

NEUTRALITY IN LIBERAL LEGAL THEORY AND CATHOLIC SOCIAL THOUGHT

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INTRODUCTION	514
I. FOUR KINDS OF LIBERAL NEUTRALITY	522
II. FOUR COMMITMENTS IN CATHOLIC SOCIAL THOUGHT	526
A. The Status of Rights in Catholic Social Thought	526
1. Rights as Less than Absolute.....	531
2. Rights and Duties.....	536
3. The Good and the Right Reconsidered	544
a. The Untenable Nature of Complete Neutrality	548
b. The Common Good as the Norm of Social Life	552
c. The Nature of the Right and the Priority of the Good	554

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4.	The Civilization of Love: The Goal of Social Life	558
a.	The Central Importance of the Family	566
b.	The Liberal "Goal" of Social Life: Pluralism and the Civilization of Tolerance	569
B.	A Realist Anthropology.....	573
1.	The Human Person: Freedom and Intellect	579
2.	Love: The Fulfillment of Human Freedom.....	582
C.	Neutrality and the Political Process.....	583
1.	Positive Support for Democratic Government.....	585
2.	Human Dignity as a Limit to Democratic Legitimacy	588
D.	Neutrality in Adjudication.....	590
1.	The Problem of Enforcing Unjust Laws.....	591
2.	Legal Neutrality and the Absence of Partisanship.....	594
	CONCLUSION.....	596

INTRODUCTION

Liberalism is widely regarded as "[t]he dominant strand of American political philosophy,"¹ and neutrality is often identified as one of the defining features and virtues of the liberal state.² Not surprisingly, then, talk of neutrality deeply informs

1. Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 878 (1991); see also WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 79 (1991) ("Most Anglo-Americans are, in one way or another, liberals; all are deeply influenced by the experience of life in liberal societies.").

2. See, e.g., CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 42 (1987) (arguing that the characteristic feature of liberalism is not how it "distinguishes the public from the private" and that instead "the distinctive liberal notion is that of the neutrality of the state"); JOHN RAWLS, POLITICAL LIBERALISM 190–91 (expanded ed. 2005) [hereinafter RAWLS, POLITICAL LIBERALISM] ("Historically one

our public discourse concerning not only the nature of law and the structure of legal institutions, but also the content of particular judicial opinions, legislative acts, administrative rulings, and executive orders.

Frequently, however, what is meant by “neutrality in the law” is far from clear.³ What quality in law does “neutrality” describe? What does it mean to say that a legal institution or a particular juridical act is “neutral”? Does it refer only to the identity of the decision maker, the nature of the forum, and the procedures employed? Does it refer also to the kinds of argument that will be entertained and advanced in support of the ultimate decision? Finally, does “neutrality in the law” relate to the actual resolution of the dispute, the content of the decision itself?

To put the matter more concretely, suppose that the state criminally prohibits the consumption of a certain hallucinogenic substance. Suppose further that a group of individuals ingest this drug as part of a ritual that is central to their firmly held religious beliefs.⁴ Does neutrality demand that the state refrain from banning the substance? If so, does the state violate the principle of neutrality by forbidding the consumption of any particular substance? Could the state, in a neutral fashion, ban the use of the drug for some purposes but not for others? For example, would the state violate the principle of neutrality if it recognized a religious exemption from the general ban⁵ or if it permitted consumption of the drug for medical purposes but not for recreational use?⁶

common theme of liberal thought is that the state must not favor any comprehensive doctrines and their associated conception of the good.”); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 4 (1996) (“The political philosophy by which we live is a certain version of liberal political theory. Its central idea is that government should be neutral toward the moral and religious views its citizens espouse.”).

3. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 128 & n.139 (2002) (arguing that neutrality understood as neutrality “toward all contested ideas of the good” is incoherent and so “must be defended at a lower level of abstraction,” but that, below the high level of abstraction defended by liberal theorists, “neutrality can stand for so many different political conceptions that it cannot resolve any actual controversy about religion or anything else”).

4. Cf. *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990).

5. Cf. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

6. Cf. *Gonzales v. Raich*, 545 U.S. 1, 5–6 (2005).

Likewise, consider a state-created social assistance program that provides subsistence benefits to qualified individuals.⁷ Would the very existence of such a program violate the principle of neutrality? That is, would the act of drawing a distinction between individuals who are “qualified” and those who are not, with the attendant provision of resources to the former and not to the latter, mean that the state is acting in a non-neutral fashion? If the state later terminates the benefits it once provided by means of a summary administrative decision, has it then violated the principle of neutrality? What if the state official assigned to determine the merits of an application for benefits knew or was somehow related to the applicant? Would neutrality then demand the use of another decision maker or the use of an entirely different method for making the determination? If, instead, the state were to make the award or denial of benefits based upon a public hearing, what would a neutral proceeding look like? What would constitute a neutral set of adjudicative procedures? For example, would neutrality be satisfied if the rules allowed for the presentation of evidence and the cross-examination of witnesses? Would the rules be neutral if the proceeding permitted but did not require representation by counsel? What would constitute a neutral burden of proof? And how could the state satisfy neutrality in allocating this burden between the parties?

Lastly, with respect to the ongoing dispute concerning the legal status that should be afforded same-sex relationships, some have argued that the laws that define marriage in a traditional sense are not neutral, but are in fact discriminatory against same-sex couples.⁸ Indeed, some contend that “just as there was no neutral way for liberal theory to justify prohibiting interracial marriage yesterday, so there is no neutral way to

7. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 255–56, 256 n.1 (1970).

8. This, of course, was one of the principal grounds adopted by the Supreme Judicial Court of Massachusetts in striking down and refashioning Massachusetts’s definition of marriage. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 959–60, 968 (Mass. 2003). Other courts have recognized the right of same-sex couples to marry or to receive the same benefits as opposite-sex couples on similar grounds. See *In re Marriage Cases*, 183 P.3d 384, 440–41, 451–52 (Cal. 2008); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006); *Baker v. State*, 744 A.2d 864, 867–68 (Vt. 1999). But see *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Anderson v. King County*, 138 P.3d 963 (Wash. 2006).

justify prohibiting same-sex marriage today.”⁹ Claims of this sort demand either that the meaning of “neutrality” be clarified or that the concept be abandoned. Is the state acting in a neutral fashion by limiting marriage to couples composed of one man and one woman? Does it violate neutrality by requiring the marital partners to be of a certain age? Does neutrality demand that the legal status of marriage be extended to include relationships where the partners involved are of the same sex? Does neutrality require the state to recognize the existence of such relationships simply because the parties desire such recognition? Would the law be neutral if marriage were available to groups of three or more individuals? The law recognizes a wide variety of other relationships, such as employer and employee, buyer and seller, doctor and patient, parent and child. Moreover, significant legal consequences often follow from the recognition bestowed upon these relationships. Does neutrality demand that the state ignore these relationships such that they no longer function as categories within our legal system? Must the state treat every relationship exactly alike regardless of its content or the identity of the persons involved?¹⁰

That the answers to at least some of these questions are not immediately apparent suggests that the concept of neutrality is in need of some elaboration. In the Article that follows, I seek to clarify what “neutrality in law” means in two basic, though sometimes disparate, jurisprudential perspectives.

The first perspective is liberalism, precisely because it is liberal theory that so keenly insists on the importance of neutrality in law. Beyond this, however, the meaning of neutrality in liberal thought warrants especially close attention for a number of reasons. First, as a historical matter, liberalism as a jurisprudential perspective has provided the intellectual foundation for much of the American legal system. Indeed, liberalism has been “the dominant secular approach to matters of government

9. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1423 (1993).

10. See Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 202 (2003) (“I advocate here a more sweeping reform, incorporating recognition in every area of law of the diversity of adult relationships characterized by emotional intimacy and economic interdependence. The law should no longer reward marriage above all other relationships.”).

and society in the West for at least the past four centuries.”¹¹ Despite the frequent claim that we now live in a “post-liberal” age, this continues to be the case. Second, as noted above,¹² many of liberalism’s most thoughtful proponents contend that the idea of neutrality is central to the liberal project. If neutrality is “the organizing principle of liberal thought,” as some insist,¹³ then examining liberal theory should prove fruitful in understanding the meaning of “neutrality in law.” Third, despite the tendency of many legal scholars to embrace ideas borrowed from one or another jurisprudential school of thought, liberalism remains the dominant point of view among legal academics. Notwithstanding the wide variety of intellectual perspectives available, liberalism remains the philosophy with which all serious reflection on American law must contend.

Of course, there has never been “any single, authoritative version of liberalism.”¹⁴ Rather, liberalism is an intellectual tradition, that is, “an argument extended through time in which certain fundamental agreements are defined and redefined” through a process of responding to external critiques and internal interpretive disputes.¹⁵ As such, liberalism has developed through the contributions of many thoughtful commentators¹⁶—far too many to attempt to address in a detailed and comprehensive fashion within the confines of a single article. In the Article that follows I will, from time to time, make reference to one or another particular author within the liberal tradition. Nonetheless, as a template for the exposition of liberal neutrality gener-

11. Frank J. Garcia, *Building a Just Trade Order for a New Millennium*, 33 GEO. WASH. INT’L L. REV. 1015, 1021 (2001) (citing JOHN RAWLS, *POLITICAL LIBERALISM*, at xxii–xxiv (1993)); see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1074 (1980) (describing liberalism as “the dominant ideology in the modern Western world, an ideology that pervades our views of human nature and of social life”).

12. See *supra* note 2.

13. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10 (1980).

14. ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 13 (1985); see also JOHN KEKES, *AGAINST LIBERALISM* 1 (1997) (arguing that liberalism cannot be identified with “a set of necessary and sufficient conditions,” a fact that even proponents of liberalism acknowledge).

15. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 12 (1988).

16. See generally *id.* at 326–48. Indeed, in addition to those liberals who generally support an expansive government such as Ronald Dworkin, Bruce Ackerman, and John Rawls, the liberal tradition also includes libertarians such as Robert Nozick, Richard Epstein, and Randy Barnett.

ally, I will make use of Andrew Altman's splendid summary of the main currents of liberal legal thought.¹⁷

The second perspective on legal neutrality that I wish to explore is the one offered by the body of papal encyclicals, conciliar documents, episcopal statements, and other magisterial texts collectively known as modern Catholic social teaching.¹⁸ The documents that make up this teaching have addressed a number of topics, including the plight of the poor and working classes;¹⁹ the problems of economic justice posed by international trade and globalization;²⁰ the nature of the family and the need to protect its place in society;²¹ the morality of abortion, euthanasia, and capital punishment;²² the treatment of ethnic

17. ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990).

18. As Kenneth Himes has noted, "[t]he designation of *modern* teaching is a customary way of dating those teachings that begin with the promulgation of *Rerum Novarum* in 1891 by Leo XIII." Kenneth R. Himes, O.F.M., *Introduction to MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS 2-3* (Kenneth R. Himes, O.F.M., ed., 2005) [hereinafter MODERN CATHOLIC]. At the same time, as William Murphy has observed, "Catholic social teaching certainly did not begin with the appearance of *Rerum Novarum* on May 15, 1891. Social doctrine has been a constant element of the Church's life from the beginning; it is the logical application of Catholic philosophical and theological thought to the questions of person and society." William Murphy, *Rerum Novarum, in A CENTURY OF CATHOLIC SOCIAL THOUGHT: ESSAYS ON 'RERUM NOVARUM' AND NINE OTHER KEY DOCUMENTS 1* (George Weigel & Robert Royal eds., 1991).

19. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* (May 15, 1891) [hereinafter *Rerum Novarum*], reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 14 (David J. O'Brien & Thomas A. Shannon eds., 1992) [hereinafter CATHOLIC SOCIAL THOUGHT], available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html; Pope John Paul II, Encyclical Letter, *Laborem Exercens* (Sept. 14, 1981) [hereinafter *Laborem Exercens*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra*, at 352, available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html.

20. Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* (Dec. 30, 1987) [hereinafter *Sollicitudo Rei Socialis*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 19, at 395, available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html.

21. Pope John Paul II, Apostolic Exhortation, *Familiaris Consortio* (Nov. 22, 1981) [hereinafter *Familiaris Consortio*], available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html; Pope John Paul II, Letter to Families, *Gratissimam Sane* (Feb. 2, 1994) [hereinafter *Gratissimam Sane*], available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_02021994_families_en.html.

22. Pope John Paul II, Encyclical Letter, *Evangelium Vitae* (Mar. 25, 1995) [hereinafter *Evangelium Vitae*], available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

and racial minorities, immigrants, and refugees;²³ and relations among peoples and nation-states and the need to build authentic peace in a world often savaged by war.²⁴ Although these documents have long been a fruitful source of reflection and commentary for theologians,²⁵ over the past several years they have drawn the attention of a growing number of legal scholars. Legal academic interest in the Catholic social tradition has given rise to the creation of a journal dedicated to the subject,²⁶ to numerous articles in established law reviews,²⁷ and to books and chapters in volumes exploring the relationship between law and religious discourse.²⁸ Although it would be an exaggeration to say that the official texts that make up Catholic social teaching offer a systematic treatment of jurisprudence, in addressing various problems of modern social life these texts do set forth a number of foundational principles concerning the purpose of law, the nature of legal obligation, and the relationship between law and morality.

23. Nat'l Conference of Catholic Bishops, Pastoral Letter, *Brothers and Sisters to Us* (1979), available at http://www.osjspm.org/majordoc_us_bishops_statements_brothers_and_sisters.aspx.

24. Pope John XXIII, Encyclical Letter, *Pacem in Terris* (Apr. 11, 1963) [hereinafter *Pacem in Terris*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 19, at 131, available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html; Nat'l Conference of Catholic Bishops, Pastoral Letter, *The Challenge of Peace: God's Promise and Our Response* (1983), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 19, at 492.

25. See, e.g., ONE HUNDRED YEARS OF CATHOLIC SOCIAL THOUGHT: CELEBRATION AND CHALLENGE (John A. Coleman, S.J., ed., 1991); READINGS IN MORAL THEOLOGY NO. 5: OFFICIAL CATHOLIC SOCIAL TEACHING (Charles E. Curran & Richard A. McCormick, S.J., eds., 1986).

26. Although founded as an interdisciplinary publication, the *Journal of Catholic Social Thought* is published at Villanova University School of Law. Moreover, the Dean of Villanova's law school, Mark Sargent, was instrumental in the creation of this journal and in inviting many legal academics to contribute to its pages.

27. A representative sample of this scholarship includes Vincent D. Rougeau, *A Crisis of Caring: A Catholic Critique of American Welfare Reform*, 27 HARV. J.L. & PUB. POL'Y 101 (2003); Lucia A. Silecchia, *Environmental Ethics from the Perspectives of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 659 (2004); Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001). For a convenient list of additional sources, see THE CATHOLIC DIMENSIONS OF LEGAL STUDY: THE CATHOLIC UNIVERSITY COLUMBUS SCHOOL OF LAW ANNOTATED BIBLIOGRAPHY (2d ed. 2004).

28. See, e.g., CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001); RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

The texts at the heart of the Catholic social tradition often make use of the Hebrew and Christian scriptures. These works, however, are not primarily exercises in biblical interpretation. They are instead an often subtle amalgam of scriptural exegesis, theological reflection, and philosophical reasoning.²⁹ Accordingly, it would be wrong to see the legal commentary that makes use of Catholic social thought as an effort to infuse the law with a specifically religious content. Indeed, the critiques of existing legal structures, doctrines, and concepts derived from this tradition accord with the demands of public reason, properly understood.

Part I of this Article sets forth the four varieties of liberal neutrality Altman identifies, namely, what he calls “rights neutrality,” “epistemological neutrality,” “political neutrality,” and “legal neutrality.” Part II sets forth in detail how Catholic social teaching regards each of these kinds of neutrality. On the practical level—with respect to the existence and enforcement of legal rights, the structures of democratic government, and the need for an independent and unbiased judiciary—Catholic social thought and liberal theory have much in common. They often differ, however, with respect to the reasons that support and justify these well-established features of the modern state. Moreover, as might be expected, the theoretical foundations of Catholic social teaching that challenge the underlying premises of liberal theory also have practical consequences—consequences that this Article will explore in the pages that follow.

This Article is not an exercise in comparative law in the strictest sense. It does not constitute an analysis of how the legal doctrines or statutory schemes of different countries address a common social problem.³⁰ It is, however, an exercise in comparative jurisprudence. As such, it provides us with the hope and the opportunity of closely examining something so familiar to us that it often goes unnoticed, of seeing what we

29. Cf. John R. Donohue, S.J., *The Bible and Catholic Social Teaching: Will This Engagement Lead to Marriage?*, in *MODERN CATHOLIC*, *supra* note 18, at 9 (“The social teaching was based almost exclusively on the Catholic natural law tradition mediated primarily through Scholastic philosophy and theology, though later enhanced by dialogue with contemporary social ethics.”).

30. Cf. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 1 (1987) (noting that “legal scholars often use comparative law, just as they sometimes consult history, to see how legal systems of the past or present have dealt with problems similar to ours”).

often take for granted from a new vantage point—in T.S. Eliot’s famous phrase, “to arrive where we started and know the place for the first time.”³¹ Beyond this, the ultimate point of this extended comparison is not simply to obtain a deeper appreciation of what liberalism has to say concerning the meaning of neutrality in law, but to begin to imagine a different conception of neutrality and a different way of envisioning the modern secular state.

I. FOUR KINDS OF LIBERAL NEUTRALITY

A convenient place to begin this discussion is with Professor Andrew Altman’s thoughtful and spirited defense of liberal legal theory, a defense he offers against the assault made by Critical Legal Studies.³² Altman identifies “four forms of neutrality that are defended within the liberal tradition”: “rights neutrality,” “epistemological neutrality,” “political neutrality,” and “legal neutrality.”³³

Among these four, the most fundamental is undoubtedly “rights neutrality” because, as Altman bluntly states, “[w]hat counts for liberalism is the commitment to substantial con-

31. T.S. ELIOT, *Little Gidding*, in COLLECTED POEMS 1909–1962, at 222 (1974); cf. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411, 411–12 (1985) (arguing that comparative law “is somewhat like traveling” in that it “promises opportunities for learning both about one’s own country and culture and about other countries and cultures”).

32. Critical Legal Studies refers to a movement in legal scholarship that flourished from the late 1970s through the 1990s. Some of the common themes advanced by the scholars identified with this movement include a biting critique of legal and social hierarchies, the argument that all law is inextricably political in nature, and a belief that the ineluctable indeterminacy of legal texts undermines claims regarding the rule of law. For an early bibliography of works by these scholars, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). See generally THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

33. ALTMAN, *supra* note 17, at 72–77. Although logically distinct, these four varieties of neutrality are not wholly independent of one another. For example, in his discussion of the different kinds, Altman makes clear that epistemological neutrality is concerned with the justification for rights neutrality and the principled distinction between the right and the good. He also makes clear that political neutrality is strictly subordinate to rights neutrality. Furthermore, the four kinds of neutrality are often linked together in liberal discourse.

straints on politics in the name of individual autonomy."³⁴ Rights neutrality embodies just this sort of commitment. Moreover, in different ways it also embodies the distinction between "the right" and "the good" as well as the distinction between "law" and "politics."

As Altman makes clear, in the liberal tradition "rights" demarcate those "domains of human experience and activity that are beyond the legitimate reach of the state."³⁵ These areas of life "are not to be subject to the processes of deliberation, compromise, and negotiation that constitute the normal political life of the liberal state."³⁶ Instead, rights define "the boundaries of permissible politics."³⁷ If the state were to intrude beyond these boundaries, it would not only cause harm to the individuals affected, but it would also call into question the very reason for the creation and recognition of the state in the first instance. Consequently, the state must remain neutral with respect to the exercise of individual rights precisely because they "involve matters that are not legitimate subjects for the concern

34. *Id.* at 75. There is in fact an intramural dispute among liberal theorists over whether autonomy or equality is the value most central to liberalism. See KEKES, *supra* note 14, at 12–15 (comparing "classical liberalism," which emphasizes the value of freedom from external interference, with "egalitarian liberalism," which stresses not only freedom but the redistribution of resources to ensure equality of opportunity). Compare RONALD DWORKIN, A MATTER OF PRINCIPLE 191–92 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE] (arguing that "liberalism takes as its constitutive political morality" the "theory of equality [that] supposes that political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life"), and RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY] (arguing that "the liberal conception of equality" holds that the government may not distribute goods unequally or restrain liberty "on the ground that one citizen's conception of the good life of one group is nobler or superior to another's"), with LARMORE, *supra* note 2, at 42–68 ("Liberalism . . . has generally been associated with the ideal of freedom. . . . [T]his has been a mixed blessing because of all the different things that 'freedom' can mean. One distinct advantage of making neutrality the primary ideal of liberalism is that it explains what freedom has generally meant for the political liberal. . . . [N]eutrality emphasizes the equal freedom that all persons should have to pursue their conception of the good life."), and JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 37–39 (1993) (arguing, contrary to Dworkin, that liberty is the central value in liberalism because "equality of respect . . . cannot be understood in this context except by reference to a conviction about the importance of liberty (for everyone)").

35. ALTMAN, *supra* note 17, at 72–73.

36. *Id.* at 72.

37. *Id.* at 73.

and regulation of the political community.”³⁸ They are “beyond the bounds of legitimate politics.”³⁹ As prominent examples of the kinds of rights that liberal theory has traditionally supported, Altman briefly mentions the right to freedom of conscience and the right to private property.⁴⁰ In surveying the contemporary liberal landscape, freedom of expression and sexual liberty also readily leap to mind.

The second kind of neutrality that Altman identifies he calls “epistemological neutrality.” This variety of neutrality is closely related to the first in that it is concerned with what constitute “acceptable arguments for the principles that are alleged to demarcate the boundaries of permissible politics.”⁴¹ As rights neutrality makes clear, these boundaries lie between those areas of life protected by rights, and thus free from interference by the state, and all other areas of life, which are “legitimate subjects for the concern and regulation of the political community.”⁴² In other words, “epistemological neutrality” is the idea that liberal theory must be neutral not only in the freedoms and political structures it recommends, but also in the thinking that lies behind these recommendations.

The third variety of liberal neutrality Altman identifies, “political neutrality,” is concerned with the “institutional arrangements” of government. Political neutrality means that the legislative procedures used to establish public policy must “guarantee that political power . . . is sufficiently widespread and equalized” so that no one group may dominate the political scene and impose its vision of the good on society as a

38. *Id.*

39. *Id.* This way of describing rights enjoys some support in American law. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 22 (3d ed. 2000) (seeing the “outlines of an answer” to why the Constitution would restrict the policy preferences of current majorities in an experiment in which pigeons were found sometimes to prefer to “bind their ‘own future freedom of choice’ in order to reap the rewards of acting in ways that would elude them under the pressures of the moment” (quoting G. W. Ainslie, *Impulse Control in Pigeons*, 21 *J. EXPERIMENTAL ANALYSIS BEHAV.* 485 (1974))).

40. ALTMAN, *supra* note 17, at 73.

41. *Id.*

42. *Id.*

whole.⁴³ These arrangements must “insure that no single group or fixed coalition can gain lasting control of the power of government.”⁴⁴ Instead, the institutions of government should “embody some fair set of procedures that compel different groups, each having its own controversial moral and political views, to compromise and negotiate with one another.”⁴⁵ Only by engaging in the “processes of normative compromise and accommodation” may a group hope “to exercise significant influence over the deployment of state power.”⁴⁶

The fourth and final type of liberal neutrality that Altman identifies is “legal neutrality.” It concerns neutrality in adjudication.⁴⁷ Legal neutrality means that, absent some superseding individual right, judges may not revisit what the political process has already settled. That is, if the legislature has enacted “some particular rule, then the rule [must be] interpreted and applied . . . in a way that is insulated from the influence of any fresh assessment of the contending normative views.”⁴⁸ Accordingly, judges and other officials deciding matters in an adjudicative setting must act in a neutral fashion by refraining from the exercise of simple political choice. Altman notes that this kind of neutrality plainly envisions a fairly strict separation between the realm of “law” and the realm of “politics.”⁴⁹

Behind the four varieties of liberal neutrality in law (and rights neutrality in particular) lies a further conceptual distinction crucial to liberal thought: the distinction between “the right” and “the good.” As Altman explains, arguments concerning the right and the good each involve a distinct set of “normative directives, or *values*.” Whereas the right “concerns the demands of justice and moral obligation,” the good “concerns the ends we should strive for, once we have insured that we are living above the moral threshold set by the require-

43. *Id.* at 76.

