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Priest, Prophet, and King: Abortion, the Vocation of Catholic Politicians and the Culture of Life

John Breen

I. Introduction

What does it mean that Joseph Biden, the Vice President of the United States, is both a life-long practicing Catholic and a proponent of the legal right to end the life of an unborn child?¹ During the 2008 Presidential Campaign, the bishop of Biden's hometown of Scranton, Pennsylvania, Bishop Joseph Martino, warned that "[n]o Catholic politician who supports the culture of death should approach Holy Communion," and that he would "be truly vigilant on this point."² Similarly,

Associate Professor, Loyola University–Chicago School of Law; B.A., 1985, University of Notre Dame; J.D., 1988, Harvard University. I delivered an earlier version of this paper as part of Villanova University School of Law's Joseph T. McCullen, Jr. Symposium on Catholic Social Thought and the Law. I wish to thank Dean Mark Sargent and Professor Michael Moreland for organizing this event. I also wish to thank Michael A. Scaperlanda for reviewing an earlier draft of these remarks. Above all, I wish to thank Susan Nelligan Breen and our sons, Peter and Philip Breen, for their welcome reminder to always return to the vows of baptism.

¹ Senator Biden's official website makes plain that "Senator Biden supports the Supreme Court's decision in *Roe v. Wade* that protects a woman's right to choose." Joe Biden, *U.S. Senator for Delaware – Women*, at <http://biden.senate.gov/issues/issue/?id=12edb4e5-0755-43f4-8ce5-da0beb58e510>. The website also declares that "Senator Biden has been a major voice of opposition to the Reagan and two Bush Administration's attempts to pack the federal courts with judges committed to a narrow view of the Constitution that denies women equal protection under the law." *Id.* During the campaign, some speculated that Joe Biden's strong support for abortion rights together with his running-mate Barack Obama's even more radical stand on the issue might hurt their campaign among Catholic voters. See, e.g., David D. Kirkpatrick, *Abortion Issue Again Dividing Catholic Votes*, N.Y. TIMES, Sept. 17, 2008. Voter exit polls indicate show that while Senator McCain was supported by 50% of Catholics voters who go to mass weekly as opposed to Senator Obama's 49%, Obama received 54% of the vote from voters who identify themselves as Catholic compared to McCain's 45%. *2008 Election Results / Exit Polls / United States-President*, at <http://www.msnbc.msn.com/id/26843704>.

² Charles Schillinger, *Biden Risks Refusal of Holy Communion*, SCRANTON TIMES-TRIBUNE, Aug. 31, 2008, available at http://www.scrantontimes.com/articles/2008/08/31/news/sc_times_trib.20080831.a.pg1.tt31communion_s1.1911465_top4.txt.

during the 2004 presidential campaign, the possibility that John Kerry, the Democratic nominee for president, might not be welcomed to the Eucharistic feast at Mass because of his staunchly pro-choice views was a neuralgic point of contention within the Church.³ Indeed, a number of bishops publicly stated that, given Mr. Kerry's political record and on-going support for abortion and other anti-life policies, he should refrain from presenting himself for Communion in their dioceses.⁴

Much was made of this controversy four years ago, and I strongly suspect that, given the prominence of Biden's public office and his conspicuous self-identification as a Catholic, even greater controversy of a similar nature lies ahead. Nevertheless, in the essay that follows, I will not attempt to argue either that Catholic politicians who support abortion rights should be free to receive the Eucharist when they attend Mass, or that they should be denied the Blessed Sacrament when they present themselves for the reception of Holy Communion. Rather, because I believe that the resolution of this vexing issue is a matter of canon law and pastoral judgment, both of which are outside the scope of my competence, I will leave the matter to others who are better suited to the task.⁵

³ See James P. Gannon, *Kerry's Catholicism: Checked at the Door – For Democratic Candidate, Politics is His True Religion*, USA TODAY, June 2, 2004; Joe Feuerherd, *Who's-a-Catholic Flap Hits Congress*, NAT'L CATHOLIC RPR., Apr. 30, 2004.

⁴ See Bishop Michael J. Sheridan, *Pastoral Letter on the Duties of Catholic Politicians and Voters*, available at <http://www.dioc.org/CPC/Corner/pastoralletters/2004/May.pdf> (stating that Catholic politicians who advocate abortion "place themselves outside full communion of the Church" and so "may not receive Holy Communion until they have recanted their positions"); Most Rev. Raymond L. Burke, *Prophecy for Justice: Catholic Politicians and Bishops*, AMERICA, June 21, 2004, available at http://www.americamagazine.org/content/article.cfm?article_id=3636; see also Kevin Eckstrom, *Bishop Bans Pro-Choice Voters from Communion*, CHRISTIANITY TODAY, May 1, 2004, available at <http://www.christianitytoday.com/ct/2004/mayweb-only/5-10-53.0.html> (noting that in addition to Bishop Sheridan and Archbishop Burke's statements that they would deny Communion to pro-choice politicians, Archbishops Sean O'Malley of Boston, Alfred Hughes of New Orleans and John Vlazny of Portland "urged dissenting politicians to not approach the Communion rail" to receive the sacrament); Daniel J. Wakin, *A Divisive Issue for Catholics: Bishops, Politicians and Communion*, N.Y. TIMES, May 31, 2004 (discussing the opposition of bishops to candidates who support abortion rights and their fitness to receive communion).

⁵ Those who are competent to address the matter – canon lawyers, bishops and priests – have ably addressed the topic. Some have found that public officials who are obstinate in their support for the grave sin of abortion are, given the public nature of their support, gives rise to scandal making them ineligible for reception of the sacrament. These individuals should not be given the Holy Eucharist if they present themselves for receipt of the Blessed Sacrament. See Archbishop Raymond L. Burke, *The Discipline Regarding the Denial of Holy Communion to Those Obstinate Persevering*

Instead of delving into the sensitive issues surrounding the reception of communion, I propose to discuss another sacrament that also concerns the Christian vocation to public service and support for abortion rights, namely, baptism. In the Sacrament of Baptism, according to the Roman Rite, immediately after the celebrant immerses the person in water or pours water over his or her head with the invocation of the Triune God, the celebrant anoints the newly baptized with oil and says:

God the Father of our Lord Jesus Christ has freed you from sin, given you a new birth by water and the Holy Spirit, and welcomed you into his holy people. He now anoints you with the chrism of salvation. As Christ was anointed Priest, Prophet, and King, so may you live always as a member of his body, sharing everlasting life.⁶

Through this prayer, every baptized person is invited to participate in Christ's mission of redemption – to bring about the sanctification of the world.⁷ Moreover, the sacrament gives everyone who receives it the grace to succeed in this mission,⁸ the grace to faithfully imitate Christ as priest, prophet and king.⁹

in Manifest Grave Sin, 96 PERIODICA DE RE CANONICA 7 (2007); Edward N. Peters, *Denial of the Eucharist to Pro-Abortion Catholic Politicians: A Canonical Case Study*, HOMILETIC & PASTORAL REV., Oct. 1990, at 28-32, 48, 49, available at http://www.canonlaw.info/canonlaw_articlesreviews.htm. Others have concluded that, following a proper examination of conscience, politicians who support abortion rights should not present themselves for reception of the sacrament. See Archbishop Joseph Naumann, *Governor's Veto Prompts Pastoral Action*, available at <http://www.theleaven.com/V29N37ColumnistNaumann.htm> (setting forth Kansas City Archbishop Joseph Naumann's response to Kansas Governor Kathleen Sebelius' veto of pro-life legislation in Kansas). Still others have concluded that notwithstanding their public stance on the issue, they are entitled to receive the sacrament. See Susan Stabile, *John Courtney Murray and the Abortion Debate*, 4 J. CATH. SOCIAL THOUGHT 87 (2007).

⁶ RITES OF THE CATHOLIC CHURCH (1990).

⁷ The sanctification of the world was perhaps the single most important theme to emerge from the Second Vatican Council. See SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON THE CHURCH *Lumen Gentium* ¶ 31 (1964) [hereinafter *Lumen Gentium*], reprinted in THE DOCUMENTS OF VATICAN II 14 (Walter M. Abbott, S.J. ed., & Joseph Gallagher trans. 1966), also available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html (stating that it is the vocation of the laity to "seek the kingdom of God by engaging in temporal affairs and by ordering them according to the plan of God" such that "by exercising their proper function and being led by the spirit of the gospel [the laity] can work for the sanctification of the world from within, in the manner of heaven").

⁸ UNITED STATES CATHOLIC CONF., CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1262-1266 (2d. ed. 1997).

⁹ *Lumen Gentium*, supra note 7, ¶ 31 (stating that the laity "are in their own way made sharers in the priestly, prophetic, and kingly functions of Christ").

Politicians who support abortion rights and who claim to be Catholic deserve severe criticism by their fellow Catholic citizens and indeed all people of good will. Regardless of the resolution of the canonical and pastoral question regarding the reception of communion, Catholic politicians who support abortion rights have failed to be the Body of Christ in the world.¹⁰ They have failed to fulfill their baptismal obligation to imitate Christ as priest, prophet, and king. Moreover, this failure remains appallingly clear even when these politicians claim to oppose the practice of abortion as a personal and moral matter. Furthermore, it seems obvious that if we (the Catholic laity and hierarchy in this country) do not ask something more of these politicians – politicians who make a special point of publicly identifying themselves with the Catholic community, even as they betray that community and its Founder by their actions in public life – if we do not insist that they speak honestly and forthrightly from *within* the Catholic tradition rather than demand that the Church accept their aberrant views, then all we can expect is more of the same. Indeed, in the absence of this sort of fraternal correction,¹¹ given in charity, we can expect that those Catholic politicians in both of the major political parties who support abortion rights will continue to engage in the conceit that they are faithfully fulfilling the vocation to work as public servants acting in support of the common good.

I will examine this issue through the template of the now famous address that then New York Governor Mario Cuomo delivered at the University of Notre Dame in September 1984 – an artful though seriously flawed defense of his pro-choice politics. In examining Cuomo's speech I shall also make reference to a number of the other prominent Catholic politicians who have likewise supported abortion rights, all the while publicly professing their fidelity to the faith and moral teachings of the Catholic Church. As shall be seen, these politicians studiously mimic Cuomo's arguments and rhetorical feints. Indeed, what is remarkable is that although Cuomo's speech is now over twenty-four years old, it remains the gold-standard for those Catholic politicians who today simultaneously embrace the abortion license and claim to be faithful members of Christ's church. As will be seen, however, the claims that Cuomo set forth at Notre Dame have not improved with age and repetition. Instead, Catholic politicians of both parties would do well to consider their involvement in public life in light of the

¹⁰ See *id.* ¶ 33 ("Upon all the laity, therefore, rests the noble duty of working to extend the divine plan of salvation ever increasingly to all men of each epoch and in every land.")

¹¹ Cf. *Matthew* 18:15.

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Church's magisterial teaching concerning the sanctity of unborn human life, the nature of citizenship, and the vocation of public service within the political process. Indeed, they would do well – both as public leaders and as members of Christ's flock – to return to the vows of their baptism.

II. The Inviolable Rights of Nascent Human Life

Although Catholic politicians sometimes feign a kind of ignorance with respect to Catholic teaching regarding the morality of abortion¹² and the proper response that civil authority should make with respect to the practice, the Church's teaching is hardly a secret. On the contrary, the Church in the United States has worked with uncommon vigor to ensure that the content of this teaching is widely known by the faithful and by those outside the Church.¹³ Indeed, the Church's teaching on the matter is so well known that I will only briefly touch on it here.

¹² House Speaker Nancy Pelosi's spokesperson Brendan Daly provided the media with a statement following Pelosi's August 24, 2008 appearance on "Meet the Press." Amy Welborn Dubruiel, *The Response*, <http://amywelborn.wordpress.com/2008/08/26/the-response/> (Aug. 26, 2008). Daly says that after Pelosi was elected to Congress, she "studied the matter [of abortion] more closely" and that "[h]er views on when life begins were informed by the views of Saint Augustine." Plainly, Ms. Pelosi did not study the Church's teaching regarding abortion (a matter her spokesperson refers to as "the choice issue") in any depth given her conclusion that the Church's view of abortion developed only within the last fifty years. See *Meet the Press*, Transcript for Aug. 24, 2008, available at <http://www.msnbc.msn.com/id/26377338/page/3/>. Moreover, it strains credulity to think that Pelosi believed that the Church's biological understanding of human life did not advance beyond the primitive scientific beliefs of the 5th century reflected in the work of St. Augustine.

¹³ Since abortion became an issue on the national stage, the Catholic bishops of the United States have been staunch supporters of both unborn children and women facing unplanned pregnancies. Over the years, the United States Conference of Catholic Bishops ("USCCB") and its predecessor organizations, the Catholic Welfare Association, the National Conference of Catholic Bishops (together with its public policy arm, the United States Catholic Conference) and its Committee on Pro-life Activities (previously known as the Secretariat for Pro-life Activities) have issued numerous statements and teaching documents regarding the need to protect unborn human life and care for women who find themselves in crisis pregnancies. See, e.g., National Conf. of Catholic Bishops, *We Reject This Decision of the Court*, 2 ORIGINS 553 (1973); National Conf. of Catholic Bishops, *Resolution on Abortion* (1989), available at <http://www.usccb.org/prolife/tdocs/resabort89.shtml>; NATIONAL CONF. OF CATHOLIC BISHOPS, FAITHFUL FOR LIFE: A MORAL REFLECTION (1995), available at <http://www.usccb.org/prolife/tdocs/FaithfulForLife.pdf>; National Conf. of Catholic Bishops, *Light and Shadows: Our Nation 25 Years After Roe v. Wade* (1997), available at <http://www.usccb.org/prolife/tdocs/lightshad.shtml>; NATIONAL CONF. OF CATHOLIC BISHOPS, LIVING THE GOSPEL OF LIFE: A CHALLENGE TO AMERICAN CATHOLICS (1998), available at <http://www.usccb.org/prolife/gospel.shtml> [hereinafter LIVING THE GOSPEL OF LIFE]; United States Conf. of Catholic Bishops, *A Matter of the Heart: Statement on the Thirtieth Anniversary of Roe v. Wade* (2002),

Contrary to “the morals of the Greco-Roman world” in which the Christian faith first took root, “[t]he tradition of the Church has always held that human life must be protected and cherished from the beginning, just as at the various stages of its development.”¹⁴ Although explicit condemnation of abortion can be found in authoritative Christian texts from the second century,¹⁵ some believe that passages in St. Paul’s *Letter to the Galatians* and in the *Book of Revelation* condemn the practice in language that has become obscure with the passage of time.¹⁶ Although the Church’s teaching with respect to the kind of penance appropriate in the case of abortion has differed over time, as has metaphysical speculation concerning the precise time of “ensoulment” or “animation,” these disputes “did not cast doubt on the illicitness of abortion.”¹⁷ Rather, the Church’s teaching has developed while remaining constant since the beginning of Christianity, bearing witness to an authentically organic growth – a living example of change without contradiction.

