

## St. John's Law Review

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Volume 71  
Number 3 *Volume 71, Summer 1997, Number 3*

Article 1

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March 2012

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#### Recommended Citation

Wagner, William Joseph (1997) "Christianity and the Civil Law: Secularity, Privacy, and the Status of Objective Moral Norms," *St. John's Law Review*: Vol. 71 : No. 3 , Article 1.  
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# ST. JOHN'S LAW REVIEW

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VOLUME 71

SUMMER 1997

NUMBER 3

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## CHRISTIANITY AND THE CIVIL LAW: SECULARITY, PRIVACY, AND THE STATUS OF OBJECTIVE MORAL NORMS

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If asked what concrete issue comes to mind when the topic of "Christianity and the Civil Law" is mentioned, the average American today, who is also a practicing Catholic, would probably answer "abortion." The abortion controversy has been the occasion for one of the most intensive efforts ever made by American Catholics to influence the shape of civil law.<sup>1</sup> Catholic efforts have not generally led to an amendment of the laws, but have often led merely to a renewal of intellectual prejudice against Catholics.<sup>2</sup> The association of the Catholic stance on the rela-

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<sup>1</sup> The efforts of Catholics in the United States to influence abortion law in the recent past are not without precedent. Catholics have sought to influence lawmaking on a wide range of welfare-related issues out of moral conviction since, at least, the founding of the National Catholic Welfare Council in September 24, 1919, and the issuance in the same year of The Bishops' Program of Social Reconstruction. See 10 NEW CATHOLIC ENCYCLOPEDIA, *National Catholic Welfare Conference (NCWC)* 225 (2d ed. 1967); see also TIMOTHY A. BYRNES & MARY C. SEGERS, *THE CATHOLIC CHURCH AND THE POLITICS OF ABORTION* (1992) (discussing Catholic Church's recent attempts to influence public policy on abortion); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) (reviewing history of abortion and abortion rights in America).

<sup>2</sup> A federal suit of the 1980's which sought the removal of the Catholic Church's tax exempt status because of its efforts to influence national abortion policy appeared to some to be symbolic of resurgent anti-Catholic prejudice. See *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989) (action dismissed for lack of standing); see also Edward McGlynn Gaffney, Jr., *Hostility to Religion, American*

tionship of civil law and religion with the abortion issue is painful for many Catholics.<sup>3</sup>

The devout Catholic tends to hold that there is an objective basis for rejecting abortion, which lawmakers should be amenable to understanding no less than arguments in favor of prohibiting theft or fostering public education.<sup>4</sup> But, the Catholic may also experience doubt about his or her position, since it is so widely repudiated by the press and an influential sector of public opinion.<sup>5</sup>

When the Catholic Christian tries to apply objective moral norms to proposals for legal reform in this area, he or she frequently is ruled out of order on one of two grounds. The first ground used to invalidate Catholic arguments is that the civil law is "secular" and, thus, in principle, closed to arguments

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*Style*, 42A DEPAUL L. REV. 263, 279-93 (1992) (placing this present day hostility within context of historical prejudice against Catholics). In the longer term, greater harm might flow to the credibility of Catholicism's intellectual integrity if it were to capitulate to the widespread contemporary societal denial of the demonstrably homicidal character of abortion.

<sup>3</sup> The pain has been palpable as the Catholic Bishops have wrestled to find a way to preserve their Catholic stance on abortion while avoiding alienating their general American audience. The Bishops' interim solution has been to offer a medley of policy commitments in the form of a "consistent ethic of life," linking "church opposition to abortion with activism against nuclear arms, poverty and capital punishment," on the ground that doing so was "essential if the Church's message is to be seen as a coherent, credible agenda in support of human life." Bruce Buursma, *Bishops Adopt Bernadin Plan for 'Pro-Life' Activism*, CHI. TRIB., Nov. 15, 1985, at C21. Joseph Cardinal Bernadin's "seamless garment" metaphor notes that opposition to abortion, the death penalty, the nuclear arms race, and the exploitation of the poor are all pro-life policies and part of a broader "approach to the sacredness of life." GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 324 (1990). United States Representative Henry Hyde has called the seamless garment metaphor "an unwarranted moral equivalence." Tom Roberts, *Catholic Right Hears Plea for Tolerance*, NAT'L CATH. REP., Dec. 8, 1995, at 14.

<sup>4</sup> See Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 824 (1993) (classifying theologically-based regulations according to their level of application: 1) only members of a specific congregation; 2) a given class of persons (i.e., Catholics); 3) universal (all men and women)). It is the last category which has an objective basis. *Id.*

<sup>5</sup> It has been observed that news reporters often specify "the religious affiliations of abortion opponents who are Catholic while leaving unspecified the affiliations of others." BYRNES & SEGERS, *supra* note 1, at 153; see also Terry Golway, *Life in the 90's*, AMERICA, May 25, 1996, at 7 (demonstrating association made by politicians and press between Catholics and abortion issues); Edd Doer, *Curbing Population: An Opportunity Missed*, USA TODAY MAG., Jan. 1, 1995, at 36-37 (suggesting President Reagan "brought U.S. policy into line with Vatican wishes," by halting United Nations efforts at population control).

based in religion;<sup>6</sup> the “objective moral norms” of the Catholic being characterized as “religious.”<sup>7</sup> The second ground raised to quash Catholic arguments is that the areas of conduct implicated in abortion are “private” and beyond the regulative scope of the civil law.<sup>8</sup>

The trauma of the abortion controversy for the Catholic is only partly that he or she is powerless to change the law. The trauma also lies in the Catholic position being treated, in effect, as having no meaning worthy of public recognition.<sup>9</sup> The latter event is what accounts for many Catholics desisting from further defense of the Catholic position, even while they are unable to affirm a status quo which they find morally disturbing.<sup>10</sup>

The intellectual danger of the abortion controversy is that it will lead Catholics not only to abandon a practical commitment to the present concrete moral challenges of lawmaking and citizenship, but to abandon as well their own distinctive modes of reasoning about law and morality.<sup>11</sup> The latter kind of aban-

<sup>6</sup> The “secular” argument is not new. See George McKenna, *On Abortion: A Lincolnian Position*, THE ATLANTIC MONTHLY, Sept. 1, 1995, at 51. Mr. McKenna notes the historical analogue between modern assertions that moral arguments are too “religious” to be inserted into the secular abortion debate with similar issues arising during the debate on slavery. *Id.* at 58.

<sup>7</sup> A principle such as Bruce Ackerman’s requirement of neutral dialogue might be applied, for example, for this purpose. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 331-35 (1980).

<sup>8</sup> The right of privacy as embodied in contemporary American constitutional law can, with however little convincing justification, be put to this purpose: “[T]he right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Thus, Justice William O. Douglas reasoned on one occasion as follows:

The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship .... [S]tate-imposed control over the medical decision whether pregnancy should be interrupted ... is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.

*Roe v. Wade*, 410 U.S. 179, 219 (1973) (Douglas, J., concurring).

<sup>9</sup> See Gaffney, *supra* note 2, at 287; McKenna, *supra* note 6, at 6.

<sup>10</sup> See Gaffney, *supra* note 2, at 285.

<sup>11</sup> Examples abound of avowedly Christian, or even Catholic, positions on abortion not grounded in a classically Roman Catholic approach to reasoning about law and morality. See, e.g., Jennifer Bradley, *Choice Words*, NEW REPUBLIC, Feb. 27, 1995, at 16-19 (disclosing that Francis Kissling, President of Catholics for a Free Choice, seeks to provide philosophy mediating between being good liberal and good Catholic, without any apparent familiarity with the Catholic tradition); Garry Wills, *Evangelists of Abortion*, N.Y. REV. OF BOOKS, June 15, 1989, at 15, 18-21 (illustrating that Randall Terry’s anti-abortion activism rests on goals formulated without ap-

donment would be an irremediable harm. It would entail the loss of a constitutive element of the Catholic religion.<sup>12</sup> And, from a purely human standpoint, it would be to relinquish one of the world's profound traditions of thought on the nature and meaning of law.

If this danger is to be averted, Catholics must retrieve and renew their distinctive understanding of the relationship between civil law and objective morality, and their understanding of how their view of that relationship forms a constitutive element of their religion. In today's context, however, Catholics cannot be said to understand these matters adequately unless they have understood and answered, within a Catholic framework, the overriding objections based on "secularity" and "privacy."<sup>13</sup>

The remainder of this article will explore the outlines of an answer to this intellectual challenge to Catholicism. In doing so, it will address three specific questions within a Catholic framework: 1) What is the justification for asserting that objective moral norms apply to the content of the civil law?; 2) Why is not the law's "secular" character a barrier to enactments, based on objective moral norms?; and 3) Why is not the "private" character of reproductive and other activities a barrier to the enactment of legal regulation affecting them?

