

Subsidiarity as Subversion: Local Power, Legal Norms, and the Liberal State

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Introduction

Much of Catholic social teaching provides a cohesive real-world framework for the Church's anthropological truth claims concerning some of the most deeply divisive issues facing modern society, including abortion, homosexuality, workers' rights, the death penalty, and euthanasia. By comparison, subsidiarity's reminder that "needs are best understood and satisfied by people who are closest to them"¹ seems an oasis of calm, situated beyond culture war controversy and not subject to vehement resistance by any significant faction along the ideological spectrum. Standing alone, subsidiarity can be read simply as calling for social problems to be addressed at the local level to the extent local bodies can address a given problem effectively. Understood as a strictly political principle, the only grounds for dispute will be over the normative definition and empirical verification of effectiveness. Beyond that, the doctrine seems so broadly stated as to be of nearly universal appeal. Indeed, as an ideal that has been embraced openly by both the Bush Administration and the European Union,² its acceptance among cultural power brokers appears beyond question.

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¹ John Paul II, Encyclical Letter, *Centesimus annus* ¶ 48 (1991).

² See Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 *IND. L. REV.* 103 (2001).

After all, who reasonably could challenge the notion that families, neighborhoods, and towns should address needs within their respective spheres, and higher forms of authority should step in only as needed? Especially in the United States, such a bottom-up vision of self-governance is embedded in our national fabric, and hardly needs a seal of approval from the Catholic Church. Even the most rabid fans of the modern welfare state would be hard-pressed to welcome the prospect of a government superagency taking exclusive reins over the provision of food, child care, education and all other social needs through anonymous bureaucrats, obviating the need for any subgroups standing between the all-encompassing state and the fully atomized individual. At the same time, even the staunchest opponents of centralized government must concede that at least some collectively channeled exercises of political authority are prudent, even if only for national defense or the protection of private property.

Like much of Catholic social teaching, however, subsidiarity's seeming vacuity arises only when the doctrine is shorn from its surrounding web of truth claims; therein lies its vulnerability to secular domestication. This article seeks to recapture the radical edge of subsidiarity by reconnecting its localizing framework with the substantive anthropological vision of solidarity. Understood in this context, subsidiarity reveals itself as a proposition that is fundamentally subversive to the hyperindividualist norms espoused and increasingly enforced by the liberal state. Specifically, subsidiarity calls for individuals and communities to recognize the objective value of the human person as they strive to meet the needs of those around them.

This call stands in direct opposition to modern America's brand of liberalism, which appears to value consumer autonomy above all else and increasingly seems willing

to collectivize its consumerist norms by legally precluding the exercise of moral agency by providers of certain goods and services. In this regard, the maintenance of subsidiarity's framework will require a vigorous defense of moral autonomy beyond that of the consumer. This takes us into the realm of value pluralism, for the surrounding society's emerging conception of the common good appears unlikely to embrace such a defense. In other words, for subsidiarity to continue facilitating the common good as conceived of by Catholic social teaching, society must be persuaded to make room for multiple conceptions of the good, not simply seek to collectivize the Church's anthropologically authentic conception.

Admittedly, this is no simple endeavor, and will require some careful unpacking and exploration. In Part II(A) of this article, I address the conceptions of social power underlying the emerging collectivization of consumerist and individualist norms in the American legal system, as contrasted, in Part II(B), with the implications of subsidiarity for the exercise of power. Given the disconnect between subsidiarity's premise and the prevailing public vision of the common good, Part III explores the philosophical presumptions and political ramifications of value pluralism, in particular their compatibility with the Christian worldview. Finally, Part IV examines potential avenues by which Catholic social teaching can most effectively engage a consumerist culture. Put simply, the thrust of this article is that subsidiarity is doubly subversive: it subverts the state's efforts to collectivize individualist norms, but it also may subvert religious voices' efforts to collectivize norms grounded in the moral anthropology.

II. Subsidiarity and Social Power

Subsidiarity, at base, concerns the exercise of power in society – not just who exercises it, but how it is exercised in light of the reality of the human person. Procedurally, it opposes the relentless centralization of power within modern society, but does not disregard the human-affirming capacity of that centralization in its more prudent forms. Substantively, subsidiarity looks for power to be exercised not with the ultimate aim of maximizing individual autonomy, but of furthering authentic human development. Both aspects speak prophetically to the conception of power pursued by the modern liberal state.

A. Individualism as Collectivism

The rise of democracy did not, of course, signal the end of oppression. As recognized by Isaiah Berlin, “[d]emocracy may disarm a given oligarchy, a given privileged individual or set of individuals, but it can still crush individuals as mercilessly as any previous ruler.”³ A broader proof on the same theme is made persuasively in Bernard de Jouvenel’s groundbreaking 1945 exposition of state power, which traces the history of centralized power in society, noting that the centralization of power has exploded with the rise of the democratic state. He explains that power’s make-up includes “an egoistical urge combined with the will to serve society,” and it is “through the interplay of these two antithetical principles that the tendency of Power is towards

³ Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY* (Hardy ed. 2002) at 209.

occupying an ever larger place in society; the various conjectures beckon it on at the same time its appetite is driving it to fresh pastures.”⁴

One component of modern society’s homage to democratic norms is the assumption that democratic rights form a meaningful limit on state power. In fact, the opposite is evident once we understand that pre-democratic rulers had nothing approaching the power of the modern state. “It is not true,” de Jouvenel writes, “that mankind has emerged from a former state in which magistrates and monarchs dictated out of their own heads the rules of the behaviour,” for “[t]hey had not in truth a vestige of such a right, or, more accurately perhaps, of such a power.”⁵ As such, “[t]he assents of people or assembly, so far from fettering for the rulers a freedom to act which they never had, made possible an extension of governmental authority.”⁶

Especially significant to our inquiry is de Jouvenel’s recognition that the rise of the collective is portrayed, and popularly perceived, as the rise of the individual. He observes that the growth of state power “strikes private individuals as being not so much a continual encroachment on their liberty as an attempt to put down the various petty tyrannies to which they have been subjected.”⁷ Indeed, “[i]t looks as though the advance of the state is a means to the advance of the individual.”⁸

⁴ BERNARD DE JOUVENEL, *ON POWER: ITS NATURE AND THE HISTORY OF ITS GROWTH* 119 (J.F. Huntington, trans., Greenwood Press 1981) (1945).

⁵ *Id.* at 208.

⁶ *Id.*

⁷ *Id.* at 130.

⁸ *Id.*

De Jouvenel’s insight has held up well with the passage of time. Though the American commitment to the individual has been an essential foundation for the development of authentic visions of the good, the public culture has begun to embody such an extreme brand of individualism that it gives rise to a relatively new form of social order – an individualist collectivism. That is, new forms of collective authority arise under the guise of serving the individual.

As the Church has recognized, the Enlightenment conception of freedom tends to posit a human subject “whose finality is the satisfaction of his own interests in the enjoyment of earthly goods.”⁹ Increasingly, consumer freedom is being elevated as a non-negotiable collective ideal and enforced through the coercive power of the state. In particular, the state has taken upon itself the responsibility to compel providers to honor the individual’s decisions in matters of consumption, regardless of how morally problematic those decisions might be from the provider’s perspective. Examples of this trend abound, and are especially obvious in areas that are viewed as essential public goods in modern American life such as health care, education, and law.

In the health care arena, reproductive and religious freedoms came into direct conflict recently in California, and reproductive freedom emerged victorious. The state legislature passed a law requiring employers who provide prescription drug coverage to their employees to cover contraceptives. The law included a religious exemption, but this was drawn narrowly, defining “religious employer” as employers whose purpose is to inculcate religious values, who primarily employ persons of the employer’s same faith,

⁹ *Id.*

and who primarily serve people of the employer's same faith.¹⁰ In other words, any religious organization who took seriously the Gospel's call to service fell outside the exemption, including Catholic Charities, which challenged the statute as an encroachment on its religious liberty. The California Supreme Court rejected the challenge, employing stark individualist reasoning in the process. The law, the Court held, did not threaten the Catholic Church's internal governance, but simply "implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church."¹¹ After all, "[o]nly those who join a church impliedly consent to its religious governance on matters of faith and discipline."¹²

In these terms, reproductive freedom is not simply about negative liberty – that is, it does not consist of the individual consumer's entitlement to use birth control free from government interference. Rather, it is a distinctly positive liberty – the individual consumer can compel her employer to pay for her birth control, even if the act of payment violates the employer's most fundamental beliefs. It is not only that the individual cannot be bound by the Catholic Church's teachings unless she freely consents to do so, but further that the individual cannot be inconvenienced by the Church's teaching unless she consents to do so. The individual does not just coexist with the intermediate body; the individual, backed up by state power, trumps the intermediate body. The individual preference has become the collective norm.

