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## John Paul II, the Structures of Sin and the Limits of Law

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**JOHN PAUL II, THE STRUCTURES OF SIN AND  
THE LIMITS OF LAW**

JOHN M. BREEN\*

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INTRODUCTION

On April 2, 2005, the world mourned the death of the servant of God, Karol Wojtyla, who as Pope John Paul II served for twenty-six years as the Bishop of Rome and Supreme Pontiff of the Catholic Church. Many popular commentators saw in his passing the death of a “world leader,” a figure who loomed large on the diplomatic stage, a champion of the cause of peace, and a man who played a significant role in helping to bring about the downfall of Communism in his native Poland and throughout Central and Eastern Europe.<sup>1</sup> While history will surely acknowledge John Paul’s involvement in world events, these descriptions fail to capture the essence of the man and his life, namely, that of being a disciple of Jesus Christ. Like all Christian disciples since the twelve apostles, he fervently sought, through word and example, to share the Gospel with those around him. Thus, in the death of John Paul II, the world saw the passing of one of the great witnesses to the Christian faith.<sup>2</sup>

In virtually every aspect of his ministry as Peter’s successor, John Paul worked to overcome the tumult and confusion that defined the immediate post-conciliar era by bringing to the Church and the world an authentic understanding of the Second Vatican Council.<sup>3</sup> Indeed, the major themes of

1. See, e.g., JOHN O’SULLIVAN, *THE PRESIDENT, THE POPE, AND THE PRIME MINISTER: THREE WHO CHANGED THE WORLD* (2006) (discussing the efforts of Ronald Reagan, Pope John Paul II, and Margaret Thatcher to end Communism); David Remnick, *John Paul II*, *NEW YORKER*, Apr. 11, 2005, at 21–23 (describing John Paul largely in terms of his opposition to world Communism).

2. For a thorough account of the late Holy Father’s life and work, see GEORGE WEIGEL, *WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II* (1999). In addition to his extraordinary record of formal teaching, discussed *infra*, John Paul’s love for Christ and thus his witness to the Christian faith can be seen most vividly and dramatically in his act of forgiveness and reconciliation with his would-be assassin, Mehmet Ali Agca, see *id.* at 412–14, and his public suffering and death from Parkinson’s disease and other ailments.

3. See, e.g., Tracey Rowland, *Reclaiming the Tradition: John Paul II as the Authentic Interpreter of Vatican II*, in JOHN PAUL THE GREAT: MAKER OF THE POST-CONCILIAR CHURCH

John Paul's pontificate gave concrete expression to many of the themes of the Council itself. This can be seen in his efforts to "confirm the brethren in the faith"<sup>4</sup> by providing the faithful with a sound basis for a correct understanding of Christian doctrine and practice;<sup>5</sup> in his efforts to ensure observation of the Christian Sabbath<sup>6</sup> and prayerful celebration of the sacraments including, preeminently, the Eucharist;<sup>7</sup> in his outreach to the Jewish people and his

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(William Oddie ed., 2005); DAVID L. SCHINDLER, HEART OF THE WORLD, CENTER OF THE CHURCH: COMMUNIO ECCLESIOLOGY, LIBERALISM, AND LIBERATION 30 (1996) (arguing that John Paul's *communio ecclesiology* represents the authentic teaching of Vatican II); Richard John Neuhaus, *Rome Diary: April 11: Remembering John Paul II*, FIRST THINGS, June/July 2005, at 58, 62 ("Among the many achievements of the pontificate of John Paul II, some would say the most important achievement, was to secure the hermeneutic for the interpretation of that great council.").

4. *Luke 22:23*.

5. POPE JOHN PAUL II, APOSTOLIC CONSTITUTION *Fidei Depositum* (1992) (marking the publication of the *Catechism of the Catholic Church*), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_constitutions/documents/hf\\_jp-ii\\_apc\\_19921011\\_fidei-depositum\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19921011_fidei-depositum_en.html).

6. POPE JOHN PAUL II, APOSTOLIC LETTER *Dies Domini* (1998) (on keeping the Lord's Day holy), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_letters/documents/hf\\_jp-ii\\_apl\\_05071998\\_dies-domini\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_05071998_dies-domini_en.html).

7. POPE JOHN PAUL II, ENCYCLICAL LETTER *Ecclesia de Eucharistia* (2003) (on the Eucharist in its relationship to the Church), available at [http://www.vatican.va/holy\\_father/special\\_features/encyclicals/documents/hf\\_jp-ii\\_enc\\_20030417\\_ecclesia\\_eucharistia\\_en.html](http://www.vatican.va/holy_father/special_features/encyclicals/documents/hf_jp-ii_enc_20030417_ecclesia_eucharistia_en.html); POPE JOHN PAUL II, APOSTOLIC LETTER *Mane Nobiscum Domine* (2004) (reflecting on the Year of the Eucharist), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_letters/documents/hf\\_jp-ii\\_apl\\_20041008\\_mane-nobiscum-domine\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_20041008_mane-nobiscum-domine_en.html); POPE JOHN PAUL II, APOSTOLIC LETTER *Misericordia Dei* (2002) (on the sacrament of reconciliation), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/motu\\_proprio/documents/hf\\_jp-ii\\_motu-proprio\\_20020502\\_misericordia-dei\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/motu_proprio/documents/hf_jp-ii_motu-proprio_20020502_misericordia-dei_en.html); POPE JOHN PAUL II, APOSTOLIC EXHORTATION *Familiaris Consortio* (1981) (on Christian marriage and the family in the modern world), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_1981122familiaris-consortio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_1981122familiaris-consortio_en.html); POPE JOHN PAUL II, LETTER TO FAMILIES *Gratissimam Sane* (1994) (reflecting on the Year of the Family), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/letters/documents/hf\\_jp-ii\\_let\\_02021994\\_families\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_02021994_families_en.html).

The intimate connection between the sacraments of penance and the Eucharist was a theme that John Paul addressed at the very beginning of his pontificate. See POPE JOHN PAUL II, ENCYCLICAL LETTER *Redemptor Hominis*, para. 20 (1979) [hereinafter *Redemptor Hominis*], available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_04031979\\_redemptor-hominis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis_en.html); see also CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF SACRAMENTS, INSTRUCTION ON THE USE OF VERNACULAR LANGUAGES IN THE PUBLICATION OF THE BOOKS OF THE ROMAN LITURGY *Liturgiam Authenticam* (2001), available at [http://www.vatican.va/roman\\_curia/congregations/ccdds/documents/rc\\_con\\_ccdds\\_doc\\_20010507\\_liturgiam-authenticam\\_en.html](http://www.vatican.va/roman_curia/congregations/ccdds/documents/rc_con_ccdds_doc_20010507_liturgiam-authenticam_en.html); CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF SACRAMENTS, INSTRUCTION ON CERTAIN MATTERS TO BE OBSERVED OR TO BE AVOIDED REGARDING THE MOST HOLY EUCHARIST *Redemptionis Sacramentum* (2004), available at [http://www.vatican.va/roman\\_curia/congregations/ccdds/documents/rc\\_con\\_ccdds\\_doc\\_20040423\\_redemptionis-sacramentum\\_en.html](http://www.vatican.va/roman_curia/congregations/ccdds/documents/rc_con_ccdds_doc_20040423_redemptionis-sacramentum_en.html).

sorrow to God for the sins committed in the name of Christ and his Church;<sup>8</sup> in his untiring work to secure human dignity through the recognition of human rights including the right to life<sup>9</sup> and the right to religious freedom;<sup>10</sup> in his ecumenical efforts to achieve genuine unity among all the separated followers of Christ;<sup>11</sup> in his work on behalf of inter-religious dialogue;<sup>12</sup> and in his challenge to the cultural and intellectual malaise of modern society.<sup>13</sup> In pursuing these themes, the late Pope put to good use his stunning intellect, his

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8. See generally JOHN PAUL II IN THE HOLY LAND: IN HIS OWN WORDS (Lawrence Boadt, CSP & Kevin di Camillo eds., 2005) (collection of homilies, prayers, and addresses of John Paul II during his trip to Egypt, Jordan, Palestine, and Israel, including his address at Yad Vashem and his prayer at the Western Wall); LUIGI ACCATTOLI, WHEN A POPE ASKS FORGIVENESS (Jordan Aumann trans., 1998) (collection of prayers and addresses by John Paul which seek forgiveness for the sins of Christians). For a thoughtful essay on the proper interpretation of John Paul's statements regarding forgiveness, see Mary Ann Glendon, *Contrition in the Age of Spin Control*, FIRST THINGS, Nov. 1997, at 10. See also *The Catholic Church and the Holocaust*, FIRST THINGS, May 1998, at 39 (setting forth the text of the Holy See's Commission for Religious Relations with the Jews, *We Remember: A Reflection on the Shoah*, as well as the text of John Paul II's letter to Edward Cardinal Cassidy, the head of the Commission).

9. POPE JOHN PAUL II, ENCYCLICAL LETTER *Evangelium Vitae* (1995) [hereinafter *Evangelium Vitae*] (addressing the threats to human life presented by legal abortion, euthanasia, and capital punishment), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).

10. Pope John Paul II, Address to the Fiftieth General Assembly of the United Nations Organization (Oct. 5, 1995), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1995/october/documents/hf\\_jp-ii\\_spe\\_05101995\\_address-to-uno\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1995/october/documents/hf_jp-ii_spe_05101995_address-to-uno_en.html); Pope John Paul II, On the Value and Content of Freedom of Conscience and of Religion (Sept. 1, 1980), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/messages/pont\\_messages/1980/documents/hf\\_jp-ii\\_mes\\_19800901\\_helsinki-act\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/messages/pont_messages/1980/documents/hf_jp-ii_mes_19800901_helsinki-act_en.html); Pope John Paul II, Address of His Holiness John Paul II to the 34th Session of the General Assembly of the United Nations (Oct. 2, 1979), in PERMANENT OBSERVER MISSION OF THE HOLY SEE TO THE UNITED NATIONS, PATHS TO PEACE: A CONTRIBUTION: DOCUMENTS OF THE HOLY SEE TO THE INTERNATIONAL COMMUNITY 16, 23–24 (Liturgical Publications, Inc. 1987).

11. POPE JOHN PAUL II, ENCYCLICAL LETTER *Ut Unum Sint* (1995) [hereinafter *Ut Unum Sint*] (on the Church's commitment to ecumenism), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25051995\\_ut-unum-sint\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25051995_ut-unum-sint_en.html).

12. See, e.g., Pope John Paul II, Address to the Representatives of the Christian Churches and Ecclesial Communities and of the World Religions (Oct. 27, 1986), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1986/october/documents/hf\\_jp-ii\\_spe\\_19861027\\_prayer-peace-assisi-final\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1986/october/documents/hf_jp-ii_spe_19861027_prayer-peace-assisi-final_en.html); see also CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON THE UNICITY AND SALVIFIC UNIVERSALITY OF JESUS CHRIST AND THE CHURCH *Dominus Iesus* (2000) (rejecting the purported identification of other religions with Christianity and the claim that there is salvation outside of the redemption won by Christ), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20000806\\_dominus-iesus\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20000806_dominus-iesus_en.html).

13. POPE JOHN PAUL II, ENCYCLICAL LETTER *Fides et Ratio* (1998) [hereinafter *Fides et Ratio*], available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091998\\_fides-et-ratio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091998_fides-et-ratio_en.html).

gift for oratory and flair for the dramatic, and his warm touch as a dedicated pastor and true spiritual father. Thus, it is no surprise that, even before his death, some began to refer to the Pope, without exaggeration, as “John Paul the Great.”<sup>14</sup>

Although the late Pontiff was not a lawyer, his writings on the purpose and nature of law are quite substantial. Indeed, even a cursory examination of the contents of the rich pontificate just ended shows that this is an enormous topic. Throughout his numerous encyclicals, apostolic exhortations and letters, homilies, and addresses, the late Holy Father was a passionate defender of both democracy and the rule of law.<sup>15</sup> In the exercise of his teaching office, John Paul self-consciously sought to recover an authentic understanding of law, an understanding that had been obscured by the distorted notion of autonomy embraced by the liberal democracies of the West and lost in the tragic disregard for the individual that typified the legal regimes of countries under socialism.<sup>16</sup> John Paul’s teaching concerning the relationship between freedom, truth, and law is especially noteworthy in this regard.<sup>17</sup>

Part of the intellectual work that must be performed in every discipline is the work of circumscribing the limits of the discipline itself. Indeed, in order to carry the discipline forward, it is vitally important to know what lies within its boundaries and what exceeds them. The same can be said of the terms and definitions that make up the conceptual framework within a given field of study. That is, in order to understand a particular concept, it is necessary to be

14. In 1997, somewhat audaciously, CRISIS magazine featured a picture of John Paul on its cover with this honorific. See CRISIS, Nov. 1997. While some doubt whether John Paul is truly deserving of the title, see, for example, Susan A. Ross & Robert Louis Wilken, *A Measure of Greatness—The Papacy of John Paul II: Two Assessments*, COMMONWEAL, Oct. 10, 2003, referring to the late Pontiff in this manner has become common place. See, e.g., PEGGY NOONAN, JOHN PAUL THE GREAT: REMEMBERING A SPIRITUAL FATHER (2005). Indeed, Pope Benedict XVI routinely refers to his beloved predecessor in this fashion. See Ian Fisher, *Cardinals Choose a Close Aid to John Paul II to Lead Church*, N.Y. TIMES, April 19, 2005.

15. See, e.g., POPE JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *Ecclesia in America*, para. 19 (1999) (applauding the “growing support for democratic political systems” in the Americas but insisting that “[t]here can be no rule of law . . . unless citizens and especially leaders are convinced that there is no freedom without truth”), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_22011999\\_ecclesia-in-america\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html).

16. See POPE JOHN PAUL II, ENCYCLICAL LETTER *Centesimus Annus*, para. 47 (1991) [hereinafter *Centesimus Annus*], reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 439 (David J. O’Brien & Thomas A. Shannon eds., 1992) [hereinafter CATHOLIC SOCIAL THOUGHT] (“Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person.”), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html).

17. POPE JOHN PAUL II, ENCYCLICAL LETTER *Veritatis Splendor*, paras. 35–53 (1993) [hereinafter *Veritatis Splendor*], available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html).

able to identify that to which it refers, as well as that to which it does not. Because law is a normative discipline, its boundaries are not merely conceptual. They are also prudential.

The topic I wish to explore in the essay that follows is how John Paul II helped to perform this important task with respect to law. He reminded us of the limits of law, of what exceeds the competence of juridical authority. Briefly put, the law may be employed as a means of eliminating or reforming the systemic defects or problems in society that the late pontiff referred to as “structures of sin,” but because it cannot reach the recesses of the human heart, law is severely limited in bringing about true social transformation.<sup>18</sup> Where the ambitions behind a given statute or judicial opinion go beyond law’s capacity to achieve justice and promote the common good, modesty dictates a different course. To put the matter in a slightly different fashion, John Paul’s thought helped to identify the somewhat nebulous line where law ends and society begins. In doing so, John Paul contributed to the long tradition of reflection on the meaning of “culture” and its relationship to law found in the Catholic intellectual tradition in general and the Church’s social teaching in particular. For reasons that I hope will be clear, the place I wish to begin this examination of John Paul’s work is not with a close study of one of his many magisterial texts, but with a passage from Dostoevsky’s *The Brothers Karamazov*.<sup>19</sup> Indeed, this remarkable passage succinctly captures many of the central tenets of modern Catholic social thought, including the work of John Paul II.

Furthermore, in a recent article, David Skeel and William Stuntz argue in favor of legal modesty, a virtue that they say coincides with the understanding of law that emerges from a correct reading of the Christian Bible.<sup>20</sup> Arguing from an Evangelical perspective, they contend that the law is ill-suited to address a number of social ills to which it is frequently directed, including, conspicuously, the problem of abortion.<sup>21</sup> They criticize the practice of enacting merely symbolic laws, a vice they term “legal moralism.”<sup>22</sup> Because these sorts of laws are seldom enforced, they cannot teach the public the values that they purportedly embody.<sup>23</sup> Moreover, because these laws often take the

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18. See *infra* Part II.

19. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* (Andrew H. MacAndrew trans., Bantam Books, 1981) (1880).

20. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 813 (2006) (“If our society is to recover the rule of law, it must be a more modest law that rules.”); *id.* at 815 (“These Biblical principles lead, in other words, to the same rule-of-law principles that our legal system purports to honor.”).

21. *Id.* at 831–39.

22. *Id.* at 832.

23. *Id.* at 836 n.117.

form of extensive moral codes, they undermine the rule of law as a whole by vesting an inordinate amount of discretion in the hands of public officials.<sup>24</sup>

A great deal of Skeel and Stuntz's argument coincides with what John Paul had to say about the limits of law. Nevertheless, their reflections would have benefited from a fuller engagement with the Christian intellectual tradition, including the social magisterium of John Paul II. In the essay that follows I hope to show first, with respect to abortion, that Skeel and Stuntz fail to make the case that a concern for legal modesty should trump a concern for the protection of unborn human life. Put another way, Skeel and Stuntz fail to demonstrate that the value of prudence for safeguarding the integrity of the rule of law should outweigh the pursuit of justice, properly understood. Second, I shall argue that, contrary to Skeel and Stuntz's assertions, anti-abortion laws are not merely symbolic. Indeed, the available evidence indicates that various kinds of restrictions have been effective in curbing the frequency of abortion.<sup>25</sup> Third and finally, I shall argue that Skeel and Stuntz fail to fully appreciate the different ways in which law effectively instructs those who are subject to it. Indeed, as the late Pope well knew, a particular law can serve a vital teaching function that goes beyond the specific instances in which it is enforced. In this way, the law can reaffirm the values already present in a given culture and so reinforce the non-legal norms operating within it.

#### I. FATHER ZOSIMA AND THE LIMITS OF LAW

John Paul's views on the limits of law—of the inability of law to serve as the primary vehicle for truly profound social change—are beautifully captured in a passage from Fyodor Dostoevsky's *The Brothers Karamazov*.<sup>26</sup> Although Dostoevsky was an Orthodox Christian whose criticism and Russian suspicion of the Roman Catholic Church appear throughout his novels, he is in many ways a deeply Catholic writer. The themes he explores—themes of suffering, mercy, and redemption, of the wretched nature of the human condition, and of man's ineluctable desire to touch the divine—in fact underscore the profound communion that still exists between the Orthodox East and the Catholic West, a true unity of heart and mind that existed for a millennium before the Great Schism and which can be fully realized once again.<sup>27</sup> Given this common

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24. *Id.*

25. *See infra* Part V.B.

26. *See* DOSTOEVSKY, *supra* note 19.

27. *But see* Ralph C. Wood, *Ivan Karamazov's Mistake*, *FIRST THINGS*, Dec. 2002, at 29 ("Though he was a student of Western Christianity and culture, Dostoevsky remained fundamentally Russian in his conception of God and the world, of good and evil, of the sacred and the secular. We cannot properly understand his treatment of these matters, therefore, until we grasp his Orthodox reading of them.").



heritage and John Paul's fervent hope to bring about the reunion of East and West, to see the Church once again "breathe with her two lungs,"<sup>28</sup> perhaps it is not surprising that Dostoevsky would share the Pope's understanding of what law can and cannot accomplish.