In developing answers to these questions, this article will rely primarily on the writings of St. Augustine and St. Thomas Aquinas, taking it as noncontroversial that these thinkers are perennial sources of Catholic thought.<sup>14</sup> The points made and

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parently being informed by Catholic tradition of thought on law and morality). Notable contrasts can be found to the examples of Terry and Kissling. See Joseph A. Califano, Jr., *The Dangers of Discovery*, AMERICA, Jan. 14, 1995, at 8, 11 (advocating open discussion of whether advances in medical technology are serving human needs).

<sup>12</sup> In its broad outlines, a characteristic approach to questions of law and morality has historically been constitutive of Catholicism. This historic connection is surely based, at some level of generality at least, on theological premises which have an inherent necessity within a Catholic understanding of fidelity to Divine Revelation. The approach developed here is proposed as being characteristic of Catholic modes of reasoning, not authoritative magisterial pronouncements.

<sup>13</sup> See *infra* Part II A-B (discussing use of Augustinian-Thomist scheme of thought to counter these objections); see *supra* notes 6-8 and accompanying text (laying out "secular" and "privacy" arguments).

<sup>14</sup> See, e.g., THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., Benzinger Brothers, Inc. 1947) [hereinafter SUMMA] (because there are many translations of SUMMA THEOLOGICA, this article will cite only to book, chapter, and paragraph); ST. AUGUSTINE, THE CITY OF GOD (Henry

answers asserted could be supported by additional references to many other Catholic thinkers and to magisterial documents, but the scope of the present article does not permit their inclusion. In order to place the Catholic position into profile, it will help to contrast it with that of thinkers who have influenced dominant attitudes on the value and meaning of secularity and privacy. Within the constraints of this short article, reliance will be placed on the thought of John Locke and John Rawls to provide this alternative perspective.<sup>15</sup>

#### OBJECTIVE MORALITY AS A BASIS OF NORMATIVE DIRECTION FOR CIVIL LAW

In seeking to understand what Catholicism says about morality's relevance to civil law, it makes sense to begin with what Catholicism considers morality. Generally, morality can be defined as a set of commitments or ideas about how people ought to act or are obliged to act.<sup>16</sup> Differing moralities have in the past, and do today, have currency. The distinctive morality of Catholicism has a number of salient features, even leaving room for the various schools of thought within Catholicism.<sup>17</sup>

Because St. Thomas Aquinas is the pre-eminent representa-

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Bettenson trans., 1972) [hereinafter CITY OF GOD] (because there are many translations of THE CITY OF GOD, this article will only cite to book and chapter). David Tracy offers a useful concept for discerning the meaning of these two thinkers for Catholic thought on law, with his concept of a "classic" work. DAVID TRACY, THE ANALOGICAL IMAGINATION 99-135 (1981) (explaining that interpretation of "classic" involves not only subjective understanding but also "pre-understanding" of text, i.e., context in which reader interprets text).

<sup>15</sup> See, e.g., John Locke, *The Second Treatise of Government*, in JOHN LOCKE: TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1960) [hereinafter *Second Treatise*]; JOHN RAWLS, A THEORY OF JUSTICE (Clarendon Press, Oxford 1972) [hereinafter THEORY OF JUSTICE].

<sup>16</sup> In claiming that "Moral" has no axiomatic or canonical meaning in either popular or academic-philosophical culture," Michael Perry overstates his case. MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 7 (1988). While interpretations of the term cannot proceed far without stumbling upon deep-seated pluralism and even disintegration in contemporary culture, the term would seem to have a reasonably clear ordinary definition.

<sup>17</sup> A major historical example is the division between voluntarist and intellectualist approaches and Dominican and Franciscan Schools. See generally THOMAS E. DAVITT, THE NATURE OF LAW (1951). The voluntarist approach asserts that a person's will is autonomous, free of the person's intellect and the "cause of the freedom of election." *Id.* at 2-3. The intellectualist approach asserts that a person's will and intellect are interactive; the will being dependent on the intellect to make choices. *Id.* at 3.

tive of the Catholic tradition of thought about morality,<sup>18</sup> his ideas provide a sense of what Catholicism generally means by morality and, in particular, by the "objectivity" of morality.<sup>19</sup> St. Thomas begins from the premise that the human being's Ultimate End is *God*.<sup>20</sup> Among its other meanings, this concept asserts that a person's happiness, fulfillment, and self-realization ultimately flows from fully and unreservedly knowing and loving God, who is the proper transcendent, infinite, and entirely good object of the human person's deepest, most authentic desire.<sup>21</sup>

Reaching this "Ultimate End," however, requires some apparent indirection. For the human being, by contrast to God, is finite and is constituted within a finite world.<sup>22</sup> The way, therefore, that the human being reaches his or her fulfillment in God is, in essential part, by choosing well in relation to the *goods* of Creation, which, after all, define the conceivable scope of concrete human action.<sup>23</sup> Grounded in human freedom, such choices can be described as "moral" choices.<sup>24</sup>

According to St. Thomas, choosing well entails conceiving of and executing action in a way so as to order the desire for, or attachment to, any particular created good to the requirements of a good or virtuous character.<sup>25</sup> Such action neither falls short of, nor overshoots the goal of several basic human purposes of

<sup>18</sup> For a general discussion of St. Thomas Aquinas' approach to the law, see Thomas E. Davitt, *Law as Means to End—Thomas Aquinas*, 14 VAND. L. REV. 65 (1960) (noting that Aquinas wrote "the first systematically organized treatise on law and its philosophical roots.")

<sup>19</sup> The meaning of objectivity in this context relates to the universality of the terms of practical reason. See TIMOTHY E. O'CONNELL, PRINCIPLES FOR A CATHOLIC MORALITY 124 (1978).

<sup>20</sup> SUMMA, *supra* note 14, at I-II, Q. 3, Art. 8; see also PAUL J. GLENN, A TOUR OF THE SUMMA 100, 102 (1960).

<sup>21</sup> SUMMA, *supra* note 14, at I-II, Q. 3, Art. 8.

<sup>22</sup> *Id.* at I-II, Q. 5, Art. 6. The essence of God is greater than the nature of man can understand. *Id.* at I-II, Q. 5, Art. 5.

<sup>23</sup> *Id.* at I-II, Q. 5, Art. 7. The will must choose "works of virtue." See GLENN, *supra* note 20, at 105.

<sup>24</sup> SUMMA, *supra* note 14, at I-II, Q. 6, Art. 1.

<sup>25</sup> *Id.* at I-II, Q. 61, Art. 1; see also THOMAS AQUINAS, THE TREATISE ON LAW 67 (R.J. Henle ed., 1993) [hereinafter TREATISE] (identifying temperance, fortitude, justice, and prudence as virtues that assist in making good moral choices). "In order to determine the rightness or wrongness of acts ... we have to determine whether or not they are reasonable and virtuous." DANIEL MARK NELSON, THE PRIORITY OF PRUDENCE: VIRTUE AND NATURAL LAW IN THOMAS AQUINAS AND THE IMPLICATIONS FOR MODERN ETHICS 127 (1992).

goods.<sup>26</sup> *Recta Ratio*, or "right reason," is the intellect habituated to virtue; it is capable of identifying these purposes and determining whether a given action furthers them in due measure.<sup>27</sup>

If the choice to pursue some created good contravenes a basic human purpose and harms our character, by undermining the will's habitual orientation to true human fulfillment, it is a bad moral choice.<sup>28</sup> It disorders our relationship with the goods of Creation by placing the disproportionate enjoyment of a lower good over higher available goods and, thus, over the unrestricted openness to good of a virtuous character.<sup>29</sup> It may even entail the more fundamental disorder of satisfaction pursued in direct violation of a basic human purpose.<sup>30</sup> Acts having this latter character are said by St. Thomas to run "against nature" or "reason."<sup>31</sup>

Choosing in a manner that is against basic goods or that places lower goods over higher ones necessarily offends against the *order* of good found in the created universe as a whole, which means that it is an offense against God.<sup>32</sup> Since God is personal, this offense has the character of an injustice, in that it refuses to give God His Due.<sup>33</sup>

For St. Thomas, an especially important species of immoral-

<sup>26</sup> SUMMA, *supra* note 14, at I-II, Q. 60, Art. 4 (stating that "moral virtue consists in a kind of mean, the mean in contrary passions stands in the same ratio to both, even as in the natural order there is but one mean between two contraries, e.g., between black and white"). Different passions do not require different moral virtues because they seek the same thing, "the attainment of some good or the avoidance of some evil." *Id.*

<sup>27</sup> *Id.* at I-II, Q. 90, Art. 1.

<sup>28</sup> *Id.* at I-II, Q. 94, Art. 2; *see also* TREATISE, *supra* note 25, at 250 (discussing human inclinations and human goods and stressing St. Thomas' view that human nature is basically good, but one's act must be ordered according to reason).

<sup>29</sup> SUMMA, *supra* note 14, at I-II, Q. 21, Art. 4; *see also* SUMMA THEOLOGIAE: A CONCISE TRANSLATION 200 (Timothy McDermott ed., 1989) [hereinafter CONCISE TRANSLATION] (explaining that "if you do something that cannot be related to God as ultimate goal you do him dishonor and deserve redress from him .... [E]verything a man has or can have is ordered to God and all human actions merit God's reward or punishment.").