¹⁰ Calif. Health & Safety Code § 1367.25 (also requiring non-profit status).

¹¹ *Catholic Charities v. Superior Court*, 85 P.3d 67, 77 (Cal. 2004).

¹² *Id.*

The collectivist trend in reproductive access is by no means without challenge. Many state legislatures have passed “conscience clauses” ensuring that health care providers are not held liable or fired because of their refusal to participate in morally controversial procedures like abortion. But even the terms of these debates reflect the degree to which the individual consumer has already been elevated. In Wisconsin, for example, the governor promised to veto his state’s conscience clause, offering the bizarre explanation that “you’re moving into very dangerous precedent where doctors make moral decisions on what medical care they’ll provide.”¹³ In other states, the battle lines have shifted to the previously unfathomable questions of whether hospitals and pharmacists should be legally required to provide the “morning-after” emergency contraception pill.¹⁴ These new points of contention, whatever their outcome, reflect the degree to which consumer preferences are the driving force behind the creation and expansion of legal norms.

Educational providers, by comparison, appear to enjoy substantially unfettered institutional autonomy in pursuing their missions through the shaping of a distinct educational environment. Certainly American law is no stranger to the imposition of collective educational ideals, but historically these have been motivated by animus against a particular group (Catholics, most notably),¹⁵ rather than the abstract elevation of

¹³ Stacy Forster, *Women’s health debate intensifies*, MILW. JOURNAL-SENTINEL, Apr. 21, 2004, at 1B.

¹⁴ See Marilyn Gardner, *Pharmacists’ moral beliefs vs. women’s legal rights*, CHRISTIAN SCIENCE MONITOR, Apr. 26, 2004, at 11; Brietta Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 ORE. L. REV. 625 (2003).

the individual student's purported well-being. But this may be changing as well, and the change may be imposed through a path actually intended to enhance educational freedom.

To some, the school choice movement represents the hope of meaningful educational freedom, as families would be equipped through school vouchers to attend private schools that they otherwise would be unable to afford financially. Such a vision of school choice is expressly embodied in Catholic social thought, which reminds us of the centrality of the family in educational decisions and reminds the state that it “cannot without injustice merely tolerate so-called private schools” because “[s]uch schools render a public service and therefore have a right to financial assistance.”¹⁶

The embrace of this vision is far from universal, of course, and to many, the school choice movement represents the most promising path toward state regulation of private schools. In a market where school vouchers are prevalent, a school will be hard-pressed to keep its tuition levels competitive without the subsidy of voucher money. At a minimum, religious schools whose missions compel them to maintain educational access among a variety of economic classes will need to accept vouchers in order to remain viable in the market. And with the vouchers will come, almost invariably, government regulation.

For our purposes, it is important to recognize that proposed regulations for voucher schools are justified based on the purported best interest of the student. This is a

¹⁵ See Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORD. L. REV. 493 (2003).

¹⁶ Congregation for the Doctrine of the Faith, *Instruction on Christian Freedom and Liberation* ¶ 138 (1986).

collectivist twist on the consumerist ideology, for the child as consumer is not able to realize or articulate, much less act on, her own best interests. As a result, the state takes on the role of identifying and protecting the student's best interests on her behalf, albeit on a collective scale. As James Dwyer explains, "states must attach to vouchers whatever regulatory strings are needed to ensure that children in all private schools receive a good secular education," and if this means that "some parents cannot use their children's schooling to proclaim the 'good news,' because in the state's judgment the parents' news is not so good, then so be it."¹⁷

Many proposed regulations, some of which have already adopted in voucher districts, seem relatively innocuous, but by no means unobjectionable, such as mandating certain curricular requirements, requiring teachers to be state-certified, ensuring that religious instruction or services are optional for voucher students, and prohibiting the use of religious criteria in the admission of students. Others are more problematic, most notably the power to censor the transmission of illiberal religious teachings. Whatever our view of a particular regulation's reasonableness, the content is not as significant as the underlying notion that the state is equipped to define and pursue collectively the student consumer's interests, even at the expense of the educational providers' institutional autonomy and the efficacy of parents' child-forming decisions.

The law's elevation of the consumer extends to the legal profession itself. Lawyers are trained to function as amoral technicians, agents who provide access to the law. The access is, for the most part, to remain unfettered by the lawyer's

¹⁷ James G. Dwyer, *School Vouchers: Inviting the Public Into the Religious Square*, 42 WM. & MARY L. REV. 963, 992, 1005 (2001).

personal affiliations, motivations, or worldviews. In providing such access, the lawyer is constrained by the law, but not by any perceived need to reconcile her own conscience or personal values with the client or the client's cause. As the Model Code of Professional Responsibility provides, clients are "entitled to . . . seek any lawful objective through legally permissible means."¹⁸ The lawyer, then, aims not to inject her own vision of the good into the representation, but simply to pursue the client's vision of the good through the maximization of the client's legal rights. One prominent legal ethics scholar nicely captures the paradigm's essence: "For access to the law to be filtered unequally through the disparate moral views of each individual's lawyer does not appear to be justifiable."¹⁹

The consumerist mindset is collectivized through the profession-wide embrace of role-differentiated morality, under which "behavior that is potentially criticizable on moral grounds is blocked from such criticism by an appeal to the existence of the actor's role which, it is claimed, makes the moral difference."²⁰ When a client asks a lawyer to provide representation in pursuit of an objective that clashes with the lawyer's own vision of the good, the lawyer's good gives way to the client's good, as reflected in the Model Rules of Professional Conduct, which remind lawyers that representation of a client does not constitute an endorsement of

¹⁸ MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1969).

¹⁹ Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

²⁰ Richard Wasserstron, *Roles and Morality*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 25, 28 (David Luban, ed. 1983).

the client's morality.²¹ And if the means or ends of the representation threaten to cause harm to third parties, the lawyer's role warrants deference to the client's views on the acceptability of that harm, as stated expressly in the Model Rules.²² By effectively depriving the lawyer of her moral agency, the legal system ensures that the client's preferences are honored within the bounds of the law, no matter how morally problematic they might be.

The consumerist ramifications of role-differentiated morality were seen in Tennessee, where a Catholic lawyer tried to turn down a court appointment to represent a minor seeking an abortion without her parents' consent. The state ethics board advised that the lawyer's religiously derived objection was not a legitimate ground on which to be excused, and that he was ethically obligated to proceed with the case.²³ Under most circumstances, a lawyer can refuse a given representation – most commonly for a prospective client's inability to pay, but for moral considerations as well, or for no reason at all. However, once the attorney-client relationship is established, the collective norms of the profession suggest that the lawyer function more as a mere conduit for the client's values than as a partner in a rich moral dialogue with another human. This is in keeping

²¹ MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2003) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

²² *Id.* cmt. 2 (explaining that "lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected").

²³ *See* Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 96-F-140 (1996) (requiring Catholic lawyer to proceed with a court appointment in such a case despite his religiously grounded objection); *see also* Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997) (discussing case).

with the consumerist paradigm, which, especially in its collectivist forms, tends to view the individual as a bundle of preferences to be satisfied on the open market, not as a human person capable of meaningful moral reflection and growth.

This trend of collectivized consumerism is not some anomaly, out of step with liberalism's theoretical groundings. Indeed, the trend makes perfect sense given the terms of modern liberalism, which has constructed a public sphere devoted almost exclusively to the expression and satisfaction of individual preferences. The pervasive culture of liberalism presumes, as Alasdair MacIntyre puts it, that a well-formed individual will "become the kind of person to whom it appears normal that a variety of goods should be pursued, each appropriate to its own sphere, with no overall good supplying any overall unity to life."²⁴ Accordingly, "[t]he liberal self then is one that moves from sphere to sphere, compartmentalizing its attitudes," and "[t]he claims of any one sphere to attention or to resources are . . . determined by the summing of individual preferences and by bargaining."²⁵ Given this orientation, any concept of justice must "govern the tallying and weighing of preferences," and so "must provide, so far as is possible, a justification to each individual qua individual for tallying and weighing his or her particular preferences in the way that they do."²⁶

This conception of justice feeds into the consumerist trump that is emerging in American law, for it is cognizable only in terms of individual preferences. Reflecting the "confident belief that all cultural phenomena must be potentially translucent to

²⁴ ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 336 (1988).

²⁵ *Id.* at 336-37.

²⁶ *Id.* at 344.

understanding, that all texts must be capable of being translated into the language which the adherents of modernity speak to each other,”²⁷ modern liberalism expects all sources of authority and commitment to self-translate into the language of preferences in order to be recognized in the public sphere. Not surprisingly, obligations steeped in robust notions of moral agency may not fare well in the public sphere, especially when their recognition requires the denial of the more straightforward preference claim of the individual consumer. In effect, modern liberalism offers this response to Catholic employers: if you oppose the use of contraceptives, you will never be forced, as consumers, to use them; but you are not allowed to preclude (or even hinder) other consumers from reaching a contrary decision on the matter. Neutrality on questions of the good is purportedly assured, but only to the extent that those questions drive an individual’s decisions of consumption and do not impinge on them.