In recent years, in response to new cultural practices and legal threats to unborn human life, the Church has repeated her historic

available at <http://www.usccb.org/prolife/heart.shtml>; USCCB Committee on Pro-life Activities, *Respect for Unborn Human Life: The Church’s Constant Teaching* (2008), available at <http://www.usccb.org/prolife/constantchurchteaching.shtml>.

Moreover, beginning in 1975, the USCCB adopted a “Pastoral Plan for Pro-life Activities,” a document outlining strategies for public education regarding abortion, concrete plans to meet the material and spiritual needs of women in problem pregnancies, and legislative and other policy initiatives designed to curtail the practice of abortion and end the legal regime that protects it. See NATIONAL CONF. OF CATHOLIC BISHOPS, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES (1975), available at <http://www.usccb.org/prolife/issues/abortion/roevwade/1975PastoralPlan.pdf>. The bishops have refined these strategies on several occasions since then. See NATIONAL CONF. OF CATHOLIC BISHOPS, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES: A REAFFIRMATION (1985), available at <http://www.usccb.org/prolife/docs/paspl85.shtml>; UNITED STATES CONF. OF CATHOLIC BISHOPS, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES – A CAMPAIGN IN SUPPORT OF LIFE (2001), available at <http://www.usccb.org/bishops/pastoralplan.shtml>.

¹⁴ SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION *Quaestio de abortu* ¶ 6 (1974) [hereinafter *Quaestio de abortu*], reprinted in VATICAN COUNCIL II: MORE POSTCONCILIAR DOCUMENTS 441 (Austin Flannery, O.P. gen. ed. 1982), also available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html.

¹⁵ See *id.*

¹⁶ See John T. Noonan, Jr., *An Almost Absolute Value in History, in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1, 8-9 (John T. Noonan, Jr. ed., 1970) (citing *Galatians* 5:19-21 and *Revelation* 9:21, 21:8 and 22:15 and arguing that the term *pharmakeia* refers to the use of abortifacient medicines and that this term is included among the serious sins mentioned in each text); but see JOHN CONNERY, S.J., *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* 34-35 (1977) (disputing Noonan’s reading of these texts).

¹⁷ *Quaestio de abortu*, *supra* note 14, ¶ 7.

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²² *Id.* ¶ 11.

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²⁴ *Id.* ¶ 20.

teaching with greater frequency and clarity. The Second Vatican Council reaffirmed this teaching in a way that was brief but emphatic. Indeed, in the Council's *Pastoral Constitution on the Church in the Modern World, Gaudium et Spes*, the Council Fathers listed abortion together with genocide, euthanasia, and suicide as "infamies" which are "opposed to life itself" that "poison human society."¹⁸ Moreover, the Council warned that "from the moment of its conception [human] life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes."¹⁹

Notwithstanding these clear admonitions, the movement to liberalize abortion laws gathered momentum in the late 1960s and early 1970s.²⁰ In response to these changes and proposed changes, the Sacred Congregation for the Doctrine of the Faith issued its *Declaration on Procured Abortion*.²¹ Here the curial office of the Holy See responsible for maintaining the integrity of Christian teaching with respect to faith and morals in the universal Church made clear that the right to life is "the first right of the human person" in that it is "the condition of all the others."²² Respect for the life of a new human being "is called for from the time that the process of generation begins" since "[f]rom the time that the ovum is fertilized, a life has begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth."²³ With respect to the legal treatment of abortion, the *Declaration* concluded that, notwithstanding the reality of pluralism in modern society with respect to the morality of abortion and the difficulties involved in enforcing restrictive laws, "the life of the child takes precedence over all opinions" since "[o]ne cannot invoke freedom of thought to destroy life."²⁴

¹⁸ SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *Gaudium et Spes* ¶ 27 (1965) [hereinafter *Gaudium et Spes*], reprinted in THE DOCUMENTS OF VATICAN II, 199 (Walter M. Abbott, S.J. ed., & Joseph Gallagher trans. 1966), also available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html.

¹⁹ *Id.* ¶ 51.

²⁰ With respect to the liberalization of abortion laws in the United States and Western Europe during this time, see generally MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 10-62 (1987).

²¹ See *Quaestio de abortu*, supra note 14, ¶ 1 (noting that "[t]he problem of procured abortion and of its possible legal liberalization has become almost everywhere the subject of impassioned discussions").

²² *Id.* ¶ 11.

²³ *Id.* ¶ 12.

²⁴ *Id.* ¶ 20.

In 1995, Pope John Paul II took up the subject of abortion, euthanasia and capital punishment in his encyclical *Evangelium Vitae*, a nearly book-length discourse that the Pope wrote in response to a unanimous request by the Cardinals of the Church "to reaffirm with the authority of the Successor of Peter the value of human life and its inviolability, in light of present circumstances and attacks threatening it today."²⁵ First, John Paul urges everyone to avoid "the tendency to disguise certain crimes against life in its early or final stages by using innocuous medical terms which distract attention from the fact that what is involved is the right to life of an actual human person."²⁶ Thus, we must "have the courage to look the truth in the eye and to call things by their proper name."²⁷ Bluntly stated, the truth about abortion is that "we are dealing with murder" since "[t]he one eliminated is a human being at the very beginning of life."²⁸ Moreover, because "procured abortion is the deliberate and direct killing . . . of a human being in the initial phase of his or her existence,"²⁹ laws which authorize or promote abortion are "radically opposed not only to the good of the individual but also to the common good [and] as such they are completely lacking in authentic juridical authority."³⁰ Even permissive laws which enjoy widespread popular support cannot legitimize abortion since the value of democratic legal measures "is not automatic, but depends on conformity to the moral law

²⁵ POPE JOHN PAUL II, *EVANGELIUM VITAE* ¶ 5 (1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html. There is little doubt that in condemning abortion "by the authority which Christ conferred upon Peter and his Successors, in communion with the Bishops" *id.* ¶ 62, John Paul intended to propose that all Catholics adhere to this teaching as a definitive matter. Indeed, even those less who are less than enthusiastic about the robust exercise of papal authority have concluded that "[i]t is hard to see how any other interpretation would do justice to the language that [John Paul] used." Francis A. Sullivan, S.J., *Infallible Teaching on Moral Issues? Reflections on Veritatis Splendor and Evangelium Vitae*, in *CHOOSING LIFE: A DIALOGUE ON EVANGELIUM VITAE* 77, 87 (Kevin Wm. Wildes, S.J. & Alan C. Mitchell eds. 1997) [hereinafter *CHOOSING LIFE*].

As is the case with much of John Paul's papal magisterium, *Evangelium Vitae* constitutes an extensive reflection on a particular theme enunciated by the Second Vatican Council – a gathering in which he played an active and enthusiastic part as Karol Cardinal Wojtyla, Archbishop of Krakow. For an overview of Karol Wojtyla's participation in the work of the Council, see GEORGE WEIGEL, *WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 145-188* (Perennial ed., 2005).

²⁶ *EVANGELIUM VITAE*, *supra* note 25, ¶ 11.

²⁷ *Id.* ¶ 58.

²⁸ *Id.*

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³⁰ *Id.* ¶ 72.

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to which [democracy], like every other form of human behaviour, must be subject."³¹

The Catholic bishops in the United States have shared this same authoritative teaching with American Catholics and the public at large on a number of occasions. For example, in their 1998 statement, *Living the Gospel of Life*, the bishops sought to situate opposition to abortion in the context of America's founding principles – the “universal understandings of freedom and truth [that are] ‘written on the human

³¹ EVANGELIUM VITAE, *supra* note 25, ¶ 70. In what has proven to be the most controversial aspect of the document, John Paul elsewhere describes the contemporary confluence of attitudes, practices, and social structures against life (including abortion, euthanasia, infanticide, prenatal diagnosis, assisted reproduction, and contraception) as constituting “a kind of ‘conspiracy against life’” and “a veritable ‘culture of death.’” *Id.* ¶ 12. Taken as a whole, this culture of death “betrays a completely individualistic concept of freedom, which ends up becoming the freedom of ‘the strong’ against the weak who have no choice but to submit.” *Id.* ¶ 19. Some have taken issue with the Pope's choice of words. See, e.g., Richard A. McCormick, *The Gospel of Life*, AMERICA, April 10, 1995, at 10, 17 (concluding that John Paul's “framing of [these] concerns in terms of a face-off between a culture of death and a culture of life can nourish an impression that all the matters touched on in the encyclical are either-or, black and white. This of course is not so.”); James F. Childress, *Moral Rhetoric and Moral Reasoning: Some Reflections on Evangelium Vitae*, in CHOOSING LIFE, *supra* note 25, at 21, 35 (concluding that “the rhetoric of *Evangelium Vitae*'s cultural analysis/critique appears to oversimplify the culture of death by making it a monolithic reality in order to illuminate our situation and to motivate action on behalf of life”).

By way of a brief response, with respect to Childress' point, one might concede that the culture of the United States and other countries where abortion is legally protected and widely practiced are not cultures of death in a “monolithic” sense. There are undoubtedly many admirable features in American culture, as John Paul II himself acknowledged on many occasions. The presence of some redeeming qualities in a given culture does not, however, render the “culture of death” descriptive inapposite. In South Africa under apartheid, there were undoubtedly elements in the culture dedicated to racial equality. Yet to describe the South Africa of the day as being mired in a “culture of racism” seems entirely appropriate. In the same way, however, notwithstanding the many pro-life elements within the United States, it is no exaggeration to say that a society in which 1.3 million unborn children are killed annually through abortion reflects a “culture of death.”

With respect to McCormick's point, one might likewise concede that not every matter touched on in the encyclical reflects a stark, absolute choice between a “culture of life” and a “culture of death,” but surely some do. McCormick insists that “honesty and courage” demand that we see that “[c]omplexity, doubt, ambiguity and uncertainty” surround the issues addressed by John Paul. McCormick, *supra* at 17. Surely, however, these same virtues demand that we recognize that the moral answers to many of the problems addressed by the Pope are simple, known, unambiguous and certain. Our difficulty in assenting to these answers is more often than not a failure of moral and political will rather than a weakness in moral and political reasoning.

heart."³² Indeed, the bishops explored the uncomfortable tension between "our nation's founding principles" and the current political reality in which there is "diminishing respect for the inalienable right to life" and indeed "the elimination of protections for those who are most vulnerable."³³ In specifically addressing the contradiction posed by the juxtaposition of the right to life located in the American founding and the right to abortion found in current law, the bishops were especially forthright. "Direct abortion is never a morally tolerable option. It is always a grave act of violence against a woman and her unborn child."³⁴ Indeed, for the bishops, this contradiction is so stark that it "renders suspect" our society's other claims to care for "the poorest and least powerful of the human community."³⁵

III. The Christian Vocation to Serve in Political Life

There are a number of authoritative magisterial sources which set forth the Church's teaching concerning the vocation of those who serve in positions of political authority. Some of these sources also specifically discuss the responsibility of Catholic officials with respect to both the morality of abortion and its treatment in law.³⁶ Here, however, I will confine myself to two documents already mentioned, namely, *Gaudium et Spes*³⁷ and *Evangelium Vitae*.³⁸ I shall also briefly address the Congregation for the Doctrine of the Faith's *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*³⁹ and

³² LIVING THE GOSPEL OF LIFE, *supra* note 13, ¶ 13; cf. *Romans* 2:15 (remarking that the pagans, who do not have the Mosaic law but do what is right "show that the demands of the law are written in their hearts").

³³ *Id.* ¶ 14.

³⁴ *Id.* ¶ 21.

³⁵ *Id.* ¶ 23.

³⁶ For each quadrennial national election, beginning in 1976, the United States Conference of Catholic Bishops has issued a document entitled "Faithful Citizenship" in which the bishops offer their reflections on the issues of the day in light of the principles of Catholic social thought. For the most recent of these statements, see UNITED STATES CONF. OF CATHOLIC BISHOPS, FORMING CONSCIENCES FOR FAITHFUL CITIZENSHIP (2007) [hereinafter FORMING CONSCIENCES], available at http://www.usccb.org/faithful_citizenship/FCStatement.pdf. For bishops' document for the prior election cycle, see UNITED STATES CONF. OF CATHOLIC BISHOPS, FAITHFUL CITIZENSHIP: A CATHOLIC CALL TO POLITICAL RESPONSIBILITY (2003), available at <http://www.usccb.org/faithfulcitizenship/bishopStatement.html>.

³⁷ *Gaudium et Spes*, *supra* note 18.

³⁸ *EVANGELIUM VITAE*, *supra* note 25.