44. *Id.*

45. *Id.* at 87.

46. *Id.* at 76.

47. Indeed, the expression “adjudicative neutrality” more accurately describes the kind of neutrality Altman has in mind, namely, neutrality in the application of settled rules of decision by courts and tribunals. “Legal neutrality” is too broad a term because both “rights neutrality” and “political neutrality” plainly involve law and legal institutions.

48. ALTMAN, *supra* note 17, at 76.

49. *Id.* at 76–77.

ments of justice and moral obligation.”⁵⁰ Liberalism traditionally has held that judgments regarding the good—identifying the ends in life worthy of pursuit—are subjective, such that “no conception of the good licenses those who embrace it to coerce those who dissent.”⁵¹ In other words, because the nature of the good is unsettled, contested, and always open to dispute, liberalism holds that it is never appropriate to use the coercive power of the state to mandate a particular theory of the good. By contrast, “liberalism does not deny the legitimacy of coercion or the applicability of the concept of objective truth when it comes to matters of the right.”⁵² Thus, the distinction between the right and the good gives rise to liberal neutrality in its most basic sense: “[T]he state must be neutral among all (and only) those normative conceptions that endorse ways of life actually above the threshold of right and justice”⁵³ where right and justice are themselves defined in a way that is independent of any notion of goodness.

II. FOUR COMMITMENTS IN CATHOLIC SOCIAL THOUGHT

Catholic social teaching has a great deal to say in response to each of these four varieties of neutrality, both by way of support and by way of critique. The sections that follow address each of these kinds of neutrality in turn.

A. *The Status of Rights in Catholic Social Thought*

For at least some commentators, it seems, the Catholic Church does not have a reputation for championing individual rights. Some view it as a backward institution—anti-democratic, patriarchal, authoritarian, and dedicated to the suppression of individual freedoms.⁵⁴ In the eyes of these critics, the Church surely

50. *Id.* at 66–67.

51. *Id.* at 67.

52. *Id.*

53. *Id.* at 70.

54. See, e.g., James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. Rev. 1321, 1344 (1996) (asserting that the Catholic Church “remains notoriously patriarchal”); Roy Lucas, *New Historical Insights on the Curious Case of Baird v. Eisenstadt*, 9 ROGER WILLIAMS U. L. REV. 9, 44 (2003) (“The Roman Catholic Church still has not made great gains in accepting human liberty, gender equality, and privacy, preferring authoritarian control instead.”).

has a reputation inferior to that of the United Nations, Amnesty International, the American Civil Liberties Union, and other groups that typically enjoy wide praise for their efforts in promoting individual rights.

Notwithstanding this sentiment, by any reasonable estimation, the Catholic Church must be counted among the institutions on Earth most dedicated to supporting human rights.⁵⁵ This support is *most* evident in the praxis of the Church—the work that Catholics undertake around the world in caring for people who suffer from a loss of rights and basic human dignity. Whether tending to the needs of migrants and refugees, providing medical services and hospice care for those who suffer from HIV/AIDS, or supplying food, shelter, and education to those who have none, the Catholic Church shows her profound dedication to “the least of these”⁵⁶ and to the realization of their rights in the concrete circumstances of everyday life.⁵⁷

The tremendous effort of many Catholics, whether lay or ordained, who work on behalf of those who suffer from a denial of rights is at least in part a response to Catholic social teaching. Although the Church once employed the language of

This decidedly unflattering view of the Catholic Church enjoys a long lineage in American thought. See generally JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* (2003).

55. See, e.g., Gregory R. Beabout & Mary Catherine Hodes, *John Paul II on the Relationship Between Civil Law and the Moral Law: Understanding Evangelium Vitae in Light of the Principle of Subsidiarity and the Moral Grammar of John Paul II*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 71, 91 (2007) (observing that “the Roman Catholic Church has shifted from nineteenth century suspicion about the use of rights language to a twenty-first century position where the Vatican is perhaps the world’s most articulate advocate of human rights”); Louis-Léon Christians, *Religious Law and Secular Law in Democracy: The Evolutions of the Roman Catholic Doctrine After the Second Vatican Council*, 2006 BYU L. REV. 661, 662 (“During the Second Vatican Council, the Roman Catholic Church transformed itself from a vigorous defender of the *ancien régime* ‘into one of the world’s leading advocates of social and political justice, democratic governance, and human rights.’” (quoting Zachary R. Calo, *Catholic Social Thought, Political Liberalism, and the Idea of Human Rights 1* (unpublished manuscript), available at http://www.samford.edu/lillyhumanrights/papers/Calo_Catholic.pdf)).

56. *Matthew* 25:40.

57. Through her schools, hospitals, social service agencies, and various parish and diocesan programs, the Catholic Church feeds the poor, offers aid to the victims of disasters, responds to the needs of migrants and refugees, and cares for more people with HIV/AIDS than any other organization in the world. For a summary of the work of Catholic Charities in the United States, see CATHOLIC CHARITIES USA, *POVERTY IN AMERICA 2007: BEYOND THE NUMBERS* (2007), <http://www.catholiccharitiesusa.org/NetCommunity/Document.Doc?id=566>.

rights only reluctantly,⁵⁸ the papal and other magisterial docu-

58. Although the language of rights is now a mainstay of Catholic social teaching, this has not always been the case. The theoretical and practical challenges to the Christian faith posed by both Enlightenment thought and the radical practices of the newfound secular state made the Church suspicious of the language of rights. For an overview of this period in church history, see ALEC R. VIDLER, *THE CHURCH IN AN AGE OF REVOLUTION* (1971). For an especially poignant account of one encounter between a group of Catholic women and the revolutionary regime in France, see WILLIAM BUSH, *TO QUELL THE TERROR: THE MYSTERY OF THE VOCA-TION OF THE SIXTEEN CARMELITES OF COMPIÈGNE GUILLOTINED JULY 17, 1794* (1999). Although the Church today remains highly critical of the intellectual currents generated by the Enlightenment, especially the various anthropologies that trace their roots to that historical epoch, see, e.g., Pope John Paul II, Encyclical Letter, *Centesimus Annus* ¶ 13 (May 1, 1991) [hereinafter *Centesimus Annus*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 19, at 439, 448–49, available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html (criticizing the “mechanistic” view of human and social reality put forth by the Enlightenment), she has embraced the language of rights in her teaching.

Although some contend that the older Catholic language of “duty” and “virtue” found in Thomistic thought can be translated into the language of rights, see Daniel Finn, *Commentary on Centesimus Annus*, in *MODERN CATHOLIC*, *supra* note 18, at 436, 446–47, or can otherwise be understood as congruent with the Catholic tradition, see David Hollenbach, S.J., *A Communitarian Reconstruction of Human Rights: Contributions from Catholic Tradition*, in *CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY* 127 (R. Bruce Douglass & David Hollenbach eds., 1994) (interpreting the Catholic tradition as supporting a communitarian construction of human rights); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 198–226 (1980), others believe that there are still “unresolved elements in the church’s struggle with modern individualism and liberalism.” John Langan, S.J., *Human Rights in Roman Catholicism*, in *READINGS IN MORAL THEOLOGY* NO. 5, *supra* note 25, at 110, 120–21 (noting that Catholicism contains a deep desire “for a more unified, more cohesive, more disciplined form of society than prevails in the secularized West” and the fear “that liberalism errs in giving too much room to individual freedom at the expense of the common good”); see also Kenneth L. Grasso, *Beyond Liberalism: Human Dignity, the Free Society, and the Second Vatican Council*, in *CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM: THE CATHOLIC INTELLECTUAL TRADITION AND THE MORAL FOUNDATIONS OF DEMOCRACY* 29, 48 (Kenneth L. Grasso et al. eds., 1995) (acknowledging the “Catholic human rights revolution” in Catholic social thought, but concluding that the “liberal understanding of man, social and political life, and the human good is simply incompatible” with the Church’s perspective).

Perhaps the greatest challenge to a Catholic assimilation of the language of rights comes from Alasdair MacIntyre and David Schindler. See Alasdair MacIntyre, *Community, Law, and the Idiom and Rhetoric of Rights*, 26 *LISTENING* 96, 96–97 (1991) (arguing that “[t]he dominant contemporary idiom and rhetoric of rights cannot serve genuinely rational purposes” and that in adopting the language of rights Catholic bishops “may have injured their own case”); David L. Schindler, *Grace and the Form of Nature and Culture*, in *CATHOLICISM AND SECULARIZATION IN AMERICA* 10, 17 (David L. Schindler ed., 1990) (arguing that, in the liberal tradition, a right “is a claim which the self has on the other” such that the logic of

ments that set forth Catholic social teaching now contain numerous references to the “universal and inviolable” rights of the human person⁵⁹ and of the need for every state to establish “an effective and independent system for the protection of rights.”⁶⁰ According to the Church, “the State must protect natural rights, not destroy them,”⁶¹ such that when a government ventures to deny the exercise of rights that human beings possess by their very nature, “it contradicts the very principle of its own existence.”⁶² Thus, these rights take the form of immunity from coercion by the state and freedom to act without interference from others.⁶³ The many rights recognized in the Church’s social teaching include: “the right to life, to bodily integrity and to the means which are suitable for the proper development of life,”⁶⁴ the right of a man and a woman to marry and establish a family⁶⁵ and “to have and to rear children through the responsible exercise of [their] sexuality,”⁶⁶ the

rights “presupposes a primitive externality of relation between the self and the other, which in turn makes the self the center of relation,” and that this logic of “self-centricity” is inimical to Christianity). For an excellent discussion of MacIntyre and Schindler’s work in this regard, see TRACEY ROWLAND, *CULTURE AND THE THOMIST TRADITION AFTER VATICAN II* 148–58 (2003).

59. SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *Gaudium et Spes* ¶ 26 (Dec. 7, 1965) [hereinafter *Gaudium et Spes*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 19, at 166, 181, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html; see also *Pacem in Terris*, *supra* note 24, ¶ 9.

60. *Gaudium et Spes*, *supra* note 59, ¶ 75; see also *Pacem in Terris*, *supra* note 24, ¶ 62 (stating that “the rights of all should be effectively safeguarded and, if they have been violated, completely restored”).

61. *Rerum Novarum*, *supra* note 19, ¶ 38.

62. *Id.*

63. Cf. SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM, *Dignitatis Humanae Personae* ¶ 2 (Dec. 7, 1965) [hereinafter *Dignitatis Humanae*], reprinted in *THE DOCUMENTS OF VATICAN II*, 675 (Walter M. Abbott, S.J., ed., Joseph Gallagher trans., 1966), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (describing specifically the right to religious freedom).

64. *Pacem in Terris*, *supra* note 24, ¶ 11; see also Pope Paul VI, Encyclical Letter, *Populorum Progressio* ¶ 22 (Mar. 26, 1967) [hereinafter *Populorum Progressio*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 19, at 240, 245, available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html (asserting that “each man has . . . the right to find in the world what is necessary for himself”).

65. *Laborem Exercens*, *supra* note 19, ¶ 10; see also *Pacem in Terris*, *supra* note 24, ¶ 15.

66. *Centesimus Annus*, *supra* note 58, ¶ 47.

right “to private initiative, to ownership of property and to freedom in the economic sector,”⁶⁷ the “right to work”⁶⁸ in a safe environment and to receive the payment of a just wage⁶⁹ so as to have “the means to support oneself and one’s dependents,”⁷⁰ “the right to develop one’s intelligence and freedom in seeking and knowing the truth,”⁷¹ including “the right to a basic education and to technical and professional training,”⁷² “the right “of professing a religion both privately and publicly,”⁷³ including the right “to seek the truth” and “to adhere to the truth, once it is known, and to order [one’s] whole [life] in accord with the demands of truth,”⁷⁴ the right to assemble and associate and to express freely one’s opinions;⁷⁵ and the right

67. *Id.* ¶ 24. The right to private property has received considerable attention throughout the history of modern Catholic social thought. See, e.g., *Gaudium et Spes*, *supra* note 59, ¶¶ 69–71; *Laborem Exercens*, *supra* note 19, ¶¶ 14–15; Pope John XXIII, Encyclical Letter, *Mater et Magistra* ¶¶ 109–112 (May 15, 1961) [hereinafter *Mater et Magistra*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 19, at 84, available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html; *Pacem in Terris*, *supra* note 24, ¶¶ 21–22; *Populorum Progressio*, *supra* note 64, ¶¶ 22–23; Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* ¶¶ 45–56 (May 15, 1931) [hereinafter *Quadragesimo Anno*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 19, at 42, available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html; *Rerum Novarum*, *supra* note 19, ¶¶ 5–10.

68. *Gaudium et Spes*, *supra* note 59, ¶ 67.

69. *Pacem in Terris*, *supra* note 24, ¶¶ 18–20.

70. *Centesimus Annus*, *supra* note 58, ¶ 47. The right to a just wage sufficient to support the whole family has been a constant theme in Catholic social thought since Leo XIII. See *Gaudium et Spes*, *supra* note 59, ¶ 67; *Laborem Exercens*, *supra* note 19, ¶ 19 (referring specifically to a “family wage” that is “a single salary given to the head of the family for his work, sufficient for the needs of the family without the spouse having to take up gainful employment outside the home”); *Quadragesimo Anno*, *supra* note 67, ¶ 71 (“[T]he wage paid to the working man should be sufficient for the support of himself and of his family.”); *Rerum Novarum*, *supra* note 19, ¶¶ 34–35 (stating that “the remuneration must be enough to support the wage earner in reasonable and frugal comfort” that is “sufficient to enable him to maintain himself, his wife, and his children in reasonable comfort”).

71. *Centesimus Annus*, *supra* note 58, ¶ 47.

72. *Pacem in Terris*, *supra* note 24, ¶ 13.

73. *Gaudium et Spes*, *supra* note 59, ¶ 73; see also *Centesimus Annus*, *supra* note 58, ¶ 47 (stating that religious freedom is in a certain sense “the source and synthesis of all other rights”); *Pacem in Terris*, *supra* note 24, ¶ 14.

74. *Dignitatis Humanae*, *supra* note 63, ¶ 2; see also *Pacem in Terris*, *supra* note 24, ¶ 14 (describing the right “to honor God according to the sincere dictates of [a person’s] own conscience, and therefore the right to practice [a person’s] religion privately and publicly”).

75. *Gaudium et Spes*, *supra* note 59, ¶ 73; *Pacem in Terris*, *supra* note 24, ¶¶ 12, 23; *Rerum Novarum*, *supra* note 19, ¶ 38.

“to take an active part in public affairs and to contribute one’s part to the common good of the citizens.”⁷⁶

This rather lengthy list of rights seems consistent with Altman’s account of rights neutrality in liberalism. A closer examination of the treatment of rights in Catholic social thought, however, reveals three features that distinguish it from the treatment of rights found in liberal theory.

1. *Rights as Less than Absolute*

The first distinguishing feature is that although the Catholic social tradition regards each of these rights as fundamental and inalienable, it does not treat any of them as absolute. For example, the social teaching of the Church has made this point specifically and repeatedly with respect to the right to own private property. As the late Pope John Paul II stated, the “Christian tradition has never upheld this right as absolute and un-touchable.”⁷⁷ Although Catholic social thought acknowledges private property as an “expression of personality” and “an extension of human freedom” that can aid in the exercise of civil liberties,⁷⁸ private property “does not constitute for anyone an absolute and unconditioned right.”⁷⁹ The tradition holds that all goods, and indeed the entire world, are given to humanity in general⁸⁰ such that “[t]he right to private property is subordinated to the right to common use, to the fact that goods are meant for everyone.”⁸¹ Because “private property has a social quality deriving from the law of the communal purpose of earthly goods,”⁸² the state may regulate the use of private property⁸³ and ensure that “the right to property must never be exercised to the detriment of the common good.”⁸⁴

76. *Pacem in Terris*, *supra* note 24, ¶ 26.

77. *Laborem Exercens*, *supra* note 19, ¶ 14.

78. *Gaudium et Spes*, *supra* note 59, ¶ 71.

79. *Populorum Progressio*, *supra* note 64, ¶ 23.

80. *Centesimus Annus*, *supra* note 58, ¶ 30; *Rerum Novarum*, *supra* note 19, ¶ 7.

81. *Laborem Exercens*, *supra* note 19, ¶ 14.

82. *Gaudium et Spes*, *supra* note 59, ¶ 71.

83. For example, although *Rerum Novarum* states that one of the chief duties of the state “is the safeguarding, by legal enactment and policy, of private property,” *Rerum Novarum*, *supra* note 19, ¶ 30, and that “private ownership must be held sacred and inviolable,” *id.* ¶ 35, the encyclical also makes the distinction between the right to own something and the right to use it as one pleases. *Id.* ¶ 19. Building on this point, *Quadragesimo Anno* states that because “the right of ownership . . . is

According to the Church's social teaching, rights even more basic than the right of ownership—such as the right to life—are not absolute and unqualified. Plainly, “[f]or man, the right to life is the *fundamental right*.”⁸⁵ Indeed, the Church acknowledges that the right to life enjoys a kind of logical priority over other rights in that bodily life is a necessary condition for enjoying all other earthly goods.⁸⁶ Still, even this most basic right is not absolute. For example, an individual or the state may licitly take the life of another through an act of legitimate self-defense.⁸⁷ In the case of public authorities who are responsible for defending public order and ensuring people's safety and well-being, “[l]egitimate defense can be not only a right but a grave duty.”⁸⁸ Thus, under certain well-defined circumstances, the Church teaches that the state can take the life of someone intent on harming others.

Likewise, even the right to religious liberty, which Pope John Paul II described as “the source and synthesis”⁸⁹ of other rights and “the apex of development,”⁹⁰ is subject to some qualification. As defined by the Second Vatican Council, the right to religious freedom includes both freedom from coercion, such that “no one [may] be forced to act in a manner contrary to his own beliefs,” and freedom from restraint, such that one may act “in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others.”⁹¹ But even this most solemn right is subject to the qualification that “the just requirements of public order are observed.”⁹² Although the

not absolutely rigid” within the bounds of the natural law, the state “may specify more accurately what is licit and what is illicit for property owners in the use of their possessions.” *Quadragesimo Anno*, *supra* note 67, ¶ 49.

84. *Populorum Progressio*, *supra* note 64, ¶ 23.

85. POPE JOHN PAUL II, CROSSING THE THRESHOLD OF HOPE 204 (1994).

86. See SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION, *Quaestio de abortu* ¶¶ 9, 11 (1974) [hereinafter *Quaestio de abortu*], reprinted in VATICAN COUNCIL II: MORE POSTCONCILIAR DOCUMENTS (Austin Flannery, O.P., ed., 1982).

87. See *Evangelium Vitae*, *supra* note 22, ¶¶ 55–56.

88. CATECHISM OF THE CATHOLIC CHURCH ¶ 2265 (1994).

89. *Centesimus Annus*, *supra* note 58, ¶ 47.

90. *Id.* ¶ 29.

91. *Dignitatis Humanae*, *supra* note 63, ¶ 2.

92. *Id.* The Declaration on Religious Freedom later defines “public order” as government's responsibility to ensure an “effective safeguard of the rights of all

Council stated that the right to religious freedom must “be respected as far as possible and curtailed only when and insofar as necessary,”⁹³ the Council clearly anticipated that there could be instances in which the right may justly be restricted.

The Catholic social tradition does speak in terms of absolutes with respect to certain forms of conduct. That is, the Church regards certain actions as “intrinsically evil” in that they are incapable of ordering the human person toward his or her authentic good.⁹⁴ As such, it is never morally licit to perform these acts, even when done with the best of intentions.⁹⁵ Catholic social teaching holds that to fulfill its function as the guarantor of public order and facilitator of the common good⁹⁶—indeed, in order to preserve the integrity of law *as such*—the law must prohibit some of these acts.⁹⁷ In doing so, the Church often describes the freedom not to be victimized by the wrongful acts of others as a “right” that should enjoy juridical status. At the same time, the Church does not teach that every intrinsically wrongful act must be subject to legal penalty. Indeed, prudential concerns

citizens and for peaceful settlement of conflicts of rights,” “an adequate care of genuine public peace,” and “a proper guardianship of public morality.” *Id.* ¶ 7.

93. *Id.* ¶ 7.

94. The Second Vatican Council discussed this point at some length in its Pastoral Constitution on the Church in the Modern World, concluding that

whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia, or willful self-destruction, whatever violates the integrity of the human person, such as mutilation, torments inflicted on body or mind, attempts to coerce the will itself; whatever insults human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children; as well as disgraceful working conditions, where men are treated as mere tools for profit, rather than as free and responsible persons; all these things and others of their like are infamies indeed.

Gaudium et Spes, *supra* note 59, at ¶ 27.

95. See Pope John Paul II, Encyclical Letter, *Veritatis Splendor* ¶¶ 79–83 (Aug. 6, 1993) [hereinafter *Veritatis Splendor*], available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html.

96. *Evangelium Vitae*, *supra* note 22, ¶ 71 (stating that “[t]he real purpose of civil law is to guarantee an ordered social coexistence in true justice”).

97. See, e.g., CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION, *Donum Vitae* § 3 (Feb. 22, 1987) [hereinafter *Donum Vitae*], available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html (“As a consequence of the respect and protection which must be ensured for the unborn child from the moment of his conception, the law must provide appropriate penal sanctions for every deliberate violation of the child’s rights.”).

strongly suggest that law and morality should not be coextensive in many instances.⁹⁸ Thus, although Catholic social teaching understands that the legal recognition and enforcement of moral rights must, in certain instances, give way to the demands of public order and the common good, certain legal duties—and thus their correlative rights⁹⁹—must remain absolute.¹⁰⁰ Indeed, if the state does not recognize and enforce certain rights always and everywhere—such as the right of an innocent person not to be killed by another individual or the state—then “the very foundations of a State based on law are undermined.”¹⁰¹

98. *Evangelium Vitae*, *supra* note 22, ¶ 71 (stating that “public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause more serious harm”); *see also* Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. CATH. SOC. THOUGHT 231 (2004). Thus, for example, although the Church teaches that the practice of artificial contraception is intrinsically evil, *see Veritatis Splendor*, *supra* note 95, ¶ 80, it does not teach that the state must prohibit the use of contraceptives in law.

99. Describing the freedom not to be subject to a certain form of conduct as a “right” indicates the very terminological weakness surrounding the use of the term that Hohfeld sought to correct. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Suppose that the conduct at issue is murder. The use of the word “right” in this manner is odd because the focus of the legal prohibition against murderous acts is on the wrongdoer and not on the person wronged. In Hohfeldian terminology the obligation not to murder others could be described as a “duty” correlative to which is the “right” on the part of the would-be victim not to be killed. Likewise, what we colloquially refer to as the “right to life” could in Hohfeldian terminology be described as a “privilege” enjoyed by all, correlative to which there is “no right” to engage in murder. Moreover, the state has the “power” to prohibit murder, and those who violate this prohibition are subject to a correlative “liability.” *See* Curtis Nyquist, *Teaching Wesley Hohfeld’s Theory of Legal Relations*, 52 J. LEGAL EDUC. 238 (2002); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

100. *See, e.g., Centesimus Annus*, *supra* note 58, ¶ 44 (asserting that the human person is the subject of rights that “[n]ot even the majority of a social body may violate”); *cf.* CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL NOTE ON SOME QUESTIONS REGARDING THE PARTICIPATION OF CATHOLICS IN POLITICAL LIFE ¶ 5 (2002), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (remarking that “it cannot be denied that politics must refer to principles of absolute value precisely because these are at the service of the dignity of the human person and of true human progress”).

101. *Centesimus Annus*, *supra* note 58, ¶ 47 (arguing that democracy must be given “an authentic and solid foundation through the explicit recognition” of rights, among the most important of which is “the right to life”); *Donum Vitae*, *supra* note 97, § 3; *see also Evangelium Vitae*, *supra* note 22, ¶ 20 (arguing that a democracy that fails to acknowledge and safeguard the dignity of every human person “is betrayed in its very foundations” (emphasis omitted)).

