

## RIGHTS AND THE NEED FOR OBJECTIVE MORAL LIMITS

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### INTRODUCTION

An Ellen Goodman column told “a tale of two signatures, each bearing the Bush penmanship.”<sup>1</sup> Governor Jeb Bush signed the Florida bill that required restoration of nutrition and hydration to Terri Schiavo,<sup>2</sup> whose husband had obtained a court order permitting him to remove her feeding tube, and President George W. Bush would sign the bill restricting “partial-birth abortion.”<sup>3</sup> The bills, Goodman concluded, “remind us that the ‘right to decide’ . . . [is] at the center of personal freedom. It is [a] deeply troubling moment when a stranger, a governor, a legislator, a president is given the power to write the end of our ethical, medical, family tales. Yes, this is how we lose our freedoms: [o]ne signature at a time.”<sup>4</sup>

Goodman equates the “right to decide” with “the right to make complicated decisions about life and death.”<sup>5</sup> Her individualist defense of that right raises several questions: What is being decided? By whom? If it is a life-and-death decision, what does the prospective decedent have to say about it? Where does such a “right to decide” come from?

The Declaration of Independence affirmed “that all men are created equal, that they are endowed by their Creator with certain

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1. Ellen Goodman, *Freedom Lost at Stroke of Politician’s Pen*, S. BEND TRIB., Oct. 26, 2003, at B11.

2. 2003 Fla. Sess. Law Serv. 418 (West).

3. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003); Goodman, *supra* note 1.

4. Goodman, *supra* note 1.

5. *Id.*

unalienable Rights.”<sup>6</sup> But what *are* “rights”? Professor Iredell Jenkins, in his seminal essay three decades ago on the nature of rights, identified “two broad views which have disputed the field for centuries”:<sup>7</sup>

One of these holds that rights have a real metaphysical and moral status. They are extra- and supra-legal. Rights derive directly from God or Nature—from the ultimate structure of things—and they belong to man as part of his intrinsic nature, as much as do his body, his mind, and his various powers. Law merely recognizes these rights and enforces respect for them. This is the classical view, as expressed in the doctrines of Natural Law and Natural Rights, and it was the dominant influence for centuries.

The other view holds that rights are strictly legal entities or notions. They owe their being and their nature exclusively to law—to the substantive and procedural apparatus of a legal system—whose creatures they are. Law literally creates rights: the legislative or judicial act accords certain privileges and protections to some persons, and imposes corresponding duties on other persons, and it is this act that brings the right into being and constitutes its content. This is the view made famous by Holmes and Gray, and associated with the schools of Legal Positivism, Formalism, and Analytical Jurisprudence.

These statements are admittedly so general as to seem almost a caricature of the subtle and labyrinthine arguments that have been spun out in support of the different theories of rights. But I think that these broad interpretations constitute the only real and fundamental alternatives.<sup>8</sup>

The second notion of rights described by Professor Jenkins, “rights as strictly legal entities or notions,” can provide no supra-legal basis for absolute or transcendent rights of the person against the state. Only if the person is created with an immortal destiny, as affirmed in Professor Jenkins’s “classical view,” will that person have a reasoned basis to assert rights that are beyond abolition by the positive law.

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6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

7. Iredell Jenkins, *The Concept of Rights and the Competence of Courts*, 18 AM. J. JURIS. 1, 2 (1973).

8. *Id.*

In this article, we will examine the natural law conception that rights are rooted in human nature, which nature itself is of divine origin through creation. We will compare this natural law concept to the premises and social consequences of the secular, relativist, and individualist approaches common to the jurisprudence of the Enlightenment. This article will offer the conclusion that only a grounding of right in the nature of persons as immortal beings created by God can offer moral and cultural security against the depersonalization characteristic of regimes premised on a relativist individualism.

#### THE NEED FOR OBJECTIVE MORAL NORMS

Ellen Goodman's two examples of the "right to decide," abortion and euthanasia by starvation, involve a "right" to end the life of an innocent human being who can say nothing about it. They illustrate the potential for abuse inherent in an individualist concept of rights cut off from any objective moral limits. Consider, for example, *Byrn v. New York City Health & Hospitals Corporation*,<sup>9</sup> in which the highest court of New York upheld New York's 1970 abortion law,<sup>10</sup> at that time the most permissive in the nation.<sup>11</sup> In its decision, the court validated the right of the mother to kill her unborn child.<sup>12</sup> It did so by denying the child's personhood and therefore his right to have rights.<sup>13</sup> The court first found as a fact that the unborn child is a human being "upon conception."<sup>14</sup> But, the court then said that it is up to the legislature to decide which human beings are persons and are therefore entitled to the right to live:

What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person. . . . The point is that it is a policy determination

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9. 286 N.E.2d 887 (N.Y. 1972).