³⁹ CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL NOTE ON SOME QUESTIONS REGARDING THE PARTICIPATION OF CATHOLICS IN POLITICAL LIFE (2002) [hereinafter DOCTRINAL NOTE].

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⁴⁶ *Id.*

⁴⁷ *Id.*

some of the American Catholic bishops' statements on the matter. Each of these documents has the virtue of not only describing the Christian vocation in political life and the responsibilities incumbent on those who are called to serve in this fashion, but also of situating this vocation within the Church's understanding of the nature and role of the state.

The Second Vatican Council taught that society exists because of the nature of the human person and the good proper to man's being. Thus, as the Council stated, social life is something integral to the human person and "not something added on to man."⁴⁰ Because a certain good, proper to human nature, can only be attained in relationship with others, government exists to settle disputes and to coordinate actions to avoid tearing the community "to pieces as each man follows his own viewpoint."⁴¹ Accordingly, political community exists to serve "the common good in which the community finds its full justification and meaning."⁴² The Council broadly defined the common good as "the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment."⁴³ Given the multiplicity and fluidity of circumstances in which people live, "the concrete demands of [the] common good are constantly changing as time goes on."⁴⁴ Thus, governments must be sensitive to these changes and be prepared to respond to them creatively. At the same time, the parameters of the common good are not infinitely malleable. Rather, the Council taught that "political authority . . . must always be exercised within the limits of morality . . . according to a juridical authority enjoying legal status."⁴⁵ Under such a scheme, it is appropriate for citizens "to defend their own rights . . . provided that in so doing they observe the limits imposed by natural law and the Gospel."⁴⁶

With respect to political involvement, the Council made clear that the structures of government should "afford all their citizens the chance to participate freely and actively in establishing the constitutional bases of a political community, governing the state, determining the scope and purpose of various institutions, and choosing leaders."⁴⁷ Within

⁴⁰ *Gaudium et Spes*, *supra* note 18, ¶ 25.

⁴¹ *Id.* ¶ 74.

⁴² *Id.* ¶ 74.

⁴³ *Id.*

⁴⁴ JOHN PAUL II, SOLLICITUDO REI SOCIALIS ¶ 78 (1987), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html.

⁴⁵ *Gaudium et Spes*, *supra* note 18, ¶ 74.

⁴⁶ *Id.*

⁴⁷ *Id.* ¶ 75.

this larger scope of participation of all citizens, the Council said that Christians have a "special and personal vocation in the political community," a vocation they fulfill by "giv[ing] conspicuous example of devotion to the sense of duty and of service to the advancement of the common good."⁴⁸ Moreover, the Council urged "those who are suited for it, or can become so, [should] prepare themselves for the difficult but most honorable art of politics"⁴⁹ so that they can "[p]rudently and honorably . . . fight against injustice and oppression."⁵⁰

In *Evangelium Vitae*, Pope John Paul II specifically addressed both the obligations of those who hold political office and the role of law in fighting the scourge of abortion. To begin, John Paul noted "the trend to demand a legal justification" for abortion and other direct attacks on human life, that is, to treat them "as if they were rights which the State . . . must acknowledge as belonging to citizens."⁵¹ Proponents of abortion employ a variety of arguments to justify the creation of such a legal regime. What lies behind each of them is a kind of ethical relativism which insists that the law give individuals "the most complete freedom of choice" within a wide sphere of action, and that the law be normative with respect to the exercise of public and professional duties, trumping even the dictates of individual conscience.⁵² Indeed, the claim is made that this sort of relativism is "an essential condition of democracy, inasmuch as it alone is held to guarantee tolerance, mutual respect among people and acceptance of the decisions of the majority."⁵³

John Paul insists, however, that "[d]emocracy cannot be idolized to the point of making it a substitute for morality."⁵⁴ Not even an overwhelming popular consensus could legitimate the denial of a human being's fundamental rights. Rather, "the value of democracy stands or falls with the values which it embodies and promotes."⁵⁵ In fact, laws which are a result of the combination of moral skepticism and majority rule challenge the very foundations of the democratic system⁵⁶ since they "deny the equality of everyone before the law."⁵⁷ Indeed, "the values of the dignity of every individual and of solidarity between all

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Gaudium et Spes*, *supra* note 18, ¶ 75.

⁵¹ *EVANGELIUM VITAE*, *supra* note 25, ¶ 68.

⁵² *Id.* ¶ 69.

⁵³ *Id.* ¶ 70.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *EVANGELIUM VITAE*, *supra* note 25, ¶ 70.

⁵⁷ *Id.* ¶ 71.

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⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *EVANGELIUM VITAE*

⁶² *Id.*

⁶³ *Id.*

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⁶⁵ *Id.*

people frequently proves illusory" where the enjoyment of rights is left to a democratic process that functions as a "mere mechanism for regulating different and opposing interests."⁵⁸ Moreover, he warns that such a scheme frequently favors the powerful who are "most capable of manoeuvring not only the levers of power but also of shaping the formation of consensus."⁵⁹

Accordingly, John Paul argues that law, properly understood, "must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, rights which every positive law must recognize and guarantee" and that "[f]irst and fundamental among these is the inviolable right to life of every innocent human being."⁶⁰ With respect to the obligations of those in government, *Evangelium Vitae* makes clear that protecting innocent human life may, in some instances, call for the exercise of prudential judgment in that those in "public authority can sometimes choose not to put a stop to something which – were it prohibited – would cause more serious harm."⁶¹ However, the exercise of prudential judgment "can never presume to legitimize as a right of individuals . . . an offense against other persons caused by the disregard of so fundamental right as the right to life."⁶² On the contrary, with respect to "an intrinsically unjust law, such as a law permitting abortion . . . it is never licit" for a public official "to take part in a propaganda campaign in favour of such a law, or vote for it."⁶³

In 2002, building on the work of the Council and John Paul II, the Congregation for the Doctrine of the Faith (CDF) issued a *Doctrinal Note* addressing the subject of Catholic participation in political life. The ostensible purpose of this document was to clarify some "ambiguities or questionable positions" brought on by "the pressure of world events."⁶⁴ Echoing the teaching of John Paul, the text begins by noting that "[a] kind of cultural relativism exists today" according to which "citizens claim complete autonomy with regard to their moral choices, and lawmakers maintain that they are respecting this freedom of choice by enacting laws which ignore the principles of natural ethics and yield to ephemeral cultural and moral trends."⁶⁵ To the extent that

⁵⁸ *Id.* ¶ 70.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 71.

⁶¹ *EVANGELIUM VITAE*, *supra* note 25, ¶ 71.

⁶² *Id.*

⁶³ *Id.* ¶ 73 (quoting *Quaestio de abortu*, *supra* note 14, ¶ 22).

⁶⁴ *DOCTRINAL NOTE*, *supra* note 39, ¶ 1.

⁶⁵ *Id.* ¶ 2.

democratic government embraces this sort of relativism it indulges in a kind of political death-wish. As the CDF makes clear, "[d]emocracy must be based on the true and solid foundation of non-negotiable ethical principles which are the underpinning of life in society."⁶⁶ Moreover, Catholics directly involved in the law-making process "have a grave and clear obligation to oppose any law that attacks human life. Indeed, for them as for every Catholic it is impossible to promote such laws or to vote for them."⁶⁷

The American bishops have likewise made clear that "any legal system that violates the basic right to life on the grounds of choice is fundamentally flawed."⁶⁸ They have made plain that the direct and intentional destruction of innocent human life which is the object of abortion "must always be opposed,"⁶⁹ such that "[t]hose who formulate law ... have an obligation in conscience to work toward correcting morally defective laws."⁷⁰ Indeed, "[t]hose who knowingly, willingly, and directly support public policies or legislation that undermine fundamental moral principles cooperate with evil."⁷¹ Thus, "[n]o public official, especially one claiming to be a faithful and serious Catholic, can responsibly advocate for or actively support direct attacks on innocent human life."⁷²

IV. Pro-Choice Catholic Politicians and Church Teaching: A Brief Chronology of Events

In light of how the Church understands the right to life and both the nature of the political community and the vocation of those who serve in public life, how have Catholic politicians measured up? Specifically, how do Catholic politicians who support abortion rights fit within this

⁶⁶ *Id.* ¶ 3.

⁶⁷ *Id.* ¶ 4.

⁶⁸ FORMING CONSCIENCES, *supra* note 36, ¶ 22.

⁶⁹ *Id.* ¶ 28.

⁷⁰ UNITED STATES CONF. OF CATHOLIC BISHOPS, CATHOLICS IN POLITICAL LIFE (2004), available at <http://www.usccb.org/bishops/catholicsinpoliticallife.shtml>.

⁷¹ FORMING CONSCIENCES, *supra* note 36, ¶ 31.

⁷² LIVING THE GOSPEL OF LIFE, *supra* note 13, ¶ 32. The same document goes further and urges "Catholic officials who choose to depart from Church teaching on the inviolability of human life in their public life to consider the consequences for their own spiritual well being, as well as the scandal they risk by leading others into serious sin." *Id.* These individuals should, the bishops say, "reflect on the grave contradiction of assuming public roles and presenting themselves as credible Catholics when their actions on fundamental issues of human life are in agreement with Church teaching." *Id.*

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understanding? Here, I think, it would be helpful to sketch a brief chronology of significant events explaining how this controversy came about. What follows is a brief history of the strained relationship between pro-choice Catholic politicians and the Church of Jesus Christ to which they claim to belong.

On January 22, 1973, the Supreme Court of the United States handed down its decision in *Roe v. Wade*⁷³ and its companion case, *Doe v. Bolton*.⁷⁴ Although the history of abortion in this country did not begin with *Roe*,⁷⁵ the Court's decision marked a definitive moment in that history – the point of departure with which all subsequent history must reckon. In *Roe*, a 7-2 majority of the Court held that the “liberty” interest protected by the “due process” clause of the 14th Amendment to the Constitution included the right of a pregnant woman to choose an abortion. To be sure, there is no shortage of arguments for and against the Court's opinion. Some argue that the decision was a reasonable, even restrained interpretation of the constitutional text and a valid exercise of the power by the judicial branch to say what the law is that has helped to ensure the emancipation of American women.⁷⁶ Others view it as an anti-democratic exercise of raw judicial power unwarranted by the text, structure or history of the Constitution – a decision that under the conceit of false modesty ignores the humanity of the unborn child who is killed in the process of abortion.⁷⁷

Notwithstanding this disagreement regarding the legitimacy of the decision, there should be no argument as to what *Roe* actually held, namely, that the government may not interfere with a woman's right to terminate her pregnancy up to and including the time of birth. Because there is still widespread misunderstanding regarding what *Roe* actually

⁷³ *Roe v. Wade*, 410 U.S. 113 (1973).

⁷⁴ *Doe v. Bolton*, 410 U.S. 179 (1973).

⁷⁵ The standard account of the history of abortion in the United States can be found in JAMES C. MOHR, *ABORTION IN AMERICAN: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* (1978). For a more recent and far more comprehensive history of abortion in the United States and elsewhere, an account that is highly critical of the one offered by Mohr and others, see JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006).

⁷⁶ See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relations to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985); Silvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

⁷⁷ See, e.g., Richard Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 62 NEB. L. REV. 668 (1984); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975).

held, this point bears repeating. The *Roe* decision did not legalize abortion only in the first three months of pregnancy – an egregious mischaracterization of the Court's holding that many in the media have worked to legitimize and that, sadly, some Catholic politicians have helped to perpetuate⁷⁸ – or only in the first trimester,⁷⁹ or only up until the time of viability.⁸⁰ Instead, *Roe* held that a woman may obtain an abortion during all three trimesters of pregnancy, and the state may not interfere with her decision insofar as her “health” is at stake. *Roe*'s companion case, *Doe v. Bolton*, set forth an expansive understanding of health which the Court said included “all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient.”⁸¹ Not surprisingly, the federal courts have interpreted this understanding of health as “well-being” as voiding nearly

⁷⁸ For many years the national media mischaracterized the holding in *Roe* as only legalizing abortion in the first three months of pregnancy. This deliberate strategy helped to form the public's perception of *Roe* as a decision that was both modest and restrained. In response to the National Right to Life Committee's persistent complaint that this description fundamentally mischaracterized the breadth of the Court's holding, the *New York Times* and several other news organizations officially changed their stylistic treatment of the decision. See National Right to Life Committee, *Associated Press and Other Media Distort Roe v. Wade and Public Opinion on Abortion Policy*, available at <http://www.nrlc.org/abortion/Roedistort112904.html>. Despite this alleged change, a number of news outlets have regressed to their previous description of the case. See also, Douglas Johnson, *Old Myths Resurface About Roe v. Wade and Partial Birth Abortion*, available at <http://www.nrlc.org/news/2003/NRL02/myths.html>. Unfortunately, some Catholic politicians have also embraced this fundamentally false description of the Court's holding in *Roe* and have sought to use it to their political advantage. See Event Transcript, *Defining Ourselves as Catholic Democrats* (Pew Forum, Phoenix Park Hotel, Washington, D.C., June 8, 2006), available at <http://pewforum.org/events/?EventID=117> (statement of Rep. Rosa DeLauro: “First of all, if you know *Roe v. Wade* and its many parts, late term abortion is prohibited under the third-trimester in *Roe*.”).

⁷⁹ Following medical convention, the Court in *Roe* divided the period of human gestation into three “trimesters.” The Court then chose to attach different levels of state interest to these purportedly distinct phases in gestation. See *Roe v. Wade*, 410 U.S. 113, 145-47, 163-66 (1973). In *Planned Parenthood v. Casey*, the Court abandoned the trimester approach as “rigid,” as suffering from “basic flaws,” and as not “part of the essential holding of *Roe*.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992).

