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A CULTURAL TOUR OF THE LEGAL LANDSCAPE: REFLECTIONS ON CARDINAL GEORGE'S LAW AND CULTURE

Charles E. Rice

Law and culture, as the late Notre Dame Law Professor Edward F. Barrett put it, are exercises in "Ultimatology." Each involves the search for an ultimate truth. In his recent address, Cardinal George similarly emphasizes truth, noting that "People make cultures... according to what they believe is true." On the law side, the natural law approach differs from the various forms of legal positivism on the question of whether there is a knowable truth, a standard of right and wrong to which the human law is subject. If "[j]ustice is an irrational ideal," then any duly enacted law is valid, regardless of its content, even if it sends Jews and others to the gas chambers. It all depends on the ultimate question of knowable Truth.

A TIME FOR CHOOSING

"Justice Oliver Wendell Holmes," said Cardinal George, "helped to set American law on the wrong path a century ago in separating law from morality and truth, leaving law the plaything of forces purely political or the object of manipulation by pressure groups."
The cardinal asks, "what can law do" to remedy this problem? His answer is simple, but not easy: "In working to create a culture open to the transcendent truths of faith, . . . Catholic jurists and lawyers, judges and legislators should work to shape a legal system informed by a sense of right and wrong transcendent to political manipulation." In culture and in law, this is a time for choosing, a favorable time for knowledgeable and committed Catholics to enter the legal profession. John Paul II states that:

A new phase in the history of freedom is opening up. . . . The challenge is enormous but the time is right. For other culture-forming forces are exhausted, implausible or lacking in intellectual resources. . . . The great achievement of the Council is to have positioned the Church to engage modernity with the truth about the human condition, given to us in Jesus Christ who is the answer to the question that is every human life.

Jesus Christ offers such "truth about the human condition" through the Church he founded and specifically through the moral and social teachings of his Vicar, the Pope. The task of the Catholic lawyer is to act prudently but energetically to bring the leaven of those teachings to the culture as well as to the law. Cardinal George, however, rightly cautions against an emphasis on either legal or cultural reform to the exclusion of the other.

**BROWN V. BOARD OF EDUCATION: A MODEL, BUT NOT ENTIRELY**

The Cardinal examines the relation between law and culture as it affects three issues: religion, marriage and the family, and the sanctity of life. He places them in the context of *Brown v. Board of Education*. "The Brown court," the Cardinal said, "knew that law . . . functions as a teacher. . . . The Justices knew that segregation, as a cultural practice, would not end so long as law testified, and thus taught, in season and out, that black and white are unequal."

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6. Id. at 17.
7. Id.
The *Brown* decision, however, is problematic in ways that may be instructive on the issues raised by Cardinal George. Enforced racial segregation in public schools fits Thomas Aquinas's definition that a law is unjust as "contrary to human good ... when burdens are imposed unequally on the community.... The like are acts of violence rather than laws." An unjust law, however, is not by that fact unconstitutional. The *Brown* Court's dismissal of the history of the Fourteenth Amendment as "inconclusive," and its determination that the intent of that amendment in 1868 is inapplicable to modern public education, are debatable. More important, the Court seems to have held segregation enforced by law to be unconstitutional, not as a matter of principle, but rather for utilitarian reasons because of its adverse effects on minority children. The Court's seeming reliance upon psychological and other social science opinions reinforced that impression of pragmatism.

The government's classification of persons on the basis of race and their compulsion or exclusion on account of that classification is wrong, not merely because it does not work but because it violates the equal dignity of all persons before God and the law. In his dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan said that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens." The *Brown* Court failed to affirm that color-blindness principle. To the extent that *Brown* based its rejection of segregation not on principle but on a calculation as to whether it works, it is a dubious model for the abortion issue. That issue is governed by a principle even more absolute than that of color-blindness, that in a legal system where personhood is the condition of possessing the right to life, every human being is entitled to be treated

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13. See *Brown*, 347 U.S. at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").
14. See *id.* at 494 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.").
by the law as a person. The innocent person’s right to live is absolute and the state may never tolerate intentional killing of such a person.

Judges and the Higher Law

Brown, incidentally, is one of the few Supreme Court cases where the invocation of the natural law as a standard higher than the Constitution could have been appropriate. After World War II, the courts of West Germany applied the natural law in several cases to hold some Nazi laws invalid. As one appellate court said, “Whenever the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice.” In the words of Gustav Radbruch, “law is the quest for justice . . . [and] if certain laws deliberately deny this quest for justice (for example, by arbitrarily granting or denying men their human rights) they are null and void; the people are not to obey them, and jurists must find the courage to brand them unlawful.” If one concluded that the Fourteenth Amendment allowed segregated public schools and that public education today is sufficiently similar to what it was in 1868 so as to be governed by the intent of that Amendment, one could argue that officially imposed segregation is nevertheless void because it is intolerably unjust and therefore a violation of the supraconstitutional standard of the natural law. Obviously, it would make the six o’clock news if the Supreme Court of the United States ever adopted such a natural law approach. Nevertheless, it is helpful to remind ourselves that there really is a higher law, and that human law, including the

17. Congregation for the Doctrine of the Faith, Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day, Part I (1) (1987) [hereinafter Instruction on Respect for Human Life] (“The human being is to be respected and treated as a person from the moment of conception; and therefore, from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life.”).
19. Instruction on Respect for Human Life, supra note 17, Part III (“[T]he law must provide appropriate penal sanctions for every deliberate violation of the child’s rights.”).
21. Id. at 110-11 (emphasis added).
Constitution, is subject to it. This is especially true when innocent life is at stake.

A Supreme Court Justice would not have to rely on the higher law to overturn Roe v. Wade. That decision contradicts the intent of the framers of the Fourteenth Amendment to include all human beings as persons entitled to the right to life and to equal protection of the laws. "[I]n the eye of the Constitution, every human being within its sphere... from the President to the slave, is a person." Once the humanity of the child is established, the child is entitled to personhood.