As a practical matter, given that not all rights are absolute, the state may, for example, subject the right of religious expression to reasonable restrictions regarding the time, place, and manner in which the expression is to take place.¹⁰² Likewise, the state may restrict the right of free speech where the speech at issue presents an immediate threat to public safety.¹⁰³ The state may not, however, permanently prohibit the dissemination of political views or the public expression of religious devotion because the very foundation of the state is to secure the free exercise of these rights.¹⁰⁴

In light of this qualification, some might object that this alleged difference is illusory. Some proponents of liberalism may argue that the simultaneous recognition of rights and the treatment of those rights as “less than absolute” does not distinguish Catholic social thought from liberal theory. Some liberal theorists, however, such as Ronald Dworkin, describe rights as “political trumps held by individuals,”¹⁰⁵ such that the government cannot “defeat such a right by appealing to the right of a democratic majority to work its will.”¹⁰⁶ For Dworkin, the state “must not define citizens’ rights so that these are cut off for supposed reasons of the general good.”¹⁰⁷ Still, notwithstanding this rhetorical bravado, other committed liberals have observed that the state “can infringe even the most fundamental rights if its justifications are sufficiently ‘compelling’ and

102. Cf. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (upholding a rule that had the effect of restricting the distribution of religious literature at the Minnesota State Fair).

103. Cf. *Feiner v. New York*, 340 U.S. 315, 321 (1951) (upholding the conviction of a civil rights speaker and the power of the police to “prevent a breach of the peace” where the speech “undertakes incitement to riot”); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.”).

104. *Pacem in Terris*, *supra* note 24, ¶ 60 (arguing that “[t]he chief concern of civil authorities must . . . be to ensure that these rights are acknowledged, respected, coordinated with other rights, defended and promoted”).

105. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 34, at xi; *see also* DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 34, at 198 (stating that for the liberal rights “will function as trump cards held by individuals”); Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 153 (Jeremy Waldron ed., 1984) (arguing that “[r]ights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole”).

106. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 34, at 194.

107. *Id.* at 204.

the means used are the least restrictive available.”¹⁰⁸ Under this approach, one could zealously subscribe to the tenets of liberalism and still hold that a deeply cherished right, such as the right to free speech under the First Amendment, may be overcome under certain circumstances.¹⁰⁹

As noted above,¹¹⁰ liberalism has a long and rich history to which many individuals have made significant contributions. Although it is important to recognize the genuine diversity of opinion that exists within liberal thought, the concept of “liberalism” is not so amorphous and protean as to be devoid of meaning. Rather, it identifies a number of ideas, principles, and values that coalesce together and argue for a certain kind of social order. In showing that Catholic social teaching treats rights as norms that are less than absolute, I have not demonstrated that Catholic social thought stands in opposition to *all* liberal theory, only that it differs from *some* versions of liberalism with respect to this point.¹¹¹

Beyond this disagreement with specific participants within the liberal tradition, the difference is one of emphasis. The forthright way in which the Church acknowledges the qualified nature of rights reflects a greater concern for the genuine interests of the community than can be readily seen in the liberal conception of individual rights. It reflects an overt wariness toward the dangers of radical individualism.

2. Rights and Duties

A second feature that more strongly distinguishes the treatment of rights found in Catholic social thought from liberal theory is that, in Catholic social teaching, rights never stand

108. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998).

109. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (recognizing the “clear and present danger” standard in First Amendment cases). For a more contemporary articulation of the standard which the government must satisfy to punish speech for inciting violence, see *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (holding that the state may restrict speech where the speaker intends to “incite imminent lawless action” and the words used are likely to produce this result).

110. See *supra* notes 11 and 16 and accompanying text.

111. For arguments that criticize Dworkin for conceptual inconsistency in his discussions of rights, see Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 368–71 (1993); Richard H. Pildes, *Dworkin’s Two Conceptions of Rights*, 29 J. LEGAL STUD. 309 (2000).

alone. Rather, they are always accompanied by duties.¹¹² Indeed, this pairing of rights and duties appears throughout the social tradition, beginning with the opening lines of Pope Leo XIII's *Rerum Novarum*, the encyclical that ushered in the modern era of Catholic social thought.¹¹³

The very concept of a right is, in a sense, neutral in that the right holder has the freedom to exercise it in one way or another. As Dean John Garvey has noted, we are taught that a freedom is bilateral, like "a two-way street," where one is free to travel in one direction or the other, and both "are equal in value."¹¹⁴ A duty, by contrast, is unidirectional. It is decidedly non-neutral inasmuch as it denotes a definite end that one is bound to pursue. Aside from the duty to respect the rights of others,¹¹⁵ discussion of duties is largely absent from liberal discourse.¹¹⁶ The individual's freedom to act, the freedom to plan one's own life course which lies at the heart of liberal theory, is thought best preserved by imposing on others the duty not to interfere with the exercise of rights. Liberal duties are always directed *outward*, toward another rights holder in the exercise of his or her rights.¹¹⁷

Catholic social thought clearly recognizes that the human person has "the duty to respect the rights of others."¹¹⁸ Never-

112. *Pacem in Terris*, *supra* note 24, ¶ 30 (noting that "every fundamental human right draws its indestructible moral force from the natural law, which in granting it imposes a corresponding obligation").

113. See *Rerum Novarum*, *supra* note 19, ¶ 1 (stating that "[i]t is not easy to define the relative rights and the mutual duties of the wealthy and of the poor, of capital and of labor").

114. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 5 (1996). *But see id.* at 18 (arguing that "freedoms are not necessarily bilateral" and that whether they are "depends on the principles they revolve around").

115. See JOSEPH RAZ, THE MORALITY OF FREEDOM 170–72 (1986) (arguing that rights are the "grounds" of duties and that rights are part of a "justification" for duties, but rejecting the idea that a right to X may be reduced to a corresponding duty to furnish the right holder with X).

116. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

117. This was in fact one of Hohfeld's most insightful points, namely, that a legal relation is a pair of correlatives. Accordingly, how a legal relationship is described depends upon the point of view from which the description is made. One person's "right" is another person's "duty," and one person's "power" is another person's "liability." See *supra* note 99.

118. *Centesimus Annus*, *supra* note 58, ¶ 17; see also *Pacem in Terris*, *supra* note 24, ¶ 30 (noting that "in human society to one man's right there corresponds a duty in all other persons: the duty, namely, of acknowledging and respecting the right in question").

theless, in teaching that rights and duties are “inseparably connected,”¹¹⁹ the social tradition goes beyond the limited correspondence between rights and duties reflected in liberal theory. Rather, it teaches that the duties which accompany the various rights of the human person are duties which have an *inward* orientation. These duties address the proper exercise of rights by the rights holder him or herself. Thus, as Pope John XXIII set forth in *Pacem in Terris*, “the right of every man to life is correlative with the duty to preserve it; his right to a decent standard of living with the duty of living it becomingly; and his right to investigate the truth freely, with the duty of seeking it ever more completely and profoundly.”¹²⁰ Other examples in the tradition include the duty to work and the corresponding right to decent and safe working conditions and a living wage,¹²¹ and the duty to use material goods both for one’s own benefit and “the benefit of others” and the corresponding right to private ownership.¹²²

The notion that rights holders have duties, not only toward others but also with respect to themselves, shows that duties enjoy a kind of priority over rights in Catholic social doctrine. On this point the Second Vatican Council’s Declaration on Religious Freedom, *Dignitatis Humanae*, is especially instructive. The Council argued that every human being has a “personal responsibility” and “a moral obligation to seek the truth, especially religious truth.”¹²³ This obligation arises from the very nature of the human person. Still, a person cannot be responsible unless he or she is also free. As the Council states, “men cannot discharge these obligations . . . unless they enjoy immunity from external coercion.”¹²⁴ Because of his nature, “every man has the duty, and therefore the right, to seek the truth in matters religious.”¹²⁵ Rights need to be protected because

119. *Pacem in Terris*, *supra* note 24, ¶ 28.

120. *Id.* ¶ 29.

121. *See Laborem Exercens*, *supra* note 19, ¶¶ 16–19.

122. *Rerum Novarum*, *supra* note 19, ¶ 19.

123. *Dignitatis Humanae*, *supra* note 63, ¶ 2.

124. *Id.*

125. *Id.* ¶ 3. John Courtney Murray makes a similar claim with respect to the Bill of Rights in the American Constitution:

The philosophy of the Bill of Rights was also tributary to the tradition of natural law, to the idea that man has certain original responsibilities precisely as man, antecedent to his status as citizen. These responsibilities

where their exercise is rendered ineffective “the fulfillment of duties is compromised.”¹²⁶ Thus, duties provide the grounds and justification for rights—not the other way around, as some liberal theorists contend.¹²⁷ This relationship between duties and rights—the idea that obligations give rise to freedoms—is admirably summarized by John Henry Cardinal Newman: “Conscience has rights because it has duties.”¹²⁸

Although duties enjoy a kind of priority over rights, the Church’s social doctrine makes plain that the enjoyment of a right is not contingent upon the right holder fulfilling the correlative duty that accompanies it. For example, *Dignitatis Humanae* expressly states that the right to religious freedom—the right to be free from coercion in the pursuit of truth—“continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it.”¹²⁹ This view of rights and duties is undoubtedly compatible with the liberalism reflected in the American constitutional scheme. That is, the “right to investigate the truth freely”¹³⁰ is protected by the First Amendment.¹³¹ Under this broad constitutional freedom a person may read the Bible, or reflect on the verses of the Qur’an or the Bhagavad Gita, or investigate the works of Plato and Aristotle, Hegel and Marx, Nietzsche and Sartre without

are creative of rights which inhere in man antecedent to any act of government; therefore they are not granted by government and they cannot be surrendered to government. They are as inalienable as they are inherent.

JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 37* (1960). Other commentators are less confident than Murray about the connection between natural law and natural rights. See, e.g., Louis Dupré, *The Common Good and the Open Society*, in *CATHOLICISM AND LIBERALISM*, *supra* note 58, at 172, 180 (arguing that, although “the theory of rights may be *reinterpreted* within the general context of natural law, its original individualism was far removed from the natural law’s fundamental assumption of the essentially social nature of the person” (citation omitted)).

126. *Pacem in Terris*, *supra* note 24, ¶ 63.

127. See RAZ, *supra* note 115, at 166 (saying that someone has a right means that some aspect of a person’s well-being “is a sufficient reason for holding some other person(s) to be under a duty”).

128. JOHN HENRY NEWMAN, *A LETTER ADDRESSED TO HIS GRACE THE DUKE OF NORFOLK, ON OCCASION OF MR. GLADSTONE’S RECENT EXPOSTULATION* 75 (New York, Catholic Publ’n Soc’y 1875).

129. *Dignitatis Humanae*, *supra* note 63, ¶ 2.

130. *Pacem in Terris*, *supra* note 24, ¶ 29.

131. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 19–29 (1982) (discussing the value of free speech in the process of discerning the truth).

interference from the state. At the same time, a person does not forfeit his or her First Amendment freedoms if, instead of fulfilling the duty to seek the truth ever more completely and profoundly, he or she seeks “to spend life in enjoyment as an end in itself”¹³²—a life of “self-love which leads to an unbridled affirmation of self-interest,”¹³³ a life that indulges in the excesses of the material consumption and exhibitionist culture that characterize much of Western society. Even if a person spends his or her entire life moving from distraction to distraction, wholly neglecting the duty to explore the fundamental question of human existence—the question of meaning that lingers in every human heart¹³⁴—such a person nevertheless retains the

132. *Centesimus Annus*, *supra* note 58, ¶ 36.

133. *Id.* ¶ 17.

134. The unavoidable question of the meaning of human existence is a persistent theme in Catholic social teaching and in the Church’s wider magisterial tradition. See, e.g., *Centesimus Annus*, *supra* note 58, ¶ 13 (noting how the rationalism and mechanism of the Enlightenment cannot resolve “the contradiction in [man’s] heart between the desire for the fullness of what is good and his own inability to attain it”); *id.* ¶ 24 (observing that “[d]ifferent cultures are basically different ways of facing the question of the meaning of personal existence” to which God is the ultimate answer and that a system of thought which “promised to uproot the need for God from the human heart” could not succeed without “throwing the heart into turmoil”); Pope John Paul II, Encyclical Letter, *Fides et Ratio* ¶ 1 (Sept. 14, 1998) [hereinafter *Fides et Ratio*], available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html (describing “the fundamental questions which pervade human life: *Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life?*”); Pope Paul VI, Encyclical Letter, *Octogesima Adveniens* ¶ 40 (May 14, 1971) [hereinafter *Octogesima Adveniens*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 19, at 265, available at http://www.vatican.va/holy_father/paul_vi/apost_letters/documents/hf_p-vi_apl_19710514_octogesima-adveniens_en.html (noting that scientific knowledge “deepens rather than solves the mystery of the heart of man; nor does it provide the complete and definitive answer to the desire which springs from his innermost being”); *Veritatis Splendor*, *supra* note 95, ¶ 2 (“No one can escape from the fundamental questions: *What must I do? How do I distinguish good from evil?*”); *id.* ¶ 8 (adding that the question put by the young man to Jesus in *Matthew* 19:16 “is one which rises from the depths of his heart” and that “[i]t is an essential and unavoidable question for the life of every man, for it is about the moral good which must be done, and about eternal life”); see also *Gaudium et Spes*, *supra* note 59, ¶ 10 (noting that “people are raising the most basic questions or recognizing them with a new sharpness: What is man? What is this sense of sorrow, of evil, of death, which continues to exist despite so much progress? What is the purpose of these victories, purchased at so high a cost? . . . What follows this earthly life?”); *id.* ¶ 21 (noting that “every man remains to himself an unsolved puzzle, however obscurely he may perceive it”); *id.* ¶ 41 (“For man will always yearn to know, at least in an obscure way, what is the meaning of his life, of his activity, of his death.”); SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON THE RELATIONSHIP OF THE CHURCH TO NON-

right to religious freedom. The state may not force a person to read Aristotle or Marx or the teachings of Calvin or Buddha as the price, the *quid pro quo*, for retaining his or her constitutional right to seek the truth freely.¹³⁵

Because the enjoyment of a right is not contingent upon its proper exercise by the right holder, many of the duties set forth in Catholic social teaching are only *moral* duties. As set forth in greater detail below, Catholic social thought provides that the state may impose legal duties that are binding on its citizens insofar as these duties are in accord with the common good and do not compel immoral conduct.¹³⁶ The respective duties incumbent upon right holders that accompany the various rights set forth in Catholic social teaching cannot, however, be *legal*¹³⁷ in nature, as this would contradict the very idea of rights as protecting certain domains of human experience “beyond the legitimate reach of the state.”¹³⁸ Thus, although the Church’s social doctrine speaks of rights and duties together as being “universal and inviolable,”¹³⁹ the duty of a person to exercise a specific right in a particular way does not enjoy the same juridical status as the right itself. Instead, the documents that make up the social tradition indicate that, although these duties exert a binding force on the human conscience,¹⁴⁰ they do not enjoy the force of positive law.¹⁴¹ Moreover, aside from the problem of contradic-

CHRISTIAN RELIGIONS, *Nostra Aetate* ¶ 1 (Oct. 28, 1965) [hereinafter *Nostra Aetate*], reprinted in THE DOCUMENTS OF VATICAN II, *supra* note 63, at 660, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html (“Men look to the various religions for answers to those profound mysteries of the human condition which, today even as in olden times, deeply stir the human heart: What is a man? What is the meaning and the purpose of our life? What is goodness and what is sin? What gives rise to our sorrows and to what intent? Where lies the path to true happiness? What is the truth about death, judgment, and retribution beyond the grave? What, finally, is that ultimate and unutterable mystery which engulfs our being, and whence we take our rise, and whither our journey leads us?” (footnote omitted)).

135. Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

136. See *infra* Parts II.A.3.b, II.C.2.

137. Altman uses the term “political duty,” by which he means “a moral duty that should be legally enforced.” ALTMAN, *supra* note 17, at 137.

138. *Id.* at 72.

139. *Gaudium et Spes*, *supra* note 59, ¶ 26.

140. See *Veritatis Splendor*, *supra* note 95, ¶ 59.

141. See, e.g., *Pacem in Terris*, *supra* note 24, ¶ 60 (acknowledging both rights and duties and stating that rights must be “defended and promoted” while making no similar statement regarding duties).

tion, the Church's social tradition holds that the enforcement of many of these duties would in any case prove ineffective. The coercive power of the state cannot compel genuine belief in any proposition—scientific, political, or religious—any more than it can make one person love another.¹⁴²

Although the state cannot compel right holders to exercise their rights so as to fulfill the duties that correspond to them, Catholic social thought provides that these duties still enjoy a kind of secondary juridical status—a status that runs contrary to the liberal understanding of rights neutrality. The social tradition provides that these moral duties can serve as the impetus behind various kinds of non-coercive legal measures. That is, consistent with the logic of rights, the state cannot demand that citizens exercise a particular right in the few narrow ways approved by the state. The state can, however, encourage the fulfillment of moral duties for the good of the individual and society as a whole. Thus, “[w]hile respecting the legitimate liberties of individuals, families, and subsidiary groups,” the state should act “in such a way as to create, effectively and for the well-being of all, the conditions required for attaining man’s true and complete good.”¹⁴³ It is “demanded by the common good that civil authorities should make earnest efforts to bring about a situation in which individual citizens can easily exercise their rights and fulfill their duties as well.”¹⁴⁴

Law can facilitate the fulfillment of natural duties which are an essential component of the genuine good and happiness of every human being,¹⁴⁵ not through direct intervention but through indirect prompting that encourages rightful conduct. As the Second Vatican Council stated, “government is more often required to intervene in social and economic affairs, by

142. See, e.g., *Dignitatis Humanae*, *supra* note 63, ¶ 1 (recognizing the duty to seek and know the truth but observing that “[t]he truth cannot impose itself except by virtue of its own truth, as it makes its entrance into the mind at once quietly and with power”); *id.* ¶ 10 (noting that “[t]he act of faith is of its very nature a free act” such that it is “in accord with the nature of faith that in matters religious every manner of coercion on the part of men should be excluded”).

143. *Octogesima Adveniens*, *supra* note 134, ¶ 46.

144. *Pacem in Terris*, *supra* note 24, ¶ 63.

145. Cf. Pope Paul VI, Encyclical Letter, *Humanae Vitae* ¶ 31 (July 25, 1968) [hereinafter *Humanae Vitae*], available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html (asserting that “man cannot attain that true happiness . . . unless he keeps the laws which the Most High God has engraved in his very nature”).

way of bringing about conditions more likely to help citizens and groups freely attain to complete human fulfillment with greater effect."¹⁴⁶ Thus, for example, although the state may not compel the observance of a religious practice because of the inviolable right to religious freedom, government may "help create conditions favorable to the fostering of religious life, in order that the people may be truly enabled to exercise their religious rights and to fulfill their religious duties."¹⁴⁷ Likewise, although everyone has a right to work,¹⁴⁸ "[t]he state could not directly ensure the right to work for all its citizens unless it controlled every aspect of economic life and restricted the free initiative of individuals."¹⁴⁹ Instead, the state should work to "creat[e] conditions which will ensure job opportunities, by stimulating those [business] activities where they are lacking or by supporting them in moments of crisis."¹⁵⁰ Similarly, the state cannot force people to marry or force spouses to fulfill the duties of marriage with respect to the begetting and raising of children.¹⁵¹ Indeed, because marriage and procreation are inalienable rights, "it is for the parents to decide, with full knowledge of the matter, on the number of their children."¹⁵² Nevertheless, governments should "strive to create economic, social, public health and cultural conditions which will enable married couples to make their choices about procreation in full freedom and with genuine responsibility."¹⁵³ Thus, although

146. *Gaudium et Spes*, *supra* note 59, ¶ 75; cf. *Octogesima Adveniens*, *supra* note 134, ¶ 43 (noting that with respect to international development "the most important duty in the realm of justice is to allow each country to promote its own development, within the framework of a cooperation free from any spirit of domination, whether economic or political").

147. *Dignitatis Humanae*, *supra* note 63, ¶ 6.

148. See *Gaudium et Spes*, *supra* note 59, ¶ 67.

149. *Centesimus Annus*, *supra* note 58, ¶ 48.

150. *Id.*; see also *Laborem Exercens*, *supra* note 19, ¶¶ 16–19 (describing the state as the "indirect employer" who can affect the conditions and circumstances under which "direct employment" by private actors can take place).

151. See *Gaudium et Spes*, *supra* note 59, ¶ 50 (referring to "the duty to procreate"); *Humanae Vitae*, *supra* note 145, ¶ 1 (referring to "[t]he transmission of human life" as "a most serious role").

152. *Populorum Progressio*, *supra* note 64, ¶ 37.

153. *Evangelium Vitae*, *supra* note 22, ¶ 91; see also *Centesimus Annus*, *supra* note 58, ¶ 39 (noting that it is "a lack of freedom, which causes a person to reject a commitment to enter into a stable relationship with another person and to bring children into the world"); *id.* ¶ 49 (arguing that "[i]t is urgent . . . to promote not only family policies, but also those social policies which have the family as their prin-

the state may not enforce the moral duties that correspond to the rights of the human person, it may enact laws and promote policies that aid and encourage people in the fulfillment of their duties.¹⁵⁴

3. *The Good and the Right Reconsidered*

The desire to foster the fulfillment of moral duties, and, thus, the exercise of legal rights in a particular way, exposes the fault line between Catholic social thought and liberal theory as described by Altman. Here, these two jurisprudential perspectives oppose one another in a significant way. In encouraging the fulfillment of duties—that is, in identifying duties that correspond with particular rights—the state promotes a specific conception of the good. This approach is not neutral because the state recommends that a person’s rights *ought* to be exercised in a certain way, which is sharply at odds with the liberal claim that “the state must be neutral among all . . . those normative conceptions that endorse ways of life actually above the threshold of right and justice.”¹⁵⁵ Because the duties fostered by the state under Catholic social thought are not legal duties, the specter of coercion is absent. Still, in fostering a certain vision of the good through the fulfillment of these duties, Catholic social thought violates the idea of state neutrality advocated by many liberal theorists.

For example, Ronald Dworkin, perhaps the most celebrated champion of liberal legal thought in the academy, has argued that “government must be neutral on what might be called the

principle object, policies which assist the family by providing adequate resources and efficient means of support, both for bringing up children and for looking after the elderly”); *Gaudium et Spes*, *supra* note 59, ¶ 52 (“Public authority should regard it as a sacred duty to recognize, protect, and promote [families’] authentic nature, to shield public morality, and to favor the prosperity of domestic life.”).

154. The practice of encouraging the proper exercise of rights is already evident in a wide array of practices in the United States. For example, although the Supreme Court has not been receptive to state attempts to punish “hate speech,” *see* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this has not dissuaded states, municipalities, and governmental units such as school districts and universities from working to promote the values of diversity, civility, and respect. Indeed, the American experience shows that government can and should refrain from interfering with the exercise of rights, such as the right to free speech, but that it need not be indifferent to the use of speech that is intended to demean or ridicule individuals based on their race, ethnic background, religion, or sexual orientation.

155. ALTMAN, *supra* note 17, at 70.

question of the good life.”¹⁵⁶ Indeed, he contends that such neutrality is essential to liberalism. According to Dworkin, the “constitutive political morality” of liberalism¹⁵⁷ is a theory of equality that supposes “that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.”¹⁵⁸ Liberalism definitively rejects the alternate view, which holds “that the content of equal treatment cannot be independent of some theory about the good for man or the good of life,” that is, “a theory of what human beings ought to be.”¹⁵⁹ The state “must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s.”¹⁶⁰ Thus, liberalism demands a framework of substantive and procedural rights that restrict the ways in which government may enact preferences for one or another theory of the good. These rights “function as trump cards held by individuals” that enable them “to resist particular decisions . . . [and] are necessary to protect [the] equal concern and respect” to which everyone is entitled.¹⁶¹ According to Dworkin, for the state to treat people as human beings—as subjects of equal concern and respect—the state must treat their disparate life plans and theories of the good as deserving of equal concern and respect.¹⁶²

Similarly, Professor Bruce Ackerman has argued at length that neutrality is “the organizing principle of liberal thought.”¹⁶³ For Ackerman, liberalism is not primarily about ideas of natural right or some supposed social contract that explains and justifies the relationship between the state and the individual. Instead, liberalism should be understood “as a way of talking about power.”¹⁶⁴ What distinguishes liberalism from other political theories is “the kinds of reasons liberals rely on to legiti-

156. DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 34, at 191.

157. *Id.* at 192.