<sup>30</sup> *See infra* notes 40-42 and accompanying text.

<sup>31</sup> *See* SUMMA, *supra* note 14, at II-II, Q. 64, Art. 5; *see also* GLENN, *supra* note 20, at 228 (explaining that suicide, for example, constitutes sin against God, nature, and community).

<sup>32</sup> *See* SUMMA, *supra* note 14, at II-II, Q. 122, Art. 2 and I-II, Q. 100, Art. 6.

<sup>33</sup> *Id.* at II-II, Q. 81, Art. 2; CONCISE TRANSLATION, *supra* note 29, at 400 (commenting on Q. 81 and stating that "[v]irtues make men and their actions good.").



ity is injustice to other human persons.<sup>34</sup> Right reason tells us that a basic human purpose is life in society with others and that a disposition to treat others with equal regard (justice) is a prerequisite for life in common with them.<sup>35</sup> An unjust act, therefore, is one that takes a disproportionate share of some created good at the expense of the right of another.<sup>36</sup> Every allocation we make between ourselves and others, no matter how remote from public scrutiny, is subject to moral evaluation for its justice or injustice.<sup>37</sup> If the act is unjust, it is immoral and causes disorder in our characters.<sup>38</sup> By committing unjust acts we define ourselves as persons who do not acknowledge the moral equality of others.<sup>39</sup>

St. Thomas' vision of morality is widely and correctly thought to have an "objective" basis.<sup>40</sup> Right and wrong are not a

<sup>34</sup> SUMMA, *supra* note 14, at II-II, Q. 59, Art. 4; *see also* R.J. Araujo, *Thomas Aquinas: Prudence, Justice, and the Law*, 40 LOY. L. REV. 897, 909 (1995) (stating that according to method developed by Aquinas, goal of living moral life in which good is sought and evil is avoided is identified with justice). Justice is viewed as the object which directs "man in his relations with others." *Id.* (quoting SUMMA, *supra* note 14, at I-II, Q. 57, Art. 1). *See generally* TREATISE, *supra* note 25 (discussing justice as social virtue most relevant to law because law directs society or community).

<sup>35</sup> *See* SUMMA, *supra* note 14, at I-II, Q. 95, Art. 3 and II-II, Q. 57, Art. 1; *see also* Araujo, *supra* note 34, at 909 ("At the heart of the interpersonal relationship, and therefore justice, is 'a kind of equality'-the name of *justice* implies equality because 'things are adjusted ... when they are made equal ....'") (quoting SUMMA, *supra* note 14, at I-II, Q. 57, Art. 1).

<sup>36</sup> SUMMA, *supra* note 14, at II-II, Q. 58, Art. 10-11.

<sup>37</sup> *See* TREATISE, *supra* note 25, at 67 (discussing virtue as interior disposition that enables people to do the right things). "[T]he virtue of Justice is a perfection of man's relationship with others in regard to goods and services." *Id.*

<sup>38</sup> "As individual persons, we are each entitled to equal treatment to pursue the goods and opportunities which enable us to flourish as the beings God created us to be. But our liberty to pursue these goods and opportunities does not give anyone the license 'to infringe the equal rights of others.'" Araujo, *supra* note 34, at 921-22 (quoting Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 924 (1993)); *see also* DAVID GRANFIELD, *THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY* 68 (1988). "If one sins against the laws of proportion and gives something too big to something too small to carry it - ... too big meals to too small a body, too big powers to too small a soul - the result is bound to be a complete upset." *Id.* (quoting PLATO, *THE LAWS* (691 c.)).

<sup>39</sup> "Justice is a habit whereby a man renders to each one his due by a constant and perpetual will." SUMMA, *supra* note 14, at II-II, Q. 58, Art. 1. A person who disregards the rights of others also disregards the common good and in so doing injures the rights of others. Araujo, *supra* note 34, at 922. A person infringing on the rights of others, in turn, harms oneself. *Id.*

<sup>40</sup> SUMMA, *supra* note 14, at I-II, Q. 1, Art. 7-8 (specifying that there is universal final purpose to human life).

matter of emotion, but depend on goods given to human beings in Creation.<sup>41</sup> Even the relatively subjective task of building a virtuous character has an objective quality, since the virtues to be inculcated are habits promoting respect for objectively given human purposes.<sup>42</sup> In addition to its stress on the objective, St. Thomas' equation of morality with *recta ratio*, or "right reason," means that the *scope* of morality is as broad as all human reasoning. Every human act, according to St. Thomas, is subject to evaluation for whether it is moral.<sup>43</sup>

Let us turn now to the question of how Catholic tradition has understood this objective morality as giving the civil law its normative direction. One might suppose, since the Catholic approach to morality as seen in St. Thomas is so comprehensive, unified, and purportedly objective in its scope, that objective morality would subsume the civil law into itself, providing a definite answer based on its characteristic reasoning to every question of law. To test this notion, however, consider what would happen to the welfare of the Nation if a team of moral theologians replaced Congress!

Catholicism has throughout its history rejected any such idea.<sup>44</sup> St. Thomas, and the Church generally, treat the civil law as *related to*, but clearly distinguishable *from* morality.<sup>45</sup> If the nature of the distinction between the two terms is first ascertained, the nature of their relationship can also be described. That relationship will disclose the normative direction which

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<sup>41</sup> See TREATISE, *supra* note 25, at 76-77 (explaining that despite intrinsic drive for happiness, humans must act according to what is right and what is wrong). "[T]hroughout our lives we are faced with making many decisions in which the motivation must be the objective good and not simply the desire for happiness." *Id.*

<sup>42</sup> For an enlightening extended treatment of the meaning of subjective appropriation in understanding law and morality, see GRANFIELD, *supra* note 38.

<sup>43</sup> SUMMA, *supra* note 14, at I-II, Q. 18, Art. 9; see also GLENN, *supra* note 20, at 114-16 (detailing that every human act performed is either in accord with right reason or contrary to it; no act is considered neutral, they are either morally good or evil).

<sup>44</sup> This position is already reflected in New Testament Scripture. See *Matthew* 22:21 ("Then pay Caesar what is due Caesar, and pay God what is due God."); *1 Peter* 2:11-17 ("Submit yourself to every human institution for the sake of the Lord."); *Romans* 13:1-7 ("Every person must submit to the supreme authorities. There is no authority but by act of God, and the existing authorities are instituted by him.").

<sup>45</sup> This assumption is clearly at the basis of St. Thomas Aquinas's thought on civil law. SUMMA, *supra* note 14, at I-II, Q. 91, Art. 2-4 and I-II, Q. 95, Art. 2; see also TREATISE, *supra* note 25, at 84 (explaining that in addition to existence of Eternal Law and Natural Law, human determinations (human laws) are necessary and should be worked out by practical reason).

objective morality provides for the civil law.

In undertaking this analysis, it is good to begin with the early Christians, who were the first members of the Church to consciously perceive the civil law as a phenomenon susceptible to moral justification as well as critique.<sup>46</sup> The early Christians had a strong moral sense, and they looked to the Church for comprehensive guidance in giving content to their moral lives, tending to remove themselves from the general run of society.<sup>47</sup> But, when they were called before the Law, they acknowledged the state as having authority independent of the Church or the Church's blessing. When St. Polycarp, for instance, was brought before the Roman magistrate in the Second Century, he said: "You, ... I indeed consider entitled to an explanation; for we have been trained to render honor, in so far as it does not harm us, to magistrates and authorities appointed by God."<sup>48</sup> Polycarp refused to comply with the magistrate's unjust request that he worship the emperor, but in principle he conceded the authority of the civil law.<sup>49</sup>

The early Christians saw the civil law as ordained by God to preserve the external order of civil society.<sup>50</sup> As such, it had a locus of authority separate from moral reasoning about individual

<sup>46</sup> See Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 980 (1932) (detailing that by Twelfth Century canonists were already influencing law).

[Canonists] had long insisted that the mental element [of legal culpability] was the real criterion of guilt and under their influence the conception of subjective blameworthiness as the foundation for legal guilt was making itself strongly felt .... [Moreover] the early Anglo-Saxon law [allowing punishment of death] violated the idea of moral guilt derived from the canonists.

*Id.*

<sup>47</sup> The early Christians can be understood as an apocalyptic sect. See WAYNE A. MEEKS, *THE MORAL WORLD OF THE FIRST CHRISTIANS* 13, 102-04 (1986) (clarifying that conscious "resocialization" of Christianity in many ways presupposed unconscious "socialization" of contemporary moral expectation).

<sup>48</sup> *The Martyrdom of Polycarp*, in 6 ANCIENT CHRISTIAN WRITERS: THE WORKS OF THE FATHERS IN TRANSLATION 95 (James A. Kleist trans., Johannes Quasten and Joseph C. Plumpe eds., 1948).