A death penalty case could present the higher law issue to the Supreme Court or to a lower court, since the Fifth Amendment explicitly allows that penalty. Justice Antonin Scalia believes that "the choice for the judge who believes the death penalty to be immoral is resignation." Why should that be the only alternative for the judge? The Catholic Church teaches, as discussed later in this article, that the use of the death penalty may not be justified for purposes of retribution, general deterrence, or generalized protection of society. Instead, the state may exercise capital punishment only where it is absolutely necessary to protect other lives from that criminal. If a judge accepts that teaching and has a case that would require him to apply or uphold the death penalty contrary to that teaching, he will be faced with the issue of material cooperation with evil. This does not mean, however, that the judge should resign from the bench or even recuse himself, stepping aside to allow a compliant judge to take his place. Judges are under a strong duty, rooted in the natural law, to apply the positive law as enacted and not to violate their judicial role by usurping the legislative function. Nevertheless, a time can come when the application or upholding of an unjust law, whether in an appellate or lower court, would involve

22. See Barrett, supra note 1, at 9; CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 103-21 (rev. ed. 1999).
25. "No person shall be held to answer for a capital... crime, unless on a presentment or indictment of a Grand Jury...; nor... be twice put in jeopardy of life...; nor be deprived of life... without due process of law." U.S. CONST. amend. V.
27. For an analysis of the principles governing formal and material cooperation, see the 1990 pastoral statement of Most Rev. John J. Myers, then Bishop of Peoria, Obligations of Catholics and the Rights of Unborn Children, 20 ORIGINS 65 (1990).
the judge in immoral proximate material cooperation with evil. At that point the judge has to choose his ultimate truth.

Suppose the Thirteenth Amendment were repealed and slavery again became a constitutional practice in the United States. Would a judge be morally bound to enforce that constitutional right to enslave another human being? Would that case not present an "unendurable" conflict between the enacted law and justice so as to oblige the judge to brand that enactment "unlawful"? It is a poor reflection on the federal bench that no federal judge ever refused to enforce the Fugitive Slave Act of 1793 and the fugitive slave provisions of the Compromise of 1850. If such a conflict arose from a reinstitution of slavery in the Constitution, Justice Scalia’s position on the judge’s duty toward a law allowing abortion seems to indicate that a judge who morally objected to the enforcement of such a slavery amendment should resign from the bench. Resignation or recusal, however, would be an evasion of responsibility. The problem in such a case would not be with the judge, but with the law. It is a choice-of-law problem. Although the Constitution is the highest human law in this country, it is subject to a higher law given by God.

This duty does not confer a license on a "natural law" judge to act as a continuing constitutional convention in disregard of the constitutional text and its evident intent. Only rarely would a judge have the right or duty to rely on supraconstitutional principles to refuse to uphold or enforce an enacted law. As the German courts indicated after World War II, judges should take this step only when

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28. See, e.g., Hippel, supra note 20, at 111.


I am a judge, and it is my duty to apply the law. And I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign. But the alternative is not to do what is good or apply the law. The alternatives are to apply the law or resign because the law is what the people have decided. And if it is bad, the whole theory of a democratic system is you must persuade the people that it is bad. I cannot go around and – with respect to the Nuremberg laws, I would have resigned. But I would certainly not have the power to invalidate them because they are contrary to the natural law. I have been appointed to apply the Constitution and positive law. God applies the natural law.

Id. at 89.
the conflict between the law or precedent and justice is "intolerable" or "unendurable." One need not reach that issue with respect to Roe, since the Court's denial of personhood to unborn human beings was an incorrect interpretation of the Fourteenth Amendment.

THE CONSTITUTION: IT IS NOT THERE ANYMORE

The tough question raised by Cardinal George's address is: How do we change the law and the culture? "We must not wait for changes of heart before changing the laws," the Cardinal said, "We must do both at the same time." This is easier said than done. Constitutional developments over the past century have made it more difficult, if not impossible, to enact federal pro-life and pro-family legislation.

The Constitution as it came from the Convention and ratifying states is dead. That Constitution created a limited government with only delegated powers; the states retained all governmental powers except as limited by the Constitution. Within the federal government, power was separated among the legislative, executive, and judicial branches, with checks and balances to prevent the dominance of any one or two branches. The Constitution itself was a bill of rights, with the division and limitation of governmental power regarded as the most effective safeguard of liberty. The ten amendments of the Bill of Rights emphasized that division and limitation. The first eight restricted only the federal government. The last two amendments, in effect, said, "This new government is limited, and we mean it." State constitutions and state courts protected the people against their state governments.

The Civil War began a movement of power from the states to Washington, a shift that accelerated in the twentieth century. In 1913, the Sixteenth Amendment gave Congress virtually unlimited power to tax incomes. Also in 1913, the Seventeenth Amendment mandated the popular election of United States Senators. Originally, Senators were elected by the state legislatures. They were, in a sense, ambassadors from the state governments to the federal government,

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31. See Hippel, supra note 20, at 111.
32. Cardinal George, supra note 2, at 10.
33. The Ninth Amendment provides, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Tenth states: "The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X.
and they were not directly accountable to the people. Under that system, some Senators bought their seats by bribing state legislators. After 1913, the combination of the Sixteenth and Seventeenth amendments enabled Congress to influence the elections to both houses of Congress by bribing the people with their own money in the form of federal subsidies. A third centralizing change in 1913 was the Federal Reserve Act, which empowered the unelected Board of Governors of the Federal Reserve System, who are appointed by the President and confirmed by the Senate, to formulate monetary policy and regulate the money supply.

Apart from these structural changes, the movement of power to Washington gained momentum in the twentieth century as a result of wars, economic emergencies, and Supreme Court decisions. The process continues in the current War on Terrorism. The Supreme Court’s interpretation of the Commerce Clause has also expanded Congress’s power to regulate activities affecting interstate commerce. The Court has recently imposed some limits on Congress’s power, but it is unlikely that the Court will seriously curtail the expanded commerce power.

The Court’s interpretation of the General Welfare Clause expanded Congress’s power to control local activities. In 1936, the Supreme Court held that the General Welfare power to tax and to spend the money raised is not limited to carrying out the powers specifically delegated to Congress. The Court said that the appropriations must be for the general welfare of the nation but the Court has left it to Congress’ discretion to decide what the general welfare is. The power to appropriate carries with it the power to regulate the use of the money. States and private persons accepting federal money under grant-in-aid programs are subject to federal regulation of the way the money is spent.

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34. H.R. Con. Res. 7837, 63d Cong. (1913) (enacted).
39. Wickard v. Filburn, 317 U.S. 111, 131 (1942) ("It is hardly lack of due process for the Government to regulate that which it subsidizes.").
Within the federal government, the Supreme Court gained dominance through its misinterpretation of the Fourteenth Amendment. Although the Bill of Rights was intended to protect the specified rights only against invasion by the federal government, the Supreme Court has wrongly held that virtually all of the restrictions in the first eight amendments of the Bill of Rights are incorporated into the due process clause of the Fourteenth Amendment, and that they bind the states (including all local governments) as fully as they bind the federal government. In addition, the Court has used the incorporation doctrine to enforce against the states new rights created by the Court, such as the right of privacy, which became the basis of Roe v. Wade. The Court has also interpreted the Equal Protection Clause of the Fourteenth Amendment to diminish the power of the states in numerous areas.