158. *Id.* at 191; *see also id.* at 222 (“Orthodox liberalism holds that no government should rely, to justify its use of public funds, on the assumption that some ways of leading one’s life are more worthy than others . . .”).

159. *Id.* at 191.

160. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 34, at 273.

161. DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 34, at 198.

162. *See id.* at 190–98; *see also* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 34, at 272–78.

163. ACKERMAN, *supra* note 13, at 10.

164. *Id.* at 6 (emphasis omitted).

mate their claims to scarce resources.”¹⁶⁵ For Ackerman, liberalism holds that arguments concerning the exercise of state power must be neutral with respect to the good. Liberalism definitively rejects claims that require a person to assert “that his conception of the good is better than that asserted by any of his fellow citizens” or that “he is intrinsically superior to one or more of his fellow citizens.”¹⁶⁶ With these principles of neutrality in place, reasoned discourse can “demonstrate the illegitimacy of a wide variety of power structures by reducing their proponents to silence.”¹⁶⁷

Likewise, Professor Charles Larmore identifies neutrality as “the central ideal of the modern liberal state,”¹⁶⁸ that is, “the primary ideal of liberalism.”¹⁶⁹ He insists, however, that the neutrality of the liberal state “is not meant to be one of outcome, but rather one of procedure.”¹⁷⁰ According to Larmore, the state is acting in a neutral fashion if its action “can be justified without appealing to the presumed intrinsic superiority of any particular conception of the good life.”¹⁷¹

This view, which seeks to banish discussion of the good from legal and political discourse, is at odds with both the Catholic social tradition and the Church’s traditional teaching regarding the nature of law.¹⁷² According to this teaching, the purpose of law is to lead human beings to the realization of their genuine good. Moreover, because man is a personal—and therefore social—being, the genuine good of each person includes the common good of all as an integral component.¹⁷³

165. *Id.* at 7 (emphasis omitted).

166. *Id.* at 11.

167. *Id.* at 9.

168. See LARMORE, *supra* note 2, at 42.

169. *Id.* at 46.

170. *Id.* at 44 (emphasis omitted).

171. *Id.*

172. Many of the premises upon which the Christian understanding of law is founded are not specifically Christian but rather derive from classical antiquity. These premises continued to define the dominant view of law in the West until the Enlightenment. See, e.g., HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 3–29 (Thomas R. Hanley, O.S.B., trans. 1998) (discussing the understanding of law and justice and the relationship between the two in the thought of ancient Greece and Rome).

173. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, Q. 90, art. 2, Q. 92, art. 1; cf. *Pacem in Terris*, *supra* note 24, ¶ 54 (noting that “the whole reason for the existence of civil authorities is the realization of the common good”); *Rerum Nova-*

In his contribution to the social tradition, Pope John Paul II acknowledged and responded to the claim made by some contemporary liberal theorists¹⁷⁴ that law must be neutral with respect to competing theories of the good. According to Pope John Paul II, the effect of excluding theories of the good from politics and law is to enshrine ethical relativism. He notes that today “there is a tendency to claim that agnosticism and skeptical relativism are the philosophy and the basic attitude which correspond to democratic forms of political life.”¹⁷⁵ Indeed, some claim that “such relativism [is] an essential condition of democracy, inasmuch as it alone is held to guarantee tolerance, mutual respect between people and acceptance of the decisions of the majority, whereas moral norms considered to be objective and binding are held to lead to authoritarianism and intolerance.”¹⁷⁶ Thus, those who advocate a theory of the good that they contend is objectively true regardless of its popularity “are considered unreliable from a democratic point of view, since they do not accept that truth is determined by the majority, or that it is subject to variation according to different political trends.”¹⁷⁷

As a consequence of the widespread acceptance of this point of view, Pope John Paul II observed that democracies are experiencing a “crisis within . . . themselves,” which manifests itself as the inability “to make decisions aimed at the common good.”¹⁷⁸ He warned that the inability to talk about, discern, and enact laws oriented toward the good is especially destructive of the democratic project. In the absence of truth, and specifically truth about the human person and the good proper to

rum, *supra* note 19, ¶ 27 (noting that “since it is the end of society to make men better, the chief good that society can be possessed of is virtue”). This theory of law also informs the Church’s social teaching that a statute or ordinance which is contrary to the objective moral order is not genuinely law but an act of violence masquerading as law. See *infra* notes 436–40 and 446–50 and accompanying text.

174. See Paul E. Sigmund, *Catholicism and Liberal Democracy*, in CATHOLICISM AND LIBERALISM, *supra* note 58, at 217, 235 (arguing that “procedural” and “value-neutral” liberal theorists such as Ackerman, Dworkin and Robert Nozick are often mistakenly lumped together with more “substantive” liberals such as Joseph Raz).

175. *Centesimus Annus*, *supra* note 58, ¶ 46. For a recent article advancing this thesis in the context of American constitutional law, see Stephen G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331 (1995).

176. *Evangelium Vitae*, *supra* note 22, ¶ 70.

177. *Centesimus Annus*, *supra* note 58, ¶ 46.

178. *Id.* ¶ 47.

human beings, “the force of power takes over.”¹⁷⁹ In democratic governments, this power takes the form of electoral majorities and financial resources. Within such a framework, questions surrounding politics have less to do with the merits of any given measure than with the electoral tallies of partisan groups and the funding necessary to acquire them. Under the dynamics of such a system, “each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others.”¹⁸⁰ As such, “everything is negotiable, everything is open to bargaining,”¹⁸¹ and “[p]eople are then respected only to the extent they can be exploited” for one’s own ends.¹⁸²

Thus, according to Pope John Paul II, the very reason behind the liberal exclusion of claims concerning the good—namely, the preservation of individual rights—in fact works to undermine those rights. When rights are “no longer firmly founded on the inviolable dignity of the person,” they are instead “made subject to the will of the stronger part.”¹⁸³ Of course, the consequences of this change might not be immediately apparent. The full effects of this fundamental shift might be delayed or hampered by certain procedural protections, such as the status of rights. For example, it may be more difficult to change a fundamental right recognized in a country’s constitution or fundamental law than it would be to overturn rights that are recognized in ordinary legislation. Still, if discussion about the good remains off-limits, exiled from legal and political discourse, a significant ground for objecting to such a change is no longer available.

a. The Untenable Nature of Complete Neutrality

In addition to Pope John Paul II’s criticism, the claim that the liberal state must be neutral with respect to competing theories of the good has been further challenged. Indeed, both critics and proponents of liberalism have criticized the purported meaning of “neutrality” and the importance attributed to neutrality in liberal theory.

179. *Id.* ¶ 44.

180. *Id.*

181. *Evangelium Vitae*, *supra* note 22, ¶ 20.

182. *Centesimus Annus*, *supra* note 58, ¶ 44.

183. *Evangelium Vitae*, *supra* note 22, ¶ 20.

One of the more salient points raised by these critiques concerns the importance of neutrality itself. It is, after all, hardly self-evident why neutrality should be the principle that defines the legal and political order. As Professor Joseph Raz has observed, “[t]he question of the justification of neutral political concern invites moral and political argument and cannot be settled by the inherent appeal of neutrality as such.”¹⁸⁴ Likewise, Professor Robert George has remarked that “the putative requirement of moral neutrality is neither self-evident nor self-justifying”; it needs to be vindicated as true “by a valid argument.”¹⁸⁵ Even Professor Bruce Ackerman, one of neutrality’s leading champions, has conceded that “whatever else it may be, Neutrality is not a way of transcending value; it *is* a value, which can only be defended by locating its relationship to other values.”¹⁸⁶

Plainly, the value that neutrality hopes to serve is not indecision. The litigants in a dispute do not go to court seeking to be ignored. Rather, the parties want a resolution that each side hopes will favor his or her particular interests. Likewise, the proponents of legislation who petition the government want the state to enact laws that will address their concerns, not remain indifferent to them.¹⁸⁷ Indeed, as Professor Larry Alexander rightly notes, in choosing between groups who seek to advance interests that are mutually exclusive, “government must at the end of the day side with one group or the other, at least if neither of the opposing groups has been convinced of the error of its beliefs and values.”¹⁸⁸ Moreover, siding “with one group on the matter in dispute is the antithesis of neutrality, at least from the point of view of the losing group.”¹⁸⁹ As Professor Steven Smith makes clear, “the state must choose among competing values and beliefs” when formulating a law or deciding

184. RAZ, *supra* note 115, at 114.

185. Robert P. George, “Same-Sex Marriage” and “Moral Neutrality,” in MARRIAGE AND THE COMMON GOOD 81, 82 (Kenneth D. Whitehead ed., 2001).

186. Bruce Ackerman, *Neutralities*, in LIBERALISM AND THE GOOD 29, 29 (R. Bruce Douglass et al. eds., 1990).

187. See Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 332 (1990) (“Legislatures and courts must make decisions, and decisions require choices among beliefs and values.”).

188. Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 629 (2002).

189. *Id.*

upon a course of action.¹⁹⁰ Because “[s]uch decisions inevitably require governmental choices among competing conceptions of the good . . . it is implausible to suggest that the government can make such choices yet somehow remain neutral.”¹⁹¹

Some liberal theorists have acknowledged that neutrality in law does not mean neutrality with respect to outcome. Charles Larmore notes that the actions of the state “will generally benefit some people more than others, and so some conceptions of the good life will fare better than others.”¹⁹² For Larmore, neutrality means that a political decision “can be justified without appealing to the presumed intrinsic superiority of any particular conception of the good life.”¹⁹³ Similarly, Bruce Ackerman insists that neutrality is not “a way of directly assessing consequences.”¹⁹⁴ Instead, for Ackerman, neutrality must be understood within a “dialogic framework,” a “conversational filter” that prohibits political conversation from “express[ing] a principled public preference either between citizens or between their ideals of the good.”¹⁹⁵

In attempting to banish all discussion of the good from the foundations of law and justice, however, liberal theory attempts to occupy a ground that no one can claim without fear of contradiction. Thus, some proponents of liberalism, like Professor William Galston, have concluded that “[t]he strategy for justifying the liberal state that seeks to dispense with all specific conceptions of the good cannot succeed.”¹⁹⁶ Because “[n]o form of political life can be justified without some view of what is good for individuals,” in practice, liberal theorists always “covertly employ theories of the good.”¹⁹⁷ That is, despite the

190. Smith, *supra* note 187, at 314.

191. *Id.*

192. LARMORE, *supra* note 2, at 43. The fact that liberal arrangements will inevitably prove to be an advantage to proponents of some conception of the good over others is reflected in the thought of a number of liberal theorists. See, e.g., RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 193 (noting that “it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time”).

193. LARMORE, *supra* note 2, at 44.

194. Ackerman, *supra* note 186, at 39.

195. *Id.* at 37 (emphasis omitted).

196. GALSTON, *supra* note 1, at 301.

197. *Id.* at 79; see also Smith, *supra* note 187, at 315 (noting that “[t]he necessity of selecting among competing conceptions of the good can be disguised, but it can-

overt promises of Dworkin, Ackerman, and Rawls to do without a substantive theory of the good, “[a]ll of them covertly rely on the same triadic theory of the good, which assumes the worth of human existence, the worth of human purposiveness and of the fulfillment of human purposes, and the worth of rationality as the chief constraint on social principles and social actions.”¹⁹⁸ Indeed, “[m]ost accounts of liberalism embrace, tacitly or explicitly, the premise that life is too valuable to jeopardize in conflicts over how to lead it and that conflicts over the good life must therefore be muted in the name of life.”¹⁹⁹ As Professor Alasdair MacIntyre neatly summarizes, “[t]he starting points of liberal theorizing are never neutral as between conceptions of the human good; they are always liberal starting points.”²⁰⁰ Laws based upon the liberal values of the “freedom to express and implement preferences” that are adopted according to the liberal standards of rational justification cannot help but “impose a particular conception of the good life, of practical reasoning, and of justice upon those who willingly or unwillingly accept the liberal procedures and the liberal terms of debate.”²⁰¹

As a result, the kind of neutrality that liberalism purports to embody is never achieved “because it is never possible.”²⁰² Even the existence of some highly cherished set of rights protected by a government’s highest law does not show neutrality at work. A present-day consensus cannot hide that society still faces “factious disagreements about which rights it should value most highly,” or that “competing versions of rights inevitably reflect competing conceptions of the good.”²⁰³ Because

not be avoided”). That liberal theory necessarily includes some theory of the good leads Galston to conclude that “[w]hat is distinctive about liberalism is not the absence of a substantive conception of the good, but rather a reluctance to move from this conception to full-blown public coercion of individuals.” GALSTON, *supra* note 1, at 89; *see id.* at 93 (“Liberalism is the theory not of the neutral state but of the minimally committed state.”).

198. GALSTON, *supra* note 1, at 92. Galston acknowledges that Larmore is at least more explicit in noting that his commitment to civil peace is a limitation on neutrality. *See id.* at 107; LARMORE, *supra* note 2, at 60.

199. GALSTON, *supra* note 1, at 107.

200. MACINTYRE, *supra* note 15, at 345.

201. *Id.* at 344–45. Similarly, Steven Smith concludes that “[t]he whole point of requiring government to be neutral is to permit individuals to select and pursue their own values.” Smith, *supra* note 187, at 314.

202. *See* GALSTON, *supra* note 1, at 97.

203. Smith, *supra* note 187, at 315–16.

"[e]very law is designed to attain some end," every law "embodies a peculiar view of the good."²⁰⁴ Even liberal regimes inevitably make use of some theory of the good in the formulation of law, thus exposing the liberal exclusion of alternative conceptions of the good as arbitrary and unprincipled.²⁰⁵

b. The Common Good as the Norm of Social Life

If liberal neutrality were designed to prohibit making claims with respect to the good in the formulation of law and public policy, then Catholic social thought and liberalism would oppose one another on a profound level. From the Church's point of view, it is difficult to overstate the importance of the common good as a principle of law and public life because the purpose behind civil society²⁰⁶ and the state is the "realization of the common good."²⁰⁷ Indeed, the common good is "the norm of social justice."²⁰⁸ Given this importance, there are few themes that receive as much attention as the common good in the Church's social tradition. To prohibit any mention of the common good would, as Ackerman suggests, largely reduce the proponents of Catholic social thought to silence.²⁰⁹

According to the Church's social magisterium, the common good "embraces the sum total of those conditions of social living, whereby men are enabled more fully and more readily to achieve their own perfection."²¹⁰ It is "not simply the sum total of particular interests"²¹¹ produced by a kind of democratic calculus. Rather, "as a result of a tragic obscuring of the collective conscience,"²¹² the democratically expressed views of the majority might in fact be contrary to the authentic good of the in-

204. John P. Safranek & Stephen J. Safranek, *Licensing Liberty: The Self-Contradictions of Substantive Due Process*, 2 TEX. REV. L. & POL. 231, 245 (1998).

205. See GALSTON, *supra* note 1, at 93–94; Safranek & Safranek, *supra* note 204, at 244–45.

206. See *Rerum Novarum*, *supra* note 19, ¶ 37.

207. *Mater et Magistra*, *supra* note 67, ¶ 20; *accord Pacem in Terris*, *supra* note 24, ¶ 54.

208. *Quadragesimo Anno*, *supra* note 67, ¶ 110.

209. See ACKERMAN, *supra* note 13, at 9.

210. *Mater et Magistra*, *supra* note 67, ¶ 65; see also *Dignitatis Humanae*, *supra* note 63, ¶ 6 (relying on the same passage); *Gaudium et Spes*, *supra* note 59, ¶¶ 26, 74 (relying on the same passage); *Pacem in Terris*, *supra* note 24, ¶ 58 (quoting the same).

211. *Centesimus Annus*, *supra* note 58, ¶ 47.

212. *Evangelium Vitae*, *supra* note 22, ¶ 70.

dividual and society.²¹³ The common good is instead “the good of all and of each individual” at the same time,²¹⁴ which is to say that “it involves an assessment and integration of [particular] interests on the basis of a balanced hierarchy of values.”²¹⁵ Because it is integral in nature, it concerns the good of the whole person—not just the person’s material well-being, but his or her opportunities for cultural engagement, political involvement, family intimacy, and religious expression.²¹⁶ Indeed, the requirement that one assess what is proposed as the common good against a proper hierarchy of values is meant to ensure that individuals, families, and society as a whole do not value “having” over “being.”²¹⁷ Indeed, because a “man is more precious for what he is than for what he has,”²¹⁸ materialism inevitably leads to “radical dissatisfaction.”²¹⁹

Such an assessment is also necessary because of the changing demands of the common good. Those aspects of the common good which relate to the objective moral order of the natural law do not change, because the nature of the human person remains the same. Nevertheless, “the concrete demands of [the] common good are constantly changing as time goes on”²²⁰ because the historical circumstances in which people live are

213. See *infra* notes 408–14 and accompanying text.

214. *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 38.

215. *Centesimus Annus*, *supra* note 58, ¶ 47.

216. See *Centesimus Annus*, *supra* note 58, ¶ 29 (stating that “development must not be understood solely in economic terms but in a way that is fully human,” and referring to religious freedom as the “apex of development”); *Gaudium et Spes*, *supra* note 59, ¶ 26 (discussing the various aspects of the common good); *Octogesima Adveniens*, *supra* note 134, ¶ 41 (while “quantitative economic growth” is one measure of progress, we should also look to the “quality and truth of human relations” and “the degree of participation and of responsibility”); *id.* ¶ 46 (in working to achieve the common good, the state must respect “legitimate liberties” while acting to create “the conditions required for attaining man’s true and complete good, including his spiritual end”); *Populorum Progressio*, *supra* note 64, ¶ 14 (asserting that “[d]evelopment cannot be limited to mere economic growth” but “to be authentic, it must be complete: integral, that is, it has to promote the good of every man and of the whole man”).

217. *Centesimus Annus*, *supra* note 58, ¶ 36; *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 28; see also *Populorum Progressio*, *supra* note 64, ¶¶ 6, 19; Pope John Paul II, Encyclical Letter, *Redemptor Hominis* ¶ 16 (Mar. 4, 1979) [hereinafter *Redemptor Hominis*], available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis_en.html.

218. *Gaudium et Spes*, *supra* note 59, ¶ 35.

219. *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 28 (emphasis omitted).

220. *Gaudium et Spes*, *supra* note 59, ¶ 78.

fluid.²²¹ Thus, public authorities must be sensitive to these changes and be prepared to respond to them creatively.

Even so, the basic means whereby the state fosters the common good do not change. The Church's social doctrine teaches that "the common good is chiefly guaranteed when personal rights and duties are maintained."²²² It is essential for government to protect and promote "the inviolable rights of man."²²³ In fulfilling this responsibility, the state enables each person to "more easily carry out his duties."²²⁴ The authentic good of society cannot be realized—indeed, it will always be frustrated—if people celebrate their freedoms while neglecting their responsibilities, that is, if people only exercise their rights while ignoring their duties. Thus, in fostering the common good, the state must promote and facilitate the fulfillment of duties primarily by "appeal[ing] . . . to the conscience of individual citizens"²²⁵ but also, as noted above, by creating conditions that encourage the performance of duties.²²⁶

The connection the Church draws between rights and duties again shows the integral nature of the common good. This good is not properly understood as individual autonomy bounded only by respect for the rights of others. Rather, the common good, and indeed the fulfillment of one's dignity as a person, is found in satisfying the duties one has received.²²⁷

c. *The Nature of the Right and the Priority of the Good*

The idea that rights and duties together constitute part of the common good also serves to correct the misunderstood rela-

221. Cf. *id.* ¶ 74 (referring to a "dynamically conceived common good").

222. *Pacem in Terris*, *supra* note 24, ¶ 60; see also *Dignitatis Humanae*, *supra* note 63, ¶ 6 (the "common welfare of society . . . consists chiefly in the protection of the rights, and in the performance of the duties, of the human person" (footnote omitted)); *Gaudium et Spes*, *supra* note 59, ¶¶ 26, 74–75 (the common good involves the protection and promotion of the rights and duties of the human person).

223. *Dignitatis Humanae*, *supra* note 63, ¶ 6.

224. *Pacem in Terris*, *supra* note 24, ¶ 60.

225. *Id.* ¶ 48; see also *Gaudium et Spes*, *supra* note 59, ¶ 74 (stating that the public authority "must dispose the energies of the whole citizenry toward the common good, not mechanically or despotically, but primarily as a moral force").

226. See *supra* notes 143–54 and accompanying text.

227. See *Gaudium et Spes*, *supra* note 59, ¶ 16 (to obey the law of God written on the human heart "is the very dignity of man"); *Populorum Progressio*, *supra* note 64, ¶ 16 (arguing that human fulfillment constitutes "a summary of our duties" and the highest goal of this fulfillment is "union with Christ").

tionship between the right and the good that underlies the various kinds of liberal neutrality. That is, as Altman makes clear, liberalism views the normative claims that make up “the right” as being prior to and independent of the different normative claims that make up “the good.”²²⁸

Altman is correct to single out the priority of the right over the good as one of the central tenets of liberalism and intellectual foundations of liberal neutrality. Although the idea originated in Kant,²²⁹ it is now most closely associated with John Rawls. In his *Theory of Justice*, Rawls famously argued that the liberal ordering of the right as prior to the good stood in contrast to the various teleological theories, according to which “the good is defined independently from the right, and then the right is defined as that which maximizes the good.”²³⁰ Because Rawls’s theory of justice as fairness is deontological in nature, it “does not interpret the right as maximizing the good.”²³¹ Indeed, for Rawls, “there is no reason to think that just institutions will maximize the good.”²³² Moreover, “the concept of right is prior to that of the good” in that “[t]he principles of right, and so of justice . . . impose restrictions on what are reasonable conceptions of one’s good.”²³³ For Rawls, the idea that the right is prior to the good means that “something is good only if it fits into ways of life consistent with the principles of right already on hand.”²³⁴ As Rawls later stated in his book *Political Liberalism*, “this priority means that admissible ideas of the good must respect the limits of, and serve a role within, the political conception of justice.”²³⁵

By contrast, contemporary Catholic social thought, as well as the historic Western moral tradition prior to the Enlightenment, rejects the lexical priority of the right over the good proposed by Rawls and others. From this historical perspective, the right and the good are distinct but related. Indeed, the right

228. See *supra* notes 48–51 accompanying text.

229. See SANDEL, *supra* note 2, at 10–11.

230. JOHN RAWLS, A THEORY OF JUSTICE 24 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE].

231. *Id.* at 30.

232. *Id.*

233. *Id.* at 31.

234. *Id.* at 396.

235. RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 176.

should be seen as a constitutive part of the good.²³⁶ That is, the reason why the right is desired—the reason why the principles of justice are inviolable and so earnestly sought in social life—is because recognition and enforcement of the right itself is good,²³⁷ not because it is somehow independent from the good.²³⁸ As liberal theorist William Galston has noted, “[i]f we believe that justice is beneficial, its value stems from the worth of the benefits it confers on the just agent or on those affected by that agent’s actions.”²³⁹ Thus, the relationship between the

236. See AQUINAS, *supra* note 173, at II-II, Q. 58, arts. 3, 5, 6; see also MORTIMER J. ADLER, *SIX GREAT IDEAS* 136 (1981) (arguing that justice is in “the domain of the idea of goodness” and that “[t]o act rightly or justly is to do good”).

237. See Smith, *supra* note 187, at 316 (arguing that “rights are valuable only insofar as they are related to our conceptions of what is good”).

