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LAW AND CULTURE

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A little more than a century ago, Oliver Wendell Holmes took up a task something like mine today. On January 8, 1897, Holmes dedicated a new law school building, and took the measure of law and culture at the turn of a century. Holmes spoke in Boston, at the university of that name. His lecture went into the books as "The Path of the Law"[1] and became a classic of legal literature. Of course, I do not pretend to be the towering figure that Holmes was. He was over six feet tall; besides, I am not even a lawyer. Still, I am grateful for the opportunity to come to this new law school, important in its founding and in its promise, to offer some reflections on law and its relation to culture in this new century.

Perhaps I should preface my remarks by noting a few differences between what Justice Holmes did at Boston University and what I intend to do here at Ave Maria. First, measured by the text published in the *Harvard Law Review*, Holmes spoke that chilly day in Boston for about two hours. I will not, at least, not quite. Second, Holmes placed before his audience the proposition that "the man of the future is the man of statistics and the master of economics."[2] My view is very different. While I do not belittle statistics and economics or deny their importance in the law, what I wish to urge today upon lawyers, law professors, and law students is reflection on fundamental moral truths: truths that are by nature irreducible to numbers and resistant to calculation. What Holmes did, and what I am here to do, differ in still another way: my charge is to *consecrate to God,* as well as to *dedicate to human purpose,* a law building. From what we know

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1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Reprinted in 110 HARV. L. REV. 991 (1997).

2. *Id.* at 469.

about Holmes's attitude towards religious faith, I doubt that he would be envious.

Holmes greeted not only a new century but also the dawn of a truly *national* culture. He knew as well as anyone the world then slipping away: an America of island communities, of regional if not local cultures, of a vigorous—more than occasionally strident—ethnicity. Deep cultural and legal divisions drew the blood of Holmes's body at Antietam; he was wounded three times in that great crucible of national bonding, the Civil War. The experience of fratricidal war transformed his character.[3] With neither television nor radio, nor anything approaching a national press, nor a national consumer market to homogenize them, Americans were as different, region to region, ethnic group to ethnic group, as inhabitants of different countries are today (or were, until recently). Those differences would not be significantly domesticated until the Second World War united diverse Americans in a single national purpose. In many ways that great conflict completed the job begun by the Civil War: the forging of a singular American cultural identity.

Holmes stood that day in Boston on the verge of the only world we have known, a world of huge cities, instant communication, an integrated national economy, a large, highly bureaucratized federal government, a truly national culture. Ours is a world in which all levels of government mold the warp and woof of daily life to an extent unimaginable to our nation's Founders and even to those who reconstructed the nation after the Civil War.

We stand at the dawn of still another age, the age of globalization, of an economy without borders, of international law and of *world* culture, all carried by the internet, cell phones, satellite television and jet travel. Ours is the world of the United Nations, the euro, and high school field trips to Kenya. The globalization of culture has already had an impact on law, chiefly, it seems to me, by dramatically reducing *any* government's control over culture, and thus over the habits and beliefs of people. This creates critical challenges worthy of the most careful reflection, but I will not take them up today. I turn instead to the equally critical question of the role and task of law in the formation of culture.

"Culture" broadly understood is the world that people in a given society make by what they do and why they do it. It is a human

3. *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000) (detailing Holmes's life and views).

artifact brought into being by the practices and habits of a people, especially their purposive activity.[4] "Culture" thus reflects and is shaped by people's understandings of meaning and value. No culture can be critically understood except by probing people's ends, their goals, their beliefs about what is good and bad, right and wrong, just and unjust, noble and base, and their understanding of the ultimate source or sources of meaning and value. It is especially the hierarchy of values, the relative importance of each of the goods present in every authentically human culture, that defines a culture's particularity, its genius.

It is true that the positive sciences of culture (*e.g.*, anthropology, sociology, parts of political science) strive to bracket ultimate questions, including questions of moral truth, for the sake of accurate description. The concept of culture, however, is not necessarily relativistic; speaking of culture as an autonomous human artifact does not imply moral relativism. People make cultures, and they characteristically make them according to what they believe God or the gods wish of them. People make cultures, in other words, according to what they believe is *true.* And we can judge their efforts by reference to the truth, as we are given to understand it.

We Christians believe that culture must be judged ultimately by reference to the fullness of truth in Christ. As Pope John Paul II said in his encyclical letter *Fides et Ratio*, this does not mean that Christian faith supposes that there is some single uniquely correct culture.[5] There is a legitimately wide range of cultural variability, circumscribed only by basic principles of justice and other fundamental moral truths. The Second Vatican Council called for a dialogue between faith and culture,[6] a conversation that is the successor to the earlier conversation between church and state. In our culture, that dialogue must include a conversation between faith, which is one normative system, and the law, another normative system.

When American law was mostly common law, as it was when Holmes addressed his Boston listeners, its relationship to culture was harmonious, because it was almost wholly derivative. The common

4. *See generally* 1 ENCYCLOPEDIA OF SOCIOLOGY 562-63 (Edgar F. Borgatta & Rhonda J.V. Montgomery eds., Macmillan Reference USA 2d ed. 2000).

