

THE BLESSING OR THE CURSE: WHOSE VALUES WILL GUIDE US? WHERE WILL THEY LEAD US?

PIERO A. TOZZI†

*Ond' io per lo tuo me' penso e discerno
che tu mi segui, e io sarò tua guida,
e trarrotti di qui per loco eterno;
ove udirai le disperate strida,
vedrai li antichi spiriti dolenti,
ch'a la seconda morte ciascun grida;
e vederai color che son contenti
nel foco, perché speran di venire
quando che sia a le beate genti.
A le quai poi se tu vorrai salire,
anima fia a ciò più di me degna¹*

We live in an age where laws and legal culture have taken a decidedly post-Christian turn and, indeed, have become hostile to values rooted in a once-shared Judeo-Christian heritage.

They are the values of a secular “New Orthodoxy”²—which include what Lee Harris calls those of a “carpe diem” society,³ or

† Piero A. Tozzi, a New York-based attorney, has litigated a number of religious liberty and conscience cases and serves as General Counsel to the Catholic Family & Human Rights Institute. He organized and moderated the panel presentation *Attacked on All Fronts: How Secular Ideology is Marginalizing the Rule of Law and Catholic Contributions to Law and Society* at the Fifteenth Annual Society of Catholic Social Scientists Meeting at St. John’s University School of Law on October 26–27, 2007. This Article is an amplification of his remarks at that conference.

¹ DANTE, *INFERNO* canto I, pt. XI (Robert & Jean Hollander trans., 2000).

Therefore, for your sake, I think it wise you follow me: I will be your guide, leading you, from here, through an eternal place where you shall hear despairing cries and see those ancient souls in pain as they bewail their second death. Then you shall see the ones who are content to burn because they hope to come, whenever it may be, among the blessed. Should you desire to ascend to these, you’ll find a soul more fit to lead than I

Id.

² See generally ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* (2001).

³ LEE HARRIS, *THE SUICIDE OF REASON: RADICAL ISLAM’S THREAT TO THE WEST*

one that idolizes radical individualism and sexual autonomy—that are now ascendant. This “New Orthodoxy” would banish religious discourse, and the values informed by such discourse, from the everyday life of the *polis*.⁴

Consider if you would, three examples of legislation that effectively restricts the ability of the Catholic Church and its charitable institutions to participate freely in the public square in a manner consistent with Catholic teaching⁵:

- First: Contraceptive Mandate legislation such as that passed by California⁶ and New York⁷ that would force ostensibly religious organizations like Catholic Charities and the Carmelite Sisters of the Aged either to choose between providing contraceptives to their employees—contrary to Church teaching that contraceptive usage is “intrinsically evil”⁸—or not providing any

11 (2007).

A *carpe diem* society is entirely organized around the principle of maximizing the happiness and pleasure of each individual—a society that puts the individual’s pursuit of happiness above all other obligations to the community, the wider world, or to the future of the individual’s own society. The hallmark of a *carpe diem* society is its complete lack of interest in its own historical and cultural foundation, and its relative indifference to the future: The past is ancient history, and the future will take care of itself.

Id.; cf. Christopher Dawson, “*What Is a Christian Civilization*,” in *CHRISTIANITY AND EUROPEAN CULTURE: SELECTIONS FROM THE WORK OF CHRISTOPHER DAWSON* 32, 32 (Gerald J. Russello ed., 1998) (“[A] secular civilization that has no end beyond its own satisfaction is a monstrosity—a cancerous growth which will ultimately destroy itself.”).

⁴ See generally Piero A. Tozzi, *When Conscience Clashes with State Law & Policy: Catholic Institutions: A Response to Susan Stabile*, 46 *J. CATH. LEGAL STUD.* 161 (2007).

⁵ The following three examples are analyzed in Susan J. Stabile, *When Conscience Clashes with State Law & Policy: Catholic Institutions*, 46 *J. CATH. LEGAL STUD.* 137, 149–59 (2007).

⁶ CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering 2007); CAL. INS. CODE § 10123.196(d)(1) (Deering 2007).

⁷ N.Y. INS. LAW §§ 3221(l)(16)(A)(1), 4303(cc)(1)(A) (McKinney 2007). Speaking of both the California and New York statutes, Susan Stabile has noted that, “The legislation . . . raises a fundamental question of who decides what a religious institution is, and who defines the institution’s mission. It also sets a dangerous precedent for even greater intrusions on religion in the future.” Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 *HARV. J.L. & PUB. POL’Y* 741, 745–46 (2005).

⁸ CATECHISM OF THE CATHOLIC CHURCH ¶ 2370 (2d ed. 1997) [hereinafter CATECHISM] (“[E]very action which, whether in anticipation of the conjugal act, or

prescription drug coverage at all. Indeed, if one looks at the California legislative history, that state's Contraceptive Mandate statute was clearly designed to target the Church and to close a perceived "gap" in contraceptive coverage.⁹

- Second: The mandating that agencies involved in adoption adhere to a policy of "non-discrimination" with respect to the placement of children, without distinguishing between households headed by same-sex or by traditional parents, as seen in Massachusetts in wake of that state's "gay marriage" decision.¹⁰ Under Catholic teaching, "The bond between two men or two women cannot constitute a real family and much less can the right be attributed to that union to adopt children . . ." ¹¹

in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible,' is intrinsically evil."). The Catechism is an authoritative doctrinal compendium—"a sure norm for teaching the faith"—and thus its statements on matters of faith and morals are indicative of what Catholics believe. JOHN PAUL II, APOSTOLIC CONSTITUTION *FIDEI DEPOSITUM* ¶ 4 (Oct. 11, 1992); see also CATECHISM, *supra*, ¶ 3.

⁹ See Tozzi, *supra* note 4, at 164–65.

¹⁰ See *Goodrich v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

As the indomitable Maggie Gallagher has pointed out, once same-sex unions are legitimized as being on par with marriage, State coercion of societal acceptance of the new norm soon follows. Religious organizations may be stripped, for example, of tax exemptions on the ground that they unjustifiably discriminate by refusing to countenance same-sex commitments as being the equal of marriage between a man and a woman. This happened recently in New Jersey, where the State Commissioner for Environmental Protection, Lisa Jackson, decreed that a beachfront pavilion owned by the Methodist Ocean Grove Camp Meeting Association in a Jersey shore town is no longer exempt from state real estate tax due to the Methodists' refusal to permit the performance of same-sex ceremonies on their property. See Maggie Gallagher, *Can New Jersey Punish Methodists for Marriage?*, TOWNHALL.COM, Sept. 19, 2007, http://www.townhall.com/columnists/MaggieGallagher/2007/09/19/can_new_jersey_punish_methodists_for_marriage; see also Roger Severino, *Or for Poorer: How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939, 942 (2007) ("The movement for gay marriage is on a collision course with religious liberty."); cf. Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73, 84–85 & nn.95–96 (2007) (pointing out that while the Church's teaching on abortion ethics date back nearly two millennia, it only recently has been "co-opted by the political sphere," though the ironic result of State intrusion into this realm may be to threaten the tax exemption of religious organizations for simply expounding upon fundamental moral principles from the pulpit during the campaign season).