<sup>49</sup> *Id.*

<sup>50</sup> See R.A. MARKUS, *SEACULUM: HISTORY AND SOCIETY IN THE THEOLOGY OF ST. AUGUSTINE* 84 (1970) (noting early Christian tradition whereby purpose of state was "to deal with the disorganisation and conflict resulting from the Fall: to prevent men from devouring each other like fish."); see also SUMMA, *supra* note 14, at I-II, Q. 92, Art. 1 (stating "the proper effect of the law is to lead its subjects to their proper virtue: and since virtue is *that which makes its subjects good*, it follows that the proper effect of law is to make those to whom it is given, good ....") (emphasis in original).

choice and independent of the Church's delegation. This insight lies behind the more systematic body of thought on the nature and role of the civil law one finds in St. Augustine.<sup>51</sup> St. Augustine, like St. Thomas, believes that life in society is a basic and indispensable human good.<sup>52</sup> This human purpose, however, is only perfectly fulfilled where there is perfect justice.<sup>53</sup> But, such justice transcends the world, in its sin and imperfection, that we encounter.<sup>54</sup> Such justice is something that Christians strive for during their lives on earth, but that they will only experience in heaven, which St. Augustine understands as the perfectly just society or the "City of God."<sup>55</sup> Perfect justice is, then, only possible for St. Augustine, where there is perfect love.<sup>56</sup>

The problem of civil law, for St. Augustine, is the problem of how human beings are to organize the civil society under short-run temporal conditions of sin and imperfection, making perfect justice far from possible.<sup>57</sup> Specifically, he asks how society is to

<sup>51</sup> See CITY OF GOD, *supra* note 14; see also MARKUS, *supra* note 50, at 78 (explaining that Augustine believed that all order is from God, and both cosmic order and idea of human society as way of order was commonplace in classical thought).

<sup>52</sup> CITY OF GOD, *supra* note 14, at bk. XIX, ch. 12-14 (discussing good of earthly city); see also HERBERT A. DEANE, THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE 9 (1963) (stating that Augustine follows traditional Christian notion that society and social life are natural to mankind); see also MARKUS, *supra* note 50, at 99 (detailing that life in society was seen as necessary because without it no human maturity was possible).

<sup>53</sup> CITY OF GOD, *supra* note 14, at bk. XIX, ch. 5. St. Augustine believed that there are four virtues in life: temperance, fortitude, justice, and prudence. DEANE, *supra* note 52, at 83. Virtue is defined as the perfect love of God and therefore these four virtues are forms of love. *Id.* at 93. Justice is defined as "love serving God only, ruling well to all else, subject to man." *Id.*

<sup>54</sup> CITY OF GOD, *supra* note 14, at bk. XIV, ch. 28 and bk. XIX, chs. 17 & 27.

<sup>55</sup> *Id.* at bk. XIV, ch. 28, bk. XVIII, ch. 1 and bk. XX, ch. 1; see also Arthur J. Burke, *Moral Foundations of Constitutional Thought: Current Problems, Augustian Prospects*, 89 MICH. L. REV. 1421, 1425 (1991). St. Augustine sets out two societies, the debased city of man and the eternally peaceful City of God. *Id.* The citizens of the City of God attempt to order their lives in accord with the divine revelation and true good. *Id.* Citizens of the city of man seek out surrogates for God in personal affections and passion. *Id.* Given the flawed nature of humans, St. Augustine concluded that establishing a City of God on earth is both impossible and contrary to the nature of man. *Id.*

<sup>56</sup> CITY OF GOD, *supra* note 14, at bk. XV, ch. 22. Perfect justice is only found in a community made up of individuals who serve and love God, but this community is only possible in the City of God. DEANE, *supra* note 52, at 119.

<sup>57</sup> See DEANE, *supra* note 52, at 98 (discussing that because Adam allowed sin to enter human world and corrupt his descendants, true justice is only found in City of God); see also Anton-Hermann Chroust, *The Fundamental Ideas in St. Augustine's*

organize itself when many are not willing to participate in the intrinsic pursuit of justice (i.e., the fair and equal treatment of one another), but instead seek to arrogate unlimited power and possessions.<sup>58</sup>

St. Augustine sees the authority of the state and civil law as a necessary external use of coercion to ensure a provisional temporal ordering of the human community under these conditions.<sup>59</sup> The authority of the state, for St. Augustine, is a coercive authority which restrains sinful human natures to create a semblance of order.<sup>60</sup> What, more precisely, is the goal of the civil law in this scheme?

For St. Augustine, the civil law seeks to effect a minimal fulfillment of the *public requirements of justice*.<sup>61</sup> Its content, then, depends on morality or "natural law," since it is through moral reasoning that the requirements of justice become evident.<sup>62</sup> Generally, justice requires that each give the other his or her due or, put differently, that each treat the other as he or she wishes to be treated him or herself.<sup>63</sup> But, in order to formulate *particular* content for the civil law, the civil authority must make an additional determination of *how much* of the compre-

*Philosophy of Law*, 18 AM. J. JURIS. 57, 72-73 (1973) (positing that although man cannot attain Divine Wisdom or attain ultimate perfection expressed by *lex aeterna*, human or temporal laws not derived from or sanctioned by divine or natural law are unjust and should not be obeyed).

<sup>58</sup> CITY OF GOD, *supra* note 14, at bk. XIV, ch. 1 and bk. XV, ch. 1. St. Augustine uses the word "lust" to describe all earthly desires. DEANE, *supra* note 52, at 44-45. There is a lust for power, money and all temporal goods. *Id.* There is no limit to sinful man's desire for material goods. *Id.*

<sup>59</sup> CITY OF GOD, *supra* note 14, at bk. XIV, ch. 13 (describing threat of loss of temporal things as offering overriding human motivation among mass of unredeemed humanity).

<sup>60</sup> MARKUS, *supra* note 50, at 84. While state and civil law do not help the "right" order of the world, their task is to minimize disorder to the public. *Id.* Political authority is not natural to man, but is the result of his sinful condition. *Id.*

<sup>61</sup> CITY OF GOD, *supra* note 14, at bk. XIX, ch. 21. "We are not to reckon as right such human laws as are iniquitous, since even unjust lawgivers themselves call a right [ ] only what derives from the fountainhead of justice .... [I]t follows beyond question that where there is no justice, there is no commonwealth." *Id.*; see also MARKUS, *supra* note 50, at 88 ("No legislation that fails to measure up to the requirements of the eternal law can be just, or indeed deserve the name of law .... Justice is almost synonymous with the right ordering of human affairs ....").

<sup>62</sup> CITY OF GOD, *supra* note 14, at bk. XIX, ch. 16; see also St. Augustine, *De Libera Arbitrio*, in THE FATHERS OF THE CHURCH bk. 1, ch.6 (R. Russell trans., 1968) [hereinafter *De Libera Arbitrio*]. Augustine recognizes the existence of natural law, a basic moral law written in the hearts of all men, and distinct from human or divinely revealed law. DEANE, *supra* note 52, at 85.

<sup>63</sup> *De Libera Arbitrio*, *supra* note 62, at bk. I, ch. 13.

hensive moral scope of justice's requirements can and should be accomplished by the coercive power of the state.<sup>64</sup>

According to St. Augustine, the civil law should seek to effect justice only insofar as it concerns *temporal* goods, such as life and property.<sup>65</sup> Moreover, St. Augustine would assert that rights in these goods should be protected only to the degree that is compatible with an effective rule of law, given the degree of law-abidingness in the given jurisdiction.<sup>66</sup> As a rule, St. Augustine would admit that the civil law can prevent only fairly gross violations of justice.<sup>67</sup> For example, St. Augustine considers killing in self-defense morally wrong (here he differs from Aquinas), but he does not believe that such killing can realistically be outlawed without giving rise to more egregious violations of justice.<sup>68</sup>

The civil law is distinct from morality for St. Augustine. It enforces a strictly limited range of the norms of morality—only those dealing with justice issues definite enough to be considered public—and, given the realities of human society, the civil law must be prepared to accept compromises in the enforcement of even these norms.<sup>69</sup> Finally, the civil law differs from morality in aiming not to make human beings “good” but only to keep a provisional peace, so that those with the grace to desire the good may pursue a virtuous life in peace.<sup>70</sup>

These distinctions all presuppose that civil law is fundamentally related to morality. According to St. Augustine, the civil law retains its validity precisely and only insofar as it fulfills the moral norms of public justice, which is its divinely appointed

<sup>64</sup> Chroust, *supra* note 57, at 74. Human law is not concerned with the promotion of moral virtue, but with the preservation of people and order by preventing, deterring, and punishing the worst abuses and “crudest social maladjustment” that might endanger and destroy peace and order. *Id.* Temporal law is needed to preserve a minimum of civil peace and to secure the survival of the secular society. *Id.*

<sup>65</sup> CITY OF GOD, *supra* note 14, at bk. XIX, chs. 13 & 17.

<sup>66</sup> *Id.* at bk. XIX, ch. 7 (expounding law as kind of compromise between human wills).

<sup>67</sup> *See id.* at bk. XIX, ch. 21.