⁸⁰ The Court in *Roe* did state that “viability,” when “the fetus . . . presumably has the capability for meaningful life outside the mother's womb,” marks the point at which “the State's important and legitimate interest in potential life” becomes “compelling.” *Roe*, 410 U.S. at 163. At this point the state “may go so far as to proscribe abortion during this period, except when it is necessary to preserve the life or health of the mother.” *Id.* at 163-64. As noted below, although this passage seems to indicate that the state has some latitude in prohibiting post-viability abortions, the breadth of the “health” exception renders this language meaningless.

⁸¹ *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

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all legislation, a point dramatically illustrated by the Supreme Court's own 2001 decision in *Stenberg v. Carhart*⁸² striking down Nebraska's ban on a particularly gruesome procedure appropriately described as "partial-birth abortion."⁸³

The immediate response of the American hierarchy to *Roe* was understandably and predictably one of condemnation. Indeed, shortly after the justices handed down their decision, the Administrative Committee of what was then the National Conference of Catholic Bishops of the United States issued an emphatic retort. In light of the country's jurisprudential heritage guaranteeing the right to life as reflected in the Declaration of Independence and the preamble to the Constitution, the bishops stated "we reject the opinion of the U.S. Supreme Court as erroneous, unjust, and immoral."⁸⁴ Although the reaction of Catholic politicians was decidedly more mixed, it is interesting to note that in 1973 representatives of NARAL could still describe Senator Edward Kennedy's position on abortion as "thoroughly revolting."⁸⁵ Two years later, when Kennedy championed the use of public funds to pay for abortions under Medicaid, he became the darling of the pro-choice lobby, a position he still enjoys today. Although Kennedy sought the Democratic nomination for president in 1980, little was made at the time of his professed Catholic faith and his avowed support for abortion rights.

The first time that the issue of pro-choice Catholic politicians and their standing within the Church came to national prominence was in 1984. The presidential election that year pitted the incumbent Republican, President Ronald Reagan and his vice president, George H. Bush, against Walter Mondale, the Democratic Senator from Minnesota, and New York Congresswoman Geraldine Ferraro. Ms. Ferraro, the daughter of an Italian immigrant, was the first woman to be nominated for either president or vice president by any major political party. She is also one of only seven Catholics to have been nominated by a

⁸² *Stenberg v. Carhart*, 530 U.S. 914 (2000).

⁸³ For a critique of the Court's decision in *Stenberg*, see John M. Breen & Michael A. Scaperlanda, *Never Get Out'a the Boat: Stenberg v. Carhart and the Future of American Law*, 39 CONN. L. REV. 297 (2006).

⁸⁴ RICHARD A. MCCORMICK, S.J., HOW BRAVE A NEW WORLD: DILEMMAS IN BIOETHICS 138 (1981) (citing the pastoral statement).

⁸⁵ JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 280 (2003) (citing NARAL letter); see also MARK STRICHERZ, WHY THE DEMOCRATS ARE BLUE: SECULAR LIBERALISM AND THE DECLINE OF THE PEOPLE'S PARTY 209 (2007) (noting that in 1976 Senator Kennedy voted in favor of a constitutional amendment overturning *Roe v. Wade* and returning the issue of abortion to the states).

major party to serve in either office, Vice President Joseph Biden of Delaware being the most recently admitted member of this rather exclusive group.⁸⁶ During her three terms in Congress, Ferraro had amassed a solidly liberal and pro-choice voting record, including votes in favor of using public funds to pay for abortions. Her position on abortion naturally did not sit well with New York's leading prelate, Archbishop John O'Connor. Having been just installed as archbishop in March of 1984, in June of that year O'Connor "startled many by asserting that he did not see how a Catholic in good conscience can vote for a candidate who explicitly supports abortion."⁸⁷ As a vice presidential candidate, Ms. Ferraro's views on abortion were the same as she had articulated in Congress, namely, that while she was personally opposed to abortion she felt that she could not use the law to impose her personal religious views on others.⁸⁸ Ferraro also stated in a 1982 letter that she co-signed with then Congressmen Leon Panetta and Tom Daschle that "the Catholic position on abortion is not monolithic and that there can be a range of personal and political responses to the issue."⁸⁹ In response to the letter, Archbishop O'Connor accused Ferraro of misrepresenting Catholic teaching on the subject,⁹⁰ much in the same way that numerous members of the American hierarchy and the United States Conference of Catholic Bishops itself recently criticized House Speaker Nancy Pelosi for her buffoonish reading of St. Augustine on "Meet the Press" and her ludicrous claim that the Church's current position on abortion had only been fashioned within the last fifty years.⁹¹

⁸⁶ The other members of this select group include Al Smith (Democratic Pres. Nominee 1924), John F. Kennedy (Democratic Pres. Nominee 1960), William Miller (Republican V.P. nominee 1964), Sargent Shriver (Democratic V.P. nominee 1972), and John Kerry (Democratic Pres. Nominee 2004).

⁸⁷ Robert D. McFadden, *Archbishop Calls Ferraro Mistaken on Abortion Rule*, N.Y. TIMES, Sept. 10, 1984, at A1.

⁸⁸ See Jane Perlez, *Aide to Reagan Criticizes Rep. Ferraro for Remarks about Religion*, N.Y. TIMES, July 15, 1984, at 127. Ferraro also repeated this stance during the Vice Presidential debates. *Transcript of Philadelphia Debate Between Busch and Ferraro*, N.Y. TIMES, Oct. 12, 1984, at B4, also available at <http://www.debates.org/pages/debtrans.html>.

⁸⁹ '82 Letter Signed by Ferraro, N.Y. TIMES, Sept. 11, 1984, at A26.

⁹⁰ McFadden, *supra* note 87.

⁹¹ *Meet the Press*, Transcript for August 24, 2008, available at <http://www.msnbc.msn.com/id/26377338/page/3/>. In its statement responding to Pelosi's remarks, the United States Conference of Catholic Bishops' Committee on Pro-Life Activities made clear that Pelosi had "misrepresented the history and nature of the authentic teaching of the Catholic Church against abortion." Press Release, United States Conf. of Catholic Bishops, *Bishops Respond to House Speaker Pelosi's Misrepresentation of Church Teaching Against Abortion* (Aug. 26, 2008), available at <http://www.usccb.org/comm/>

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V. Mario Cuomo at Notre Dame

Mario Cuomo, the then Governor of New York, came to Ms. Ferraro's defense. In a now famous speech that he delivered at the University of Notre Dame on September 13, 1984 (a speech that I incidentally attended as a college senior), Cuomo attempted to set forth for the first time an intellectually rigorous defense of the position that he and a number of other Catholic politicians including Ferraro had assumed, namely, that one could support abortion rights as a public and political matter and still claim to be a faithful Catholic by adhering to the Church's teaching in one's personal life and as a matter of religious belief. Cuomo's speech warrants careful study on a number of different levels, more attention than we can devote to it here. Suffice it to say, however, that regardless of what one thinks of the substance of Cuomo's remarks, the speech stands as a memorable example of political theatre and oratory masterfully delivered by a skilled political actor. It is also a position to which he has continued to adhere over the years.⁹² More importantly, as I hope will become clear from what follows, Cuomo's address constitutes the most sophisticated iteration of the same

archives/2008/08-120.shtml. For a list of the more than twenty-five members of the American hierarchy who sharply criticized Pelosi for the erroneous comments she made regarding the Church's teaching on the subject, see *American Bishops who have spoken against Pelosi*, available at <http://www.americanpapist.com/2008/08/listed-american-bishops-who-have-spoken.html> (providing links to the various episcopal statements). For a brief analysis of Pelosi's misuse of St. Augustine's comments on abortion, and her spokesperson's subsequent statement, see *Pelosi's spokesman responds with more gobbledegook, quotes Augustine again*, available at <http://wdtprs.com/blog/2008/08/pelosis-spokesman-responds-with-more-gobbledegook-quotes-augustine-again/>. For a translation and careful exegesis of the Augustine's Latin text, see *Context, Pelosi*, at <http://suburbanbanshee.wordpress.com/2008/08/26/context-pelosi/>.

The week following Speaker Pelosi's appearance on Meet the Press, Senator Joseph Biden, the Democratic nominee for Vice President likewise appeared on the show. Sadly, his mastery of the Church's teaching with respect to abortion was also seriously flawed. *Meet the Press*, Transcript for September 7, 2008, available at <http://www.msnbc.msn.com/id/26590488/page/4/> (asserting that the belief that human life begins at conception is a "religiously based view" and "a matter of faith" rather than a scientific view based on biological science). Like Pelosi's remarks, Biden's comments received a stinging rebuke from over a dozen American bishops. *Updated: 12 (14) bishops have responded to Sen. Joe Biden*, available at <http://www.americanpapist.com/2008/09/updated-9-10-bishops-have-responded-to.html> (providing links to the various episcopal statements). See also <http://www.delawareonline.com/article/20081019/LIFE/810190304> (interview with Senator Biden conducted April 27, 2007, in which he asserts that the moral wrongness of abortion has varied in the eyes of the Church, "almost a gradation" and that this has "always been a debate").

⁹² See, e.g., Mario M. Cuomo, *Persuade of Coerce? A Response to Kenneth Woodward*, COMMONWEAL, Sept. 24, 2004, at 13.

bundle of arguments and claims that pro-choice Catholic politicians continue to mouth even today, albeit without the ease and polish of Cuomo's delivery.

Cuomo's argument may be summarized as follows. First, he asserts that a politician may, as a legal matter, seek to enact laws that restrict abortion because he or she thinks "that the whole community, regardless of religious beliefs, should agree on the importance of protecting life."⁹³ Indeed, going beyond what some constitutional commentators say is permitted, Cuomo asserts that one may even argue that one's religious belief "would serve well as an article of universal public morality," that it would be "desirable even apart from [its] specific religious base or context."⁹⁴ The central issue, he says, is not the legality but the prudence of such an approach to law. As Cuomo asked rhetorically "When should I argue to make my religious value your morality - my rule of conduct your limitation?"⁹⁵

Second, Cuomo makes what I take to be both a broad and a narrow claim concerning the role of consensus in the formation of law. The narrow claim is that "values derived from religious belief will not, and should not, be accepted as part of the public morality unless they are shared by the pluralistic community at large, by consensus."⁹⁶ The

⁹³ Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 17 (1984).

⁹⁴ *Id.* at 16-17.

⁹⁵ *Id.* at 17.

⁹⁶ *Id.* at 18. In using the term "consensus," Cuomo may have sought to evoke the work of John Courtney Murray, S.J., the Jesuit theologian and political theorist whose writings on the relationship between church and state deeply influenced the work of the Second Vatican Council. See SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM *Dignitatis Humanae* (1965), reprinted in THE DOCUMENTS OF VATICAN II, 675 (Walter M. Abbott, S.J. ed., & Joseph Gallagher trans. 1966), also available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html. Although Murray was clearly fond of the term, he clearly did not employ the word "consensus" in the way that Cuomo does. That is, by "consensus" Murray does not intend to refer to an overwhelming majority opinion with respect to a given matter. See John Courtney Murray, S.J., *Natural Law and the Public Consensus*, in NATURAL LAW AND MODERN SOCIETY 48 (1961). Instead, by "consensus" Murray referred to "a whole constellation of principles bearing upon the origin and nature of society, the function of the state as the legal order of society, and the scope and limitations of government." JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS - CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 31 (1960). Indeed, for Murray, the "American consensus" referred to "the truths we hold in common, and a natural law that make known to all of us the structure of the moral universe in such wise that all of us are bound to it in common obedience." *Id.* at 40. As such, a consensus is not a majority opinion, rather, it makes the formation of intelligent public opinion

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broad claim is that, as a general matter, the "public morality" embodied in law "depends upon a consensus view of right and wrong."⁹⁷ That is, even those values *not* derived from any particular religious tradition *must* be supported by consensus in order for their insertion into law to be legitimate.

Third, Cuomo emphatically proclaims his acceptance of the Church's moral teaching regarding the morality of abortion and the sacredness of human life. Cuomo forthrightly says, "I accept the church's teaching authority" and "I accept the bishop's position that abortion is to be avoided."⁹⁸ He also, at least ostensibly, indicates his disagreement with the Court's decision in *Roe*. "For me," says Cuomo "life or fetal life in the womb should be protected, even if nine Justices of the Supreme Court . . . disagree with me."⁹⁹

Fourth, Cuomo insists that the Church does not demand that faithful Catholics seek to implement a particular political strategy in pursuit of what the Church believes is essential for the common good. "That is, while we always owe our Bishops' words respectful attention and careful consideration, the question [of] whether to engage the political system in a struggle to have it adopt certain articles of our belief as part of public morality is not a matter of doctrine. It is a matter of prudential political judgment."¹⁰⁰ This point is so crucial to Cuomo's argument that he repeats it four times in three pages.¹⁰¹ Cuomo assures us that there is "no inflexible moral principle which determines what . . . [the] political conduct [of Catholic politicians] should be."¹⁰² There is, he says, "no Church teaching that mandates the best political course for making our belief everyone's rule."¹⁰³

possible. Our consensus is "an ensemble of truths" that "furnishes a common universe of discourse in which public issues can be intelligently stated and intelligently argued." *Id.* at 80-81.

⁹⁷ Cuomo, *supra* note 93, at 18.

⁹⁸ *Id.* at 21. Cuomo's odd use of the passive voice here is suggestive of his larger position with respect to abortion. That is, abortion is not a medical condition (like the flu) that "is to be avoided" by taking precautionary measures. Having an abortion is not like catching a cold — something that just "happens" of its own accord, notwithstanding the steps one took to avoid catching one. Rather, it is an elective procedure that "happens" only when one chooses to obtain one.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 21 ("My church does not order me, under pain of sin or expulsion, to pursue my salvific mission according to a precisely defined political plan.")

¹⁰² Cuomo, *supra* note 93, at 20.

¹⁰³ *Id.* at 22.