¹¹ PONTIFICAL COUNCIL FOR THE FAMILY, *FAMILY, MARRIAGE AND "DE FACTO" UNIONS* ¶ 23 (July 26, 2000). The issue of homosexuality and "gay equality" is an

Same-sex adoption is deemed to be “gravely damaging to the rights of children,” as it involves “serious, negative and even irreparable consequences for the normal development of their personalities.”¹² Rather than bowing to state dictates and violating Church teaching, Catholic Charities of Boston ceased participating in all adoptions.¹³

emotionally charged one, and Church teaching at first blush can appear hurtful to those who struggle with same-sex attractions, many of whom who have experienced societal and familial rejection. The Catechism calls upon the faithful to accept those with “deep-seated homosexual tendencies” with “respect, compassion, and sensitivity.” CATECHISM, *supra* note 8, ¶ 2358. A distinction is drawn between individual persons, however, and homosexual acts, which are “‘intrinsically disordered’” and can be approved under “no circumstances.” *Id.* ¶ 2357. If, from this perspective, homosexual acts and the “gay lifestyle” are contrary to the dignity and well-being of the individuals who engage in such activity themselves—and not only harmful to their spiritual well-being, but also their physical, psychological, and social well-being—then it would be a failure of true charity to remain silent when one’s brother is engaged in self-destructive behavior, and encouraging or enabling such self-destructive behavior would be acts of moral cowardice. For a sincere discussion of reconciling orientation with Faith’s invitation, see Eve Tushnet’s contribution to Luke Timothy Johnson & Eve Tushnet, *Homosexuality & the Church: Two Views*, COMMONWEAL, June 15, 2007, at 14, 18–21, available at http://www.commonwealmagazine.org/print_format.php?id_article=1957.

¹² FINAL DECLARATION OF THE INTERNATIONAL SYMPOSIUM ON ADOPTION *THE RIGHTS OF CHILDREN* ¶¶ 13–14, in ENCHIRIDION ON THE FAMILY: A COMPENDIUM OF CHURCH TEACHING ON FAMILY AND LIFE ISSUES FROM VATICAN II TO THE PRESENT 932, 935 (Pontifical Council for the Family ed., 1st English ed. 2004). For cautionary flags raised by social scientists with regard to the effect placement in same-sex households may have on the development and socialization of adopted children, see discussions in Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 29, 41, 45–46 (Robert P. George & Jean Bethke Elshtain eds., 2006) [hereinafter MEANING OF MARRIAGE], and Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 ADOLESCENCE 757 (1996), available at http://findarticles.com/p/articles/mi_m2248/is_n124_v31/ai_19226135. Cf. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 FUTURE OF CHILD. 97, 100–02 (2005) (listing obstacles to sound methodology faced by researchers in the field, from a perspective sympathetic to same-sex parenting); George Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343, 346–74 (2002) (recounting flaws in many studies from a contrary viewpoint).

¹³ See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1. As a footnote, Boston’s Catholic Charities at the time was represented by the white-shoe brahmin firm, Ropes & Gray LLP. Following a threatened boycott of Ropes’s recruitment efforts at Harvard University School of Law by homosexual student activists, Ropes ended its representation of Catholic Charities, which had sought ways to continue its ministry serving hard-to-place

- Third: Mandating that Catholic hospitals provide Plan B “morning after” pills that can act as abortifacients to rape victims upon request without first administering an ovulation test. The most direct doctrinal guidance on the illicitness of so administering Plan B comes from the Pontifical Academy for Life, which finds that “the proven ‘anti-implementation’ action of the *morning-after pill* is really nothing other than a chemically-induced abortion,” and that “those who ask for or offer this pill are seeking the direct termination of a possible pregnancy already in progress, just as in the case of abortion.”¹⁴ Laws in Connecticut,¹⁵ Massachusetts,¹⁶ and California,¹⁷ to cite three examples, override conscience rights and require administration when requested of drugs that can cause the expulsion of a fertilized ovum, i.e., a life already in being, without exempting Catholic

children without compromising Catholic moral principles. See Sacha Pfeiffer, *Harvard Law Group Hits Ropes & Gray; Lambda Urged a Halt to Work with Church on Gay Adoption Ban*, BOSTON GLOBE, Mar. 15, 2006, at E1.

To publicize that many students viewed Ropes’s work for Catholic Charities as anti-gay, Lambda members discussed staging protest rallies when Ropes arrived on campus this fall to recruit new associates . . . “The words ‘boycott-slash-picket’ were thrown around,” said . . . a third-year student and Lambda board member who said he had wanted to shame Ropes into ending its work on behalf of Catholic Charities and warn the firm that the issue could hurt recruiting at Harvard.

Id. Whether Ropes comported itself in accordance with its lawyerly ethical obligations is open to question: The governing canon commentary states, “Legal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval.” MASS. RULES OF PROF’L CONDUCT R. 1.2 cmt. 3 (1997); *cf. id.* R. 1.16.

¹⁴ PONTIFICAL ACADEMY FOR LIFE, *STATEMENT ON THE SO-CALLED “MORNING AFTER PILL”* ¶ 3 (Oct. 13, 2000), http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20001031_pillola-giorno-dopo_en.html (“Pregnancy, in fact, begins with fertilization and not with the implantation of the blastocyst in the uterine wall . . .”). Likewise, the pertinent health care directive from the United States Conference of Catholic Bishops states, “It is not permissible . . . to initiate or recommend treatments that have as their purpose or direct effect the removal, destruction or interference with the implantation of a fertilized ovum.” UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Ethical and Religious Directives for Catholic Health Care Services* pt. 3, dir. 36 (4th ed. 2001), <http://www.usccb.org/bishops/directives.shtml>.

¹⁵ CONN. GEN. STAT. ANN. § 19a-112e(b)(3) (West 2008).

¹⁶ MASS. GEN. LAWS ANN. ch. 111, § 70E (West 2007).

¹⁷ CAL. PENAL CODE § 13823.11(e)(1)–(2) (West 2007).

hospitals. While the response to date of the bishops of Connecticut has been to capitulate to that State's encroachment on religious liberty, other bishops have steadfastly maintained that they would shut down Catholic hospitals before cooperating materially with intrinsically evil acts.¹⁸

Taken together, these three examples show the Church and conscientious Catholics¹⁹ being affirmatively excluded from full participation in civic life—or allowed to participate only at the price of compromising their institutional or personal integrity—to an extent almost unthinkable even half a generation ago.²⁰

¹⁸ See John-Henry Westen, *Wisconsin Bishop Breaks from Conference and Opposes Emergency Contraception in Catholic Hospitals*, LIFESITENEWS, Dec. 19, 2007, <http://www.lifesite.net/ldn/2007/dec/07121906.html>; John-Henry Westen, *Colorado Springs Bishop Says He Does Not and Would Not Permit Plan B in Catholic Hospitals*, LIFESITENEWS, Oct. 10, 2007, <http://www.lifesite.net/ldn/2007/oct/07101001.html>. Pope Benedict XVI recently spoke out on the “ethical implications of the use of particular drugs,” including those “that have the goal of preventing the implantation of the embryo.” John-Henry Westen, *Pope Tells Pharmacists Not to Dispense Drugs to Inhibit Implantation; Implications for Plan B at Catholic Hospitals*, LIFESITENEWS, Oct. 29, 2007, <http://www.lifesite.net/ldn/2007/oct/07102902.html>.

¹⁹ Some would phrase the encroachment upon the autonomy of Catholic institutions in carrying out their ministries in terms of a violation of “institutional conscience.” See Grattan T. Brown, *Institutional Conscience and Catholic Health Care*, 16 LIFE & LEARNING 413, 416 (2006) (positing that it is possible to speak of institutions as having a conscience “by analogy” to individuals); see also Stabile, *supra* note 5, at 138. Laws aimed at coercing a change in the practices of Catholic institutions, of course, impact those individuals, such as doctors and health care workers, who carry on the work of these institutions. Moreover, the State has likewise sought to compel conscientious individuals, as opposed to institutions, to conform to its dictates—consider, for example, the April 2005 executive order issued by Governor Rod Blagojevich of Illinois that in effect coerced pharmacists to either dispense abortifacients or jeopardize their licenses. See ILL. ADMIN. CODE tit. 68, § 1330.91(j)–(k) (2008). Pharmacists brought suit under the Illinois Health Care Right of Conscience Act, forcing the State to stipulate that the order does not bind individual pharmacists, applying only to pharmacies. See Elenor K. Schoen, *Pharmacists Win Washington Victory*, NAT'L CATH. REG., Nov. 25–Dec. 1, 2007, <http://groups.google.com/group/Kitsap-Human-Life/msg/7962fea801e330c6> (referencing an Illinois case and noting that pharmacists in Illinois, Texas, and Wisconsin have been terminated for their conscientious refusal to dispense Plan B, which can act as an abortifacient).

