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## Lessons to be Learned, Lessons to Live Out: Catholicism at the Crossroads of Judaism and American Legalism

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**LESSONS TO BE LEARNED, LESSONS TO LIVE OUT:  
CATHOLICISM AT THE CROSSROADS OF JUDAISM AND  
AMERICAN LEGALISM**

RANDY LEE\*

I. INTRODUCTION

The Catholic Church in America sits at the crossroads of two profound legal traditions: Judaism and American legalism. Positioned as such, the Church is called to interact with both. The challenge for the Church is to understand the natures these interactions must take on. As Pope John Paul II has said, the Catholic Church is called to find that “the faith and religious life of the Jewish people as they are professed and practiced still today, can greatly help us to understand better certain aspects of the life of the Church.”<sup>1</sup> Thus, Catholics may perceive Judaism, at least in part, as a teacher. On the other hand, Christ has called His Church to be “the light of the world,” and, hence, of its legal institutions.<sup>2</sup> Thus, one would expect that Catholics would seek to enlighten, even to evangelize,<sup>3</sup> the American legal system. Too often, however, American Catholics see themselves as cut off from the wisdom of their Jewish brothers and sisters and too conformed to views of law fostered by American legalism as it is practiced today.

Throughout his papacy, Pope John Paul II has stressed the necessity for Catholics to learn from their “elder brothers,” the Jews.<sup>4</sup> He has noted that

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1. Pope John Paul II, Address to Experts Gathered by the Pontifical Commission for Religious Relations with Jews (Mar. 6, 1982), *quoted in Reflections on Covenant and Mission: Consultation of the National Council of Synagogues and the Bishops Committee for Ecumenical and Interreligious Affairs August 12, 2002*, 77 THE HEBREW CATHOLIC 39, 40 (2002).

2. *Matthew* 5:14 (all references to the Bible are to SAINT JOSEPH EDITION OF THE NEW AMERICAN BIBLE (Catholic Book Publ’g Co. 1986)).

3. See Randy Lee, *Reflections on a Rose in Its Sixth Season: A Review of H. Jefferson Powell’s THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM*, 32 CREIGHTON L. REV. 1205, 1231–33 (1999).

4. Pope John Paul II, Visit to the Two Chief Rabbis of Israel (Mar. 23, 2000), in L’OSSERVATORE ROMANO, Mar. 29, 2000, at 6.

“[t]he Jewish religion is not ‘extrinsic’ to [Catholics], but in a certain way is ‘intrinsic’ to our own religion,”<sup>5</sup> and that “the Catholic faith is rooted in the eternal truths contained in the Hebrew Scriptures, and in the irrevocable covenant made with Abraham.”<sup>6</sup> In this latter point, the Pope has echoed earlier Church teaching that “[i]n the biblical sources [Catholics] share with their Jewish brothers and sisters, they find the indispensable elements for living and deepening their own faith.”<sup>7</sup> So important has the Pope deemed the teachings of Judaism to an understanding of Catholicism that among the “many worthy *enterprises*” into which the Pope believes Catholics are called to “true and fraternal cooperation” with Jews, he has included Bible studies.<sup>8</sup> Such a view draws support from the Gospels where Christ made the hearts of the apostles burn as He explained to them His own life in light of the teachings of Moses and the prophets.<sup>9</sup>

It is in the area of law that the Pope has stressed a particular need for collaboration with Judaism. The Pope has pointed out that “Jews and Christians are the trustees and witnesses of an ethic marked by the Ten Commandments, in the observance of which man finds his truth and freedom.”<sup>10</sup> Their mutual understanding of God’s teachings offers to the world a complete picture of man, the nature of law, and man’s role in community, a picture that is:

in [favor] of man, his life from conception until natural death, his dignity, his freedom, his rights, his self-development in a society which is not hostile but friendly and [favorable], where justice reigns and where, in this nation, on the various continents and throughout the world, it is peace that rules, the *shalom* hoped for by the lawmakers, prophets and wise men of Israel.<sup>11</sup>

Such a picture requires collaboration between Jews and Catholics because either group on its own tends to miss part of the essential nature of God, a natural consequence of dealing with so great a God. As the Rabbi Lawrence Hoffman has observed, Jews tend to do a better job than do Catholics of remembering that law, in God’s eyes, is a product of love.<sup>12</sup> For their part,

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5. Pope John Paul II, Allocation in the Great Roman Synagogue (April 13, 1986), in *L’OSSERVATORE ROMANO*, Apr. 21, 1986, at 6 [hereinafter Allocation].

6. Pope John Paul II, Address to the Representatives of the Jewish Community in Sydney, Australia (Nov. 26, 1986), in *L’OSSERVATORE ROMANO*, Dec. 1, 1986, at 19 [hereinafter Sydney].

7. Pope John Paul II, Address to the General Audience (Apr. 28, 1999), in *L’OSSERVATORE ROMANO*, May 5, 1999, at 11.

8. Sydney, *supra* note 6, at 19.

9. *Luke* 24:13–35.

10. Allocation, *supra* note 5, at 7.

11. *Id.*

12. Lawrence A. Hoffman, *Response to Joseph Allegretti: The Relevance of Religion to a Lawyer’s Work*, 66 *FORDHAM L. REV.* 1157, 1162 (1998).

Catholics meanwhile may be particularly good at remembering that it is God, and not law, who ultimately saves.<sup>13</sup>

A temptation for Catholics is to see the story of God before the coming of Christ as the story of an angry God imposing hard and arbitrary rules on His people and then condemning them each time they fail to meet His demands. The Old Testament can accommodate such a reading. By the middle of chapter three of *Genesis*, the reader has met four people: God has banished two<sup>14</sup> and fired one,<sup>15</sup> and the fourth is dead.<sup>16</sup> One might say that things go downhill from there. In the remainder of *Genesis*, God floods the earth<sup>17</sup> and destroys two cities.<sup>18</sup> In *Exodus*, God “[slays] every first-born in the land of Egypt”<sup>19</sup> and drowns the Egyptian army.<sup>20</sup> In *Numbers*, God sends poisonous serpents to bite the Israelites.<sup>21</sup> In the remainder of the Old Testament, Moses never reaches the Promised Land,<sup>22</sup> the Midianites are trampled,<sup>23</sup> the Philistines are crushed,<sup>24</sup> a host of peoples are expelled,<sup>25</sup> the Amalekites are slaughtered,<sup>26</sup> and the Jews themselves wind up defeated and exiled.<sup>27</sup> Such would hardly appear to be the story of a God of compassion.

Yet, that is precisely what it was and what the Jews, even at the time, understood it to be. In fact, it is in the midst of all this that Jonah resisted becoming the Lord’s prophet because he knew God to be “a gracious and merciful God, slow to anger, rich in clemency, loathe to punish.”<sup>28</sup> It was also in the midst of all this that the psalmist described God not as the source of affliction but as a “redeemer” who is faithful even when His people are not and

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13. *But see* Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 *FORDHAM URB. L.J.* 1677, 1679 & n.10 (2000) (recognizing that “Jewish law views it as apparent that human beings are, by their very nature, fallible and incapable of avoiding all sin,” and that atonement requires “a spiritual reawakening, a desire to strengthen the connection between oneself and the sacred . . . .”) (citations omitted).

14. *Genesis* 3:23.

15. *Id.* at 4:11.

16. *Id.* at 4:8.

17. *Id.* at 7:11–12.

18. *Id.* at 19:25 (destruction of Sodom and Gomorrah).

19. *Exodus* 12:29.

20. *Id.* at 14:23–28.

21. *Numbers* 21:6–9.

22. *Deuteronomy* 34:4–6.

23. *Judges* 7:16–25.

24. *Id.* at 16:29–30 (Samson brings down the temple on the Philistines).

25. *See, e.g., Joshua* 12 (“Lists of Conquered Kings”).