238. Rawls’s rhetoric would seem to suggest that the right refers to a moral quality that is somehow separate, or in Rawls’s words, “defined independently” of the good. RAWLS, *A THEORY OF JUSTICE*, *supra* note 230, at 24. Indeed, in stressing that “[i]t is essential to keep in mind that in a teleological theory the good is defined independently from the right,” Rawls seems to suggest that the right could be defined wholly apart from the good. *Id.* at 25. Likewise, by refusing to “interpret the right as maximizing the good” and by insisting that “there is no reason to think that just institutions will maximize the good,” Rawls seems to suggest that the right and the good are not merely distinct but radically different sorts of values. *Id.* at 30. Rawls, however, recognizes that the putative priority of the right over the good cannot be the priority of one independent category of moral value over another. He concedes that the right is dependent upon a conception of the good. He also admits that to establish the principles of right, “it is necessary to rely on some notion of goodness.” *Id.* at 396. Still, he attempts to minimize the importance of this concession by asserting that only a “thin theory” of the good, limited to “the bare essentials,” is needed to formulate the principles of justice in the original position. *Id.* As Charles Taylor has made clear, however, the principles of justice that Rawls articulates are appealing precisely “because they fit with our intuitions.” CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 89 (1989). Rawls makes no attempt to move beyond the level of intuition. In large part, that is the method and goal of his book—to set forth a theory of justice that eschews metaphysical commitments. Yet, something else lies beneath the surface. As Taylor rightly cautions,

If we were to articulate what underlies these intuitions we would start spelling out a very “thick” theory of the good. To say that we don’t “need” this to develop our theory of justice turns out to be highly misleading. We don’t actually spell it out, but we have to draw on the sense of the good that we have here in order to decide what are adequate principles of justice.

Id. Thus, from the Catholic point of view, the so-called “priority of the right over the good” shows itself to be more of a slogan than a serious principle of moral and political philosophy. It is a rhetorical means of overtly claiming to avoid metaphysical commitments regarding the nature of the good while, in fact, surreptitiously employing those very same sorts of commitments.

239. GALSTON, *supra* note 1, at 88.

right and the good is not one of independence, “an unequivocal priority of justice over goodness but, rather, a complex relation of mutual dependence between them.”²⁴⁰ Similarly, as Josef Pieper has explained, writing from within the Thomist tradition, “[j]ustice reaches out beyond the individual subject, because in a certain sense it is itself the *bonum alterius*, the ‘good of another.’”²⁴¹

Put another way, neither the right in general nor the possession of specific rights in particular is the end of social life. Hav-

240. *Id.*

241. JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 65 (1966). This traditional understanding of justice is, of course, somewhat at odds with Rawls’s account. In Rawls’s theory of justice, persons hidden behind a “veil of ignorance” choose the principles of justice that will govern their society after the veil is lifted. Behind the veil, participants have no knowledge of their physical characteristics or other capacities, their social status or wealth, or even their conceptions of the good. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 230, at 12. Rawls specifies that the participants behind the veil are “rational and mutually disinterested.” *Id.* at 13. He makes plain that the concept of rationality that he has in mind is the one “standard in economic theory, of taking the most effective means to given ends.” *Id.* at 14. Accordingly, under the terms of the hypothetical, the participants will choose the so-called principles of justice because of self-interest. As such, justice is transformed from the traditional concept of “the good of another,” set forth above, to “the good of the self.” What had been a virtue that led the self to engage in actions designed to benefit the other, even at great cost, is now conceived of as the epitome of self-interest.

Furthermore, although Rawls’s attempt to exclude self-interest from the deliberative process by which the principles of justice are determined is commendable, his stipulation that the participants behind the veil of ignorance do not know their own conceptions of the good renders the entire thought experiment practically useless. Indeed, because the right is not independent of the good, the participants behind the veil of ignorance will be unable to choose the principles of justice without a conception of the good to guide them in their deliberations. The premise upon which Rawls’s hypothetical is based is that the participants will act in a “rational and mutually disinterested” fashion, “not taking an interest in one another’s interests” and “taking the most effective means to [advance their] given ends.” *Id.* at 13–14; see *id.* at 143 (“A rational person is thought to have a coherent set of preferences between the options open to him. He ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed.”). But, to act out of rational self-interest, as the hypothetical supposes, one must have a conception of what is in one’s self-interest. That is, one must have a conception of the good. To simply claim that any rational person, not knowing the conception of the good to which he or she subscribes, would choose to adopt a maximal guarantee of freedom as one of the basic principles of justice, “the most extensive basic liberty compatible with a similar liberty for others,” is hardly convincing. *Id.* at 60. It is by no means clear that the only rational, or even the most reasonable, choice behind the veil of ignorance would be for a more capacious freedom.

ing rights is not an end in itself. The goal is not to possess the freedom to choose or the mere act of choosing, but the value of what is chosen.²⁴² Society values rights, such as free speech and freedom of religion, “precisely because people regard communication and worship as goods.”²⁴³ That is, “freedom is valuable because it permits us to pursue our good.”²⁴⁴ As Charles Taylor has said, “the good is always primary to the right” precisely because “the good is what, in its articulation, gives the point of the rules which define the right.”²⁴⁵

At the same time, the right is “prior” in the sense that it is the first obligation within the good. The first duty incumbent on anyone is to do no harm,²⁴⁶ and claims of right help to ensure that the state and individuals do not harm others by interfering with their rights and thereby obstructing their duties. Nevertheless, justice—the good of rendering to another that which is his or her due—is only the first step. It is the foundation of social life, not its culmination. A society where rights are honored but duties are neglected will always be incomplete—a social order marked by a perpetual sense of frustration. Despite the outward appearance of vitality, such a society is destined to suffer from a kind of chronic anemia and barrenness. The promise of freedom will remain unfulfilled where freedom is understood as a good that is complete in itself, rather than as a necessary means of attaining some further and greater good.

4. *The Civilization of Love: The Goal of Social Life*

Because social and political life is concerned with the good, it has an end to which it is oriented. In the Catholic social tradition, this end or goal has been variously described as an “authentic human community,”²⁴⁷ the “establishment of universal

242. See GARVEY, *supra* note 114, at 24 (arguing that the argument that rights are valuable because they protect the mere act of choosing “explains too much”).

243. Smith, *supra* note 187, at 316.

244. GALSTON, *supra* note 1, at 86 (citing Charles Taylor, *What’s Wrong with Negative Liberty?*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOR OF ISAIAH BERLIN* 183 (Alan Ryan ed., 1979)).

245. TAYLOR, *supra* note 238, at 89.

246. Cf. *Evangelium Vitae*, *supra* note 22, ¶ 75 (arguing that the negative precepts of the moral law lead one to “embrace the entire horizon of the good”).

247. *Centesimus Annus*, *supra* note 58, ¶ 41.

brotherhood,"²⁴⁸ an anticipation of the "kingdom of God"²⁴⁹ and, more recently, the "culture of life."²⁵⁰ Each of these phrases possesses a certain virtue, but the fullest expression of the idea that each attempts to communicate—the idea of an integral earthly good—is "the civilization of love."²⁵¹ Although this particular expression owes its origin to Pope Paul VI,²⁵² the idea pervades the social tradition. For example, Pope John XXIII repeatedly insisted that a social order which is "genuinely human"²⁵³ must be grounded "in truth," function "according to the norms of justice," and be "inspired and perfected by mutual love."²⁵⁴ Moreover, the Second Vatican Council itself relied heavily upon this ideal in describing the social order in this three-fold manner.²⁵⁵

Love itself is quite obviously the animating principle behind the "civilization of love," but the Church often speaks in terms of the principle of "solidarity."²⁵⁶ Although the relationship between solidarity and love is close, it is not a relationship of complete identity.²⁵⁷ Like love, however, solidarity is "a moral

248. *Octogesima Adveniens*, *supra* note 134, ¶ 17; see also *Rerum Novarum*, *supra* note 19, ¶ 21 (arguing that "if Christian precepts prevail, the two classes [rich and poor] will not only be united in the bonds of friendship, but also those of brotherly love").

249. *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 48.

250. *Evangelium Vitae*, *supra* note 22, ¶¶ 28, 78–101.

251. Pope John Paul II, Apostolic Exhortation, *Ecclesia in America* ¶ 10 (Jan. 22, 1999), available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html.

252. *Gratissimam Sane*, *supra* note 21, ¶ 13.

253. *Pacem in Terris*, *supra* note 24, ¶ 149.

254. *Id.* ¶ 37; see also *id.* ¶ 80 (stating that relationships between different nations "also must be harmonized in truth, in justice, in a working solidarity, in liberty"); *id.* ¶ 167 (arguing that "peace will be but an empty-sounding word unless it is founded on the order which this present document has outlined in confident hope: an order founded on truth, built according to justice, vivified, and integrated by charity, and put into practice in freedom").

255. See *Gaudium et Spes*, *supra* note 59, ¶ 26 ("It must be founded on truth, built on justice, and animated by love; in freedom it should grow every day toward a more humane balance.").

256. See *Centesimus Annus*, *supra* note 58, ¶ 10 ("[W]hat we nowadays call the principle of solidarity," Pope Leo XIII identified by the term "friendship." "Pope Pius XI used the equally meaningful term *social charity*," whereas Pope Paul VI expanded the concept by use of the phrase "civilization of love.").

257. See *id.* ¶ 49 (referring to a "concrete commitment to solidarity and charity"); *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 40 (noting that it is "possible to identify many points of contact between solidarity and charity" but that charity is "the distinguishing mark of Christ's disciples" where, "[i]n the light of faith, solidarity

and social attitude" that manifests itself in action.²⁵⁸ Thus, solidarity "is not a feeling of vague compassion or shallow distress at the misfortunes" of others.²⁵⁹ It is instead "a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all."²⁶⁰ Plainly, such a commitment to the common good entails a commitment to justice, but a desire for justice does not exhaust solidarity. Even where justice is "most faithfully observed," "a wide field . . . remain[s] open for charity."²⁶¹ Justice can help meet the material needs of men and women, but because the human person is not simply a material being, but rather a spiritual being who longs for communion, the operation of "just social structures" will never render "works of charity superfluous."²⁶² Accordingly, love "will always prove necessary, even in the most just society."²⁶³ Rendering justice alone, giving each person his or her due, "can remove indeed the cause of social strife, but can never bring about a union of hearts and minds."²⁶⁴ Indeed, "[i]f, beyond legal rules, there is really no deeper feeling of respect for and service to others, then even equality before the law can serve as an alibi for flagrant discrimination, continued exploitation, and actual contempt."²⁶⁵ Therefore, a society that embraces solidarity is not content with justice; rather, its members share the "intimate conviction that they are members of a single family" and so

seeks to go beyond itself, to take on the specifically Christian dimension of total gratuity, forgiveness and reconciliation" (emphasis omitted)).

258. *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 38.

259. *Id.*

260. *Id.* (emphasis omitted).

261. *Quadragesimo Anno*, *supra* note 67, ¶ 137.

262. Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* ¶ 28 (Dec. 25, 2005), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html.

263. *Id.*

264. *Quadragesimo Anno*, *supra* note 67, ¶ 137.

265. *Octogesima Adveniens*, *supra* note 134, ¶ 23; see also *Quadragesimo Anno*, *supra* note 67, ¶ 137 (noting that, in the absence of charity, "as repeated experience proves, the wisest regulations come to nothing"). The 1971 Synod of Bishops argued for an even closer connection between justice and love. See Synod of Bishops, *Justice in the World* [hereinafter *Justice in the World*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 19, at 288, 293 (arguing that "love of neighbor and justice cannot be separated" because "love implies an absolute demand for justice" and "[j]ustice attains its inner fullness only in love").

regard the suffering of one as the suffering of all.²⁶⁶ Solidarity reflects “a commitment to the good of one’s neighbor with the readiness, in the gospel sense, to ‘lose oneself’ for the sake of the other instead of exploiting him, and to ‘serve him’ instead of oppressing him for one’s own advantage.”²⁶⁷

Thus, the “civilization of love” not only requires that an individual’s outward conduct conform to the demands of justice as set forth in law, but also seeks to influence people’s interior attitudes and dispositions with respect to one another. The “civilization of love” asks everyone to “work with energy for the establishment of universal brotherhood, the indispensable basis for authentic justice and the condition for enduring peace.”²⁶⁸

There is, nevertheless, something deeply jarring about the phrase “the civilization of love.” The unease which this expression brings to mind has to do with the relationship between love and politics. As Pope John Paul II observed, “[e]tymologically the word ‘civilization’ is derived from ‘civis’—‘citizen,’ and it emphasizes the civic or political dimension of the life of every individual.”²⁶⁹ Politics, however, necessarily involves the exercise of power through law. On a basic level, the positive law is simply that system of rules and other norms which justify the use of coercive power by the state to ensure the fulfillment of duties and the free exercise of rights. Hence, as the late Robert Cover powerfully taught, the application of law often involves the use of violence: “Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”²⁷⁰

Love is not something that can be coerced or brought about by violence. Nor is it primarily a matter of emotion, “a simple transport of instinct and sentiment”; it is “also, and principally, an act of the free will.”²⁷¹ Indeed, love is “the free gift of self”²⁷²

266. *Quadragesimo Anno*, *supra* note 67, ¶ 137 (citing 1 *Corinthians* 12:26).

267. *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 38 (citing *Matthew* 10:40–42, 20:25; *Mark* 10:42–45; *Luke* 22:25–27).

268. *Octogesima Adveniens*, *supra* note 134, ¶ 17.

269. *Gratissimam Sane*, *supra* note 21, ¶ 13.

270. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986). There are, of course, forms of law which are not coercive in nature. See H.L.A. HART, *THE CONCEPT OF LAW* 27–28 (1961) (arguing that some legal rules confer legal powers upon individuals rather than impose obligations on them backed by threats).

271. *Humanae Vitae*, *supra* note 145, ¶ 9 (describing marital love).

whereby the human person acts to bring about the genuine good of another.²⁷³ The dignity of the human person requires that acts of love be made “according to a knowing and free choice,” a choice which is “personally motivated and prompted from within” and not the result of “blind internal impulse” or “mere external pressure.”²⁷⁴ Accordingly, because the essence of love concerns the will of the human subject, it cannot be legislated or commanded by any legal authority. By its very nature, love cannot be the immediate object of any juridical act.

Although love is not something the state can compel, it is also not something that the law should ignore or treat with indifference. Love is so vitally important to each person, so indispensable in the life of every human being, that any theory of law and politics which does not or cannot account for it should be regarded as an abject failure.²⁷⁵ The importance that Catholic social thought attaches to love does not make love an inescapably religious value.²⁷⁶ Rather, the true significance of love is an existential and

272. *Centesimus Annus*, *supra* note 58, ¶ 41 (citing *Gaudium et Spes*, *supra* note 59, ¶ 24).

273. See AQUINAS, *supra* note 173, at II-II, Q. 23, art. 1.

274. *Gaudium et Spes*, *supra* note 59, ¶ 17.

275. See MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 182 (1988) (“Political theory that fails to address questions of human good—questions of how human beings, individually and collectively, should live their lives—is, finally, vacuous and irrelevant.”).

276. Some might object that Catholic social thought compounds the violation of liberal neutrality by suggesting that the state should promote a view of humanity and the good life that is inherently religious, if not sectarian, in nature. That is, some might argue that the “civilization of love” is not only a particular theory of the good, but that it is a specifically Catholic, or at least Christian, view of man and the purpose and meaning of social life.

On the one hand, the singular importance which the Church attaches to love as a norm for living may be understood as a matter of religious conviction. Thus, the Church believes that “only in the mystery of the incarnate Word does the mystery of man take on light.” *Gaudium et Spes*, *supra* note 59, ¶ 22. Apart from Jesus Christ, “the riddles of sorrow and death” and the bleak reality of human suffering “overwhelm us.” *Id.* In Christ, however, God “fully reveals man to man himself and makes his supreme calling clear.” *Id.* That calling “consists in the sincere gift of self,” that is, in living a life of authentic love of God and neighbor. *Evangelium Vitae*, *supra* note 22, ¶ 25 (emphasis omitted). Indeed, “[b]oth the Old and the New Testaments explicitly affirm that without love of neighbor, made concrete in keeping the commandments, genuine love for God is not possible.” *Veritatis Splendor*, *supra* note 95, ¶ 14 (emphasis omitted). In particular, Christ’s “Passion and Death on the Cross, are the living revelation of his love for the Father and for others.” *Id.* ¶ 20. Moreover, Christ invites everyone to imitate him in the love of the Cross: “This is my commandment, That you love one another, as I have loved you.” *John* 15:12.

The Church is charged by her Divine Founder to share this good news with all humanity. See *Matthew* 28:19–20 (“Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to obey all I have commanded you. And surely I am with you always, until the very end of the age.”); see also *Evangelium Vitae*, *supra* note 22, ¶ 101 (“The revelation of the *Gospel of life* is given to us as a good to be shared with all people: so that all men and women may have fellowship with us and with the Trinity. Our own joy would not be complete if we failed to share this Gospel with others but kept it only for ourselves.” (citing 1 *John* 1:3)). The Christian duty to share the faith with all people has been the subject of two major documents by recent popes. See Pope Paul VI, Apostolic Exhortation, *Evangelii Nuntiandi* (Dec. 8, 1975), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 19, at 301, available at http://www.vatican.va/holy_father/paul_vi/apost_exhortations/documents/hf_p-vi_exh_19751208_evangelii-nuntiandi_en.html; Pope John Paul II, Encyclical Letter, *Redemptoris Missio* (Dec. 7, 1990), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio_en.html. Faithful to this call, the Church proposes “the new command of love [as] the basic law of human perfection and hence of the world’s transformation.” *Gaudium et Spes*, *supra* note 59, ¶ 38; see also *Evangelium Vitae*, *supra* note 22, ¶ 49 (“[T]his is the New Law, ‘the law of the Spirit of life in Christ Jesus’[,] . . . and its fundamental expression, following the example of the Lord who gave his life for his friends[,] . . . is the gift of self in love for one’s brothers and sisters.” (citations omitted) (citing *Romans* 8:2 and *John* 15:13)). In this respect “the civilization of love originates in the revelation of the God who ‘is love.’” *Gratissimam Sane*, *supra* note 21, ¶ 13 (quoting 1 *John* 4:8, 4:16).

On the other hand, it is possible to understand the great importance attached to love in Catholic thought not as a matter of revelation, but as the product of philosophical reflection on the human condition. This view does not suggest that we may “deduce” Christ or the fullness of divine love revealed in the Cross. Indeed, “[t]he crucified Son of God is the historic event upon which every attempt of the mind to construct an adequate explanation of the meaning of existence upon merely human argumentation comes to grief.” *Fides et Ratio*, *supra* note 134, ¶ 23. This does suggest, however, that the evident confusion and unhappiness of the human person in the absence of love is an observable phenomenon. One need not rely on theological conviction in order to acknowledge its existence.

In one of the most beautiful and frequently quoted passages in *Gaudium et Spes*, the Council fathers wrote that man “cannot fully find himself except through a sincere gift of himself.” *Gaudium et Spes*, *supra* note 59, ¶ 24. Granted, the Council fathers make this claim while reflecting on the mystery of the Most Holy Trinity, seeing “a certain likeness between the union of the divine Persons, and in the union of God’s sons in truth and charity.” *Id.* Nevertheless, the truth about the triune God revealed in Jesus Christ, God incarnate, is a truth which “fully reveals man to man himself and makes his supreme calling clear.” *Id.* ¶ 22. As such, the mysteries of the Incarnation and the Trinity help us to understand *why* love is essential for man’s earthly fulfillment and eternal salvation. The revelation in Christ of God’s inner-life is not, however, necessary in order to observe that love is essential to human happiness. One need not subscribe to any religious doctrine in order to observe, together with Pope John Paul II, that “[m]an cannot live without love.” *Redemptor Hominis*, *supra* note 217, ¶ 10. Immediately following this observation, the Pope points to Christ as the one who, in the words of the Council, “fully reveals man to man himself.” *Id.* The need for love and the significance of this need pose a question to which, Pope John Paul II contends, Christ is the only genuine answer.

historical fact that society ignores at its peril. As Pope John Paul II powerfully observed at the beginning of his pontificate:

Man cannot live without love. He remains a being that is incomprehensible for himself, his life is senseless, if love is not revealed to him, if he does not encounter love, if he does not experience it and make it his own, if he does not participate intimately in it.²⁷⁷

If “the subject, and the goal of all social institutions is and must be the human person,”²⁷⁸ and if “the whole reason for the existence of civil authorities is the realization of the common good,”²⁷⁹ then the state must recognize love as a constitutive part of the human person and the fulfillment of his or her genuine good. Any adequate theory of law must reckon with the central importance of love in the history of civilization and in the life of every human being. The purported value neutrality of liberal theory precludes this sort of reckoning.²⁸⁰

Even so, the human need for love is not contingent upon the purported truth of any religious doctrine. One may conclude, purely as a matter of philosophical reflection, that love is constitutive of the human person and essential for the authentic good and happiness of every human being. Consequently, although a legal system which promotes the “civilization of love” is not “neutral” as to how it defines the good, it nevertheless does not impose an inherently religious conception of the good on society.

277. *Redemptor Hominis*, *supra* note 217, ¶ 10.

278. *Gaudium et Spes*, *supra* note 59, ¶ 25.

279. *Pacem in Terris*, *supra* note 24, ¶ 54.

280. To see the difference between the importance attributed to love in Catholic social thought and in liberal theory, it is helpful to examine Rawls’s treatment of love in *A Theory of Justice*. This treatment begins with Rawls’s critique of utilitarianism, which he faults for “not tak[ing] seriously the distinction between persons.” RAWLS, *A THEORY OF JUSTICE*, *supra* note 230, at 27. Rawls, however, takes the remedy for this failing to an extreme. For Rawls, a wide chasm exists between every person, a separateness not merely reflected in his hypothetical “original position” behind the “veil of ignorance,” but which functions as an ontological presupposition that informs his entire theory. Indeed, for Rawls, persons are not merely distinct, but separate, such that the good of another person is ultimately unknowable. This is because, to Rawls, the good is finally a matter of individual preference: “[I]ndividuals find their good in different ways, and many things may be good for one person that would not be good for another.” *Id.* at 448. One person cannot fully assume the preferences, inclinations, and choices of another: “Even when we take up another’s point of view and attempt to estimate what would be to his advantage, we do so as an advisor, so to speak.” *Id.* Thus, for Rawls, solidarity and love in the Christian sense are impossible as an epistemic matter. We cannot know the genuine good of another because that good is not something that can be known in the abstract, for it is something constructed by the individual will. Moreover, because Rawls views love as simply seeking the

Catholic social thought does not suffer from this deficiency. Indeed, not only does the social tradition account for love, it champions love as “one of the fundamental principles of the Christian view of social and political organization.”²⁸¹ It regards love as “the basic law of human perfection and hence of [the world’s] transformation.”²⁸² Moreover, in the “civilization of love,” the law of the state “must help to promote the relationships between individuals and society.”²⁸³ The law must do this, however, while respecting the dignity of the individual and the nature of love as the free gift of self. That is, in building the “civilization of love,” the law must employ noncoercive means.²⁸⁴

advancement of another person’s chosen good, the loves of different people, and the love of even a single individual, will inevitably clash. *Id.* at 190–91. Because love and other “higher-order sentiments do not include principles of right to adjudicate these conflicts,” love will look to the principles of justice as fairness “to determine [love’s] aims when the many goods it cherishes are in opposition.” *Id.* at 191. This has the effect of not only relegating love to a subordinate position to justice in the political order, as is proper, but also reducing love to a secondary gloss on competing conceptions of the good—conceptions that are a matter of indifference for the state. See also MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 168–73 (1982) (discussing the moral epistemology of justice in Rawls and what this says about love).

To be clear, from the Catholic point of view, any theory (including liberal legal theory) that regards love as just one choice among many possible choices, none inherently better or worse than any other, that treats acts of love as being on par with acts of hatred or selfishness, should be rejected as morbidly deficient. Because liberalism has no theory of the good, because it abstains from judging the different choices people make, and because it is agnostic with respect to determining what does and does not enhance human flourishing, it cannot account for love. It cannot distinguish between a life spent loving other people through the “gift of self” and a life spent indulging one’s own appetites in self-love. Cf. *Centesimus Annus*, *supra* note 58, ¶ 36 (distinguishing between a life directed toward “having” and one directed toward “being”).