²⁰ One religious leader who foresaw a future conscience clash between the State and religious institutions was John Cardinal O'Connor. When in the 1980s then-New York Mayor Edward I. Koch issued Executive Order 50, requiring religious institutions providing social services pursuant to City contracts to institute not only a non-discrimination policy with respect to “sexual orientation or affectional preference” but also to adopt an affirmative hiring policy to recruit self-identified

The political scientist Hugh Heclo in his essay, *Christianity and Democracy in America*, remarks that there is currently an “estrangement” between citizens whose religious faith informs their consciences and motivates their civic commitment, and those who would premise participation in democratic discourse upon adherence to liberal, secular “value free” values.²¹ While he does not think this estrangement will lead to outright persecution—and in this we hope he is right—Professor Heclo does see this as leading to a “rupture,” whereby those who profess religion-inspired objective values are excluded from the public square by those decreeing that only their secular, relativistic values shall be given a hearing.²² The implicit assumption is that in a commonwealth where there is a multiplicity of creedal allegiances (or devotion to no creed at all), where each citizen is entitled to genuflect before altars of his own choosing, only the latter values can be deemed neutral, and those who would disrupt or displace such neutrality must be quarantined.

Yet any notion that such relativistic values can be somehow “neutral” is, of course, false, for such relativistic values are as

homosexuals and bisexuals in accord with a quota set by the City’s Bureau of Labor Services, Cardinal O’Connor, with the support of Agudath Israel and the Salvation Army (but *not* the Diocese of Brooklyn), told Mayor Koch that he would not comply with an infringement upon the autonomy of the Church, even if the City followed through with its threat not to renew contracts with Catholic social service agencies. See JOHN CARDINAL O’CONNOR & EDWARD I. KOCH, HIS EMINENCE AND HIZZONER: A CANDID EXCHANGE 115–23 (1989). The Cardinal successfully challenged the order in court, which deemed the mayor to have usurped legislative functions. See *Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 364, 482 N.E.2d 1, 10, 492 N.Y.S.2d 522, 531 (1985). Cardinal O’Connor, in his vigorous defense of institutional religious autonomy, presciently foresaw trends in the law that would one day lead to Catholic health care institutions being forced to either abandon their tradition of service or violate their integrity. Cf. Jacob M. Appel, ‘Conscience’ vs. Care: How Refusal Clauses Are Reshaping the Rights Revolution, 88 MED. & HEALTH R.I. 279 (2005), available at http://findarticles.com/p/articles/mi_qa4100/is_200508/ai_n14898588 (noting the disproportionate role Catholic institutions play in U.S. healthcare and providing an informative overview of the issue, albeit one slanted toward opponents of conscience rights). Compare O’CONNOR & KOCH, *supra*, at 129 (envisioning “a day when every Catholic hospital and nursing home could be forced to close unless willing to violate our Catholic teachings”), with R. Alta Charo, *The Celestial Fire of Conscience—Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471, 2473 (2005) (suggesting that health care provider conscience rights should be limited and in some cases overridden).

²¹ See Hugh Heclo, *Christianity and Democracy in America*, in CHRISTIANITY AND AMERICAN DEMOCRACY 1, 5 (Hugh Heclo ed., 2007).

²² See *id.* at 142.

“value laden” as those proffered by adherents to a “value objectivist” worldview.²³ As Robert P. George has elucidated:

To speak of truth frightens some people today. They evidently believe that people who claim to know the truth about anything—and especially about moral matters—are fundamentalists and potential totalitarians. But . . . those on the other side of the great debates over social issues such as abortion and marriage make truth claims—moral truth claims—all the time. They assert their positions with no less confidence and no more doubt than one finds in the advocacy of pro-lifers and defenders of conjugal marriage. They proclaim that women have a fundamental right to abortion. They maintain that “love makes a family” and other strong and controversial moral claims.²⁴

To state things bluntly, the question is not whether values or morality exist and whether they are to be imposed—the ostensible objection of those who profess to oppose “values” legislation²⁵—but rather, whose values or whose morality (or amorality) is to be imposed.²⁶ Indeed, the proponents of the New Orthodoxy can be as imperialistic as the staunchest advocates of the Old who came before them, seeking to condition full participation in civil society upon adherence to their values and

²³ See MICHAEL D. AESLICHMAN, *THE RESTITUTION OF MAN: C.S. LEWIS AND THE CASE AGAINST SCIENTISM* 77 (1998) (“[T]he relativization of the Absolute—the destruction of the concept of the objective Good—leads necessarily to ‘the absolutization of the relative.’” (quoting Russian philosopher Levitzky)). Using a memorable turn of phrase, then-Joseph Cardinal Ratzinger, just before his elevation to the papacy, posited on the one hand “a clear faith, based on the Creed of the Church,” that is often labeled “fundamentalism,” opposed to which is a “*dictatorship of relativism* which does not recognize anything as for certain and which has as its highest goal one’s ego and one’s own desires.” Cardinal Joseph Ratzinger, Homily at the Mass for the Election of the Roman Pontiff (Apr. 18, 2005), in Hugh Hewitt, *In His Own Words: Looking Back on Joseph Cardinal Ratzinger’s Historic Homily*, WEEKLY STANDARD, Apr. 20, 2005 (emphasis added).

²⁴ Robert P. George, *Law and Moral Purpose*, FIRST THINGS, Jan. 2008, at 23.

²⁵ See generally ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993).

²⁶ [The] requirement of disinterestedness in fact covertly presupposes one particular partisan type of account of justice, that of liberal individualism, which it is later to be used to justify, so that its apparent neutrality is no more than an appearance, while its conception of ideal rationality as consisting in the principles which a socially disembodied being would arrive at illegitimately ignores the inescapably historically and socially context-bound character which any substantive set of principles of rationality, whether theoretical or practical, is bound to have. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 3–4 (1988).

seeking to use the law to impose their vision of the Social Project.²⁷

The Church as an institution and individual Catholics should not be cowed from participating in the public square nor voicing a Catholic-inspired vision of the Common Good. As free citizens of the Republic, one should neither be dissuaded from exercising one's civic rights nor fulfilling one's civic duties; ours is not a society where some secularized "religion test" excludes religious believers.²⁸ Such revisionism is not only ahistorical,²⁹ but downright un-American, as it seeks to silence voices whose civic input derives from religious principles, which it simultaneously deems dangerous (and hence should be forbidden from meddling in affairs of state and coerced into conformity)³⁰ or

²⁷ See, e.g., Gallagher, *supra* note 10 ("[T]he government of New Jersey has officially endorsed the idea that treating same-sex couples any different from unions of husband and wife is immoral discrimination—and those who do so must be disciplined for their bigotry.").

²⁸ As the American bishops state the issue:

Some question whether it is appropriate for the Church to play a role in political life. . . . [T]he United States Constitution protects the right of individual believers and religious bodies to participate and speak out without government interference, favoritism or discrimination. Civil law should fully recognize and protect the Church's right, obligation and opportunities to participate in society without being forced to abandon or ignore her central moral convictions. Our nation's tradition of pluralism is enhanced, not threatened, when religious groups and people of faith bring their convictions and concerns into public life.