10. 1970 N.Y. Laws 127.

11. BERNARD N. NATHANSON, *ABORTING AMERICA* 59 (1979).

12. *Byrn*, 286 N.E.2d at 890.

13. *Id.*

14. *Id.* at 888.

whether legal personality should attach and not a question of biological or “natural” correspondence.<sup>15</sup>

The Supreme Court took this same route in *Roe v. Wade*,<sup>16</sup> where the Court ruled that the unborn child is a nonperson because “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>17</sup> The Court acknowledged that if the personhood of the child is accepted, the pro-abortion case “collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>18</sup> The Court declined to decide whether the unborn child is a living human being and essentially ruled that, whether he is human or not, he is a nonperson.<sup>19</sup> The ruling is, therefore, the same in effect as a ruling that an acknowledged human being is a nonperson and thus has no constitutional right to life. And finally, in a 1992 decision that has been described as “the worst constitutional decision of the United States Supreme Court of all time,”<sup>20</sup> the Supreme Court confirmed *Roe v. Wade* as a cornerstone of the Constitution.<sup>21</sup> This was a cornerstone crafted not by the Founders, but by the justices. Eight years later, the Court extended *Roe* to legitimize infanticide by partial-birth abortion (PBA).<sup>22</sup> Thus, with no

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15. *Id.* at 889 (citations omitted).

16. 410 U.S. 113 (1973).

17. *Id.* at 158.

18. *Id.* at 156-57.

19. *Id.* at 158-59, 162.

20. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003).

21. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846-53 (1992).

22. See *Stenberg v. Carhart*, 530 U.S. 914 (2000). At stake in partial-birth abortion (PBA) is the life of an infant who has almost entirely emerged from his mother. PBA differs only in method and timing from any other abortion. The end result is the same: a child is killed by his mother’s exercise of her constitutional “right to decide.” Most abortions after twelve or thirteen weeks are done by dilation and evacuation (D&E) in which the cervix is dilated, the fetal sac is punctured and drained and the unborn child’s head is crushed. 139 Cong. Rec. E8605 (daily ed. Apr. 28, 1993) (statement of Rep. Dornan). The child is dismembered and the parts removed with suction and forceps. *Id.* Abortionist Martin Haskell developed a new procedure, dilation and extraction (D&X). *Id.* Haskell developed this procedure because “most surgeons find dismemberment at twenty weeks and beyond to be difficult due to the toughness of fetal tissues” and because D&E can risk perforating the uterus. *Id.* In D&X, which is done after twenty weeks, the cervix is dilated to allow removal of the child’s body except for the head. *Id.* The abortionist delivers the baby feet-first up to the head, which is too large for the opening. *Id.* He inserts scissors into the back of the baby’s skull and opens the scissors to enlarge the hole. *Id.* He inserts a suction tube and sucks out the brains. The empty skull then collapses enough to fit through the opening. *Id.* The Partial-Birth Abortion Ban Act of 2003 explicitly recognizes the fact that “during [PBA] the child will fully experience the pain associated with piercing his or

objective moral limits to protect them, the unborn were totally depersonalized and stripped even of their right to life.

In contemporary euthanasia, on the other hand, the victim is not formally depersonalized. A competent adult can legally decide to bring about his death.<sup>23</sup> An incompetent patient is effectively depersonalized like the unborn child when the law allows others to decide whether he would want the cessation of medical treatment or feeding where that cessation will result in his death.<sup>24</sup> The Schiavo case illustrates the character of such cases as potentially homicidal rather than suicidal.<sup>25</sup> In reality, Terri Schiavo, unable to

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her skull and sucking out his or her brain." Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 14(M), 117 Stat. 1201, 1206 (2003). The Alan Guttmacher Institute reported that 2,200 PBAs were performed in the United States in 2000. Cheryl Wetzstein, *'Partial-birth' Abortions Shown Increasing*, WASH. TIMES, Jan. 14, 2003, at A6, LEXIS, News Library. In 1996, 650 were performed. *Id.*

23. The law allows a competent adult to starve himself to death. *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 300 (Cal. Ct. App. 1986). In Oregon, a competent, terminally ill adult can legally enlist a physician to assist his suicide. *See The Oregon Death with Dignity Act*, OR. REV. STAT. § 127.800-897 (2003). A state, however, may prohibit assisted suicide. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 705-06 (1997); *Vacco v. Quill*, 521 U.S. 793, 796-97 (1997).