26. *1 Samuel* 15:7–9.

27. *Jeremiah* 52.

28. *Jonah* 4:2.

remains merciful and forgiving, a redeemer who time and again will turn back his anger.<sup>29</sup>

One's view of the God of the Old Testament necessarily influences one's view of the law that God gave to His people in two ways of particular importance. First, if one understands that God's law comes from God's love, then one will understand that the restrictions or obligations that law imposes are designed to protect or benefit man. Meanwhile, if one understands Divine Law to come from a harsh and manipulative God, then one will see this law as an obstacle that God imposes to make people earn His graces or as a sacrifice man must suffer as a consequence of having a relationship with God.

Second, a reader's understanding of stories like that of God's detailed directives on how to build an ark and tent for the tablets on which the law was written<sup>30</sup> will depend on whether the reader understands God to be harsh or loving. For the reader who perceives a harsh God, the story of God's instructions for the ark and tent, filled with specific requirements for materials and exacting measurements,<sup>31</sup> is the story of a rigid God who is difficult to please and eager to find fault. Yet, to the Jewish mind that knows this God to be a god of love, this is the story of a loving Father allowing His children to please Him. After all, what are gold plates,<sup>32</sup> linen,<sup>33</sup> and acacia wood<sup>34</sup> to the creator of the universe, and why would the God of the Infinite care about a cubit? As God instructed David when David sought to build a house for the tablets, God can take care of His own house better than we can.<sup>35</sup> Our Heavenly Father, however, allows us through our obedience to please Him much as parents today are pleased by the pictures their children draw for the refrigerator door. From this perspective, one can almost see God trying to clothe all the lilies and keep all the sparrows in flight,<sup>36</sup> when His children begin asking Him what color He wants the plates and what wood He wants for the handles. In this light one recognizes that the specifics of the ark mattered little to God, but the desire of His children to please Him down to the cubit mattered a great deal.<sup>37</sup>

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29. *Psalms* 78:35–38.

30. *Exodus* 35–40. “The Israelites had carried out all the work just as the Lord had commanded Moses.” *Id.* at 39:42.

31. *Id.* at 35–40.

32. *Id.* at 35:5.

33. *Id.* at 35:6.

34. *Id.* at 35:7.

35. *See 2 Samuel* 7:1–7.

36. *See Matthew* 6:25–32.

37. In this regard, the Trappist Monk Thomas Merton would pray, “[T]he fact that I think that I am following your will does not mean that I am actually doing so. But I believe this: I believe that the desire to please you does in fact please you . . . I hope I never do anything apart from that desire.” Randy Lee, *A Look at God, Feminism, and Tort Law*, 75 MARQ. L. REV. 369, 398 n.170 (1992) (quoting Thomas Merton).

If we do not understand that the law is God's gift of love for the purpose of our salvation, then we turn the whole Bible and its redemption story around 180 degrees, and it becomes not the salvation story of man but the salvation story of God. Suddenly it is the story of an angry, rigid God who manipulates His people with arbitrary rules for several millennia until he suddenly has a change of heart and sends His Son to die for those people. Is not the true story of the entire Bible the story of the father and the prodigal son,<sup>38</sup> a story of a father who longs to protect his son with his wisdom and direction and a son who rejects what he perceives to be a lack of opportunity in his father's house? Yet, it is a story in which the son ultimately realizes the wisdom of his father's house and then, when the son returns to that house, the son finds the father, forever merciful and eager to forgive, running to embrace his returning son.

## II. LESSONS TO LEARN: CATHOLICS AND JUDAISM

When one integrates the Jewish and the Christian mind, the Bible begins not with *Genesis* but in the space before *Genesis*, in that space where God existed even before He created the heavens and the earth.<sup>39</sup> In that space, the Apostle John tells us, was the God who is<sup>40</sup> and is beyond time, He who is the Alpha and the Omega, "the one who is and who was and who is to come . . ."<sup>41</sup> And this God was not alone, for even in that space, "the Word was with God, and the Word was God."<sup>42</sup> John tells us that this "God is love,"<sup>43</sup> and the name this God assigned to the Word was "Jesus,"<sup>44</sup> which means "God saves."<sup>45</sup>

Through this timeless, immutable God who loves and saves, and through His Word, the world came to be,<sup>46</sup> and what God and the Word created was good.<sup>47</sup> Amongst that goodness, God created Man in His own image,<sup>48</sup> blessed him,<sup>49</sup> and created him for life and not death.<sup>50</sup> To all men who would accept Him, God gave power to become children of God,<sup>51</sup> and God intended that

38. *Luke* 15:11–23. See also *id.* at 15:24–32 (response of the angry brother to the redemption of the prodigal son).

39. *Genesis* 1:1.

40. *Exodus* 3:14.

41. *Revelation* 1:8.

42. *John* 1:1.

43. 1 *John* 4:8.

44. *Matthew* 1:21.

45. SAINT JOSEPH EDITION OF THE NEW AMERICAN BIBLE 424 (Catholic Book Publ'g Co. 1986) (Bible Dictionary).

46. *John* 1:10.

47. See *Genesis* 1.

48. *Id.* at 1:27.

49. *Id.* at 1:28.

50. See, e.g., 1 *John* 5:11 ("God gave us eternal life.").

51. *John* 1:12.

when all things were ultimately revealed, Man would be like God.<sup>52</sup> Even before Man could love, God loved Man.<sup>53</sup>

Yet, though the world came to be through Him,<sup>54</sup> the world refused to know God. Man refused to trust God: Man would not listen to God, disobeyed Him,<sup>55</sup> hid from Him,<sup>56</sup> and even accused Him,<sup>57</sup> and Man became separated from God.<sup>58</sup>

Yet, God would not abandon Man.<sup>59</sup> God continued to bless Man<sup>60</sup> and protect him<sup>61</sup> and to share with Man the wisdom that ordered the universe.<sup>62</sup> Each time that Man refused to hear God, God would express His Word of love, His desire for Man's salvation, in increasingly clear terms. From Eden's era of obedience in response to love, to a time when knowledge of good and bad was in Man's heart, to God writing the words of His law, His wisdom, for men, to the prophets applying these words directly to the lives of men, God tenaciously and persistently sought to help Man know how to be close to God. And still Man would turn his back on God.<sup>63</sup> This, then, became "the verdict, that the light came into the world, but people preferred darkness not light, because their works were evil."<sup>64</sup>

Still, the love that was God and the Word of salvation made yet another and most profound call for Man to return to God. Thus, because God loved so much, He embraced the belief that when Man encountered the fullness of grace and truth, Man would finally respect God and embrace His way,<sup>65</sup> "the Word became flesh and made his dwelling among us, and we saw his glory, the glory as of the Father's only Son, full of grace and truth."<sup>66</sup> John leaves no doubt that this was done because "God so loved the world that he gave his only son, so that everyone who believes in him might not perish but might have eternal life. For God did not send his Son into the world to condemn the world, but

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52. 1 *John* 3:2.

53. *Id.* at 4:19. ("We love because he first loved us.")

54. *John* 1:3.

55. *Genesis* 3:6.

56. *Id.* at 3:8.

57. *Id.* at 3:12.

58. *Id.* at 3:24.

59. *Isaiah* 49:15–16. ("Can a mother forget her infant, be without tenderness for the child of her womb? Even should she forget, I will never forget you. See, upon the palms of my hands I have written your name . . .").

60. *See, e.g., Genesis* 4:1.

61. *Id.* at 4:15.

62. *See, e.g., Exodus* 20.

63. *See, e.g., Numbers* 21:4–9 (the people of Israel complain against God and Moses in the desert).

64. *John* 3:19.

65. *See, e.g., Matthew* 21:37 ("They will respect my son.")