*The Brothers Karamazov* tells the story of three brothers, Ivan, Dmitry, and Alyosha, and their lecherous drunkard father, Fyodor Karamazov.<sup>29</sup> Before Fyodor's murder at the hands of his bastard child Smerdyakov—the central point of action in the novel—Alyosha suffers another kind of loss.<sup>30</sup> His friend and spiritual mentor, Father Zosima, the elder of the monastery where Alyosha serves as a novice, is ill and near death.<sup>31</sup> Before passing away, however, Father Zosima shares with Alyosha and his other visitors the story of his life prior to becoming a monk.<sup>32</sup>

As a young man, Zosima was an officer in the military who became infatuated with a young woman.<sup>33</sup> She later married another young man while the future monk was away on assignment.<sup>34</sup> Zosima later learned that the woman had in fact been engaged to the other man throughout the period of their friendship.<sup>35</sup> The young officer had only imagined their future romance together.<sup>36</sup> Eager to save his pride, Zosima provokes his would-be rival by publicly insulting the man, and the two agree to a duel with pistols.<sup>37</sup> In the morning before the duel is to take place, however, Zosima experiences a conversion in which he recognizes his own absurd vanity and sees plainly the overwhelming mercy of God.<sup>38</sup> He is overcome by the conviction that "every one of us is answerable for everyone else."<sup>39</sup>

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28. *Ut Unum Sint*, *supra* note 11, para. 54; *see also* POPE JOHN PAUL II, APOSTOLIC LETTER *Oriente Lumen* (1995) (appreciating the special gifts of the Eastern churches and insisting on the need to bring about full communion among all the particular churches in the one Church of Christ), *available at* [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_letters/documents/hf\\_jp-ii\\_apl\\_02051995\\_orientale-lumen\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_02051995_orientale-lumen_en.html); POPE JOHN PAUL II, ENCYCLICAL LETTER *Slavorum Apostoli* (1985) (reflecting in part on the catholicity of the Church and of the common ecclesial and cultural heritage of the Slavic churches, both Catholic and Orthodox), *available at* [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_19850602\\_slavorum-apostoli\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_19850602_slavorum-apostoli_en.html).

29. DOSTOEVSKY, *supra* note 19, at 9.

30. *Id.*

31. *Id.* at 340.

32. *Id.* at 344–92.

33. *Id.* at 356.

34. DOSTOEVSKY, *supra* note 19, at 356–57.

35. *Id.* at 357.

36. *Id.*

37. *Id.*

38. *Id.* at 358–59.

39. DOSTOEVSKY, *supra* note 19, at 359.

Although hoping to avoid any bloodshed, Zosima dutifully attends the duel.<sup>40</sup> His opponent fires the first shot grazing him across the cheek.<sup>41</sup> Zosima then tosses his own pistol aside and asks the man for forgiveness for deliberately offending him and so compelling him to attempt to take the life of another.<sup>42</sup> Although berated by his fellow officers at first, they accept his conduct as a courageous act when he tells them that he has resigned his commission and has decided to enter the monastery.<sup>43</sup> While his resignation is pending, Zosima becomes the talk of the town.<sup>44</sup> He enjoys a period of new-found celebrity and is a frequent guest at numerous parties and gatherings.<sup>45</sup>

On one such occasion he is introduced to Mikhail, a mysterious older visitor with a special interest in Zosima's story of forgiveness.<sup>46</sup> The two become friends and spend many late nights in conversation.<sup>47</sup> We later learn that, many years before, Mikhail killed a young woman who rejected his marriage proposal.<sup>48</sup> Suspicion fell on one of the murdered woman's servants who died in the midst of the trial. Thus, although everyone believed that justice had been served, the crime was never solved.<sup>49</sup> One evening, before confessing his crime to Zosima, Mikhail and the future monk talk about the state of the world and how it can be changed.<sup>50</sup> In recalling the conversation, Zosima relates the following:

He spoke with fervor and looked at me mysteriously, as if asking something of me.

"As to every man being answerable for everybody and everything, not just for his own sins," he went on, "you are absolutely right about it, and the way you succeeded in grasping that idea so fully, all at once, is really remarkable. It is true that when men understand that idea, the kingdom of God will no longer be a dream but a reality."

"But when do you expect that to happen?" I cried bitterly. "When will it come about, if ever? Perhaps it's just a dream and nothing more."

"So you don't believe yourself," he answered, "in the things you preach to others. Let me tell you, then, that this dream, as you call it, will most certainly come true. You may rest assured of that, but it will not happen immediately,

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40. *Id.*

41. *Id.* at 360.

42. *Id.*

43. *Id.* at 360–62.

44. DOSTOEVSKY, *supra* note 19, at 362.

45. *Id.*

46. *Id.* at 364–65.

47. *Id.*

48. *Id.* at 367–68.

49. DOSTOEVSKY, *supra* note 19, at 369.

50. *Id.* at 365–66.

because everything that happens in the world is controlled by its own set of laws. In this case, it is a psychological matter, a state of mind. In order to change the world, man's way of thinking must be changed. Thus, there can be no brotherhood of men before all men become each other's brothers. There is no science, no order based on the pursuit of material gain, that will enable men to share their goods fairly and to respect each other's rights. There will never be enough to satisfy everyone; men will always be envious of their neighbors and will always destroy one another. So to your question when heaven on earth will come about, I can only promise you that it will come without fail, but first the period of man's isolation must come to an end."

"What isolation?" I asked him.

"The isolation that you find everywhere, particularly in our age. But it won't come to an end right now, because the time has not yet come. Today everyone asserts his own personality and strives to live a full life as an individual. But these efforts lead not to a full life but to suicide, because, instead of realizing his personality, man only slips into total isolation. For in our age mankind has been broken up into self-contained individuals, each of whom retreats into his lair, trying to stay away from the rest, hiding himself and his belongings from the rest of mankind, and finally isolating himself from people and people from him. And, while he accumulates material wealth in his isolation, he thinks with satisfaction how mighty and secure he has become, because he is mad and cannot see that the more goods he accumulates, the deeper he sinks into suicidal impotence. The reason for this is that he has become accustomed to relying only on himself; he has split off from the whole and become an isolated unit; he has trained his soul not to rely on human help, not to believe in men and mankind, and only to worry that the wealth and privileges he has accumulated may get lost. Everywhere men today are turning scornfully away from the truth that the security of the individual cannot be achieved by his isolated efforts but only by mankind as a whole.

"But an end to this fearful isolation is bound to come and all men will understand how unnatural it was for them to have isolated themselves from one another. This will be the spirit of the new era and people will look back in amazement at the past, when they sat in darkness and refused to see the light. And it is then that the sign of the Son of Man will appear in the heavens . . . But until that day we must keep hope alive, and now and then a man must set an example, if only an isolated one, by trying to lift his soul out of its isolation and offering it up in an act of brotherly communion, even if he is taken for one of God's fools. This is necessary, to keep the great idea alive."<sup>51</sup>

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51. *Id.*

A. *Materialism and Alienation: The Characteristics of Modern Social Life*

Father Zosima's interlocutor offers a diagnosis of the ills of modern society that is strikingly similar to the Church's social teaching in a number of important respects. First, he identifies the central problem of modern society as that of "isolation,"<sup>52</sup> an attitude and plan of action in which "everyone asserts his own personality and strives to live a full life as an individual."<sup>53</sup> This in turn leads to the atomization of society, "broken up into self-contained individuals, each of whom retreats into his lair, trying to stay away from the rest."<sup>54</sup> The isolated person "become[s] accustomed to relying only on himself" and so places his or her hope for self-sufficiency and realization in the accumulation of material wealth.<sup>55</sup> Mikhail assures his friend that this desire to separate one's self from others is "unnatural," "mad," and a kind of "suicidal impotence" since "the security of the individual cannot be achieved by his isolated efforts but only by mankind as a whole."<sup>56</sup>

Throughout her social magisterium, the Church has taught that the human person can realize his or her authentic good and happiness only in and through community. As the Second Vatican Council stated, social life is something that is integral to the human person and "not something added on to man."<sup>57</sup> Indeed, although man often abuses his freedom by "indulg[ing] in too many of life's comforts and imprisons himself in a kind of splendid isolation,"<sup>58</sup> the Council insisted that "God did not create man for life in isolation, but for the formation of social unity."<sup>59</sup> As Pope Paul VI neatly summarized, writing shortly after the Council, "man finds his true identity only in his social milieu."<sup>60</sup> In the contemporary world, however, the human person experiences "a new loneliness . . . not in the face of a hostile nature which it has taken

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52. *Id.* at 366. Plainly, this phenomenon has not escaped the notice even of those critics writing from a secular point of view. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (discussing the phenomenon of the disintegration of social structures in everyday life).

53. DOSTOEVSKY, *supra* note 19, at 366.

54. *Id.*

55. *Id.*

56. *Id.*

57. SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *Gaudium et Spes*, para. 25 (1965) [hereinafter *Gaudium et Spes*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 16, at 166, 181, available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html).

58. *Id.* para. 31.

59. *Id.* para. 32.

60. POPE PAUL VI, ENCYCLICAL LETTER *Populorum Progressio*, para. 36 (1967) [hereinafter *Populorum Progressio*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 16, at 240, 248, available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_26031967\\_populorum\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html).

centuries to subdue, but in an anonymous crowd which surrounds him and in which he feels himself a stranger.”<sup>61</sup>

The Church’s social tradition acknowledges the fact that, as a corporeal being, the human person needs material possessions in order to survive.<sup>62</sup> Beyond the desire to live in reasonable comfort, however, many people are “infected with a practical materialism,”<sup>63</sup> such that, especially in developed countries, people “seem to be hypnotized, as it were, by economics, so that almost their entire personal and social life is permeated with a certain economic way of thinking.”<sup>64</sup> When the salient feature of a given society becomes an excessive concern with material possessions, then “men harden their hearts, shut out others from their minds and gather together solely for reasons of self-interest rather than out of friendship; dissension and disunity follow soon after.”<sup>65</sup> Indeed, in this context, the pursuit of material things “prevents man’s growth as a human being and stands in opposition to his true

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61. POPE PAUL VI, APOSTOLIC LETTER *Octogesima Adveniens*, para. 10 (1971) [hereinafter *Octogesima Adveniens*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 16, at 265, 268, available at [http://www.vatican.va/holy\\_father/paul\\_vi/apost\\_letters/documents/hf\\_p-vi\\_apl\\_19710514\\_octogesima-adveniens\\_en.html](http://www.vatican.va/holy_father/paul_vi/apost_letters/documents/hf_p-vi_apl_19710514_octogesima-adveniens_en.html).

62. See POPE LEO XIII, ENCYCLICAL LETTER *Rerum Novarum*, para. 34 (1891) [hereinafter *Rerum Novarum*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 16, at 14, 31, available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html); POPE JOHN PAUL II, ENCYCLICAL LETTER *Laborem Exercens*, para. 1 (1981) [hereinafter *Laborem Exercens*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 16, at 352–53 (through work man earns “the daily bread by which his body keeps alive”), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html); *Gaudium et Spes*, *supra* note 57, para. 14 (“Through his bodily composition [man] gathers to himself the elements of the material world . . . [and] . . . through him [they] raise their voice in free praise of the Creator.”).

63. *Gaudium et Spes*, *supra* note 57, para. 10; see also *Evangelium Vitae*, *supra* note 9, para. 23 (declaring that a “practical materialism”—as opposed to a deeply theoretical materialism such as can be found in Marxist thought—dominates thought regarding the human body, sexuality, and procreation such that the criterion of personal dignity “is replaced by the criterion of efficiency, functionality and usefulness: others are considered not for what they ‘are’, but for what they ‘have, do and produce’”). A “practical materialism” may be distinguished from a “theoretical materialism” such as can be found in the thought of philosophers from Lucretius to Marx. A person whose life reflects a practical materialism need not subscribe to some set of metaphysical beliefs that confine the nature of reality to material existence. Instead, a person subscribes to a practical materialism when the tacit premises that appear to inform his or her actions in life suggest that there is nothing more at stake than the physical consequences of the here and now. That is, even if such a person ostensibly believes in God and in the freedom and immortality of the human soul, he or she nonetheless acts as if these things did not exist, as if they were not intimately involved in the physical make-up of the universe, as if reality were confined to mere physicality.

64. *Gaudium et Spes*, *supra* note 57, para. 63.

65. *Populorum Progressio*, *supra* note 60, para. 19.

grandeur,”<sup>66</sup> a greatness which can only be attained by rejecting the isolation of materialism and “enjoy[ing] the higher values of love and friendship, of prayer and contemplation.”<sup>67</sup>

John Paul was an especially ardent critic of what he called the “*error of materialism*” whereby man’s spiritual and personal dimensions are placed “in a position of subordination to material reality.”<sup>68</sup> Although deeply critical of the theory and practice of socialism, John Paul saw in the consumerism of developed countries a “crass materialism”<sup>69</sup> involving “an excessive promotion of purely utilitarian values, with an appeal to the appetites and inclinations towards immediate gratification.”<sup>70</sup> In these societies, the human person “is seen more as a producer or consumer of goods than as a subject who produces and consumes in order to live.”<sup>71</sup> Indeed, in a society defined by material acquisition and consumption, the human person “is directed towards ‘having’ rather than ‘being.’”<sup>72</sup> He or she is encouraged to want “to have more, not in order to be more but in order to spend life in enjoyment as an end in itself.”<sup>73</sup> Because the aspirations of the human person exceed the bounds of the merely physical, the practice of materialism invariably leads to “radical dissatisfaction”<sup>74</sup> and a sense of alienation.<sup>75</sup>

Indeed, in his analysis of alienation in both socialist and liberal societies, John Paul offers perhaps the most powerful critique of the modern phenomenon that Dostoevsky identifies as “isolation.”<sup>76</sup> According to the late Pope, Marxism was right to criticize bourgeois capitalist society, but wrong in that its criticism was “based on a mistaken and inadequate idea of alienation, derived solely from the sphere of relationships of production and ownership.”<sup>77</sup> As such, it understood and attempted to correct the phenomenon of alienation entirely in materialist terms. Thus, Marxism sought to overcome the alienation suffered by workers in being separated from the product of their labor through the elimination of private property and the collective ownership of the means

66. *Id.*

67. *Id.* para. 20.

68. *Laborem Exercens*, *supra* note 62, para. 13.

69. POPE JOHN PAUL II, ENCYCLICAL LETTER *Sollicitudo Rei Socialis*, para. 28 (1987) [hereinafter *Sollicitudo Rei Socialis*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 16, at 395, 412, available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_30121987\\_sollicitudo-rei-socialis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html).

70. *Centesimus Annus*, *supra* note 16, para. 29.

71. *Id.* para. 39.

72. *Id.* para. 36.

73. *Id.*

74. *Sollicitudo Rei Socialis*, *supra* note 69.

75. *Centesimus Annus*, *supra* note 16, para. 41.

76. DOSTOEVSKY, *supra* note 19, at 366.

77. *Centesimus Annus*, *supra* note 16, para. 41.

of production.<sup>78</sup> John Paul noted, however, that the historical experience of socialist countries “sadly demonstrated that collectivism does not do away with alienation but rather increases it, adding to it a lack of basic necessities and economic inefficiency.”<sup>79</sup>

In capitalist societies, John Paul observed a distinct but related form of alienation. That is, unlike the economies under socialism, plagued by chronic inefficiencies and shortages, capitalist economies have been marked by a relatively high level of material prosperity.<sup>80</sup> It is this very success, however—combined with a culture that encourages consumption—that has led to the acute sense of emptiness and isolation endemic to the developed countries of the West.<sup>81</sup> What the alienation of socialism and capitalism share in common, then, is the root error of materialism. As John Paul makes clear, however, the effects of this error in capitalist societies have been especially pernicious. In these societies people experience a “loss of the authentic meaning of life,” namely, love.<sup>82</sup> As the late Pope taught, echoing the teaching of the Council, love is man’s origin, his purpose, and his final calling.<sup>83</sup> Indeed, it is only “through the free gift of self that man truly finds himself.”<sup>84</sup>

Thus, the human person “is alienated if he refuses to transcend himself and to live the experience of selfgiving and of the formation of an authentic human community.”<sup>85</sup> Likewise, “[a] society is alienated if its forms of social organization, production and consumption make it more difficult to offer this gift of self and to establish this solidarity between people.”<sup>86</sup> Consequently, those who inhabit a culture of consumerism often fall prey to a kind of self-love. They become “ensnared in a web of false and superficial gratifications” and so are unable “to experience their personhood in an authentic and concrete

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78. See, e.g., Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 66 (Richard C. Tucker ed., 2d ed., 1978).

79. *Centesimus Annus*, *supra* note 16, para. 41.

80. *Id.*

81. *Id.*

82. *Id.*

83. Perhaps John Paul II’s most eloquent statement on love and its essential connection to human nature can be found in his first encyclical. *Redemptor Hominis*, *supra* note 7, para. 10. The centrality of love in the vocation of men and women has been a theme taken up with renewed vigor by John Paul’s successor. See POPE BENEDICT XVI, ENCYCLICAL LETTER *Deus Caritas Est* (2005), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html).

84. *Centesimus Annus*, *supra* note 16, para. 41 (explaining that through love “man finds again the greatness, dignity and value that belongs to his humanity”); see also *Gaudium et Spes*, *supra* note 57, para. 24 (“[M]an, who is the only creature on earth which God willed for itself, cannot fully find himself except through a sincere gift of himself.”).

85. *Centesimus Annus*, *supra* note 16, para. 41.

86. *Id.*

way.”<sup>87</sup> Where this kind of alienation takes hold, society ceases to be a community of persons and instead becomes “a mass of individuals placed side by side, but without any mutual bonds.”<sup>88</sup> In this setting, the isolation that Mikhail describes holds sway as each individual “wishes to assert himself independently of the other and in fact intends to make his own interests prevail.”<sup>89</sup>

*B. Solidarity: The Human Person and Community*

Second, Mikhail says that the antidote for the isolation that afflicts modern society is for people to realize the idea that Zosima grasped in the moment of his conversion, namely, that “every man [is] answerable for everybody and everything, not just for his own sins.”<sup>90</sup> In Catholic social thought, the idea that men and women, across space and time, share a radical connection with one another is known as the principle of solidarity.<sup>91</sup> As John Paul II explained in his encyclical *Sollicitudo Rei Socialis*, solidarity is not “a feeling of vague compassion or shallow distress at the misfortunes” of others.<sup>92</sup> Rather, “it is a firm and persevering determination to commit oneself to the common good.”<sup>93</sup> Indeed, solidarity is the antithesis of the self-consuming isolation that Mikhail criticizes. It reflects a “readiness . . . to ‘lose oneself’ for the sake of the other instead of exploiting him, and to ‘serve him’ instead of oppressing him for one’s own advantage.”<sup>94</sup> Thus, solidarity is a conviction, and not a mere sentiment because it involves the recognition of a truth that moves the will to action—the truth that all of humanity is radically connected such that no individual can truly be free, can truly be him or herself if another is diminished.

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87. *Id.*

88. *Evangelium Vitae*, *supra* note 9, para. 20.

89. *Id.*

90. DOSTOEVSKY, *supra* note 19, at 365.

91. *Sollicitudo Rei Socialis*, *supra* note 69, para 38.