24. *See, e.g., FLA. STAT. ch. 765.102 (Supp. 2005).*

25. Since 1990, Theresa Marie (Terri) Schiavo is in what a Florida court found to be a "persistent vegetative state" (PVS). *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001). Other experts claim she is not PVS and could be rehabilitated. *See id.* at 179. Her husband, Michael, obtained a court order to remove her feeding tube on the ground that Terri, before 1990, had orally said to Michael, his brother and his brother's wife that she would not want "tubes" to keep her alive. *Id.* at 177, 180. Terri's parents denied that Terri had said that; they denied she would want to be starved to death. *See id.* at 178. The court granted Michael's request to end Terri's life despite a conflict of interest on his part. *See id.* In 1993, Michael recovered \$1.05 million from doctors whose misdiagnosis resulted in Terri's PVS. O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53, 58 (2005). Part of that award was used for Michael's legal fees in seeking to end Terri's life. *Id.* at 59. "This fund remains sufficient to care for Theresa for many years," said the Florida Court of Appeal in 2001. *In re Schiavo*, 780 So. 2d at 178. "If she were to die today, her husband would inherit the money . . . . If Michael . . . divorced Theresa . . . the fund remaining at the end of Theresa's life would . . . go to her parents." *Id.* Michael has been seeing another woman for several years and has had two children with her. Abby Goodnough, *Feed-Tube Law Is Struck Down in Florida Case*, N.Y. TIMES, Sept. 24, 2004, at A1; *see also* Abby Goodnough, *With His Wife in Limbo, Husband Can't Move On*, N.Y. TIMES, Nov. 2, 2003, at § 1, 18. On October 21, 2003, Florida Governor Jeb Bush ordered the resumption of Terri's feeding and hydration, pursuant to a law enacted by the Legislature on October 21, 2003. 2003 Fla. Sess. Law Serv. 418 (West). The law was held unconstitutional by the Florida Supreme Court on Sept. 23, 2004. *Bush v. Schiavo*, 885 So. 2d 321, 337 (Fla. 2004); *see also* Charles Rice, *More Concerns with the Schiavo Case*, TODAY'S CATH. (Fort Wayne, Ind.), Dec. 21, 2003, at 16; *Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003); *Schindler v. Schiavo*, 866 So. 2d 140 (Fla. Dist. Ct. App. 2004); *In re Guardianship of Schiavo*, 792 So. 2d 551 (Fla. Dist. Ct. App. 2001); Thomas C. Marks, Jr., *Terri Schiavo and the Law*, 67 ALB. L. REV. 843

communicate her wishes and desires, will no more decide to end her own life than does the decedent in an abortion. There is no morally legitimate basis upon which another can decide to remove her feeding tube.<sup>26</sup> Under Catholic teaching, which Terri Schiavo would have accepted as a practicing Catholic,<sup>27</sup> a feeding tube may be withdrawn if it no longer sustains bodily life because the patient can no longer absorb the nutrients; if the patient is in the final dying process when death is imminent despite the feeding, in which case the withdrawal of feeding will not be a cause of death; or if the administration of the tube is disproportionately painful or otherwise excessively burdensome.<sup>28</sup> It is immoral, however, to do as Terri's husband Michael wishes and remove the tube or do anything else with the intent to kill the patient.<sup>29</sup> In the objective moral sense, that is murder.<sup>30</sup> Thus, sick and innocent human beings like Terri can also be depersonalized and deprived of their human rights in the absence of objective moral limits that protect them.<sup>31</sup>

The above examples lead us to ask whether there are some things that a human being should *never* have the legal right to do. The answer lies in the epistemology. Only if we can say that justice is knowable and that the human law has a duty to serve it in the promotion of the common good—only then can we say that the legalized private killing of the innocent is intrinsically unjust and therefore beyond the moral power of the state to legitimize and enforce. Martin Luther King, Jr., explained, "An unjust law is a code that is out of harmony with the moral law. To put it in the terms of

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(2004); *Schiavo v. Schiavo Amicus Curiae Memorandum of Governor Bush*, 19 ISSUES L. AND MED. 137 (2003).