B. Subsidiarity as Relationship

Modern liberalism, especially in its theories of justice and the social good, tends to view the individual as a decontextualized rational agent, standing apart from the formative influence of others. Subsidiarity responds to this atomistic anthropology by reminding us that the human person is, above all, relational – not just as an empirical description but as a normative claim. And this relational nature must shape not only our theoretical vision of society, but our practical responses to everyday social problems. The Church’s teaching on this point has been consistent throughout its history, with Saint

²⁷ *Id.* at 327.

Augustine's thought being just one notable example, as explicated by Jean Bethke Elshtain:

We cannot 'combine many relationships' in one single self; rather, our 'connections should be separated and spread among individuals, and that in this way they should help to bind social life more effectively by involving in their plurality a plurality of persons. . . . Thus affection stretches over a greater number.' The social tie radiates out from kinship groups to ever widening circles of sociability; near and far, distant and intimate. There is something mysterious about all this, about what Augustine calls an 'inherent sense of decency.' Any society that loses this sense of decency is a society in very big trouble, indeed. It is a society that has repudiated, whether tacitly or explicitly, the ground of human being and of human being-among-others.²⁸

The doctrine of subsidiarity embodies the Church's recognition of the "human being-among-others," and it reflects the conviction that the individual's relationship to others cannot be captured simply by conceiving of her as a preference-expressing participant in the political process or the free market.²⁹ Instead, the human person "is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy, always with a view to the common good."³⁰ The civil society, which these institutions comprise, operates not through power, as does political society, but through "affinities, voluntary alliances and natural forms of solidarity."³¹

²⁸ Jean Bethke Elshtain, *Augustine and Diversity*, in *A CATHOLIC MODERNITY?* 99 (James L. Heft ed., 1999).

²⁹ John Paul II, Encyclical Letter, *Centesimus annus* ¶ 49 (1991) ("[I]t seems as though he exists only as a producer and consumer of goods, or as an object of State administration.").

³⁰ *Id.* ¶ 13.

³¹ Pontifical Council for the Family, *The Family and Human Rights* ¶ 64 (1999).

The importance of the free, meaningful, and efficacious operation of these institutions presents the “most weighty principle” of subsidiarity:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy or absorb them.³²

This fundamental ordering “must be respected” because “needs are best understood and satisfied by people who are closest to them and who act as neighbours to those in need,” a perception that derives, in turn, from the fact that “certain kinds of demands often call for a response which is not simply material but which is capable of perceiving the deeper human need.”³³

In an era when the modern liberal state seeks either to marginalize intermediate associations or remake them in the state’s own image,³⁴ subsidiarity’s call for localized and personalized responses to human need stands out as a subversive wrench in the collective enthronement of individualism. Casting social action as the responsibility of those who are in the closest proximity to a given problem reconfigures the modern citizen as a proactive moral agent, not simply as a reactive subject of higher authority. Contrary

³² Pius XI, Papal Encyclical, *Quadragesimo anno* ¶ 79 (1931).

³³ John Paul II, Encyclical Letter, *Centesimus annus* ¶ 48 (1991).

³⁴ See Richard W. Garnett, *The Story of Henry Adams’ Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1848 (2001) (“[T]he arguments of contemporary liberal theorists for increased supervision by government of religious and private schools are often less about the technical skills these schools do or do not provide to their students than the extent to which they fail to transmit the values, habits, and attitudes thought necessary for meaningful life in and service to the liberal state.”)

to its more conservative interpretations, subsidiarity does not foreclose a role for centralized authority, for often local problems are not susceptible to effective remedy without society's collectively channeled attention. But subsidiarity does reframe our image of the modern state, envisioning it as a resource for localized empowerment and coordination, rather than as the arbiter and provider of the social good.

Defending non-state actors as legitimate sources for the identification and pursuit of the social good is by no means unique to Catholic social teaching.³⁵ Subsidiarity's prophetic message to modern liberalism cannot be grasped fully without linking it to the call of solidarity, which "binds us to make ourselves the neighbor of every person without exception, and of actively helping him when he comes across our path."³⁶ In contrast to secular versions of solidarity espoused by postmodernists like Richard Rorty,³⁷ the Church's call to solidarity is all-encompassing in scope and depth, for it emanates from the truth of the Incarnation. As such, the other is "not only a human being with his or her own rights and a fundamental equality with everyone else, but . . . the living image of God the Father, redeemed by the blood of Jesus Christ and placed under

³⁵ For example, de Jouvenel offers a subsidiarity-friendly prognosis of the rise of totalitarianism: "[H]owever strong an attraction individualist ideas may have for us, it must be admitted that it is impossible to condemn totalitarian regimes without also condemning the destructive metaphysic which made their happening a certainty. This metaphysic refused to see in society anything but the state and the individual. It disregarded the role of the spiritual authorities and of all those intermediate social forces which enframe, protect, and control the life of man, thereby obviating and preventing the intervention of Power." JOUVENEL, *supra* note __, at 377.

³⁶ Vatican II, Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, ¶ 27 (1965).

³⁷ See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 196 (1989).

the permanent action of the Holy Spirit.”³⁸ As a result, every person must “be loved, even if an enemy, with the same love with which the Lord loves him or her; and for that person’s sake one must be ready for sacrifice, even the ultimate one: to lay down one’s life for the brethren.”³⁹

Solidarity’s implications for modern liberalism are formidable, for “[a] society is alienated if its forms of social organization, production and consumption make it more difficult to offer this gift of self and to establish this solidarity between people.”⁴⁰ Our commitment to others must not be instrumentalist,⁴¹ nor can it be a question of individual duty, for solidarity “is an imperative which obliges each and every man and woman, as well as societies and nations.”⁴² At its core, then, solidarity “is not a feeling of vague compassion or shallow distress” at others’ misfortunes, but rather “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.”⁴³ What is needed is “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 advantage.”⁴⁴

³⁸ John Paul II, Encyclical Letter, *Sollicitudo rei socialis* ¶ 40 (1987).

³⁹ *Id.* ¶ 40.

⁴⁰ John Paul II, Encyclical Letter, *Centesimus annus* ¶ 41 (1991).

⁴¹ John Paul II, Encyclical Letter, *Sollicitudo rei socialis* ¶ 39 (1987).

⁴² *Id.* ¶32.

⁴³ *Id.* ¶ 38.

⁴⁴ *Id.*

Especially significant to our exploration of the consumerist paradigm is the fact that solidarity entails the pursuit of truth, not just the maximization of autonomy. The freedom made possible by solidarity is not “achieved in total self-sufficiency and an absence of relationships,” but only “where reciprocal bonds, governed by truth and justice, link people to one another.”⁴⁵ In recognizing the inherent dignity and value of others, we are called not to use individual consent as validation of any market transaction, but to oppose “whatever violates the integrity of the human person.”⁴⁶ Solidarity, like the entire web of Catholic social teaching, defines freedom in terms that are largely absent from American legal culture: “Freedom is not the liberty to do anything whatsoever,” but rather is aimed at doing good, and the good, under this worldview, can be articulated only as a claim of truth.⁴⁷

Viewed in its broader context, then, subsidiarity does not just stand for the prudent devolution of government authority, but provides a framework for the ordering of society that allows solidarity’s vision of the human person to be realized. In the context of our preference-maximizing market orientation, the practice of solidarity requires that service providers honor the dignity of the consumer, which is not coextensive with the autonomy of the consumer. Solidarity, then, can only be realized to the extent that service providers are empowered to meet needs in ways that diverge from, or even defy,

⁴⁵ Congregation for the Doctrine of the Faith, *Instruction on Christian Freedom and Liberation* ¶ 26 (1986).

⁴⁶ Vatican II, *Pastoral Constitution on the Church in the Modern World, Gaudium et Spes*, ¶ 27 (1965).

⁴⁷ Congregation for the Doctrine of the Faith, *Instruction on Christian Freedom and Liberation* ¶ 26 (1986).

the overarching norms of the collective – i.e., solidarity is not possible without a public sphere that accepts the premise of subsidiarity.

That acceptance appears very much in question if the current trend holds. By harnessing individualist norms to the driving force of collectivism, modern liberalism has set out on a course that trumps any effort by service providers to pursue the common good through their own relationships with the consumer. By requiring Catholic Charities, for example, to provide contraceptives to its employees or else cease offering health care coverage of prescription drugs altogether, the state forces the organization to defy its own conception of the good by either facilitating sin or foregoing the obligation to provide for those within its care. We are left with a purely individualist sense of morality, as actors are permitted to concern themselves only with their own morally laden choices of consumption, not with their morally laden choices of provision.