66. *John* 1:14.

that the world might be saved through him.”<sup>67</sup> “In this way the love of God was revealed to us,”<sup>68</sup> and in this way Man, who began his life in the garden with the tree of life,<sup>69</sup> can return there in fulfillment of God’s story of salvation.<sup>70</sup>

When the Christian mind so allows the words of the Jewish apostle John to preface the Old Testament, the entire Bible takes on a consistency that the reader might otherwise miss. No longer can the Old Testament be read as the story of a harsh God of law whose demands for justice and obedience consistently result in the condemnation and the destruction of people,<sup>71</sup> cities,<sup>72</sup> nations,<sup>73</sup> and even the whole world.<sup>74</sup> No longer can the Bible, itself, be read as the story of how the Creator of the universe was transformed from the cold legalist of the Old Testament to the loving savior of the New Testament.

Read as John would have us read Man’s journey from the garden with the tree of life and back again, the Bible tells us that the God of Adam, Abraham, Moses, and Elijah is the same God of the apostles, saints, and us. What is more, this unchanging God is a God who, motivated by love, invests everything in the sole purpose of salvation.<sup>75</sup> Certainly He is a God of both justice and mercy, but for this God of love, justice and mercy are compatible tools to be used toward the end of salvation rather than competing responses to the failures of men. In this light one can understand how the supposedly harsh God of the Old Testament could be described as “a gracious and merciful God, slow to anger, rich in clemency, loathe to punish,”<sup>76</sup> a God who “turn[s] back [H]is anger” and lets “[not] [H]is wrath be roused,”<sup>77</sup> while the mild God of the New Testament could twice overturn the tables of the money changers in the Temple.<sup>78</sup>

When the Christian mind so recognizes God, it is better able to recognize the true nature of God’s law spoken in words. God did not intend for the law given to Moses and the Jews to be an obstacle to salvation, a heavy burden to

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67. *Id.* at 3:16–17.

68. 1 *John* 4:9.

69. *Genesis* 2:9.

70. *See Revelation* 22:2.

71. *See, e.g., Joshua* 12.

72. *See, e.g., Genesis* 19 (destruction of Sodom and Gomorrah).

73. *See, e.g., 1 Samuel* 15:3 (God ordering Saul to destroy Amalek).

74. *See, e.g., Genesis* 7:6–23 (the great flood).

75. *John* 3:17.

76. *Jonah* 4:2.

77. *Psalms* 78:38.

78. *John* 2:15–16 (at the beginning of Jesus’ public ministry); *Mark* 11:15–16 (at the end of His ministry).



bear.<sup>79</sup> Instead God intended the law to be what the Jewish people recognize it to be: a gift of love for the purpose of salvation.<sup>80</sup> Just as the Christian mind considers the Word made Flesh God's greatest gift of love,<sup>81</sup> the Jewish mind considers the Word of God in law to be His greatest gift of love.<sup>82</sup>

Upon better understanding the nature of God's law, the Christian mind is confronted, however, with the unfortunate reality of God's attempts to communicate with Man. Man is not a good listener, nor does he have an accurate grasp of the purpose of law. Throughout Biblical history, one can see Man repeatedly turning his back on the wisdom of God and using Man's own laws as a tool for condemnation. God, in turn, has sought persistently to overcome Man's hard-heartedness by speaking with increasing clarity.

This contrast is illustrated by comparing the first rule by God and the first rule by Man promulgated after the fall in Eden. The Bible indicates that Lamech was the first man to create a law.<sup>83</sup> In doing so, Lamech attempted to emulate Divine Law, but Lamech's attempt failed miserably.

One cannot understand the failure of Lamech's efforts at law-making until those efforts are placed in the context of Cain, who was the great-great-great-grandfather of Lamech.<sup>84</sup> Cain was also the son of Adam and the brother of Abel.<sup>85</sup> It was Cain who spurred God to make the first articulated rule<sup>86</sup> of the post-Eden era. Resentful of Abel, Cain killed his brother,<sup>87</sup> and God banned Cain from tilling the earth for having done so.<sup>88</sup> God also told Cain that he was to "become a restless wanderer on the earth."<sup>89</sup>

In God's dealings with Cain, one can see both God's justice and mercy at work. The punishment is one Cain considered "too great to bear";<sup>90</sup> yet, it offered Cain time to turn his heart to redemption. In fact, God guaranteed Cain that time by creating His first expressed rule of this era of Man's knowing good and bad. God decreed that "[i]f anyone kills Cain, Cain shall be avenged

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79. *Matthew* 11:28–30 ("Come to me, all you who labor and are burdened, and I will give you rest. Take my yoke upon you and learn from me, for I am meek and humble of heart; and you will find rest for yourselves. For my yoke is easy, and my burden light.").

80. *John* 3:16–17. See also Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 70 (1987) (noting the intent of Divine Law is to "aid man in his striving after perfection, and remove every impediment to the attainment of excellence" (quoting Malmonide's Epistle to Yemen)).

81. *John* 1:14, 3:16.

82. Hoffman, *supra* note 12, at 1162.

83. See *Genesis* 4:24.

84. *Id.* at 4:17–18.

85. *Id.* at 4:1–2.

86. *Id.* at 4:13–15.

87. *Id.* at 4:5, 8.

88. *Genesis* at 4:11.

89. *Id.* at 4:12.

90. *Id.* at 4:13.

sevenfold” and God “put a mark on Cain” so that all would be on notice of the rule.<sup>91</sup>

The Bible does not say how Cain’s heart responded to this opportunity. It does indicate, however, that the remainder of his days were not spent alone as a “restless wanderer” as Cain had anticipated.<sup>92</sup> Cain married,<sup>93</sup> the fate God had planned for man,<sup>94</sup> and Cain and his wife “produced a man with the help of the Lord.”<sup>95</sup> Cain also founded the first city mentioned in the Bible,<sup>96</sup> and among his descendants were counted “all who play the lyre and the pipe”<sup>97</sup> and “all who forge instruments of bronze and iron.”<sup>98</sup>

Later, Lamech based his own rule on the rule God had used to protect Cain.<sup>99</sup> Under Lamech’s rule, “If Cain is avenged sevenfold, then Lamech seventy-sevenfold.”<sup>100</sup> Lamech went on to enforce his rule, declaring “I have killed a man for wounding me, a boy for bruising me.”<sup>101</sup>

Everything about Lamech’s attempt at making law ran counter to God’s approach. While God’s rule regarding Cain had been designed to protect Cain and offer him the opportunity for salvation, Lamech’s rule was designed to justify condemnation for and harm to Lamech’s enemies. While God’s rule had postponed an ultimate judgment of Cain by God, Lamech’s rule had invited an ultimate judgment of other people by Lamech. Finally, while God’s rule arose out of an undeterrable love for Cain, Lamech’s rule arose out of Lamech’s thirst for vengeance and his selfish longing for laws that would serve Lamech to the detriment of others.

Unlike God, Lamech created his rule outside the context of a relationship of love. As a result, the consequences of Lamech’s rulemaking proved the opposite of God’s. Although in the life of Cain, we see new life, creativity, and a return to God’s plan emerging from obedience to God’s rule, the consequence of obedience to Lamech’s rule is the death of a man and a child.

One may conclude, therefore, that for human law to have any chance to emulate divine law, human law must arise out of a community of love that seeks the common good and also the salvation of each of its members. The political source of human law must not pursue power or self-interest but must model itself after the Good Shepherd, who both gives up His life to guard His

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91. *Id.* at 4:15.

92. *Id.* at 4:14.

93. *Genesis* at 4:17.

94. *Id.* at 2:24.

95. *Id.* at 4:1; *see also id.* at 4:17.

96. *Id.* at 4:17.

97. *Id.* at 4:21.

98. *Genesis* 4:22.

99. *See supra* text accompanying note 91.

100. *Genesis* 4:24.