With these premises in place, Cuomo then offers his own prudential judgment regarding the legal treatment of abortion according to which efforts to adopt an amendment to the Constitution prohibiting abortion would be wrong,¹⁰⁴ as would any move to return the matter to the states.¹⁰⁵ For Cuomo, prudence even dictates that Medicaid funds be used to pay for abortions.¹⁰⁶ Indeed, he fails to mention any restriction or limitation that would satisfy the dictates of his own exacting prudential judgment.

Cuomo's remarks are certainly deserving of a more thorough-going critique. Here, however, I will limit myself to four points. First, while at times Cuomo appears to draw and to accept a distinction between articles of religious faith and other sorts of convictions, he repeatedly confounds the two. This distinction – one that might be described as the difference between theological and philosophical belief – is the fault-line between, on the one hand, policies whose *only* justification is a set of religious tenets, policies which therefore violate the “no establishment of religion” principle embodied in the 1st Amendment,¹⁰⁷ and on the other hand, policies which enjoy some secular justification but whose acceptability may be bolstered by a distinct justification located within a given religious tradition.¹⁰⁸ Cuomo seems to deliberately confound this distinction by repeatedly referring to the Church's opposition to abortion as being a “religious position[]” an “article[] of our belief”¹⁰⁹ and a position based on “values derived from religious belief.”¹¹⁰ With the distinction between permissible and impermissible rationales against abortion blurred, the reader is left to conclude that all opposition to abortion is religious such that any attempt to restrict abortion would in fact constitute an illegitimate effort to use political means to serve theological ends.

Second, and relatedly, nowhere in his remarks does Cuomo acknowledge the fact that the Church's position with respect to abortion is not, in the first instance, a theological belief in the strict sense. As a prima-

¹⁰⁴ *Id.* at 24-25.

¹⁰⁵ *Id.* at 25.

¹⁰⁶ *Id.* at 25-26.

¹⁰⁷ U.S. CONST. amend I.

¹⁰⁸ There is a rich literature addressing the question of whether and to what extent religiously inspired moral discourse can and should inform law and public policy. Leading works on the subject include KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000).

¹⁰⁹ Cuomo, *supra* note 93, at 21.

¹¹⁰ *Id.* at 18.

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ry matter, the Church's opposition is not based on sacred scripture or divine revelation but on reason that is accessible to everyone, Catholic and non-Catholic, Christian and non-Christian, theist and atheist alike. True, the Church does refer to scripture in support of her position defending unborn human life, but at least in the realm of public policy, these references merely supplement the arguments based on public and natural reason.¹¹¹ Moreover, the fact that a particular religious tradition may reach the same conclusion embodied in a law or proposed law does not render the law sectarian and illegitimate. The laws against perjury are not made suspect by the fact that the Eighth Commandment to the Decalogue forbids bearing false witness against one's neighbor, a point that the Supreme Court has itself recognized.¹¹²

Moreover, it is simply incorrect to depict support for the legal protection of unborn human life as an attempt to impose an intrinsically religious perspective (and indeed a narrowly sectarian point of view) on an unwilling public. Indeed, as Michael Perry – hardly a proponent of the traditional pro-life position – has observed, the truth is that “were government to choose to outlaw abortion, it would not have to rely on a religious argument about the requirements of human well-being.”¹¹³ Indeed, the moral value attached to all human life – whether in the early stages of development or in the twilight of existence – is not an inherently religious judgment. It does not rely upon the invocation of a set of premises understood as the product of divine revelation and so enjoying a kind of privileged status that removes them from public scrutiny and critique. Instead, the belief that the entity developing in the womb is a “person,” or that it should in any case not be killed, is not religious in nature but is at most only metaphysical. Notwithstanding the claims of some legal and political philosophers,¹¹⁴ the Constitution does not preclude the use of metaphysical claims in law. Indeed, all law is unavoidably metaphysical in its foundations.¹¹⁵

¹¹¹ Whether or not the Church or other opponents of abortion who identify themselves as Christian should employ arguments that employ expressly religious language and themes is a prudential matter. See MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 44 (2003).

¹¹² *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (holding that a legal ordinance is not constitutionally infirm under the Establishment Clause simply “because it ‘happens to coincide or harmonize with the tenets of some or all religions’”).

¹¹³ MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 70 (1997); see also PERRY, *UNDER GOD?*, *supra* note 111, at 116 (noting that “the principle argument that most abortions are immoral . . . is not biblically grounded”).

¹¹⁴ See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. 1996).

¹¹⁵ See John F. Coughlin O.F.M., *Law and Theology: Reflections on What It Means to Be Human From a Franciscan Perspective*, 74 ST. JOHN'S L. REV. 609 (2000).

Put another way, a judgment that attaches little value to a particular instantiation of human life shares precisely the same "religious" character as a judgment which attaches enormous value to the same entity. As John Noonan argued nearly thirty years ago in his still seminal book, *A Private Choice*, if "there [is] no secular criterion by which human life c[an] be determined to exist ... then any position on the beginning of human life [is] religious."¹¹⁶

What is more, neither Cuomo nor any other Catholic politician assuming the same stance has done anything to show that opposition to abortion is inherently religious and incapable of being grounded in thoroughly secular reasoning. Instead, the allegedly religious nature of the pro-life legal perspective is founded entirely on the religious identity of those who subscribe to this point of view, and not the point of view itself. The religious affiliation of the speaker substitutes for argument about the supposed religious nature of what is said – prejudice takes the place of discourse.

Pro-choice Catholic politicians are by no means the only ones who seem intent on characterizing all opposition to abortion as an attempt to impermissibly impose the tenets of religious faith on a secular and pluralistic society. At one point or another, legal scholars such as Ronald Dworkin,¹¹⁷ Peter Wenz,¹¹⁸ Laurence Tribe,¹¹⁹ Jane Friedman,¹²⁰ Jed Rubenfeld,¹²¹ David Richards,¹²² and Geoff Stone,¹²³ among others, have argued that the proposition that a human being developing inside its mother's womb is a "person" (or that it should in any case be valued by society and protected in law) is inherently religious. As such, it has no place in public discourse on the subject of

¹¹⁶ JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 57 (1979).

¹¹⁷ RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM* (1993).

¹¹⁸ PETER S. WENZ, *ABORTION RIGHTS AS RELIGIOUS FREEDOM* (1992).

¹¹⁹ Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

¹²⁰ Jane M. Friedman, *The Federal Fetal Experimentation Regulations: An Establishment Clause Analysis*, 61 MINN. L. REV. 961 (1977).

¹²¹ Jed Rubenfeld, *Revised Opinion in Roe v. Wade and Doe v. Bolton*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 109, 113-14 (Jack M. Balkin ed. 2005); cf. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599, 614-15 (1991).

¹²² David A. Richards, *Constitutional Privacy, Religious Disestablishment, and the Abortion Decision*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 148 (Jay L. Garfield & Patricia Hennessey eds. 1984).

¹²³ Geoffrey R. Stone, *Our Faith-Based Justices*, CHI. TRIB., Apr. 30, 2007, at C19.

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abortion. Many politicians – Catholic and non-Catholic alike – find this way of formulating the issue useful¹²⁴ in that it serves as a means of avoidance. It provides a plausible way in which they can avoid grappling with the serious moral and legal questions surrounding the status that should be accorded unborn human life.¹²⁵

¹²⁴ In order to justify their opposition to even modest efforts aimed at restricting abortion, many non-Catholic politicians seek to characterize all opposition to abortion as an attempt to impose a set of religious beliefs on a pluralistic society that rejects religious establishment as a matter of both constitutional principle and political morality. Indeed, many politicians – both Catholic and non-Catholic alike – make a point of introducing religion into any discussion of the issue, on their own initiative and not in response to what opponents of abortion have said with respect to the issue. For example, at the Saddleback Presidential Candidates Forum, Pastor Rick Warren first noted that some 40 million abortions had taken place since *Roe v. Wade* and that “this is a very complex issue.” He then asked then Senator Barack Obama “[A]t what point does a baby get human rights, in your view?” Obama responded that “Well, you know, I think that whether you’re looking at it from a theological perspective or a scientific perspective, answering that question with specificity, you know, is above my pay grade.” *Transcript of Saddleback Presidential Candidates Forum* (Aug. 16, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/0808/16/se.02.html>. Aside from the glibness of Obama’s statement with respect to a matter of dire importance (i.e. “above my pay grade”) Obama’s answer is striking in a number of other respects. The question that was posed to him was legal in nature (i.e. “At what point does a baby get human rights?”). He could have answered the question, as Senator John McCain did, by saying “At the moment of conception,” *id.*, or he could have chosen a point substantially later in gestation such as “birth.” Instead, his answer wrongly suggested that only science or religion could possibly answer the question, and that they were in fact not up to the task. By raising the question of religion and then failing to explore secular alternatives, Obama at least implies that the only answers available are impermissibly religious ones. Similarly, at the Democratic Candidates Compassion Forum hosted by Messiah College in Grantham, Pennsylvania, Senator Obama was asked “[D]o you personally believe that life begins at conception? And if not, when does it begin?” In response, Obama answered that “This is something that I have not, I think, come to a firm resolution on. I think it’s very hard to know what that means, when life begins. Is it when a cell separates? Is it when the soul stirs? So I don’t presume to know the answer to that question.” *Transcript of Democratic Candidates Compassion Forum* (Apr. 13, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/0804/13/se.01.html>. Here, the question posed was not legal but empirical (i.e. “Does human life begin at conception?”). It called for the exercise of empirical, scientific judgment, not theological opinion. Yet Obama again injected religion into the discussion as a way of suggesting that the question is itself irresolvable and so out of bounds in terms of public discourse.

¹²⁵ The *Roe* decision itself serves this same strategy in a more general way by ostensibly removing the question of abortion from the realm of politics. To be sure, this removal is incomplete in that legislators intent on challenging the abortion regime may press for modest changes at the margins of the law. Still, as a matter of constitutional law and interpretation, politicians can credibly maintain that the legal right to abortion is out of their control – hence the politicization of court appointments as a surrogate for direct political engagement on the matter.

With respect to secular proponents of abortion, the identification of pro-life arguments as intrinsically religious betrays both the experience of fear and a strategy of fear. The *strategy of fear*, already alluded to, is to imply – often in a cowardly and backhanded fashion – that a discreet band of religious zealots are determined to impose their religious faith on an unwilling public and take away a cherished freedom. Indeed, the point of this strategy is to encourage the wider polity to resist this purported assault on our otherwise secular democracy. The *experience of fear* that this strategy reveals is the fear that if religious prejudice is not introduced into the debate – if the debate were to be conducted in an intellectually honest fashion confined to secular premises – indeed, if the terms of the argument are not the role of religion in public life but the meaning of humanity and a normative but not religious discourse on the boundaries of human freedom (what might be termed “ordered liberty”)¹²⁶ – then the pro-choice cause will fail. Surely we can and should demand more than this from our colleagues in the academy and our fellow Catholics who are involved in political life.

Third, Cuomo’s suggestion that consensus with respect to questions of right and wrong is a necessary condition for political action is simply not in accord with our political history and experience, nor, I dare say, is it in accord with the experience of any genuine democracy. Consensus is an exceedingly high standard for political legitimacy, a standard which is routinely ignored in Congress and in the state legislatures. Indeed, consensus is by far the exception and not the rule in a system based on partisan politics. Moreover, when a consensus does form, it does not do so of its own accord. Rather, a consensus is a state of affairs that must be built. It requires sustained effort, often over some period of time, by those who have the desire to bring it about. It also demands courage on the part of those working to build it even in the face opposition, including a willingness to suffer unpopularity in the polls and at the ballot box. Cuomo’s unstated argument seems to be that because no ready-made consensus regarding abortion already exists that no such consensus may be brought about except by respectful dialogue with those who support abortion. Aside from the fact that Cuomo never seems to have found his voice for this pro-life discourse during his political career, this prudential strategy for change (if one can call it that) seems almost intentionally obtuse or politically naïve – words that do not readily come to mind when speaking of Mario Cuomo. That is, meaningful political conversation in this country typically does not take place in the abstract. Instead, it coalesces around concrete politi-

¹²⁶ See Breen & Scaperlanda, *supra* note 83.

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cal proposals. Other than the mere conclusion rendered by his own prudential judgment, Cuomo offers no argument as to why he is unwilling to offer such proposals as a way of bringing about change. This is all the more surprising given Cuomo's avowed support for the Church's teaching. Accordingly, the absence of consensus works as a kind of self-fulfilling prophecy: There is no current consensus regarding the injustice of abortion, and prudence dictates that no effort be expended to build such a consensus in the political realm. Thus, consensus functions for Cuomo as a way of evading responsibility for his own inaction.¹²⁷ Contrary to this, the mere fact of pluralism in this country with respect to abortion does not make the attempt to establish a new, definitive, legal norm governing the matter illegitimate.

Fourth, and lastly, Cuomo insists that the Catholic Church does not mandate that those in public life follow a particular course of action in pursuit of a particular goal. Instead, he says that the Church leaves such matters to the prudential judgment of the faithful engaged in the political process. While this claim is true as a general matter, it is subject to some significant qualification.

First, the Church does teach that a statute or ordinance which is fundamentally unjust is not "law" in the sense of being a norm that is binding on the conscience. As such it should not be reflected in the positive law of any nation. A law that is fundamentally unjust is one that causes substantial injury to the rights of individuals and the common good. Laws which authorize or promote abortion are precisely of this kind and so, as John Paul II said in *Evangelium Vitae*, they "are completely lacking in authentic juridical validity."¹²⁸

Second, the Church does require that the faithful not engage in any action – whether in a public capacity or as a private individual – that constitutes either formal or proximate material cooperation

¹²⁷ I should also add that Cuomo's inaction is highly suspect in light of the fact that as governor he was willing to try to build consensus and persuade his fellow New Yorkers regarding the undesirability of the death penalty not only by means of political discourse but by concrete political action as well. See James Dao, *Cuomo Proposes a Referendum on the Death Penalty*, N.Y. TIMES, July 8, 1994.