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Forming Consciences for Faithful Citizenship: A Call to Political Responsibility from the Catholic Bishops of the United States* 6 (2007), <http://www.usccb.org/faithfulcitizenship/FCStatement.pdf>.

²⁹ See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002) ("[T]he constitutional authority for separation is without historical foundation."). See generally BARRY A. SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (1994) (arguing that a reformed communitarian republicanism was an integral concept at our nation's founding).

³⁰ See, e.g., CHRIS HEDGES, AMERICAN FASCISTS: THE CHRISTIAN RIGHT AND THE WAR ON AMERICA 33 (2006) (summoning the mainstream churches, the universities, the Democratic party, and the media to exclude Evangelical Christians and their conservative allies from treatment as "legitimate player[s] in an open society," but rather regard them as threats to democracy who should be "forced to include other points of view to counter their hate talk in their own broadcasts" and "denied the right to demonize whole segments of American society" (emphasis added)).

intellectually debased and lampoonable³¹—in either case, the People are not to be trusted.

Indeed, rather than religious values threatening civic republicanism—values that de Tocqueville credited with providing the foundation for the American republican experiment³²—one has more to fear from the elites who yearn for an anti-democratic “just society.” It is the secular elitists who pose the threat to republican democracy and individual conscience rights. Most often, they have sought to legislate their ideals from the judicial bench, while simultaneously ruling as out-of-bounds the desire of citizens whose values are based on religious principles from active participation in the civic life of the Republic.³³ (It should be noted, however, that the contraceptive mandate and “emergency contraception” statutes referenced above were acts of *legislative* encroachment upon conscience rights and religious liberty that perhaps signal more of the same to come. This perhaps calls for a rethinking among those who traditionally decried judicial activism and saw legislative deliberation informed by the common sense mores of the American people as a safeguard against secular hostility.)³⁴

³¹ See, e.g., THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA 1–2 (2004).

People getting their fundamental interests wrong is what American political life is all about. This species of derangement is the bedrock of our civic order; it is the foundation on which all else rests. This derangement has put the Republicans in charge of all three branches of government; it has elected presidents, senators, governors; it shifts the Democrats to the right and then impeaches Bill Clinton just for fun.

Id.

³² [T]here is no country in the world where the Christian religion retains a greater influence over the souls of men than in America; and there can be no greater proof of its utility, and of its conformity to human nature, than that its influence is most powerfully felt over the most enlightened and free nation of the earth.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 308 (Henry Reeve trans., Colonial Press 1900) (1835), available at http://xroads.virginia.edu/~HYPER/DETOC/toc_indx.html.

³³ See discussion *supra* notes 28–32 and *infra* notes 34–54 and accompanying text.

³⁴ See Piero A. Tozzi & Lisa M. Tankoos, New York State: Steering a Course Between the Scylla of Judicial Activism and the Charybdis of Wayward Legislating—But for How Long? 8 (Ams. United for Life State Supreme Court Project, White Paper Series, 2007), available at http://www.aul.org/xm_client/client_documents/sscp/NY.pdf (“Where a legislature is unfriendly to life, judicial restraint is often merely a theoretical consolation, rather than one with beneficial practical consequences.”).

Voters whose values are informed by religion are not seeking to surreptitiously impose values: Rather, we want to get in the scrum, mix it up in the free-for-all of the political process, and defend the ground we now hold, just as other interest groups do.³⁵ There is no basis for excluding or deeming such voices out of place, or to hold that they are illegitimate because they put forward public policy prescriptions derived from religiously-inspired or objective moral principles.

Catholics have contributions to make that may indeed lead our society out of the cul-de-sac it has entered.³⁶ The Second Vatican Council issued a call, directed at the laity (and especially pertinent, one might add, for lawyers), for active engagement with the pressing societal problems of the age:

Christ's redemptive work, while essentially concerned with the salvation of men, includes also the renewal of the whole temporal order. Hence the mission of the Church is not only to bring the message and grace of Christ to men but also to penetrate and perfect the temporal order with the spirit of the Gospel. . . . Since, in our own times, new problems are arising and very serious errors are circulating which tend to undermine the foundations of religion, the moral order, and human society itself, this sacred synod earnestly exhorts laymen—each according to his own gifts of intelligence and learning—to be more diligent in doing what they can to explain, defend, and properly apply Christian principles to the problems of our era in accordance with the mind of the Church.³⁷

³⁵ See THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961).

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. . . . The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society.

Id.

³⁶ “The Catholic community brings important assets to the political dialogue about our nation’s future. We bring a consistent moral framework—drawn from basic human reason that is illuminated by Scripture and the teaching of the Church.” UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 28, ¶ 12.

³⁷ John PAUL VI, DECREE ON THE APOSTOLATE OF THE LAITY *APOSTOLICAM ACTUOSITATEM* ¶¶ 5–6 (Nov. 18, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651118_apostolicam-actuositatem_en.html; *cf.* 1 *Peter* 3:15 (New American) (counseling believers to never be afraid to give an account for the hope that resides within).

“Very serious errors.”

Consider the alternative offered by the “carpe diem” society and the values it holds out as its highest aspirational principles,³⁸ as voiced in a litany of Supreme Court cases:

- One, a right to contracept—as the Supreme Court held in 1965 in *Griswold v. Connecticut*;³⁹
- Two, a right to abort—as the Supreme Court held in 1973 in *Roe v. Wade*;⁴⁰
- Three, a right to sodomize—as the Supreme Court held in 2003 in *Lawrence v. Texas*;⁴¹ and
- Four, a right to euthanize—as the Supreme Court has (thankfully) yet to hold.⁴²

³⁸ See generally RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (Vintage Books 1994).

³⁹ 381 U.S. 479 (1965).

⁴⁰ 410 U.S. 113 (1973).

⁴¹ 539 U.S. 558 (2003).

⁴² See *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (holding that the United States Constitution does not guarantee a right to suicide or assisted suicide, deferring resolution of the issue to state legislatures); see also *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

Beyond the issue of voluntary euthanasia, if one accepts the Culture of Death logic of *Roe*—with its implicit premise that the unborn have no intrinsic right to life—then using the emergence of the child from the birth canal to demarcate permissible feticide from impermissible homicide is an arbitrary one.

I do not deny that if one accepts abortion . . . the case for killing other human beings, in certain circumstances, is strong. . . [T]his is not something to be regarded with horror. . . On the contrary, once we abandon those doctrines about the sanctity of human life . . . it is the refusal to accept killing that, in some cases, is horrific.

PETER SINGER, *PRACTICAL ETHICS* 175 (2d ed. 1993).

In a nation that witnessed the death by starvation of Terry Schiavo on CNN and Fox News, what protections ultimately undergird the (born and innocent) individual's right to life are far more tenuous than people might think. See Robert T. Miller, *The Legal Death of Terri Schiavo*, *FIRST THINGS*, May 2005, http://www.firstthings.com/article.php3?id_article=191.

The abortion cases of the 1970s and 1980s wrestled with drawing lines over a developing fetus's relative protection to governmental regulatory protection. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989) (rejecting a “rigid line” that allowed state regulation of abortion after viability but not before); *Roe*, 410 U.S. at 164–65 (positing trimester framework). If the right to life is solely dependent upon the State as guarantor, however, then the State which once drew those lines can also erase and redraw them elsewhere. Far more to the nub of the issue than the debate between the Justices in *Roe* was the New York Court of Appeals decision in the important pre-*Roe* abortion case *Byrn v. New York City Health & Hospitals*

Put aside religion and morality for a moment and consider this: Any society that has embraced such “values” has embraced a biological dead end, and simply can no longer articulate a vision of the Common Good or pass on its inheritance to future generations. It is simply refusing to perpetuate itself, in effect contracepting, aborting, sodomizing, and euthanizing itself out of existence.