How does this centralization affect Cardinal George's proposals for legal and cultural change? Under the original Constitution, the division of powers between the federal government and the states, and the separation of powers within the federal government limited the reach of decrees and enactments of any of the federal government's three branches. Legal changes, and their resultant

40. The Court has perverted the Fourteenth Amendment. First, the Court has undermined the federal structure by fastening the Bill of Rights upon the states through the fraudulent doctrine of incorporation. It has further eroded state autonomy, second, by interpreting provisions of the Bill of Rights as if their general language embodied detailed statutory schemes, thus depriving the states of their traditional authority to define the incidents of those natural and civil rights that are due every person. Third, the Court has given an unwarranted imprimatur to egalitarian doctrines through... the equal protection clause, once again depriving the states of their traditional authority to make reasonable legislative classifications in support of legitimate public policies.


42. “No State shall... abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1 (emphasis added).


cultural changes, usually could not be made by legislation or judicial decree immediately and uniformly across the nation. Granted, this preservation of state and local prerogatives made it more difficult to change the racially segregated culture of the South, but it also protected the generally religious and family-oriented culture elsewhere.

That original Constitution now is in the dead letter office. Federal legislation and executive regulations are virtually unlimited in their reach. Each successive President strives to be “the Education President” through the promotion of laws and regulations to increase standards in local schools. Each president and practically everybody else overlooks the fact that the Constitution does not confer any general power over education on the federal government. Moreover, Supreme Court edicts now effect instant change in the legal, and consequently cultural, arrangements in every neighborhood in the country. 46

The structural and legal changes that killed the Constitution could not have occurred without the acquiescence of the American people who have grown comfortable with a centralized government of expanded powers that, not incidentally, extensively subsidizes the people with their own money. The dominance of the national media also contributes to the creation of a uniform national culture. That culture is, in major respects, a “culture of death” in which the intentional infliction of death is regarded as a legitimate problem solving technique, whether in abortion, the death penalty, war, homicidal episodes in schools and elsewhere. 47 So long as that culture dominates, it will prevent any magical enactment of pro-life legislation that will turn around the constitutional depersonalization of unborn children and other legal manifestations of that culture. Cardinal George has it right: efforts for legal change cannot be postponed until the culture is changed. 48 The Constitution cannot be restored to its original structure and vitality. Nevertheless, those who subscribe to Cardinal George’s analysis can use the Constitution and


47. Gallup polls since 1977 show a consistent pattern that more than 25% of those surveyed think abortion should be “legal under any circumstances,” more than 50% think it should be “legal only under certain circumstances” and 13 to 22% think it should be “illegal in all circumstances.” The Gallup Organization, Public Opinion on Abortion Policies Making News, July 24, 2002, at http://www.gallup.com/poll/releases/pr020724.asp (on file with the Ave Maria Law Review).

48. Cardinal George, supra note 2, at 10.
the law to keep government at a distance while they seek to build a
culture that is supportive of life and family. The advocacy of legal
change can have either a positive or negative cultural impact. This
article will note a few points on the policy and tactical decisions that
have to be made in order to advance the pro-life and pro-family
cause. Specifically, it will address abortion, contraception, the death
penalty, school vouchers, and “gay marriages.”

ABORTION AND THE SANCTITY OF LIFE

A ten year-old is intrinsically no different from his younger
sibling in his mother’s womb. Both are human beings who are
entitled to be treated by the law as persons with respect to their right
to live. Similarly, there would be no intrinsic difference between Roe
v. Wade and a decree that would allow any mother to have her
school-age child executed at her discretion. If such a decree were
issued, what would be the authentic “pro-life” response? Would it be
to insist that no grade-school child may be stood up against the wall
and shot except in special cases, such as where the mother threatens
suicide if the child stays around, or if he puts a strain on her physical
health or emotional equilibrium, or if the child’s father is a rapist or a
close relative of the mother, or if the child’s grandmother has
approved the execution? No way. The only authentic “pro-life”
response to such a decree would be to insist that the law may never
validly tolerate the intentional killing of the innocent of any age,
including grade-school children.

That principled response was the initial reaction of the Catholic
Bishops to Roe v. Wade. They condemned that ruling and urged
“legal and constitutional conformity to the basic truth that the unborn
child is a ‘person’ in every sense of the term from the time of
conception.” In March, 1974, Cardinals John Krol, Timothy
Manning, John Cody, and Humberto Medeiros testified that a
constitutional amendment “should clearly establish that, from
conception onward, the unborn child is a human person in the terms
of the Constitution” and “should restore the basic protection” for the
unalienable right to life “to the unborn, just as it is provided to all
other persons in the United States.” The Cardinals declined to

49. ADMIN. COMM. NAT’L. CONF. OF CATHOLIC BISHOPS, Pastoral Message of February 13,
50. Humberto Cardinal Medeiros, From Conception Onward, the Unborn Child Is a
Human Person, THE WANDERER, Mar. 14, 1974, at 6; see also 4 Cardinals Urge U.S. Abortion
endorse an amendment that would allow abortion to save the life of the mother. In response to a question on that issue, Cardinal Medeiros said, "[i]f direct taking of life, the intentional taking of life to save the life of the mother, is what you have in mind there it is not licit." He continued, "I could not endorse any wording that would allow for abortion."\(^5\)

The Cardinals covered the waterfront. Cardinal Medeiros said:

A "States rights" amendment which would simply return jurisdiction over the abortion law to the States, does not seem to be a satisfactory solution to the existing situation. Protection of human life should not depend upon geographical boundaries. . . .

. . . . The Constitution should express a commitment to the preservation of all human life. Therefore, the prohibition against the direct and intentional taking of innocent human life should be universal and without exceptions. . . .

. . . . As for an amendment, which would generally prohibit abortion but permit it in certain exceptional circumstances, such as when a woman's life is considered to be threatened, the Catholic Conference does not endorse such an approach in principle and could not conscientiously support it.\(^5\)

Since at least 1981, the United States Conference of Catholic Bishops, the National Right to Life Committee, and other right-to-life entities have abandoned this position. They have endorsed the states' rights approach that would leave the abortion decision up to each state.\(^5\) They have also supported incremental legislation that would

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\(^5\) Ban, N.Y. TIMES, Mar. 8, 1974, at 11; Right-To-Life Hearings Begin, THE WANDERER, Mar. 14, 1974, at 1; Cardinals Reject Section Two of Buckley Amendment, THE WANDERER, Mar. 21, 1974, at 1, 10.

\(^51\) Proposing an Amendment to the Constitution of the United States for the Protection of Unborn Children and Other Persons and Proposing an Amendment to the Constitution of the United States Guaranteeing the Right of Life to the Unborn, the Ill, the Aged, or the Incapacitated on S. Res. 119 and S. Res. 130 Before the Senate Comm. on the Judiciary, 93d Cong. 171 (1974) (statement of Humberto Cardinal Medeiros).