101. *Id.* at 4:23.

flock and leaves His flock to save one lost lamb.<sup>102</sup> That political source must use justice not as an excuse for condemnation but as a tool that complements mercy in the quest for salvation. That political source must recognize that law cannot create a community of peace unless the law is created in a community committed to peace.<sup>103</sup>

### III. LESSONS TO BE LIVED OUT: CATHOLICS AND AMERICAN LEGALISM

The Catholics in America must consider how zealously American legalism pursues such goals as those Divine law was designed to achieve. Certainly American legalism makes claims that its rule seeks “justice” and “equality,”<sup>104</sup> and that its rule is “morally legitimate and socially beneficent.”<sup>105</sup> In fact, the rhetoric of American legalism may even equate American constitutionalism with theological ethics<sup>106</sup> and imply that what we do as a nation, we do in imitation of God with God’s endorsement. Yet, this rhetoric invites confusion more than it offers enlightenment. In spite of the invocations, oaths, sacred scriptures on the walls, and priestly robes with which American legalism has chosen to adorn itself, Professor H. Jefferson Powell has forcefully observed that “American law never was Christian in the requisite sense,” but instead has been “a narrow professional oligarchy that exploited its political power to protect its own socioeconomic interests.”<sup>107</sup> Such a relationship between church and state is neither anything new nor anything uniquely American. Japan, in the sixteenth century, had a similar relationship with Christianity. The faith was allowed to flourish when it facilitated the reigning power’s desires to challenge the influence of Buddhist monks or to expand foreign trade, but when the reigning power felt that increasing numbers of converts

102. *Luke* 15:4–7.

103. For a discussion of the transforming power of law within a community of shared vision, see Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*, 1998 UTAH L. REV. 465, 474 (1998).

104. H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* 7 (1993).

105. *Id.* at 270. Powell’s warning echoes the words of Thomas À. Kempis, who wrote:

Put all your trust in God; centre in him all your fear and all your love . . . This world is no native country of yours; go where you will, you are only a foreigner, only a visitor in it. Nothing will ever bring you rest, except being closely united to Jesus.

THOMAS À. KEMPIS, *THE IMITATION OF CHRIST* 61 (Ronald Knox & Michael Oakley trans., Sheed and Ward 1959).

106. POWELL, *supra* note 104, at 11.

107. *Id.* at 275–76. In his film, *MR. SMITH GOES TO WASHINGTON*, Frank Capra paints a similar picture of America when Senator Smith, the film’s hero, observes in a moment of dejection, “A lot of fancy words around this town, some of them are carved in stone. I guess the Taylors and Paines put them up there so suckers like me can read them.” *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures 1939). Senator Smith, however, ultimately is able not only to speak truth to power, but to convince the powerful to listen.

could expedite a foreign invasion, persecutions of the faith began.<sup>108</sup> In fact, Aldous Huxley noted that some governments have framed their actions themselves and subsequently conformed God to their actions.<sup>109</sup>

Powell would not suggest that any American leader, such as Abraham Lincoln, who has ever led the nation while calling for God's blessings,<sup>110</sup> is

108. Patricia Mitchell, *A Samurai's Noble Death*, THE WORD AMONG US, Apr. 1997, at 50, available at <http://www.wau.org/resources/saints/saintarchive/miki.html>. In 1596, twenty-four Christian leaders in Japan were ordered crucified in the hope that "a public, gruesome blood bath would put an end to this religion of the West." *Id.* at 52. The crucifixions, however, only strengthened the faith in Japan. *Id.*

109. See ALDOUS HUXLEY, *Politics and Religion*, in COLLECTED ESSAYS 268, 278 (The Curtis Publ'g Co. 1958) (1923) [hereinafter *Politics and Religion*]. In another essay, Huxley would add that such behavior may well result from the state's desire to deceive and the people's desire to be deceived. ALDOUS HUXLEY, *Words and Behavior*, in COLLECTED ESSAYS 245, 255 (The Curtis Publ'g Co. 1958) (1923). As Huxley puts it, "In a fictitious world of symbols and personified abstractions, rulers find that they can rule more effectively, and the ruled, that they can gratify instincts which the conventions of good manners and the imperatives of morality demand that they should repress." *Id.*

110. Many of Lincoln's speeches acknowledged America's need for God's support. In his second inaugural address, for example, President Lincoln used God and Christian imagery to refocus the nation:

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.

STERLING NORTH, *ABE LINCOLN: LOG CABIN TO WHITE HOUSE 145–46* (1956). Similarly, at Gettysburg, Lincoln stressed that America must remain a nation "under God." Abraham Lincoln, *Gettysburg Address*, in MARK A. BELILES & STEPHEN K. MCDOWELL, *AMERICA'S PROVIDENTIAL HISTORY 241* (1989). Two months before the Battle of Gettysburg, Lincoln, convinced that the Union's failures in the Civil War were attributable to the nation's sins, called for a national Day of Humiliation, Fasting, and Prayer to acknowledge that "we have forgotten God[,] [w]e have forgotten the gracious hand which preserved us in peace, and multiplied and enriched and strengthened us. . . ," and "to humble ourselves before the offended Power, and confess our national sins, and to pray for clemency and forgiveness." *Id.* at 236–37 (quoting Abraham Lincoln).

In less visible actions, Lincoln was no less willing to inject God into his official activities. When asked by one of his generals if he had been anxious about how the Battle of Gettysburg would go, Lincoln replied that after he had prayed about the matter, "a sweet comfort crept into [his] soul that God almighty had taken the whole business into his own hands . . ." *Id.* at 239 (quoting Abraham Lincoln). When word of Lee's surrender reached Lincoln, he led his whole cabinet down to their knees to pray. *Id.* at 242. For all of this, Lincoln described his spirituality perhaps oddly, but more likely profoundly:

When I left Springfield I asked the people to pray for me. I was not a Christian. When I buried my son, the severest trial of my life, I was not a Christian. But when I went to Gettysburg and saw the graves of thousands of our soldiers, I then and there consecrated myself to Christ. Yes, I do love Jesus.

*Id.* at 241 (quoting Abraham Lincoln).

either a fool or a hypocrite nor is he saying that Christians cannot participate in government or must find every action of the state inherently evil. Powell has said, in fact, that “Christians have no stake in denying the goodness of Caesar’s acts when the latter are, in Christian terms, good.”<sup>111</sup> Powell does want it understood, however, that:

Christian theology and American constitutionalism are competing traditions. By offering as its goal and justification the achievement of social peace and community—in the actual language of the Constitution, “domestic tranquility” and “a more perfect Union”—constitutionalism implicitly claims for the American constitutional order a justice and “ordered unity in plurality, a genuine *res publica*” that Christianity recognizes only in community constituted by God.<sup>112</sup>

Thus, Powell has maintained that in the rhetorical overlap between Christianity and American legalism, in the shared images, language, justifications, and goals, in so much God-talk, so to speak, lies the danger that Christians will become blinded “to the increasing irrationality and violence of the constitutional ‘order.’”<sup>113</sup> Christians, however, cannot come to the political table wearing glasses that make Caesar look like God so that Caesar’s every action appears to be what Jesus would do; instead, “Christian analyses of political structures and forms of thought must be shaped fundamentally by ‘New Testament realism about the nature of governmental power’ . . . .”<sup>114</sup>

Perhaps the dominant term in American legalism<sup>115</sup> and the term most likely to confuse and seduce Catholics in America is the concept of a right. Although the creation and exercise of rights have taken on a position of paramount importance in American legalism, God did not make us merely to have rights; He made us to be free and at the heart of Catholicism is the recognition that people need God’s grace, God’s love, and God’s law to be free.

At its core, the concept of a right, as defined by American legalism, can cast no more than an alien shadow across the contours of divine law. Whatever else a right may be, at its most basic level, a right in American law is

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111. POWELL, *supra* note 104, at 265.

112. *Id.* at 46 (quoting Rowan Williams, *Politics and the Soul: A Reading of the City of God*, 19/20 MILLTOWN STUDIES 55, 60 (1987)).