Indeed, this sage point was grasped by the Supreme Court once upon a time: “Marriage and procreation are fundamental to the very existence and survival of the race.”⁴³

With the landmark contraception cases—*Griswold v. Connecticut*⁴⁴ and *Eisenstadt v. Baird*⁴⁵—however, the Court led (or rather imposed by judicial fiat) a great social revolution, which is still celebrated in certain precincts as a great victory for individual liberty.⁴⁶ From the logic of these two cases, with their

Corp., which held that it is the prerogative of the legislature to determine who should be accorded legal personality. 31 N.Y.2d 194, 201, 286 N.E.2d 887, 888, 335 N.Y.S.2d 390, 393 (1972). Judge Robert M. Burke’s spirited dissent attacked the positivistic underpinning of the court’s opinion, declaring the primacy of natural rights that preexist the Constitution, while savaging the philosophical presumption that human beings are “merely creatures of the State.” *Id.* at 205, 286 N.E.2d at 892, 335 N.Y.S.2d at 397 (Burke, J., dissenting); see Tozzi & Tankoos, *supra* note 34, at 11 nn.14–17 (discussing the *Byrn* case).

⁴³ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down Oklahoma’s Criminal Sterilization Act as unconstitutional). In *Skinner*, the Supreme Court effectively, though not explicitly, overruled *Buck v. Bell*, which had upheld a Virginia statute that allowed for the sterilization of “mental defectives,” provided that procedural niceties were duly observed. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.) (“Three generations of imbeciles are enough.”). The sole dissenter in *Buck*, Justice Pierce Butler, was Catholic, a fact to which his squeamish scrupulosity is often attributed. See WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1106–07 (1986) (“Commentators usually attribute [Justice Butler’s] opposition to his Catholicism.” (citing DAVID J. DANIELSKI, A SUPREME COURT JUSTICE IS APPOINTED 189–90 (1964))).

⁴⁴ 381 U.S. 479 (1965).

⁴⁵ 405 U.S. 438 (1972).

⁴⁶ Legislation such as the California and New York Contraceptive Mandates goes far beyond the laissez-faire liberty reasoning of *Griswold*, since this new generation of laws, stressing equality as opposed to liberty, seeks to compel all who dissent to accede. See Stabile, *supra* note 5, at 138–39.

[W]e are very quick in American society to move from negative rights to positive rights, that is, to move from saying that the law should not interfere with someone’s ability to do something to saying the law—and everyone else—must affirmatively support that person’s ability to do that thing.

Id.; accord Tozzi, *supra* note 4, at 164–66. But see Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, in MEANING OF MARRIAGE, *supra* note 12, at 172, 173 (pointing out that the foundation for increasing statist regulation of society was inherent in

implicit substantive due process reasoning,⁴⁷ the other aforementioned mileposts toward a sterile culture, *Roe*⁴⁸ and

the privacy-based libertarian case law: “One of the unintended consequences of the jurisprudence of privacy rights is that it serves to diminish liberty as it leaves us, and especially our children, increasingly susceptible to statist regulations in those domains where the state is utterly unfit to rule”).

⁴⁷ Justice William O. Douglas protested too much that *Griswold* depended on infusing a substantive element to the Fourteenth Amendment’s Due Process Clause:

[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that [*Lochner v. New York*] should be our guide. But we decline that invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs or social conditions.

Griswold, 381 U.S. at 481–82, 484–85 (ostensibly basing the right of married couples to use contraceptives on “penumbras” and “zones of privacy” found in various provisions of the Bill of Rights). As Judge Bork points out, “*Griswold* as an assumption of judicial power unrelated to the Constitution is, however, indistinguishable from *Lochner*.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95–100 (1990) (referring to *Griswold*’s “right of privacy” as a constitutional time bomb). *Eisenstadt* served as a bridge from *Griswold* to *Roe*:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt, 405 U.S. at 453. Indeed, a highly influential law review article anticipated *Griswold*’s “penumbral right[s] emanating from values embodied in the express provisions of the Bill of Rights” as the key to striking down all state laws prohibiting abortion. Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730, 756 (1968). For a further discussion of the article, see A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL’Y 1035, 1036 (2006).

⁴⁸ 410 U.S. 113, 152–53 (1973) (citing *Griswold* as decreeing a right to privacy “broad enough” to include abortion and relying on substantive due process reasoning); see also *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (companion case to *Roe v. Wade*).

I find nothing in the language or history of the Constitution to support the Court’s judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.

Id.; see also *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

As in *Lochner* and similar cases applying substantive due process standards . . . adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be “compelling.”

Lawrence,⁴⁹ ineluctably followed.⁵⁰ Whereas not that long ago contraception was commonly recognized to be an “immoral and reprehensible” practice promoting licentiousness⁵¹—as evidenced by the survival well into the sixties and seventies of statutes such as those in Connecticut and Massachusetts that restricted the use and availability of contraception—that moral consensus quickly eroded.⁵²

Id.

⁴⁹ 539 U.S. 558, 578–79 (2003) (holding that the autonomy of individuals “concerning the intimacies of their physical relationship, even where not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause,” though the Court stopped short of labeling such a right as “fundamental”). *Lawrence* explicitly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and begat *Goodrich v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003), which relied on *Lawrence* and held that Massachusetts law limiting marriage to that between one man and one woman “does not meet the rational basis test for either due process or equal protection.” *Bowers* was very much attuned to the perils of substantive due process reasoning:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights. . . . The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Bowers, 478 U.S. at 194.

⁵⁰ In terms of cultural sea changes, widespread acceptance of contraception among heterosexual couples, married or otherwise, makes it difficult to criticize homosexual sodomy in principle without being morally arbitrary. In either case, sterility and sexual self-gratification are freely chosen, with the procreative and uniative aspects of conjugal relations thwarted.

[C]ouples achieve only a superficial union through contracepted sexual intercourse; they do not achieve the union appropriate to spouses. As *Humanae vitae* states, the goods of union and procreation are inseparable; spouses cannot achieve one good without due ordination to the other. . . . The fact is that contracepted sexual intercourse yields neither the good of procreation nor the good of spousal union.

Janet E. Smith, *The Importance of the Concept of “Munus” to Understanding Humanae Vitae*, in *WHY HUMANAЕ VITAE WAS RIGHT: A READER* 307, 317–18 (Janet E. Smith ed., 1993) [hereinafter *HUMANAЕ VITAE READER*]; see also John Finnis, *Personal Integrity, Sexual Morality and Responsible Parenthood*, in *HUMANAЕ VITAE READER*, *supra*, at 173, 179–80 (comparing contracepted sexual intercourse with the “intrinsic character” of homosexual sexual acts).

⁵¹ See *Foy Prods. Ltd. v. Graves*, 235 A.D. 475, 480, 3 N.Y.S.2d 573, 577 (3d Dep’t 1938). Once upon a time, the *Washington Post* inveighed against the use of contraceptives as a matter of editorial policy, warning that acceptance would “sound the death knell of marriage” and “encourage indiscriminate immorality.” Editorial, *Forgetting Religion*, WASH. POST, Mar. 22, 1931, at S1; cf. PAUL VI, *ENCYCLICAL LETTER HUMANAЕ VITAE* ¶ 17 (July 25, 1968) [hereinafter *HUMANAЕ VITAE*] (remarking that acceptance of contraceptives would open up a wide road “towards conjugal infidelity and the general lowering of morality”).