<sup>68</sup> *De Libera Arbitrio*, *supra* note 62, at bk. 1, ch. 5.

<sup>69</sup> MARKUS, *supra* note 50, at 89. External law cannot make man good, but can secure public order, and property rights. *Id.* St. Augustine, in his early works suggests that human law is concerned with external law and is powerless and neutral with regard to internal propositions of men, whether they act in conformity or break it. *Id.* Later, Augustine shifts his view of the purpose of human legislation and emphasizes the external character of the law. *Id.*

<sup>70</sup> The purpose of civil law is to help in avoiding conflict and to maintain “earthly peace.” MARKUS, *supra* note 50, at 89.

purpose.<sup>71</sup> He, therefore, concludes that "an unjust law is no law."<sup>72</sup> St. Augustine recognizes, moreover, that the state and the civil law are themselves often subverted by human sinfulness, becoming the engines of the greed and lust for domination by bad men.<sup>73</sup> St. Augustine sees the state as frequently akin to a "band of robbers," in which case the civil law is not law at all, but in fact a form of violence.<sup>74</sup>

Returning to St. Thomas Aquinas, we find a complementary, but broader Catholic endorsement of civil law. St. Thomas accepts roughly the schema which St. Augustine devised for understanding the civil law, but he modifies and extends it, to reflect a more optimistic philosophy of human nature.

St. Thomas offers a richer and fuller concept of the temporal peace, which is the goal of the civil law, than does St. Augustine. St. Augustine assumed that the civil law was made necessary by sin.<sup>75</sup> St. Thomas postulates that it is more than a necessary response to sin, that, more fundamentally, it is an essential response to humanity's whole, created nature; a nature that is inherently social.<sup>76</sup> For St. Thomas, the civil law's purposes include the Common Good in its entirety, not just freedom from fear of grand larceny, rape, and murder, as it is for St.

<sup>71</sup> CITY OF GOD, *supra* note 14, at bk. XIX, ch. 21 (stating that people and government devoid of justice cannot constitute commonwealth, but rather constitute a mob); *see also* MARKUS, *supra* note 50, at 88 ("Justice and human law considered as its embodiment and instrument are in Augustine's early writings part of the ladder of man's ascent to God.").

<sup>72</sup> *De Libera Arbitrio*, *supra* note 62, at bk. 1, ch. 5.

<sup>73</sup> *See* Jean Bethke Elshtain, *Sovereign God, Sovereign State, Sovereign Self*, 66 NOTRE DAME L. REV. 1355, 1357 (1991). The distinctive mark of the city of man was his greed and lust for possessions, which presumed a right of exploitation and became the foundation of all human relationships. *Id.*

<sup>74</sup> CITY OF GOD, *supra* note 14, at bk. XIX chs. 21 & 24; *see also* SUMMA, *supra* note 14, at I-II, Q. 96, Art. 4 ("[unjust laws] are acts of violence rather than laws.").

<sup>75</sup> *See supra* note 73 and accompanying text.

<sup>76</sup> *See supra* notes 26-39 and accompanying text.

For Aquinas, natural law is what reason tells us to do or to avoid in order to function well as people. It is not, he explains, a detailed list of instructions for acting in the multitude of different circumstances .... It is a framework within which people can make particular choices on particular occasions in particular circumstances. And for this reason it needs to be supplemented by sound practical reasoning, the working of conscience, and by what Aquinas calls 'human law,' i.e. institutional legislation ('laws of the land') designed to promote well-being of people in concrete societies.

BRIAN DAVIES, *THE THOUGHTS OF THOMAS AQUINAS* 246 (1992).

Augustine.<sup>77</sup> For St. Thomas, the civil law is a suitable tool to direct all common action in the community aimed at fulfilling basic human needs and common interests.<sup>78</sup> Ultimately, St. Thomas understands the civil law as assisting, in both its positive and negative functions, the members of the community in reaching their transcendent "Ultimate End" as persons.<sup>79</sup> Its observance conduces them to the fullness of a virtuous character.<sup>80</sup>

But, St. Thomas, like St. Augustine, does not see the civil law as receiving its content directly from morality, or as embodying all of morality.<sup>81</sup> He, too, teaches that the civil law's scope is limited to that which is suitable for enactment by public authority and within the capacity of the subject members of the community.<sup>82</sup> While St. Thomas allows the purposes of civil law a scope wider than St. Augustine's notion of public justice, encompassing aspects of all the virtues, he stops short of suggesting that law should enforce the whole of the virtuous life.<sup>83</sup> Rather, he believes that it ought to enforce only as much of the virtuous life as is *socially relevant*, since the organization of social life offers the basic justification for law.<sup>84</sup> St. Thomas believes that the civil law ought not to restrain private vice.<sup>85</sup>

What is "public" vice and virtue and what is "private" follows for St. Thomas, from what the society is morally strong enough

<sup>77</sup> SUMMA, *supra* note 14, at I-II, Q. 95, Art. 3.

[M]an has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some kind of training .... [T]his kind of training, which compels through fear of punishment, is the discipline of laws. Therefore, in order that man might have peace and virtue, it was necessary for laws to be framed.

*Id.* at I-II, Q. 95, Art. 1.

<sup>78</sup> *Id.*

<sup>79</sup> See *supra* notes 20-21 and accompanying text. The Ultimate End for man is happiness, and Aquinas explains that "man's last end [or Ultimate End] is the uncreated good, namely, God, Who alone by His infinite goodness can perfectly satisfy man's will." SUMMA, *supra* note 14, at I-II, Q. 3, Art. 1.

<sup>80</sup> SUMMA, *supra* note 14, at I-II, Q. 92, Art. 1. Aquinas places human law in the framework of the plan of God, who wants man to achieve eternal happiness by choosing to love and obey Him. Human law and the state exist to promote the common good and thus to help man achieve his end of eternal happiness with God.

CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW 70 (1995).

<sup>81</sup> SUMMA, *supra* note 14, at I-II, Q. 96, Arts. 1-3.

<sup>82</sup> *Id.*

<sup>83</sup> See *supra* notes 75-78 and accompanying text.

<sup>84</sup> SUMMA, *supra* note 14, at I-II, Q. 96, Arts. 1-3.

<sup>85</sup> *Id.* Aquinas postulates that if civil law is too restrictive, imperfect men will rebel against it, which would lead to even greater harm. *Id.* at I-II, Q. 96, Art. 2.



to make its common concern. He suggests, for example, that some societies might need legally to permit some behaviors, in spite of their vicious moral character, where their prohibition would only lead to greater disorders.<sup>86</sup> For St. Augustine, the practical challenge of lawmaking was how to proffer security in life and other material goods to wicked men in such a way as to advance social cooperation.<sup>87</sup> For St. Thomas, it is, rather, how prudently to moderate the law's moral demands, so as not to overtax the average person's capacity of intellect and will to master unruly appetites.<sup>88</sup> His insight is that if the lawmaker tries for too much, the weak will either disregard the law or invent new evils in trying to avoid liability.<sup>89</sup>

To sum up, St. Augustine's and St. Thomas' view on the role of objective morality as a source of normative direction for civil law: both thinkers understand the human good of living in society as an objective good, accessible to reason. In connection with this good, both find a moral duty to treat others with equal moral regard or justice. Thus, the duties of justice are objective duties. Their enforcement should occur, they believe, when an injury becomes sufficiently material to be publicly cognizable. It is this mandate which both gives the law its fundamental normative direction and justifies its authority.

These brief outlines of the positions of St. Thomas and St. Augustine prepare us to address more specifically the relevance of the objective norms of morality for the civil law's response to abortion.

Both positions support the use of the civil law to restrain abortion for moral reasons, but neither does simply because the act of abortion is immoral. Both, for example, would have moral difficulties with abortion as one of a much wider class of acts in conflict with the basic human purpose of procreation, but neither would necessarily call for the legal restraint of abortion for this reason alone.

The necessity of a civil law response to abortion flows from the conflict it represents between claims. Morally, the resolution

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<sup>86</sup> *Id.*

<sup>87</sup> CITY OF GOD, *supra* note 14, at bk. XIV, ch. 13.

<sup>88</sup> SUMMA, *supra* note 14, at I-II, Q. 96, Art. 2 ("Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain.")

<sup>89</sup> *Id.*

of this conflict is a question of justice. The injustice of taking the life of the child for the incidental benefit of the mother and, indirectly, for society's convenience ignores the moral equality of the child, as person, and is material enough of all within the scope of a publicly cognizable injustice.