113. *Id.* at 11.

114. *Id.* at 265 (quoting JOHN HOWARD YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* 153 (1984)). In fact, Powell would no doubt suggest that the recent feelings of political isolation among Christians are more a function of Christians beginning to take off these Caesar glasses rather than of any fundamental change in American government.

115. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPROVISHMENT OF POLITICAL DISCOURSE* (1991). Professor Robert Cover has contrasted the American legal system’s focus on rights with Judaism’s focus on “mitzvah,” which generally means an “incumbent obligation.” Cover, *supra* note 80, at 65.

a protection against law; a right marks an area in our lives into which the law cannot intrude. As such, the concept of a right assumes that one needs protection against law and that somehow one can gain protection from law.<sup>116</sup> Such assumptions make little sense in the face of divine law for two reasons. First, a recurring theme throughout the history of divine law is that God is the God of all aspects of our lives, and no barriers can be asserted to His power. With the infusion of knowledge of good and bad,<sup>117</sup> Cain and Abel recognized that God was entitled to the best from His children,<sup>118</sup> and in the era of the law in words, Moses instructed the people that they were to “love the Lord, your God, with all your heart, and with all your soul, and with all your strength.”<sup>119</sup> The breadth of the law in words covering everything from diet to personal hygiene affirmed the comprehensiveness of that command.<sup>120</sup> Furthermore, in the age of prophets, Job had no right to exclude God’s dominion from his business, his family, or his body.<sup>121</sup> In fact, Job lacked even a right to procedural due process before God.<sup>122</sup> How could it be otherwise before the God of Isaiah who counted even the very hairs of our heads?<sup>123</sup>

Nothing of this changed when the law became Flesh and dwelt among us.<sup>124</sup> In fact, Christ reaffirmed that the greatest command is that God is to be the God of our whole heart<sup>125</sup> and that we are called to give up everything to follow Him.<sup>126</sup> Thus, in the light of such an all-encompassing God, one cannot insist on a right capable of walling God out of some area of our lives.<sup>127</sup>

Second, in the context of God, the concept of a right fails because one only needs a right, one only needs protection from law, when law either is unwise or seeks to condemn. Yet, neither is true of the law of God. As noted earlier, the law of God reflects the perfect wisdom of the Creator of the universe and is designed not to condemn us but to save us.<sup>128</sup> We, in turn, obey that law both

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116. For examples of religious communities insisting on such rights in response to American secular law, see Levine, *supra* note 103, at 470–71.

117. *Genesis* 3:5–7.

118. *Id.* at 4:3–7.

119. *Deuteronomy* 6:5.

120. *See, e.g., Leviticus* 11, 15.

121. *Job* 1:13–2:10.

122. *Id.* at 40:2 (“Will we have arguing with the Almighty by the critic? Let him who would correct God give answer!”).

123. *Matthew* 10:30.

124. *John* 1:14.

125. *See, e.g., Mark* 12:29–30.

126. *See, e.g., id.* at 10:28–29.

127. Randy Lee, *The Immutability of Faith and the Necessity of Action*, 66 *FORDHAM L. REV.* 1455, 1456–57 (1998).

128. *See supra* text accompanying notes 39–64. *See also* Cover, *supra* note 80, at 70 (noting that in Judaism Divine Law is intended to lead us to our perfection and that when properly oriented, an individual’s purpose is consistent with divine purpose).

because of our own self-interest, as ultimately the prodigal son realized,<sup>129</sup> and also because our obedience is our gift to be freely given to God.<sup>130</sup>

Not only does the parable of the prodigal son illustrate that we do not need protection from the Father, but it also illustrates that one cannot take from this opportunity to choose a right to be free from the consequences of one's choices when those choices are at odds with God's law.<sup>131</sup> Certainly, the prodigal son had the opportunities to choose to take his inheritance during his father's lifetime and to choose to leave his father's house to encounter the world on his own terms.<sup>132</sup> Whatever right, however, the prodigal son may have had to make these choices could not protect him from the consequences of those choices. Thus, for example, the prodigal son ended up penniless and living in a pigsty.<sup>133</sup> Similarly, the "rich man who dressed in purple garments and fine linen and dined sumptuously each day"<sup>134</sup> had the opportunity to choose to ignore the starving Lazarus, who was lying at his door, covered with sores.<sup>135</sup> Yet, here again the opportunity to choose did not equate to a right to be free of the consequences of one's choices: The man chose to leave Lazarus to die, and consequently Lazarus died, and the man, himself, found his way to "the netherworld, where he was in torment."<sup>136</sup>

The opportunity to choose that God has granted us, then, is not a right to be selfish or stupid. In fact, the Church teaches that such behavior is not an exercise of freedom but "an abuse of the freedom that God gives to created persons so that they are capable of loving him and loving one another."<sup>137</sup> Rather, as the Apostle Paul exhorted the early Church, this opportunity to choose is an opportunity to choose to love.<sup>138</sup>

129. *See supra* text accompanying note 38.

130. *Isaiah* 1:11–20.

131. Judaism might object to the phraseology "opportunity to choose" for two reasons. First, in the Jewish experience of Divine Law, the ultimate event is in the Jewish community having been chosen for the law at Sinai rather than in any subsequent choosing on their part. Cover, *supra* note 80, at 66. Second, in Judaism the opportunity to choose may be not so much a product of design but of coincidence: The appearance of an opportunity to choose presents itself because the Jewish legal system, at least for the last 1900 years, has evolved as one which depends for adherence more on "social solidarity" than on "violence." *Id.* at 68.

132. *Luke* 15:12–13.

133. *Id.* at 15:13–15.

134. *See id.* at 16:19.

135. *Id.* at 16:20–21.

136. *Id.* at 16:22–23.

137. CATECHISM OF THE CATHOLIC CHURCH ¶ 387, at 109 (1994) [hereinafter CATECHISM]. *See also* Cover, *supra* note 80, at 67 ("In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.")

138. *Galatians* 5:13–15:

For you were called for freedom, brothers. But do not use this freedom as an opportunity for the flesh; rather, serve one another through love. For the whole law is fulfilled in one statement, namely, "You shall love your neighbor as yourself." But if you

In Eden, the free will that distinguished man was the opportunity to choose to obey God's directives<sup>139</sup> because man loved God as his Creator and Father rather than because man loved God because God was wise, good, or right. This is so because in Eden man could not distinguish between good and bad and, hence, could not recognize the goodness of God.<sup>140</sup> Once Man had eaten the fruit and acquired the knowledge of good and bad, Man could see the value in obeying God and could understand the utility of having God make all Man's choices for him. Yet, God still left Man free to choose his course. This was so because God still longed to be loved by Man.

If God had taken our free will because we could recognize good and bad, the Father would have had a perfect home filled with children who did what they were told and understood that ultimately everything God had would be theirs,<sup>141</sup> but it would have been a cold and unloving home.<sup>142</sup> God gives his children the choice to go or to stay, to work in His fields or to squander His wealth because He longs for a relationship where His children come home because they love Him and understand how much He loves them,<sup>143</sup> not because He is indifferent to their choices.<sup>144</sup>

All this is not to say that all concepts of a right are necessarily alien to Catholic thought. In fact, the most famous description of a right in American law, Thomas Jefferson's observations in the *Declaration of Independence*, can be read as consistent with fundamental truths of Catholicism. In the *Declaration of Independence*, Jefferson wrote that all men "are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."<sup>145</sup> The Church has always taught as much, recognizing, however, that God is the sole end of life,<sup>146</sup> that liberty "is a force for growth and maturity in truth and goodness" that "attains its perfection when directed toward God,"<sup>147</sup> and that "happiness is not found in riches or well-being, in human fame or power, or in any human achievement—however beneficial it may be—such as science, technology, and art, or indeed

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go on biting and devouring one another, beware that you are not consumed by one another.