⁵² This is as true among baptized Catholics as it is among the general populace.

Judge Robert H. Bork, in criticizing the judicial hegemonism of the contraceptive decisions, explained with respect to *Griswold* that

[i]t seems obvious that the case was not arranged out of any fear of prosecution, and certainly not the prosecution of married couples. *Griswold* is more plausibly viewed as an attempt to enlist the Court on one side of one issue in a cultural struggle. Though the statute was originally enacted when the old Yankee culture dominated Connecticut politics, it was now quite popular with the Catholic hierarchy and with many lay Catholics whose religious values it paralleled. The case against the law was worked up by members of the Yale law school faculty and was supported by the Planned Parenthood Federation of America, Inc., the Catholic Council on Civil Liberties, and the American Civil Liberties Union. A ruling of unconstitutionality may have been sought as a statement that opposition to contraception is benighted and, therefore, a statement about whose cultural values are dominant. Be that as it may, the upshot was a new constitutional doctrine perfectly suited, and later used, to enlist the Court on the side of moral relativism in sexual matters.⁵³

Though detractors highlighted Bork's criticism of *Griswold* at his failed confirmation hearing, he has consistently distinguished himself from too close an association with the actual anti-contraceptive statutes themselves, questioning whether precatory "affirmations of moral principle" are ever a proper use of law (particularly criminal law), and noting that the Massachusetts statute made no sense.⁵⁴

See Tim Townsend, *Bishops Stand Firm on Birth Control: Church Renews Tenet to Persuade Young Catholics*, WASH. POST, Nov. 25, 2006, at B9 (noting that ninety percent of American Catholics ignore Church teaching on contraception). See generally LESLIE WOODCOCK TENTLER, *CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY* (2004) (providing historical overview of U.S. Catholic attitudes and practices towards contraception since the nineteenth century). For a roadmap showing "how we got here," see Michael A. Scaperlanda, Assoc. Dean for Research and Edwards Family Chair in Law, Univ. of Okla. Sch. of Law, Remarks at the Christian Legal Society Global Convocation: Sex, Marriage, and Procreation: The Judicial Decimation of American Family Law (Oct. 28–31, 2004), <http://www.mirrorofjustice.com/mirrorofjustice/scaperlanda/sexmarriageandprocreation.pdf>. See ROBERT MARSHALL & CHARLES DONOVAN, *BLESSED ARE THE BARREN: THE SOCIAL POLICY OF PLANNED PARENTHOOD* 5–54 (1991) (describing how proponents advanced the birth control agenda incrementally, bringing it from disrepute to widespread acceptance).

⁵³ See BORK, *supra* note 47, at 96–97.

⁵⁴ See *id.* at 96 (noting further that this is different from saying that the statute

But were such precatory laws—or rather the idealized societal aspirations they conveyed—“benighted?”

Laws, even precatory ones that are not enforced, can have a normative effect, helping shape societal behavior and attitudes. On the positive side, the example of civil rights legislation helped much of this nation overcome a bigoted past that had previously enshrined unjust racial discrimination in Jim Crow Laws and the like, not simply due to their (brute) enforcement, but also because they made a (moral) statement about where we should be as a society.⁵⁵ Laws that restrict contraceptive usage conform

was unconstitutional). John Courtney Murray, S.J., also inveighed against conflating the moral and the legal. With respect to what was at issue in *Griswold*, Father Murray wrote that the Connecticut statute

confuses the moral and the legal, in that it transposes without further ado a private sin into a public crime. The criminal act here is the private use of contraceptives. The real area where the coercions of law might, and ought to, be applied, at least to control an evil—namely, the contraceptive industry—is quite overlooked.

JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 157 (1960).

⁵⁵ Evident in the *Goodrich* opinion and much of the “gay marriage” literature is an equating of discrimination against homosexuals (including, most pointedly, denying them the right to “marriage equality”) with racial bigotry. See *Goodrich v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance . . . because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.

Id. (citing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948); *Loving v. Virginia*, 388 U.S. 1 (1967)).

A full elaboration of this topic is beyond the scope of this Article, though one may note that the analogy assumes as a given that homosexual orientation is innate and immutable (like race), as opposed to being influenced by developmental factors and capable of changing over time. It also assumes that a person with a homosexual orientation must act out desires in an eroticized manner, and that those who engage in homosexual acts and adopt a homosexual lifestyle *ipse dixit* become a discernable minority group, i.e., one based on willful behavior, that is the equivalent of a racial minority. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (“Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender or alienage.”). With respect to marriage, the term “gay marriage” imposes a new definition upon the word that would obliterate the notion of marriage as being dependent upon the biological complementarity of the sexes, ordered to natural birthing and raising of children, for the flourishing of individuals and society as a whole. Unjust discrimination—that is, not treating similarly situated persons in a like fashion—would be to deny persons the ability to wed members of the opposite sex because they are perceived to manifest a certain orientation, but *not* denying them the ability

with the Natural Law,⁵⁶ which, even where such laws are recognized mainly in the breach, constitute an affirmation that human procreation is “fundamental to the very existence and survival of the race”⁵⁷ and that conjugal respect for one’s spouse is affirmed as a positive good and societal ideal.

The red-herring issue of policing the marital precincts notwithstanding,⁵⁸ this is the socially-constructive, positive reinforcement message that is sent when precatory legislation like that at issue in *Griswold* remains on the books, whereas repealing such laws—whether legislatively after due deliberation or, Thor-like, striking them down judicially—sends the opposite message. Indeed, overturning such laws further enshrines individual autonomy as the ultimate societal good, which is a worm that ultimately bores into and makes it impossible to speak of the Common Good, or even a common social project with a shared inheritance extended across generations.⁵⁹

to “marry” someone of the same sex, since that is not and simply cannot be “marriage,” without imposing an artificial meaning upon the word or engaging in subversive linguistic deconstructionism. See Sugrue, *supra* note 46, at 188–89 (noting that heterosexual marriage is pre-political and exists in a state of nature, whereas same-sex “marriage” is by necessity a political institution, dependent upon the State’s arrogating to itself “the ability to declare what constitutes marriage”); cf. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 319 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

Conjugal Society is made by a voluntary Compact between Man and Woman: and tho’ it consist chiefly in such a Communion and Right in one anothers Bodies, as is necessary to its chief End, Procreation, yet it draws with it mutual Support, and Assistance, and a Communion of Interest too, as necessary not only to unite their Care, and Affection, but also necessary to their common Off-spring, who have a Right to be nourished and maintained by them till they are able to provide for themselves.

Id.

⁵⁶ See Paul M. Quay, S.J., *Contraception and Conjugal Love*, in *HUMANAE VITAE READER*, *supra* note 50, at 19, 20–21, 24.

⁵⁷ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁵⁸ See BORK, *supra* note 47, at 96. Father Murray made (too) much of this argument: “As it stands, the [Connecticut] statute is, of course, unenforceable without police invasion of the bedroom, and is therefore indefensible as a piece of legal draughtmanship.” MURRAY, *supra* note 54, at 157–58.