92. *Id.*

93. *Id.*

94. *Id.* For a useful discussion of John Paul’s use of the term “solidarity” as an attitude, virtue, principle, and obligation, see Patricia A. Lamoureux, *Commentary on Laborem Exercens* (On Human Work), in *MODERN CATHOLIC SOCIAL TEACHING* 389, 398–99 (Kenneth R. Himes, O.F.M. ed. 2005) [hereinafter *MODERN CATHOLIC*] and Charles E. Curren, Kenneth R. Himes, O.F.M., & Thomas A. Shannon, *Commentary on Sollicitudo rei socialis* (On Social Concern), in *MODERN CATHOLIC*, *supra*, at 415, 426–30.



C. *The Insufficiency of Mere Structural Change*

Third, and relatedly, Mikhail maintains a healthy skepticism regarding the efficacy of changes in social structure to bring forth what he refers to in biblical language as “the Kingdom of God.”<sup>95</sup> With respect to economic justice, for example, he insists that “[t]here is no science, no order based on the pursuit of material gain, that will enable men to share their goods fairly and respect each other’s rights.”<sup>96</sup> The reason why such efforts will always fall short is that there will always be some scarcity and “men will always be envious of their neighbors.”<sup>97</sup> What is needed is something more than a new program or method of operation. What is needed is a change in the hearts of men and women. As Mikhail bluntly states, “In order to change the world, man’s way of thinking must be changed.”<sup>98</sup>

As set forth in greater detail in the section that follows,<sup>99</sup> the Catholic social tradition has long held that the elimination of unjust structures and patterns of behavior will never be sufficient to bring about a truly just society. Law—including the structures that law creates and regulates—operates on the human person largely, although not exclusively, as an external force, an efficient cause. As a coercive force, law cannot effect change from the inside. Standing alone, it cannot change the internal dispositions and attitudes of the human person.

Echoing the teaching of his predecessors, John Paul II made clear in his encyclical *Centesimus Annus* that the transformation of society involves two enormous tasks.<sup>100</sup> First, society has an obligation to remove the “specific structures of sin which impede the full realization of those who are in any way oppressed by them” and “replace them with more authentic forms of living in community.”<sup>101</sup> At the same time, he warns that structural transformation is secondary to moral renovation. That is, “the first and most important task [to be] accomplished [is] within man’s heart” in which everyone comes to recognize and embrace an “active commitment to [one’s] neighbor” since “no one can consider himself extraneous or indifferent to the lot of another member of the human family.”<sup>102</sup> Solidarity should impel the human person to break out of the isolation that characterizes so much of modern life and work to remove the structures that impede the cause of justice, as well as the impediments that lie within his or her own heart.

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95. DOSTOEVSKY, *supra* note 19, at 365.

96. *Id.*

97. *Id.* at 366.

98. *Id.* at 365.

99. *See infra* Part II.B.

100. *Centesimus Annus*, *supra* note 16.

101. *Id.* para. 38.

102. *Id.* para. 51.

## II. STRUCTURES OF SIN AND THE NEED FOR PERSONAL CONVERSION

Beginning with Pope Leo XIII's critique of unregulated market capitalism in *Rerum Novarum*, the Church's social doctrine has been deeply critical of institutions and systems that victimize the weak and work to corrupt those with power.<sup>103</sup> The "structures of sin" that haunt the men and women of today take many forms.<sup>104</sup> Among the many sources of injustice that have taken institutional form in the modern world, the Church's social tradition has specifically identified and critiqued the militarism and competition in arms among nations;<sup>105</sup> the systemic mistreatment of ethnic and racial minorities;<sup>106</sup> the neo-colonialism that defined the immediate post-war era and the harmful effects of global trade on local economies and ways of life;<sup>107</sup> the perverse incentives created by the legal form of the modern business corporation;<sup>108</sup> and the modern state as such, which often arrogates to itself responsibility over matters that properly rest with individuals, families, and intermediate institutions of free association.<sup>109</sup>

103. See *Rerum Novarum*, *supra* note 62.

104. See *Sollicitudo Rei Socialis*, *supra* note 69, para 36.

105. POPE JOHN XXIII, ENCYCLICAL LETTER *Pacem in Terris*, paras. 109–19 (1963) [hereinafter *Pacem in Terris*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 16, at 131, 148–50, available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html); SYNOD OF BISHOPS, JUSTICE IN THE WORLD (1971), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 16, at 288–89 (“The arms race is a threat to man’s highest good, which is life; it makes poor peoples and individuals yet more miserable, while making richer those already powerful; it creates a continuous danger of conflagration, and in the case of nuclear arms, it threatens to destroy all life from the face of the earth.”); *Populorum Progressio*, *supra* note 60, para. 53 (calling the arms race “debilitating”); *Centesimus Annus*, *supra* note 16, para. 18 (bemoaning the fact that “[a]n insane arms race [has] swallowed up the resources needed for the development of national economies and for assistance to the less developed nations”).

106. *Pacem in Terris*, *supra* note 105, paras. 94–100; *Gaudium et Spes*, *supra* note 57, para. 29 (“[W]ith respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God’s intent.”); *Octogesima Adveniens*, *supra* note 61, para. 16 (condemning discrimination and calling for the “fair sharing” of a nation’s riches).

107. *Populorum Progressio*, *supra* note 60, para. 52 (describing “a new form of colonialism” as one that “exert[s] economic pressure . . . or create[s] a new power group with controlling influence”).

108. POPE PIUS XI, ENCYCLICAL LETTER *Quadragesimo Anno*, para. 132 (1931) [hereinafter *Quadragesimo Anno*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 16, at 42, 72 (stating that laws “dividing and limiting the risk of business” define the corporate form and have “given occasion to the most sordid license” and “reduced [the] obligation of accountability” such that “directors of business companies, forgetful of their trust, betray the rights of those whose savings they have undertaken to administer”), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html).

109. *Id.* paras. 78–79.

### A. *The Phenomenon of Social Sin*

Although many examples of “social sin” appear throughout the Catholic social tradition, the idea itself did not receive a thorough exposition and conceptual development until the pontificate of John Paul II. Specifically, the concept of “social sin” and “structures of sin” was the subject of some sustained reflection both in John Paul’s 1984 post-synodal apostolic exhortation *Reconciliatio et Paenitentia*<sup>110</sup> and his 1987 encyclical *Sollicitudo Rei Socialis*.<sup>111</sup>

What stands out in John Paul’s analysis is a recognition that unjust structures exist in the world which ties these structures to the personal sins of individuals. Thus, according to the Pope, “it is not out of place to speak of ‘structures of sin’” so long as it is understood that such institutions and methods of behavior are always “rooted in personal sin, and thus always linked to the concrete acts of individuals.”<sup>112</sup> Indeed, “[s]in, in the proper sense, is always a personal act . . . an act of freedom on the part of an individual person and not properly of a group or community.”<sup>113</sup> Thus, the Church rejects the notion that injustice is present in the world simply because of the existence of “some vague entity or anonymous collectivity such as the situation, the system, society, structures or institutions.”<sup>114</sup> As John Paul makes clear, it is individuals “who introduce these structures, consolidate them and make them difficult to remove.”<sup>115</sup> Because the exercise of human freedom is always “conditioned by the social structure in which [a person] lives, by the education he has received and by his environment,”<sup>116</sup> when these malignant social forms go unchallenged, they “grow stronger, spread, and become the source of other sins, and so influence people’s behavior.”<sup>117</sup>

Thus, the Pope sees the relationship between structures of sin and particular sinful acts as dynamic and mutually reinforcing. On the one hand, unjust institutions and social phenomena are themselves the “result of the

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110. POPE JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *Reconciliatio et Paenitentia* (1984) [hereinafter *Reconciliatio et Paenitentia*], available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_02121984\\_reconciliatio-et-paenitentia\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_02121984_reconciliatio-et-paenitentia_en.html).

111. *Sollicitudo Rei Socialis*, *supra* note 69. Although the vocabulary employed may have been different, the concept of social sin long preceded the advent of modern Catholic social teaching. See Maurizio Ragazzi, *The Concept of Social Sin in Its Thomistic Roots*, 7 J. MARKETS & MORALITY 363 (2004).

112. *Sollicitudo Rei Socialis*, *supra* note 69, para. 36.

113. *Reconciliatio et Paenitentia*, *supra* note 110, para. 16.

114. *Id.*

115. *Sollicitudo Rei Socialis*, *supra* note 69, para. 36.

116. *Centesimus Annus*, *supra* note 16, para. 38.

117. *Sollicitudo Rei Socialis*, *supra* note 34, para. 36.

accumulation and concentration of many personal sins.”<sup>118</sup> Indeed, these structures continue to exist precisely because individuals deliberately choose to seek their own advantage at the expense of others, or by acting with complicity or indifference in the face of evil.<sup>119</sup> On the other hand, these structures encourage unjust behavior by creating the aura of normalcy and legitimacy. As a consequence, “the moral conscience of many people becomes seriously clouded,” the difference between right and wrong is obscured, and people experience a “loss of the sense of sin.”<sup>120</sup> Thus, a given social structure—such as a system of short-term economic incentives that discourage employers from paying workers a living wage, or a culture of racial discrimination deeply rooted in the practices and customs of a given community—is not in itself a primary cause of moral evil since “an institution, a structure, society itself . . . is not in itself the subject of moral acts.”<sup>121</sup> Instead, the subject of all moral action is the human person who remains free to choose how to live his life within the limits of the circumstances that surround him. Accordingly, “[a]t the heart of every situation of sin are always to be found sinful people.”<sup>122</sup>

*B. Papal and Conciliar Teaching on the Limitations of Structural Reform*

Although the Church has long advocated the elimination of unjust structures, customs, and modes of behavior, Catholic social teaching has never held that structural reform by itself will ever be sufficient to bring about the creation of a just society. Indeed, humanity’s fallen nature and the proclivity of men and women to pursue their own advantage at the expense of others suggests—and human experience confirms—that once the current unjust structures are swept away they will be replaced by new and perhaps more virulent social forms of oppression and exploitation.<sup>123</sup> Thus, in advocating for

118. *Reconciliatio et Paenitentia*, *supra* note 110, para. 16.

119. *Id.*

120. *Id.* para. 18.

121. *Id.* para. 16.

122. *Id.*

123. It is precisely for this reason that, contrary to the suggestions of some critics, compare Leonid Kishkovsky, *An Ecumenical Afterword to A CENTURY OF CATHOLIC SOCIAL THOUGHT: ESSAYS ON “RERUM NOVARUM” AND NINE OTHER KEY DOCUMENTS 177, 179–81* (George Weigel & Robert Royal eds., 1991) [hereinafter *A CENTURY OF CATHOLIC SOCIAL THOUGHT*] (citing Father Alexander Schmemmann and arguing that the Church in the West incorrectly saw itself as “an institution that assists in the achievement *in this world* of human dreams and aspirations” thus lending support to “secular eschatologies” and “secular utopias” and claiming that the Church in the East can help recover “the eschatological perspective of Christianity” that eschews all ideology), Catholic social thought is not tinged with utopianism. Indeed, it views the world through the clear lens of Christian realism, a lens which plainly sees human nature as fallen but redeemed through the power of Christ and his cross. As an “expert in humanity,” the Church knows that every utopian vision of earthly paradise is doomed to failure. Pope Paul VI, Address Before the General Assembly of the United Nations (Oct. 4, 1965) (internal quotation omitted).

change in the social order, the Church has always championed another, deeper kind of reform—a reform of the human heart.

This dual concern for structural change and personal reform has been a consistent theme in Catholic social thought from its inception. For example, in *Rerum Novarum*, Pope Leo XIII argued on behalf of the right of laborers to work under humane conditions and to receive a just wage, and against the exploitation of workers under unconscionable wage contracts.<sup>124</sup> At the same time, Leo makes clear that “the chief good that society can possess is virtue.”<sup>125</sup> Although Leo clearly sees a role for the state in relieving misery and achieving just relations among men, he insists that “no human expedients will ever make up for the devotedness and self sacrifice of Christian charity.”<sup>126</sup> Here, as William Murphy has noted, Leo not only makes clear the bond “between the commitment to social justice and the necessity of the virtuous life,” he also upholds “the life of charity as the ultimate flowering of the search for justice.”<sup>127</sup>

In his encyclical *Quadragesimo Anno*, Pope Pius XI made even more explicit the need for a genuine moral renovation to accompany the reform of social institutions and practices. Indeed, Pius insisted that all efforts aimed at the “reconstruction and perfection of social order can surely in no wise be brought to realization without reform of morality.”<sup>128</sup> Specifically, Pius contended that a truly meaningful “social reconstruction . . . must be [preceded by] a renewal of the Christian spirit” and that, in the absence of such renewal, “all our efforts will be futile and our social edifice will be built not upon a rock, but upon shifting sand.”<sup>129</sup>

John XXIII devoted his encyclical *Pacem in Terris* to the subject of peace among nations.<sup>130</sup> This reflection took place in the shadow of an escalating arms race between the United States and the Soviet Union, as well as an often-bloody competition for allies among developing nations.<sup>131</sup> Indeed, John issued the encyclical only a few months after the Cuban Missile Crisis when the superpowers and the world came perilously close to the calamity of nuclear

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Moreover, Catholic social thought is not an ideology and the Church has no concrete model of action to put forth. *Centesimus Annus*, *supra* note 16, para. 43. At the same time, the Church looks to the future with confident hope knowing that within the hearts of men and women lies the seed of genuine cultural renewal and societal transformation.

124. *Rerum Novarum*, *supra* note 62, paras. 34–35.

125. *Id.* para. 34.

126. *Id.* para. 30.

127. William Murphy, *Rerum Novarum*, in *A CENTURY OF CATHOLIC SOCIAL THOUGHT*, *supra* note 123, at 1, 24.

128. *Quadragesimo Anno*, *supra* note 108, para. 97.

129. *Id.* para. 127.

130. *Pacem in Terris*, *supra* note 105.

131. *Id.* para. 109–13.

conflagration. John's letter contains many recommendations for structural reform among nations and within the international order. These include the universal recognition and enforcement of human rights, support for democratic forms of government, calls for disarmament, and the establishment of an effective world authority.<sup>132</sup> Even if these sorts of reforms are implemented, however, John insists that structural changes will only go so far: "The world will never be the dwelling place of peace, till peace has found a home in the heart of each and every man, till every man preserves in himself the order ordained by God to be preserved."<sup>133</sup>

Building on the work of Pope John and his predecessors, the Second Vatican Council offered a similar diagnosis, and insisted on the need for both structural change and moral renewal. In *Gaudium et Spes* the Council fathers noted that "the disturbances which so frequently occur in the social order result in part from the natural tensions of economic, political and social forms" but that "at a deeper level they flow from man's pride and selfishness, which contaminate even the social sphere."<sup>134</sup> Thus, according to the Council, the problems that beset the modern world are not the result of the mere existence of certain unjust "social forms."<sup>135</sup> Because justice is a virtue that describes the dynamic of relations among people, it cannot be achieved through the simple, mechanical removal of an unjust "part."<sup>136</sup> Admittedly, the depravity of some customs, methods of operation, and structures may be so profound that their existence precludes the possibility of a truly just social order, and the presence of these institutional forms in social life may well create "new inducements to sin."<sup>137</sup> Nevertheless, structures, standing alone, are impotent. The ultimate source of the injustice that afflicts the world is the wrongful exercise of human freedom by individuals. Thus, the creation of a truly just social order will require more than simply the reform or removal of the structures of sin. Instead, as the Council noted, it will require the reform of every human heart through "strenuous efforts and the assistance of grace."<sup>138</sup>

Following the Council, Paul VI expressed a similar skepticism regarding the likely success of structural changes, standing alone. Paul's teaching is distinguished, however, in that it is set forth in deeply personal, indeed, existential terms. Paul insists that the cause of social renewal cannot be confined to the reform of institutions: "It is not enough," he says, "to recall principles, state intentions, point to crying injustice and utter prophetic

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132. *Id.* paras. 11–27, 67–79, 109–19, 130–45.

133. *Id.* para. 165.

134. *Gaudium et Spes*, *supra* note 57, para. 25.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

denunciations.”<sup>139</sup> Indeed, “[i]t is too easy to throw back on others responsibility for injustice, if at the same time one does not realize how each one shares in it personally, and how personal conversion is needed first.”<sup>140</sup> Thus, every person must “examine himself, to see what he has done up to now, and what he ought to do.”<sup>141</sup>

Even more than his predecessors, John Paul stressed the limitations of merely bureaucratic and institutional reforms in effecting authentic social change. As someone who lived through and indeed resisted both the Nazi occupation of Poland and the ensuing Communist dictatorship, John Paul was someone well acquainted with the most elaborate and malevolent structures of sin imaginable. Accordingly, a call for thorough-going institutional reform in various aspects of social life was a common theme throughout John Paul’s social magisterium. At the same time, John Paul knew, far better than his adversaries, that in many areas of life, law is unable to effect change precisely because the coercive power of the state cannot reach into the recesses of the human heart. Despite its seeming omnipotence, law cannot make human beings act with genuine charity toward one another, nor can it make someone believe that which his or her conscience and reason refuse to accept as true.<sup>142</sup> Moreover, when it attempts to change that which it cannot, law becomes a cruel caricature of itself by destroying the very subject it was designed to serve, namely, the human person. As one cognizant of law’s limits, John Paul was also mindful of the fact that “even when such a situation can be changed in its structural and institutional aspects by the force of law . . . the change [often] proves to be incomplete, of short duration and ultimately vain and ineffective—not to say counterproductive if the people directly or indirectly responsible for that situation are not converted.”<sup>143</sup>

### III. LAW AND THE PRIORITY OF CULTURE

John Paul’s appreciation for the limits of law is evidenced not only in his treatment of the “structures of sin,” but also in his analysis of “culture,” an analysis which appears as a recurring theme throughout his pontificate. The fathers of the Second Vatican Council made “culture” a center point of the Council’s Pastoral Constitution on the Church in the Modern World, *Gaudium*

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139. *Octogesima Adveniens*, *supra* note 61, para. 48.

140. *Id.*

141. *Id.*

142. Cf. SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM *Dignitatis Humanae Personae*, para. 1 (1965) [hereinafter *Dignitatis Humanae*], reprinted in THE DOCUMENTS OF VATICAN II, at 675 (Walter M. Abbott, S.J. ed., & Joseph Gallagher trans., 1966) (“The truth cannot impose itself except by virtue of its own truth, as it makes its entrance into the mind at once quietly and with power.”), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

143. *Reconciliatio et Paenitentia*, *supra* note 110, para. 16.

*et Spes*.<sup>144</sup> Unfortunately, their use of the word was marked by a certain “terminological looseness.”<sup>145</sup> Indeed, despite the frequent reference made to “culture” throughout the document, the Council fathers “nonetheless failed to identify precisely what *they* meant with each usage of the term.”<sup>146</sup> Here John Paul’s thoughtful treatment of “culture” supplies a useful tonic for the careless overuse of this word.

#### A. *John Paul II and the Meaning of “Culture”*

According to John Paul, culture can be found at the center of society and the experience of every person because of the answers it provides to life’s most basic questions. That is, the human person is a being who cannot avoid confronting certain questions regarding the nature of his or her existence: “Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life?”<sup>147</sup> Indeed, for John Paul, “[n]o one can escape from the fundamental questions: What must I do? How do I distinguish good from evil?”<sup>148</sup> Precisely because “[n]o-one can avoid this

144. *Gaudium et Spes*, *supra* note 57, paras. 53–62.