This contradicts Catholic social teaching’s relentless call to contribute to the common good and better the collective conditions of human life,⁴⁸ a call which is directed toward injustice arising from an individual’s omissions as much as from her affirmative acts. As we are reminded, “[f]eed the man dying of hunger, because if you have not fed him, you have killed him.”⁴⁹ Providers are called to bear witness to the true nature of the human person, even through their relationships with the consumer; abandoning that witness under the guise of facilitating individual autonomy does not

⁴⁸ Vatican II, Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, ¶ 30 (1965).

⁴⁹ *Id.* ¶ 69.

signal a necessary truce among warring conceptions of the good, but a state-imposed surrender of any claims to truth that transcend individual preference.

It is not as though the elevation of consumer autonomy is purely the product of an individualist-oriented judicial system. After all, Catholic Charities was forced to cover contraceptives pursuant to the enactment of a democratically elected legislature. In general, any exercise of communal authority that impinges on individual choice seems to be out of step with the political sensibilities of most Americans – Catholic and non-Catholic alike.⁵⁰ Liberalism’s agnosticism toward ultimate visions of the good appears to have taken deep root in the American psyche. If any “good” can truly be said to be held in common among the majority of Americans, the importance of consumer autonomy would undoubtedly be at or near the top of the list. Californians already spoke on this question, essentially identifying unhindered access to contraceptives as more in keeping with the common good than the countervailing ability of objecting employers not to subsidize that access.

If subsidiarity is to remain practically viable in the United States, it will not be because the legal culture adopts the substantive anthropological presumptions of Catholic social thought, as such a development is not even remotely foreseeable; rather, authentic subsidiarity will remain viable only if the legal culture maintains space within the public sphere for alternative visions of the common good to be pursued. For many proponents of the Church’s teaching, such a path is not easily embarked on, for it is a path proceeding directly into the province of value pluralism.

⁵⁰ [cite survey on bishops and communion]

III. The Promise and Peril of Value Pluralism

Value pluralism refers, in the eloquent phrasing of Isaiah Berlin, one of its most famous expositors, to “[t]he conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathizing and deriving light from each other.”⁵¹ Joseph Raz describes value pluralism as speaking “of the existence of more goods than can be chosen by one person,” and of more “virtues than can be perfected by one person,” including virtues that are incompatible.⁵² The concept has seen a resurgence in popularity in postmodern liberal societies, but it is by no means a new concept, as thinkers since Plato have “understood that many attributes contribute[] to the good life, depending on the abilities and interests of the people seeking the good.”⁵³

Value pluralism’s rise to prominence in the latter twentieth century was driven, in significant part, by the carnage that had already inexorably defined the century. As Berlin framed its foundation,

One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals – justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution. This ancient faith rests on the conviction that all the positive

⁵¹ ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 11 (Henry Hardy ed., 1990).

⁵² JOSEPH RAZ, *THE MORALITY OF FREEDOM* 399 (1986).

⁵³ J. Michael Martinez & Kerry R. Stewart, *Ethics, Virtue and Character Development*, in *ETHICS AND CHARACTER: THE PURSUIT OF DEMOCRATIC VIRTUES* 19, 22-23 (1998).

values in which men have believed must, in the end, be compatible, and perhaps even entail one another.⁵⁴

If, by contrast, “the ends of men are many, and not all of them are in principle compatible with each other,” then conflict is invariably part of the human experience.⁵⁵ The firm conviction that human conflict could neither be escaped nor transcended by appeal to an overarching theory of history, human nature, or divine will led Berlin to distinguish negative from positive forms of liberty. Negative, or “freedom from,” forms recognize claims of entitlement to non-interference with one’s pursuit of the good, however the good is defined by the pursuer. Positive, or “freedom to,” forms of liberty recognize claims of entitlement to affirmative support from the surrounding society for the pursuit of the good. Because individuals’ conceptions of the good will often conflict, the society cannot support the pursuit of all conceptions, as the support would be contradictory and self-defeating. (For example, the state cannot support equal distribution of wealth and the right to private property.) As a result, positive liberty usually requires the state to adopt certain conceptions of the good and reject others. For Berlin and other value pluralists, this can be problematic.⁵⁶

Of course, Catholic social teaching does not categorically reject the prospect of positive liberty, especially when it comes to the state’s obligation to assist the poor, but the Church’s consistent emphasis on the essential role played by mediating structures

⁵⁴ BERLIN, *supra* note ___, at 212.

⁵⁵ *Id.* at 214.

⁵⁶ *Id.* at 216 (“Pluralism, with the measure of ‘negative’ liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great disciplined, authoritarian structures the ideal of ‘positive’ self-mastery by classes, or peoples, or the whole of mankind.”).

warrants a cautionary stance toward positive liberties. The value of mediating structures arises, in significant part, from their ability to carve out identities and pursue missions that are distinct from, and even defiant to, those of the surrounding society.⁵⁷ To the extent that the state uses its coercive authority to empower individuals to secure some affirmative good, all other social actors become subject to that empowerment. The independence and vitality of intermediate structures is compromised, as we see in California’s decision that individual employees are entitled to secure contraceptives from their employers, notwithstanding an employer’s moral objection. Pluralists have long appreciated that “[n]egative freedom is to be commended and adopted as the fundamental species of freedom because it is most consistent with the rivalrous diversity of human purposes and goods.”⁵⁸

Value pluralism’s cautionary note toward positive freedoms reveals itself as “an evaluative theory, because it is not an uncommitted analysis of the relations among various types of values involved in good lives but a theory motivated by a concern for human beings actually living good lives.”⁵⁹ It is not simply an observation – i.e., that values are plural – but a moral theory in itself, for it seeks to arrive at “some coherent view of the nature of the values that may make life good,” even “without supposing that success would have to yield only universal and impartial principles.”⁶⁰ Recognized as a

⁵⁷ See Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949 (2004).

⁵⁸ JOHN GRAY, *ISAIAH BERLIN* 23 (1996).

⁵⁹ JOHN KEKES, *THE MORALITY OF PLURALISM* 10 (1993).

⁶⁰ *Id.* at 13.

moral theory, value pluralism is more socially powerful because of its prescriptive capacity; this also makes it more threatening for most theistic thinkers because its vision of morality does not appear altogether welcoming.

This is especially evident in the work of some of the pluralist thinkers who have expanded on Berlin's foundational observations. One prominent example is John Gray, who has derived what he calls "agonistic liberalism" in his own development of Berlin's work. Gray takes the Greek word "agon," referring to a contest, competition or rivalrous encounter, and affixes it to a theory that "is grounded, not in rational choice, but in the limits of rational choice."⁶¹ These limits are imposed by the human necessity of choosing among goods "that are both inherently rivalrous, and often constitutively uncombinable, and sometimes incommensurable, or rationally incomparable."⁶² In essence, Gray builds a political application of value pluralism, and concludes that, given the "irreducible diversity of ultimate values," there is no overarching standard of principle for resolving conflicts among ultimate values.⁶³ As a result, "we often face practical and moral dilemmas in which reason leaves us in the lurch and in which, whatever we do, there is a wrong or an irreparable loss of value," and even "the fundamental rights or basic liberties of liberal thought cannot be insulated from conflicts among incommensurables."⁶⁴

⁶¹ JOHN GRAY, ENLIGHTENMENT'S WAKE 68.

⁶² *Id.* at 68.

⁶³ *Id.* at 68-69.

⁶⁴ *Id.*; *see also id.* at 72 ("Rights discourse . . . cannot – as the proponents of a pure philosophy of right suppose – be insulated from controversy about the content of human well-being or flourishing and the relative place in it of different human interests. To understand this is to understand that rights claims are always conclusionary, provisional

Given Gray's rejection of rights discourse as liberalism's trump card for squelching disputes over conceptions of the good,⁶⁵ he makes the political sphere the primary locus for resolving such disputes. This stands in sharp contrast to most liberal thought, especially that of John Rawls, who, according to Gray, has given us "a liberalism that has been politically emasculated, in which nothing of importance is left to political decision"⁶⁶ because "all important questions about liberty and distribution are decided pre-politically, by theoretical reasonings whose results are entrenched in constitutional law, and they are not subsequently politically alterable."⁶⁷ Gray claims that Rawlsian attempts to depoliticize the socially operative conception of justice have led to "the politicization of law, as judicial institutions have become arenas of political struggle," and have unhelpfully precluded political settlements that could encompass "a compromise among conflicting interests and ideals."⁶⁸

Gray's reliance on political resolutions of contested issues may seem promising to those who are tired of losing "culture war" battles through perceived judicial activism at the expense of democratic give and take. But exclusive reliance on politics may be a more troublesome cure than the ailment of a rights-driven public discourse, as reflected in the political outcome of the contraceptives battle in California, or in survey data on

results of long chains of reasoning which unavoidably invoke contested judgments about human interests and well-being.").