26. Pope John Paul II, *Caring for Persons in a "Vegetative State": Address to the Participants in the International Congress on "Life Sustaining Treatments and Vegetative Science: Scientific Advances and Ethical Dilemma"* (March 20, 2004), in 49 THE POPE SPEAKS 264, 266 (2004).

27. Lynn Vincent, *A Good Catholic? Terri Schiavo's Life May Hinge on Her Religion*, CATH. WORLD REP., Nov. 2004, at 46, 48.

28. U.S. Bishops' Pro-Life Committee, *Nutrition and Hydration: Moral and Pastoral Reflections*, 21 ORIGINS 705, 706-07 (1992).

29. Pope John Paul II, *supra* note 26, at 266.

30. See CHARLES E. RICE, THE WINNING SIDE 199-207 (2d ed. 2000); Pope John Paul II, *supra* note 26; U.S. Bishops' Pro-Life Committee, *supra* note 28.

31. I have suggested elsewhere that the only reason anyone has really heard about Terri's case is because her husband and her parents disagree. What Michael proposes likely happens every day without publicity in cases where the relatives or other care-givers are united in deciding to kill the patient in the same way Michael Schiavo wants to end Terri's life. Rice, *supra* note 25, at 16.

Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal law and natural law."<sup>32</sup> And, by recognizing that a proposed law could be objectively unjust, a culture creates an important safeguard against the enactment of depersonalizing laws. On the other hand, if a culture maintains that we cannot know what "justice" is and if arguments based on "justice," as Hans Kelsen put it, are therefore "irrational," what arguments, other than the pragmatic, can be urged against laws that depersonalize innocent human beings in order to exclude them from the protection of the law?<sup>33</sup>

What, if any, are the moral limits to the power of the state to depersonalize innocent human beings by subjecting them to death at the discretion of others or of the state? The answer is not to be found in what Professor Jenkins describes as the "classical view . . . of Natural Law and Natural Rights"<sup>34</sup> unless we are willing to identify the author and content of that natural law and of those rights. The only coherent basis for asserting transcendent rights of the person against the state is that the person was created with a nature and an immortal destiny that transcends the state. As I write these lines in Indiana, some child is being born in a hospital somewhere in that state. That child's life began some nine months before his birth. And there will come a time someday when there will be no Indiana, no Washington, no United States of America, not even a Paris or Rome—but that child will still be alive.<sup>35</sup> This immortal destiny is the ultimate reason why the human person has rights that the state, and everyone else, is absolutely bound to respect.

Yet, America today fails to recognize man's immortal destiny. For example, abortion is usually debated in the United States in terms of rights. But the ground rules for debate, set by the cultural arbiters in the media, the academy, and elsewhere, exclude any serious assertion of the only concept of rights that makes them decisive, that they are the gift of the Creator to a creature who has rights that transcend the

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32. MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL 12 (HarperCollins Publishers 1994) (1963).

33. Hans Kelsen, *The Pure Theory of Law*, 50 LAW Q. REV. 474, 482 (1934). The same reasoning would allow for the treatment of human beings as chattel, such as in the Dred Scott decision. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

34. Jenkins, *supra* note 7, at 2.

35. We know from reason that the human being has a spiritual soul because he can abstract and reflect, and we know from reason that he is by nature immortal because a spiritual soul has no parts; therefore, his nature is not to die because death is the breaking up of a thing into its parts. These reasoned conclusions are confirmed by Revelation. See CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 143-52, 175-84 (rev. ed. 1999).

state because that creature is immortal.<sup>36</sup> Instead, the cultural arbiters would claim that our rights are whatever the Supreme Court says that they are. Such thinking allows for decisions like *Roe v. Wade*<sup>37</sup> where the Supreme Court made unborn children subject to execution at the discretion of others.<sup>38</sup>

