ever justified, but that’s more of a prophetic stand, a new way of applying the tradition.”⁶⁸ Not surprisingly, Sister Carol Keehan, CEO of the Catholic Health Association, weighed in by noting: “Caritas has done more than one would usually see to avoid being involved with abortion and other services opposed by the Catholic Church.”⁶⁹ She further stated:

As I look at the way Caritas Christi has structured this arrangement, it allows them to be participants with the state in the care of the poor and the most vulnerable citizens of the state of Massachusetts in a way that brings the richness of their system and the caring nature of that system to the poor, without in any way violating any of the religious directives or the moral imperatives of our faith.⁷⁰

Proponents of the joint venture failed to candidly acknowledge that its object was to make a profit rather than to provide free healthcare and that participation by Caritas Christi in it would require referrals for state subsidized abortions in violation of the material cooperation provision of the 2001 Ethical and Religious Directives.⁷¹ Finally, at the insistence of Cardinal O’Malley, Caritas Christi announced that it was calling off the joint venture with Centene. It was also announced that it would not be an insurer under Commonwealth Care but would continue to provide health services under the plan.⁷² Subsequently, Church officials

in a program that would provide healthcare for the most needy and vulnerable in society,’ Salzman said.”

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid. As the article notes: “Caritas has repeatedly refused to answer questions from the Globe about the proposal. Yesterday, the hospital network declined to say what services are prohibited under Catholic teaching, how the Caritas hospitals currently respond to patients who seek such prohibited services, or how Caritas proposes to handle requests for such services under the Centene deal. The state contract requires that the venture provide coverage for abortion.”

⁷² Michael Paulson & Kay Lazar, “Caritas Ends Joint Venture,” *Boston Globe* (June 27, 2009), <http://www.boston.com/news/health/articles/2009/06/>

approved the sale of Caritas Christi to a private equity firm that promised to continue the Catholic identity and abide by the Ethical and Religious Directives under diocesan supervision.⁷³ If the purchaser decides to drop the affiliation with the diocese, then it would be required “to pay \$25 million to a church-designated charity and remove the hospitals’ Catholic symbols.”⁷⁴

Misinterpretation of ERDs by Catholic Hospitals

Recently there have been two high profile incidents involving purported misinterpretations of provisions in the Ethical and Religious Directives by officials at Catholic hospitals in Texas and Arizona. In June 2008 a whistleblower’s report surfaced on wikileaks that provided information on the performance of direct sterilizations at several Catholic hospitals in Texas.⁷⁵ On 21 November 2008 Bishop Alvaro Corrada, S.J., of Tyler, Texas, issued a statement acknowledging that many direct sterilizations had been done at two Catholic hospitals in his diocese in violation of the Ethical and Religious Directives and apologized for his failure of oversight.⁷⁶ He attributed the situation to a “serious misinterpretation of the ERDs.”⁷⁷ In a subsequent statement issued on December 1, 2008, Bishop Corrada clarified the distinction between indirect sterilizations, which are permitted by the Ethical and Religious Directives, and direct sterilizations, which are forbidden by them.⁷⁸

27/catholic_hospital_system_ends_venture_out_of_concern_on_abortion/?page=1.

⁷³ Robert Weisman, “Catholic Officials Sign Off of Caritas Christi Sale,” *Boston Globe* (Oct. 15, 2010), http://www.boston.com/business/healthcare/articles/2010/10/15/catholic_officials_sign_off_on_caritas_christi_sale/.

⁷⁴ Ibid.

⁷⁵ Ann Carey, “Texas Bishops Examine Reports of Ethical Lapses at Catholic Hospitals,” *Our Sunday Visitor* (July 13, 2008), <http://www.osv.com/tabid/7621/itemid/3841/Texas-bishops-examine-reports-of-ethical-lapses.aspx>.

⁷⁶ Statement of Bishop Alvaro Corrada, S.J., Bishop, Diocese of Tyler, Texas, published in *Catholic East Texas* (Nov. 21, 2008), http://www.lifesite.news.com/ldn/2008_docs/tylerbishopstatement.pdf.

⁷⁷ Ibid.