⁶⁵ MacIntyre commented that "lawyers, not the philosophers, are the clergy of liberalism." MACINTYRE, *supra* note __, at 344.

⁶⁶ GRAY, *supra* note __, at 76.

⁶⁷ *Id.* at 75.

⁶⁸ *Id.* at 77.

public opinion endorsing state regulation of voucher schools,⁶⁹ or in public views on the exercise of religious authority against politicians,⁷⁰ or on any number of battle lines demarcating the expanding boundaries of individualism. In fact, Gray’s analysis could threaten much of the rights-based safety net that intermediate bodies take for granted. Indeed, Gray admits that his brand of pluralism entails the wholesale abandonment, “not only of any democratic project, but also of the liberal project” because “[t]he liberal project of stating, and enforcing, universal limits on government power, especially when it is coercive, amounts to the prescription that a single form of political order be everywhere installed regardless of the cultural traditions and ways of life of its subjects.”⁷¹ Obviously, eschewing universal limitations on government power and relegating disputes over the good to the political sphere could prove disastrous for groups without political power. This leads Gray to endorse the concept of legal pluralism, where different legal jurisdictions are created for different communities within a sovereign state whereby they can define their own legal obligations and privileges.⁷²

The perils of hyperindividualism notwithstanding, Catholic social teaching does not give much of a basis for embracing Gray’s blanket rejection of liberalism, given that liberalism’s limitations on state power have proven an effective avenue to the practical acknowledgment of human dignity. Nor is there any basis for resolving problems arising from the reality of human difference by retreating to a system of community-specific

⁶⁹ See TERRY MOE, *SCHOOLS, VOUCHERS AND THE AMERICAN PUBLIC*.

⁷⁰ Cite news article re survey results.

⁷¹ GRAY, *supra* note __, at 140.

⁷² See *id.* at __.

sanctuaries, as Gray’s legal pluralist model would do. Solidarity’s call to recognize the truth of the Incarnation in our response to every person does not allow us to construct a society premised on the segregation of difference.

But Gray’s is not the only politically oriented pluralist vision. William Galston takes a more moderate approach, espousing a “liberal pluralism” that argues “against Gray’s effort to drive a wedge between pluralism and liberalism.”⁷³ While Galston does not abandon the liberal project, he does reject modern liberalism’s unwavering devotion to individual autonomy as an absolute value. He cautions that “the decision to throw state power behind the promotion of individual autonomy can undermine the lives of individuals and groups that do not and cannot organize their affairs in accordance with that principle without undermining the deepest sources of their identity.”⁷⁴ Echoing a lament shared by many “illiberal” groups – whether Catholic Charities, the Salvation Army,⁷⁵ the Boy Scouts,⁷⁶ fundamentalist evangelicals,⁷⁷ or the Amish⁷⁸ – Galston explains that modern liberalism, under “the guise of protecting the capacity for diversity,”

⁷³ WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 9 (2002).

⁷⁴ *Id.* at 21.

⁷⁵ Cite newspaper article on NYC funding and Army practices.

⁷⁶ *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

⁷⁷ *See Dwyer, supra* note ____.

⁷⁸ *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

uses the autonomy principle to exert “a kind of homogenizing pressure on ways of life that do not embrace autonomy.”⁷⁹

Crucially, Galston’s prescriptive analysis emanates from the distinction between pluralism and relativism. Because “[t]he distinction between good and evil is as objective as is the copresence of multiple competing goods,” he seeks to construct a political sphere that will do “everything within reason to ward off or abolish the great evils of the human condition while allowing as much space as possible for the enactment of diverse but genuine human goods.”⁸⁰ In other words, “value pluralists believe that there is a wide range of ways in which human beings can flourish, but not that there is no distinction between developed and stunted lives, or no reason to prefer development to stunting.”⁸¹ Galston does not hesitate to argue, for example, that “[c]hildren who grow up without attachments to parents and peers, in circumstances of pervasive physical insecurity, disconnected from all potential sources of meaning and purpose in their lives, have been harmed, not from the standpoint of some, but rather all, viable conceptions of flourishing.”⁸²

That said, the state’s identification and pursuit of objective goods will be much more limited under liberal pluralism than traditional liberalism, for “if liberal pluralism means anything, it means internalized norms and habits that restrain us from compelling others to live life our way rather than theirs, even when we have good reason to believe

⁷⁹ GALSTON, *supra* note __, at 23.

⁸⁰ *Id.* at 132.

⁸¹ *Id.* at 60.

⁸² *Id.*

that their way is mistaken.”⁸³ The role of public institutions may be required to restrict the activities of individuals and their communities, but only for four reasons: first, solving coordination problems among legitimate activities; second, deterring and punishing individuals as necessary for violating the rights of others; third, safeguarding the boundaries between illegitimate and legitimate ways of life; and finally, securing the conditions needed to sustain liberal public institutions over time.⁸⁴ Even where these reasons are present, “the state will act cautiously, employing the narrowest means consistent with the attainment of compelling public ends.”⁸⁵

The fourth reason for state action – the maintenance of liberal public institutions – could prove most controversial, for similar justifications have been offered for aggressive state intervention in intermediate institutions by secularist thinkers like Stephen Macedo.⁸⁶ Galston manages to limit the potential expansiveness of this “survival of liberalism” prerogative. In education, for example, Galston concedes that liberal pluralism requires the civic value of tolerance, which he defines as a “principled refusal to use coercive state power to impose one’s views on others, and therefore a commitment to moral competition through recruitment and persuasion alone.”⁸⁷ Because the cultivation of tolerance requires “at least minimal awareness of the existence and nature

⁸³ *Id.* at 124.

⁸⁴ *Id.* at 125.

⁸⁵ *Id.* at 125-26.

⁸⁶ *See, e.g.*, STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000).

⁸⁷ GALSTON, *supra* note ___, at 126.

of ways of life other than those of one's family and community," the state "may establish educational guidelines pursuant to this compelling interest."⁸⁸ However, it may not "prescribe curricula or pedagogic practices that aim to make students skeptical or critical of their own ways of life."⁸⁹ With this limitation, Galston underscores his opposition to individual autonomy as the absolute value of education in a liberal state, and thereby rejects the core justification for some of the more radical proposals for state regulation of voucher schools.

Galston stops short of Gray's call to establish distinct legal jurisdictions for certain subcommunities, but he still acknowledges that a robust pluralism may warrant granting some subcommunities the ability to opt out of certain society-wide requirements, such as jury duty or prohibitions against polygamy.⁹⁰ However, in keeping with his view that the state may still take cognizance of objective forms of the good on a limited basis, he would not exempt any group from laws forbidding slavery or human sacrifice, for example.⁹¹ His allowance of a limited exit option does not amount to Gray's legal pluralism; he does not call for entirely separate legal jurisdictions to be constructed for given communities, but only that in some cases, community autonomy be prioritized over collective norms. Neither a strictly universalist rights-based discourse, nor an exclusive reliance on the political process are effective bulwarks against the destruction of countercultural or illiberal community values, and Galston's work provides insight into

⁸⁸ *Id.* at 126-27.

⁸⁹ *Id.*

⁹⁰ GRAY, *supra* note __, at 128.

⁹¹ *Id.*

potential responses to these shortcomings. By melding liberalism’s focus on limited state power with the recognition that the language of rights does not easily transcend individualism, Galston reminds us that when an individual or community “challenges the political system’s right to constrain thought and action, those involved must seek ways of adjudicating the conflict that does not begin by begging the question and does not end in oppression.”⁹²

The work of both Galston and Gray reflect the tension between modern liberalism and any meaningful political implementation of value pluralism. For the problem of liberalism, in comparison to pluralism, is not that pluralists and liberals are committed to different values, “it is rather than pluralists deny, and liberals assert, that when the values to which they are committed conflict, there are some values or combinations of some few values in whose favor reasonable people would always decide.”⁹³ Further, the favored values are deemed not subject to challenge, for liberalism’s vaunted neutrality is by no means neutral when it comes to rival visions of the good. This can be seen in liberalism’s tendency “to support the hegemony of a market economy that turns all values into mere commodities,” and to define the public-private distinction so as to “shield the values of the market economy or the bureaucratic state from challenge by other values.”⁹⁴ Gray responds to liberalism’s privileging of certain values by jettisoning the liberal project

⁹² *Id.* at 131.

⁹³ KEKES, *supra* note ___, at 210.