If there is any doubt that St. Thomas and St. Augustine would hold the life-taking of the unborn child as a public injustice (i.e., a violation of rights constituting the moral order of the temporal community) in today's society, it can be noted that abortions in our society are widely performed and publicized, under the auspices of important quasi-public medical institutions.<sup>90</sup> The prudential calculus of whether the law necessarily must assume the burden of enforcement on a particular moral issue (a step which both St. Augustine and St. Thomas count as an important mediating step in thinking about law) does *not* leave significant room for tolerating abortion, although it is at this stage of analysis that the Catholic can consider compromises for the legal regulation of abortion in drafting legislation.<sup>91</sup>

The Catholic position has only small room for tolerating abortion on practical grounds because the authority of law depends on its dedication to the fundamental moral equality of human persons. The deliberate exclusion of a sizable class of persons from the protection of so basic a right as life is not just a particular concrete wrong, but a serious threat to the law's fundamental claim to legitimacy. The problem is compounded when the law positively confers an immunity on another class from legal liability for acts to dominate (kill) members of the class excluded from protection.<sup>92</sup>

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<sup>90</sup> See *Abortion Numbers Continue to Decline*, WIS. ST. J., Sept. 13, 1996, at 3B (stating there were 12,782 abortions in Wisconsin in 1995, 13,396 in 1994 and 17,986 in 1988); Melissa Williams, *Pill Expected to Make Abortions More Available: Providers and Opponents of the Procedure Disagree About Whether the Number of Abortions in Texas Will Increase*, FORT WORTH STAR-TELEGRAM, Sept. 26, 1996, at 3 (stating there were 87,501 abortions in Texas in 1995).

<sup>91</sup> The recent decision of the German Constitutional Court on abortion upholds the value of human life from the beginning of gestation, while avoiding requiring the criminalization of all abortion, yet not, in any obvious way, violating Catholic moral principles. *Entscheidungen des Bundesverfassungsgerichts* 88, 203, II (1992); see also Deborah Goldberg, *Developments in German Abortion Law: A U.S. Perspective*, 5 UCLA WOMEN'S L.J. 531, 532 (1995) (noting that although German Constitutional Court in its May 1993 decision "recognized for the first time that it is a woman's ultimate responsibility to decide whether to terminate a pregnancy," the "reformed law did not meet the minimum constitutional standards for the protection of life.").

<sup>92</sup> An objective basis, and not mere societal election, exists, in this view, for

The objective moral norm leading the Church to call for the legal prohibition of abortion is that of justice.<sup>93</sup> A review of the thought of St. Thomas and St. Augustine shows that the Church's concern with the issue rests only in part on a stance of solidarity with the identifiable unborn persons threatened with the deprivation of life.<sup>94</sup> The Church is also concerned with the ramifications of abortion on demand for the fundamental legitimacy of the civil law.<sup>95</sup> With all allowances for practical mediation, if the legal system finally lets go of its grounding in the morality of justice, it becomes, at its very root, in the Catholic view, a tool of oppression for the powerful who happen to control it and who, in St. Augustine's words, resemble a band of robbers.<sup>96</sup>

A. *The Objection that the Law's Secular Character Excludes Catholicism's Approach to Law and Morality*

In moving from the Augustinian-Thomist scheme of thought to the concrete challenge of legislating against abortion, the Catholic in contemporary society encounters the objection that Catholic proposals are ineligible for recognition because they are religiously grounded.<sup>97</sup> The law, it is said, is essentially secular

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holding that the act of intentionally interrupting the gestational state upon which the child's life depends makes the agent at least *prima facie* morally responsible for the child's death, whereas the failure to positively extend assistance to a child in physical need, even with fatal consequences for the child, does not have this significance. The opposing view often dominates contemporary discussion. See LAWRENCE H. TRIBE, CONSTITUTIONAL CHOICES 243-45 (1985).

<sup>93</sup> The Catholic position is supported by Natural Law theorists who believe that every law must have moral worth. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 26 (1980).

<sup>94</sup> SUMMA, *supra* note 14, at I-II, Q. 95, Art. 2 (stating that chief arm of human law is to forbid vices which hurt others).

<sup>95</sup> See Charles Curran, *Encyclical is Positive, Problematic*, NAT'L CATH. REP., Apr. 14, 1995, at 4 ("[Pope] John Paul II maintains that civil law must respect and promote the basic right to life."). In his most recent encyclical, the Pope opposed abortion and abortion-allowing laws vigorously. See *id.* "The present situation of permissive abortion laws in many countries shows the presence of ethical relativism and the separation of freedom from truth." *Id.*

<sup>96</sup> See *supra* note 74 and accompanying text.

<sup>97</sup> See PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM 175-76 (1992). The author cites Justice Stevens in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), overruled by *Planned Parenthood of South-eastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), who stated that "attributing personhood 'during the entire period from the moment of conception until the moment of birth' rests on 'a ... theological argument.'" *Id.* at 176. Justice Stevens claimed that this was strictly a religious position and that the issue necessitated an elevation of secular state interests. *Id.*

and may not validate religious reasons.<sup>98</sup>

Catholics must learn to refute this objection, if they are to preserve their distinctive mode of reasoning about law and morality, in the contemporary situation. In order to do so, Catholics must realize that they face not just *ad hoc* resistance to a particular position they take, but a deep-seated difference in ways of grasping the relationship between law and human values. To answer the objection, Catholics must learn to be effective in criticizing the sort of thinking it represents.

To understand this prevailing view, one may conveniently begin with the thought of John Locke, who lived from 1632 to 1704.<sup>99</sup> Locke, as is well known, has had an enormous, in some ways beneficial, influence on American political institutions.<sup>100</sup>

In grounding the legitimacy of civil law, Locke does not begin with the objective norms of justice, but rather with a hypothetical agreement among the governed, which he calls the "social contract."<sup>101</sup> Using the analogy of bargains, Locke imagines that civil society comes into existence when individuals agree to give up a measure of freedom in exchange for security.<sup>102</sup> The power they give up, they cede over to the majority rule of the society.<sup>103</sup>

For Locke, the test of the legitimacy of law is the majority will.<sup>104</sup> If the majority wills it, the law is legitimate, even if the

<sup>98</sup> *Id.* at 176 (concluding that enactments reflecting theological position would unconstitutionally establish religion).

<sup>99</sup> See generally Peter Laslett, *Introduction, Second Treatise*, *supra* note 15; J.W. GOUGH, *JOHN LOCKE'S POLITICAL PHILOSOPHY* (1973); MARTIN SELINGER, *THE LIBERAL POLITICS OF JOHN LOCKE* (1968); GOPAL REENIVASAN, *THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY* (1995); John Locke, *The Natural Right to Property*, in *READINGS IN PHILOSOPHY OF LAW* (John Arthur & William H. Shaw eds., 1984) [hereinafter *Natural Right*]; John Locke, *Essays on the Law of Nature*, in *NATURAL LAW IN POLITICAL THOUGHT* 91 (Paul E. Sigmund ed., 1971) [hereinafter *Essays*].

<sup>100</sup> "In spirit, the seventeenth-century English philosopher John Locke ranks among the founders of the American political tradition. His liberal political philosophy haunts American politics like a family ghost." Stephen L. Newman, *Locke's Two Treatises and Contemporary Thought: Freedom, Community, and the Liberal Tradition*, in *JOHN LOCKE'S TWO TREATISES OF GOVERNMENT* 172 (Edward J. Harpham ed., 1992) [hereinafter *TWO TREATISES OF GOVERNMENT*].

<sup>101</sup> *Second Treatise*, *supra* note 15, at bk. II, ch. II 14, & VIII 97.

<sup>102</sup> See GOUGH, *supra* note 99, at 32. A major foundation of such an agreement, the social contract, is the consent of the people. *Id.*

<sup>103</sup> *Second Treatise*, *supra* note 15, at bk. II, ch. XI 134; see also SELINGER, *supra* note 99, at 91-94 (discussing Locke's belief that "common superior" in society is essential in order to judge between men).

<sup>104</sup> *Second Treatise*, *supra* note 15, at bk. II, ch. XI 135; see also GOUGH, *supra*

individual reasons, by St. Thomas' and St. Augustine's standards, that it is objectively unjust.<sup>105</sup> The exceptions are certain narrowly defined "natural rights" which survive the entry into the social contract, most notably the right to private property and the right to individual choice in matters of religious worship.<sup>106</sup>

Locke strongly affirms the existence of God, but does not understand morality as being grounded in responsibility for the goods of Creation.<sup>107</sup> Rather, he sees it as grounded in the essentially arbitrary will of God and reinforced by the sanctions of heaven and hell.<sup>108</sup> He views human ideas of morality as mere convention supported by the sanction of public scorn.<sup>109</sup>

Locke admits that the civil law ought to pursue what God's will calls for, but this is because the natural consequences of not doing so will be negative over the long run due to the punishments God has built into nature; the purpose of majoritarian decision making being to maximize beneficial consequences for the community.<sup>110</sup> The mere fact, however, that the civil law departs from divinely revealed norms is not itself a basis for challenging the legitimacy of the law where majority will is in effect and the specific "natural rights" mentioned before have not been violated.<sup>111</sup>

note 99, at 32 (stating that only at inauguration of state by social contract is unanimity required, whereas afterward decisions of majority are binding).

<sup>105</sup> See *Essays*, *supra* note 99, at 93 (stating that utility is result of obedience to law even if law is against one's own personal interests).

<sup>106</sup> See *Second Treatise*, *supra* note 15, at bk. II, ch. V and bk. II, ch. XI 139.