¹²⁸ *EVANGELIUM VITAE*, *supra* note 25, ¶¶ 72, 90 (concluding that "a law which violates an innocent person's natural right to life is unjust and, as such, is not valid as a law"); see also JOHN XXII, *PACEM IN TERRIS* ¶ 61 (1963), reprinted in *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* 131 (David J. O'Brien & Thomas A. Shannon eds. 1992) [hereinafter *CATHOLIC SOCIAL THOUGHT*] ("[I]f any government does not acknowledge the rights of man or violates them, it not only fails in its duty, but its orders completely lack juridical force.").

with evil.¹²⁹ This prohibition precludes many of the steps that Cuomo regards as the soul of prudence, including the use of Medicaid dollars to pay for abortions.¹³⁰

Cuomo is right, however, in arguing that prudential judgment has an important role to play in framing public policies that are effective in reducing the scandalously high incidence of abortion. Cuomo made some passing reference to this in noting that even those who adamantly support the abortion license can also “support the development of government programs that present an impoverished mother with the full range of support she needs to bear and raise her children, to have a real choice.”¹³¹ In August 2008, the group Catholics in Alliance for the Common Good issued an empirical study by political scientists Joseph Wright and Michael Bailey in which they argue that a number of policies such as “increasing benefits for pregnant women and mothers with children under five; promoting policies that increase male employment; providing funding for child care for working women; increasing economic assistance to low-income families and removing the ‘family cap’ on economic assistance”¹³² can bring about a substantial reduction in the incidence of abortion. Indeed, they claim that if the states spent only \$1,350 more per person living below the poverty line, this would result in a 20% decrease in abortion.¹³³ They also argue that restrictive abortion laws aimed at ensuring parental consent and informed consent have been almost entirely ineffective in reducing the frequency of the procedure.¹³⁴

To the extent that Wright and Bailey’s thesis is true, it is surely good news insofar as it suggests another strategy for reducing the incidence of abortion.¹³⁵ There are, however, a number of reasons to doubt some

¹²⁹ For a thoughtful exposition of the distinction between formal and material cooperation with evil in the Catholic moral tradition, see Edward A. Harnett, *Catholic Judges and Cooperation with Sin*, 4 U. ST. THOMAS L. J. 221 (2006).

¹³⁰ See Cuomo, *supra* note 93, at 25-26.

¹³¹ *Id.* at 27-28.

¹³² Joseph Wright & Michael Bailey, *Reducing Abortion in America: The Effect of Economic and Social Supports* (Aug. 2008), formerly available at <http://www.catholicsinalliance.org> (copy on file with the Journal).

¹³³ *Id.* at 11.

¹³⁴ *Id.* at 9-10.

¹³⁵ The study was also significant in that it provided a plausible basis upon which several prominent Catholic legal academics could claim that the policies of an Obama administration would more likely lead to a reduction in the incidence of abortion than would the policies of a McCain administration. See Nicholas P. Cafardi, Cathleen M. Kaveny & Douglas W. Kmiec, *A Catholic Brief for Obama*, available at [of their empir
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of their empirical claims. For example, Wright and Bailey claim that an increase in male employment will reduce the abortion rate. However, the 2005 Guttmacher Institute study upon which they rely reports that 72 percent of women who received abortions were never married, and only 12 percent reported the unemployment of a husband or partner as a reason for an abortion.¹³⁶ Moreover, there is undoubtedly a kind of diminishing return to the use of money as a disincentive to abortion. Indeed, this same Guttmacher study indicates that only 23 percent of the women surveyed said that money was their most important reason for seeking an abortion, compared to 25 percent who said that they simply were not ready for a child or another child or that the timing was wrong, and 19 percent who said that their most important reason was that they were done with childbearing.¹³⁷

I should add that the common sense conclusion that increased financial assistance will only have a marginal effect on the frequency of abortion is confirmed by a comparison of statistics reflecting the incidence of abortion in the United States with abortion statistics from other developed countries that allocate greater amounts of social resources to women and families. Given the fact that countries such as Sweden, Canada, France, Norway, England and Wales have abortion ratios at, above, or approaching 20 percent, as compared to a ratio of 23 percent in the United States, strongly suggests that the provision of greater financial assistance would help but would not dramatically affect the incidence of abortion in the United States.¹³⁸

More importantly, other social scientists have seriously called into question Wright and Bailey's methodologies and conclusions. For example, Michael New criticized their study for concluding that parental involvement laws have had little effect on overall abortion rates when

newsweek.com/id/164445. This claim did not go unchallenged. See George Weigel, *Flawed Thinking*, available at <http://www.newsweek.com/id/165045/page/1>.

¹³⁶ Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112-113 tbls. 1 & 2 (2005).

¹³⁷ *Id.* at 114 tbl. 3.

¹³⁸ I explore the data that support this conclusion at some length in a recent article. See John M. Breen, *Modesty and Moralism: Justice, Prudence and Abortion – A Reply to Skeel & Stuntz*, 31 HARV. J. L. & PUB. POL'Y 219 (2008) [hereinafter Breen, *Modesty*]. In the piece I also explore the relationship between law and culture, and how a strategy designed to reduce the incidence of abortion should make use of both cultural legal norms. I further explore the relationship between law and culture in a companion piece. See John M. Breen, *John Paul II, the Structures of Sin and the Limits of Law*, 52 ST. LOUIS U. L. J. 317 (2008).

the proper metric should have been the effect of such laws on the abortion rates of minors.¹³⁹ Moreover, numerous other studies have found that such laws are effective in reducing abortion rates among minors, studies that Wright and Bailey ignore in their paper.¹⁴⁰ New also criticizes Wright and Bailey for utilizing data from states that are statistically anomalous¹⁴¹ including data from Kansas which reported a 69 percent increase in abortion between 1991 and 1999. As New notes, this increase "cannot be attributed to changes in demographics, economics, or legislation and is instead likely due to notorious late term abortionist George Tiller expanding his abortion practice."¹⁴² Most

¹³⁹ Michael J. New, *Does Increased Welfare Spending or Pro-Life Legislation Reduce Abortion?* [hereinafter New, *Welfare Spending*], available at http://www.thepublicdiscourse.com/viewarticle.php?selectedarticle=2008.10.30_New_Michael%20J._Does%20Increased%20Welfare%20Spending%20or%20Pro-Life%20Legislation%20Reduce%20Abortion%253F_.xml. Specifically with respect to informed consent laws, New criticizes Wright and Bailey for employing a statistical model that supposedly shows that informed consent laws result in an 18% increase in abortion rates when first enacted (though not enforced due to court intervention) and an 18% decrease in abortion rates when actually implemented. Thus, according to Wright and Bailey, the net effect of these laws is close to zero. As New remarks, "there is no plausible explanation why an unenforced law should result in such a sharp and statistically significant increase in the incidence of abortion" and that "[a]berrant results like this are often evidence of some underlying problems in the statistical model." *Id.*

¹⁴⁰ See, e.g., Deborah Haas-Wilson, *The Impact of State Abortion Restrictions on Minors' Demand for Abortions*, 31 J. HUM. RESOURCES 140, 155-56 (1996) (concluding that parental involvement statutes have decreased minors' demand for abortion by between 13-25% while state Medicaid funding restrictions have decreased minors' demand for abortion by between 9-17%); Deborah Haas-Wilson, *The Economic Impact of State Policy Restrictions on Abortion: Parental Consent and Notification Laws and Medicaid Funding Restrictions*, 12 J. POL'Y ANALYSIS & MGMT. 498, 509 (1993) (concluding that rate of minors' abortions per 1000 teenage pregnancies is 16% lower, and the rate of minors' abortions per 1000 women ages 15-19 is 25% lower in states that have parental consent or notification laws as compared with states that do not have these laws, and that the rate of minors' abortions per births to teenagers is 50% lower and the rate of minors' abortions per women ages 15-19 is 38% lower in states that restrict Medicaid funding compared to states that do not); Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court Authorized Abortions*, 15 FAM. PLAN. PERSP. 259 (1983); Rebecca M. Blank, Christine C. George & Rebecca A. London, *State Abortion Rates: The Impact of Policies Providers, Politics, Demographics, and Economic Environment*, 15 J. HEALTH ECON. 513 (1996); Robert Ohsfeldt & Stephan Gorman, *Do Parental Involvement Laws Reduce Adolescent Abortion Rates?*, 12 CONTEMP. ECON POL'Y 65 (1995).

¹⁴¹ For example, Wright and Bailey made use of data from Alabama, Iowa, and Illinois even though in certain years these states "only reported data for abortions performed in hospitals" even though "a relatively high percentage of abortions are performed in clinics." New, *Welfare Spending*, *supra* note 138.

¹⁴² *Id.*; see also Michael J. New, *Reducing Abortions: Responding to Faulty Methodology and Presentation* [hereinafter New, *Responding*], available at <http://www.the>

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important of all, New criticizes Wright and Bailey for failing to weight the data they use to compensate for the distorting effect that small population states can have on measuring national trends. That is, a number of states with smaller populations experienced significant decreases in abortion in the 1990s following the enactment of certain pro-life laws. Although the national rate of abortion declined by 16.7 percent between 1992 and 1999, "if one averages the abortion rates in each state in 1992 and 1999 (unweighted) the abortion decline comes out to 23 percent."¹⁴³ Thus, failing to weight the data "exaggerates the national decline and makes [pro-life laws in smaller states] seem less effective than they really are."¹⁴⁴

It seems that Michael Bailey took these criticisms to heart. In November 2008, Catholics in Alliance for the Common Good removed the Wright and Bailey study from its website and replaced it with a revised version that lists Joseph Wright as its sole author.¹⁴⁵ As Michael New has shown, the new version corrects some of the errors in the original document (such as the use of abortion data from Kansas) but repeats others (such as analyzing the effect of parental involvement laws on the overall abortion rate rather than on the abortion rate of minors). More importantly, "[t]he new version provides evidence that welfare policy has no more than a marginal effect on the incidence of abortion."¹⁴⁶

publicdiscourse.com/viewarticle.php?selectedarticle=2008.11.11_New_Michael%20J._Reducing%20Abortions:%20Responding%20to%20Faulty%20Methodology%20and%20Presentation.xml.

¹⁴³ New, *Welfare Spending*, *supra* note 138.

¹⁴⁴ *Id.*; see also New, *Responding*, *supra* note 141.

¹⁴⁵ Joseph Wright, *Reducing Abortion in America: The Effect of Socioeconomic Factors* (Nov. 2008), available at http://www.catholicsinalliance.org/files/CACG_Final.pdf. See also Michael J. New, *Holding "Catholics in Alliance for the Common Good" Morally Accountable*, available at <http://www.moralaccountability.com/obama-on-abortion/holding-catholics-in-alliance-for-the-common-good-morally-accountable/> [hereinafter *Holding*]. Wright and New have since engaged in an ongoing colloquy. Joseph Wright, *Commenting on Reducing Abortion in America: A Response to Michael New*, available at <http://www.moralaccountability.com/abortion-reduction-debate/commenting-on-reducing-abortion-in-america-a-response-to-michael-new/>; Michael J. New, *A Response to Catholics in Alliance for the Common Good*, available at <http://www.moralaccountability.com/abortion-reduction-debate/a-response-to-catholics-in-alliance-for-the-common-good/>; Joseph Wright, *Response to Michael New II*, available at <http://www.moralaccountability.com/abortion-reduction-debate/response-to-michael-new-ii/>; Michael J. New, *Responding to Professor Wright's Response*, available at <http://www.moralaccountability.com/abortion-reduction-debate/responding-to-professor-wrights-response/>

¹⁴⁶ New, *Holding*, *supra* note 145.

Thus, while Wright and Bailey's original paper and Wright's revised version are intriguing and perhaps may in some sense be regarded as a sign of hope, we should neither understate the positive effects of restrictive abortion laws nor overstate the capacity of increased social assistance to reduce the frequency of abortion. Simply put, increased social assistance is no panacea to the blight of abortion. Indeed, even if Wright and Bailey's erroneous claims were true, social assistance cannot reduce the incidence of abortion to where it was prior to legalization under *Roe*.¹⁴⁷ Given the nearly 1.3 million abortions that take place each year in this country, even a 20 percent reduction would mean that well over 1 million unborn children would still be aborted each year. Given this reality, I would argue that restrictive measures, including the criminal law, have an indispensable role to play in achieving truly dramatic reductions in abortion in the United States in the future.¹⁴⁸

VI. Following Cuomo's Lead

It has been important for us to focus on Cuomo's speech because it still represents the most sophisticated attempt to date to provide a cogent defense for those whom claim to be faithful Catholics but who support abortion rights in their capacity as public officials. As such, Cuomo's position has been the model that others have imitated, though often in a less thorough and articulate manner. Indeed, statements such as the remarks made by Senator Kerry made during the 2004 campaign and the 2006 letter signed by fifty-five House Democrats and spearheaded by Representative Rosa DeLauro of Connecticut are mere echoes of Cuomo's position. They embody the substance of Cuomo's remarks without his rhetorical flair – poor cousins who claim a more well-to-do relation.

Thus, for example, during the second Presidential Debate between Senator John Kerry and President George W. Bush held in St. Louis in 2004, Senator Kerry made clear that he could not subscribe to the pro-life position as president because for him, the only rationale for such a policy would be theological – indeed, narrowly sectarian in nature – and thus illegitimate. As Kerry declared:

I'm a Catholic, raised a Catholic. I was an altar boy. Religion has been a huge part of my life. It helped lead me through a war, leads me today. But I can't take what is

¹⁴⁷ See Breen, *Modesty*, *supra*, note 137.