⁹⁴ Richard Madsen & Tracy B. Strong, *Introduction: Three Forms of Pluralism*, in *THE MANY AND THE ONE: RELIGIOUS AND SECULAR PERSPECTIVES ON ETHICAL PLURALISM IN THE MODERN WORLD* 3 (2003) [hereinafter “THE MANY AND THE ONE”].

entirely; Galston responds by seeking to narrow the range of values that the liberal project is willing to use as trumps over contested visions of the good.

Both responses offer insight for discussions of subsidiarity in the United States, where conflicts between incommensurable values tend to be decided by invoking individual autonomy as a trump. This tendency bodes ill for institutions that do not place an overriding value on individual autonomy. Put simply, the hope held out by pluralism consists of its refusal to accept the political and legal supremacy that individual autonomy has been granted by American culture.

More broadly, pluralism, like Catholic social teaching, challenges the entire range of utilitarian reasoning that is embedded in modern liberalism.⁹⁵ Pluralism also provides an ally in the Church's battle against postmodern trends toward relativism and nihilism. While the modern view of ethics, for example, is grounded "in the denial of moral knowledge, in the rejection of anything akin to moral belief or moral judgment, and in the consequent assimilation of morality to the expression of preference," the pluralism espoused by Berlin and his intellectual progeny "insists that values and conflicts of value are matters of knowledge for us, with the necessity of radical choice arising only in conflicts of incommensurables."⁹⁶

⁹⁵ See GEORGE CROWDER, *LIBERALISM AND VALUE PLURALISM* 50-51 (2002) ("[T]o decide rationally among competing options is to represent these in terms of the units of pleasure they produce, and to select that option that produces the most pleasure units," is problematic from a value-pluralist view because "it fails dismally to appreciate the distinctiveness, the radical plurality of values."); GALSTON, *supra* note __, at 33 ("From a pluralist perspective . . . the core problem is that utilitarianism fails to take seriously the heterogeneity of values. The burden of proof is on utilitarians (and ethical monists of all kinds) to show how the apparent diversity of values can be translated into a single vocabulary of value without loss of moral meaning.").

This is not to suggest that value pluralism and Catholic social teaching are kindred spirits, of course. For all the potential benefits accompanying the pluralist take on society, the downside must not be sugarcoated. Years ago, John Courtney Murray warned society of the appearance of the barbarian who “untutored in the high tradition of civility, who goes busily and happily about his work, a domesticated and law-abiding man, engaged in the construction of a philosophy to put an end to all philosophy, and thus put an end to the possibility of a vital consensus and to civility itself.”⁹⁷ In Murray’s view, the barbarian’s work is “to undermine rational standards of judgment, to corrupt the inherited intuitive wisdom by which the people have always lived, and to do this not by spreading new beliefs but by creating a climate of doubt and bewilderment in which clarity about the larger aims of life is dimmed and the self-confidence of the people is destroyed.”⁹⁸

As highlighted by Murray’s caution, the obstacle for Christians contemplating an embrace of the pluralist vision of society lies in the proposition of value pluralism as a truth claim. The leading value pluralists sketch a vision of the world that reflects a metaphysical disconnect from the presumptions animating Catholic social teaching, as seen in Gray’s description of incommensurability:

Incommensurability marks imperfection neither in our understanding nor in the world; rather it signifies the incoherence of the very idea of perfection. Incommensurability is not, then, the Augustinian idea of the imperfectability of human things, which is a familiar cliché of conservative thought; it is the radical denial of the very meaning of

⁹⁶ GRAY, *supra* note __ (Isaiah Berlin), at 41.

⁹⁷ JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 24 (Image Books 1964) (1960).

⁹⁸ *Id.*

perfection. For religions . . . in which the idea of the perfection of the deity or of the world, the project of theodicy and the idea that there is one way of life that is right or best for all human beings, are centrally important, this may be a result of no small importance.⁹⁹

Indeed, the truth claim of value pluralism is not just a question of semantics, but informs the prescription of pluralist theorists. Liberals like Raz focus on choice as having value only as it leads to rational autonomy, which may or may not be compatible with religious truth. But a pluralist like George Crowder goes further, explaining that “a genuinely pluralist chooser cannot accept as decisive [a] predetermined rule of conduct,” for pluralists “must be prepared to interrogate not only their desires but also the authority of rules that purport to regulate desires.”¹⁰⁰ In effect, this form of pluralism requires that well-formed individuals recognize the legitimacy of plural values and act accordingly. This elevation of choice, as a normative prescription for worthwhile individual lives, appears to negate the very attempt to make space for the operation of plural values at the community level. Crowder allows that “[t]here are good lives other than liberal and self-consciously pluralist lives, and good lives lived in ignorance of significant truths,” but “[i]f value pluralism is true,” then “such lives will not be among the best possible.”¹⁰¹ In some ways, of course, pluralism as the forced acknowledgment of plural values leads back to the problem of liberalism in that it seems to have little tolerance for contrary, monistic visions of the good, whether held by individuals or communities. Indeed, Crowder’s particular theory of pluralism results in an enthusiastic embrace of liberal

⁹⁹ GRAY, *supra* note __, at 70.

¹⁰⁰ CROWDER, *supra* note __, at 209.

¹⁰¹ *Id.* at 213.

ideals, for the state “may legitimately be a perfectionist state, not aspiring to neutrality among conceptions of the good but actively engaged in promoting liberal forms of the good,”¹⁰² most notably “personal autonomy,” envisioned as a “positive capacity for strong self-direction rather than mere absence of interference.”¹⁰³

Even for those theorists who do not invoke value pluralism’s truth claim in Crowder’s decidedly unpluralist way, accepting the premise that moral values are often hopelessly conflicted and occasionally incommensurable does not sit well with many theists. Crowder acknowledges this, but insists that “[e]ven if one believes that all values harmonize within the mind of God, one could consistently accept the idea of pluralism as accurately capturing the nature of human moral experience.”¹⁰⁴ This attempt at harmony, of course, does not overcome the tension between value pluralism and natural law traditions, which are premised on humanity’s ability to perceive, reconcile, and apply universal laws, whether through reason, creation, or divine revelation.

Not surprisingly, Christian thinkers themselves differ markedly on the acceptability of value pluralism as a truth claim. Jeffrey Stout looks to C.S. Lewis and Stanley Hauerwas as representatives of two distinct traditions within Christianity:

[B]oth Lewis and Hauerwas believe that there are moral truths and that people can know them. . . . Furthermore, both of them agree that disagreement on moral issues occurs from one person or culture or period to the next, that some of this disagreement is very hard to resolve by rational means, and that failure to resolve such disagreement sometimes leads to tragic consequences – like resort to warfare.

¹⁰² *Id.* at 225.

¹⁰³ *Id.* at 210.

¹⁰⁴ *Id.* at 184 n.4.

Both authors would affirm the rationality of morals, if this means that we are entitled to go on using the notions of moral truth and justification with confidence, the facts of moral disagreement notwithstanding. Lewis, however, would suspect that Hauerwas's way of stressing diversity and the dependence of moral reasoning upon particular cultural traditions makes it too hard to defend this affirmation. And Hauerwas would suspect that Lewis's talk of a transcultural natural law unwittingly invites nihilism or skepticism by making it seem as if the objectivity or rationality of morals depended on something that turns out, on examination, to be a fiction. Both then would worry that the other does something that invites nihilistic or skeptical doubts – the one by providing so little universal grounding for moral reasoning that it threatens to collapse, the other by requiring more universal grounding than could ever be supplied.¹⁰⁵

Presumably even Hauerwas, though, would dispute the stronger versions of value pluralism, which reject any sort of ultimate moral order,¹⁰⁶ and make the more limited argument that the moral order is perceived through culturally dependent reasoning. Still less controversial, even in natural law circles, would be weaker forms of value pluralism, founded not on the objective incommensurability of moral values, but on the prudence of making room “up to a point, for diverse ethical positions and propose procedures for ‘living with’ or tolerating them, without necessarily rejecting a monistic (or dualistic) theory.”¹⁰⁷ Such political measures are “justified not on the basis of religious and ethical relativism but as a matter of monistic ethical obedience to the political principle that government has limited authority in a political community and does not possess omniscient ethical authority.”¹⁰⁸

¹⁰⁵ JEFFREY STOUT, *ETHICS AFTER BABEL* 16 (1988).

¹⁰⁶ See TAN 99, *supra*.

¹⁰⁷ David Little, *Conscientious Individualism: A Christian Perspective on Ethical Pluralism*, in *THE MANY AND THE ONE*, *supra* note ___, at 230-31.