Here, as elsewhere, the law is an educator. Legalized abortion has contributed to a culture in which the intentional infliction of death is accepted, in an expanding list of cases, as an optional problem-solving technique. One could cite Columbine and other school shootings, euthanasia by sedation or withdrawal of feeding, the waging of endless war that never leads to peace, uncritical popular support for the death penalty, and other such phenomena as examples of the increasing popular acceptance of taking human life in order to resolve difficult situations. Theorists who have helped create this acceptance by busily conjuring "rights" without anchoring them, as the Declaration of Independence did anchor them,<sup>39</sup> in God and creation, ought to reflect on the implications of their ideas. For if, as Hans Kelsen put it, "[f]rom the standpoint of rational knowledge there are only interests and conflicts of interests,"<sup>40</sup> those rights conjurers will be without rational objection when the politicized creation of "rights" runs contrary to their own "interests."<sup>41</sup>

#### ENLIGHTENMENT THOUGHT AND THE DENIAL OF OBJECTIVE MORAL NORMS

Western culture has entered what Francis Canavan, S.J., called "the fag end of the Enlightenment" by which he meant the dying phase of the Enlightenment Era.<sup>42</sup> Again, the problem is epistemological. Enlightenment philosophy rejected revealed religion and the capacity to know objective moral truth.<sup>43</sup> As Joseph Cardinal

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36. See generally John Finnis, *Secularism, Faith, and Public Policy*, in *THE CATHOLIC CITIZEN: DEBATING THE ISSUES OF JUSTICE* 5 (Kenneth D. Whitehead ed., 2004) (discussing the implications of the separation of objective morality from politics by leading secular theorists).

37. 410 U.S. 310 (1973).

38. See *id.* at 162-67.

39. See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

40. Kelsen, *supra* note 33, at 482.

41. *Id.*; see also, e.g., Harriet McBryde Johnson, *Unspeakable Conversations: Or How I Spent One Day as a Token Cripple at Princeton University*, N.Y. TIMES MAG., Feb. 16, 2003, at 50; Michael Specter, *The Dangerous Philosopher*, NEW YORKER, Sept. 6, 1999, at 46.

42. Francis Canavan, *Commentary*, CATH. EYE (New York), Dec. 10, 1987, at 2.

43. See HEINRICH A. ROMMEN, *THE NATURAL LAW* 75-123 (Thomas R. Hanley trans., 1948).

Ratzinger explained, "The fundamental dogma of the Enlightenment is that man must overcome the prejudices inherited from tradition; he must have the boldness to free himself from every authority in order to think on his own, using nothing but his own reason."<sup>44</sup> With this denial of the power of reason to know objective truth, "[t]he only reference point for each person [became] what he can conceive on his own as good."<sup>45</sup> Thus, freedom became disconnected from any objective notion of truth or good; instead, truth became simply "an emancipation from all conditions which prevent each one from following his own reason,"<sup>46</sup> and "good" became relative, defined by each individual according to his own lights (and, ultimately, his own interests).<sup>47</sup> Enlightenment theory has borne fruit in

an almost complete purging of religion from prominent areas of public life.

Religion had to be purged from public life because, with the enshrinement of "reason" as the guide of man, the experiences which inspired religious symbolisms were deemed unscientific. . . . [and] "irrational" because they [could not] be understood in scientific categories.<sup>48</sup>

As Professor Harold Berman wrote, "Only in the past two generations, in my lifetime, has the public philosophy of America shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory, and from a historical to a pragmatic theory."<sup>49</sup>

Enlightenment philosophers denied the capacity of reason not only to know anything about God but also to know any objective moral truth.<sup>50</sup> For the Enlightenment relativist, the morality of an act depends on the circumstances.<sup>51</sup> He sees all propositions as relative

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44. Cardinal Joseph Ratzinger, *Threats to Human Life: Address of Cardinal Joseph Ratzinger, Prefect of the Congregation for the Doctrine of the Faith, to the Extraordinary Consistory of the College of Cardinals* (April 4, 1991), in 36 THE POPE SPEAKS 332, 333 (1991).

45. *Id.*

46. *Id.* at 334.

47. *Id.* at 334-35.

48. William Smith, *The First Amendment and Progress*, HUMANITAS 102, 107 (1987).

49. Harold J. Berman, *The Crisis of Legal Education in America*, 26 B.C. L. REV. 347, 348-49 (1985).

50. See ROMMEN, *supra* note 43; see also Hans Kelsen, *Absolutism and Relativism in Philosophy and Politics*, 42 AM. POL. SCI. REV. 906 (1948).