\(^52\) Medeiros, supra note 50, at 6.

forbid abortion except where it was sought for the life or health of the mother, in pregnancies caused by rape or incest, and for minors with parental consent or the consent of a court.  

The states' rights approach concedes that the United States Constitution does not of itself protect the right to life of the unborn: if the state legislature votes that the unborn child may be legally executed, the unborn child has no ground for complaint under the United States Constitution. That result would have drawn the approval of the pragmatic "realist," Oliver Wendell Holmes, who said that "the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction."

Both the states' rights and incremental approaches affirm the basic holding of Roe v. Wade that the unborn child is a non-person with no more constitutional right to live than a housefly. If a human being's life is subject to termination at the mere discretion of a state legislature or another person, then he is, in constitutional terms, a non-person. The Court itself acknowledged in Roe v. Wade that if the unborn child is a person in constitutional terms, the case for abortion "collapses, for the fetus's right to life would then be guaranteed specifically by the [Fourteenth] Amendment." Every member of the Supreme Court, including those who would "overrule" Roe, subscribes to that non-personhood holding. Justice John Paul Stevens accurately summarized this reality:

The Court in Roe... rejected... the State's argument "that the fetus is a 'person' within... the Fourteenth Amendment."... [T]he Court concluded that that word "has application only postnatally."... Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection."... From this holding, there was no dissent,... indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a


fundamental premise of our constitutional law governing reproductive autonomy.\textsuperscript{57}

In an earlier case, Justice Stevens said that "Even the dissenters in \textit{Roe} implicitly endorsed that [non-personhood] holding by arguing that state legislatures should decide whether to prohibit or to authorize abortions."\textsuperscript{58} When the Justices opposed to \textit{Roe} speak of "overruling" it, they merely mean that the states should decide.\textsuperscript{59}

Proponents of the states' rights and incremental strategies present them as the only realistic alternatives to permanent acceptance of \textit{Roe v. Wade}. There are two problems with that claim. First, the states' rights amendment would never be ratified by thirty-eight states; it has never even made it out of Congress to be sent to the states. Second, if it were sent to the states, it would be opposed by the media and the pro-abortion establishment as well as by opponents of abortion who see it as a cop-out and betrayal, since it treats the right to life as a political issue no less negotiable than a highway appropriation. Ideas do have consequences. Consider this vignette from fly-over America:

Station KELO-TV in Sioux Falls, SD, conducted polls on abortion in late 1990 and late 1991. In 1991 the major pro-life effort in South Dakota was an attempt to forbid abortions except for rape, incest, and the life or physical health of the mother. After that campaign, the second poll, identical to the first and covering the same audience, showed that more people favored some abortion, and fewer opposed all abortions, than had been the case with the first poll. "[T]he large body of the public who remain 'unsure' where they stand on abortion look to committed pro-lifers and pro-death forces to help develop their views. And with many pro-lifers willing to allow


\textsuperscript{59} "A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." Planned Parenthood v. Casey, 505 U.S. at 944 (Rehnquist, Ch. J., dissenting). "The states may, if they wish, permit abortion-on-demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy; by citizens trying to persuade one another and then voting. As the Court acknowledges, 'where reasonable people disagree the government can adopt one position or the other.'" Id. at 979 (Scalia, J., dissenting).
A CULTURAL TOUR

some abortions legislatively, it appears the public has followed their lead. As a result, we have lost ground with the public.”

Technology is making the surgical abortion a thing of the past. Early abortifacients, in the form of pills or other devices, many of which are treated by the law as contraceptives, will predictably dominate the market as technical refinements make them more convenient to use. The use of abortifacients, like the commission of euthanasia by privately administered terminal sedation, will be difficult if not impossible for the law to reach. Abortion will be truly a private matter in the doctor’s office. Licensing restrictions on abortifacients will be only marginally effective, especially with respect to substances that have both abortive and non-abortive uses. The only way to mobilize support for even those restrictions, and the only way to prevent the cultural acceptance of early abortion as a fact of life, will be to restore among the American people the conviction that the right of innocent life is absolute because it comes from God. The states’ rights and incremental approaches work against that objective. They give the contrary message that innocent life is negotiable.

An illustration of the futility of the compromising pro-life movement is the campaign to prohibit “partial-birth abortion.” In any civilized society, when the issues of life and death are considered, the only relevant question is whether innocent human beings may be legally executed. On the contrary, the states’ rights and incremental approaches frame the issue in terms of which innocents may be legally executed. The effort to ban partial-birth abortion did raise awareness of the abortion issue, but it also confirms the strategic failure of a “pro-life” movement which now defines the issue not in terms of whether innocents may be legally executed, and not even in terms of which innocents, but in terms of how the killing is to be done. Moreover, the so-called ban on partial-birth abortion would not stop a single abortion; the abortionist could simply kill the baby


61. See Gina Kolata, Morning After Pill Becomes Available Without a Doctor, N.Y. TIMES, Oct. 8, 2000, Sec. 1, 1; Chris Kahlenborn et al., Postfertilization Effect of Hormonal Emergency Contraception, 36 ANNALS OF PHARMACOTHERAPY 465 (2002); Teresa R. Wagner, Little Pills: Targeting Youth with New Abortion Drugs, INSIGHT No. 236 (Family Research Council Nov. 13, 2001) at http://www.frc.org/get/is01i1.cfm (on file with Ave Maria Law Review); Gina Kolata, Abortion Pill Slow to Win Users Among Women and Their Doctors, N.Y. TIMES, Sept. 25, 2002, at A1; see also RICE, WINNING SIDE, supra note 60, at 72-74.

inside the mother's body. Any "ban" would have to allow partial-birth abortion when it is sought for reasons of the mother's health. As a consequence, the "pro-life" emphasis on partial-birth abortion allows pro-abortion politicians to pose as "pro-life" because they have cast a meaningless vote against partial-birth abortion.

John Paul II specified the conditions under which a legislator could morally vote for a law that would permit some abortion in *Evangelium Vitae*.

In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it or to "take part in a propaganda campaign in favor of such a law, or vote for it."

A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of a more restrictive law, aimed at limiting the number of authorized abortions, in place of a more permissive law already passed or ready to be voted on. . . . When it is not possible to overturn or completely abrogate a pro-abortion law an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This [is] not in fact . . . an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.