¹⁴⁸ *Id.*

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¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

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an article of faith for me and legislate it for someone who doesn't share that article of faith, whether they be agnostic, atheist, Jew, Protestant, whatever. I can't do that.¹⁴⁹

During the third Presidential Debate held in Tempe, Senator Kerry repeated his unwillingness to "legislate or transfer to another American citizen my article of faith. What is an article of faith for me is not something that I can legislate on somebody who doesn't share that article of faith."¹⁵⁰ He also made clear his belief that the choice to opt for abortion "is a woman's choice" and that he would "defend the right of *Roe v. Wade*."¹⁵¹ Thus, it was somewhat bewildering for Kerry to assert a few moments later that "My faith affects everything that I do, in truth" and that "I think that everything you do in public life has to be guided by your faith, affected by your faith, but without transferring it in any official way to other people."¹⁵² He explained that his Catholic faith was the reason why he fought against poverty, for a cleaner environment, and to advance equality and justice. "All of those things," he said, "come out of that fundamental teaching and belief of faith."¹⁵³ The test for true public service was, he said, President Kennedy's admonition that "on Earth, God's work must truly be our own."¹⁵⁴

This confusing set of assertions (one can hardly call it an argument) mirrors Cuomo's speech in a number of significant ways, the most telling of which is Kerry's identification of the Church's opposition to abortion as a specifically religious, indeed, narrowly sectarian point of view. Few would argue against Kerry's claim that it would be wrong to impose one's own religious beliefs on society as a whole by employing the coercive power of the state. However, Kerry makes no effort to show that Catholic opposition to abortion is in fact "religious." Indeed, Kerry simply relies upon the supposition that it is inherently Christian if not specifically Catholic, and therefore illegitimate. Moreover, like Cuomo, Kerry's remarks manifest a selective willingness to be influenced by the faith. Thus, Kerry cites his faith-inspired concern for the poor and the environment as his motivation for public service. Like Cuomo, however, Kerry makes this selective invocation of his faith without drawing a principled distinction between those areas of public life that

¹⁴⁹ The Second Bush-Kerry Presidential Debate (Oct. 8, 2004), available at <http://www.debates.org/pages/trans2004c.html>.

¹⁵⁰ The Third Bush-Kerry Presidential Debate (Oct. 13, 2004), available at <http://www.debates.org/pages/trans2004c.html>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

permit such influence and those that do not. Kerry differs from Cuomo, however, in one significant respect. Whereas Cuomo clearly stated that he agreed with the Church's teaching regarding the sanctity of human life, Kerry demurred. Indeed, during the second debate, in response to a question from a woman who compared abortion to murder, Kerry stated that he deeply respected her "belief about life and when it begins," but he declined to say that he agreed with it.¹⁵⁵ In the third debate, Kerry was asked to respond to "reports that some Catholic archbishops are telling their church members that it would be a sin to vote for a candidate like [Kerry]" because of his support for abortion rights. Kerry remarked that although he "completely respect[ed] their views," and that he "grew up learning how to respect those views," he flatly declared "I disagree with them, as do many."¹⁵⁶ Perhaps this rejection of Church teaching explains how Kerry is able to equate preserving *Roe v. Wade* with doing "God's work on earth."

The letter prepared by Congresswoman DeLauro and signed by fifty-five Catholic Democrats in the House of Representatives is perhaps an even more tortured effort to identify with Catholic teaching concerning law, morality and politics, and at the same time reject an integral part of that teaching. The signatories to the letter begin by noting their pride in being part of the "living Catholic tradition – a tradition that promotes the common good [and] expresses a consistent moral framework for life."¹⁵⁷ They contend that they "work every day to advance respect for life and the dignity of every human being" and profess their commitment to the basic principles of Catholic social teaching including "protecting the most vulnerable among us."¹⁵⁸ They say that this commitment is reflected in their work to reduce poverty and to increase access to health-care. Although they "agree with the Catholic Church about the value of human life and the undesirability of abortion" they insist on "the primacy of conscience."¹⁵⁹ The statement says that the signing members "acknowledge and accept the tension that comes with being in disagreement with the Church in some areas."¹⁶⁰ Although the statement does not say so explicitly, apparently the reader is left to infer that the "primacy of conscience" both explains and legitimizes this

¹⁵⁵ The Second Bush-Kerry Presidential Debate, *supra* note 146.

¹⁵⁶ The Third Bush-Kerry Presidential Debate, *supra* note 147.

¹⁵⁷ Statement of Principles by Fifty-Five Catholic Democrats in the U.S. House of Representatives (Feb. 28, 2006), available at http://www.house.gov/delauro/press/2006/February/catholic_statement_2_28_06.html.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

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disagreement with the Church. Lastly, the signatories assert that “the separation of church and state allows for [their] faith to inform [their] public duties” and that the Church is called to be “in the vanguard of creating a more just America and world.”¹⁶¹

Apparently creating a more just nation and world does not include any legal restrictions on abortion, only efforts to “reduce[e] the number of unwanted pregnancies” and “promot[e] alternatives to abortion.”¹⁶² Thus, the “vanguard” of justice looks more like a rear-guard of Democratic Party loyalists who find no injustice in the extermination of 1.3 million unborn children a year. That is, the signatories to the letter merely say that abortion is “undesirable.” Although they do not say so, they may even believe that it is tragic and horrifying. However, whatever else they may believe about abortion, we *do* know that for them abortion is *not* a matter of injustice. They do not believe that it is *unjust* to kill the unborn child in the womb when his or her mother so decides.

The problem with the statement is that it is either plainly incoherent, or that it constitutes a simple rejection of the Church’s teaching regarding the sanctity of life. That is, the signatories say that they agree with the Church “about the value of human life,” but they are unwilling to engage in any political action to defend innocent human life *in utero*. They say that they work “to advance respect of life and the dignity of every human being.” If they genuinely believe this statement to be true, then they must also believe either that the unborn are not human beings or that one can show human beings “respect” and “advance their dignity” by supporting a legal regime that sanctions their dismemberment in the womb. Similarly, the signatories say that they work to

¹⁶¹ *Id.*

¹⁶² Statement of Principles by Fifty-Five Catholic Democrats in the U.S. House of Representatives (Feb. 28, 2006), available at http://www.house.gov/delauro/press/2006/February/catholic_statement_2_28_06.html. The heads of three episcopal committees of the USCCB pointed out the weakness and insufficiency of this claim in a written response to the DeLauro letter that they delivered on behalf of the American bishops. They noted that “[w]hile it is always necessary to work to reduce the number of abortions by providing alternatives and help to vulnerable parents and children, Catholic teaching calls all Catholics to work actively to restrain, restrict and bring to an end the destruction of unborn human life.” United States Conf. of Catholic Bishops, *Statement on the Responsibilities of Catholics in Public Life* (Mar. 10, 2006), available at <http://www.usccb.org/catholicspubliclife.shtml>. In a similar vein, in *Forming Consciences for Faithful Citizenship*, the USCCB noted that while “incremental improvements are acceptable as steps toward the full restoration of justice” but that “Catholics must never abandon the moral requirement to seek full protection for all human life from the moment of conception until natural death.” FORMING CONSCIENCES, *supra* note 36, ¶ 32.

protect “the most vulnerable among us,” so one must conclude that the signatories to the statement believe either that the unborn are not “among us” or that they are not “vulnerable.” Thus, although it purports to be a statement of faithful Catholics, as such, it is plainly incoherent. But, to be frank, coherence was never its real intention. Rather, the statement was contrived merely to create political cover for continued support for abortion rights. It is a veil designed to suggest a face of earnest fidelity behind a verbal shroud – a face that is revealed to be false and confused when the veil is lifted by careful examination of the prepared text.

VII. The Loss of Prophetic Voice and Other Broken Vows

What Mario Cuomo’s famous Notre Dame speech, the statement drafted by Representative DeLauro in 2006, John Kerry’s remarks in the 2004 presidential debates, and Speaker Pelosi and Senator Biden’s recent statements all reveal is a failure on the part of Catholic politicians to live their baptismal vows. Again, this is not to resurrect the canard that Catholic politicians who pursue a pro-life agenda are in fact working to undermine our secular democracy by establishing a kind of theocratic rule over matters involving reproductive choice. Rather, what I mean to say is that if we believe that we as Catholics have something to offer the wider community in which we live, if we believe that there is such a thing as a Christian vocation to serve others in political life including the weakest and most vulnerable members of society,¹⁶³ then this vocation must be a kind of fulfillment of the vows of baptism, and not a renunciation of those vows. By refusing to take up the pro-life cause, indeed, by staunchly defending the pro-choice status quo and even seeking to further extend the abortion license, some Catholics in public life have done precisely that. At least in this regard, they have failed in their call to bring Christ to the world. Indeed, it follows from much of what I have already said that they have failed to live out their vocation in the imitation of Christ as priest, prophet and king.

A priest, after all is someone who offers sacrifice.¹⁶⁴ The Zadokite and Levitical priesthood of our Hebrew ancestors offered the sacrifice of the

¹⁶³ LIVING THE GOSPEL OF LIFE, *supra* note 13, ¶ 25 (noting that American Catholics “have been *changed* by our culture too much, and we have *changed it not enough*” but that “[i]f we are leaven, we must bring to out culture the whole Gospel, which is the *Gospel of life and joy*”).

¹⁶⁴ Cf. Hebrews 8:3 (“Now every priest is appointed to offer gifts and sacrifices”).

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temple according to the strictures of the Mosaic law.¹⁶⁵ As Christians, we follow the new covenant sealed in Christ's blood. We offer the sacrifice of Christ himself in the Mass,¹⁶⁶ the sacrifice of Calvary in which the perfect and blameless victim – the spotless Lamb of God – gives Himself to the world out of a boundless love for all humanity and every human being. This one and eternal act of sacrifice is carried out by the ministerial priesthood through the prayer of the Divine Liturgy,¹⁶⁷ a prayer in which the laity share.¹⁶⁸ Yet beyond the Mass itself, by baptism every Christian is called to be a priest, to offer up in sacrifice to God the gift of one's own life – the joys and hopes, the struggles and fears of daily life.

Pro-choice politicians have not sacrificed their lives for the good of the weakest and most vulnerable among us.¹⁶⁹ Whether out of a willful ignorance or callous disregard for the lives of the unborn, a misplaced notion of compassion¹⁷⁰ for women with unwanted pregnancies, or a selfish desire to advance their own political careers, pro-choice Catholic politicians have not been willing to take the risk – to make the sacrifice – that the priesthood of the baptized demands.

The claim is often made that Catholic politicians who support abortion rights do so reluctantly, and with a heavy heart, and only after a searching examination of the issue in light of the faith that they hold so dearly and to which they are so plainly committed. The only solace that these anguished souls have is the firm belief that they have followed their individual consciences which, it is also said, enjoy a kind of primacy in moral decision-making according to the Church's own teaching.¹⁷¹ Others have argued that the notion of "conscience" implicit in

¹⁶⁵ Cf. Genesis 14:17-20; Exodus 28:1-43; Numbers 18:1-32.

¹⁶⁶ CATECHISM ¶ 1357 (1994).

¹⁶⁷ See JOHN PAUL II, LETTER TO PRIESTS FOR HOLY THURSDAY ¶ 1 (2005), available at http://www.vatican.va/holy_father/john_paul_ii/letters/2005/documents/hf_jp-ii_let_20050313_priests-holy-thursday_en.html (noting that through the words of consecration a priest "make[s] present on our altars the sacrifice made once and for all on Calvary"). A series of particularly rich and heart-felt reflections on the vocation to the ordained priesthood can be found in the letters that the late Pope John Paul II wrote each Holy Thursday to the Church's priests. See JOHN PAUL II, LETTERS TO MY BROTHER PRIESTS 1979-2005 (2006).

¹⁶⁸ CATECHISM ¶¶ 1368-1372 (1994).

¹⁶⁹ Cf. EVANGELIUM VITAE, *supra* note 25, ¶ 74 ("Sometimes the choices which have to be made are difficult; they may require the sacrifice of prestigious professional positions or the relinquishing of reasonable hopes for career advancement").

¹⁷⁰ *Id.* ¶ 19 (noting that "the taking of life not yet born . . . is sometimes marked by a mistaken sense of altruism and human compassion").

¹⁷¹ Pope John Paul II diagnosed this modern phenomenon well. According to this view "[t]he individual conscience is accorded the status of a supreme tribunal of moral

these appeals is in fact a gross distortion of an authentic Catholic understanding of the concept.¹⁷²

The human conscience is “in its primordial reality . . . an act of a person’s intelligence, the function of which is to apply the universal knowledge of the good in a specific situation.”¹⁷³ It is “the witness of God himself, whose voice and judgment penetrate the depths of man’s soul.”¹⁷⁴ Accordingly, neither you nor I nor anyone else is in a position to judge whether or not the portrait sketched above – the portrait of a soul torn between political loyalty and religious fidelity – truthfully conveys the interior life of the individual Catholic politicians involved. At the same time, it must be noted that the objective facts surrounding these individuals, to which we are privy, paint a very different picture. For example, if Representative Rosa DeLauro was truly anguished over the issue of abortion, then it is incongruous that, before being elected to Congress, she would have worked as the executive director of Emily’s List, an organization whose sole purpose is to work for the election of pro-choice politicians and so ensure the preservation and expansion of the abortion license.¹⁷⁵ If endorsing the abortion license somehow offended his Catholic sensibilities, then Senator Dick Durbin of Illinois would not promote himself as someone who has “striv[en] to be a leader” in “preserving women’s reproductive rights.”¹⁷⁶ If Senator John Kerry found support for abortion to be morally repugnant but politically necessary then he would not celebrate the fact that, in his first

judgment which hands down categorical and infallible decisions about good and evil.” JOHN PAUL II, *VERITATIS SPLENDOR* ¶ 32 (1993) [hereinafter *VERITATIS SPLENDOR*], also available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html. An example of this view of the primacy of conscience can be observed in David R. Obey, *My Conscience, My Vote*, AMERICA, August 16, 2004. David Obey echoes Mario Cuomo in stressing that “public officials must reserve to themselves prudential judgments about how and under what circumstances to apply moral principles in a pluralistic society” and of accusing the some members of the Church of attempting “to impose, through law, their religious values on issues such as abortion, upon those who do not share our religious beliefs.” *Id.* Although the Church holds that a person’s conscience is sacrosanct, the Church also believes that “[c]onscience, as the judgment of an act, is not exempt from the possibility of error.” *Veritatis Splendor, supra*, ¶ 62.