<sup>107</sup> *An Essay Concerning Human Understanding*, bk. I, chs. 3, 5-8, 12-13, & 18, in *THE LOCKE READER* 190-95 (John W. Yolton ed., 1977) [hereinafter *Human Understanding*]; see also Eldon Eisenach, *Religion and Locke's Two Treatises of Government*, in *TWO TREATISES OF GOVERNMENT*, *supra* note 100, at 50, 70-80.

<sup>108</sup> *Human Understanding*, *supra* note 107, at 195-201 (bk. II, chs. 4-16, 28).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 190 (bk. I, ch. 3) (explaining that God has imprinted upon man idea of Himself and all men's actions must be done in obedience to His will; men are warned not to let "their appetites cross their duty"); see also WENZ, *supra* note 97, at 170-84 (discussing dangers resulting from failure to observe God's laws). Wenz cites the Old Testament in his analysis and explains that the destruction of cities and the successive plagues visited upon Egypt were examples of such punishments. *Id.* at 183.

<sup>111</sup> See SELINGER, *supra* note 99, at 305. According to Locke, in order to serve any substantial human purpose, morality must often be compatible with expediency and such a principle is illustrated through the majority rule. *Id.* The decision of the greater number prevails over that of the smaller and there is a moral right possessed by the majority to be decently governed. *Id.* Instead of suppressing divinely revealed norms the deference always given to the majority actually preserves moral-

Although Locke would consider "life" a natural right deserving *prima facie* respect by the law, this right belongs only to persons.<sup>112</sup> His system does not provide a strong basis for conceding that status to the unborn child, now that in our era the child's membership in the community of those bearing legal rights has been challenged. In keeping with their stress on grounding respect for others in the objective good of Creation, St. Thomas and St. Augustine understand the human person as on a path of "exitus-reditus," or emergence from and return to God in the cycle of birth and death, and creation and redemption.<sup>113</sup> As a consequence, under their schema, powerholders easily identify with the child from its earliest beginnings and recognize the moral need to treat it as an equal.<sup>114</sup> Locke, by contrast, conceptualizes the prototypical person as a bargaining, property owning adult.<sup>115</sup> His model tends to provide less of a basis for universal recognition of personhood. Moreover, since the legitimacy of the law is grounded, for Locke, in the *will* of the majority and not in the

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ity. *Id.*

<sup>112</sup> See GOUGH, *supra* note 99, at 31. Locke writes of government as the protector of life. *Id.* In his analysis, men in a state of nature (already born and functioning within society) give up their individual power to a government that protects their lives. *Id.* The preservation of such life is a primary function of society. *Id.*; see also *Natural Right*, *supra* note 99, at 530-31 (explaining that each person has duty to preserve mankind and not to take away life, liberty, health, limb or goods of another). Locke writes of the "person" as one's neighbor (one's fellow man), an entity worthy of protection. *Id.* at 531. Locke writes that natural reason "tells us that men *being once born* have a right to their preservation." *Id.* at 533 (emphasis added).

<sup>113</sup> St. Thomas develops this fundamental underlying vision of the human condition in a number of dichotomies that pervade his scheme of thought, including those defined by the paired terms of Creation and Providence, *SUMMA*, *supra* note 14, at I-II, Q. 106, Arts. 3-4 and Q. 107, Arts. 1-3, and Nature and Grace, *SUMMA*, *supra* note 14, at I-II, Q. 109, Art. 2. As a pattern of returning to God, St. Thomas conceives of the life of the Christian as a "journey" of faith. *Id.* at II-II, Q. 1, Art. 1. St. Augustine offers a parallel pattern in his vision of the providential guidance by God of the human community in history. *CITY OF GOD*, *supra* note 14, at bk. I-X.

<sup>114</sup> See DANIEL CALLAGHAN, *ABORTION: LAW, CHOICE AND MORALITY* 418 (1970) (citing Pius XII that "the unborn child is a human being in the same degree and by the same title as his mother") Callaghan discusses the moral policy to protect all innocent life and cites one of the principles of the Catholic Hospital Association of the United States and Canada that: "[e]very unborn child must be regarded as a human person, with all the rights of a human person, from the moment of conception." *Id.* at 419.

<sup>115</sup> Locke's interpretation of a person as being a bargaining, property owning adult mirrors the "achievement view" which is a pro-choice position in the abortion debate. See STEPHEN SCHWARZ, *THE MORAL QUESTION OF ABORTION* 103 (1990). This view states that "only human beings who have achieved a certain degree of development of the present immediate capacity to function as persons count as real persons." *Id.*

objective goodness of persons,<sup>116</sup> his system is more open to essentially arbitrary legislative classifications.

The Lockean view continues to shape, in part, the contemporary American political system. A contemporary political philosopher, John Rawls, has created a theory of justice, perpetuating the Lockean view, and updating it to more closely reflect common contemporary intuitions.<sup>117</sup> Rawls, like Locke, uses the model of bargain as a basis for legitimating law. But, unlike Locke, he is distrustful of the majority will, and he wishes to provide certain moral limits to its power over minorities.<sup>118</sup> However, in keeping with his individualism, Rawls is unwilling to make a system of objective human values the basis of a justice evaluation of the civil law passed by the majority, as would St. Augustine and St. Thomas.<sup>119</sup> So, instead of appealing to the "objective" requirements of justice, he derives limits from a principle of fairness, making obligatory the requirements to which parties bargaining at the time of the hypothetical social contact (in the "Original Position") would agree, if they did not comprehend fully the role they would have in society (he places them behind a "veil of ignorance").<sup>120</sup> The rules Rawls purports to derive in this way include political equality and a *prima facie* economic equality.<sup>121</sup> Every person should have equal freedom to

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<sup>116</sup> See *supra* notes 104-105 and accompanying text; see also *Natural Right, supra* note 99, at 530 (stating that by investing his own labor in a pursuit, each individual can make what was common property into his personal property). Locke limits this right, however, by stating that a man could not labor for more than he could use. *Id.* at 540.

<sup>117</sup> Rawls specifically identifies his theory as a further development of "the familiar theory of the social contract as found, say, in Locke." THEORY OF JUSTICE, *supra* note 15, at 11.

<sup>118</sup> *Id.* at 228-34. "Whenever questions of justice are raised, we are not to go by the strength of feeling but must aim instead for the greater justice of the legal order." *Id.* at 230.

<sup>119</sup> *Id.* at 142-45.

<sup>120</sup> *Id.* at 13-14, 17-21, 136-42. The parties are prevented from knowing about the citizens they represent by what Rawls terms a "veil of ignorance." *Id.* at 137. Information regarding a particular citizen's race, ethnicity and gender is withheld from the parties. JOHN RAWLS, POLITICAL LIBERALISM 24-25 (1993) [hereinafter POLITICAL LIBERALISM]. In addition, parties are prevented from realizing the skills, abilities, tastes, or strengths they possess. *Id.* at 272; see also Gary C. Leedes, *Morality and the Law Symposium Review Essay: Rawls's Excessively Secular Political Conception*, 27 U. RICH. L. REV. 1083, 1089 (1993) (discussing Rawls' hypothetical "original position").

<sup>121</sup> THEORY OF JUSTICE, *supra* note 15, at 14-15. To arrive at the well-ordered society, persons in the original position would have to choose principles requiring

choose his own life style and have roughly equal access to material goods to fund its pursuit.<sup>122</sup>

In Rawls' framework, the civil law can be criticized for injustice, but only insofar as constraints of fairness have been violated.<sup>123</sup> Moral objections in justice based on a full theory of the good are held out of order.<sup>124</sup> For Rawls, it is axiomatic that views on morality and religion are individual and may not be imposed on others by law—since doing so would interfere with the individual autonomy that parties behind the veil of ignorance would hypothetically refuse to give up.<sup>125</sup> Even more than Lockean theory, Rawls' approach undercuts claims that rights extend, under his ground rules, to unborn or even very small children.<sup>126</sup> His model of personhood, after all, is the bargaining adult intent on a share of material goods, and the autonomy to pursue self-realization through the use of such goods.<sup>127</sup>

Both Locke and Rawls respect religion and morality as an individual's right, but in both cases religion and morality remain otherwise fundamentally unrelated to the bases for legitimating law and therefore also inadmissible as a basis for criticizing the content of the civil law.<sup>128</sup>

equality in the assignment of basic rights and duties. *Id.* Furthermore, these persons would be justified in allowing inequalities of wealth and authority only if the end attained results in benefits for all members of society. *Id.*; see also ROBERT PAUL WOLFF, UNDERSTANDING RAWLS 38-41 (1977) (discussing Rawls' meaning of equal liberty).

<sup>122</sup> THEORY OF JUSTICE, *supra* note 15, at 302. Rawls also writes that "the distribution of wealth and income, and the hierarchies of authority must be consistent with both the liberties of equal citizenship and equality of opportunity." *Id.* at 61; see also REX MARTIN, RAWLS AND RIGHTS 67-70 (1985) (explaining Rawls' view of opportunities citizens should be entitled to pursue).