145. See TRACEY ROWLAND, *CULTURE AND THE THOMIST TRADITION AFTER VATICAN II* 18 (2003).

146. *Id.* at 20.

147. *Fides et Ratio*, *supra* note 13, para. 1 (emphasis omitted).

148. *Veritatis Splendor*, *supra* note 17, para. 2 (emphasis omitted). In presenting these questions as central to the “mystery of man,” John Paul was again echoing the teaching of the Second Vatican Council. *Accord Gaudium et Spes*, *supra* note 57, para. 10 (noting “the number constantly swells of the people who raise the most basic questions or recognize them with a new sharpness: What is man? What is this sense of sorrow, of evil, of death, which continues to exist despite so much progress? What purpose have these victories purchased at so high a cost? What can man offer to society, what can he expect from it? What follows this earthly life?”); SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON THE RELATIONSHIP OF THE CHURCH TO NON-CHRISTIAN RELIGIONS *Nostra Aetate*, para. 1 (1965), *reprinted in* THE DOCUMENTS OF VATICAN II, at 660 (Walter M. Abbott, S.J. ed., & Joseph Gallagher trans., 1966) (referring to “the unsolved riddles of the human condition, which today, even as in former times, deeply stir the hearts of men: What is man? What is the meaning [and] aim of our life? What is moral good [and] what [is] sin? Whence suffering and what purpose does it serve? Which is the road to true happiness? What are death, judgment and retribution after death? What, finally, is that ultimate inexpressible mystery which encompasses our existence: whence do we come, and where are we going?”), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_nostra-aetate\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html).

For both the Pope and the Council, and indeed the Church throughout history, “the decisive answer to every one of man’s questions, his religious and moral questions in particular, is given by Jesus Christ, or rather is Jesus Christ himself, as the Second Vatican Council recalls: ‘In fact, it is only in the mystery of the Word incarnate that light is shed on the mystery of man.’” *Veritatis Splendor*, *supra* note 17, para. 2 (quoting *Gaudium et Spes*, *supra* note 57, para. 22). Thus, “[t]he man who wishes to understand himself thoroughly—and not just in accordance with immediate, partial, often superficial, and even illusory standards and measures of his being—he must with his unrest, uncertainty and even his weakness and sinfulness, with his life and death,



questioning,”<sup>149</sup> “all men and women . . . are in some sense philosophers” in that, “one way or [an]other, they shape a comprehensive vision and an answer to the question of life’s meaning; and in the light of this they interpret their own life’s course and regulate their behaviour.”<sup>150</sup> At the same time, the human person is a social animal. He or she does not formulate the answers to these questions in isolation. Instead, “[f]rom birth . . . [men and women] are immersed in traditions which give them not only a language and a cultural formation but also a range of truths in which they believe almost instinctively.”<sup>151</sup>

A culture, then, constitutes the response that a given people have to these fundamental questions, a response that is constantly being revised and worked out over time. It is expressed not only through the customs and traditions of a people, but through their language, history, art, commerce, and politics. Indeed, “[a]ll human activity takes place within a culture and interacts with culture.”<sup>152</sup> At the same time, a given culture reveals its deepest identity in the position it takes “towards the fundamental events of life, such as birth, love, work and death” as well as “the mystery of God.”<sup>153</sup> Thus, “[d]ifferent cultures are basically different ways of facing the question of the meaning of personal existence.”<sup>154</sup>

As such, every culture is, in essence, a normative and didactic enterprise. It indicates what is desirable and permissible within a given society. It instructs both the observer and the participant as to how they ought to act. Indeed, as Joseph Pieper reminds us, and as the etymology of the word confirms, at the heart of every “culture” is a “cult” in the sense of religious devotion.<sup>155</sup> That is, a culture is a societal answer to the question of value. Every culture renders a whole series of judgments as to what is truly important in life. In the norms implicit in the practices it supports and encourages, every culture identifies what is really worth valuing, what is worth the sacrifice and effort necessary to pursue and possess that which is most prized. Thus, in

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draw near to Christ.” *Redemptor Hominis*, *supra* note 7, para. 10. Although it is entirely appropriate to give *cultural* expression to this fundamentally Christocentric perspective, the Church believes that to give *legal* expression to this truth in the form of coercive laws would violate the dignity of the human person. See *Dignitatis Humanae*, *supra* note 142. Thus, although Christ *is* the answer to all the questions of the human heart, he is the answer that people must come to freely on their own. The state cannot force anyone to come to this truth, to embrace Christ, without at the same time engaging in conduct that is deeply sinful and offensive to God.

149. *Fides et Ratio*, *supra* note 13, para. 27.

150. *Id.* para. 30.

151. *Id.* para. 31.

152. *Centesimus Annus*, *supra* note 16, para. 51.

153. *Id.* para. 24.

154. *Id.*

155. JOSEPH PIEPER, LEISURE THE BASIS OF CULTURE 76–77 (Alexander Dru trans., Pantheon Books 1952).

ways which are sometimes subtle and sometimes overt, but which are always readily understood, a given culture defines that which is truly deserving of *worship* as the highest good to be attained.

*B. Identifying the Salient Features of American Culture*

Again, the answers that a culture proposes to the fundamental questions and events of life are not made in the abstract. Instead, they are made present in the most mundane and concrete decisions of life. As John Paul makes clear, “[a] given culture reveals its overall understanding of life through the choices it makes in production and consumption.”<sup>156</sup> Thus, looking at the United States, the answers proposed by our culture to these basic questions can be found in such things as the size and location of the homes that people choose to build,<sup>157</sup> in the number of hours they devote to work and to leisure,<sup>158</sup> in the kinds of cars they choose to drive,<sup>159</sup> in how they regard the durability and disposability of both goods and packaging,<sup>160</sup> in the kinds of meals they choose to enjoy,<sup>161</sup> and in their use of resources as basic as water.<sup>162</sup> Plainly, the

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156. *Centesimus Annus*, *supra* note 16, para. 36.

157. ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* x, 4 (2000) (lamenting the “self-destructive [growth]” of suburban sprawl, which the authors consider a “soulless [collection of] subdivisions, . . . strip shopping centers, . . . [and] office parks”); Fred A. Bernstein, *Are McMansions Going Out of Style?*, N.Y. TIMES, Oct. 2, 2005, §11, at 1 (reporting that the size of the average American house rose from about 1,500 square feet in 1970 to over 2,300 square feet in 2001, but that the trend for larger houses is abating).

158. Alberto Alesina et al., *Work and Leisure in the United States and Europe: Why So Different?*, 20 NBER MACROECONOMICS ANNUAL 1, 1 (2006) (arguing that Europeans work more than Americans and take more vacations largely as a result of European labor market regulations of the 1970s, '80s, and '90s).

159. See KEITH BRADSHER, *HIGH AND MIGHTY: SUVs—THE WORLD’S MOST DANGEROUS VEHICLES AND HOW THEY GOT THAT WAY* (2002) (highlighting the safety and environmental concerns of sport utility vehicles and proposing various regulatory and other incentives to increase safety standards or drive SUVs off the market).

160. See HEATHER ROGERS, *GONE TOMORROW: THE HIDDEN LIFE OF GARBAGE 2* (2005) (arguing that Americans produce the most waste of any country in the world and pointing out the problems with wasteful packing, recycling programs, and flawed landfills and incinerators). *But see* Kirk Johnson, *Throwaway Societies of Yesteryear: Past Decades Were the Golden Ages for Waste, Scientist Says*, N.Y. TIMES, Nov. 22, 2002, at B1 (reporting one study finding that New York City’s output of garbage per person is decreasing over the course of the century).

161. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 9 (2001) (discussing the “diverse influences of fast food . . . on [the] distinctively American way of viewing the world” and arguing that consumers can positively affect social and economic trends such as obesity, unsafe working conditions, and the domestic agriculture industry by choosing not to purchase fast food).

162. EPA, *CLEANER WATER THROUGH CONSERVATION* (1995), available at <http://www.epa.gov> (suggesting different methods of using water efficiently, thereby lowering the high demand for water in the United States that can contribute to water source pollution).

identity of a given culture is not confined to the ideas proposed by its writers and artists. At the same time, the answers that our culture provides to life's questions can also be gleaned from the music,<sup>163</sup> television, films,<sup>164</sup> and other forms of entertainment<sup>165</sup> that Americans produce and consume.

These choices give some indication of what Americans consider important, what it is that they believe is truly deserving of sacrifice, even worship. Plainly, any attempt to summarize something as complicated as American culture risks falling into caricature. General descriptions of vast subjects must, of necessity, forgo nuance. Having said that, it would not be wrong to say that the culture reflected in the choices made by most Americans is defined by a set of "consumer attitudes and life-styles" that celebrate "having" over "being."<sup>166</sup> Indeed, the description that Father Zosima's friend offers of a society in which "the more goods [one] accumulates, the deeper [one] sinks into suicidal impotence" is chilling in its familiarity.<sup>167</sup> That is, although Americans have often demonstrated a remarkable sense of generosity, especially in times of crisis,<sup>168</sup> the choices we make day to day, under ordinary circumstances, tend to reflect a kind of "self-love which leads to an unbridled affirmation of self-interest," a self-love that often frustrates the demands of justice and the requirements of the common good.<sup>169</sup> Thus, the "cult" at the heart of

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163. Steven C. Martino et al., *Exposure to Degrading Versus Nondegrading Music Lyrics and Sexual Behavior Among Youth*, 118 PEDIATRICS 430 (2006) (arguing that the degrading sexual lyrics prevalent in popular music contribute to the problem of early and risky sexual activity in the United States).

164. See KID STUFF: MARKETING SEX AND VIOLENCE TO AMERICA'S CHILDREN (Diane Ravitch & Joseph P. Viteritti eds., 2003) (concluding that exposure to entertainment containing explicit sex and violence negatively affects the social and psychological development of adolescents, and urging parents to counter negative media messages by discussing them with children).

165. See THOMAS BARKER & MARJIE BRITZ, *JOKERS WILD: LEGALIZED GAMBLING IN THE TWENTY-FIRST CENTURY* (2000) (conducting an examination of legalized gambling in the United States and its effects on individuals and communities); PHILIP JENKINS, *BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET* (2001) (urging more effective law enforcement against child pornography and suggesting a prohibition of the newsgroups and message boards where the child pornography subculture communicates); PHIL SCHAAF, *SPORTS, INC.: 100 YEARS OF SPORTS BUSINESS* (2004) (describing the growth of the sports entertainment industry and analyzing modern income sources and sports marketing techniques).

166. *Centesimus Annus*, *supra* note 16, para. 36 (emphasis omitted).

167. DOSTOEVSKY, *supra* note 19, at 366.

168. See Anna M. Tinsley, *Outpouring of Donations After Katrina Largest Ever*, PITT. POST-GAZETTE, Aug. 27, 2006, at A11 (stating the Americans gave \$4.2 billion for Katrina relief, exceeding the previous record of \$3 billion given after the 9/11 terrorist attacks).

169. *Centesimus Annus*, *supra* note 16, para. 17.

American “culture” may be described as a cult of the individual, a cult of the autonomous self.<sup>170</sup>

### C. *The Relationship Between Law and Culture*

John Paul recognizes that people must enjoy a large measure of freedom in the exercise of culture.<sup>171</sup> Because culture is a vast, decentralized phenomenon that is expressed only over time through the accretion of numerous individual decisions involving a multiplicity of activities, in a society that values freedom,<sup>172</sup> law is ill-suited to bring about a thorough-going cultural transformation. Instead, according to John Paul, what is urgently needed is the cultural work of education “including the education of consumers in the responsible use of their power of choice [and] the formation of a strong sense of responsibility among producers.”<sup>173</sup> By “education,” the Pope does not mean a formal system of indoctrination or the imposition of an ideology.<sup>174</sup> The education that must take place is a matter of persuasion, not coercion.<sup>175</sup> That is, it must be freely accepted by those to whom it is proposed.

As such, the change in society that the Pope has in mind will not come about principally through a change in the law. To repeat, John Paul acknowledges the need to alter “the established structures of power which

170. John Paul believes that this worship of the self is the consequence of the separation of freedom from truth. *See, e.g., Veritatis Splendor, supra* note 17, paras. 32, 35 (describing certain currents in modern thought in which “[t]he individual conscience is accorded the status of a supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil” and that the freedom to “create values” goes beyond a claim to “*moral autonomy*” and “actually amount[s] to an *absolute sovereignty*”); *Evangelium Vitae, supra* note 9, para. 19 (stating that the contemporary understanding of freedom “exalts the isolated individual in an absolute way” and “ends up by becoming the freedom of ‘the strong’ against the weak who have no choice but to submit”). Thus, at the heart of his critique of this radical liberalism is a flawed anthropology, that is, a loss of “the truth about man.” *Veritatis Splendor, supra* note 17, para. 31.

171. *Cf. Gaudium et Spes, supra* note 57, para. 59 (stating that “culture . . . has constant need of a just liberty in order to develop” and that “[i]t is not [public authority’s] function to determine the character of the civilization”).

172. It is not by coincidence that the tumultuous period in Chinese history in the 1960s and 1970s under Mao Zedong is known as the “Cultural Revolution,” nor is it a coincidence that the Chinese Communist authorities in power did not value individual freedom and so were quite content to effect the cultural changes they sought through the force of law. *See generally* THE CHINESE CULTURAL REVOLUTION AS HISTORY (Joseph W. Esherick et al. eds., 2006).

173. *Centesimus Annus, supra* note 16, para. 36.

174. *Cf. id.* para. 46 (insisting that Christian truth is not an ideology in that it “does not . . . imprison changing socio-political realities in a rigid schema”).

175. *Cf. Pope John Paul II, ENCYCLICAL LETTER Redemptoris Missio*, para. 39 (1990) (“The Church proposes; she imposes nothing. She respects individuals and cultures, and she honors the sanctuary of conscience.”) (emphasis omitted), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_07121990\\_redemptoris-missio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio_en.html).

today govern societies.”<sup>176</sup> Where justice is at stake, law has an indispensable role to play in the regulation of social life.<sup>177</sup> But law is itself a cultural artifact. Law does not stand outside of culture but emerges from within it. At the same time, law influences the very culture that produced it, causing that culture to develop in ways that otherwise would not have taken place. Thus, the relationship between law and culture is complex insofar as culture is both generative of and responsive to law. As Francis George has noted, “[l]aw contributes massively to the formation of culture [and] culture influences and shapes law” such that the two “stand in a mutually informing, formative, and reinforcing relationship.”<sup>178</sup>

At the same time, however, culture and law are not equal players in the formation of social norms. Instead, as George Weigel has written, summarizing an important theme from John Paul’s pontificate, culture enjoys a kind of priority “over politics and economics as the engine of historical change.”<sup>179</sup> First, culture enjoys a kind of logical priority over law.<sup>180</sup> That is, although every legal system is the intellectual product of some culture, not every culture generates a system of laws.<sup>181</sup> Admittedly, when a society attains a certain size and level of complexity, informal social norms are often superseded by laws that have been formally adopted. Moreover, many of the values and beliefs that make up the culture typically receive some juridical expression. This need not, however, be the case. No society can ever exist in the absence of values, that is, without culture, but a society can exist independent of any formal system of law.

Second, and relatedly, law is not, as a logical matter, necessary in order to achieve the social goal for which it is established, namely, justice. Strictly speaking, the laws of a given society are not the primary cause of it being

176. *Centesimus Annus*, *supra* note 16, para. 58.

177. *See, e.g., id.* para. 36 (referring to “the necessary intervention by public authorities”).

178. Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 9 (2003).

179. George Weigel, *John Paul II and the Priority of Culture*, FIRST THINGS, Feb. 1998, at 19.

180. *See* S.L. Hurley, *Objectivity and Disagreement*, in MORALITY AND OBJECTIVITY: A TRIBUTE TO J.L. MACKIE 55 (Ted Honderich ed., 1985).

In general, to say that one concept or set of concepts is logically prior to another is to say that the latter is properly accounted for and understood in terms of the former and not *vice versa*; someone could grasp the prior concept without grasping the concept understood in terms of it, but not *vice versa*. To deny a claim of logical priority is to deny that someone could correctly understand one without understanding the other.

*Id.*

181. Here, I disagree with Cardinal George’s claim that, in the “complex dialectical relationship” between law and culture, “[n]either comes first; neither comes last.” *See* George, *supra* note 178, at 9. George’s claim is correct insofar as it is limited to the practical, temporal order. For the reasons set forth above, however, on the conceptual level, culture enjoys a kind of logical priority over law.

either just or unjust.<sup>182</sup> Instead, what makes a society just in the first instance is that it is composed of just people—of men and women who desire justice and who are willing to make the sacrifices necessary to ensure that justice characterizes their life together.<sup>183</sup> Indeed, aside from the need for coordination,<sup>184</sup> a society made up of perfectly just individuals would have no

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182. This claim is in need of some clarification. It is true that, as a primary matter, the laws of a given society do not make the society either just or unjust. Nevertheless, it is also true that a society composed of perfectly just individuals would still suffer from injustice if any one of its laws repudiated the principles of justice. Indeed, this would be true even if the unjust law in question did not affect the conduct of those whom it governed. For example, a state composed of perfectly just individuals that chose to repeal its rape statute while maintaining other criminal prohibitions against acts such as murder, assault and burglary, would be guilty of injustice even if no one was victimized by rape following the statute's repeal. This selective omission would, in a soft but unmistakably clear voice, tell people what is and is not acceptable conduct. Likewise, a state that enacted a statute that permitted whites to enslave non-whites would be unjust even if no one attempted to practice slavery. That is, even if the law was in effect dead-letter—the sole rhetorical remnant of a racist past long forgotten—it would still impair the full realization of justice in the society by continuing to teach the superiority of some individuals over others. Indeed, for the state to continue to exercise its teaching capacity in this manner—the official state endorsement of injustice—would harm the common good, even if the message was ignored by everyone. In the same way, a lie is harmful for being told, even if no one believes it. By contrast, the state could teach a quite different lesson through repeal, a lesson not soon forgotten by the state's constituents. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring unconstitutional state laws making interracial marriage illegal); Jeff Amy, *Voters Strike Ban on Interracial Marriage*, MOBILE REGISTER, Nov. 8, 2000, at 24A (describing the results of the state constitutional referendum that voided a portion of the Alabama constitution that had been ineffective since the *Loving* decision).

183. The mere fact that a society has adopted laws that are just does not mean that its members will exude justice. After all, individuals and groups may violate the law with impunity, perhaps undetected, or the law may go unenforced by the state. Moreover, because justice is a virtue of the individual, part of his or her constitution, it can only be acquired through the active assimilation of the person. Thus, in this sense, a person cannot be “made” just simply by being subject to just laws because a person is not “made” in the same way that a chair is “made” out of a block of wood. Nevertheless, a person who is subject to just laws may acquire the virtue of justice through the routine of right conduct. See 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II, Q. 92, Art. 2, at 1002 (Fathers of the English Dominican Province trans., Benziger Bros. 1946) (1920) (“From being accustomed to avoid evil and fulfil what is good, through fear of punishment, one is sometimes led on to do so likewise, with delight and of one's own accord. Accordingly, law, even by punishing, leads men on to being good.”). Indeed, a person can become just by doing what is just, repeatedly, within a given situation, such that the decision to do what is right becomes a matter of habit. See also ARISTOTLE, *NICOMACHEAN ETHICS* 1105b 9–12 (W.D. Ross trans.), reprinted in *THE BASIC WORKS OF ARISTOTLE* 956 (Richard McKeon ed., 1963). The great Jesuit poet Gerard Manley Hopkins beautifully captured precisely this point in one of his most famous verses: “I say more: the just man justices;/Keeps grace: that keeps all his goings graces.” Gerard Manley Hopkins, *As kingfishers catch fire*, in *GERARD MANLEY HOPKINS: THE MAJOR WORKS* 129 (Catherine Phillips ed., 2002).

184. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 231–33 (1980) (arguing that, absent unanimity, there is a need for some political authority to coordinate matters with respect to

need of law since no one would violate the rights of any other person.<sup>185</sup> Everyone in such a society would do what is right as a matter of habit and desire and not out of compunction brought on by fear of the state.<sup>186</sup> As Grant Gilmore observed, echoing both St. Paul and the *Federalist Papers*, “The better the society, the less law there will be. In Heaven there will be no law . . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.”<sup>187</sup> From this perspective the existence of law represents a kind of failure. Laws are a second-best corrective that hope to make up for the absence of rightful conduct in the first instance. As such, however, law is necessary in every society composed of fallible human beings who, perhaps despite their better instincts, often fail to render to one another that which is their due. In these imperfect societies—in every society known throughout history—the law exists in order to teach, to encourage, and to restore the order—the just order—that defines the just society. Thus, as a practical matter, law and culture are virtually inseparable.

Third, and perhaps most important of all, culture is, as an empirical matter, vastly more important than law in shaping the everyday lives of people. Indeed, this influence includes the immediate, practical decision as to whether or not to obey the law. This decision is often based on the perceived justice of the law as well as the perception that it will be fairly applied to different

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the management of natural resources, the use of force, and the resolution of competing rights and claims regarding the common good); ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 107–08 (1999) (admitting that in a society of “perfectly morally upright beings” laws against murder and the like would not be necessary, but insisting that since “the moral point of law is to serve the good of people as they are” such laws are necessary and proper and that they require the exercise of authority to translate “natural principles of justice and political morality into rules and principles of positive law”).

185. This captures something of what St. Paul means when he declares that Christians are not subject to the specific provisions of the Mosaic law. *Romans* 6:14 (“For sin shall not have dominion over you, for you are not under the law, but under grace.”); *Galatians* 5:18 (“But if you are led by the Spirit, then you are not under the law.”). Cf. THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001) (“But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

186. Even if the law of a given society was perfectly just and its institutions well-ordered, the life of the society might nevertheless be marked by grave injustice. Just laws and just social structures do not and cannot ensure a just society since, as a fundamental matter, justice is a virtue of character that one exemplifies in his or her relationships with others. See generally Robert John Araujo, S.J., *Realizing a Mission: Teaching Justice as “Right Relationship,”* 74 ST. JOHN’S L. REV. 591 (2000). Accordingly, what matters most in assessing the presence or absence of justice within a given society is the content of the actions taken by its members in regard to one another.

187. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

individuals.<sup>188</sup> Many of the social phenomena criticized by John Paul have a legal dimension. Various legal doctrines and institutions support their existence.<sup>189</sup> Nevertheless, the legal nature of these phenomena is not primary. Rather, they come into existence and are sustained in the legal and political order because of some set of antecedent values that subsists in the culture.

Ultimately, the priority of culture over law means that “[t]he real responsibility” for unjust structures as well as particular sinful acts “lies with individuals.”<sup>190</sup> Thus, John Paul insists that “the first and most important task is accomplished within man’s heart.”<sup>191</sup> Only by reaching the human heart will the human person come to see him or herself less “as a producer or consumer of goods” and more “as a subject who produces and consumes in order to live.”<sup>192</sup> Only then will individuals no longer regard “the production and consumption of goods . . . [as] the centre of social life and society’s only value.”<sup>193</sup> Only then can new “life-styles”<sup>194</sup> come about “in which the quest for truth, beauty, goodness and communion with others for the sake of the common growth are the factors which determine consumer choices, savings and investments.”<sup>195</sup> Only then will men and women feel free to turn away from the cult of the autonomous self and embrace that which is truly deserving of worship.

In sum, we can say that John Paul’s concern for the elimination of unjust social structures is always tempered by the recognition that such actions will not, as an ultimate matter in the temporal order,<sup>196</sup> bring about a world of true peace. Although he supports the use of law to dismantle the structures of sin, John Paul believes that such actions will always be insufficient. New

188. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

189. For example, the market and its attendant consumerism and materialism are supported by a number of legal doctrines and institutions such as freedom of contract, the right to own and dispose of private property, and the modern business corporation. For John Paul’s criticism of the market and the consumerist mentality see *supra* notes 69–89 and accompanying text.

190. *Reconciliatio et Paenitentia*, *supra* note 110, para. 16.

191. *Centesimus Annus*, *supra* note 16, para. 51.

192. *Id.* para. 39.

193. *Id.*

194. *Id.* para. 36. The term appears throughout John Paul’s discussion of cultural transformation in *Centesimus Annus*. See *id.* para. 52 (stating that fostering the standing of the poor in the world economy “may mean making important changes in established life-styles, in order to limit the waste of environmental and human resources, thus enabling every individual and all the peoples of the earth to have a sufficient share of those resources”); *id.* para. 58 (helping the poor will require “above all a change of life-styles, of models of production and consumption”).

195. *Centesimus Annus*, *supra* note 16, para. 36.

196. From the Church’s point of view, true ultimacy goes beyond time and consists of participation in the life of God throughout eternity. See CATECHISM OF THE CATHOLIC CHURCH §§ 1023–1029 (2d ed. 1997).



structures will always rise to take their place as the world is always inventing new pathologies from which it must recover. Indeed, legal solutions to social problems will always be merely partial solutions. Legal actions will always lack what is necessary for genuine social transformation because, in the first instance, man is a *cultural* being, not a *legal* being. The ordering of his life *de facto* precedes the ordering of his life *de jure*. Indeed, culture is a more powerful force in directing the lives of individuals and groups than is law.<sup>197</sup> Accordingly, John Paul contends that the creation of a just society requires the support of a culture dedicated to justice and solidarity among all people. Thus, like Father Zosima's guest, John Paul insists that profound social change will not take place without a conversion of the human heart. But what, if any, role does law have in bringing about such a change?

#### IV. MODESTY AND MORALISM: THE SKEEL-STUNTZ THESIS

In their recent essay, *Christianity and the (Modest) Rule of Law*, David Skeel and William Stuntz argue that law, properly understood, should be modest both in the scope of its application and in the goals that it seeks to realize in social life.<sup>198</sup> Echoing the thought of many others on the subject,<sup>199</sup> Skeel and Stuntz contend that in order to be law a rule must possess certain qualities. Indeed, the very notion of "the rule of law" holds that a legal rule "must define the line between behavior that is subject to legal penalty and behavior that isn't"<sup>200</sup> in a way that is "reasonably clear."<sup>201</sup> Moreover, the rule of law demands some basic level of equality among persons in that "the law must treat violators at least roughly the same"<sup>202</sup> regardless of their social or economic station in life. The requirements of equality, clarity, and specificity help to guarantee that the application of law is not simply a matter of "discretionary choice" on the part of officials who enforce the law.<sup>203</sup> Indeed, Skeel and Stuntz posit that "[i]f there is one key condition that must be satisfied for a country to call itself free, it is that no one can be thrown in

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197. Here again, Karol Wojtyla's own experiences in life—as a young man in Poland under Nazi occupation and as a priest and bishop confronting Communism—confirmed the fact that the coercive power of the state is unable to effect truly profound and lasting social change when a people, bolstered by the support of an authentic culture, choose to exercise their freedom in defiance of the ruling powers. In each case, a totalitarian regime was unable to defeat the cultural identity, political aspirations, and moral sense of the Polish nation. For an account of Karol Wojtyla's experiences during these periods in Polish history, see generally WEIGEL, *supra* note 2.

198. Skeel & Stuntz, *supra* note 20.

199. See, e.g., FINNIS, *supra* note 184, at 270–73; LON L. FULLER, *THE MORALITY OF LAW* 33–94 (1969).

200. Skeel & Stuntz, *supra* note 20, at 809.

201. *Id.* at 815.

202. *Id.* at 810.

203. *Id.* at 809.

prison for no better reason than because it pleased some government official to put him there.”<sup>204</sup>

Skeel and Stuntz find additional support for the rule of law in “an unlikely subject: Christian theology.”<sup>205</sup> Indeed, they conclude that the rule of law “follows quite naturally from Christian premises.”<sup>206</sup> For example, the idea that the law applies equally to everyone follows from the radical equality reflected in the biblical claim “that each of us is made in God’s image.”<sup>207</sup> Moreover, the Bible teaches that “we are all radically *imperfect*,” that “the desire for sin is woven into our very being.”<sup>208</sup> Because everyone is “prone to selfishness and exploitation,”<sup>209</sup> those charged with the responsibility of governing society cannot yield “unbounded discretion”<sup>210</sup> and “pass judgment”<sup>211</sup> on others. Thus, biblical teaching provides further moral justification for a legal system in which “[c]learly articulated rules, not jurors’ or judges’ whims [are] the basis for decisions that impose criminal or civil liability.”<sup>212</sup>

According to Skeel and Stuntz, however, problems arise when law exceeds its competence, when it “strays from the modest goal of resolving litigation outcomes.”<sup>213</sup> That is, when lawmakers believe that the primary goal of law is to teach values, they end up enacting comprehensive moral codes. Then “the rule of law becomes a veneer that hides the rule of discretion.”<sup>214</sup> Indeed, moral laws that purport to teach through the imposition of legal penalties “are likely only to teach lessons in arbitrary government and the rule of discretion.”<sup>215</sup> Thus, Skeel and Stuntz conclude that “[t]he rule of law works only if law does not seek to rule too much.”<sup>216</sup>

A particularly egregious example of law run amok can be found in what Skeel and Stuntz refer to as “legal moralism.”<sup>217</sup> By this they mean the practice of enacting “purely symbolic laws”<sup>218</sup> which lawmakers know “will rarely be enforced.”<sup>219</sup> As such, these sorts of measures are largely a “means

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204. *Id.* at 810.

205. Skeel & Skuntz, *supra* note 20, at 811.

206. *Id.* at 816.

207. *Id.* at 813.

208. *Id.* at 814.

209. *Id.*

210. Skeel & Stuntz, *supra* note 20, at 815.

211. *Id.*

212. *Id.* (footnote omitted).

213. *Id.* at 811.

214. *Id.*

215. Skeel & Stuntz, *supra* note 20, at 812.

216. *Id.* at 811.

217. *Id.* at 838.

218. *Id.* at 828.

219. *Id.* at 824.

of sending messages to voters, not sending offenders to prison.”<sup>220</sup> At the same time, because they exist on the books, laws of this sort vest law enforcement officials with enormous discretion. Accordingly, when they are enforced “the message the law sends is bound to be different than the message embodied in the relevant statute.”<sup>221</sup>

Skeel and Stuntz cite to a number of examples of the immodesty of legal moralism, including the Mann Act, the Travel Act, the experience of state enforced temperance under Prohibition, and the various federal bans on narcotics and gambling,<sup>222</sup> as well as Congress’s recent efforts to respond to corporate mismanagement under the Sarbanes-Oxley Act.<sup>223</sup> Given Skeel and Stuntz’s professed Christianity, however, what stands out is their criticism of legal attempts to regulate abortion.

#### V. LAW, CULTURE, AND THE PROBLEM OF ABORTION: A CONTEMPORARY APPLICATION

According to Skeel and Stuntz, the “chief object” of law is not to teach but to rule, and law rules best “when its ambitions are modest,” that is, when law is limited to “[i]dentifying the most destructive wrongs . . . for fair, accurate adjudication.”<sup>224</sup> Thus, law should “draw lines not between right and wrong but between the most destructive and verifiable wrongs, and everything else.”<sup>225</sup> Law must be content with “restraining the worst wrongs by the citizenry without empowering judges and prosecutors to do wrong themselves.”<sup>226</sup> The “grander ambitions our law seems to have” for shaping the moral norms that will govern social life are, in their assessment, “not achievable.”<sup>227</sup>

Skeel and Stuntz are critical of legal efforts to restrict abortion because they see such measures as examples of legal immodesty. The criminal prohibitions against abortion that preceded *Roe v. Wade*<sup>228</sup> were, they say, largely symbolic laws. They did not reduce the incidence of abortion. Indeed,

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220. Skeel & Stuntz, *supra* note 20, at 825.

221. *Id.* at 828. In this regard Skeel and Stuntz make several pointed references to the special counsel’s investigation of President Clinton involving Monica Lewinsky and the prosecution and conviction of Martha Stewart for lying to federal investigators. In each case, the charge ultimately brought was distinct from or even unrelated to the subject matter of the original investigation. The authors see this as proof of the enormous discretion that the wide-ranging federal criminal code affords prosecutors. *See id.* at 821–822, 827.

222. *Id.* at 825.

223. *Id.* at 826.

224. *Id.* at 830–31.

225. Skeel & Stuntz, *supra* note 20, at 839.

226. *Id.* at 817.

227. *Id.* at 831.

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

according to Skeel and Stuntz, “[t]he number of abortions rose steeply in the years leading up to *Roe*.”<sup>229</sup> Moreover, laws prohibiting abortion “did not reinforce the social norm against th[e] practice.”<sup>230</sup> Instead, Skeel and Stuntz contend that “the norm fell apart while those bans were still in place.”<sup>231</sup> Thus, the law proved to be both an ineffective teacher and a poor ruler. Indeed, for Skeel and Stuntz, the law against abortion failed to teach precisely because it failed to rule.

As such, anti-abortion laws are, for Skeel and Stuntz, a misguided effort to use the law as a “tool . . . for healing a spiritually diseased society.”<sup>232</sup> With respect to abortion, Christians, they say, should avoid the “tendency to confuse God’s law with man’s”<sup>233</sup> and resist the temptation “to enact their preferred moral vision into law.”<sup>234</sup> Plainly, “immorality and illegality cannot and must not be coextensive.”<sup>235</sup> Not only do such efforts to equate them undermine the rule of law values, but Skeel and Stuntz also contend that it is “abundantly clear that law cannot save souls.”<sup>236</sup>

#### A. *Abortion Restrictions: The Pursuit of Justice, Not Salvation*

Skeel and Stuntz are undoubtedly correct in asserting that Christians, and indeed people of other religious faiths, can fall into the error of “[c]onflating God’s law and man’s law.”<sup>237</sup> Indeed, the tendency to overreach—to use the law to impose one’s moral vision on society as a whole—is a trait shared even by avowed secularists and persons of no religious persuasion at all. Moreover, Skeel and Stuntz are also plainly correct in asserting that the purpose of the law is not to bring about some sort of spiritual healing for a troubled society. Indeed, because the proper ambition of law is not theological in nature, the purpose of law cannot be to “save souls.”<sup>238</sup>

Instead, the purpose of law is to achieve justice. Plainly, Skeel and Stuntz believe that the kinds of injustice to which the law should be directed are relatively narrow. That is, in order to guard against unfettered discretion and preserve the rule of law, Skeel and Stuntz argue that law’s reach should exhibit modesty by addressing only “the worst wrongs”<sup>239</sup> that people commit. By

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229. Skeel & Stuntz, *supra* note 20, at 833 (citing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 353–55 (1991)).

230. *Id.* at 829.

231. *Id.* (citing ROSENBERG, *supra* note 229).

232. *Id.* at 837.

233. *Id.* at 832.

234. Skeel & Stuntz, *supra* note 20, at 837.

235. *Id.* at 838.

236. *Id.* at 831.

237. *Id.* at 839.

238. *Id.* at 831.

239. Skeel & Stuntz, *supra* note 20, at 817.

identifying laws against abortion as examples of the vice of “legal moralism,” however, Skeel and Stuntz suggest that they do not believe that justice—the “chief object” of law<sup>240</sup>—is at stake in laws that seek to limit abortion. Indeed, while Skeel and Stuntz obliquely suggest that women might be dissuaded from seeking abortions if abortion opponents made use of techniques other than the coercive force of law,<sup>241</sup> they give no indication that they believe that the act of abortion is itself a matter of injustice.

Here, the clear voice of John Paul II offers an indispensable perspective. First, the Pope forthrightly reminds us of the object of abortion. That is, abortion always involves “the deliberate and direct killing . . . of a human being in the initial phase of his or her existence.”<sup>242</sup> Thus, he says it is no exaggeration to say “that we are dealing with murder” since “[t]he one eliminated is a human being at the very beginning of life.”<sup>243</sup> Although some individuals who purport to speak from a Christian perspective openly dispute these claims,<sup>244</sup> in their essay Skeel and Stuntz do not deny the humanity of the entity developing in the womb, nor do they deny the moral claim that such a being has to our protection—to be free from the violent act of dismemberment and extermination. Certainly John Paul would agree with Skeel and Stuntz that morality and legality are not coextensive insofar as “the purpose of civil law is different and more limited in scope than that of the moral law.”<sup>245</sup> At the same time, given the nature of the procedure and its ultimate end, it is difficult to understand why Skeel and Stuntz apparently do not regard abortion as one of “the worse wrongs,” one of “the most destructive and verifiable wrongs”<sup>246</sup> that the law ought to address.

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240. *Id.* at 829–30.

241. *See id.* at 835 (arguing that the effort expended “in trying to make the statute books mirror the law of God . . . distracts religious believers from other, more limited efforts that might command wide-spread support”). At a conference hosted by the Lumen Christi Institute and the Law Professors’ Christian Fellowship that included a panel on the Skeel-Stuntz thesis, David Skeel made clear his opposition to abortion and his support for pro-life legal efforts. While this is surely welcome news, these views are wholly absent from Skeel and Stuntz’s article.

242. *Evangelium Vitae*, *supra* note 9, para. 58.

243. *Id.*

244. *See, e.g.*, BEVERLY WILDUNG HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION (1983); Marjorie Reiley Maguire, *Personhood, Covenant, and Abortion*, THE ANN. OF THE SOC’Y OF CHRISTIAN ETHICS (1983), reprinted in ABORTION AND CATHOLICISM: THE AMERICAN DEBATE 100 (Patricia Beattie Jung & Thomas A. Shannon eds., 1988).

245. *Evangelium Vitae*, *supra* note 9, para. 71. For a more complete discussion of this point see Gregory A. Kalscheur, S.J., *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. CATH. SOC. THOUGHT 231, 233–43 (2004).