139. See, e.g., *Genesis* 1:28 ("Be fertile and multiply . . ."); *id.* at 2:17 ("From that tree [of knowledge of good and bad] you shall not eat . . .").

140. *Id.* at 3:22.

141. *Luke* 15:31 (describing the instruction of the father to the angry brother of the prodigal son).

142. *Id.* at 15:28–30 (describing the attitude of the angry brother to the return of the prodigal son).

143. *Id.* at 15:17–19 (describing the prodigal son's recognition of his father's loving nature).

144. CATECHISM, *supra* note 137 ¶¶ 143, 161, at 44, 50 (recognizing that the faith to submit our will to God pleases God).

145. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

146. CATECHISM, *supra* note 137, ¶ 2258, at 602.

147. *Id.* ¶ 1731, at 481.



in any creature, but in God alone, the source of every good and of all love.”<sup>148</sup> The Church is also in accord with the *Declaration*'s accompanying assertion about rights—that they are secured in community.<sup>149</sup> In fact, before God gave the Jewish people the law, He built the Jewish community through the Jewish experience from Abraham to Mount Sinai.<sup>150</sup> Similarly, before God gave to the Church His new law,<sup>151</sup> He built the Christian community through the experience with Christ.<sup>152</sup> In fact, from the beginning God has insisted that “[i]t is not good for the man to be alone.”<sup>153</sup>

Reasonable minds may differ on whether an author such as Jefferson, who ardently embraced the Bible's moral authority while struggling with its divine origin, would have intended the *Declaration* to be read in this way.<sup>154</sup> In fact, popular characterizations of rights in American law tend to ignore the potential similarity between Jefferson's language and Catholic thought and thus fall into

148. *Id.* ¶ 1723, at 479.

149. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among Men. . .”).

150. See generally *Genesis 12–Exodus 19*.

151. *John 13:34* (“I give you a new commandment: love one another. As I have loved you, so you also should love one another.”).

152. For a discussion of the workings of this community, see *Acts 2:42–47*; *id.* at 4:32–37.

153. *Genesis 2:18*. Although this discussion highlights the incompatibility of popular notions of rights and divine law, others have found parallels between the two. For a comparison of Jewish law and substantive rights, for example, see Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998).

154. Thomas Jefferson has been characterized as anti-Christian. See, e.g., ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 108 (1996) (reporting the views of famous Connecticut Civil War era preacher Horace Bushnell). However, he passionately embraced Jesus as “the greatest teacher of moral truths that ever lived,” even as he struggled with the reality of the miracles reported in the Bible. *Id.* at 100. Jefferson was a thoughtful reader of the Bible and refused to answer those who questioned his faith, in part, because he felt he was accountable only to God for his beliefs, see *id.* at 100–01, and in part, because an answer would suggest that his inquisitor had a right to ask. See EDWIN S. GAUSTAD, *FAITH OF OUR FATHERS: RELIGION AND THE NEW NATION* (1987). Ultimately, Jefferson's reservations with Christianity were not so much with Christ but with those who corrupted “the pure religion of Jesus.” *Id.* at 47. Jefferson rejected clergy “interested not in truth but only in wealth and power” and clergy who would enlist the aid of the state to force “their impious heresies” down the throats of the people, especially when no rational person would swallow them. *Id.* Thus, Jefferson is perhaps only one step behind Catholic social activist Dorothy Day, who said:

I loved the Church for Christ made visible. Not for itself, because it was so often a scandal to me. Romano Guardini said the Church is the Cross on which Christ was crucified; one could not separate Christ from His Cross, and one must live in a state of permanent dissatisfaction with the Church.

DOROTHY DAY, *THE LONG LONELINESS* 149–50 (1981); see also ROBERT COLES, *HARVARD DIARY: REFLECTIONS ON THE SACRED AND THE SECULAR* 157 (1988).

those traps noted earlier that distinguish secular rights from divine law.<sup>155</sup> For example, although Man has no absolute right to life, liberty or happiness apart from God, some visions of American legalism would seek to assign him one.<sup>156</sup> Such insistence comes even though throughout the history of Man, whenever Man has insisted on such a right, the result has been his despair and death. Certainly God did not give the people at the time of the flood<sup>157</sup> or the citizens of Sodom<sup>158</sup> an opportunity to assert a right to life removed from God, and God showed Himself just as capable of claiming lives at His discretion in the New Testament.<sup>159</sup> Furthermore, God did not ask Job's permission before allowing him to be stripped of health, family, and wealth.<sup>160</sup> Thus, one cannot suggest that the Creator endowed Man with an absolute right to live and pursue happiness even apart from God, at least not a right enforceable against God.

This is not to suggest that we have an angry and vengeful God waiting to punish us at the first opportunity. Quite the contrary, as Jonah recognized, we have "a gracious and merciful God, slow to anger, rich in clemency, loathe to punish."<sup>161</sup> God's mercy, however, is not a result of any right we have to stay His hand but results, instead, from His love for us. God "turn[s] back his anger" and lets not "his wrath be roused"<sup>162</sup> because He wants to give us the same opportunity for redemption that He gave Cain.<sup>163</sup> He is, after all, a God of second chances.<sup>164</sup>

Because God is a God of second chances, a God of mercy who stays His hand, Man may misperceive God's gentleness and patience as the result of rights that Man has with respect to God. Certainly, God stayed His hand throughout the life of the rich man who feasted throughout his life while the good Lazarus starved at his feet.<sup>165</sup> Yet, ultimately that rich man had to answer

155. *See supra* text accompanying notes 115–130.

156. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing against "[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers").

157. *Genesis* 7.

158. *Id.* at 19:24.

159. *See, e.g.,* *Acts* 5:1–10 (describing the deaths of Ananias and Sapphira, who "lied not to human beings, but to God.>").

160. *Job* 1:13–2:7.

161. *Jonah* 4:2.

162. *Psalms* 78:38.

163. *See supra* text accompanying notes 87–98.

164. Cain's killing Abel was, itself, a response to a second chance God had given Cain. When Cain failed to give God his best in his offering as Abel had done, God did not bless Cain as He blessed Abel. *Genesis* 4:3–5. God, however, did explain to Cain his failure and gave Cain the opportunity to make amends. *Id.* at 4:6–7. Cain's response to this first second chance was to kill Abel. *See supra* text accompanying notes 87–98.

165. *Luke* 16:19–31.

to God,<sup>166</sup> and in His description of the judgment of the nations, Christ indicated that all men are to be similarly held accountable.<sup>167</sup> Thus, even if God's gentleness did result from some right of man, that right could offer Man no more than does the necessity defense in torts: It would temporarily suspend the normal accountability of men during men's lifetimes but still require men to be accountable for the harm they do.<sup>168</sup> Even in this, any such right would not protect Man during his lifetime from the consequences of his own sins, his disobedience toward God's plans for his life.<sup>169</sup>

Alternatively, other views of American law would maintain that God intended such rights to be enforced only against other men. Thus, while Man cannot insist on these rights before God, God recognizes Man's ability to assert them against other men. For example, adults might not have a right before God to engage in whatever consensual sexual practices they may choose,<sup>170</sup> but God might still intend for adults to have that right with respect to the communities of people in which they live.<sup>171</sup> In the context of American democracy, one might describe this as a right to be counter-majoritarian.

Some support for this view can be found within the Church and scripture. The Church teaches that "[f]reedom is exercised in relationships between human beings. Every human person, created in the image of God, has the natural right to be recognized as a free and responsible being. All owe to each other this duty of respect."<sup>172</sup> Furthermore, the Church itself is not a democracy, and therefore, the notion of counter-majoritarianism would not offend the Church. In addition, Christ admonished against judging others and directed us to focus our energies on evaluating our own behavior.<sup>173</sup> Thus, one could draw from this admonition a duty of the majority community to mind its own business.