⁵⁹ The Common Good is that “Good which is Common to all”—it is neither to be equated with the majority “good” (or “greatest good”), which is exclusive to the greater number, nor that “good” of the minority which excludes the multitude from participation. It exists as a realizable Ideal knowable by Reason, in conformity with which individuals singly and collectively can and should freely direct their actions. In so doing, individuals flourish and society flourishes. See *generally* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 154–60 (1980). Nor should our conception of the Common Good be a flat one of merely a horizontal solidarity, as we are also

The resonance across society of a thunderclap case like *Griswold* or *Eisenstadt* is enormous, even if perception of its clangor is not instantaneous:

As harmless as the *Eisenstadt* decision must have seemed at the time, it simultaneously made marriage less central to the law, set the stage for the eventual treatment of marital and nonmarital sexual and reproductive acts as equivalent before the law, and robbed the law of the grounds for restricting certain reproductive technologies to their use within marriage.⁶⁰

Grounding its reasoning in privacy, *Eisenstadt* undercut arguments concerning the social goods of marriage, and how marriage and procreation are necessary for the future of society.⁶¹

Western society moves away from such ideals at its own peril. Modern man takes for granted that the carpe diem society will always be around, but such confidence is unwarranted. For the carpe diem society is failing to reproduce itself. The replacement level birth rate necessary for a population simply to remain static is for each woman to bear 2.1 children; no Western European country is at that rate. Germany's rate is 1.3, Italy's is 1.2, and Spain's is 1.1.⁶² Beyond such bald statistics are empty

linked vertically to our forebears and with generations yet to be born.

⁶⁰ Browning & Marquardt, *supra* note 12, at 33.

⁶¹ *Id.*

Although . . . [*Eisenstadt* and *Griswold*] might possibly have been justified on grounds of the impossibility of enforcing laws applying to such private behavior, the mode of legal reasoning clearly functioned to make law a leading contributor to the multiple separations of the goods of marriage that have occurred in recent decades.

Id.

⁶² GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA AND POLITICS WITHOUT GOD* 21 (2005). Put another way, by 2050 Germany will have lost the equivalent of the entire population of the former East Germany, Spain's population will decline from 40 million to 31.3 million, and forty-two percent of Italians will be over sixty, by which time almost sixty percent of the Italian people will have no brothers, sisters, cousins, aunts, or uncles. *Id.* at 22.

If one looks at France, it has a relatively high birthrate compared with the rest of Western Europe, roughly 1.7 children per family. This differential is due, however, to a high birth rate among Muslim immigrants. *See id.*; *see also* Niall Ferguson, *Eurabia?*, N.Y. TIMES, Apr. 4, 2004, § 6, at 13. Islam may win the day, notwithstanding whatever difficulties it may have coming to terms with modernity, simply because the Muslim world is not contracepting itself out of existence. *See* AKBAR S. AHMED, *ISLAM UNDER SIEGE: LIVING DANGEROUSLY IN A POST-HONOR WORLD* 7 (2003) (noting that, despite crises internal and external, the world's Muslim population is one of the fastest growing, and positing that the "21st century will be the century of Islam"); *see also* WEIGEL, *supra*, at 134.

playgrounds and shuttered toy stores in graying Italy,⁶³ and empty beds in German maternity wards “lined up against a wall like rental cars in an airport parking lot.”⁶⁴ As Niall Ferguson has pointed out, “There has not been such a sustained reduction in the European population since the Black Death of the 14th Century.”⁶⁵

Europe is experiencing a “crisis of civilizational morale.”⁶⁶ In this regard Europe, where *carpe diem* values are even more ascendant than here, is a harbinger. Though the demographic statistics are less stark overall, in the United States there is a marked contrast between birth rates in conservative family-friendly Red States (high) and liberal ersatz European Blue States (low).⁶⁷

And lest one think that the death rattle emanates from the West alone, fertility rates in Japan, South Korea, Taiwan, and Hong Kong are 1.32,⁶⁸ 1.13,⁶⁹ 1.1,⁷⁰ and 1.0⁷¹ per woman,

Europe’s current demographic trend lines, coupled with the radicalization of Islam that seems to be a by-product of some Muslims’ encounter with contemporary, secularized Europe, could eventually produce a Europe in which King Jan III Sobieski’s victory at Vienna in 1683 is reversed, such that the Europe of the twenty-second century, or even the late twenty-first, is a Europe increasingly influenced, and perhaps even dominated, by militant Islamic populations, convinced that their long-delayed triumph in the European heartland is at hand.

Id.

⁶³ Elisabeth Rosenthal, *In Northern Italy, the Agony of Aging Not so Gracefully*, N.Y. TIMES, Sept. 22, 2006, at A3 (“Low birthrates in Italy began almost three decades ago, around the time women’s liberation took off here. The figures are startling: A quarter of women in Italy now have no children, and another quarter stop at one . . .”).

⁶⁴ Mark Landler, *Empty Maternity Wards Imperil a Dwindling Germany*, N.Y. TIMES, Nov. 18, 2004, at A3 (reporting prognostications of a “reverse Malthusian nightmare: Germany as a land of predominantly geriatric town and cities set in a deserted, creeping countryside”).

⁶⁵ Ferguson, *supra* note 62.

⁶⁶ WEIGEL, *supra* note 62, at 53.

⁶⁷ See Steve Sailer, *Baby Gap: How Birthrates Color the Electoral Map*, AM. CONSERVATIVE, Dec. 20, 2004, http://www.amconmag.com/2004_12_06/print/coverprint.html.

⁶⁸ *Japan’s Birth Rate Rises for 1st Rise in 6 Years; Suicides Fall*, INT’L HERALD TRIB., June 6, 2007, <http://www.iht.com/bin/print.php?id=6017824>.

⁶⁹ U.S. Census Bureau, International Data Base, Country Summary: South Korea, <http://www.census.gov/ipc/www/idb/country/ksportal.html> (last visited Feb. 20, 2008).

⁷⁰ U.S. Census Bureau, International Data Base, Country Summary: Taiwan, <http://www.census.gov/ipc/www/idb/country/twportal.html> (last visited Feb. 20, 2008).

respectively. In Japan, robotic dolls substitute for grandchildren that were never born⁷²—a chilling scene worthy of P.D. James at her most prophetic.⁷³

If the British tabloids are to be believed, there are those who, blithely oblivious to the implications of such cultural self-immolation, congratulate themselves for their “altruistic” forgoing of the joys and burdens of bearing and raising children:

Having children is selfish. It's all about maintaining your genetic line at the expense of the planet. . . . I didn't like having a termination, but it would have been immoral to give birth to a child that I felt strongly would only be a burden to the world. . . . [We] have a much nicer lifestyle as a result of not having children. . . . Every year, we also take a nice holiday—we've just come back from South Africa. We feel we can have one long-haul flight a year, as we are vegan and childless, thereby greatly reducing our carbon footprint and combating over-population.⁷⁴

⁷¹ U.S. Census Bureau, International Data Base, Country Summary: Hong Kong, <http://www.census.gov/ipc/www/idb/country/hkportal.html> (last visited Feb. 20, 2008).

⁷² Brian Clowes, *Japan in the Death Spiral*, SPIRIT & LIFE, Nov. 16, 2007, http://www.hli.org/sl_2007-11-16.html.

Saddest of all is the sight of elderly Japanese women cuddling Takara-Tomy's talking Yumel robotic dolls. These women buy these expensive dolls because they have no children or grandchildren to lavish their attentions on. The dolls, which are selling very well, tell their owner how much they love her and welcome her when she walks back into the room.

Id.

⁷³ P.D. JAMES, *THE CHILDREN OF MEN* 34–35 (1992) (envisioning a futuristic dystopia where an inexplicable worldwide plague of sterility has struck and, to compensate, menopausal women push perambulators containing porcelain dolls and the mawkish baptize kittens in Church of England ceremonies of dubious orthodoxy).

⁷⁴ Natasha Courtenay-Smith & Morag Turner, *Meet the Women Who Won't Have Babies—Because They Are Not Eco Friendly*, THE DAILY MAIL, Nov. 21, 2007, http://www.dailymail.co.uk/pages/live/femail/article.html?in_article_id=495495&in_page_id=1879 (quoting a woman who, after aborting her first and only child, underwent sterilization).