246. Skeel & Stuntz, *supra* note 20, at 839.

Second, the late Pope plainly had no illusions that the problem of abortion could be easily solved through the machinations of law. Indeed, as noted above, John Paul understood the priority that culture enjoys over formal norms that govern human behavior, including law.<sup>247</sup> Thus, he recognized that abortion is a complex cultural phenomenon made up of a number of attitudes and beliefs embodied in various institutions and practices. Taken together, these attitudes and beliefs constitute a “culture of death” that is “actively fostered by powerful cultural, economic and political currents which encourage an idea of society excessively concerned with efficiency.”<sup>248</sup> From this cultural perspective any life “which would require greater acceptance, love and care is considered useless, or held to be an intolerable burden.”<sup>249</sup> From this point of view, a human being whose mere existence “compromises the well-being or life-style of those who are more favoured . . . [is] looked upon as an enemy to be resisted or eliminated.”<sup>250</sup> Thus, at the foundation of this cultural phenomenon John Paul discerned “a completely individualistic conception of freedom, which ends up by becoming the freedom of ‘the strong’ against the weak.”<sup>251</sup>

This morbid culture assumes concrete form in various practices and institutions as “actual ‘structures of sin’ which go against life”<sup>252</sup> which “oppose . . . human life not yet born.”<sup>253</sup> This “conspiracy against life” includes not only the individual choices of women and men who opt for abortion, but also doctors and nurses who “place at the service of death skills which were acquired for promoting life,” government officials who “promote . . . and approve . . . abortion laws” as well as those “international institutions, foundations and associations which systematically campaign for the legalization and spread of abortion in the world.”<sup>254</sup> As such, the Pope recognized that “abortion goes beyond the responsibility of individuals and beyond the harm done to them, and takes on a distinctly social dimension.”<sup>255</sup>

Plainly, the cultural task of responding to this vast apparatus of institutions and beliefs and the further task of social renovation—the process of proposing and establishing a new set of values and convictions—is beyond the limited capacity of law to accomplish. Because the “structures of sin” that support abortion are founded on the beliefs and attitudes of the “culture of death,” genuine social change demands that these cultural values be confronted.

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247. *See supra* Part III.

248. *Evangelium Vitae*, *supra* note 9, para. 12.

249. *Id.*

250. *Id.*

251. *Id.* para. 19.

252. *Id.* para. 24.

253. *Evangelium Vitae*, *supra* note 9, para 59.

254. *Id.*

255. *Id.*

According to John Paul, “[w]hat is urgently called for is a general mobilization of consciences and a united ethical effort to activate a great campaign in support of life.”<sup>256</sup> Indeed, genuine cultural change “demands from everyone the courage to adopt a new life-style, consisting in making practical choices—at the personal, family, social and international level—on the basis of a correct scale of values: the primacy of being over having, of the person over things.”<sup>257</sup>

Accordingly, the Pope makes emphatically clear that “it is not enough to remove unjust laws”<sup>258</sup> that guarantee the abortion license. Beyond this, “[t]he underlying causes of attacks on life have to be eliminated, especially by ensuring proper support for families and motherhood.”<sup>259</sup> Still, John Paul also makes plain that while “laws are not the only means of protecting human life, . . . they do play a very important and sometimes decisive role in influencing patterns of thought and behaviour.”<sup>260</sup> Thus, although John Paul recognizes that the struggle against the practice of abortion is primarily a cultural struggle, it necessarily entails a legal dimension. Indeed, given the immensity of the problem, the “truly alarming spectacle” of “attacks on life” that occur in an “unheard-of numerical proportion” with “widespread legal approval and the involvement of certain sectors of health-care personnel,”<sup>261</sup> any proposed reform of the culture must, unavoidably, engage the legal order.

Lastly, when pro-life efforts to reduce abortions do engage the legal order they do not constitute an attempt to impose an inherently religious view of women, or sexuality, or the developing human person on society as a whole. To their credit Skeel and Stuntz do not derisively refer to the “Christian Right”<sup>262</sup> and roil against the impending establishment of an American theocracy, as others have done.<sup>263</sup> At the same time, they do repeatedly refer to the problem of “[c]onflating God’s law and man’s law”<sup>264</sup> and the “danger in trying to make the statute books mirror the law of God.”<sup>265</sup> Thus, while Skeel and Stuntz’s concern is the existence of rules that vest public officials

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256. *Id.* para. 95.

257. *Id.* para. 98.

258. *Evangelium Vitae*, *supra* note 9, para. 90.

259. *Id.*

260. *Id.*

261. *Id.* para. 17.

262. They do say that “Conservative Christians could stand to learn” the lesson that good morals often make for bad law. *See* Skeel & Stuntz, *supra* note 20, at 831.

263. *See, e.g.*, MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM (W.W. Norton & Company 2006); CHRIS HEDGES, AMERICAN FASCISTS: THE CHRISTIAN RIGHT AND THE WAR ON AMERICA (Free Press 2006).

264. Skeel & Stuntz, *supra* note 20, at 839.

265. *Id.* at 835.

with inordinate discretion,<sup>266</sup> their rhetoric has the whiff of an extreme and intolerant secularism.

Although pro-life legal efforts may coincide with the moral teaching of any number of faiths, including Christianity, the same could be said of any number of laws including such basic crimes as those prohibiting theft and murder. Indeed, the Supreme Court has long held 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.’”<sup>267</sup> Moreover, because the justifications put forth for such laws are entirely secular in nature they meet the requirement of “public reason” advanced by a number of legal and political theorists.<sup>268</sup> Indeed, as John Paul made clear, the cause of the protection of the unborn is not an exclusively Christian concern. Although human life “certainly has a sacred and religious value, . . . in no way is that value a concern only of believers.”<sup>269</sup> Indeed, because “[t]he value at stake is one which every human being can grasp by the light of reason . . . it necessarily concerns everyone.”<sup>270</sup> Thus, legal efforts to restrict abortion do not aim to “save souls” or to protect the country from damnation by a vengeful God. Instead, properly understood, their concern is only justice in the here and now.

*B. No Mere Symbol: The Effect of Legal Restrictions on the Incidence of Abortion*

Skeel and Stuntz are right to criticize “purely symbolic laws,”<sup>271</sup> that is, the practice whereby lawmakers seek to “please constituents who wish to condemn [a certain kind of] conduct without paying either the fiscal or political price of *stopping* that conduct.”<sup>272</sup> Indeed, the act of declaring some form of behavior to be a crime can give the appearance of taking decisive action when in fact the measure affects nothing—a cheap salve advertised as real medicine. Although their objection to these sorts of laws is sound, with respect to laws designed to curtail the practice of abortion, it is sadly misplaced. These laws are not purely symbolic. Moreover, this is true both for those laws that flatly prohibited abortion prior to the Supreme Court’s landmark decision in *Roe v. Wade*,<sup>273</sup> as

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266. See *supra* note 221 and accompanying text.

267. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

268. See, e.g., KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 49–76 (1988); JOHN RAWLS, *POLITICAL LIBERALISM* 212–54 (1993).

269. *Evangelium Vitae*, *supra* note 9, para. 101.

270. *Id.*

271. Skeel & Stuntz, *supra* note 20, at 828.

272. *Id.* at 825.

273. 410 U.S. 113 (1973).



well as the more modest restrictions that the Court has since begrudgingly allowed.

### 1. The Effectiveness of Modest, Contemporary Restrictions

First, with respect to the more limited kinds of laws now in place, the available evidence indicates that these laws have been effective in helping to reduce the frequency of abortion. Indeed, a number of studies have concluded that parental involvement laws and restrictions on Medicaid funding have resulted in a lower incidence of abortion in the jurisdictions where these laws are in place.<sup>274</sup> As Michael New has pointed out, however, these studies have not accounted for the fact that the lower incidence of abortion in these states may reflect “changes in values and mores, not the legislation itself.”<sup>275</sup> Put another way, the declines in abortion experienced in these states may be due to the influence of culture rather than law. Indeed, the mere fact that this sort of legislation was enacted at all may simply reflect a change in the underlying cultural norms.

In his own recent study, New argues that the impact of legal restrictions can be isolated from the effect of cultural changes by comparing the experience in states whose restrictions have been nullified by courts with the experience of states where the restrictions have been upheld and enforced.

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274. See, e.g., Rebecca M. Blank et al., *State Abortion Rates: The Impact of Policies, Providers, Politics, Demographics, and Economic Environment*, 15 J. HEALTH ECON. 513, 513–15 (1996) (summarizing findings); Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15:6 FAM. PLAN. PERSP. 259, 266 (Nov./Dec. 1983); Deborah Haas-Wilson, *The Economic Impact of State Restrictions on Abortion: Parental Consent and Notification Laws and Medicaid Funding Restrictions*, 12 J. POL’Y ANALYSIS & MGMT. 498, 509 (1993) (concluding that the rate of minors’ abortions per 1,000 teenage pregnancies is 16% lower, and the rate of minors’ abortions per 1,000 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); Deborah Haas-Wilson, *The Impact of State Abortion Restrictions on Minors’ Demand for Abortions*, 31 J. HUM. RESOURCES 140, 155–57 (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%); Robert L. Ohsfeldt & Stephan F. Gohmann, *Do Parental Involvement Laws Reduce Adolescent Abortion Rates?*, 12 CONTEMP. ECON. POL’Y 65, 75 (1994). *But see*, Deborah Haas-Wilson, *Women’s Reproductive Choices: The Impact of Medicaid Funding Restrictions*, 29:5 FAM. PLAN. PERSP. 228, 232 (Sept./Oct. 1997) (concluding that Medicaid funding restrictions do not affect the abortion rate in models controlling for the availability of abortion providers and other variables).

275. MICHAEL J. NEW, HERITAGE CTR. FOR DATA ANALYSIS, USING NATURAL EXPERIMENTS TO ANALYZE THE IMPACT OF STATE LEGISLATION ON THE INCIDENCE OF ABORTION 2 (2006) [hereinafter NEW, USING NATURAL EXPERIMENTS], available at [www.heritage.org/Research/Family/CDA06-01.cfm](http://www.heritage.org/Research/Family/CDA06-01.cfm).

That is, because “[p]resumably, all states that pass pro-life legislation [have] undergo[ne] similar changes in values and mores” comparing “nullified-legislation states to enacted-legislation states effectively holds constant any changes in values and mores.”<sup>276</sup> From conducting this analysis, he concludes that cultural shifts in values “have little impact on the incidence of abortion” whereas “enacted legislation results in statistically significant reductions in abortion rates and ratios.”<sup>277</sup> Specifically, New finds that with respect to informed consent laws “the abortion ratio decreases by 10.34 abortions for every thousand live births and the abortion rate decreases by 0.86 abortions per thousand women between the ages of 15 and 44.”<sup>278</sup> Similarly, in the case of parental involvement laws, New finds that “the abortion rate decreases by 16.37 abortions for every thousand live births and the abortion rate decreases by 1.15 abortions for every thousand women” of child-bearing age.<sup>279</sup> Moreover, in each case, the difference in the abortion rates and ratios between the states where the legislation was nullified and where it was enforced is statistically significant.<sup>280</sup> As such, Skeel and Stuntz’s label of “purely symbolic laws” is plainly inapposite.

## 2. The Effectiveness of Abortion Prohibitions Prior to Legalization

Second, the degree to which the abortion restrictions in place during the time prior to legalization were “purely symbolic laws” is the source of some considerable debate. This debate centers around two sets of competing factual claims. The first set of claims involves the extent to which prohibitions against abortion were enforced by prosecutors and other officials. The second set of claims involves estimates regarding the incidence of abortion under a legal regime that criminally banned the procedure.

### a. The Enforcement of Abortion Prohibitions by Prosecutors and the Medical Profession

With respect to the first set of claims, a number of proponents of abortion contend that the laws in place prior to both *Roe* and the state reforms that preceded it were, indeed, merely “symbolic” for the simple reason that they were rarely, if ever, enforced. For example, Mark Graber has argued at length that the criminal law of abortion involved a combination of “official

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276. *Id.*

277. *Id.*

278. *Id.* at 5.

279. *Id.*

280. NEW, USING NATURAL EXPERIMENTS, *supra* note 275, at 5; *see also* MICHAEL J. NEW, HERITAGE CTR. FOR DATA ANALYSIS, ANALYZING THE EFFECTS OF STATE LEGISLATION ON THE INCIDENCE OF ABORTION DURING THE 1990S, at 2 (2004), *available at* [www.heritage.org/Research/Family/CDA04-01.cfm](http://www.heritage.org/Research/Family/CDA04-01.cfm).

prohibition and official permissiveness”<sup>281</sup> such that legal restrictions against the procedure constituted a kind of institutional hypocrisy, the real effect of which was the “discriminatory” treatment of poor women and racial minorities.<sup>282</sup>

Notwithstanding the emphatic way in which the claim is made, a fair reading of the available evidence simply does not support the assertion that laws prohibiting abortion went unenforced. Indeed, at least as evidenced by newspaper accounts and appellate decisions,<sup>283</sup> the historical record suggests that criminal prosecutions of abortionists were frequent, though not always successful. Some attribute the difficulty in obtaining convictions to police and juries drawn from a public sympathetic to the plight of women with unwanted pregnancies and accepting of the need for abortion.<sup>284</sup> While support for abortion may explain the failure of some prosecutions, a more plausible account for the pattern as a whole has to do with the nature of abortion itself and the proof required for conviction. That is, during the era of criminalization, abortion was something done in secret by individuals who deliberately sought to conceal the nature of their actions.<sup>285</sup> Moreover, both

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281. Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL'Y & L. 309, 322 (1994) [hereinafter Graber, *The Ghost of Abortion Past*]. Graber subsequently advanced this same thesis in book form. See MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* 44–45 (1996) [hereinafter GRABER, *RETHINKING ABORTION*].

282. Graber, *The Ghost of Abortion Past*, *supra* note 281, at 337–45. For a response to Graber's normative claim, see Clarke D. Forsythe, *The Effective Enforcement of Abortion Law Before Roe v. Wade*, in *THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE* 196 (Brad Stetson ed., 1996) (noting that characterizing the effects of the law as discriminatory “betrays the underlying presumption that abortion is a virtue and not a vice” and that “[i]t ignores the common understanding that society does not repeal criminal laws simply because the rich, unlike the poor, can afford the higher cost of vices caused by criminalization itself (as with narcotics and prostitution, for example)”).

283. See JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 490 (2006) (noting that “[a]t best, historians and others (myself included) have only surveyed the prosecutions that resulted in published court opinions plus occasional trial transcripts or newspaper accounts” which means that there are undoubtedly “a large number of prosecutions that have never been tallied in the attempt to assess the total number of prosecutions in any century—including the twentieth”).

284. PAUL H. GEBHARD ET AL., *PREGNANCY, BIRTH AND ABORTION* 192 (1958) (asserting that “defense lawyers know that their best way to win an abortion case is to secure a jury rather than a court trial” and that “[p]olice and other officials often allow known abortionists to practice since it is felt that there is a need for their services”); Note, *A Functional Study of Existing Abortion Laws*, 35 COLUM. L. REV. 87, 91 n.17 (1935) [hereinafter Note, *A Functional Study*] (describing the unwillingness of juries to convict abortionists).

285. As Joseph Dellapenna explains:

Abortionists were careful to perform the procedure with no one in the room except the woman undergoing the abortion (and the fetus, if one counts it as a person), so there would be no witness but the woman herself. If the woman died, there could be no witness

the woman and the person who performed the abortion had a keen interest in maintaining this secrecy following the procedure, while disposing of the remains of the aborted fetus could be accomplished with relative ease. Accordingly, “[w]ithout witnesses or evidence, the crime would be undetected and unpunished.”<sup>286</sup>

It was certainly the case that enforcement of the laws against abortion varied greatly over time and across jurisdictions. Nevertheless, it is also true that “prosecutions for illegal abortions occurred in every decade in every major metropolitan area throughout the nineteenth and first half of the twentieth century.”<sup>287</sup> It also appears to be the case that the lack of rigorous enforcement in some areas was the result of official corruption.<sup>288</sup> While the practice of extorting money from abortion providers did take place, it did not define the approach taken by law enforcement toward abortion in its entirety since many arrests ultimately “resulted in convictions, an unlikely outcome if bribery were the goal.”<sup>289</sup>

The difficulties of proof involved in obtaining abortion convictions led prosecutors in the first half of the twentieth century to pursue those cases in which the woman obtaining the abortion died as a result of the procedure.<sup>290</sup> Indeed, given the difficulties described above “it is hardly surprising that criminal prosecutions in the United States depended to a large extent on the death bed statements of aborted women.”<sup>291</sup> Although there is no record of a

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at all. Some abortionists entered the room already masked, so even if the woman were willing to testify, she would have difficulty identifying the abortionist. The *corpus delicti*, at least early in a pregnancy, was disposed of simply through flushing a toilet.

DELLAPENNA, *supra* note 283, at 533 (footnote omitted).

286. *Id.*

287. *Id.* at 532; *see also* Note, *A Functional Study*, *supra* note 284, at 91 n.18 (setting forth historic figures for abortion prosecutions and convictions from the attorneys general of the several states).

288. The practice of law enforcement officers and prosecutors extorting money from abortionists in exchange for protection from arrest and prosecution is recounted by Jerome E. Bates. Jerome E. Bates, *The Abortion Mill: An Institutional Study*, 45 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 157, 164–67 (1954); *see also* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 155 (1997) (describing how Chicago police officer Daniel Moriarity received regular bribes from an abortion clinic owner and how he attempted to kill her in order to conceal his bribe-taking but mistakenly killed her daughter instead).

289. DELLAPENNA, *supra* note 283, at 545.

290. *Id.* at 433.

291. *Id.* at 534; *see also id.* at 433–35, 535. Leslie Reagan provides a vivid account of how, in March of 1916, Carolina Petrovitis was coaxed into revealing the identity of her abortionist by her physician, the hospital staff, and the police as she lay dying in a Chicago hospital. *See* Leslie J. Reagan, “About to Meet Her Maker”: Women, Doctors, Dying Declarations, and the State’s Investigation of Abortion, Chicago, 1867–1940, 77 J. AM. HIST. 1240, 1240–41 (1991) [hereinafter Reagan, *Maker*].

woman being prosecuted under a statute prohibiting abortion, as a technical matter such women could be charged with a crime in some jurisdictions.<sup>292</sup> This led New York to amend its laws to make clear that women who underwent the procedure could be given immunity in exchange for testimony against the person who performed the abortion.<sup>293</sup> Although obtaining convictions in abortion cases remained difficult, “police investigations . . . could themselves be a form of punishment and a serious deterrent even if no charges were ever brought.”<sup>294</sup>

Some jurisdictions also introduced the practice of using paid informants who posed as women seeking abortions as a method of obtaining evidence against illicit abortion providers.<sup>295</sup> Although “[n]umerous convictions of abortionists were reversed for entrapment,”<sup>296</sup> the aggressive use of paid investigators would seem to dispel the notion that law enforcement quietly tolerated the practice of abortion. Indeed, it demonstrates that “police and prosecutors were going to extraordinary lengths to detect and eliminate abortionists.”<sup>297</sup> What is more, the number of abortion prosecutions actually increased in the 1950s and continued up until the time that *Roe* was decided.<sup>298</sup>

In addition to criminal prosecution, the laws against abortion were also enforced indirectly through the revocation of medical licenses of those physicians who performed abortions. Because this sort of proceeding was civil in nature, “the finding of a violation needed only be proven by preponderance of the evidence rather than, as in a criminal prosecution, beyond a reasonable doubt.”<sup>299</sup> Although the level to which these professional disciplinary actions were effective in reducing the number of physicians from performing abortions or curbing the incidence of abortion itself cannot be known, the fact that

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292. See Forsythe, *supra* note 282, at 184 (stating that “there is apparently no reported appellate decision in American history upholding the conviction of a woman for self-induced abortion or for submitting to an abortion”); Reagan, *Maker*, *supra* note 291, at 1243–44 (stating that “women were not arrested, prosecuted, or incarcerated for having abortions”). Forsythe also notes that “[a]lthough there is evidence that, at common law, women were occasionally subject to criminal prosecution for participation in abortion, the common law gave way to the pragmatic judgments of modern abortion law that the abortionist is the most significant culprit.” Forsythe, *supra* note 282, at 184. Indeed, the statutes regulating abortion in most states “expressly treated women as the second victim of abortion.” *Id.*

293. Forsythe, *supra* note 282, at 190.

294. DELLAPENNA, *supra* note 283, at 535.

295. See *e.g.*, *id.* at 545 (describing the practice of using female “testers” in New York); Forsythe, *supra* note 282, at 190–91 (same).