Yet, one cannot draw either from scripture or from Church teachings a right to pretend we live in a vacuum, a right to ignore our neighbors or to pursue our own happiness without regard to the consequences our actions may have on others. Specifically, the Church teaches that "[t]he exercise of freedom does not imply a right to say or do everything. It is false to maintain that man, 'the subject of this freedom,' is 'an individual who is fully self-

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166. *Id.* at 16:23–26. *See also supra* text accompanying notes 134–136.

167. *Matthew* 25:31–46.

168. *See, e.g., Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221 (Minn. 1910) (describing the defense as one "in which the ordinary rules regulating property rights [are] suspended" but one in which the defendants remain liable for the property they damage during the emergency).

169. CATECHISM, *supra* note 1377, ¶ 397, at 112. *See also supra* text accompanying notes 132–137.

170. CATECHISM, *supra* note 137, ¶ 2357, at 566.

171. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

172. CATECHISM, *supra* note 137, ¶ 1738, at 431.

173. *See, e.g., Matthew* 7:1–5.

sufficient and whose finality is the satisfaction of his own interests in the enjoyment of earthly goods.”<sup>174</sup> Christ, in fact, stressed that the commandment second only to the call to love God is the commandment to love our neighbor as ourselves.<sup>175</sup> Paul pointed out to the Church at Corinth that love “does not seek its own interests.”<sup>176</sup> Love, in fact, is neither self-centered, selfish, nor rude.<sup>177</sup> Such teachings recognize that our sins have consequences on others, that others have an interest in our salvation, and even that one must avoid using her freedom in a way that may confuse others and lead them to sin.<sup>178</sup> Thus, in obedience to God, one could not ignore the consequences our actions have on others.

Paul also undermined any possibility that counter-majoritarianism from God’s perspective translates to a right to be self-destructive so long as one only hurts oneself. One might label this as again a right to be self-destructive or stupid and insist upon it as a check against community “paternalism.”<sup>179</sup> Such a view is implicit in the insistence that even God gives each person the right to choose. Paul, however, articulated to the Church at Corinth that all people in a community are interrelated. Paul pointed out that for people in a community there can be no incident of an assertion of a right that hurts oneself and no others because in a community “[i]f [one] part suffers, all the parts suffer with it; if one part is honored, all the parts share its joy.”<sup>180</sup>

To understand God’s notion of a right to be counter-majoritarian among men, one is best served to look to Noah<sup>181</sup> and Lot.<sup>182</sup> Both were counter-majoritarian in the sense that each sought after holiness in an unholy world. God not only recognized their right to seek holiness despite their communities

174. CATECHISM, *supra* note 137, ¶ 1740, at 432.

175. *Matthew* 22:37–39.

176. *1 Corinthians* 13:5.

177. *Id.* at 13:4–5.

178. CATECHISM, *supra* note 1377, ¶ 2287, at 551 (“Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged.”).

179. *See, e.g.,* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 638 (1982) (“[A]lmost everyone is a principled anti-paternalist, at least by their own account.”). *But see supra* text accompanying notes 131–137.

180. *1 Corinthians* 12:26. Professor Cover similarly stressed that the Jewish experience of law must be understood as “collective” or “corporate” rather than as “individualist” or “atomistic.” Cover, *supra* note 80, at 66.

181. *See Genesis* 6:5–9:17 (story of Noah and the flood).

182. *See id.* at 19:1–26 (story of Lot and his family and the destruction of Sodom and Gomorrah).

but preserved them in their attempt by rescuing Noah from the flood of the earth<sup>183</sup> and Lot from the destruction of Sodom and Gomorrah.<sup>184</sup>

Man does not need rights to protect him before God because God's laws are perfect and designed to preserve man.<sup>185</sup> The right to be counter-majoritarian exists between men, however, because the laws of men are not like the laws of God. At their best they are imperfect, and at their worst they echo the law of Lamech.<sup>186</sup> God recognizes rights between men to guarantee that a man can seek to be holy even when all other men have lost their way.

The United States Supreme Court seemed implicitly to pursue this vision of a right in *Wisconsin v. Yoder*.<sup>187</sup> There, the Court held that the right of the Amish to the free exercise of their religion prevented Wisconsin from forcing Amish children to enroll in high school.<sup>188</sup> In doing so, the Court recognized that the Amish were "a highly successful social unit within our society, even if apart from the conventional 'mainstream.'"<sup>189</sup> Furthermore, the Amish are a unit whose "members are productive and very law-abiding members of society"<sup>190</sup> exhibiting "reliability, self-reliance, and dedication to work . . ."<sup>191</sup> Having so noted the degree to which Amish culture could be admired, the Court acknowledged that one day we may decide that the Amish preserved something essential for the modern world:

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'<sup>192</sup>

Testimony at trial had established the degree to which *Yoder* turned on a right to pursue God in a world that did not choose necessarily to do so. For example, during the state's cross-examination of Dr. John Hostetler, an authority on the Amish people, the prosecutor had asked, "'Now, Doctor, . . .

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183. *See id.* at 7:1 (God directing Noah to "[g]o into the ark, you and all your household, for you alone in this age have I found to be truly just.").

184. *See id.* at 19:15-16 (angels urging Lot and his family to leave Sodom and even leading them out of the city by the hand).

185. *See supra* text accompanying notes 117-145.

186. *See supra* text accompanying notes 99-103.

187. 406 U.S. 205 (1972).

188. *Id.* at 234.

189. *Id.* at 222.

190. *Id.*

191. *Id.* at 224.

192. *Yoder*, 406 U.S. at 223-24.

[w]hat's the point of education? Isn't it to get ahead in the world?" and Dr. Hostetler had responded, "'It all depends on which world.'"<sup>193</sup>

Although God may recognize a right to be counter-majoritarian in this sense, one may question the ability of the American legal system to enforce it. Despite the Supreme Court's apparent success in protecting religious liberty in *Yoder*, commentators have cautioned Christians that they are ill-advised to put too much faith in the American judiciary to protect their interests.<sup>194</sup> This is so for at least two reasons. First, there is very little reason to expect that in a nation that had chosen to turn away from God, its judiciary would bother to look for holiness.<sup>195</sup> Second, courts that choose to look for truth often prove themselves lacking in their ability to find it. In fact, in a number of his opinions written while on the Court, Justice Oliver Wendell Holmes noted that inability in the United States Supreme Court.<sup>196</sup>

One might well draw from all this that first, American legalism falls into the traps of Lamech, it is more about power and self-interest than it is about love and community, and thus it fails to model itself after divine law.<sup>197</sup> Second, it structures itself around concepts alien to divine law.<sup>198</sup> Beyond that, however, American legalism offers an additional temptation to the Church: the opportunity to wield secular power for good. American legalism invites the leaders of the Church and the body of the faithful to believe that if they can just convert the government, they can escape the more difficult task of converting hearts.

Father Jim Burtchaell illustrated both the occurrence of such temptation and the dangers it presents in a story about the various responses to a draft of the Catholic Bishops' letter on nuclear arms:

I had a classmate who worked at the Pentagon at the time the Catholic Bishops first circulated the draft of their letter on . . . nuclear arms. . . . [He] told me that when it first came out . . . the Navy began to make plans to withdraw Catholic officers from command positions on nuclear submarines, because all of a sudden they were stricken with the thought that Catholics were all security

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193. William B. Ball, *Building a Landmark Case: Wisconsin v. Yoder*, in *COMPULSORY EDUCATION AND THE AMISH: THE RIGHT NOT TO BE MODERN* 114, 117, 118 (Albert N. Keim ed., 1975).

194. POWELL, *supra* note 104, at 287–92.

195. *Id.* at 288–89.

196. *See, e.g.,* *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting): [I]f there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

197. *See supra* text accompanying notes 99–103.