281. *Centesimus Annus*, *supra* note 58, ¶ 10 (referring to the principle of solidarity).

282. *Gaudium et Spes*, *supra* note 59, ¶ 38.

283. *Sollicitudo Rei Socialis*, *supra* note 20, ¶ 33 (referring to “true development”).

284. In advocating the use of noncoercive means to promote certain social ends, Catholic social thought is in agreement with certain liberal theorists. See, e.g., GALSTON, *supra* note 1, at 292–94 (arguing that liberal public principles of the liberal state may have noncoercive effects on the practices of nonliberal communities within it); RAZ, *supra* note 115, at 420–24 (arguing that the harm principle must be in the service of promoting “the conditions of autonomy,” but that this allows for policies that aid in the building of a public culture that supports certain values). But see Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 *STAN. L. REV.* 385, 398–99 (1996) (noting that in addition to coercive means that raise serious questions about autonomy, the state “also possesses a number of noncoercive means to promote favored ways of life, such as simple exhortation and the use of

Accordingly, although love is not something that the law can compel, it is something that the law should nurture and encourage. The state can help realize the “civilization of love” by intervening “to bring about favorable conditions which will give more effective help to citizens and groups in their free pursuit of man’s total well-being.”²⁸⁵ The law can help to create circumstances that enhance love and increase the potential for the genuine expression of love between individuals and among groups.

a. The Central Importance of the Family

The Church’s belief that love must be the virtue that animates society as a whole is not naïve idealism, nor is the Church’s vision for society a kind of utopianism. On the contrary, the Church knows that every utopian vision of earthly paradise—and in reality, every “ideology of progress”²⁸⁶—is doomed to failure. From the Church’s perspective, “[t]he appeal to a utopia is often a convenient excuse for those who wish to escape from concrete tasks in order to take refuge in an imaginary world.”²⁸⁷ Instead, “as an expert in humanity,”²⁸⁸ the Church views the world through the clear lens of Christian realism—a lens which plainly sees human nature as fallen but open to redemption—a redemption which cannot be achieved through the improvement of political structures and scientific techniques, but only “by love.”²⁸⁹

At the same time, beyond mere platitudes, the Catholic social tradition offers a number of concrete ways in which this love can be realized. Specifically, the social tradition teaches that the most important way in which the state can foster “the condi-

financial and other incentives,” but adopting “a presumption against widespread state action of this sort”).

285. *Gaudium et Spes*, *supra* note 59, ¶ 75; see also *supra* notes 150–54 and accompanying text (discussing the state’s responsibility to create conditions for the fulfillment of those natural duties which correspond to natural rights).

286. Pope Benedict XVI, Encyclical Letter, *Spe Salvi* ¶ 17 (Nov. 30, 2007) [hereinafter *Spe Salvi*], available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20071130_spe-salvi_en.html.

287. *Octogesima Adveniens*, *supra* note 134, ¶ 37.

288. Pope Paul VI, Address to the Twentieth General Assembly of the United Nations Organization (Oct. 4, 1965), available at <http://www.christusrex.org/www1/pope/UN-1965.html>.

289. *Spe Salvi*, *supra* note 286, ¶¶ 25–26.

tions required for attaining man's true and complete good"²⁹⁰ is by devoting its attention and resources to those conditions which assist the family. Because the family "is the foundation of society," the "[p]ublic authority should regard it as a sacred duty to recognize, protect and promote [the] authentic nature [of marriage and the family], to shield public morality and to favor the prosperity of home life."²⁹¹ Although the family is the "basic social structure" of man's life²⁹² and the "natural, primary cell of human society,"²⁹³ the family is not simply a convenient structure in which individuals share economic resources and living arrangements. Rather, "[t]he family is a kind of school of deeper humanity,"²⁹⁴ "a school of love"²⁹⁵ in which a person "receives his first formative ideas about truth and goodness, and learns what it means to love and to be loved, and thus what it actually means to be a person."²⁹⁶ Understood in this way, the family should be seen as "the centre and the heart of the civilization of love."²⁹⁷

This view of the family, and its essential role in building the "civilization of love," has enormous implications for law. According to Pope John Paul II, "[a] family policy must be the ba-

290. *Octogesima Adveniens*, *supra* note 134, ¶ 46.

291. *Gaudium et Spes*, *supra* note 59, ¶ 52.

292. *Populorum Progressio*, *supra* note 64, ¶ 38.

293. *Pacem in Terris*, *supra* note 24, ¶ 16.

294. *Gaudium et Spes*, *supra* note 59, ¶ 52.

295. Pope John Paul II, Address to the Bishops of Brazil from the East 2 Region on their "Ad Limina" Visit ¶ 5 (Nov. 16, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/november/documents/hf_jp-ii_spe_20021116_brazil-leste-ii_en.html. The full text that provides this beautiful phrase is worthy of quotation: "The family, more than any other human reality, is the place in which the person is loved for himself and in which he learns to live 'the sincere gift of self'. Thus the family is a school of love, as long as it keeps its own identity: the stable communion of love between a man and a woman, founded on marriage and open to life." *Id.*

296. *Centesimus Annus*, *supra* note 58, ¶ 39. Significantly, the social tradition also provides that the family educates the human person about the nature and value of work. See *Laborem Exercens*, *supra* note 19, ¶ 10 (describing the family as "simultaneously a *community made possible by work* and the *first school of work*, within the home, for every person"). At the same time, work remains subordinate to family, see *Gaudium et Spes*, *supra* note 59, ¶ 67 (arguing that "the entire process of productive work . . . must be adapted to the needs of the person and to his way of life, above all to his domestic life"), because "in the first place work is 'for man' and not man 'for work,'" *Laborem Exercens*, *supra* note 19, ¶ 6.

297. *Gratissimam Sane*, *supra* note 21, ¶ 13 (emphasis omitted).

sis and driving force of all social policies.”²⁹⁸ By this, he meant that the state should promote not only family policies per se, as they relate to the legal recognition of marriage and divorce, the care and custody of children, and the laws of inheritance, adoption, and emancipation, but, in addition, the state must also promote “those social policies . . . which assist the family by providing adequate resources and efficient means of support, both for bringing up children and for looking after the elderly.”²⁹⁹ This understanding of “family policy” includes virtually every body of law imaginable, including, most conspicuously, those areas of law that involve taxation, employment, education, housing, immigration, and health care. From the perspective of Catholic social thought, laws that assist the family bolster the “civilization of love” and so work to realize the genuine good of humanity.³⁰⁰

From the perspective of liberalism, insofar as the law promotes the so-called “civilization of love,” the law violates the liberal requirement of state neutrality concerning “the good.” As noted above,³⁰¹ liberal theory holds that the use of coercive state power should be reserved for the protection and vindication of individual rights, and that it is illegitimate for the state to endorse a particular conception of the good. Catholic social thought does not sanction the use of coercive state power to promote the civilization of love or to violate the rights of individuals. Rather, the state helps to create conditions where people choose to exercise their freedom “in building up [an] active and lived solidarity.”³⁰² Nevertheless, by encouraging people to exercise their rights in a certain way, and by seeking to influence how they see their relationship with other people and the world around them, the state endorses a particular theory “about the good for man or the good of life.”³⁰³ This is squarely

298. *Evangelium Vitae*, *supra* note 22, ¶ 90.

299. *Centesimus Annus*, *supra* note 58, ¶ 49.

300. See *Gratissimam Sane*, *supra* note 21, ¶ 13 (noting that “[t]he phrase [the civilization of love] is linked to the tradition of the ‘domestic church’ in early Christianity” (emphasis omitted)).

301. See *supra* notes 34–40 and accompanying text.

302. *Octogesima Adveniens*, *supra* note 134, ¶ 47.

303. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 34, at 191. Of course, from the liberal point of view, governmental action may violate neutrality by favoring a certain theory of the good through noncoercive means, such as offering a benefit on

at odds with the liberalism championed by theorists such as Rawls, Dworkin, and Ackerman.³⁰⁴ If the state is to remain neutral with respect to competing theories of the good, plainly it cannot serve as an advocate for one of those theories, even one so benignly characterized as the “civilization of love.”

*b. The Liberal “Goal” of Social Life: Pluralism and
the Civilization of Tolerance*

Because liberal theory does not endorse any specific conception of the good, there is, strictly speaking, no analogue to the Church’s vision of the “civilization of love.” Liberalism rejects “the claim that there is a discoverable excellence or optimal condition . . . which characterizes human beings.”³⁰⁵ Thus, there is no substantive goal of social life that the liberal state should work to achieve. Indeed, life has no goal or purpose beyond the particular ends that individuals choose to pursue. Instead, liberalism offers only the goal of a perfected process—an ideal procedure whereby rights are recognized and carefully protected, and political and adjudicative neutrality is scrupulously observed.³⁰⁶ This liberal neutrality prevents the state from “making all sorts of intolerant public pronouncements about the nature of ‘human flourishing.’”³⁰⁷ Whereas the Church believes that love is “the deepest and most authentic meaning of life: namely, that of being a gift which is fully realized in the giving of self,”³⁰⁸ the liberal state regards love as a purely “private” value, one possible choice among many. As Bruce Ackerman describes it, in liberal society each citizen is “free from any obligation to love his neighbor; he is even free to believe that his neighbor is a despicable creature who is wasting his own life and corrupting the lives of those stupid enough to call him

condition of some act or omission involving a constitutionally protected right. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

304. *But see* GALSTON, *supra* note 1, at 280–89 (supporting the liberal case against “intrinsic traditionalism” with respect to family policy, but arguing in favor of “functional traditionalism” on liberal premises).

305. R. Bruce Douglass & Gerald M. Mara, *The Search for a Defensible Good: The Emerging Dilemma of Liberalism*, in LIBERALISM AND THE GOOD, *supra* note 186, at 257–58.

306. *See infra* notes 393–451 and accompanying text.

307. Ackerman, *supra* note 186, at 39 (criticizing Joseph Raz).

308. *Evangelium Vitae*, *supra* note 22, ¶ 49.

friend.”³⁰⁹ The liberal state “does not pretend to solve the final mysteries of life,” but invites citizens “to make the sense they can of their place in the universe.”³¹⁰

The hallmark of such a liberal society will always be pluralism.³¹¹ As such, liberal society must inculcate a virtue beyond mere respect for individual rights and the rule of law. In any society where numerous, disparate theories of the good are adopted and put into action by various individuals, tolerance is a necessary civic virtue.³¹² Thus, in place of the “civilization of love,” liberal theory offers at most a “civilization of tolerance.”³¹³ In such a social order, the law plainly recognizes the right of everyone to “equal concern and respect”³¹⁴ regardless of his or her conception of the good. Beyond this, however, it fosters an attitude of equal concern and respect that must pervade the wider culture.

It is undoubtedly correct to see tolerance as a virtue of social life and to acknowledge the widespread commitment to tolerance in liberal societies as “a huge achievement that must not be forgotten or negated.”³¹⁵ Indeed, during the Second Vatican

309. ACKERMAN, *supra* note 13, at 347.

310. *Id.* at 347–48.

311. *See id.* at 348 (“Any form of social life that makes sense to any significant group will find a place in the liberal state.”).

312. The suggestion is that tolerance is not merely a political value, but a cultural value that makes liberal politics feasible. *Cf.* RAWLS, POLITICAL LIBERALISM, *supra* note 2, at xxv–xxviii (distinguishing between “political liberalism,” which sets forth principles of justice for a constitutional democratic regime, and various “comprehensive liberalism[s],” each of which purports to answer basic questions concerning how one must act in order to live a moral life).

313. GALSTON, *supra* note 1, at 222 (arguing that the two key features of liberal society are individualism and diversity and that “[t]he maintenance of social diversity requires the virtue of tolerance”); LARMORE, *supra* note 2, at 51 (acknowledging that, historically, “[l]iberalism has always urged toleration for the diversity of ideals and forms of life,” but criticizing historic liberalism for failing to justify the virtue of toleration on neutral grounds).

314. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 34, at 180–83, 272–73 (arguing that the fundamental conception of liberal equality is “[t]he right to equal concern and respect” by which he means “the right to treatment as an equal” rather than “the right to equal treatment”); GALSTON, *supra* note 1, at 182 (describing the principle of “liberal equality” as the idea that “no social policy can be sustained if its justification gives unequal weight to the good of different individuals within a society” (emphasis omitted)); LARMORE, *supra* note 2, at 59–68 (arguing that “equal respect” means that “we cannot treat [others] merely as objects of our will, but owe them an explanation for those actions of ours that affect them”).

315. DAVID HOLLENBACH, S.J., THE COMMON GOOD AND CHRISTIAN ETHICS 32 (2002).

Council, the Church herself expressly endorsed the legal recognition of tolerance with respect to religious belief and practice.³¹⁶ Still, it is wrong to overstate the value of tolerance. It is wrong, as some suggest, to think of tolerance as the highest virtue and crowning achievement of social life.³¹⁷ Properly understood,³¹⁸ tolerance is not the pinnacle of cultural and political development, but the necessary starting point for the beginning of political development and cultural formation.³¹⁹ Although tolerance can help ensure respectful dialogue among people who as-

316. In *Dignitatis Humanae*, the Council's Declaration on Religious Freedom, the Church recognized the right to religious freedom with "its foundation in the very dignity of the human person" as known by "the revealed Word of God and by reason itself." *Dignitatis Humanae*, *supra* note 63, ¶ 2. According to the Council fathers, this right includes the freedom "to be immune from coercion" such that "no one is to be forced to act in a manner contrary to his own beliefs," as well as the freedom not to be "restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits." *Id.*

Clearly this support for the legal right to religious liberty would seem to be consistent with the "rights neutrality" characteristic of liberalism. However, *Dignitatis Humanae* supports religious freedom without committing the Church to the kind of relativism or "epistemological neutrality" suggested by many liberal theorists with respect to the proper content of religious belief. Indeed, the document makes plain that all men are "bound by a moral obligation to seek the truth, especially religious truth," *id.*, and that the "one true religion subsists in the catholic and apostolic Church." *Id.* ¶ 1. Thus, religious indifference on the part of individuals and, more subtly, the state, is expressly repudiated. *See also* Avery Cardinal Dulles, *Religious Freedom: Innovation and Development*, *FIRST THINGS*, Dec. 2001, at 35. Elsewhere, the Council made clear that, although the fullness of religious truth can only be found in the Catholic faith, other religions "nevertheless often reflect a ray of that Truth which enlightens all men." *Nostra Aetate*, *supra* note 134, ¶ 2. For an interesting collection of essays on whether *Dignitatis Humanae* constitutes a repudiation of earlier Catholic teaching or a development of doctrine in continuity with that teaching, see *CATHOLIC DOSSIER*, Mar.–Apr. 2000 (symposium issue on *Dignitatis Humanae*).

317. The importance of tolerance is especially prominent in legal literature concerning the First Amendment. *See, e.g.*, LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992).

318. *See* A. J. Conyers, *Rescuing Tolerance*, *FIRST THINGS*, Aug.–Sept. 2001, at 43 (distinguishing between the "Enlightenment doctrine" of toleration and the pre-modern Christian practice and habit of mind).

319. *See* Smith, *supra* note 187, at 332–33 (arguing that liberal tolerance, unlike liberal neutrality, "acknowledges that a political community must act on the basis of substantive values that it regards as true and good" and that although the tolerant liberal society must abide by some orthodoxy, it also acknowledges disagreement and "protects the freedom and autonomy of all its citizens by permitting dissent"); *see also* PERRY, *supra* note 275, at 102 ("Liberalism-as-tolerance is an admirable ideal. Liberalism-as-neutrality is a phantom, a will o' the wisp.").

sert differing points of view, it cannot serve as the sole, or even the primary, substantive criterion for resolving disputes when these viewpoints come into conflict.³²⁰ Indeed, some of the more astute admirers of tolerance know that “there are major social and political questions today that call for more vision than tolerance can generate on its own.”³²¹ In short, tolerance is too dim a light by which to steer the ship of state.

In addition to these shortcomings, Catholic social thought suggests that a society which does not aspire to anything more than the “civilization of tolerance” is destined to become a society marked by a profound sense of alienation. In its truest and most profound sense, alienation occurs when the “essence of freedom” is understood as “self-love carried to the point of contempt for God and neighbor, a self-love which leads to an unbridled affirmation of self-interest and which refuses to be limited by any demand of justice.”³²² The human person “is alienated if he refuses to transcend himself and to live the experience of self-giving and of the formation of an authentic human community.”³²³ Likewise, “[a] society is alienated if its forms of social organization, production and consumption

320. More precisely, tolerance as a *procedural* value is indispensable in any society as a way of ensuring peaceful discourse concerning matters of public and private concern. That is, tolerance is a basic ground rule that enables citizens openly and fairly to discuss, for example, both the legal restrictions on environmental pollution and the meaning of a new film or novel. By contrast, when tolerance is offered as a *substantive* value for the resolution of disputes, it only serves to establish a right to the conduct under challenge. Thus, if tolerance is urged as a principle for resolution of the debate over same-sex marriage, the medicinal use of marijuana, or the combination of auditing and consulting services within the same accounting firm, then both the practice and the non-practice of the conduct in question will be tolerated. Taken to its logical extreme, however, tolerance as a principle of social organization leads to chaos, for example, tolerance of both stopping at red traffic lights and ignoring them. Thus, tolerance cannot be the sole, or even the primary, principle governing social life. It must be supplemented and limited by other principles, such as the individual rights of others and the common good. Accordingly, the Church recognizes that even in the case of religious freedom, tolerance of religious practices may be limited by “the just requirements of public order.” *Dignitatis Humanae*, *supra* note 63, ¶ 4; see also *supra* notes 89–93 and accompanying text.

321. HOLLENBACH, *supra* note 315, at 34. For Hollenbach, these questions include the seemingly intractable problem of minority, urban poverty, and the myriad issues raised by the phenomenon known as “globalization.” See *id.* at 34–61.

322. *Centesimus Annus*, *supra* note 58, ¶ 17.

323. *Id.* ¶ 41 (also stating that an “authentic human community” is one that is “oriented toward [man’s] final destiny, which is God”).

make it more difficult to offer this gift of self and to establish this solidarity between people."³²⁴ As such, a society of alienation, a society that exudes and perpetuates selfishness, "is directly and radically opposed to the civilization of love."³²⁵

The polite indifference among the inhabitants of a "civilization of tolerance" is too thin a social bond to overcome the selfishness of men and women "which ultimately harms both [the individual] and others."³²⁶ In contemporary, liberal society, man often "indulges in too many of life's comforts and imprisons himself in a kind of splendid isolation."³²⁷ In this context, the human person experiences "a new loneliness . . . not in the face of a hostile nature which it has taken him centuries to subdue, but in an anonymous crowd which surrounds him and in which he feels himself a stranger."³²⁸ As such, "[t]he world is sick," but "[i]ts illness consists less in the unproductive monopolization of resources by a small number of men than in the lack of brotherhood among individuals and peoples."³²⁹ Beyond mere tolerance and in place of isolation, loneliness, and selfishness, Catholic social thought proclaims the power of love. The Church insists that man was not created "for life in isolation, but for the formation of social unity."³³⁰ Contrary to the liberal view that social and political life has no goal or purpose other than the maximization of individual freedom, the Church calls her members to "work to ensure that justice and solidarity will increase and that a new culture of human life will be affirmed, for the building of an authentic civilization of truth and love."³³¹

B. A Realist Anthropology

Catholic social thought is also at odds with what Altman calls "epistemological neutrality." This brand of neutrality is concerned with what constitutes "acceptable arguments for the principles that are alleged to demarcate the boundaries of per-

324. *Id.*

325. *Gratissimam Sane*, *supra* note 21, ¶ 14.

326. *Centesimus Annus*, *supra* note 58, ¶ 55.

327. *Gaudium et Spes*, *supra* note 59, ¶ 31.

328. *Octogesima Adveniens*, *supra* note 134, ¶ 10.

329. *Populorum Progressio*, *supra* note 64, ¶ 66.

330. *Gaudium et Spes*, *supra* note 59, ¶ 32.

331. *Evangelium Vitae*, *supra* note 22, ¶ 6.

missible politics.”³³² Altman identifies several competing strands of this kind of neutrality, including the theory that rights “must be derived from premises that are noncommittal on questions of the human good,”³³³ the theory of reflective equilibrium,³³⁴ and the theory that rights can be derived from premises widely shared within a given social group.³³⁵

Altman’s own resolution of the matter is rather unsatisfying. He holds that liberalism should be “indifferen[t] toward the specific moral epistemology that accompanies the commitment to individual rights,” because “[w]hat counts for liberalism is the commitment to substantial constraints on politics in the name of individual autonomy and not the particular epistemology that lies behind that commitment.”³³⁶ This has the ironic sound of what is often disparagingly referred to in liberal circles as “religious faith.” That is, what counts for liberalism is the commitment to rights, even if a proper account—that is, a *neutral* justification—for such rights cannot be given. Faith makes up for what rational argument cannot attain.³³⁷

Ackerman’s view of liberalism, described above,³³⁸ may be taken as exemplary of the epistemological neutrality that holds that the principles for specifying individual rights “must be derived from premises that are noncommittal on questions of the human good.”³³⁹ Ackerman contends that there are “countless pathways of argument coming from very different directions” that lead to supporting this kind of neutrality.³⁴⁰ Among the various justifications offered for epistemological neutrality, moral skepticism is especially prominent among liberal theorists.³⁴¹ This sort of skepticism holds that “[w]hile everybody

332. ALTMAN, *supra* note 17, at 73.

333. *Id.*

334. See RAWLS, A THEORY OF JUSTICE, *supra* note 230, at 19–21, 48–51 (describing the concept of reflective equilibrium).

335. See ALTMAN, *supra* note 17, at 73–75.

336. *Id.* at 75.

337. Cf. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 271–76 (1983) (describing legal scholarship’s rebirth of conceptualism in Law and Economics, Critical Legal Studies, and Dworkinian liberalism as reflecting “the need for some binding faith” and a “new age of faith”).

338. See *supra* notes 163–67 and accompanying text.

339. ALTMAN, *supra* note 17, at 73.

340. ACKERMAN, *supra* note 13, at 12.

341. During the first half of the twentieth century, many liberals argued that skepticism about the objectivity of moral values was a necessary condition for

has an opinion about the good life, none can be known to be superior to any other."³⁴² Although Ackerman purports to be agnostic about the specific grounds that justify this kind of neutrality, for him, moral skepticism enjoys a kind of pride of place. The truth of skepticism is something about which he is hardly skeptical.³⁴³

maintaining liberal democracy. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 205–10 (1973). Skepticism about the objectivity of any moral values remains a recurrent theme in contemporary legal theory. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 2–10 (1971) (arguing that courts should defer to legislative majorities because “[t]here is no way of deciding [matters such as those at issue in *Griswold v. Connecticut*] other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ”); Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229, 1229–30 (arguing that “there cannot be any normative system ultimately based on anything except human will”). For a more recent argument regarding liberalism and skepticism, see RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 9 (2003) (arguing for a legal regime that maximizes human choice based upon a skepticism that anyone can know “the intensity and preferences of other individuals”). Ronald Dworkin has argued that “[l]iberalism cannot be based on skepticism. Its constitutive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right.” DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 34, at 203. It is, of course, significant that Dworkin’s remarks concern “political liberalism.” Surely it is the case that a government cannot be skeptical with respect to the normative principles it embodies. This simply underscores the impossibility of a thoroughgoing neutrality, discussed above. See *supra* Part II.A.3.a. Moreover, as an ultimate matter, Dworkin’s nonskeptical political liberalism is founded on a deep-seated skepticism regarding morality. Indeed, Dworkin’s moral skepticism is precisely why he seeks to preclude political discussions as to whether “one citizen’s conception of the good life of one group is nobler or superior to another’s.” DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 34, at 273; see Thomas Morawetz, *Persons Without History: Liberal Theory and Human Experience*, 66 *B.U. L. REV.* 1013, 1021 (1986) (concluding that “the form of liberalism found in Rawls and Dworkin is grounded not on political skepticism but on moral skepticism”); see also Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 *IOWA L. REV.* 761 (1989) (criticizing the view that moral skepticism provides an important foundation for liberal freedom). Some have plausibly argued that Rawls’s liberalism is not premised on skepticism, but on agnosticism. See Heidi M. Hurd, *The Levitation of Liberalism*, 105 *YALE L.J.* 795, 796 n.6 (1995) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)); see also RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 63 (“Political liberalism does not question that many political and moral judgments of certain specified kinds are correct and it views many of them as reasonable.”).