51. In *Veritatis Splendor*, Pope John Paul II analyzed the errors of "consequentialism" and "proportionalism." Pope John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain

except, of course, his proposition that all things are relative.<sup>52</sup> The absurdity of such skepticism lies in the relativist's certainty that he cannot be certain of anything. If he is not even certain about that, at least he is certain that he is not certain. Yet, the relativist maintains that he cannot know any objective moral truth.<sup>53</sup>

The jurisprudence of relativism can only be some form of legal positivism. "If," wrote Kelsen, "it is recognized that only relative values are accessible to human knowledge and human will, then it is justifiable to enforce a social order against reluctant individuals only if this order is in harmony with . . . the will of the majority."<sup>54</sup> Such an enforcement by law of the majority will, regardless of the content of that will and of that law, is of the essence of legal positivism. If one cannot really know what justice is, how can one insist that a law must be just as a condition of its validity? All theories of legal positivism share to some degree the denial of the ability of reason to know what is right or wrong.<sup>55</sup> These theories therefore focus on what the law is, not on whether it is just. As Kelsen put it, "Any content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm."<sup>56</sup> Thus, the only requirement for a law to be valid and binding is that "it has been constituted in a particular fashion, born of a definite procedure and a definite rule."<sup>57</sup> And once a law is enacted, it is obligatory. Since there is no higher law of nature or of God, the positive law cannot be criticized as unjust. Kelsen believed that justice "is not ascertainable by rational knowledge at all. . . . [Rather], [f]rom the standpoint of rational

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*Fundamental Questions of the Church's Moral Teaching*] ¶ 75 (St. Paul ed. 1993) [hereinafter *Veritatis Splendor*]. Those theories, "while acknowledging that moral values are indicated by reason and by Revelation, maintain that it is never possible to formulate an absolute prohibition of particular kinds of behavior which would be in conflict, in every circumstance and in every culture, with those values." *Id.*

52. See Paul J. Glenn, *CRITERIOLOGY* 169-74 (1933).

53. "As a result of the crisis of rationalism, what has appeared finally is nihilism. As a philosophy of nothingness, it has a certain attraction for people of our time. Its adherents claim that the search is an end in itself, without any hope or possibility of ever attaining the goal of truth. . . . Nihilism is at the root of the widespread mentality which claims that a definitive commitment should no longer be made, because everything is fleeting and provisional." Pope John Paul II, *Fides et Ratio* [*Encyclical Letter on the Relationship Between Faith and Reason*] ¶ 46 (St. Paul ed. 1998).

54. Kelsen, *supra* note 50, at 913.

55. See generally William F. Cahill, *One Phase of the New Debate on the Iniquitous Law*, 5 *CATH. LAWYER* 119 (1959).

56. Hans Kelsen, *The Pure Theory of Law: Part II*, 51 *LAW Q. REV.* 517, 517-18 (1935).

57. *Id.* at 518.

knowledge there are only interests and conflicts of interests. . . . Justice is an irrational ideal."<sup>58</sup> Rights for the relativist, therefore, are merely conventional.

The relativist Enlightenment thinking embodied in legal positivism directly undermines the recognition of objective truth that alone safeguards our individual rights and results in a dangerous legal realism. In 1942, Professor Francis E. Lucey, S.J., of Georgetown University, described the consequences of legal realism when he contrasted its epistemological premises with those of natural law:

Non-natural law systems of Jurisprudence rest on a view of man's nature that makes man independent of his creator and hence the helpless prey of his fellow men. For Holmes and the Realist he is a sort of superior animal. For Scholastic Natural Law, man is a being with a mind and a soul, and hence, superior to animals. He derives his dignity not from other men, but from God his creator. This question of God and morals in law is the real basic difference between Natural Law and other philosophies of law. If there is no God, man is only an animal. He has no innate dignity and no *de jure* independence. He is bound by no norm. Morals have no place in law. Man is subject to the law for animals, physical force. This much must be said for Realism. If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct.<sup>59</sup>

#### THE AUTONOMOUS INDIVIDUAL

For an assertion of rights to be fully coherent it must be anchored in a recognition of God and a knowable, binding moral law. Modern "rights talk" fails because of its acceptance of secularism and relativism. But it also fails, perhaps in the most obvious way, because of its dogmatic individualism. The Enlightenment looks on the human person as an isolated, autonomous individual whose relation, if any, to others arises not from any social nature he has but rather from his personal choice, from the social contract.<sup>60</sup> That is the origin of the "pro-choice" ideology which holds that "[t]he mother has relation to the child she is carrying only if she so chooses."<sup>61</sup> In the

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58. Kelsen, *supra* note 33, at 482.