198. *See supra* text accompanying notes 115–196.

risks. . . . [But] within a few weeks they didn't worry anymore. They realized that there was no risk at all. Catholics weren't paying any attention to the Bishops, because the Bishops had been trying so long to preach to the Oval Office that they stopped preaching to Catholics . . . .<sup>199</sup>

The problem here, of course, is not what the bishops attempted to gain, but what they lost. The Church must witness truth to power.<sup>200</sup> As Rabbi Joseph B. Solovietchik insisted, "[T]he people of Israel must take part in the 'universal confrontation' of man with the cosmos."<sup>201</sup> Saint Thomas More, meanwhile, explained that "what you cannot turn to good, you . . . make as little bad as possible."<sup>202</sup> In so witnessing, however, the Church must remember that Christ turned down the kingdoms of this world<sup>203</sup> so that He could fulfill a mission that called Him to the home of a poor fisherman where He healed the multitude by laying hands on them one at a time.<sup>204</sup> The hierarchy of the Church in America must not become so concerned with saving America that it forgets to witness to the hearts of the Catholics who live here.

Our Jewish brothers and sisters would remind us that God is both good and intimate. His prophet Nathan came to David as much to redeem David as to redeem Israel,<sup>205</sup> and His prophet Elijah came to Ahab as much to redeem Ahab as to redeem Israel.<sup>206</sup> God forms His people into nations<sup>207</sup> and bodies;<sup>208</sup> yet, He recognizes that each member of the body is indispensable,<sup>209</sup> even calling to it in its Mother's womb.<sup>210</sup> God is not so removed nor so busy that He cannot patiently work at the margins healing lives one at a time,<sup>211</sup> and we are called to be like Him.<sup>212</sup>

The Catholic Church in America does, indeed, sit at the crossroads of Judaism and American legalism, and there it waits for the day when God will

199. Thomas L. Shaffer, *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 7, 8 (2000) (quoting Fr. Jim Burtchaell) (alterations in original).

200. Lee, *supra* note 3, at 1232–33.

201. Shaffer, *supra* note 199, at 21 (quoting Rabbi Joseph B. Solovietchik).

202. THOMAS MORE, *UTOPIA* 36 (George M. Logan & Robert M. Adams eds., 1989).

203. *See Luke* 4:5–9.

204. *See id.* at 4:38–41.

205. 2 *Samuel* 12:1–25 (describing Nathan chastising David over his affair with Bathsheba but then blessing the infant Solomon born of their marriage).

206. 1 *Kings* 21 (describing Elijah chastising Ahab for murdering Naboth to get his vineyard, and God then recognizing the humbled Ahab).

207. *Genesis* 12:2 (God telling Abram, "I will make of you a great nation, . . .").

208. 1 *Corinthians* 12:27 ("Now you are Christ's body, and individually parts of it.").

209. *Id.* at 12:22.

210. *Isaiah* 49:1.

211. *Politics and Religion*, *supra* note 109, at 283.

212. 1 *John* 3:2.

gather the nations and they shall see His glory.<sup>213</sup> Its older brother Judaism whispers to it that God gives law as an instrument of love, and that God builds community because only in a relationship of love can law work. American legalism, meanwhile, proclaims to the Church that law can find the proper balance between rights and power so that all can feel free and pursue happiness. God spoke to Elijah in a whisper,<sup>214</sup> and so He speaks to His Church in America today. The Church in America is called, not to be conformed to this world and its ways of thought,<sup>215</sup> but to draw strength from its roots and to be a light that “must shine before others.”<sup>216</sup>

The Bible is not ignorant of the possibility that law can be about power and self-interest. In fact, the Gospels are filled with people who use law to seek power, wealth, and status,<sup>217</sup> people who press the burdens of the law on others without accepting those burdens themselves,<sup>218</sup> and people who judge and condemn.<sup>219</sup> We are all familiar with their cries: look Jesus, he didn’t wash his hands;<sup>220</sup> look Jesus, he picked grain on the Sabbath;<sup>221</sup> look Jesus, we caught her in the very act of adultery.<sup>222</sup> We hear them demand: Get him, Jesus; punish him, Jesus; kill her, Jesus.

Ironic that the name these lawyers called on was “Jesus”—that name that God ordained to identify the essence of the words of wisdom God had tried to express across the millennia—that name that means “God saves.”<sup>223</sup>

Rabbi Hoffman is right in expressing that our Jewish brothers and sisters have been entrusted with the recognition that God’s law is a gift of love.<sup>224</sup> In fact, from that mission of the Jews comes the Catholic mission in America: to witness that it is only in the law-giver Himself that one finds life, liberty, and happiness,<sup>225</sup> that it is the law-giver Himself who saves.

#### IV. CONCLUSION

A great American temptation is to believe that God has blessed America with the political structure that will solve all our problems and that when

213. *Isaiah* 66:18.

214. *1 Kings* 19:12.

215. *Romans* 12:2 (“Do not conform yourselves to this age but be transformed by the renewal of your mind, . . .”).

216. *Matthew* 5:16.

217. *E.g., id.* at 23:5–6.

218. *E.g., id.* at 23:4.

219. *E.g., John* 8:3–5.

220. *Matthew* 15:1–2.

221. *Id.* at 12:1–2.

222. *John* 8:3–5.

223. *See supra* note 45.

224. Hoffman, *supra* note 12, at 1162.

225. *See supra* notes 79–80, 145–48 and accompanying text.



Americans order the world through that political structure, we order the world as God orders it.<sup>226</sup> We see the lady in the harbor holding out her torch to us, we hear her speak to us of rights and liberty, and we huddle about her light; yet, we still hunger for a freedom that even she cannot deliver.<sup>227</sup>

One can acknowledge this temptation for what it is and still recognize America as a most accommodating place to pass the exile of our parents Adam and Eve.<sup>228</sup> In so doing, however, Catholics in America must not “forg[e]t that our identity is wrapped up in Christ.”<sup>229</sup> Just as our Jewish brothers and sisters can teach us about the love in God’s law, they can also teach us the dangers in becoming too comfortable in exile. It is a lesson worth learning.

Rich Mullins articulated the fate of Christians passing their sojourn in America when he wrote:

Nobody tells you when you get born here  
 how much you’ll come to love it  
 and how you’ll never belong here  
 so I call you my country, but I’m lonely for my home  
 and I wish that I could take you there with me.<sup>230</sup>

Our older brothers and sisters have long been accustomed to such feelings. They know the longing that comes with having to “sing a song of the Lord in a foreign land”<sup>231</sup> Yet, they also know the longing that comes with wishing to share one’s home with one’s country. As the Rabbi Samson Raphael Hirsch voiced that longing,

If we . . . were truthful, just and holy and loving in mind and soul . . . if then God would let this promise of salvation grow out of our fate and our life: that the whole of mankind, awakened . . . enlightened . . . uplifted by our destiny and life, should, in unity with us, turn to the One and Only – and if thus we would fulfill our vocation as priests to humanity – what bliss there would be . . . .<sup>232</sup>

226. 20: The Countdown Magazine Remembers Rich Mullins (syndicated radio program broadcast, Oct. 11, 1997) (transcript available at <http://www.kidbrothers.net/words/interviews/20-the-countdown-magazine-oct1197.html>).

227. RICH MULLINS, *Land of My Sojourn, on A LITURGY, A LEGACY, AND A RAGAMUFFIN BAND* (Reunion Records 1993).

228. *Genesis* 3:23.

229. 20: The Countdown Magazine, *supra* note 226.

230. MULLINS, *supra* note 227.

231. *Psalms* 137:4.

232. Shaffer, *supra* note 199, at 7 (quoting Rabbi Samson Raphael Hirsch) (alterations in original).

If only we, as Catholics, could share this longing of our Jewish brothers and sisters, if only we could resist the temptation of our exile and through the witness of our lives fulfill our vocation as priests to humanity, what bliss there would be, here at our crossroads in America.