Subject to more explicit specification by the Magisterium, a legislator meeting the strict requirements of *Evangelium Vitae* could licitly vote for a law that would allow abortions in some cases. That does not mean, however, that the legislator should support that law. It is realistic to conclude that the compromise strategy, over the years,


has increased the toll in unborn lives through that strategy's implicit trivialization of the right to live. For instance, a law requiring a pregnant minor to have parental consent (or approval of a judge) before she has an abortion conveys the message to that minor that the decision whether to kill her unborn child is qualitatively no different from the decision whether to get her ears pierced, which also requires parental consent. The passage of parental consent laws does decrease the number of abortions in comparison with a previous law allowing unrestricted abortion. But the proper comparison would be between a totally permissive law (or even a parental consent law) and a situation in which the pro-life movement and the churches were conveying to young people the message that unborn life is absolutely inviolable. How can young people be expected to develop absolute respect for innocent life when even pro-life advocates act as if they do not really buy it?

Numerous bills can be offered in federal and state legislatures that will throw sand in the gears of the abortion industry without compromising principle. One example would be a bill making it easier to sue abortionists for malpractice. The objective in proposing pro-life bills should be primarily educational, as part of the effort to reconvert the American people to the conviction that every human life is sacred because every human being is made in the image and likeness of God and has an eternal destiny. Compromise undermines that effort.

Abortion is "murder," an "unspeakable crime." Legalized abortion, however, did not spring up unannounced. It is itself a symptom, a product of a cultural disorder of which contraception is the defining vice. The futility of the establishment pro-life movement, including the Catholic bishops' apparatus, is traceable to the unwillingness of its leaders to confront that reality.

**CONTRACEPTION**

The 2002 Respect Life Program, "Celebrating Life, 1972-2002," issued by the Catholic Bishops' Secretariat for Pro-Life Activities, presents a useful and attractive program to encourage respect for life

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68. See RICE, WINNING SIDE, supra note 60, at 243-55 (enumerating such bills).

on issues including racism, poverty, hunger, employment, education, housing, health care, the death penalty, abortion, and euthanasia. This program concentrates on abortion. The only references to contraception are a nine line statement that contraception is not the answer to abortion, an essay affirming natural family planning as better than contraception, and an informative analysis of the effort to mandate coverage of contraception (and ultimately, abortion) in Catholic health care facilities. The program gives no clue, however, as to why contraception is wrong or how it relates to abortion. Some earlier Respect Life programs have dealt with contraception and natural family planning. The subject, however, is hardly in the forefront of the Catholic Bishops' pro-life effort. For more than three decades, the mainstream pro-life movement, with the exception of a few organizations, including the American Life League, The Population Research Institute, and Human Life International, has studiously ignored the 800-pound gorilla that is the cultural acceptance of contraception. By their silence, the pro-lifers have fostered that acceptance.

Abortion is the taking of human life, while contraception is the prevention of that life. They therefore require different treatment in the law. Both involve the deliberate separation of the unitive and procreative aspects of the conjugal act. And the contraceptive mentality, in practice, requires abortion as a backup.

John Paul II does not equivocate on the relation of contraception to abortion:

[The pro-abortion culture is especially strong precisely where the Church's teaching on contraception is rejected.... Despite their differences of nature and moral gravity, contraception and abortion are often closely connected, as fruits of the same tree. It is true that in many cases contraception and even abortion are practiced under the pressure of real life difficulties, which nonetheless can never exonerate from striving to observe God's law fully. Still, in very

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many other instances such practices are rooted in a hedonistic mentality unwilling to accept responsibility in matters of sexuality, and they imply a self-centered concept of freedom, which regards procreation as an obstacle to personal fulfillment. The life which could result from a sexual encounter thus becomes an enemy to be avoided at all costs, and abortion becomes the only possible decisive response to failed contraception. The close connection... between... contraception and... abortion... is being demonstrated in an alarming way by the development of chemical products, intrauterine devices and vaccines which, distributed with the same ease as contraceptives, really act as abortifacients, really act as abortifacients, really act as abortifacients, really act as abortifacients, really act as abortifacients, really act as abortifacients.

The contraceptive mentality also leads to acceptance of euthanasia. If one claims for himself "a power which belongs solely to God: the power to decide, in a final analysis, the coming into existence of a human person," it will be no surprise if he makes himself also the arbiter of the ending of life, through abortion, euthanasia, or suicide. An incentive to euthanasia arises from graying of the population, with fewer workers to support the growing number of elderly. The aging of the population is attributable in part to increased longevity but primarily to the reduction in fertility caused by widespread contraception and abortion.

The contraceptive ethic denies the connection between the unitive and procreative aspects of the sexual act. The separation of sex from procreation undermines any rational explanations of why sex should be reserved for marriage, why marriage should be permanent, and why it should be heterosexual. Persons in a contraceptive society, incapable of denying and controlling themselves, cannot coherently reject promiscuity, divorce, and homosexual activity. The legitimization of pornography is predictable in that society. In *Humanae Vitae*, Pope Paul VI warned that the acceptance of contraception would lead to the treatment of women as sex objects.

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It is not surprising that a contraceptive society will be receptive to in vitro fertilization and other forms of laboratory production of human beings, including cloning. An Irish Cardinal, Cahal Daly, spelled out these realities two years before *Humanae Vitae*.

Birth control *mores* create a mentality of “unwanting” babies. Furthermore, it is not a practice only but a new philosophy of man and sex, a new “way of life.” It means the abandonment of self-control over sexual urges; it implicitly authorizes sexual promiscuity. The real problem of our time is that society tolerates a continuous and ubiquitous display, by every medium of mass communication, of artificial libidinous solicitation, which makes it unnaturally difficult for people, particularly young people, to be continent; and then offers a remedy, contraceptives, which merely increases the incontinence. Promiscuity is the logic of birth control; but to have promiscuity with impunity there must also be abortion and infanticide, sterilization and euthanasia. The logical contraceptionist must insist that if these cannot be generalized by persuasion, they must be imposed by law. It has long been recognized that there is a connection between eroticism and totalitarianism.

The effort recommended by Cardinal George to promote the sanctity of life will fail if it temporizes on contraception.

**THE DEATH PENALTY**

It is fair to ask how the Church’s restrictive teaching on the death penalty and its absolute teaching on abortion fit together. The papal teaching on the dignity of every human life is attractive in the context of abortion because the unborn child is so obviously innocent and helpless. But, one’s belief in this concept can be tested when the person in question is a serial-killer like Richard Speck or John Wayne Gacy. The two teachings, however, do fit together. Pope John Paul II has raised the Church’s insistence on the dignity and importance of every human person to a new level: “Not even a murderer loses his personal dignity.”