59. Francis E. Lucey, S.J., *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 531 (1942).

60. RICE, *supra* note 30, at 93.

61. *Id.*

same way, the husband and wife are seen to have a continuing relation to each other only if they continue to consent. Thus, according to the Enlightenment the autonomous individual creates his own morality.<sup>62</sup>

Though Aristotle and Aquinas and others had earlier affirmed that man is social by nature,<sup>63</sup> the social contract thinkers of the Enlightenment postulated a mythical "state of nature" populated by autonomous individuals who were not social, but "sociable."<sup>64</sup> These individuals, they held, formed the state by the social contract. According to Thomas Hobbes, individuals did so to achieve security;<sup>65</sup> according to John Locke, it was for the protection of rights;<sup>66</sup> for Jean-Jacques Rousseau it was to implement the "general will" which turned out to be the unlimited will of the sovereign.<sup>67</sup> The origin of the state for these thinkers was, therefore, not in nature and the divine plan as Aquinas asserted, but in the social contract, with rights coming not from God but from man, and ultimately from the state.<sup>68</sup> This move toward the social contract theory of the state was embodied in the late eighteenth century Declaration of the Rights of Man, which, according to Hannah Arendt, "was a turning point in history. It meant nothing more nor less than that from then on Man, and not God's command or the customs of history, should be the source of Law."<sup>69</sup>

This "natural rights" theory of the Enlightenment asserted the liberation of the autonomous individual from any objective natural law, and from the divine law, so that each individual became his own ultimate authority, his own god.<sup>70</sup> Its individualism made the purpose of law the protection of individual rights rather than the promotion of the common good.<sup>71</sup> Yet, this elevation of individual rights paradoxically left the individual at the complete mercy of the state. Cardinal Ratzinger described this result as inevitable when he

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62. *Id.* at 90-93; *Veritatis Splendor*, *supra* note 51, at ¶ 86.

63. *See* ROMMEN, *supra* note 43, at 3-69.

64. *Id.* at 81.

65. *Id.* at 83.

66. *Id.* at 88.

67. *Id.* at 92.

68. *See id.* at 75-109.

69. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290 (new ed. 1976).

70. *See* ROMMEN, *supra* note 43.

71. *Id.*

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explained that, according to the social contract theories of those like Hobbes,

that which would bring harmony among men was a law recognized by reason and commanding respect by an enlightened prince who incarnates the general will.

Here, too, when the common reference to values and ultimately to God is lost, society will then appear merely as an ensemble of individuals placed side by side, and the contract which ties them together will necessarily be perceived as an accord among those who have the power to impose their will on others.

....

Thus, by a dialectic within modernity, one passes from the affirmation of the rights of freedom, detached from any objective reference to a common truth, to the destruction of the very foundations of this freedom. The "enlightened despot" of the social contract theorists became the tyrannical state, in fact totalitarian, which disposes of the life of its weakest members, from an unborn baby to an elderly person, in the name of a public usefulness which is really only the interest of a few.<sup>72</sup>

Thus, Enlightenment individualism ultimately contradicts itself by leaving the weak and innocent individuals of society at the mercy of the decrees of the powerful.

## FREEDOM "LIBERATED" FROM TRUTH

In *Evangelium Vitae*, John Paul II ascribed individualism's "contradiction" between the affirmation of rights in theory and their denial in practice to,

a *notion of freedom* which exalts the isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service of them.

....

... If the promotion of the self is understood in terms of absolute autonomy, people inevitably reach the point of rejecting one another.

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72. Ratzinger, *supra* note 44, at 334-35.