Such an anti-natalist mindset may also help account for the transformation of Protestant mainline denominations into flatline denominations. As Episcopal Presiding Bishop Katharine Jefferts Schori has taken pains to point out in explaining why the percentage of her congregants is shrinking as a national percentage, Episcopalians “tend to be better educated and tend to reproduce at lower rates than some other denominations,” namely “Roman Catholics and Mormons.” Thus, when asked whether Episcopalians are interested in replenishing their ranks by having children, she replied: “No. It's probably the opposite. We encourage people to pay attention to the stewardship of the earth and not use more than their

Such sentiments are not always expressed with such a clumsy lack of self-awareness. Scratch below the *Zeitgeist* superficiality and uncover academic sophists providing theoretical justification for nihilism: “[C]oming into existence, far from ever constituting a net benefit, always constitutes a net harm. Most people, under the influence of powerful biological dispositions towards optimism, find this conclusion intolerable. They are still more indignant at the further implication that *we should not create new people*.”⁷⁵

Ideas do have consequences, and bad ideas have bad consequences.⁷⁶

The *carpe diem* society cannot perpetuate itself: “the centre cannot hold.”⁷⁷ Ours would not be the first example of a high civilization inexplicably descending into irrational self-destruction—Greeks do destroy their own, as students of the classical world know.⁷⁸ Judging the *carpe diem* society by the values it extols, one can say that it has embraced the Culture of Death, its initiates swaying serenely in a *danse macabre*.

Forty years ago, Pope Paul VI in *Humanae Vitae* warned that from a societal acceptance of contraception a host of social

portion.” Deborah Solomon, *Questions for Katharine Jefferts Schori: State of the Church*, N.Y. TIMES, Nov. 19, 2006, (Magazine), at 23 (adding that her one-time Catholic parents probably left the Church because they “were looking for a place where wrestling with questions was encouraged rather than discouraged”). One hopes that the last superbly-educated Episcopalian in America to exit the rectory will remember to shut the carbon-friendly lights on the way out.

⁷⁵ DAVID BENATAR, BETTER NEVER TO HAVE BEEN: THE HARM OF COMING INTO EXISTENCE 1 (2006) (emphasis added). Citing Professor Benatar’s work as well as that of an Australian academic who calls for a carbon tax on babies and credits for those who undergo sterilization, the doleful humorist Mark Steyn predicts a seasonal call for banning nativity scenes because the Holy Family sets a bad example. Mark Steyn, *By the Numbers*, N.Y. SUN, Dec. 17, 2007, at 8.

⁷⁶ WEIGEL, *supra* note 62, at 47 (“[I]deas have consequences and . . . bad ideas can have lethal consequences.”). This echoes the eponymous work of Richard Weaver. See generally RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (Univ. of Chicago Press 1984) (1948) (arguing that a relativism which denies the existence of universal values has baneful societal consequences).

⁷⁷ W.B. Yeats, *The Second Coming* (1920).

⁷⁸ See Euripides’s *The Bacchanals*, describing how King Pentheus was ripped apart by devotees of Dionysius, his corpse mutilated by his own mother, and *Medea*, relating how Medea killed her two sons to avenge herself against her unfaithful husband, Jason, in EURIPIDES: PLAYS (A.S. Way trans., Everyman’s Library 1965) (n.d.); see also E.R. DODDS, THE GREEKS AND THE IRRATIONAL (1951) (discussing upon the theme of irrationality in classical Greek society). For more recent historical manifestations, see generally MICHAEL BURLEIGH, SACRED CAUSES: THE CLASH OF RELIGION AND POLITICS, FROM THE GREAT WAR TO THE WAR ON TERROR (2007).

ills would follow.⁷⁹ Nearly three decades after his predecessor's encyclical, in analyzing the change to the legal and broader societal culture brought about by the *carpe diem* ethos, Pope John Paul II observed:

[A] new cultural climate is developing and taking hold, which gives crimes against life a *new and—if possible—even more sinister character*, giving rise to further grave concern: broad sectors of public opinion justify certain crimes against life in the name of the rights of individual freedom, and on this basis they claim not only exemption from punishment but even authorization by the State, so that these things [*i.e.*, abortion, euthanasia, etc.] can be done with total freedom and indeed with the free assistance of health-care systems. . . . The fact that legislation in many countries, perhaps even departing from basic principles of their Constitutions, has determined not to punish these practices against life, and even to make them altogether legal, is both a disturbing symptom and a significant cause of grave moral decline. Choices once unanimously considered criminal and rejected by the common moral sense are gradually becoming socially acceptable.⁸⁰

Far from solely harping on the evils manifest in the Culture of Death, however, the Church and those who adhere to the values taught by the Magisterium offer a contrarian path, namely, the Culture of Life:

⁷⁹ See *HUMANAE VITAE*, *supra* note 51, ¶ 17. These ills include the objectification of women and disregard for their dignity, as well as the temptation for government to impose birth control programs. *Id.*; see also Janet E. Smith, *Humanae Vitae Made Some Bold Prophecies Two Decades Ago. Did They Come to Pass?*, in *HUMANAE VITAE READER*, *supra* note 50, at 519, 519, 524, 527.

On Pope Paul VI's latter point, consider judicial and legislative efforts to force welfare recipients to use the contraceptive Norplant as a condition of obtaining benefits:

In several states, judges have given women convicted of child abuse or drug use during pregnancy a 'choice' between using Norplant or serving time in jail. In 1991, 1992, and 1993, legislators in more than a dozen states introduced measures that, had they passed, would have coerced women to use Norplant. Some of these bills would have offered financial incentives to women on welfare to induce them to use Norplant. Other legislation would have required women receiving public assistance either to use Norplant or lose their benefits. Some bills would have forced women convicted of child abuse or drug use during pregnancy to have Norplant implanted.

Norplant: A New Contraceptive with the Potential for Abuse, ACLU, Jan. 31, 1994, <http://www.aclu.org/reproductiverights/contraception/16528res19940131.html>.

⁸⁰ JOHN PAUL II, *ENCYCLICAL LETTER EVANGELIUM VITAE* ¶ 4 (Mar. 25, 1995) (emphasis added).

The issue of life and its defence and promotion is not a concern of Christians alone. Although faith provides special light and strength, this question arises in every human conscience which seeks the truth and which cares about the future of humanity. . . . *The Gospel of life* is for the whole of human society. To be actively pro-life is to contribute to the *renewal of society* through the promotion of the common good. It is impossible to further the common good without acknowledging and defending the right to life, upon which all the other inalienable rights of individuals are founded and from which they develop. . . . Only respect for life can be the foundation and guarantee of the most precious and essential goods of society, such as democracy and peace. There can be no *true democracy* without a [recognition] of every person's dignity⁸¹

Where then do we find ourselves?

For faithful Catholics seeking to engage and change the culture by bearing Christian witness, there must first be a deep and sincere personal conversion, a shucking off of an attachment to sin followed by a farewell to timidity.

For the sake of a lemming-like society that has seriously lost its way, Catholics must be voices crying out in the wilderness, even at the risk of seeming at times "benighted" or engaged upon a fool's errand.⁸²

For the Author of Creation has endowed us with free will, with which comes an enormous responsibility to exercise it wisely. We are authors of our own destiny, both as individuals and as a whole; what is to be is not yet written. To that end, the words with which He once addressed His People are as relevant today as they once were millennia ago: "I have set before you life and death, the blessing and the curse. Choose life, then, that you and your descendants may live" ⁸³

⁸¹ *Id.* ¶ 101 (emphasis added).

⁸² *But see* *Corinthians* 1:25 (New American).

⁸³ *Deuteronomy* 30:19.