296. DELLAPENNA, *supra* note 283, at 533.

297. *Id.*

298. See Forsythe, *supra* note 282, at 193–94 (listing the court decisions involving a number of well-known abortionists in many states from the 1950s and 1960s and early 1970s).

299. DELLAPENNA, *supra* note 283, at 546.

doctors' licenses were regularly revoked or suspended for abortion activities cannot be seriously contested.<sup>300</sup>

Accordingly, with respect to the question of whether the laws against abortion were the sort of "purely symbolic" laws that Skeel and Stuntz deride cannot be answered based on the historical record. Plainly, the criminal and civil rules against abortion did not lie dormant during the decades before state liberalization efforts and the Court's decision in *Roe*. Nevertheless, to say that "abortion laws were regularly enforced before *Roe v. Wade*"<sup>301</sup> might suggest that enforcement was "regular" relative to the frequency of the law's violation. However, the incidence of abortion cannot be known with any certainty based upon the number of criminal prosecutions and license revocations.<sup>302</sup> Instead, figures for the incidence of abortion prior to legalization need to be calculated using other methods.

#### b. The Incidence of Abortion Prior to Legalization

With respect to the second set of factual claims, the way in which the issue has been framed has been to compare the incidence of illegal abortion in the era of criminalization with the incidence of abortion following both the liberalization of state abortion laws in the late 1960s and early 1970s and the Supreme Court's decision in *Roe v. Wade*. There is no dispute that abortions took place in large numbers during the time in which states uniformly prohibited the procedure. The question—indeed, the heart of the matter as to whether such legal measures were "purely symbolic"—is the frequency with which the law was violated. How common were illegal abortions during the time before the advent of abortion reform in the states and the invalidation of abortion restrictions under *Roe*? Did the frequency of abortion increase significantly following its legalization? Or does the historical record show that

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300. For a sample of appellate court decisions disposing of these professional disciplinary matters see *id.* at 546 nn. 72–73 (collecting cases from several jurisdictions including New York); Forsythe, *supra* note 282, at 191 n. 98 (collecting cases from New York). Leslie Reagan insists that "[p]ublicly, the leaders of the medical profession opposed abortion; privately, many physicians sympathized with women's need for abortions, performed abortions, or referred patients to midwives or physicians who performed them." Reagan, *Maker*, *supra* note 291, at 1251. At best, this seems to be a gross overstatement given the fact that, as Dellapenna notes, in New York the recommendation of discipline required a unanimous vote by the investigating committee. See DELLAPENNA, *supra* note 283, at 547. For Dellapenna's devastating critique of Reagan's claim that there was an elaborate referral network for abortions among Chicago's most prominent physicians see *id.* at 560.

301. Forsythe, *supra* note 282, at 180.

302. See DELLAPENNA, *supra* note 283, at 536 (stating that prosecution and conviction rates are not "particularly good evidence of the rate at which abortions were being performed illegally"). *Cf. id.* at 561 ("Those who insist that abortion was tolerated by law enforcement institutions make no attempt to compare the rate of non-prosecutions for abortion against other serious crimes that were also not always prosecuted.").

the large numbers of abortions performed in the wake of legislative reform and judicial action would have taken place in any event, albeit in violation of the law? Little or no difference between these two figures would show that the laws in place were mostly symbolic, whereas a wide differential between them would show the efficacy of anti-abortion legal measures.

Unfortunately, this way of framing the issue has tended not to yield answers, only further controversy, because of the dubious nature of the statistics that purportedly reflect the frequency of abortion during the era of criminalization. Thus, while many commentators on the subject acknowledge the uncertainty of abortion figures prior to legalization,<sup>303</sup> those same commentators often assert the validity of their own estimates with a remarkable degree of confidence.<sup>304</sup> Sadly, in this regard, many proponents of legal abortion continue to cite to long-discredited estimates,<sup>305</sup> engaging in the

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303. See Forsythe, *supra* note 282, at 199 n.163 (collecting quotations acknowledging the uncertainty of estimates concerning the number of abortions prior to legalization).

304. For example, Mark Graber notes that his “conclusions are necessarily estimates because information about abortion in the years before *Roe* is sketchy.” Graber, *The Ghost of Abortion Past*, *supra* note 281, at 313 n.12. Indeed, because “[c]riminal abortionists did not keep detailed records” of their work, Graber cautions that “scholars must rely on more speculative means for determining the extent, bias, and consequences of abortion underground.” *Id.* Yet three pages later, Graber confidently asserts that “[s]cholars estimate that one out of every three to five pregnancies in the United States was aborted during the first seventy years of the twentieth century” and, further, that “[s]ome public health specialists suggest that as many as two to three million abortions were performed annually in the United States” during this time. *Id.* at 316–17.

305. For example, in 1955 Planned Parenthood’s medical director, Mary S. Calderone, organized a conference in New York entitled “Abortion in the United States.” See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 275–76 (1994). The papers presented at this conference were subsequently published in a volume edited by Calderone. *ABORTION IN THE UNITED STATES* (Mary Steichen Calderone ed., 1958) [hereinafter *ABORTION IN THE UNITED STATES*]. One paper, authored by a Statistics Committee charged with assessing the frequency of abortion and composed of Christopher Tietze, Paul Gebhard, Alan Guttmacher, P.K. Whelpton, Carl Erhardt, and Irene Taeuber, stated that plausible estimates of induced abortion could be as low as 200,000 or as high as 1.2 million per year. *Id.* at 180. The Committee concluded, however, that “[t]here is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency.” *Id.*

Despite this overt lack of confidence by the authors of the report, proponents of abortion have routinely cited the 1.2 million figure as if it were an undisputed fact rather than a dubious estimate. See, e.g., LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 41 (1990) (stating that “[b]y the late 1960s as many as 1,200,000 women were undergoing illegal abortions each year”). In support of this claim, Tribe cites JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900*, at 254 (1978) (“By the late 1960s estimates of the number of illegal abortions performed in the United States each year ranged from 200,000 to 1,200,000.”), who in turn cites N.Y. GOVERNOR’S SELECT COMMITTEE TO REVIEW THE STATE’S ABORTION LAWS, REPORT 15 (1968). Governor Nelson Rockefeller created the so-called “Froesel Commission” because of the perceived need to generate additional legislative

conceit that these figures are not in dispute. These authors are either oblivious to the fact that these studies have been dismissed or they simply choose to continue to cite these works because it appears to suit their argument.<sup>306</sup>

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support for abortion reform. See DELLAPENNA, *supra* note 283, at 628; GARROW, *supra*, at 345–47. The Commission, whose members included Alan Guttmacher, Christopher Tietze, and Cyril Means, relied upon the Statistics Committee paper in the published volume of the proceedings of the 1955 Planned Parenthood conference. See GARROW, *supra*, at 346. Thus, notwithstanding the Committee’s warning that there was “no objective basis” for selecting any number within the range, ABORTION IN THE UNITED STATES, *supra*, at 180, many advocates of abortion have persisted in anointing the 1.2 million figure as the truth. See, e.g., CAROLE JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER ROE V. WADE 29 (1995) (citing 1.2 million figure). Significantly, the 1.2 million, figure cited by the 1955 Planned Parenthood conference, that has been so enthusiastically embraced by abortion supporters, is itself derived from the much discredited Kinsey materials. See GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES AND THE ARGUMENTS 40 (1970); see also *infra* note 306.

306. For example, in support of his statement that “[s]cholars estimate that one out of every three to five pregnancies in the United States was aborted during the first seventy years of the twentieth century,” Graber, *The Ghost of Abortion Past*, *supra* note 281, at 316, Mark Graber in part cites to a study published by the Alfred C. Kinsey Institute for Sex Research. See *id.* at 316 n.27 (citing GEBHARD et al., *supra* note 284, at 93–94). Graber seems not to know, or chooses to ignore, the many severe criticisms leveled against this study for, among other things, the unrepresentative nature of the women surveyed. See, e.g., GRISEZ, *supra* note 305, at 39.

Indeed, the Kinsey study has been criticized as unreliable even by ardent supporters of the abortion license. The Statistics Committee of the 1955 Planned Parenthood conference concluded that the data in the Kinsey report did “not provide an adequate basis for reliable estimates of the incidence of induced abortion in the urban white population of the United States, much less in the total population.” ABORTION IN THE UNITED STATES, *supra* note 305, at 179; see also DANIEL CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 135–36 (1970) (commenting that a number of studies, including those by Kinsey and Gebhard, “did not have representative population samples, and yet their figures were used to provide the basis for the high estimates”); Robert G. Potter, Jr., *Abortion in the United States*, 37 MILBANK MEMORIAL FUND Q. 92, 94 (1959) (book review) (observing that Christopher Tietze contends that the Kinsey survey respondents are usefully representative but that “his tables contradict this conclusion by showing not only gross differences with respect to age, education, and marital status, but also, and more important, tangible differences with respect to age-specific marital fertility”). These severe criticisms notwithstanding, Graber’s article would have the reader believe that the Kinsey report’s findings have gone unchallenged.

Although Graber seems to want to make amends for this omission in his book, his effort falls short. He notes that the Kinsey study has been criticized because the women surveyed did not include representative numbers of urban dwellers, minority women, and unmarried women. GRABER, *RETHINKING ABORTION*, *supra* note 281, at 165 n.42. Graber trumpets the fact that this criticism is heard from “opponents of legal abortion.” *Id.* He again fails to note, however, that this same criticism is voiced by the supporters of legal abortion as well. See, e.g., ABORTION IN THE UNITED STATES, *supra* note 305, at 178 (concluding that the women surveyed in the Kinsey materials “do not constitute a representative sample of the population of the United States”); CALLAHAN, *supra*. What is more, Graber contends that this weakness is in fact a strength. He argues that the under-representation of these groups of women indicates that the Kinsey study likely understates the actual incidence of abortion prior to legalization because “[p]ersons of



To their credit, some writers on the subject have recognized the tendency of certain authors to favor estimates which in turn favor the author's own moral and legal predilections with respect to the issue.<sup>307</sup> Given the widely shared view that firm numbers reflecting the era of criminalization are hard to come by, it is difficult to disagree with Joseph Dellapenna's statement that "[a]ny estimate of the incidence of illegal abortion must remain largely a guess."<sup>308</sup> At the same time, it is undoubtedly the case that some guesses are better than others.

In support of their contention that anti-abortion laws were ineffective and so merely symbolic, Skeel and Stuntz rely almost entirely on one source,

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color, urban dwellers, and unmarried women . . . have much higher illegal abortion rates than the women Kinsey surveyed." GRABER, RETHINKING ABORTION, *supra* note 281, at 165 n.42. Here again, however, Graber appears to miss the main criticism concerning the unrepresentative nature of the Kinsey study, namely the fact that the women surveyed were not drawn from a random sample. Indeed, these women were self-selected in that they had "some interest in, and comprehended the value of, sex research." GEBHARD et al., *supra* note 284, at 14. This likely had "the greatest effect on the validity not only of this study but of all the Kinsey material." GRISEZ, *supra* note 305, at 39.

Similarly, historian James Mohr cites to Frederick Taussig's work, "a classic study published in 1936" in which he estimated "that over half a million illegal abortions were then taking place in the United States annually." MOHR, *supra* note 305, at 254. In fact, Taussig estimated that some 681,600 abortions took place throughout the country each year. See FREDERICK J. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS 28 (1936). Mohr does not consider the critique of Taussig's study based on the fact that the bulk of his data is derived from case histories of patients at a New York birth control clinic reported in MARIE E. KOPP, BIRTH CONTROL PRACTICE (1934). He does not pause to consider how such data might diverge significantly from the population as a whole. Nor does Mohr bother to consider how Taussig's data for rural areas might be flawed given that it was based on questionnaires sent to Iowa physicians who were simply asked to give "their estimate" as to the frequency of the practice. See GRISEZ, *supra* note 305, at 35-36. What is worse, Mohr does not consider the fact that in 1944 Taussig repudiated his estimate of 681,800 annual abortions as far too high. See DELLAPENNA, *supra* note 283, at 537 (citing *Statement of Dr. Frederick Taussig*, NAT. COMM. ON MATERNAL HEALTH, THE ABORTION PROBLEM 28 (1944)). Perhaps the effusive praise of Taussig's work offered by the author of a law review comment who did not have the benefit of this criticism can be forgiven, see Comment, *A Medicolegal Analysis of Abortion Statutes*, 31 S. CAL. L. REV. 181, 181 n.1 (1958) (stating that Taussig's work should be "required reading" for legislators), but this is hardly an excuse for a professional historian like Mohr or more recent commentators who continue to rely on Taussig's repudiated figure. See DELLAPENNA, *supra* note 283, at 537 n.423 (citing additional examples).

307. DELLAPENNA, *supra* note 283, at 557 ("The larger estimates have found an audience among those who favored the legalization of abortion as it allows them to claim that the abortion laws were a failure and therefore should have been repealed."); GRISEZ, *supra* note 305, at 41 ("One opposed to legalized abortion naturally would like to minimize the dimensions of the problem.").

308. DELLAPENNA, *supra* note 283, at 557.

namely, Gerald Rosenberg's book *The Hollow Hope*.<sup>309</sup> Indeed, they cite Rosenberg for the proposition that "[c]ommon estimates of the number of illegal abortions during the 1960s . . . range from 500,000 to 1.5 million."<sup>310</sup> For his part, Rosenberg acknowledges that "illegal abortions are impossible to count accurately" such that "[f]or obvious reasons of partisanship and lack of hard data" the proffered figures for illegal abortions "can only be taken as very rough estimates."<sup>311</sup> Although he further cautions that "one should approach estimates of the number of illegal abortions with care," in the next breath he concludes that "the 1 million figure is probably not a grossly unreasonable estimate."<sup>312</sup> Likewise, in another article, Stuntz contends that "[b]y most

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309. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 173–201, 353–55 (1991).

310. Skeel & Stuntz, *supra* note 20, at 829 n.46 (citing ROSENBERG, *supra* note 309, at 353–55 & tbl.A1).

311. ROSENBERG, *supra* note 309, at 353.

312. *Id.* at 355. There are a number of reasons to criticize Rosenberg's analysis of the issue regarding the annual number of abortions that took place prior to legalization. First, Rosenberg treats all of the estimates he draws upon as empirical studies of the issue. This, however, is plainly not the case. Indeed, some of the sources he cites are merely duplicative of one another. That is, they repeat the same figures, but these figures represent only one empirical study. For example, Rosenberg cites to Taussig, *see* TAUSSIG *supra* note 306, and the Kinsey materials, *see* GEBHARD ET AL., *supra* note 284, and then to a law review article as if it were an independent source. *See* ROSENBERG, *supra* note 309, at 354 tbl.A1 (citing Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123 (1962)). In fact, however, this article simply relies on Taussig's study and the Kinsey materials. *See* Leavy & Kummer, *supra*, at 123–24. Rosenberg also has the audacity to cite to a sponsor's statement by Senator Robert Packwood introducing abortion reform legislation in the Senate. ROSENBERG, *supra* note 309, at 354 tbl.A1 (citing 116 Cong. Rec. 12673 (1970) (statement of Sen. Packwood)). Rosenberg would have the reader believe that Packwood's statement should be treated as a serious, independent authority. In fact, however, Packwood conducted no independent research in support of the figures he advances. He merely repeats the 1 million abortions per year figure which he obtained from another source. The same could be said of Rosenberg's citations to articles in the *New York Times*, the *New Republic*, and *Newsweek*. ROSENBERG, *supra* note 309, at 354 tbl.A1.

Perhaps even more troubling is that Rosenberg fails to cite to a number of authorities that do genuinely set forth independent research. What is apparent about each of these studies is that they do not favor Rosenberg's preferred number of 1 million abortions per year. These sources include James R. Abernathy, Bernard G. Greenberg & Daniel G. Horvitz, *Estimates of Induced Abortion in Urban North Carolina*, 7 DEMOGRAPHY 19, 29 (1970) (study which extrapolates out to about 829,000 abortions per year nationally) and Barbara J. Syska, Thomas W. Hilgers & Dennis O'Hare, *An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy*, in NEW PERSPECTIVES ON HUMAN ABORTION 171 (Thomas W. Hilgers, Dennis J. Horan & David Mall eds., 1981) (using maternal mortality rates due to criminal abortion and natural pregnancy to estimate that between 39,000–210,000 abortions took place annually prior to legalization).

The study by Syska, Hilgers, and O'Hare poses an especially serious challenge to the 1 million illegal abortions per year figure championed by Rosenberg and others. In it, the authors

use the number of maternal deaths due to criminal abortion, the maternal death rate due to natural pregnancy, and the degree to which criminal abortion is more dangerous than natural pregnancy to predict the number of illegal abortions for a given year. *See id.*; *see also generally* Brian W. Clowes, *The Role of Maternal Deaths in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 327 (1993) (demonstrating the use of greatly exaggerated maternal death figures by abortion proponents in the abortion debate).

To his credit, Mark Graber at least recognizes this challenge. His response, however, leaves something to be desired. Indeed, Graber seems not to fully comprehend the implications of the model Syska and her colleagues put forth. Thus, Graber offers several superficial criticisms of Syska, Hilgers, and O'Hare's study. For example, he tries to make a virtue out of the fact that pro-choice advocates have ignored the Syska study in asserting that "no article published after 1960 in a respectable medical, public health, or scientific journal supports the claim of pro-life advocates that less than 200,000 abortions were being performed annually in the United States during the period when abortion was illegal." GRABER, RETHINKING ABORTION, *supra* note 281 at 23. Instead, Graber says that "[t]he most reliable studies" support the figure of 1 million abortions per year. *Id.* This, of course, is not an argument in favor of these other studies, merely a rhetorical assertion on Graber's part. He does not present any reasons for having confidence in their reliability, only his commendation that they are so.

More importantly, Graber criticizes the Syska study for "calculat[ing] the relative risk of the *average* criminal abortion by using a survey of 'the nonwhite population of New York City.'" *Id.* It is wrong, he says, to assume "that black women in Harlem had access to anything remotely resembling the same quality abortion services as had white women who lived in such affluent suburbs as Scarsdale and Great Neck." *Id.* What Graber fails to mention, however, is that Syska and her co-authors explicitly make note of this very limitation themselves. *See* Syska et al., *supra*, at 170–71. What is more, they also note that when "applied on a national basis" this has the effect of "artificially inflat[ing] the estimate of criminal abortions," *id.* at 170, a point that seems to have escaped Graber's attention. Indeed, the Syska study makes different predictions regarding the frequency of illegal abortion based on different assumptions that the procedure was either three, five, ten, or fifteen times more dangerous than carrying a pregnancy to term.