342. ACKERMAN, *supra* note 13, at 11.

343. See *id.* at 368 (“The hard truth is this: There is no moral meaning hidden in the bowels of the universe. All there is is you and I struggling in a world that neither we, nor any other thing, created.”).

Catholic social thought plainly rejects the argument that the philosophical arguments which underlie the principles of public order must themselves be neutral. The Church often says that she “has no philosophy of her own nor does she canonize any one particular philosophy in preference to others.”³⁴⁴ Although it is certainly true that the Church does not require adherence to any particular philosophy—not even Thomism—it is also true that Christianity precludes the acceptance of certain philosophical presuppositions and conclusions. Thus, it is the responsibility of the Church’s teaching office to “exercise a critical discernment of opinions and philosophies which contradict Christian doctrine.”³⁴⁵ Ethical skepticism and moral relativism—that is to say, philosophies that hold that there is no such thing as moral truth or that such truth cannot be known with certainty by the human mind, or that contradictory modes of conduct are of equal worth, or that there is no such thing as human nature or an intelligible good proper to it³⁴⁶—are not and cannot be made compatible with the Christian faith and the intellectual tradition to which it gave rise.

Instead, the Catholic intellectual tradition in general, and the Church’s social tradition in particular, embodies a kind of philosophical realism. Briefly put, realism is a philosophical disposition according to which reality is understood to be mind-independent, such that the things, events, and qualities that make up the universe enjoy an existence independent of our experience, description, and cognition of them. Although realism is by no means an exclusively Catholic way of thinking,³⁴⁷ it is a defining characteristic of Catholic thought.

344. *Fides et Ratio*, *supra* note 134, ¶ 49; see also *Veritatis Splendor*, *supra* note 95, ¶ 29 (“Certainly the Church’s Magisterium does not intend to impose upon the faithful any particular theological system, still less a philosophical one.”).

345. *Fides et Ratio*, *supra* note 134, ¶ 50.

346. See, e.g., *Veritatis Splendor*, *supra* note 95, ¶¶ 32, 46.

347. For example, although not engaging the Catholic intellectual tradition directly, Professor Michael Moore has been a prolific exponent of the importance of philosophical realism in legal interpretation and legal theory. See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453 (1987) (reviewing RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985)); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061; Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for The Worse?*, 41 STAN. L. REV. 871 (1989).

In the social tradition, this realism is most evident in the Church's teaching about the nature of the human person. Indeed, if one thing emerges from a review of the Church's social teaching, it is that one cannot speak intelligently about the purpose of government and the rule of law without also talking about the nature of man and the good of the human person.³⁴⁸ Such a discussion necessarily involves truth claims about its subject. In place of the philosophical skepticism that pervades so much liberal thought, the Church offers in her social teaching what some have called a "Christian anthropology."³⁴⁹ This philosophy of man, which provides "a correct view of the human person," is "the guiding principle . . . of all of the church's social doctrine."³⁵⁰ Moreover, the anthropological claims that make up this philosophy—that man is made in the image of the Divine, that every human person is an incarnate being, that he or she possesses a conscience, free will, and an intellect, and that all human beings are fundamentally good in nature but tempted by evil—are not offered as mere conventions that have only an instrumental value or that purport to represent mere custom or current consensus. They are instead offered as the truth about what it means to be a human being. They are the product of philosophical reflection on human experience in light of the Gospel.³⁵¹

The truth is that behind every kind of jurisprudence lies a theory of what it means to be a human being.³⁵² In this respect, the jurisprudence implicit in Catholic social thought is no different from any other. Indeed, the contention that liberal theory

348. See *Pacem in Terris*, *supra* note 24, ¶ 55 ("For the common good since it is intimately bound up with human nature cannot therefore exist fully and completely unless the human person is taken into consideration and the essential nature and realization of the common good be kept in mind.").

349. See John J. Coughlin, O.F.M., *Law and Theology: Reflections on What It Means to Be Human From a Franciscan Perspective*, 74 ST. JOHN'S L. REV. 609, 625 (2000).

350. *Centesimus Annus*, *supra* note 58, ¶ 11.

351. For useful discussions of the philosophical anthropology that informs the Church's social magisterium, see Francis Canavan, S.J., *The Image of Man in Catholic Thought*, in CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM, *supra* note 58, at 15; Angela C. Carmella, *A Catholic View of Law and Justice*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 28, at 255, 260–65.

352. See Coughlin, *supra* note 349, at 610. For a discussion of the implications of this assertion with respect to the legality of capital punishment, see Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (2003).

is somehow “neutral” in this regard—that it neither assumes nor proposes any theory of human nature—is simply fatuous.³⁵³ Although the theories of human nature embedded in liberal accounts of law and justice are certainly less elaborate and markedly less pronounced, they are, nevertheless, always present. More importantly, however briefly stated they may be, these moral anthropologies invariably have a decisive influence on the larger theories of justice of which they are a part.

Thus, Catholic social thought does not differ from liberal theory in relying upon an understanding of what it means to be a human being.³⁵⁴ It does, however, differ in the completeness of the theory on which it relies and in the candor with which it proposes this anthropology. Beyond all of the “partial perspec-

353. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 230, at 13 (stating that one feature of his theory “is to think of the parties in the initial situation as rational and mutually disinterested”). For a searing critique of Rawls’s assertion that he successfully avoids the use of anything more than a minimal anthropology, see SANDEL, *supra* note 280, at 172–83. See also Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 *UCLA L. REV.* 1103, 1107 (1983) (“Lurking behind [liberal] neutrality is a conception of what human beings ought to be like and how they ought to think.”). At times, the conceit necessary to assert that a theory of justice can be fashioned without recourse to a theory of human nature is nothing short of astounding. See, e.g., LARMORE, *supra* note 2, at 25 (insisting that, contrary to Alasdair MacIntyre and other critics, “by its very nature liberalism must be a philosophy of politics, and not a philosophy of man”). It is simply ludicrous to suggest that one can articulate a theory of justice without saying something substantial about the nature of the being who receives justice and the being who dispenses it, the being who desires justice and the one who impedes its progress. The attempt to eschew a philosophical anthropology—to articulate a theory of justice that is, as Rawls says, “political, not metaphysical”—is doomed to failure. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 223 (1985). As William Galston says, paraphrasing Amy Gutmann, “it is one thing to say that liberalism does not presuppose a single metaphysical view of the individual, but quite another to say that liberalism is compatible with all such views.” GALSTON, *supra* note 1, at 152. The theory of human nature upon which a theory relies may not be spelled out, but it will always be present, see TAYLOR, *supra* note 238, at 89, and it will always preclude certain alternatives.

354. To their credit, some liberal theorists acknowledge that a political theory will necessarily contain within it some theory of man because “conceptions of freedom directly derive from views of what constitutes a self, a person, a man.” ISAIAH BERLIN, *LIBERTY* 181 (Henry Hardy ed., 2002). The judgment to restrict certain actions in turn depends on how we determine good and evil, that is to say, on our moral, religious, intellectual, economic and aesthetic values; which are, in their turn, bound up with our conception of man, and of the basic demands of his nature. In other words, our solution of such problems is based on our vision, by which we are consciously or unconsciously guided, of what constitutes a fulfilled human life . . .

Id. at 214–15.

tives" offered by individual philosophies and the physical and social sciences, the Church offers "an integral vision of man and of his vocation."³⁵⁵ Many aspects of this anthropology are relevant to law, but two are of special importance.

1. *The Human Person: Freedom and Intellect*

According to Catholic social teaching, man "is a person, that is to say, a subjective being . . . capable of deciding about himself and with a tendency to self-realization."³⁵⁶ As a person, "his nature is endowed with intelligence and free will."³⁵⁷ These two qualities—rationality and freedom—largely define the human person and set him apart from the rest of creation. As Pope Leo XIII made clear at the beginning of the modern social tradition, "[i]t is the mind, or the reason, which is the chief thing . . . which makes a human being human, and distinguishes him essentially and completely from the brute."³⁵⁸

Freedom also sets man apart from other creatures. Through the exercise of his free will, man is "the master of his own acts—govern[ing] himself by the foresight of his counsel."³⁵⁹ Indeed, "man's dignity demands that he act according to a knowing and free choice."³⁶⁰ Thus, in her anthropology, the Church recognizes that the integral good of the individual cannot be realized with-

355. *Humanae Vitae*, *supra* note 145, ¶ 7; see also *Octogesima Adveniens*, *supra* note 134, ¶ 40 (noting that "each individual scientific discipline will be able, in its own particular sphere, to grasp only a partial—yet true—aspect of man; the complete picture and the full meaning will escape it").

356. *Laborem Exercens*, *supra* note 19, ¶ 6. John Noonan notes that the greatest debt that law owes "to theology is the idea of the person—a concept that can be philosophically defended, but which historically developed under theological auspices, with human beings understood by analogy to the divine persons" of the Holy Trinity. John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037, 1042 (1992). For useful historical discussions of this conceptual development in Christian theology, see LEO DONALD DAVIS, S.J., *THE FIRST SEVEN ECUMENICAL COUNCILS (325–787): THEIR HISTORY AND THEOLOGY* (1987); GERALD O'COLLINS, S.J., *CHRISTOLOGY: A BIBLICAL, HISTORICAL, AND SYSTEMATIC STUDY OF JESUS CHRIST* (1995).

357. *Pacem in Terris*, *supra* note 24, ¶ 9.

358. *Rerum Novarum*, *supra* note 19, ¶ 5; see also *Gaudium et Spes*, *supra* note 59, ¶ 15 ("Man judges rightly that by his intellect he surpasses the material universe, for he shares in the light of the divine mind.").

359. *Rerum Novarum*, *supra* note 19, ¶ 6.

360. *Gaudium et Spes*, *supra* note 59, ¶ 17.

out reference to that individual's freedom.³⁶¹ Indeed, "[o]nly in freedom can man direct himself toward goodness."³⁶²

At the same time, however, human freedom is not a matter of unrestricted choice.³⁶³ Freedom is not the capacity to render "categorical and infallible decisions about good and evil."³⁶⁴ It is not the power to "create values."³⁶⁵ If this were the case, then freedom "would enjoy a primacy over truth, to the point that truth itself would be considered a creation of freedom."³⁶⁶ Taken to its logical conclusion, such a radical notion of freedom would mean that "man would not even have a nature; he would be his own personal life-project" composed of "nothing more than his own freedom!"³⁶⁷

Far from being unrestricted, "the manner in which the individual exercises his freedom is conditioned in innumerable ways."³⁶⁸ The physical body that every human being possesses, with all its limitations, demonstrates the restricted nature of human choice. The human body is constituted in a certain way such that there are goods proper to it—goods that are not chosen, but are simply given. Still, although the physical and temporal conditions of human life can and do influence the exercise of freedom by making it more or less difficult, "they cannot destroy it."³⁶⁹ Regardless of the influences affecting him or her, every human being remains "the principal agent of his [or her] own success or failure."³⁷⁰

In Catholic social thought, freedom is not simply the absence of impediment, what Isaiah Berlin famously termed "negative freedom." Properly understood, freedom has a "positive" di-

361. Cf. *Centesimus Annus*, *supra* note 58, ¶ 13 (criticizing Socialism for ignoring this fact).

362. *Gaudium et Spes*, *supra* note 59, ¶ 17.

363. See *Octogesima Adveniens*, *supra* note 134, ¶ 35 (noting that "at the very root of philosophical liberalism is an erroneous affirmation of the autonomy of the individual in his activity, his motivation, and the exercise of his liberty").

364. *Veritatis Splendor*, *supra* note 95, ¶ 32.

365. *Id.* ¶ 35.

366. *Id.*

367. *Id.* ¶ 46.

368. *Centesimus Annus*, *supra* note 58, ¶ 25.

369. *Id.*

370. *Populorum Progressio*, *supra* note 64, ¶ 15. By "success or failure" Pope Paul VI referred to moral, rather than material, success or failure. Indeed, as the rest of the paragraph makes clear, because he possesses freedom and intelligence, man is "responsible for his fulfillment as he is for his salvation." *Id.*

mension as well.³⁷¹ More precisely, freedom has an “essential and constitutive relationship to truth.”³⁷² Freedom “possesses an *inherently relational dimension*”³⁷³ in that through freedom, every individual is capable of relating to the truth concerning the authentic moral good of the human person. As such, authentic freedom “is never freedom ‘from’ the truth but always and only freedom ‘in’ the truth.”³⁷⁴ Genuine freedom means being “open[] . . . to that which allows men and women to come to complete self-understanding.”³⁷⁵ Accordingly, truth is not a limitation on freedom, but its “first condition.”³⁷⁶

Put another way, because goodness is a *real* quality and not simply a name attached to things that particular individuals find appealing, freedom is not “a license for doing whatever [one] pleases . . . even if it is evil.”³⁷⁷ Authentic freedom is not simply an open-ended possibility, a boundless horizon of choice. Freedom does not make man “an end unto himself,”³⁷⁸ nor is it simply “a claim for autonomy [which] oppos[es] the

371. The basic distinction between “negative” and “positive” freedom was famously set forth by Isaiah Berlin in his essay “Two Concepts of Liberty.” See BERLIN, *supra* note 354, at 168–81. For a thoughtful critique of Berlin, see George Weigel, *A Better Concept of Freedom*, FIRST THINGS, Mar. 2002, at 14.

372. *Veritatis Splendor*, *supra* note 95, ¶ 4.

373. *Evangelium Vitae*, *supra* note 22, ¶ 19.

374. *Veritatis Splendor*, *supra* note 95, ¶ 64.

375. *Fides et Ratio*, *supra* note 134, ¶ 13.

376. *Centesimus Annus*, *supra* note 58, ¶ 41.

377. *Gaudium et Spes*, *supra* note 59, ¶ 17. Here liberal theory and Catholic social thought differ. Whereas some versions of liberalism overtly support a legal “right to do wrong,” see WALDRON, *supra* note 34, at 65 (arguing that “[j]ust as individuals may have legal duties that require them to perform wrong acts . . . so they may have legal rights that entitle them to perform actions that are wrong from the moral point of view”), the endorsement of rights found in Catholic social thought, discussed above, does not. See *supra* Part II.A.1. Indeed, Catholic social thought makes plain that an action that is inherently wrong cannot be protected in law as a “right.” See, e.g., *Evangelium Vitae*, *supra* note 22, ¶ 71 (arguing that the state “can never presume to legitimize as a right of individuals . . . an offence against other persons caused by the disregard of so fundamental a right as the right to life”). At the same time, the social tradition recognizes that the law may refrain from prohibiting some practices for prudential reasons. See, e.g., *Quaestio de abortu*, *supra* note 86, ¶¶ 20–21 (arguing that the civil law “must often tolerate what is in fact a lesser evil, in order to avoid a greater one” such that while “[h]uman law can abstain from punishment . . . it cannot declare to be a right what would be opposed to the natural law”). Thus, the positive law might refrain from prohibiting some form of conduct, such as homosexual acts or the use of artificial contraception, which the Church regards as intrinsically wrong.

378. *Gaudium et Spes*, *supra* note 59, ¶ 20.

freedom of others.”³⁷⁹ Indeed, “freedom attains its full development only by accepting the truth”³⁸⁰—the truth about the nature of the human person—which “mak[es] it possible for a person to order his needs and desires and to choose the means of satisfying them according to a correct scale of values.”³⁸¹ Thus, freedom is the means whereby the human person pursues the good, of which justice is a constituent part, assimilates it, and makes it his or her own.

2. *Love: The Fulfillment of Human Freedom*

Paradoxically, the Church believes that the consummation of freedom is not the power of acquisition, but the power of gift. The Gospel shows “that freedom is acquired in love, that is, in the gift of self.”³⁸² Specifically, the Church believes that “[t]he Crucified Christ reveals the authentic meaning of freedom; he lives it fully in the total gift of himself and calls his disciples to share in his freedom.”³⁸³

At the same time, the centrality of love in the constitution of the human person is a reality that reason and experience make known without the specific aid of revelation.³⁸⁴ As John Garvey observes, love “is an essential part of a good life” such that “[o]ne who lived without loving and being loved would be less than human.”³⁸⁵ Moreover, love is not valued instrumentally. It is not valued “because it gives me a pleasant feeling” as “it sometimes happens that love results in my feeling miserable, but I wouldn’t give up my love for a better feeling.”³⁸⁶ Instead, the disposition to love and be loved is simply part of the nature of the human person.

Because “the full meaning of freedom” is “the gift of self in service to God and one’s brethren,”³⁸⁷ freedom is “ultimately directed towards communion.”³⁸⁸ Put another way, man, “by

379. *Octogesima Adveniens*, *supra* note 134, ¶ 47.

380. *Centesimus Annus*, *supra* note 58, ¶ 46.

381. *Id.* ¶ 41.

382. *Veritatis Splendor*, *supra* note 95, ¶ 87 (emphasis omitted).

383. *Id.* ¶ 85 (emphasis omitted).

384. *See supra* note 276 and accompanying text.

385. GARVEY, *supra* note 114, at 28.

386. *Id.* at 28–29.

387. *Veritatis Splendor*, *supra* note 95, ¶ 87 (emphasis omitted).

388. *Id.* ¶ 86.

his innermost nature . . . is a social being, and unless he relates himself to others he can neither live nor develop his potential."³⁸⁹ The call to communion, which is innate to every human person and "not something added on to [him],"³⁹⁰ is a call that can be fulfilled only in love. Although justice is a necessary condition for a properly ordered social life, "[l]ove is . . . the fundamental and innate vocation of every human being."³⁹¹ Without love, every person remains a mystery to himself or herself. Indeed, the human person "cannot fully find himself except through a sincere gift of himself."³⁹² Thus, material circumstances can influence the exercise of freedom, but freedom is not ultimately the mere absence of impediment. Authentic freedom is not so much freedom *from* constraints as it is freedom *for* something or, more correctly, someone. From the perspective of Catholic social thought, the liberal notion of the unencumbered individual—the radically autonomous self who is separated from all others except as he or she consents to some limited connection—cannot serve as either the predicate or the goal of a correct understanding of law and politics.

C. *Neutrality and the Political Process*

With respect to what Altman calls "political neutrality"³⁹³ in liberal theory, the Church's social teaching is somewhat sympathetic. According to Altman, political neutrality demands that the various institutions that make up government be designed to ensure a wide diffusion of political power.³⁹⁴ Because such an arrangement makes it difficult for any particular group to dominate the political scene and enact its views into law, political neutrality encourages a civic dynamic of negotiation, "normative compromise and accommodation."³⁹⁵

Here it is worth noting that many of the features of the American political system appear to satisfy the demands of political neutrality. Some of the more significant examples that readily come to mind include the existence of a written consti-

389. *Gaudium et Spes*, *supra* note 59, ¶ 12.

390. *Id.* ¶ 25.

391. *Familiaris Consortio*, *supra* note 21, ¶ 11.

392. *Gaudium et Spes*, *supra* note 59, ¶ 24.

393. ALTMAN, *supra* note 17, at 76.

394. *Id.*

395. *Id.*

tution that sets forth the limited powers of government and the enumerated rights of individuals; the separation of powers among the legislative, executive, and judicial branches of government; the system of checks and balances among the three branches of the federal government, and between the federal government and the several States; the proportional representation in the House of Representatives based on state population and the equal representation of each state in the Senate; the regular accountability of public officials through direct elections; the widely available, though underutilized, right to vote; and the right to free expression and freedom of the press.³⁹⁶

It is also worth observing that, in endorsing democratic government and separation of powers, liberalism expresses a decidedly non-neutral preference in favor of certain governmental structures, ostensibly for the sake of neutrality. Every set of procedures, whether it governs the adjudication of cases in court, the election of officials to office, or the adoption of legislation, embodies certain values, indeed, a particular conception of the good.³⁹⁷

In contrast to liberalism's forthright endorsement of democratic government, the Church's traditional stance was one of indifference to the particular form of government adopted by a given people, so long as their institutions conformed "to right reason and natural law."³⁹⁸ Historically, the thinking of the Church was that the choice of a particular form of government should depend on the "circumstances which will vary in different times and in different places."³⁹⁹ Indeed, the Second Vatican Council expressly taught that "the choice of government and the method of selecting leaders are left to the free will of citizens."⁴⁰⁰ This indifference frees the Church; she is not

396. See generally U.S. CONST.

397. See *supra* Part II.A.3.a.

398. *Rerum Novarum*, *supra* note 19, ¶ 25; see also ST. AUGUSTINE, THE CITY OF GOD bk. V, ch. 17, at 166 (Marcus Dods trans., The Modern Library 2000) (asking "what does it matter under whose government a dying man lives, if they who govern do not force him to impiety and iniquity?"); cf. *Gaudium et Spes*, *supra* note 59, ¶ 42 (stating that the church may work freely "under any kind of government which grants recognition to the basic rights of person and family and to the demands of the common good").

399. *Pacem in Terris*, *supra* note 24, ¶ 68; see also *Gaudium et Spes*, *supra* note 59, ¶ 74 ("The practical ways in which the political community structures itself and regulates public authority can vary according to the particular character of a people and its historical development.").

400. *Gaudium et Spes*, *supra* note 59, ¶ 74.

bound “to any political, economic, or social system”⁴⁰¹ and can carry out her mission around the world among diverse peoples governed by a variety of political structures.

1. *Positive Support for Democratic Government*

As noted above, the Church was initially hostile to the establishment of democratic governments and the revolutionary movements that inspired them.⁴⁰² With the advent of modern Catholic social thought, however, the Church began to give strong support to political democracy and democratic institutions. Nevertheless, the reasons given in Catholic social thought for doing so differ markedly from those advanced under the liberal idea of political neutrality.

Under the idea of political neutrality advanced by Altman, the principal reason given in support of democracy is essentially negative.⁴⁰³ On this account, the primary motivation behind the establishment of democratic government is fear:⁴⁰⁴ the fear of cruelty and the fear of arbitrary authority. This fear can also include the fear of domination by a political faction, such as that articulated by James Madison in *Federalist* No. 10.⁴⁰⁵ The direct and regular election of officials by the people, the principle of separation of powers, and the system of checks and balances, including those procedures that require accommodation and compromise to cull together legislative majorities, all help to allay the fear that a single group or fixed majority will dominate the political scene and, thereby, seek its own advantage or impose its view of the good on society at large. From this vantage point, the good of democratic government is the evil that it prevents.

In contrast to this view, the Church’s support for democracy is essentially positive. Plainly, Catholic social doctrine, like liberal theory, is also concerned that the instruments of government should not be used “to serv[e] the advantage of a certain faction

401. *Id.* ¶ 42.

402. See *supra* note 58 and accompanying text.

403. See ALTMAN, *supra* note 17, at 76.

404. See Judith N. Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 22, 22 (Nancy L. Rosenblum ed., 1989).

405. THE FEDERALIST NO. 10, at 42 (James Madison) (George W. Carey & James McClellan eds., 2001); see also ALTMAN, *supra* note 17, at 76.

or of the rulers themselves.”⁴⁰⁶ Indeed, the Church “cannot encourage the formation of narrow ruling groups which usurp the power of the state for individual interests or for ideological ends.”⁴⁰⁷ But these concerns are present regardless of the specific form of government the state adopts.

Instead of basing its support for democracy on the evils that popular government seeks to avoid, Catholic social teaching stresses the positive value of participation in civic affairs. Building on the teaching of Popes Pius XII and John XXIII,⁴⁰⁸ the Second Vatican Council declared that governments “should . . . afford all their citizens the chance to participate freely and actively in establishing the constitutional bases of a political community, governing the state, determining the scope and purpose of various institutions, and choosing leaders.”⁴⁰⁹ Indeed, elsewhere the Council praises “those national procedures which allow the largest possible number of citizens to participate in public affairs with genuine freedom.”⁴¹⁰ The Church judges such democratic participation in political life to be a good thing, one of the “signs of the times”⁴¹¹ in that it reflects “a keener awareness of human dignity”⁴¹² and a sense of

406. *Gaudium et Spes*, *supra* note 59, ¶ 73; see also *Pacem in Terris*, *supra* note 24, ¶ 56 (stating that civil authority must promote the common good “without preference for any single citizen or civic group”); *Quadragesimo Anno*, *supra* note 67, ¶ 109 (lamenting that “[t]he State which should be the supreme arbiter, ruling in queenly fashion far above all party contention, intent only upon justice and the common good, has become instead a slave, bound over to the service of human passion and greed”).