¹⁷² See *VERITATIS SPLENDOR, supra* note 171, ¶¶ 54-64; see also George Cardinal Pell, *The Inconvenient Conscience*, FIRST THINGS, May 2005, at 22; Avery Dulles, *John Paul II and the Truth About Freedom*, FIRST THINGS, Aug./Sept. 1995.

¹⁷³ *VERITATIS SPLENDOR, supra* note 171, ¶ 32.

¹⁷⁴ *Id.* ¶ 58.

¹⁷⁵ Congresswoman Rosa L. DeLauro, *Biography*, available at <http://delauro.house.gov/bio.cfm>.

¹⁷⁶ Dick Durbin U.S. Senator, *Women’s Issues*, available at <http://www.dickdurbin.com/issues?id=0006>.

speech from the Senate floor, he declared that "the right to choose [abortion] is a fundamental right" that "[n]either the government nor any person has a right to infringe upon that freedom" as he did at the NARAL Pro-Choice America dinner in January 2003.¹⁷⁷ Moreover, if Kansas Governor Kathleen Sebelius were truly struggling with the fate of unborn children, one would not expect to find her hosting a special gala reception at the Kansas Governor's mansion in honor of George Tiller, the notorious abortionist who specializes in performing abortions on unborn children in the second and third trimesters of development.¹⁷⁸ These, and many other examples involving many other Catholic politicians, Democrat and Republican alike, are incongruent – they simply do not fit – with the picture of a troubled soul, rosary beads in hand, pouring over the demands of the faith and the competing demands of one's political party. They do not fit with the priestly vocation of all the baptized.

Christ is the King of the Universe and the Prince of Peace.¹⁷⁹ Through baptism, we are called to imitate him. When we assume positions of leadership in the political community, under the guidance of prudence, we are called to govern the affairs entrusted to us with justice. Justice – not "Catholic" justice, not a religious sense of fairness – but justice in the traditional sense, the justice proper to a secular democracy – rendering to another that which is his or her due¹⁸⁰ – demands that the lives of the unborn be protected in law. The Second Vatican Council taught that the laity should, "by their combined efforts remedy any institutions and conditions of the world which are customarily an inducement to sin, so that all such things may be conformed to the norms of justice and may favor the practice of virtue rather than hinder it."¹⁸¹ In fulfilling this vocation, the Council hoped that the laity would "imbue culture and human activity with moral values."¹⁸² In supporting a legal regime in which abortion is protected as a right, pro-choice Catholic politicians have done the very opposite. They have worked to deny a basic element of justice – the right to life – to the most vulnerable of

¹⁷⁷ Senator John Kerry, NARAL Pro-Choice America Dinner, Washington, D.C., Jan. 21, 2003, available at <http://www.gwu.edu/~action/2004/interestg/naral012103/kerr012103spt.html>.

¹⁷⁸ For photographs of the event, complete with pictures of Governor Sebelius smiling over cocktails with Tiller and his staff, see Operation Rescue, *Gallery: Gov. Sebelius Honors Tiller at Secret Gala Event at Cedar Crest*, http://operationrescue.org/photos/main.php?g2_itemId=4190.

¹⁷⁹ *Isaiah* 9:6.

¹⁸⁰ See JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 44 (1966).

¹⁸¹ *Lumen Gentium*, *supra* note 7, ¶ 36.

¹⁸² *Id.*

human beings. They have labored to undermine "the task of the State" which is "at all times . . . to preserve each person's rights and to protect the weakest."¹⁸³ Rather than ennoble the culture, pro-choice Catholic politicians have coarsened it by contributing to a "conspiracy against life" and helping to build a "culture of death."¹⁸⁴ Indeed, by seeking to perpetuate a regime that seeks to legitimize the slaughter of the innocents, pro-choice Catholic politicians have rejected their baptismal call to imitate Christ the King.

It is, however, the loss of the prophetic voice that represents perhaps the most conspicuous failure of pro-choice Catholic politicians, because it is here that they have failed on the most rudimentary level to speak truth to power. In a recent article, Professor Cathleen Kaveny has argued that there are two styles of moral argumentation within the Christian tradition, namely, "prophecy" and "casuistry."¹⁸⁵ Drawing on the work of Abraham Herschel, Kaveny notes that, in the biblical tradition, a prophet "was an individual who said No to his society, condemning its habits and assumptions, its complacency, waywardness, and syncretism" in the hope of "reconcil[ing] man and God."¹⁸⁶ However, to speak with a prophetic voice in the contemporary setting is not necessarily to claim "to be delivering particular messages from God" but "to call attention to the moral and political challenges confronting" one's society,¹⁸⁷ often by employing metaphors, symbols, and the language of indictment.¹⁸⁸ Casuistry, by contrast, is the painstaking process of reaching moral conclusions in particular, concrete cases, through the reasoned application of moral principles in the light of paradigmatic cases, prior decisions and exceptions.¹⁸⁹ As Kaveny notes, following Paul Ramsey, over time this method of moral decision-making leads to a "deepening, extending and qualifying" of a given moral rule "as it confronts circumstances not included in the central cases of its application."¹⁹⁰

Kaveny argues that some of the breakdown in moral conversation that has occurred in the Catholic community in the United States derives not from differing factual predicates or inconsistent moral

¹⁸³ *Quaestio de abortu*, *supra* note 14, ¶ 21.

¹⁸⁴ *EVANGELIUM VITAE*, *supra* note 25, ¶ 12.

¹⁸⁵ M. Cathleen Kaveny, *Prophecy and Casuistry: Abortion, Torture and Moral Discourse*, 51 *VILL. L. REV.* 499 (2006).

¹⁸⁶ *Id.* at 506 (quoting ABRAHAM J. HERSCHEL, *THE PROPHETS* vol. 1 (1969)).

¹⁸⁷ *Id.* at 506.

¹⁸⁸ *Id.* at 507.

¹⁸⁹ *Id.* at 508-11.

¹⁹⁰ Kaveny, *supra* note 185, at 510.

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premises, but from differing styles of moral discourse¹⁹¹ and the way in which each of these modes of discourse is sometimes misused or ignored.¹⁹² The specific moral disputes that she uses to explore this thesis are legal abortion and state sanctioned torture. Kaveny is, I think, to be applauded for attempting to reconcile these two modes of discourse by acknowledging that each has a place in moral conversation. She argues, quite rightly I believe, that casuistry – the case by case mode of practical reasoning that moves from paradigmatic case, to principle, to application, refinement and exception – is our basic moral language which must sometimes be supplemented by the unyielding moral indictment of prophecy.¹⁹³

What should be clear from my foregoing remarks is that pro-choice Catholic politicians have not been very rigorous casuists. They have instead attempted to mislead the public into thinking that all opposition to abortion is inherently religious and so presumptively illegitimate as a matter of public policy. Moreover, they often seem content to mouth some general interest in the desirability of reducing the number of abortions without bothering to set forth the reasons why this is a desirable goal. That is, they make this claim without explaining why abortion is a bad thing such that its reduction should be sought. It is this silence that shows both a disdain for genuine casuistry and a rejection of the prophetic voice.

Let's be frank. The whole point of an abortion is to kill something – something that is alive. And this thing, this living thing that is killed, is in fact a human being.¹⁹⁴ The singular unwillingness of pro-choice

¹⁹¹ *Id.* at 501.

¹⁹² *Id.* at 561-69.

¹⁹³ Kaveny rightly says that casuistry is something that we simply “cannot do without” in deciding “what to do in concrete cases.” *Id.* at 572. Thus, casuistry is like the ordinary medicine we ingest in order to correct an ordinary moral ailment. By contrast, she likens prophecy to a kind of “moral chemotherapy,” *id.* at 574, which can be dangerous in that it “kills healthy cells as well as diseased ones.” *Id.* at 576.

¹⁹⁴ This is true even in the earliest stages in human gestation. As Kaveny notes, because of the possibility of twinning and recombination prior to fourteen days gestation, some believe that “the scientific evidence does not unequivocally support that judgment.” *Id.* at 564. For a thoughtful paper that engages the scientific literature on this point at the highest level, see Maureen Condit, *When Does Human Life Begin?: A Scientific Perspective* (Westchester Inst. Cot., 2008), available at http://www.westchesterinstitute.net/index.php?option=com_content&view=article&id=351:white-paper&catid=64:white-papers&Itemid=113; see also GERMAIN GRISEZ, *ABORTION: THE MYTHS, THE REALITIES AND THE ARGUMENTS* 11-33 (1970); ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* (2008). For a pithy essay addressing the scientific community's judgment regarding the biological status of the human embryo, see

Catholic politicians to speak this truth – even while being sensitive to the interests of women carrying unwanted pregnancies and mindful of the difficulties involved in curtailing the practice by legal means alone – betrays a tragic failure to answer the vocation of the Catholic politician to bring Christ to the world¹⁹⁵ in answer to the vows of baptism – to speak truth to power.

Moreover, the failure of pro-choice Catholic politicians to publicly acknowledge this fact and instead to mischaracterize such empirical claims as inherently religious and so impermissible in public discourse, seriously calls into question Professor Kaveny's hypothesis (at least with respect to abortion) that disputes within the Catholic community "are not precipitated by factual disputes, or the application of mutually inconsistent moral premises."¹⁹⁶ On the contrary, this failure suggests that, due to the corruption brought on by the desire for career advancement in the political sphere, or the embrace of an ideology that is both anti-Catholic and anti-scientific, these politicians no longer "possess the necessary preconditions for the reliable exercise of practical reason."¹⁹⁷ With these "distorted assumptions and skewed perceptions"¹⁹⁸

William L. Saunders, Jr., *Embryology: Inconvenient Facts*, FIRST THINGS, Dec. 2004, at 13. Of course most abortions do not take place at the earliest stages of formation, but at a later point in human development. According to the latest study by the Centers for Disease Control, 27.9 percent of abortions take place either during or before the sixth week of gestation, such that 72.1 percent take place in the seventh week of gestation or later. Of these, 17.8 percent take place during the seventh week and 14.9 percent take place during the eighth week. The study also indicates that 17.1 percent occur during the ninth and tenth weeks and 9.1 take place between the eleventh and twelfth weeks of gestation. See Lilo T. Strauss, et al., *Abortion Surveillance – United States, 2004*, 56 MMWR SURVEILLANCE SUMMARIES 1, 16 tbls. 6, 7 (2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5609a1.htm>. Some scientists contend that the early embryo is not a "human being" until the formation of an inner cell mass, or implantation, or the appearance of specific structures such as the primitive streak, or limb buds. Many scientists contend that, as a moral matter, the entity in the womb should not be regarded as a "person" until some late state in the pregnancy or even birth. However, no serious scientist contends as an empirical, scientific matter that the entity developing in the womb of its human mother at six weeks gestation or later is not a "human being." See KEITH L. MOORE & T. V. PERSAUD, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* (8th ed. 2007). For a series of stunning photographs of young human beings in the embryonic and fetal stages of development, see JAN E. JIRASEK, *AN ATLAS OF THE HUMAN EMBRYO AND FETUS: A PHOTOGRAPHIC REVIEW OF HUMAN PRE-NATAL DEVELOPMENT* (2000).

¹⁹⁵ *Lumen Gentium*, *supra* note 7, ¶ 35 (insisting that "even when preoccupied with temporal cares, the laity can and must perform eminently valuable work on behalf of bringing the gospel to the world").

¹⁹⁶ Kaveny, *supra* note 185, at 501.

¹⁹⁷ *Id.* at 574.

¹⁹⁸ *Id.*

now dominant, the use of a prophetic mode of discourse would seem to be an appropriate way of addressing these individuals, even on Kaveny's own account. At the same time, we would do well to recall that casuistry, when properly exercised, can speak with a prophetic voice, both in settings where prophecy is unwelcome and where a lax and unrigorous casuistry has become the order of the day. Now, more than ever, pro-choice Catholic politicians must be made to hear the truth about human life and encouraged to find the voice of truth within themselves once again.

VIII. Conclusion

Just prior to the distribution of communion at Mass, everyone present is invited to make an examination of conscience. We acknowledge our sinfulness and our salvation from God as we repeat the words of the Roman Centurion: "Lord, I am not worthy to receive you, but only say the word and I shall be healed."¹⁹⁹ This prayer is not meant to be a mere formality followed by the reception of communion as a foregone conclusion. It is intended to give the individual the opportunity for self-reflection, to give pause and seriously consider his or her standing before the Lord. The equivalent prayer in the Byzantine liturgy is even more poignant:

I believe, O Lord, and confess that You are indeed the Christ, the Son of the living God, Who came into the world to save sinners, of Whom I am the first. Of Your mystical supper, make me a partaker this day, O Son of God, for I will not speak of Your mysteries to Your enemies, nor like Judas will I give You a kiss, but like the good thief will I confess to You.²⁰⁰

This prayer calls us to return to the vows of our baptism, the sacrament where our life in Christ began. It is a call that pro-choice politicians should hear and respond to with renewed fidelity.

¹⁹⁹ ROMAN MISSAL (response to invitation to communion). See also *Matthew* 8:8.

²⁰⁰ DIVINE LITURGY OF ST. JOHN CHRYSOSTOM.