⁷⁸ “Statement on Human Dignity, Conscience, and Healthcare to the Catholics and People of East Texas,” Bishop Alvaro Corrada, S.J., Bishop,

Unfortunately, one of the hospitals (viz., Trinity) continued to insist that sterilizations are permissible under the 2001 Ethical and Religious Directives when deemed “medically necessary,” i.e., in order to alleviate health problems that could be exacerbated by future pregnancies.⁷⁹ Subsequently, Trinity, originally a non-Catholic facility that had been acquired by Franciscan Services twenty-years before, announced that it would disaffiliate with the system and no longer be a Catholic hospital because of the ban on direct sterilizations.⁸⁰ Ron Hamel, Senior Director of Ethics at CHA acknowledged that Trinity and other Catholic hospitals in the Franciscan System had previously interpreted Directive §53 to permit sterilizations for medical reasons.⁸¹

On 14 May 2010 the Bishop of Phoenix announced that Sister Margaret McBride, a Sister of Mercy who headed up the ethics committee at St. Joseph's Hospital owned by Catholic Healthcare West, had been automatically excommunicated for approving a direct abortion to treat the medical condition of a pregnant woman.⁸² The statements by hospital representatives, however, defended the abortion as consistent with Catholic teaching by claiming that the woman was suffering from pulmonary hypertension and that the abortion was necessary to save her life.⁸³ It appears that Sister McBride and others at the hospital may have been operating pursuant to a misunderstanding of the Ethical and Religious Directives, but Directive §45 is clear on this point: a directly

Diocese of Tyler, Texas (Dec. 1, 2008), <http://www.dioceseoftyler.org/documents/HumanDignityBpCorrada.pdf>.

⁷⁹ Ann Carey, “Texas Hospital Challenges Bishop on Sterilizations,” *Our Sunday Visitor* (Dec. 28, 2008), <http://www.osv.com/tabid/7621/itemid/4273/Texas-hospital-challenges-bishop-on-sterilizations.aspx>

⁸⁰ “Trinity to Leave Franciscan System,” *Catholic Health World* (May 15, 2009), http://www.chausa.org/Pages/Publications/Catholic_Health_World/Catholic_Health_World_Archive/2009/May_15/Trinity_to_leave_Franciscan_system/.

⁸¹ *Ibid.*

⁸² Press Release, Statement of the Diocese Re: St. Joseph's Hospital, <http://www.catholicsun.org/2010/phxdio-stjoes/diocese-statement-051410.pdf>.

⁸³ Michael Clancy, “Nun at St. Joseph's Rebuked over Abortion to Save Woman,” *Arizona Republic* (May 19, 2010), <http://www.azcentral.com/arizonarepublic/news/articles/2010/05/15/20100515phoenix-catholic-nun-abortion.html>.

intended abortion is impermissible even if done to preserve the health of the mother.⁸⁴ They claimed to be acting under Directive §47,⁸⁵ but this directive only permits performance of a necessary treatment for a serious pathological condition in the mother where there is a risk that an abortion could result as an unintended side effect of that treatment.⁸⁶

It is possible that the Phoenix hospital officials did not understand the difference between direct and indirect abortions found in the Ethical and Religious Directives, but if they did not, it suggests a systemic problem with Catholic healthcare, especially coming after the Texas case. It indicates a need for the bishops to insist that Catholic hospitals have staff ethicists that are adequately trained in the Ethical and Religious Directives and in Catholic bioethics. But to outside observers it appears that Catholic hospitals are not all that serious about compliance with the Directives.

Conclusion

It is possible that the greatest threat to the continuation of a distinctively Catholic healthcare system will result not from a frontal assault on conscience protection but from a process of incremental

⁸⁴ *Ethical and Religious Directives* (2001), supra n28. Directive 45 provides: "Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers."

⁸⁵ 85 Peter J. Smith, "Bishop Says Nun is Automatically Excommunicated for Rubberstamping Hospital Abortion," LifeSiteNews.com (May 17, 2010), <http://www.lifesitenews.com/ldn/2010/may/10051712.html>.

⁸⁶ Directive 47 provides: "Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child." See also Statement of Father John Erlich, STL, Medical Ethics Director, Diocese of Phoenix, <http://www.catholicsun.org/2010/phxdio-stjoes/Medical-Ethics-Director-Statement-05172010.pdf>.

erosion of their commitment to the Ethical and Religious Directives. Catholic healthcare institutions may be enticed into facilitating access to sterilizations and abortion referrals in the name of social justice and concerns about financial viability. It will, however, be impossible to avoid the taint of scandal by entering into complex and nuanced arrangements to provide access to these services.