Everyone else is considered an enemy from whom one has to defend oneself. Thus society becomes a mass of individuals placed side by side, but without any mutual bonds. Each one wishes to assert himself independently of the other and in fact intends to make his own interests prevail. . . . In this way, any reference to common values and to a truth absolutely binding on everyone is lost and social life ventures onto the shifting sands of complete relativism. At that point, *everything is negotiable, everything is open to bargaining*: even the first of the fundamental rights, the right to life.<sup>73</sup>

Five justices of the United States Supreme Court embraced this notion of freedom in the joint opinion of *Planned Parenthood v. Casey*<sup>74</sup> when they raised Enlightenment individualism to the level of constitutional principle, stating,

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. . . .*

....

. . . [I]n some critical respects the abortion decision is of the same character as the decision to use contraception.<sup>75</sup>

The "Mystery Passage," emphasized in the above quote, is becoming culturally descriptive in the United States, with each person setting his own criteria for right and wrong—and his own concept of rights—pursuant to his own elective vision of reality. As a result, legal protection not only for the right to life, but also for traditional marriage, may become a casualty of this country's cultural absorption of these Enlightenment ideas. In *Lawrence v. Texas*,<sup>76</sup> the Supreme

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73. Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶¶ 19-20 (St. Paul ed. 1995) [hereinafter *Evangelium Vitae*].

74. 505 U.S. 833 (1992).

75. *Id.* at 851-52 (citations omitted) (emphasis added).

76. 539 U.S. 558 (2003).

Court held unconstitutional a Texas law that made it a crime if a person “engages in deviate sexual intercourse,” as defined in the statute, “with another individual of the same sex.”<sup>77</sup> In his dissent, Justice Antonin Scalia summarized the impact of *Lawrence* on state regulation of sexual activity and of marriage:

At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. More illuminating . . . is . . . an earlier passage in the Court’s opinion, which notes the constitutional protections afforded to “personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and then declares that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.<sup>78</sup>

The *Lawrence* and *Casey* decisions raise the prospect that the Enlightenment rejection of an objective morality will bear fruit in a wholesale reinvention of individual rights by the United States Supreme Court.

#### CONCLUSION

Law reflects as well as shapes the culture. The law will not return to the principles of the Declaration of Independence without a prior restoration among the American people of the conviction that man (of both sexes) is created in the image and likeness of God with an immortal destiny and consequent rights that transcend the state. Pope John Paul II described it this way:

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77. *Id.* at 563. Justice Anthony Kennedy, writing for five Justices, held that the conviction of the two male defendants violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 578-79. Justice Sandra Day O’Connor concurred in the 6-3 decision on the ground that the convictions deprived the defendants of their rights under the Equal Protection Clause. *Id.* at 579-85.

78. *Id.* at 604 (Scalia, J., dissenting) (internal citations omitted).

[T]he heart of the tragedy being experienced by modern man [is] *the eclipse of the sense of God and of man*, typical of a social and cultural climate dominated by secularism . . . .

. . . .

[This] eclipse . . . leads to a *practical materialism*, which breeds individualism, utilitarianism and hedonism. . . .

. . . .

In the materialistic perspective . . . *interpersonal relations are . . . impoverished*. The first to be harmed are women, children, the sick or suffering, and the elderly. The criterion of personal dignity . . . is replaced by the criterion of efficiency, functionality and usefulness: others are considered not for what they “are,” but for what they “have, do and produce.” This is the supremacy of the strong over the weak.

*It is at the heart of the moral conscience* that the eclipse of the sense of God and of man . . . is taking place. . . . The moral conscience, both individual and social, is today subjected, also as a result of the penetrating influence of the media, to an *extremely serious and mortal danger*: that of *confusion between good and evil*, precisely in relation to the fundamental right to life.<sup>79</sup>

A professed inability to recognize objective good and evil leads Ellen Goodman and other cheerleaders for the Culture of Self to place “the right to decide”—including even to decide intentionally to kill the innocent—at “the center of personal freedom.”<sup>80</sup> In light of the rising body count from the exercise of that “right to decide,” it is past time to consider Pope John Paul’s reminder that because of his “transcendent dignity . . . as the visible image of the invisible God,” the human person is “by his very nature the subject of rights which no one may violate—no individual, group, class, nation or state.”<sup>81</sup>

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79. *Evangelium Vitae*, *supra* note 73, ¶¶ 21, 23-24.

80. Goodman, *supra* note 1.

81. *Veritatis Splendor*, *supra* note 51, ¶ 99.