Any attempt to articulate Catholicism's stance toward value pluralism, whether in its weaker or stronger versions, must also explore the work of Charles Taylor. Taylor argues persuasively that pluralism is embodied in Christianity, given that "[r]edemption happens through Incarnation, the weaving of God's life into human lives, but these human lives are different, plural, irreducible to each other."¹⁰⁹ And while the reconciliation that redemption brings is "a kind of oneness," it is "the oneness of diverse beings who come to see that they cannot attain wholeness alone, that their complementarity is essential, rather than of beings who come to accept that they are ultimately identical."¹¹⁰ Catholicism, as envisioned by Taylor, embodies a unity-across-difference, rather than a unity-through identity, not because "the human material, with which God's life is interwoven, imposes this formula as a kind of second-best solution to sameness," but because "life of God itself, understood as Trinitarian, is already a oneness of this kind."¹¹¹ In a very real sense, "[h]uman diversity is part of the way in which we are made in the image of God."¹¹²

As part of an incarnational worldview, Catholics should recognize that "in modern, secularist culture there are mingled together both authentic developments of the gospel, of an incarnational mode of life, and also a closing off to God that negates the

¹⁰⁸ James W. Skillen, *Pluralism as a Matter of Principle*, in *THE MANY AND THE ONE*, *supra* note __, at 263.

¹⁰⁹ Charles Taylor, *A Catholic Modernity?*, in *A CATHOLIC MODERNITY?*, *supra* note __, at 14.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 14-15.

gospel.”¹¹³ This recognition, in Taylor’s view, must be accompanied by the concession that, “in breaking with the structures and beliefs of Christendom,” modern culture “also carried certain facets of Christian life further than they ever were taken or could have been taken within Christendom.”¹¹⁴ For example, the “radical unconditionality” of human rights, in the sense that the rights are not dependent on gender, religion, culture, etc., would not have been possible in a civilization where “the structures, institutions, and culture were all supposed to reflect the Christian nature of the society (even in the nondenominational form in which this was understood in the early United States).”¹¹⁵ This impossibility is no fault of Christianity, but of “the attempt to marry the faith with a form of culture and a mode of society.”¹¹⁶ Such attempts are ultimately hopeless and dangerous because they are inevitably built on coercion and the pressures of conformity, and involve “inescapably some confiscation of the highest ideals for narrow interests.”¹¹⁷

Taylor’s analysis is not leading us toward an embrace of a Rawlsian relegation of religion to the private sphere, however, but toward pluralism. He carefully reminds us that “the attempt to put some secular philosophy in the place of faith – Jacobinism, Marxism – has scarcely led to better results (in some cases, spectacularly worse).”¹¹⁸ Instead, the culture “has flourished where the casing of Christendom has been broken

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 16-17.

¹¹⁸ *Id.* at 17-18.

open and where no other single philosophy has taken its place, but the public sphere has remained the locus of competing ultimate visions.”¹¹⁹

Crucially, and in sharp contrast with the stronger forms of value pluralism, Taylor does not give license to Christians’ abandonment of their own ultimate truth claims. He cautions that the benefits arising from the relative weakening of Christianity’s formal hold on society “can be seen to accredit the view that human life is better off without transcendental vision altogether.”¹²⁰ Thus, along with the development of modern freedom comes the rise of a humanism that denies any aim beyond human flourishing. The suggestion that “there is something more, that human life aims beyond itself, is stamped as an illusion and judged to be a dangerous illusion because the peaceful coexistence of people in freedom has already been identified as the fruit of waning transcendental visions.”¹²¹

The heart of Taylor’s analysis, then, brings a prophetic message not just to those who seek to reestablish new forms of Christendom, but to those modern liberals who seek to marginalize the very concept of transcendence. He urges Christians to avoid two erroneous reactions to modern society: “either we pick certain fruits of modernity, like human rights, and take them on board but then condemn the whole movement of thought and practice that underlies them, in particular the breakout from Christendom,” or else, “in reaction to this first position, we feel we have to go all the way with the boosters of

¹¹⁹ *Id.*

¹²⁰ *Id.* at 19.

¹²¹ *Id.* at 19.

modernity and become fellow travelers of exclusive humanism.”¹²² The more productive, authentic course is to “gradually find our voice from within the achievements of modernity, measure the humbling degree to which some of the most impressive extensions of a gospel ethic depended on a breakaway from Christendom, and from within these gains try to make clearer to ourselves and others the tremendous dangers that arise in them.”¹²³

Taylor offers the pluralist perspective on the value of a public sphere in which a unified conception of the common good does not reign supreme, but he does not buy into the truth claims of pluralism to the extent that they necessitate sacrificing the claims of universal, transcendent truth made by Christianity. Like other value pluralists, Taylor contemplates a society where subsidiarity holds significant meaning because intermediate bodies are not precluded from facilitating the pursuit of conceptions of the good that defy those held by the state. Unlike other value pluralists, he stops short of suggesting that value pluralism, as a truth claim, should shape the conduct of individual lives.

The challenge is to translate Taylor’s middle-ground approach into terms that are helpful to crafting Christian responses in the variety of real-world scenarios where the pluralist question looms large, without losing sight of either subsidiarity’s localizing framework or solidarity’s call to honor human dignity. Specifically, to the extent that subsidiarity’s continued vitality presupposes a public sphere open to plural moral values, does subsidiarity preclude us from seeking to capture anthropological moral truths in collective mechanisms?

¹²² *Id.* at 36.

¹²³ *Id.* at 36-37.

IV. Toward a Pluralist Engagement of Culture

When we talk about defending the ability of individuals and communities to live in fidelity to their religiously informed conceptions of the good, we are talking about, in Nancy Rosenblum’s term, “integralism,” which she defines as the push by religious believers “to be able to conduct themselves according to the injunctions of religious law and authority in every sphere of everyday life, and to see their faith mirrored in public life.”¹²⁴ Rosenblum identifies three types of integralism: the first two, moral and civic integralism, describe what I believe are prudent objectives of Catholicism’s cultural engagement because they “aim at rejuvenating virtue through direct impact on individuals by building up networks of faith and social works from below.”¹²⁵ By contrast, the third type, foundationalist integralism, aims “to get a share of political as well as social power; its goal is to give religion a controlling place in public arenas and public law,” and the means utilized include urging the faithful “to form religious parties, support candidates who promise to rule with divine guidance, justify postures in theological terms, and aim at political power qua believers – in short, to alter the foundations of democratic public life from above.”¹²⁶

This demarcation is a useful starting point, but it does not take us very far, for very few thoughtful Catholics actually call for some sort of top-down imposition of law

¹²⁴ Nancy Rosenblum, *Pluralism, Integralism, and Political Theories of Religious Accommodation*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 15 (N. Rosenblum ed., 2000).

¹²⁵ *Id.*

¹²⁶ *Id.* at 20.

derived explicitly from religious propositions, as embodied in foundational integralism. Most calls for the collective imposition of moral norms are framed in publicly accessible terms; indeed, Catholic social teaching is perhaps the most well-developed example of this. The trickier question is: to the extent that a bottom-up process of moral suasion is successful, should its results be embodied in collective norms and backed by the power of state coercion? After all, arguably the citizens of California, through their duly elected representatives, reached a moral consensus on the value of maximizing women's access to contraceptives. If we resist this result out of concern for the viability of communities that dissent from that consensus, must not we also resist imposing the results of other bottom-up formations of public consensus, even if anthropologically authentic?

If the import of pluralism is to be taken seriously – as I believe it must for subsidiarity to be more than a noble relic of some Tocquevillean image of America – our focus should be on carving out and defending space within the public sphere for the pursuit of plural moral values. For the providers of public goods, such space is a shrinking middle ground between the rapidly converging pincers of individualist consumerism and aggressive collectivism. But once Catholics carve out a sphere of autonomy for their illiberal norms, they are hard-pressed to turn around and hijack the power of state coercion in furtherance of those norms.

Pluralism is no stranger to Catholic thought and teaching, evidenced most famously in the work of John Courtney Murray, who emphasized the distinction between the common good and public order. He explained that “[t]he common good includes all the social goods, spiritual and moral as well as material, which man pursues here on earth in accord with the demands of his personal and social nature,” and its pursuit “devolves

upon society as a whole, on all its members and on all its institutions.”¹²⁷ By contrast, “[p]ublic order, whose care devolves upon the state, is a narrower concept,” and consists of three goods “which can and should be achieved by the power which is proper to the state – the power inherent in the coercive discipline of public law.”¹²⁸ Two of the goods – public peace and justice – are not controversial, but the third, public morality, is at the crux of our inquiry. The key to Murray’s analysis is his suggestion that public morality be “determined by moral standards commonly accepted among the people.”¹²⁹ In American culture today, where public morality is defined largely in terms of the quest for individual autonomy, Murray’s work seems to stand in some tension with subsidiarity, and indeed could be twisted in an attempt to justify Catholic Charities falling in line with the public consensus on the importance of access to contraceptives.

At the time Murray was writing, of course, he was concerned primarily with laying the theoretical groundwork for creating space between secular law and Church teachings. At issue was the extent to which a pluralist society could legitimately deviate from religious truth, not the extent to which the collective mechanisms of a pluralist society could preclude its members from adhering to religious truth. In other words, Murray was focused more on reining in the collectivizing capacity of Church teaching than on constructing a robust defense against the collectivizing impulse of secular society.