Many liberal Catholics left the Church or engaged in a sit-in schism when Paul VI reiterated in *Humanae Vitae* the unbroken teaching of the Church on contraception. The death

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79. CAHAL B. DALY, **MORALS, LAW AND LIFE** 94-95 (1966) (citations omitted).
penalty is the *Humanae Vitae* of some politically conservative and otherwise religiously orthodox Catholics. Neither the teaching on abortion nor that on the death penalty can be rejected without undermining both teachings because they both depend on the dignity of the human person.

John Paul II has not changed the traditional teaching that the state has authority to impose the death penalty. He has developed the teaching as to when the state may rightly exercise that authority. The only case in which a Catholic may now argue for the use of the death penalty is where it is absolutely necessary to protect other lives from that criminal. The question of whether it is so necessary, of course, involves a prudential judgment to the ability of the prison system to confine that prisoner securely, but John Paul II’s teaching as to the use of the death penalty is not a prudential teaching. That criterion applies everywhere and to all states. The prudential inquiry as to whether a penal system is able to guarantee a prisoner’s security is only a step in the application of that universally binding criterion. The Pope offered his own empirical judgment that, in developed countries, situations in which execution is absolutely the only way to protect others from that criminal are practically non-existent, but his criterion still applies in all places. A person could fully accept the Pope’s teaching and yet uphold the death penalty in a penal system which that person judges to be incapable of confining that criminal securely. The ultimate Court of Review of that person’s judgment,

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82. The Second Vatican Council said that

> loyal submission of will and intellect must be given, in a special way, to the authentic teaching authority of the Roman Pontiff, even when he does not speak ex cathedra in such wise, indeed, that his supreme teaching authority be acknowledged with respect, and that one sincerely adhere to decisions made by him conformably with his manifest mind and intention, which is made known principally either by the character of the documents in question, or by the frequency with which a certain doctrine is proposed, or by the manner in which the doctrine is formulated.


84. *Id.*
however, may be less than sympathetic if that judgment is made in less than good faith.

_Evangelium Vitae_ and the _Catechism of the Catholic Church_ explicitly affirm the traditional teaching that "the primary aim" of punishment is the retributive of "redressing the disorder introduced by the offense." However, the death penalty is different. The _Catechism_ shows that retributive and general deterrent reasons no longer by themselves justify use of the death penalty. The Church's teaching allows the use of the death penalty only if it is:

the only possible way of effectively defending human lives against the unjust aggressor. If, however, nonlethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means. . . . Today . . . as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm — without definitively taking away from him the possibility of redeeming himself — the cases in which the execution of the offender is an absolute necessity "are very rare, if not practically non-existent." 

Is this teaching a legitimate development of doctrine? Yes. It is the Pope who has jurisdiction to decide that question. If it is not the Pope in Rome, who is it?

The new restriction on the use of the death penalty arises from the importance of the possibility of the criminal's conversion. Saint Thomas Aquinas, who argued for the use of the death penalty on one who is "dangerous and infectious to the community," agreed that the conversion of one sinner is a greater good than the creation of the entire material universe. If Aquinas were around today, it is fair to say that he would support John Paul II's teaching, first, because he would obey the pope, and second, because of the modern state's

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85. _Evangelium Vitae_, supra note 18, ¶ 56; _CATECHISM OF THE CATHOLIC CHURCH_ ¶ 2266.
86. _CATECHISM OF THE CATHOLIC CHURCH_ ¶ 2267 (quoting _Evangelium Vitae_, supra note 18, ¶ 56).
87. _Cf. Lumen Gentium_, supra note 82, ¶ 22. ("[T]he Roman Pontiff, by reason of his office as Vicar of Christ, namely, and as pastor of the entire Church, has full, supreme and universal power over the whole Church, a power which he can always exercise unhindered.")
88. _Summa Theologica_, supra note 11, Part II-II, Question 64, Article 2.
89. "[T]he justification of the ungodly . . . is greater than the creation of heaven and earth." _Id._ at Part I-II, Question 113, Article 9.
ability to keep criminals from being “dangerous and infectious to the community” without cutting off their chance for conversion.

Pope John Paul II’s teaching could still permit the death penalty in limited cases, even in developed countries. Suppose a life inmate, already under maximum security, murders another inmate or a guard. What sense would it make to give him another life sentence? Similarly, it might be justifiable to execute a criminal in an unstable situation in which the state is unable to confine inmates securely. Also, Evangelium Vitae and the Catechism treat the death penalty in the context of the “penal system,” “punishment for the crime,” and “preventing crime.” It might be argued that the teaching has no application to the laws of war, especially in the cases involving terrorist networks. These issues are debatable. It is clear, however, that if a Catholic is to be consistent with the teaching of his Church with respect to the death penalty in the criminal process, he can no longer argue for the use of that penalty on the general bases of retribution, deterrence of other potential criminals, or any other arguments, unless that penalty is “the only possible way of effectively defending” other lives from this criminal. Thus, in his 1999 exhortation, Ecclesia in America, John Paul II quoted the Catechism in criticizing “the unnecessary recourse to the death penalty when other ‘bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons.’”

John Paul II insists that the state is not the arbiter of life, and that its power must be exercised in accord with the law of God. The state exists for the person, and not the person for the state. All states that have ever existed, or ever will exist, have gone out of business or will do so. Every human being who has ever been conceived will live forever. The only reason that will justify the state in killing even a murderer is the absolute necessity of killing him to protect other persons from him.

John Paul II seeks a “cultural transformation” that builds a “new culture of life.” “The first and fundamental step towards this cultural transformation consists in forming consciences with regard to the incomparable and inviolable worth of every human life.”

90. Evangelium Vitae, supra note 18, ¶ 56; CATECHISM OF THE CATHOLIC CHURCH ¶ 2267.
91. Evangelium Vitae, supra note 18, ¶ 56.
93. Evangelium Vitae, supra note 18, ¶¶ 95, 96.
'Evangelium Vitae' is "a pressing appeal addressed, in the name of God, to each person: respect, protect, love and serve life, every human life!" The Pope notes that God put a mark on Cain, not to make him a target, but to protect him: "God, who preferred the correction rather than the death of a sinner, did not desire that a homicide be punished by the exaction of another act of homicide." John Paul II challenges the culture of death on its basic rejection of the dignity of the person; this is where the death penalty and abortion issues link. The common element is the affirmation of the importance and dignity of each human being, even the murderer and especially the child in the womb. Neither the teaching on the death penalty nor the teaching on abortion can be rejected without undermining the basic teaching on the dignity of every human person.

THE VOUCHER: CLIMBING ON BOARD THE TITANIC

Cardinal George laid out briefly but precisely the issues raised by the Supreme Court's interpretation of the religion clauses of the First Amendment. Let me offer just one caution here: The Court certainly struck a blow for common sense in its 5-4 decision upholding under the First Amendment the Cleveland school voucher. The plan provides scholarships for children, which may be used to pay tuition at religious and other private schools. Voucher plans, however, will still have to survive challenges under "Blaine Amendments" in state constitutions that prohibit aid to religious schools more strictly than does the Establishment Clause of the First Amendment.