407. *Centesimus Annus*, *supra* note 58, ¶ 46.

408. The works of Pope John XXIII on which the Council relied include *Mater et Magistra*, *supra* note 67, and *Pacem in Terris*, *supra* note 24. The works of Pope Pius XII upon which the Council relied include Pope Pius XII, Christmas Message, *True and False Democracy* (Dec. 25, 1944), reprinted in 2 THE MAJOR ADDRESSES OF POPE PIUS XII, at 78 (Vincent A. Yzermans ed., 1961), available at <http://www.papalencyclicals.net/Pius12/p12xmas.htm>, and Pope Pius XII, Christmas Message, *The Internal Order of States and People* (Dec. 25, 1942), reprinted in 2 THE MAJOR ADDRESSES OF POPE PIUS XII, *supra*, at 51, available at <http://www.papalencyclicals.net/Pius12/P12CH42.HTM>.

409. *Gaudium et Spes*, *supra* note 59, ¶ 75.

410. *Id.* ¶ 31.

411. *Id.* ¶ 4; see also *Evangelium Vitae*, *supra* note 22, ¶ 70 (stating that the “almost universal consensus with regard to the value of democracy . . . is to be considered a positive ‘sign of the times’”).

412. *Gaudium et Spes*, *supra* note 59, ¶ 73. Pope John XXIII was even clearer on this point. See *Pacem in Terris*, *supra* note 24, ¶ 79 (noting that “the men of our time are becoming increasingly conscious of their dignity as human persons” and that

responsibility for the needs of others.⁴¹³ Thus, the Council concluded that all citizens should “be mindful of their simultaneous right and duty to vote freely in the interest of advancing the common good.”⁴¹⁴

With respect to the various institutions that make up government, the Church has, since the publication of *Pacem in Terris*, explicitly recommended the threefold division of government into legislative, executive, and judicial branches.⁴¹⁵ Until recently, this recommendation was not based on the concerns regarding the distribution and limitation of power that underlie Altman’s concept of political neutrality. In *Centesimus Annus*, however, Pope John Paul II argued in favor of tripartite government because “it is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds.”⁴¹⁶

The assertion that the division of public authority into three branches checks the exercise of power by any one of them may be valid, but it was not the original justification given in the Church’s social magisterium. Instead, function and competence justified tripartite government. For example, Pope John XXIII argued that such a threefold division would help civil authorities “most effectively fulfill their respective functions.”⁴¹⁷ The difficulty involved in judging the validity and application of one’s own work, rather than a concern with the aggregation of power in any one person’s hands, seems to lie behind this recommendation. Thus, Pope John XXIII concluded “that it is in keeping with the innate demands of human nature that the state should take a form which embodies

“[t]his awareness prompts them to claim a share in the public administration of their country, while it also accounts for the demand that their own inalienable and inviolable rights be protected by law”).

413. See *Gaudium et Spes*, *supra* note 59, ¶¶ 30–31.

414. *Id.* ¶ 75. Pope John XXIII further suggested that democratic participation will assist public officials in that their “frequent contact with the citizens” will make it “easier for them to learn what is really needed for the common good.” *Pacem in Terris*, *supra* note 24, ¶ 74.

415. See *Pacem in Terris*, *supra* note 24, ¶¶ 67–68; see also MICHAEL J. SCHUCK, *THAT THEY BE ONE: THE SOCIAL TEACHING OF THE PAPAL ENCYCLICALS 1740–1989*, at 164 n.61 (1991) (stating that this passage “constitutes the first recognition of the principle of separation of powers in encyclical literature”). *But see Centesimus Annus*, *supra* note 58, ¶ 44 (attributing the first papal endorsement of tripartite government to Pope Leo XIII’s *Rerum Novarum*).

416. *Centesimus Annus*, *supra* note 58, ¶ 44.

417. *Pacem in Terris*, *supra* note 24, ¶ 67.

the threefold division of powers corresponding to the three principal functions of public authority."⁴¹⁸ Support for separation of powers based on fear of political domination, as located in liberal theory, does not preclude support based on competence. Although the two rationales may be mutually reinforcing, each represents a distinct emphasis.

2. *Human Dignity as a Limit to Democratic Legitimacy*

Although the Church's support for democratic government is strong, it is not absolute. As Pope John Paul II warned, "[d]emocracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality."⁴¹⁹ Surely "[t]he church values the democratic system inasmuch as it ensures the participation of citizens in making political choices, guarantees to the governed the possibility both of electing and holding accountable those who govern them, and of replacing them through peaceful means when appropriate."⁴²⁰ Nevertheless, ultimately "the value of democracy stands or falls with the values which it embodies and promotes."⁴²¹

This qualified endorsement of democratic government is consonant with the Catholic understanding of the purpose behind the state, whatever its particular form. This purpose is a substantive end, whereas "[f]undamentally, democracy is a 'system' and as such is a means and not an end."⁴²² Pope John XXIII succinctly taught that, "the whole reason for the existence of civil authorities is the realization of the common good."⁴²³ As discussed at length above, this common good consists of protecting the rights and fostering the duties of the human person

418. *Id.* ¶ 68; see also *id.* ¶ 76 (arguing that each state should have a written constitution "which prescribes the manner of designating the public officials along with their mutual relations, the spheres of their competence, the forms and systems they are obliged to follow in the performance of their office").

419. *Evangelium Vitae*, *supra* note 22, ¶ 70.

420. *Centesimus Annus*, *supra* note 58, ¶ 46.

421. *Evangelium Vitae*, *supra* note 22, ¶ 70.

422. *Id.*

423. *Pacem in Terris*, *supra* note 24, ¶ 54; see also *Octogesima Adveniens*, *supra* note 134, ¶ 46 ("Political power . . . must have as its aim the achievement of the common good."); *Rerum Novarum*, *supra* note 19, ¶ 28 (noting that "government's whole reason of existence" is to "safeguard the community and all its parts").

while creating those other conditions that contribute to his or her integral fulfillment.⁴²⁴

A system of government based on democratic procedures may succeed in limiting the possibility of dominant faction. If it cripples the public authority, however, making it unable to take steps to advance the common good, then it is a disservice to the people. Because the state “is more than the mere guardian of law and order,” it must strive to realize both “public well-being and private prosperity.”⁴²⁵ Moreover, if democratic procedures result in the denial of inviolable rights of the human person, then the state erases the justification for its own existence. No majority, even if pieced together through the otherwise laudable process of compromise and negotiation, “may violate these rights.”⁴²⁶ Indeed, the Church expressly rejects the argument that the genesis of fundamental rights is recognition by the democratic majority, that “the original and single source of civic rights and duties [can be found] . . . in the mere will of human beings, individually or collectively.”⁴²⁷

On this point Catholic social thought and liberal theory both agree and disagree. They agree that, as Altman explains, “political neutrality is strictly subordinate to rights neutrality.”⁴²⁸ Whatever compromises and negotiations take place within the democratic process, they “must operate within the borders set by substantial constraints on politics that are imposed in order to protect and promote individual autonomy.”⁴²⁹ As set forth at length above, however, liberal theory and Catholic social thought disagree as to the epistemological foundation of such rights, the existence of duties beyond respect for other people’s rights, and the relationship between the right and the good.⁴³⁰

424. See *supra* Part II.A.3.b.

425. *Quadragesimo Anno*, *supra* note 67, ¶ 25 (quoting *Rerum Novarum*, *supra* note 19, ¶ 26).

426. *Centesimus Annus*, *supra* note 58, ¶ 44.

427. *Pacem in Terris*, *supra* note 24, ¶ 78.

428. ALTMAN, *supra* note 17, at 76.

429. *Id.*

430. See *supra* Parts II.A.2–3, II.B.

D. Neutrality in Adjudication

Under the variety of neutrality that Altman calls “legal neutrality,”⁴³¹ a judge or other decision maker in an adjudicative setting may not reassess the value choices that other public authorities have made in the creation of the law. This kind of neutrality envisions a fairly strict separation between politics and law, that is, between the normative judgments and compromises that take place in the process of formulating and adopting statutes and regulations and the distinct types of judgments that take place in interpreting and applying these texts in disputes between litigants. Although Altman acknowledges that it is “impossible to insulate the legal process completely from assessments of the normative views that competed in the political arena,” he contends that liberalism requires legal reasoning to “proceed, for the most part, without reliance on political judgments about the views that compete in the legislative arena.”⁴³²

Given the earlier discussion concerning the principle of the separation of powers, it is easy to construe this idea of legal neutrality as being consistent with Catholic social thought. The division of public authority into three separate branches can help to preserve adjudication as a distinctly legal function, a function that takes shape not only through its own institutions and structures, but one that possesses its own discipline, culture, and way of thinking. Indeed, the Second Vatican Council taught that the state must establish “a positive system of law,” which involves “a division of governmental roles and institutions,” including “an effective and independent system for the protection of rights.”⁴³³ Pope John Paul II went even further, suggesting that distinguishing the different functions of government is essential to the rule of law. That is, if the judiciary were to exercise simple political choice in applying the law in a given case, then citizens would not enjoy the rule of law. The norms that govern society would, in that case, not be truly sovereign. Instead, they would reflect only “the arbitrary will of individuals.”⁴³⁴

431. ALTMAN, *supra* note 17, at 76–77. One might also call it “adjudicative neutrality.” See *supra* note 47.

432. *Id.* at 77.

433. *Gaudium et Spes*, *supra* note 59, ¶ 75.

434. *Centesimus Annus*, *supra* note 58, ¶ 44.

1. *The Problem of Enforcing Unjust Laws*

Clearly, support for what Altman calls “legal neutrality” can be found in the Church’s social magisterium.⁴³⁵ Nevertheless, Catholic social thought qualifies this kind of neutrality in a significant way. The Church has long taught that an unjust law is not “law.”⁴³⁶ According to this view, “if civil authorities pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens.”⁴³⁷ Although such governmental norms may appear to be law, they are “only the tragic caricature of legality”⁴³⁸ and are “completely lacking in authentic juridical validity.”⁴³⁹ Thus, for example, in *Evangelium Vitae*, with specific reference to laws that authorize abortion and euthanasia, Pope John Paul II concluded that “a law which violates an innocent person’s natural right to life is unjust and, as such, is not valid as a law.”⁴⁴⁰

This aspect of Catholic social doctrine presents the question: Can a judge abide by the demands of liberal legal neutrality and not reassess and reweigh the contending normative views behind a law yet simultaneously refuse to recognize the judicial validity of a law that he or she concludes is inherently unjust? In other words, are legal neutrality and Catholic teaching on the invalidity of unjust laws compatible?

435. See *supra* notes 416–18 and accompanying text.

436. See AQUINAS, *supra* note 173, at I-II, Q. 92, art. 1, Q. 93, art. 3, Q. 95, art. 2, Q. 96, art. 4; ST. AUGUSTINE, *supra* note 398, at bk. IV, ch. 4, at 88 (“In the absence of justice, what is sovereignty but organized brigandage?”). But see FINNIS, *supra* note 58, at 363–66 (arguing that the tradition does not deny the validity of iniquitous rules).

437. *Pacem in Terris*, *supra* note 24, ¶ 51; see also *Dignitatis Humanae*, *supra* note 63, ¶ 7 (noting that government action must “be controlled by juridical norms which are in conformity with the objective moral order”); *Gaudium et Spes*, *supra* note 59, ¶ 74 (stating that “political authority . . . must always be exercised within the limits of morality and on behalf of the dynamically conceived common good, according to a juridical order enjoying legal status” and that when these conditions are satisfied, “citizens are conscience-bound to obey”).

438. *Evangelium Vitae*, *supra* note 22, ¶ 20.

439. *Id.* ¶ 72; see also *Pacem in Terris*, *supra* note 24, ¶ 61 (“[I]f any government does not acknowledge the rights of man or violates them, it not only fails in its duty, but its orders completely lack juridical force.”).

440. *Evangelium Vitae*, *supra* note 22, ¶ 90.

It would be tempting to evade the question and claim that it will rarely, if ever, present itself. Most laws do not concern matters of natural justice; rather, they concern matters of convention that, nevertheless, relate to the common good. People of good faith can reasonably disagree as to the precise way to address a given situation, and Catholic social teaching recognizes “a legitimate plurality” within which possible solutions may be proposed.⁴⁴¹ Nevertheless, even if it is conceded that unjust laws are rare, the possibility still exists.

Another possible response would be for the conscientious judge to invalidate an unjust law by invoking a superior legal authority. When striking down a statute that forbids flag burning⁴⁴² or mandates prayer in the public schools,⁴⁴³ it should be sufficient for a court to analyze the law in light of the constitutional text, its historical intent, the structure of the Constitution, and relevant precedent, without assessing the merits of the legislation at issue from a political point of view.⁴⁴⁴ This is not to suggest that constitutional interpretation is simply a mechanical exercise, or that legal interpretation does not call for the exercise of normative judgment; it often does, but the need for such judgment is often attenuated based on other factors.⁴⁴⁵ Such an approach is entirely in line with what Altman describes as legal neutrality in that it does not require the judge to reevaluate the choices made by the political branches of government. Indeed, because laws that are the product of the political process are subordinate to rights that stand beyond the bounds of politics, legal neutrality would require such a result.

Still, there may well be instances in which arguments based on the constitutional text, historical intent, and precedent will prove unavailing. Faced with the prospect of enforcing an in-

441. See *Octogesima Adveniens*, *supra* note 134, ¶ 46; see also *Gaudium et Spes*, *supra* note 59, ¶ 43 (noting that “the Christian view of things will itself suggest some specific solution in certain circumstances” but that “it happens rather frequently, and legitimately so, that with equal sincerity some of the faithful will disagree with others on a given matter”).

442. See *Texas v. Johnson*, 491 U.S. 397 (1989).

443. See *Engel v. Vitale*, 370 U.S. 421 (1962).

444. For a typology of constitutional argument similar to this, see PHILIP BOBBITT, *CONSTITUTIONAL FATE* 7 (1982) (arguing that there are five types of constitutional argument: historical, textual, structural, prudential, and doctrinal).

445. See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1231–51 (1987).

herently unjust law, Catholic social thought would support two disparate courses of action. First, a conscientious judge could invalidate an inherently unjust law if he or she found that it violated “the objective moral order”⁴⁴⁶ by inflicting a gross evil. The open-textured nature of many constitutional provisions certainly invites judicial reasoning that is more overtly normative in character, especially where other modes of argumentation fail. Still, in doing so, such a judge would be subject to the criticism that he or she was acting like a policymaker, “legislating from the bench,”⁴⁴⁷ and reweighing the competing values presented in the legislature. From the perspective of Catholic social teaching, however, such a judge would be guilty only of recognizing “the transcendent dignity of the human person” that makes law possible and without which there is only “the force of power.”⁴⁴⁸ As Professor Gerard Bradley has argued, a recusant judge should be seen as acting “for the common good by not giving effect to the positive law.”⁴⁴⁹ Second, in certain instances, a judge will be unable to argue that the legislative act in question is not a valid and enforceable legal measure. Indeed, the language and intention of the constitutional text authorizing such measures may preclude a contrary legal opinion that is both intellectually honest and compelling.⁴⁵⁰ To avoid providing material cooperation to the implementation of an unjust law involving grave evil, a judge may have to recuse himself or herself from the proceedings.⁴⁵¹

446. *Dignitatis Humanae*, *supra* note 63, ¶ 7.

447. For an overview of the meanings attributed to this phrase, see Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185 (2007).

448. *Centesimus Annus*, *supra* note 58, ¶ 44.

449. Gerard V. Bradley, *Moral Truth, the Common Good, and Judicial Review*, in CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM, *supra* note 58, at 115, 129 (emphasis omitted).

450. See Fallon, *supra* note 445, at 1282–85 (concluding that, although morally objectionable, the constitutional language and the history of the Framers’ intent concerning the question of slavery render hopelessly implausible an interpretation of the Constitution prior to the Civil War amendments that would have permitted a court to declare the practice of slavery unconstitutional).

451. For an excellent article discussing the distinction between formal and material cooperation with evil and the ability of Catholic judges to enforce laws that are contrary to the objective moral order, see Edward A. Hartnett, *Catholic Judges and Cooperation in Sin*, 4 U. ST. THOMAS L.J. 221 (2006). See also John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 305–06 (1997).

2. *Legal Neutrality and the Absence of Partisanship*

Altman, however, does not address one particular dimension of legal neutrality, perhaps because it is not peculiarly liberal in nature.⁴⁵² Still, this aspect of neutrality is essential to the proper functioning of any civil society. It is, as Cass Sunstein describes, the simple notion of neutrality as the absence of partisanship.⁴⁵³ According to this view of neutrality, “government may not play favorites; it must be impartial. It may not, for example, take resources or opportunities from one person solely for the benefit of another. Nor may it make social outcomes depend entirely on the exercise of political influence.”⁴⁵⁴ The idea of neutrality presented here is that of a decision maker who is not susceptible to corruption or intimidation; it is one who suffers from no conflict of interest—whether from his or her own background and past experiences, or from his or her current financial holdings and personal and familial relations—that would incline him or her toward or against any party to the dispute. This adjudicatory neutrality is best summarized as that habit of mind and disposition of temperament called “judicial independence.”

Perhaps not surprisingly, the Church’s social teaching fully supports this aspect of neutrality. As Pope John XXIII wrote in *Pacem in Terris*, the “human person is . . . entitled to a juridical protection of his rights, a protection that should be efficacious, impartial, and inspired by the true norms of justice.”⁴⁵⁵ He likewise insisted that “the courts must administer justice impartially and without being influenced by favoritism or pressure.”⁴⁵⁶

The importance of impartiality in Catholic social thought suggests an analogy between an unjust law and a biased judge.

(concluding that Catholic judges may not sentence individuals to death, preside over the sentencing phase of a capital trial, or affirm a death sentence on appeal).

452. Cf. ALTMAN, *supra* note 17, at 71 (noting his disquiet that “political neutrality means merely the absence of state bias with respect to any normative view above the threshold set by [the] objective conception” of the just and right).

453. See Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992).

454. *Id.* at 1.

455. *Pacem in Terris*, *supra* note 24, ¶ 27; cf. *Quadragesimo Anno*, *supra* note 67, ¶ 109 (arguing that the state, in its regulation of economic life, “should be the supreme arbiter, ruling in queenly fashion far above all party contention, intent only upon justice and the common good”).

456. *Pacem in Terris*, *supra* note 24, ¶ 69; see also *Gaudium et Spes*, *supra* note 59, ¶ 75 (urging those who enter politics “to exercise this art without thought of personal convenience and without benefit of bribery”).

Just as the Church teaches that a law “opposed to the moral order”⁴⁵⁷ is not “law,” a judge who is not impartial, who is biased in favor of one party, or who has prejudged a matter before the case is presented, is not a “judge.” He or she does not engage in judging, exploring the meaning of the law by considering different points of view, or weighing the evidence introduced. Such a person is not a judge but a mouthpiece for a foregone conclusion. Adorned in robes, gavel in hand, such a person may appear to be a judge, but this appearance is deceit, a mere sham. In truth, such a person has abandoned the substance of his or her office. Indeed, that a judge abdicates the judicial role by allowing himself or herself to be influenced by financial interests, biases and prejudices, or the influence of anyone outside the adjudicative process, is reflected in the severe way judicial ethics treats such lapses.⁴⁵⁸

The significance of this conclusion—that someone who may appear to be a judge is not, in fact, a judge—should not be overstated. A person is free to disobey the orders of someone who has betrayed the judicial office, just as he or she is free to disregard an unjust law. In either case, the command of the sovereign is not binding on the conscience of the human person. Still, freedom of conscience does not mean freedom from consequences. From the Catholic point of view, the enforcement of an unjust law is not a matter of justice but an act of state violence, and a person who disregards such a statute is not a lawbreaker but a conscientious objector victimized by the state. Similarly, a judge can still employ the real force of the state in implementing an order, no matter how corrupt the order may be. The sting of the state’s coercive power is still very real, and a person who challenges an unjust law or a corrupt judge must be prepared to suffer the real consequences that may follow such a decision.⁴⁵⁹

457. *Pacem in Terris*, *supra* note 24, ¶ 51.

458. See generally MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT (1994) (providing for sanctions for judicial misconduct ranging from disciplinary agreements to removal).

459. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (upholding against First Amendment challenge contempt convictions of civil rights protestors for violating an ex parte injunction issued by an Alabama court prohibiting them from engaging in street parades without a permit).

CONCLUSION

This Article has not been simply an extended comparison between the tenets of liberal legal theory and Catholic social thought with respect to the idea of “neutrality in law.” Surely, one of the purposes of this Article has been to see what these two jurisprudential perspectives hold in common and where they disagree. More than simple juxtaposition, however, the point of this comparison has been to examine the reasons behind these differences, and to explore in some depth the intellectual landscape each claims.

No country’s borders are ever truly neutral; even states with the best of relations insist on territorial integrity. In the same way, the liberal foundations of law and justice are *not* neutral. The conceptual apparatus of liberal theory—the four varieties of neutrality that Altman identifies—give the liberal state its defining characteristics, its settled borders. They demarcate the normative boundaries of the liberal state.

In this Article I have argued that many of the features that make the liberal state attractive and a desirable place in which to live are preserved in the new territory marked out by the principles of Catholic social thought. These features include popular government in which power is widely diffused among distinct branches, an independent and impartial judiciary, and a wide array of individual rights that guarantee a robust conception of freedom.

At the same time, Catholic social thought offers other features that simply do not exist within the confines of the liberal state. Catholic social thought refuses to indulge in the conceit that a meaningful theory of law and justice can avoid relying upon a philosophical understanding of human nature. That liberal anthropology is often understated in liberal legal theory does not mean that it is any less decisive in determining the contours of liberal justice. By contrast, Catholic social thought forthrightly embodies an anthropology that understands human beings as free but conditioned, capable of depravity but called to the greatness of love. Moreover, because this understanding is grounded in the truth of the human person and his or her authentic good, it provides a more rigorous and secure foundation for the legal rights that liberal theory purports to cherish.

Catholic social thought understands that the freedom guaranteed by legal rights is ordered toward the good and that this

good can be both peculiar to individuals in their circumstances and common to all. From this perspective, the enjoyment of rights is valued as a means of participating in the good to which human nature is ordered. Thus, Catholic social thought also rejects the liberal notion that “the right” is somehow prior to “the good.” Although the obligation to act with justice toward others is “prior” in that it is the first duty in social life, justice and the right are only intelligible in terms of the good.

Catholic social thought refuses to see the human person as merely a holder of rights, an unencumbered self⁴⁶⁰ whose obligations are limited to acts of individual consent. It recognizes that the human person is also the subject of moral duties, the fulfillment of which the state is obliged to encourage through noncoercive means. Without something more than respect for the rights of fellow citizens, indeed, in the absence of a responsible exercise of freedom and an active sense of solidarity, social life in the liberal state will never rise above the sense of alienation and perpetual struggle for power that plagues life in the West today.

The law does not dream, but it is a place where dreamers live and work, experiencing the present while imagining the future.⁴⁶¹ Looking at the law from the new vantage point afforded by Catholic social thought allows us to imagine new possibilities. From this vista we are invited to see beyond the borders of liberalism. Indeed, the Catholic social tradition offers an invitation to see beyond the civilization of tolerance to an undiscovered country: the civilization of love. Perhaps, when the limits of liberalism are better appreciated, those of us who yearn for more might take up the invitation to look beyond our shores to this new world.

460. See SANDEL, *supra* note 2, at 6.

461. Cf. RONALD DWORKIN, *LAW'S EMPIRE* 407–10 (1986) (arguing that the dreams of legal philosophers are “already latent in the present law”).