¹²⁷ JOHN COURTNEY MURRAY, RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 145 (J. Leon Hooper ed., 1993).

¹²⁸ *Id.*

¹²⁹ *Id.*

This is not to suggest that the Church must withdraw into a strictly defensive mode when it enters the public policy arena, although undoubtedly there will be more frequent cause for Catholics to engage in the rights discourse of which they have tended to be skeptical.¹³⁰ Certainly top-down economic initiatives do not raise the same concerns as top-down enforcement of contested moral claims.¹³¹ But even on questions of morality, Pope John Paul II's work ably reflects that some moral truths are non-negotiable, even in the pluralist public sphere.¹³² The debate over the recriminalization of abortion, to take the most prominent example, cannot be understood simply as an attempt to close out alternative conceptions of the good through state coercion, but stands as an unavoidably collective conversation to determine which members of society have standing even to enter into the pursuit of the good. Whatever stance someone takes on the ultimate determination, the determination itself – that a fetus either possesses or lacks such standing – must be enforced through the coercive mechanisms of the state; to devolve the conversation to individuals and subcommunities is to answer it definitively in the negative. The death penalty is similarly situated. As Greg Kalscheur explains in his recent exploration of Murray's jurisprudence, "reason compels civil society to seek the

¹³⁰ A robust conception of constitutional freedom need not be expressed as merely the market preferences of individual consumers. Subsidiarity is consistent with certain visions of federalism, and other constitutional provisions – most obviously rights of association and religious liberty, but potentially privacy and substantive due process rights as well – are essential to the cultivation of autonomy for community-centered visions of the good that diverge from individualist norms.

¹³¹ Although the Church's support for "living wage" legislation, for example, emanates from the moral anthropology, such legislation does not close out others' pursuit of alternative conceptions of morality, unless we stretch morality to encompass an employer's desire to save money.

¹³² John Paul II, Encyclical Letter, *Evangelium vitae* (1995).

common good and to recognize that the effort to secure some aspects of the common good may require the help of the state acting through the coercive force of law.”¹³³

But other aspects of the moral anthropology may not be appropriate for advocacy aimed at top-down enforcement. Again to quote Kalscheur, “[t]he limited effectiveness of legal coercion compelling obedience through fear of punishment as a vehicle toward real moral reform means that the law must be used with caution in a free society.”¹³⁴ By way of obvious illustration, those who support Catholic Charities’ resistance to the state’s efforts to compel the provision of contraceptives would no doubt express misgivings were the organization to embark on an effort to convince legislators to prohibit any employer from providing coverage for contraceptives. The misgivings would be well-placed, for replacing one state-imposed vision of the morally contested good with another does not advance the cause of Catholic social teaching in the long run.

Perhaps more controversially, the criminalization of sexual acts between consenting adults of the same gender represents a top-down imposition of a widely disputed conception of the common good. Beyond the question of whether such measures are effective in compelling obedience, such measures stand in tension with subsidiarity’s premise, as they turn the cultivation of the common good into a zero-sum contest of raw power. As we have seen in California, such contests do not necessarily hold out hope for the realization of the social teaching’s basic premises. Even among those who celebrate the pedagogical potential of law, hesitation is in order, for the

¹³³ 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. SOCIAL THOUGHT (2004).

¹³⁴ *Id.*

pedagogical potential is realized only through the state's coercive trump over individuals and communities who resist the lesson's import; needless to say, there are plenty of lessons that proponents of individualism and consumerism would love to impart to those who see the world differently.

Many reasonable and faithful adherents to Catholic social teaching will disagree over the range of anthropologically authentic moral claims that are not subject to compromise under the pluralist paradigm. Without question, such an exercise entails line-drawing, and the lines' placement will be disputed vigorously. The point of this article is not to articulate some sort of blueprint that resolves these disputes, but simply to suggest that, if we take subsidiarity seriously, we will be very cautious in collectivizing our conception of the good. Subsidiarity subverts modern liberalism's attempts to collectivize the consumerist norms of individualism; but its practical premise stands for a broader localization of moral authority, even where the collectivist impetus is substantively laudable. If we claim that subsidiarity renders localization in a particular context valid only to the extent that the local body's approach contributes to the common good, as defined by the truth claims of the moral anthropology, we have emptied subsidiarity of its real-world meaning. If localization's validity is measured against a standard derived from a contested vision of the good, subsidiarity becomes a simple prop, justifying whatever vision of the good happens to hold sway in the political and legal spheres.

This by no means is to suggest that supporters of subsidiarity are to abandon the front lines in the cultural contests of moral values. Just as a top-down imposition of morality is problematic from the standpoint of subsidiarity, so too is the prospect of a

“naked public square.”¹³⁵ The pluralist impetus, taken to the extreme, is prone to push faith to the sidelines of public life, as illustrated by Alasdair MacIntyre’s story of the modern university:

When universities without religious tests were founded or religious tests were abolished in universities formerly enforcing them, the consequence was not that such universities became places of ordered intellectual conflict within which the contending and alternative points of view of rival traditions of enquiry could be systematically elaborated and evaluated. Had this been the case, unity of belief would have been replaced by a multiplicity of contending beliefs, each permitted to provide its own framework for enquiry. Instead, what happened was that in the appointment of university teachers considerations of belief and allegiance were excluded from view altogether. A conception of scholarly competence, independent of standpoint, was enforced in the making of appointments. A corresponding conception of objectivity in the classroom required the appointed teachers to present what they taught as if there were indeed shared standards of rationality, accepted by all teachers and accessible to all students. And a curriculum was developed which, so far as possible, abstracted the subject matters to be taught from their relationship to conflicting overall points of view. Universities became institutions committed to upholding a fictitious objectivity.¹³⁶

The wisdom of a religious believer’s reluctance to support the adoption of a collectively imposed vision of the common good does not in any way diminish her duty to engage the culture on the question of the common good, including conceptions informed by faith. As Richard Bellamy puts it, “[w]ithin a pluralist polity, liberalism does not frame democracy, excluding, avoiding or segregating putatively intractable types of value conflict,” but simply “informs the democratic spirit through which they are discussed.”¹³⁷ But the aim is not so much to close out public debate through non-

¹³⁵ See RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE*.

¹³⁶ MACINTYRE, *supra* note ___, at 399.

negotiable collective mandates, but to cultivate public debate by more carefully targeting the hearts and minds of the citizenry.

In this regard, Catholic social teaching will always most dramatically display its transformative capacity not through the mechanisms of democracy, but in the life of the human person, a capacity founded on the person's exercise of free will. One unmistakable implication of subsidiarity is that individuals and the communities to which they belong be given space to construct their lives in ways they find meaningful – subject to the foundational determinations on inclusion in human society, as discussed above – even if that meaning defies the authentic anthropology reflected in Catholic social teaching. In this regard, subsidiarity supports Will Kymlicka's observation that "no life goes better by being led from the outside according to values the person doesn't endorse," even if those values are correct.¹³⁸

While the truth claims that comprise Christianity preclude Catholics from buying into the pluralist worldview as an empirical proposition, ultimately pluralism and Catholic social teaching share a mutually supportive subversive stance toward the collectivizing impulse of modern liberalism. MacIntyre reminds us that "only by either the circumvention or the subversion of liberal modes of debate can the rationality specific to traditions of enquiry reestablish itself sufficiently to challenge the cultural and political hegemony of liberalism effectively."¹³⁹ Viewed through the lens of subsidiarity, MacIntyre's prescription is best pursued not by capturing the apparatus of liberalism in

¹³⁷ RICHARD BELLAMY, *LIBERALISM AND PLURALISM: TOWARD A POLITICS OF COMPROMISE* 13 (1999).

¹³⁸ WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 12 (1989).

¹³⁹ MACINTYRE, *supra* note __, at 401.

order to enforce a singular vision of the good, authentic as that vision might be, but by expanding the liberal project's capacity to tolerate the pursuit of divergent, even illiberal, visions of the good, including their pursuit in contexts where the positive liberty of consumers may be impeded.

Approaching the political and legal spheres via the path of value pluralism allows for the common good to be pursued through relationship, rather than through collective mandates; subsidiarity's promise lies along the same path, for it stands as an invitation to relationship, facilitating the pursuit of truth person by person, community by community. Subsidiarity calls us not only to support social structures that facilitate personal responses to human need, but to provide those personal responses ourselves. Any political agenda derived from the Church's social teaching must reflect the relational, non-coercive quality of its message, not only out of recognition of the dignity of those who hold divergent conceptions of the good, but also because a pluralist stance may offer the best hope of maintaining the legal viability of the social teaching itself.