Here Graber fails to recognize the power of the model put forth by Syska and her co-authors as it relates to other literature on the subject. That is, even if the risk of maternal death due to illegal abortion was only twice as great as carrying a pregnancy to term, rather than three or five or ten times more dangerous, as the Syska study hypothesizes, the annual number of illegal abortions is still far below the 1 million per year figure that Graber champions. *See* GRABER, RETHINKING ABORTION, *supra* note 282, at 42, n.19. For example, for the year 1967, Syska and her co-authors estimate that 135,000 criminal abortions took place based on the assumption that the risk of maternal death is five times greater in the case of criminal abortion than in the case of natural pregnancy. Syska et al., *supra*, at 168. If the same statistics are used but it is assumed that criminal abortion was only three times more dangerous than carrying a pregnancy to term, then the Syska study predicts that 225,000 abortions took place that year. *Id.* at 168 tbl.3. If instead it is assumed that criminal abortion was only twice as dangerous as natural pregnancy, then the formula yields a figure of 337,500 abortions. If it is assumed that criminal abortion was no more dangerous than carrying the pregnancy to term, then the formula yields a figure of 675,000 abortions for 1967. While these numbers are substantial, they are on the lower end of the 200,000 to 1.2 million range put forth at the famous Planned Parenthood conference in 1955. *See* ABORTION IN THE UNITED STATES, *supra* note 305, at 180. More importantly, these figures are far below the 1 million abortions per year that Graber, Rosenberg, and many others (including by extension Skeel and Stuntz) tout as authoritative. The point is that, if these numbers are correct—and Graber offers no sound reason why they should not be regarded as

estimates, there were about a million illegal abortions per year during the 1960s.<sup>313</sup> Here again, his sole authority for this figure is Rosenberg.<sup>314</sup>

Rosenberg provides a useful table that makes use of the annual abortion totals compiled by the Guttmacher Institute.<sup>315</sup> It shows that the number of legal abortions rose from 22,700 in 1969 to 193,500 in 1970, to 485,800 in 1971, 586,800 in 1972, and 744,600 in 1973, the year *Roe* was decided.<sup>316</sup> Likewise, he notes that legal abortions did not exceed 1 million per year until 1975, reaching nearly 1.6 million abortions in 1985.<sup>317</sup> For Rosenberg it is significant that “[t]here was no steep or unusual increase in the number of legal abortions following *Roe*” and that “[w]hile the increases were large and steady, they were smaller than those of previous years.”<sup>318</sup> Thus, Rosenberg emphasizes that “the largest increase in the number of legal abortions occur[red] between 1970 and 1971, two years before *Roe*.”<sup>319</sup>

This pattern of increase fits the thesis that Rosenberg seeks to advance in his book, namely that *judicial* action has not been quite as decisive in bringing about social change as others have opined.<sup>320</sup> This pattern does not, however, lend support to Skeel and Stuntz’s thesis concerning the inability of law *in general* to help bring about social change. Indeed, it undermines Skeel and Stuntz’s claim regarding the impotence of law. Thus, although Skeel and Stuntz join with Rosenberg in observing that the number of abortions “rose steeply in the years leading up to *Roe*”<sup>321</sup> they fail to mention the well-known historical reason that accounts for this change, namely the fact that between

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such—then it is plainly the case that the law prohibiting abortion was not “purely symbolic.” Indeed, it had an enormous influence on the frequency with which abortions were sought and obtained.

313. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1886 (2000).

314. *Id.* (citing ROSENBERG, *supra* note 309, at 353–55 & tbl.A1).

315. ROSENBERG, *supra* note 309, at 180 tbl.6.1.

316. *Id.*

317. *Id.*

318. *Id.* at 179.

319. *Id.* at 178. To further stress the increase in abortion prior to *Roe*, Rosenberg analyzes the data in two and three year blocks:

The largest increase over a two-year period is in 1969–71 with an increase of 463,100 legal abortions. Next is 1970–72 with 393,300, about 26 percent higher than the 1972–74 increase of 311,800. The 1971–73 increase is only 258,800. Even the 1973–75 increase is only 289,600. The largest increase over three years comes in the pre-*Roe* 1969–72 period where there were an additional 564,100 legal abortions. The 1972–75 period saw an increase of 447,400 legal abortions, and between 1973 and 1976 the increase was 434,700.

*Id.* at 179.

320. ROSENBERG, *supra* note 309, at 1–8.

321. Skeel & Stuntz, *supra* note 20, at 833.

1966 and 1971 seventeen states either repealed or substantially liberalized their abortion statutes.<sup>322</sup>

The “large and steady” increases witnessed in this period do not support the larger estimates of illegal abortions prior to *Roe*. As noted above, Rosenberg—and with him Skeel and Stuntz—contends that 1 million abortions took place annually prior to both *Roe* and the legislative reforms that preceded it. Yet, as Joseph Dellapenna observes, “[I]legal abortions did not reach 1,000,000 until 1975—two full years after *Roe* and eight years after the first reform of the abortion statutes,”<sup>323</sup> a point with which Rosenberg agrees.<sup>324</sup> Thus, as large as the increases recounted above were, one would have expected them to have been even larger if the true level of illegal abortions had been toward the high end of the 200,000 to 1.2 million range that many proponents of abortion suggest and which Rosenberg and Skeel and Stuntz endorse. Indeed, Dellapenna concludes that “[a]ll of this seems to point towards the low-end estimates, without, of course, giving us anything like a precise figure.”<sup>325</sup>

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322. The *Roe* court itself noted that in “the past several years” prior to its decision there was “a trend toward liberalization of abortion statutes” resulting in “less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3.” *Roe v. Wade*, 410 U.S. 113, 140 (1973). For a summary of the various state laws in place at the time *Roe* was decided as well as citation to these authorities, see Paul Benjamin Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. DET. L. REV. 157, 158–61, 258 (1990).

In another chapter of his book, Rosenberg makes clear the legislative and political changes that took place during this time, though he does not explicitly correlate these changes to the increases in the incidence of abortion noted earlier. See ROSENBERG, *supra* note 309, at 258–65. While the fact that these legislative developments led to an increase in the incidence of growth in abortion supports Rosenberg’s narrow thesis that *courts* were not solely or even primarily responsible for this change in the social order, it pointedly undermines Skeel and Stuntz’s broader thesis that, in the case of abortion, *law* generally is unable to bring about substantial change in social practices. That is, even if the figure of 1 million abortions per year before the state reforms were enacted is conceded, the jump to nearly 1.6 million abortions in 1985 which Rosenberg reports must be reckoned as substantial in anyone’s estimation.

323. See DELLAPENNA, *supra* note 283, at 557.

324. ROSENBERG, *supra* note 309, at 180 tbl.6.1.

325. DELLAPENNA, *supra* note 283, at 557. The relatively slow growth in the annual number of abortions following legalization is even more pronounced if one makes use of the abortion statistics compiled by the Centers for Disease Control, as Dellapenna does, rather than the figures generated by the Guttmacher Institute, the research arm of Planned Parenthood, which Rosenberg employs. Thus, for example, whereas the Guttmacher Institute reported that 744,600 legal abortions took place in 1973 and 898,600 in 1974, the CDC reported that 615,813 and 763,476 legal abortions took place respectively for these same years. Compare Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 8 tbl.1 (Jan./Feb. 2003) with Lilo T. Strauss et al., Ctr. for Disease Control and Prevention, Dep’t of Health and Human Services, *Abortion Surveillance—United States, 2003*, 55 MORBIDITY AND MORTALITY WEEKLY REPORT 1, 16 tbl.2 (2006), available at <http://www.cdc.gov/mmwr/PDF/ss/ss5511.pdf>. The difference lies in the use of

More importantly, if this is correct—if the number of illegal abortions was well below the 1 million per year figure advanced by Rosenberg, and by extension Skeel and Stuntz—then the law that prohibited the practice of abortion prior to *Roe* was not merely symbolic. Indeed, this would suggest that it had a profound influence on the behavior of women and men with respect to the decision to terminate or sustain nascent human life. Put another way, if as Skeel and Stuntz suggest, the law prohibiting abortion was only symbolic and so had no effect in curbing its incidence, then one would not have expected the annual number of abortions to rise from the inflated pre-legalization estimate of 1.2 million advanced by abortion advocates<sup>326</sup> to almost 1.6 million in 1985, an increase of nearly one-third. Indeed, if the law was of no effect, then one would not have expected the annual number of abortions to more than double from 744,600 in 1973 to nearly 1.5 million in 1979.<sup>327</sup> If the law is incapable of promoting profound cultural change, if the law truly is modest in what it can hope to achieve, then the 1 million per year figure prior to legalization that Skeel and Stuntz endorse should have remained fairly constant. Instead the data shows that from 1975 to 1985 the incidence of abortion increased by almost sixty percent.<sup>328</sup>

### C. *The Law as Teacher: Beyond Simple Enforcement*

The lesson that should be learned from this historical experience of enormous change is a deeper appreciation for the teaching function that law performs. The absence of legal restriction helped to usher in this change. It helped to give birth to a culture in which abortion is practiced with alarming regularity.<sup>329</sup> Indeed, a legal regime that recognized abortion as a civil and constitutional right served as the midwife for a “culture of death.”<sup>330</sup> The law did not create the demand for abortion. The desire on the part of some women to be rid of unwanted pregnancies existed long before *Roe* was decided and

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different methods of data collection. The CDC only reports figures that it actually receives from the central health authorities for each of the fifty states plus the District of Columbia and New York City. See Strauss, et al., *supra*, at 1–3, 8. By contrast, the Guttmacher Institute directly contacts (with a mailed questionnaire) the abortion providers that it identifies. For those providers that fail to respond to either its mailings or subsequent efforts at contact, the Guttmacher Institute uses the numbers reported to the various state health authorities. Where such figures are not available, however, the Guttmacher Institute employs its own estimates. See Finer & Henshaw, *supra*, at 6–9.

326. For a discussion regarding the origins of this dubious figure and its popularity among abortion advocates, see *supra* note 305.

327. See Finer & Henshaw, *supra* note 325, at 8 tbl.1 (reporting 1,497,700 abortions for 1979).

328. *Id.* (reporting that abortions rose from 1.034 million in 1975 to 1.588 million in 1985).

329. For the twenty-eight years of legal abortion summarized in Finer and Henshaw’s study, on average 27 percent of all pregnancies in America have ended in abortion. *Id.*

330. See *supra* notes 242–61 and accompanying text.

will undoubtedly continue to exist in some form in the future. But the law did legitimize this desire, and made its realization far easier to obtain. By cloaking abortion in the aura of respectability, the law transformed abortion from a clandestine practice that was publicly derided to one that was openly practiced and widely supported. The cultural message transmitted by this change in legal status could not help but alter the frequency of the practice.

Indeed, the steady growth of abortion following legalization recounted above does more than call into question the exaggerated number of abortions that purportedly took place during the era of criminalization. It also demonstrates the power of law's teaching function. That is, the reason why the number of abortions in the United States did not rise to 1 million per year until 1975 is not only because the figure of 1 million per year prior to *Roe* was false. The reason this level was not achieved until two full years after *Roe* was decided and eight years after states began to adopt more liberal abortion statutes is that education takes time. During this time, during the period of clamoring for the repeal of restrictions and indeed the constitutionalization of abortion on demand, women learned the lesson being taught by the law, the media,<sup>331</sup> and through other venues of cultural expression. They learned that the public approved of abortion—that abortion was no longer to be seen as an action worthy of condemnation but as a legitimate exercise of one's inalienable freedom. American women learned the lesson of cultural approval and so practiced abortion in far greater numbers than they did before legalization.

Skeel and Stuntz do not entirely reject the notion of the law as teacher, but they severely limit it. Thus, they concede that "[l]aw can indeed teach, but only when its chief object lies elsewhere,"<sup>332</sup> namely when it pursues justice

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331. For example, and perhaps unsurprisingly, the NEW YORK TIMES was an early and enthusiastic supporter, first of abortion reform, then repeal, and then the Supreme Court's decision in *Roe v. Wade*. See GARROW, *supra* note 305, at 298–317, 345–47, 357–58, 605–08 (also describing the news coverage and editorial positions of other media publications). This institutional bias in favor of the freedom to abort clearly persists to this day. See, e.g., DEANA ROHLINGER, CTR. FOR THE STUDY OF DEMOCRACY, COUNTERMOVEMENT AND MEDIA COVERAGE OUTCOMES: A CASE STUDY OF THE ABORTION DEBATE 17 (2001) (concluding from a survey of media reporting that "it is apparent that pro-choice organizations were mentioned more often than pro-life organizations"), available at <http://repositories.cdlib.org/csd/01-06>; Maryann Barakso & Brian F. Schaffner, *Winning Coverage: News Media Portrayals of the Women's Movement, 1969–2004*, 11 HARV. INT'L J. PRESS/POL. 22, 36 (2006) (finding an overrepresentation of the abortion issue in coverage of women's issues and remarking that "it is not surprising to find women's movement organizations frequently winning coverage on the issue on television newscasts"); David Shaw, *Abortion Foes Stereotyped, Some in the Media Believe: Abortion and the Media*, L.A. TIMES, July 2, 1990, at A20. For a recent, specific example of how the institutional bias against the pro-life message precludes some media sources from employing certain language in its reporting, see Kenneth L. Woodward, *What's In a Name? The New York Times On "Partial-Birth" Abortion*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427 (2005).

332. Skeel & Stuntz, *supra* note 20, at 830.

through the enforcement of specific ordinances.<sup>333</sup> Thus, for Skeel and Stuntz, law teaches best when it rules modestly, when it “does not seek to rule too much,”<sup>334</sup> when it does not “cover . . . too much territory.”<sup>335</sup> Indeed, if we are to avoid the pitfall of excessive governmental discretion and “recover the rule of law,” they assure us that “it must be a more modest law that rules.”<sup>336</sup>

Skeel and Stuntz are not wrong to insist that law teaches best when its lessons are learned through enforcement, but law’s ability to teach goes beyond this. The abortion laws in place prior to *Roe* served as an imperfect though still effective teacher, reminding women and men of both the gravity of the act of abortion and its lethal and irreversible consequences. They reaffirmed the life-nurturing values already present in American society and so encouraged people to do what they already knew to be right.

Plainly, not everyone listened to this message nor was every illegal abortion that did take place subject to criminal prosecution. The evidence indicates, however, that the abortion laws in place prior to *Roe* “effectively inhibited the performance of abortions”<sup>337</sup> even when such laws were not properly enforced in every instance. Indeed, the law in place at that time plainly influenced the cultural outlook of society in a way that was reflected in the actions of American women. Put another way, the enormous difference between the likely incidence of abortion prior to the liberalization of abortion laws by the states in the late 1960s and early 1970s and the staggering frequency of abortion following the Supreme Court’s decision in *Roe v. Wade* shows that law’s teaching function goes beyond the concrete application of a statute in particular cases of enforcement. This is a lesson that John Paul well knew and which Skeel and Stuntz would do well to remember.

#### CONCLUSION

In ordering the day-to-day affairs of most people within a given society, culture is indeed vastly more important than law. Indeed, culture enjoys a kind priority over law insofar as all law is generated and exists within a given culture. At the same time, law also influences the development of culture through its effect on the behavior and beliefs of the individuals subject to it. Because John Paul II understood this vital relationship, he recognized that the legal prohibition of unjust actions is never sufficient to remove the “structures of sin” that sometimes dominate society. Instead, he understood that “[t]he changing of laws must be preceded and accompanied by the *changing of*

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333. *Id.* (referring, with respect to the enforcement of civil rights laws, to “direct, tangible consequences that [do] not depend on discretionary decisions” of government officials).

334. *Id.* at 811.

335. *Id.* at 819.

336. *Id.* at 813.

337. Forsythe, *supra* note 282, at 180.



*mentalities and morals.*”<sup>338</sup> That is, because culture enjoys a kind of priority over law, legal change can greatly contribute to the process of cultural renovation, but law can never be a substitute for it.

In arguing on behalf of “legal modesty” from a Christian perspective, David Skeel and William Stuntz seem both to agree with Pope John Paul and to appreciate law’s limits. Indeed, they recognize that when the subject matter of a legal rule exceeds law’s ability to regulate, it may in fact undermine the rule of law by vesting inordinate discretion in public officials. Thus, they argue that lawmakers should refrain from engaging in “legal moralism” by enacting “purely symbolic laws” intended more as a means of political expression than as a mechanism for the enforcement of basic standards of conduct.

Although examples of legal moralism clearly exist, Skeel and Stuntz incorrectly place laws regulating abortion in this category of legal excess. This unfortunate move constitutes a significant departure from both the teaching of John Paul II and the wider Christian tradition. Indeed, this wider tradition, as reflected in the magisterium of the late Pope, recognizes that law can indeed teach beyond the particular instances in which a specific ordinance is enforced. That is, unlike Skeel and Stuntz, John Paul recognized the “sometimes decisive role” that law plays “in influencing patterns of thought and behaviour”<sup>339</sup> even when the law is not enforced with perfect regularity.

This decisive role that law can play in the culture of a society is reflected in the historical record concerning the legal regulation of abortion in the United States prior to state efforts at liberalization and the Supreme Court’s decision in *Roe v. Wade*. Unfortunately, Skeel and Stuntz ignore the substantial literature on this subject. Instead they rely upon a single empirical source in a facile and uncritical manner. A more thorough review of the available evidence indicates that, although abortion was widely practiced during this time, the subsequent legalization of the procedure multiplied the incidence of abortion several fold.<sup>340</sup>

Accordingly, Skeel and Stuntz fail to demonstrate that the laws prohibiting abortion prior to the current era of legalization were either purely symbolic or immodest. Laws that restrict abortion are indeed modest insofar as they seek to protect the lives of unborn human beings—a point that John Paul repeatedly emphasized and upon which Skeel and Stuntz are conspicuously silent.

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338. Pope John Paul II, Address at the Commemoration of the Fifth Anniversary of the Encyclical “*Evangelium Vitae*,” para. 9 (Feb. 14, 2000) [hereinafter Fifth Anniversary Address], available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/documents/hf\\_jp-ii\\_spe\\_20000214\\_acd-life\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/documents/hf_jp-ii_spe_20000214_acd-life_en.html).

339. *Evangelium Vitae*, *supra* note 9, para. 90.

340. See, e.g., DELLAPENNA, *supra* note 283, at 701 (stating that legalization likely increased the incidence of abortion “between two and three times”).

The incalculable worth of every human being was always foremost in the mind of Pope John Paul II. Indeed, the dignity of the human person was at the center of his service as Peter's successor.<sup>341</sup> Although he was not a lawyer, as Pope he made a substantial contribution to the proper understanding of law and its limits. John Paul knew that law had a crucial role to play in combating the "structures of sin" and securing the dignity of every human being. At the same time, he knew that law is derivative of culture and that it is primarily through culture that men and women find the answers to life's questions. Although justice is the measure of both law's modesty and law's ambition, the human heart's desire for justice exceeds law's ability to control. Thus, like Father Zosima, John Paul taught that justice will take root only when we come to recognize that "every one of us is answerable for everyone else."<sup>342</sup> The witness that Karol Wojtyla bore to this truth in his teaching and in his life is something for which his pontificate will long be remembered. Indeed, it is something for which the entire human family should be grateful.

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341. Fifth Anniversary Address, *supra* note 338, para. 1 (John Paul states that he considers the document *Evangelium Vitae* to be "central to the whole Magisterium of my Pontificate").

342. DOSTOEVSKY, *supra* note 19, at 359.