The upholding of educational vouchers under the First Amendment leaves open the prudential judgment as to whether they are good policy. The "school choice" movement commendably affirms parental rights, fairness, and a rational understanding of the

94. Id. ¶ 5.
95. Id. ¶ 9.
96. Id. ¶ 57 ("If such great care must be taken to respect every life, even that of criminals and unjust aggressors, the commandment, 'You shall not kill' has absolute value when it refers to the innocent person.").
97. Cardinal George, supra note 2, at 11.
First Amendment," but the voucher, as a policy proposal, collides with the reality that there is no such thing as a free lunch.

In order to change American culture as suggested by Cardinal George, we must soundly educate the rising generations. Authentic Catholic and other religious schools, and especially the rapidly growing home schools, have already begun to have a significant cultural impact. Sadly, the public school system has been a major factor in the secularization of American culture. The quality of education in those schools is in steady decline. A voucher program would tie participating schools to the sinking public school system. It is a delusion to suppose that a private school can receive a public subsidy through vouchers or otherwise without making itself vulnerable to state control. The first voucher program upheld in the courts is the Milwaukee Parental Choice Program. It is not a free lunch: students are not eligible for the voucher if they are already enrolled in the private school unless they are in kindergarten through third grades. The private school must accept the applying students "on a random basis," except that it may give preference to siblings of students already in the school. Further, the Milwaukee Parental Choice Program was quickly amended to require the school to permit students to "opt out" of "any religious activity." Schools receiving vouchers will predictably be targets of political pressure to conform to public school standards on testing, certification of teachers, release of data, discrimination on grounds including sexual orientation, and other matters. A voucher program would bring about a three-tiered educational system: state schools, private schools, and in between, the


106. Id. at 609, 617.

state-regulated "private" schools.\footnote{108} In addition, it would put economic pressure on parents of children in non-participating schools including home schools.\footnote{109}

It would be imprudent, even folly, for Catholic and other private schools to climb on board the Titanic which is the public school system, as it sinks beneath the waves.\footnote{110} There are alternatives. One would be to increase the personal exemption from income for federal income tax purposes. It began in 1948 at $600 and for 2002 it was $3,000.\footnote{111} For that exemption to be the equivalent of what it was in 1948, it would now have to be more than $10,000 for each parent and each dependent child.\footnote{112} Such an increase would improve the ability of parents to pay tuition, and the ability of Catholic schools, to which that tuition would be paid, to open their doors to the poor so as to offer them a genuinely Catholic education.\footnote{113} Privately funded scholarships offer another possibility. For example, the Children's Scholarship Fund, established in 1998 by John T. Walton and Ted Forstmann, currently provides scholarships to nearly 34,000 needy children to enable them to attend 7,000 private schools in 49 states.\footnote{114}

Any realistic effort to attain the religious and educational objectives identified by Cardinal George ought to avoid the superficially appealing, but suicidal, "quick fix" of the voucher. Dwight Lee predicted in 1986 that:

If education vouchers become politically viable it will be because they can be used to reverse the expansion in genuinely private education. The public school lobby will see educational vouchers as the means to entice those who are attending private schools back

\footnotesize{\begin{itemize}
  \item \footnote{110} See Dwight R. Lee, \textit{The Political Economy of Educational Vouchers}, \textit{The Freeman: Ideas on Liberty}, July 1986, at 244.
  \item \footnote{111} Internal Revenue Service, \textit{2002 1040 Instructions}, at 17 (2002).
  \item \footnote{114} About CSF, \textit{The Children's Scholarship Fund Program}, at http://www.scholarshipfund.org/about/index.asp (on file with the Ave Maria Law Review).
\end{itemize}}
into a public education system that will be no better than the one which they have rejected.\textsuperscript{115}

One line, with good reason, always gets a laugh: “I’m from the government. I’m here to help you.” Young men and women now in religious private schools, including home schools, will build the “culture of life” in the United States, unless their parents take the voucher bait and mortgage their education to the secular state and its failed school system. There really is no such thing as a free lunch.

\textbf{“GAY MARRIAGE”: AN OXYMORON}

Cardinal George accurately warns that the withdrawal of the law from protection of the family could ultimately “abolish the already bruised and broken institution of marriage in our culture.”\textsuperscript{116} I suggest two points here. First, as discussed above, the acceptance of contraception is the proximate cultural cause of the breakdown of the family.\textsuperscript{117} Second, although the effort to legalize “gay marriage” must be resisted, it would be imprudent to endorse the Federal Marriage Amendment.

Why not allow two persons of the same sex to exercise their freedom of association to marry? Why is that anyone else’s business? For one thing, it is a matter of justice. In marriage, the husband and wife make a public and reciprocal commitment, assuming duties to society, to themselves, and to their children. Society and the law rightly reciprocate by bestowing on marriage, in the words of John Paul II, a “juridical status that recognizes the rights and duties of the spouses to one another and to their children. . . . [F]amilies play an essential role in society, whose permanence they guarantee. The family fosters the socialization of the young and helps curb . . . violence by transmitting values and . . . brotherhood and solidarity.”\textsuperscript{118}

The family, based on marriage, is a natural institution that is prior to the state. The law grants it exclusive privileges because it is the seedbed for future generations. The partners in “de facto unions” whether heterosexual or homosexual, make no comparable binding

\begin{footnotes}
\item[115] Lee, \textit{supra} note 110, at 248.
\item[116] Cardinal George, \textit{supra} note 2, at 16.
\end{footnotes}
and public commitments to themselves, their children, or society.\textsuperscript{119} It is impossible to overstate the importance of maintaining the exclusively privileged status of marriage as the union of a man and a woman. John Paul II, in responding to the European Parliament's approval of homosexual marriage and the adoption of children by homosexual couples, said:

Forgetting Christ's words, "the truth will set you free" (Jn 8:32), the attempt has been made to tell the inhabitants of this continent that moral evil, deviation, a kind of slavery, is the way to liberation, thus distorting the true meaning of the family. The relationship of two men or two women cannot constitute a true family; still less can one grant such a union the right to adopt children who lack a family. These children suffer great danger, grave harm, because in these "substitute families" they do not have a father and mother, but two fathers or two mothers. This is dangerous.\textsuperscript{120}

Not every proposal to defend the traditional family, however, is worthy of support. Cardinal George mentioned "a federal constitutional amendment to protect marriage from judicial redefinition."\textsuperscript{121} This Federal Marriage Amendment provides:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.\textsuperscript{122}

Judge Robert Bork explained:

The first sentence means that no legislature may confer the name of marriage on same-sex unions and no court may recognize a same-sex marriage contracted in another country. . . . So far as legislatures are concerned, the primary thrust of the sentence's prohibition is symbolic, reserving the name of marriage to its traditional meaning. But symbolism is crucial in cultural struggles. The second sentence

\begin{footnotes}
\item[119] Pontifical Council for the Family, \textit{Family, Marriage and "De Facto" Unions} (U.S. Catholic Conference 2001); see also Pontifical Council for the Family, \textit{supra} note 118, at 92.
\item[121] Cardinal George, \textit{supra} note 2, at 16.
\item[122] See, \textit{e.g.}, Alliance for Marriage, http://www.allianceformarriage.org (on file with the Ave Maria Law Review).
\end{footnotes}
expresses the main thrust of the amendment. It recognizes that liberal activist courts are the real problem. If courts are prevented from ordering same-sex marriage or its equivalent, the question of arrangements less than marriage is left where it should be, to the determination of the people through the democratic process. To try to prevent legislatures from enacting permission for civil unions by constitutional amendment would be to reach too far. It would give opponents the opening to say we do not trust the people when, in fact, we are trying to prevent courts from thwarting the will of the people.\footnote{123} 

This Amendment would write into the Constitution an implicit guarantee that a state legislature could give all the incidents of marriage to a union between a man and woman, two men, two women, a man and a dog, or whatever, as long as they do not call it "marriage." Courts would be more severely restricted, so that they could not confer "marital status or the legal incidents thereof" on any union other than marriage, defined in the first sentence of the amendment as the "union of a man and a woman." The amendment is unclear. Presumably, under the first sentence of the amendment, the legislature, whether federal or state, could confer some "legal incidents" of marriage upon "unmarried couples or groups," without defining such couples or groups as married. If the legislature did so, the courts would presumably be required to enforce that law and confer those "legal incidents" on such couples or groups despite the language of the second sentence.

The definition and regulation of marriage, under the original Constitution, was and remains a matter for determination by the states. It ought to remain there. One might ask why the states' rights solution is inappropriate for abortion but appropriate for marriage. The answer is that, prior to Roe v. Wade, the right to life was already explicitly protected against state infringement under the due process and equal protection clauses of the Fourteenth Amendment. In Roe, the Court defined unborn human beings as non-persons who are therefore excluded from coverage by the Fourteenth Amendment. Therefore, the proper response to a misinterpretation of an existing constitutional provision is to amend the Constitution in order to restore the protection to all unborn human beings as persons.

On the definition of marriage, however, the Constitution takes no position. A campaign to force a definition into that Constitution is unnecessary. If the Supreme Court, as some fear, were to declare a state’s heterosexual definition of marriage unconstitutional as a violation of the equal protection guarantee of the Fourteenth Amendment, it might become appropriate to consider a constitutional amendment. But it would be imprudent, if not reckless, to anticipate that problem by offering an amendment that would confirm the constitutional validity of same-sex “marriage” any time a legislature so votes as long as it calls it by a different name. The campaign to adopt such an amendment would be morally corruptive because it would implicitly legitimize gay marriage by the incoherent contention that somehow gay marriage is acceptable if voted by a legislature under a different label but not if voted by a court under any label. The alternative to such a misconceived amendment effort is to fight the issue state by state, and to consider the proposal of an unequivocal definition of marriage, binding all government units, only if the Supreme Court throws down the gauntlet by ruling unconstitutional a state’s man-woman definition of marriage.

THE REVIVAL OF LAW AND CULTURE: A PIPE DREAM?

Are the goals identified by Cardinal George attainable? I say yes. (Candor requires acknowledgment that I also thought Goldwater would win, but this is different.) In legal and political terms, to revive respect for life and family in our law and culture is a practically hopeless task. The revival, however, is not dependent on merely legal and political, or even educational, means. The essential component is spiritual: “the ultimate root of hatred for human life, of all attacks on human life, is the loss of God. . . . In the struggle for life, talking about God is indispensable.” Fortunately, God’s side is the winning side. John Paul II has voiced a recurrent theme throughout his papacy that, “God is preparing a great springtime for Christianity, and we can already see its first signs.”

124. An alternative would be the removal of the Court’s appellate jurisdiction over such cases, under Art. III, Sec. 2 of the Constitution. See also Ex parte McCardle, 74 U.S. 506 (1868).


The job of the Catholic lawyer is *laborare et orare*—to work and to pray.

It was fitting for Cardinal George to address these topics at the dedication of a Catholic law school that unapologetically affirms that the solution to what John Paul II calls "the culture of death" will be found in the moral and social teachings of the Magisterium of the Catholic Church. There are numerous Catholic law schools where students can adequately prepare to put their faith into practice in their profession and their personal lives, but more good Catholic law schools are needed. This is a propitious time, therefore, for the foundation of Ave Maria School of Law, which boasts the motto *Fides et Ratio*: "Faith and reason are like two wings on which the human spirit rises to the contemplation of truth." Ave Maria School of Law, founded under the patronage of the mother of Christ, affirms that truth is not an abstraction. It is a Person, Jesus Christ, who teaches us that "the full meaning of freedom [is] the gift of self in service to God and one's brethren." In the present war of "Ultimatologies," a vague openness to the expression of ethical and religious views will not suffice to make a law school Catholic. To be "Catholic Lite" is not enough. Warriors are needed who are equipped, by training and commitment, "to engage modernity with the truth about the human condition, given to us in Jesus Christ who is the answer." It involves no reflection on any other school to conclude that for such a student who is looking for a law school that will provide a comprehensive, nuts-and-bolts technical legal education, a systematic study every year of the moral and social teachings of the Magisterium as applied to the law, abundant sacramental and other opportunities for spiritual growth, and encouragement to put his faith and education at the service of others,

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128. Ave Maria School of Law fully accepts *Ex Corde Ecclesiae*, the 1990 Apostolic Constitution on Catholic Universities, which only a few Catholic institutions of higher learning in the United States have done. As far as the mainstream Catholic colleges and universities are concerned, *Ex Corde Ecclesiae* "is now dead." Gerard V. Bradley, *Looking Ahead at Catholic Higher Ed, FELLOWSHIP OF CATHOLIC SCHOLARS QUARTERLY*, Spring 2002, at 16.


Ave Maria is definitely the school of choice. It was, therefore, an appropriate place for Cardinal George to issue his challenge to the rising generation of Catholic lawyers. The future will bring many opportunities to address abortion, contraception, the death penalty, school vouchers, "gay marriages," and certainly many other issues. With a firm grounding in faith and reason, the students of Ave Maria School of Law will be prepared to face these challenges with courage and confidence.