<sup>123</sup> THEORY OF JUSTICE, *supra* note 15, at 54-60. Rawls writes that the "impartial and consistent administration of laws ... we may call formal justice." *Id.* at 58; see also Joshua Cohen, *A More Democratic Liberalism*, 92 MICH. L. REV. 1503, 1504 (1994) (discussing Rawls' proposed well-ordered society based on conception of justice rooted in fair cooperation among free and equal people).

<sup>124</sup> THEORY OF JUSTICE, *supra* note 15, at 59 ("[E]ven if laws ... are unjust, it is often better that they should be consistently applied.").

<sup>125</sup> *Id.* at 136-38.

<sup>126</sup> See *id.* at 139. Rawls confines the class able to engage in the bargaining in the original position. *Id.* Rawls writes that "the original position is not to be thought of as a general assembly which includes at one moment everyone who will live at some time; or, much less, as an assembly of everyone who could live at some time. It is not a gathering of all actual or possible persons." *Id.* at 139.

<sup>127</sup> THEORY OF JUSTICE, *supra* note 15, at 136-37; see also *supra* note 120 and accompanying text.

<sup>128</sup> See THOMAS W. POGGE, REALIZING RAWLS 96-97 (1989) (discussing Rawls' views pertaining to religious and moral interests of individuals); see also THEORY OF



Based on the review undertaken in this article of St. Thomas' and St. Augustine's ideas, what can the Catholic response be to this alternative contractarian scheme and its assertion of the law's fundamental "secularity" or opaqueness to religious or moral values? First, Catholicism, as the foregoing consideration of St. Thomas and St. Augustine has shown, agrees that "secularity" is a characteristic basic to the civil law. In fact, historically, this insight is the product of the Christian tradition, of which Rawlsian and Lockean theory, each in its own way, is an offshoot.<sup>129</sup>

The law exists to create the "world" of temporal peace (St. Augustine) and of social virtue (St. Thomas). The civil law does not exist to make the world into the Church, much less into a particular view of heaven. For Christians also, "secularity," properly understood, is a fundamental measure of a good law.

Second, Catholicism will note that the bargaining model, with its stress on the rights of those vying for material possessions, is no more or less "religious," and on no more or less an axiomatic grounding, than is the Catholic model of objective moral equality and relationality as inherently constitutive of the human good.

The Catholic does not respond to the objection based in "secularity" by demanding that the door be opened to all unmediated religiously-based political arguments. He or she does not, for example, expect that Sacred Revelation be acknowledged by the makers of the civil law. What the Catholic requires is only that his or her political axioms relating to human dignity be given equal time with the Rawlsian axioms of individual autonomy. Using reason, Catholics believe they can demonstrate that their axioms are the more suitable basis for constructing a just society.

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JUSTICE, *supra* note 15, at 310-15.

<sup>129</sup> These viewpoints often occur in a tradition which preserves continuity even with upheavals and reversals. Harold Berman, for example, posits "a civilization called 'Western' " with "distinctive 'legal' institutions, values, and concepts" ... "consciously transmitted from generation to generation over centuries, ... a 'tradition' periodically interrupted and transformed by revolutions." HAROLD J. BERMAN, *LAW AND REVOLUTION* 1 (1983).

*B. The Objection that the "Private" Character of Procreative and Other Activities Place Them Beyond the Regulative Scope of the Civil Law*

The Lockean-Rawlsian model is also helpful in understanding the broader basis of the second objection that the "private" character of procreative and other activities place them beyond the regulative scope of the civil law. The Lockean approach places a high value on privacy.<sup>130</sup> Property and religion give shape, in Locke, to a domain beyond the usual regulative scope of the majority will operating through the civil law.<sup>131</sup> In Rawls' framework, this zone of privacy is also of prime importance, although he both modifies and extends it.<sup>132</sup>

In Rawls, property rights are restricted for the sake of distributational equality, which shifts the focus from protecting the right to "keep more than others" to protecting the right to "acquire as much as others."<sup>133</sup> But, the scope of personal autonomy to use property is placed, more than ever, beyond the cavil of the majority.<sup>134</sup> The law's fundamental purpose, for Rawls, is to secure fair portions of material means to all, without enforcing values about how these means are to be used.<sup>135</sup> As a consequence, even the common or public value of human procreation is taken away. Procreation becomes an individual opportunity for self-realization. If the state has any purpose in this area, it would tend, in the Rawlsian model, to be the distribution of both fertility and abortion facilities as fairly as possible, so that individuals could make of these "means" what they wished.<sup>136</sup> Privacy, in Rawls' system, is not just a limit to the law's action; rather, as an expression of autonomy from the value choices of others, privacy is arguably the law's highest value.<sup>137</sup>

<sup>130</sup> *Second Treatise*, *supra* note 15, at bk. II, ch. V.

<sup>131</sup> *Id.*

<sup>132</sup> *THEORY OF JUSTICE*, *supra* note 15, at 513-20 (discussing extent to which society allows for personal autonomy).

<sup>133</sup> Rawls' reliance on concepts of the original position and the veil of ignorance effectively shifts the emphasis from the vested claims of the past to future-oriented claims of opportunity.

<sup>134</sup> *POLITICAL LIBERALISM*, *supra* note 120, at 298. "The right to hold and have the exclusive use of personal property" is a basic liberty which allows "a sufficient material basis for a sense of personal independence and self respect." *Id.*

<sup>135</sup> See *supra* note 122 and accompanying text.

<sup>136</sup> See *THEORY OF JUSTICE*, *supra* note 15, at 399-404.

<sup>137</sup> See *id.* at 513-20 (characterizing autonomy as consistent with original position).

What is the Catholic response to the objection based in privacy? It should include the affirmation that "privacy" properly understood, is and always has been a key value in Christian jurisprudence. As has been discerned in considering St. Augustine and St. Thomas, the state does not inquire into private vice and virtue in the Christian scheme of law. The inner sanctum of personal identity and decision is an area in which a person by nature is ultimately accountable to God and not to other people. Witness the stringency of the seal of Confession in the Catholic Church—in a way it is the very paradigm of privacy.<sup>138</sup> Modern Church pronouncements have strongly supported the right of the person to be free of intrusive governmental surveillance, the right of parents to decide whether or not to conceive a child without governmental interference, and the right to worship as one chooses.<sup>139</sup>

But, as has been revealed in St. Augustine and St. Thomas, all such "privacy" related rights are to be understood as limitations on state power which grow out of the objective dignity of the human person. This is the same value that calls for respecting claims in justice made on behalf of the unborn child.<sup>140</sup> Thus, privacy in the sense of individual autonomy does not, in the Catholic view, have the status of a master value.<sup>141</sup> In the Catholic view, the objective dignity grounding privacy-related rights also grounds the civil law's more fundamental orientation to *justice*, understood as an order of reciprocity among human persons as moral equals.<sup>142</sup> Furthermore, in the Catholic view,

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<sup>138</sup> Traditionally, the seal of Confession has been recognized in civil law by two-thirds of American jurisdictions as statutory priest-penitent privilege. 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2395, at 1042 (1961 and Supp. 1996).

<sup>139</sup> See *Gaudium et Spes* 48-50 (Second Vatican Council 1965), *Pacem in Terris* 129 (John XXIII 1963), *Dignitatis Humanae* (1965), and *Populorum Progressio* 9 (Paul VI 1967), in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER (David J. O'Brien and Thomas A. Shannon eds., 1992).

<sup>140</sup> See *The Challenge of Peace: God's Promise and Our Response* (U.S. Catholic Bishops, 1983), in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER (David J. O'Brien and Thomas A. Shannon eds., 1992) (citing Pope Paul VI's *World Day of Peace Message 1977*; "[i]f you wish peace, defend life").

<sup>141</sup> See Paul E. Sigmund, *Catholicism and Liberal Democracy*, in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER 65, 67-68 (discussing Catholic Church's reluctance to leave to individual choice decisions in areas considered to be serious moral ills).

<sup>142</sup> See *Pacem in Terris* (John XXIII 1963) in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER 129, 142-44 (noting relationship between citizens rights and role of government).

privacy rights are subject to limitation as justice requires.<sup>143</sup>

#### CONCLUSION

By inquiring into contemporary objections to the Catholic view of law and morality, based in the values of "secularity" and "privacy," we have traced them to a general alternative in thinking about law and morality, which makes privacy, or autonomy of choice by adults in quest of self-realization the fundamental norm governing law. Our review of the thought of St. Augustine and St. Thomas demonstrates that Catholic proposals in this area rest, by contrast, on the objective moral dignity of all human beings as the basic norm of justice and law. This Catholic norm should be no less admissible in a "secular" public discussion than its alternative.

As a practical matter, Catholics can counter objections based on "secularity" and "privacy" by offering their own interpretations of these popular values, interpretations that are well grounded in a rich and distinctive tradition of thought on the meaning and value of law.

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<sup>143</sup> See *supra* note 141 and accompanying text.