5. John Paul II, *Fides et Ratio* [*Faith and Reason*] ¶ 71 (Pauline Books & Media ed. 1998).

6. Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 44 (1965), *reprinted in* THE SIXTEEN DOCUMENTS OF VATICAN II 513, 557-59 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967).

law was conceived as the distillate of practice, of common culture. The law was *not* any judge's say-so or even the say-so of the judiciary as a body; judicial declarations counted, rather, as so much *evidence* of the law. The law remained the common practices of the people, discerned, but not made, more or less adequately by judges.

Holmes recognized this relation between common law and the people's moral beliefs and practices.[7] He provocatively urged his listeners, however, to *study* law, to come to *understand* law on radically different terms: as "predictions"[8] of what courts will do rather than reflections of what is commonly done. Laws for Holmes are "prophecies" viewed from what he famously called the perspective of the "bad man."[9] The "bad man" does not treat legal rules as reasons for his actions; he cares not a whit for their moral rightness or wrongness.[10] His concern, rather, is with their consequences for his possible actions.[11] For him, the rules of law are mere predicates in an equation whose sum supplies valuable information in the form of data about potential unpleasant consequences of pursuing this goal or that.[12]

We live in age of statutes, administrative rules, executive orders, treaties, and judicial decisions conceived differently, more creatively and more like legislation, than was the common law. Law characteristically is, for us, the purposive ordering of norms, imagined and given life, once and for all, on a certain date, down at city hall, up in the statehouse, or in Washington, D.C. All these forms of law, these *enactments,* bind by dint of someone's or some institution's authority, not by dint of popular custom and practice. The relationship between law and culture is therefore fragile, more complex, and quite problematic.

Bearing this complexity in mind, let us now look at law from the perspective not of Holmes's "bad man," but rather from the vantage point of the good and conscientious citizen. In this perspective, it seems to me, the central challenge in thinking about law and culture may be likened to resolving the paradox of the chicken and the egg. In the face of unjust and immoral practices, some well-intentioned people look immediately and single-mindedly to law to "solve" the

7. Holmes, *supra* note 1, at 459.
8. *Id.* at 458.
9. *Id.* at 461.
10. *Id.* at 459.
11. *Id.*
12. *See id.*

problem. They see legislation as the primary cure for moral defects. "There ought to be a law," they say. Viewing law as the engine driving the cultural train, they fail to see that cultural reform and renewal usually require much work beyond the domain of law. On account of this failure, their efforts at reform frequently stall and, even when they succeed, do little more than breed disrespect for laws that are perceived as "out of touch" with reality, unenforceable, ineffective.

Other good people fall into the opposite error. They are often too complacent in the face of evil cultural practices or intimidated by the power or prestige of forces supporting them. They view laws as mere epiphenomena of culture. "You can't legislate morality," is their slogan. "We should forego the pursuit of legal justice," they say, "until people are brought round to accept a sound moral understanding" of whatever the matter is at hand. They place all their hopes for reform and renewal in "education" and other extralegal efforts in the cultural sphere. When it comes to the sanctity of life, for example, they insist that it is only by changing people's hearts, not by reforming the laws, that unborn children can be protected against the violence of abortion.

Many used to say this about racial justice. In the last century, this proposition figured prominently in the argument made by John W. Davis, the great Supreme Court advocate (and loser of the 1924 presidential election) in his defense of school segregation laws in *Brown v. Board of Education*.[13] Davis allowed that segregation might be unjust, and, as an initial matter, courts might rather have held that it was unconstitutional. But in earlier cases courts had not so ruled; instead, courts, including the Supreme Court, consistently said that "separate but equal" satisfies all relevant constitutional requirements.[14] So, Davis observed in 1954 when he was arguing the case, an entire culture had been built upon segregation.[15] It would be foolish and counterproductive, he suggested, to try to uproot an entire culture by changing the law. Legal reform would have to be

13. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55, 54-61 (Leon Friedman ed., 1969). *Brown*, 347 U.S. 483 (1954).

14. *See* Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Gong Lum v. Rice, 275 U.S. 78 (1927); Berea Coll. v. Kentucky, 211 U.S. 45 (1908); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899), Plessy v. Ferguson, 163 U.S. 537 (1896).

15. ARGUMENT, *supra* note 13, at 57, 61.

put on hold until more favorable cultural conditions came into being. Law would have to follow culture. "You can't legislate morality."

The Court, to its credit, rejected this argument in *Brown v. Board of Education*.[16] The Justices in *Brown* struck a ringing blow for justice in the face of a culture corroded by the acid of racism. Of course, it is true that a judicial decree does not, by itself, convert anyone's heart. And the Court's writ in *Brown* did not run far, very fast. But "all deliberate speed" is neither neutral nor reverse, however much we may be eager to move into high gear. The *Brown* court knew that law, whether just or unjust, functions as a teacher.[17] It is capable of instigating great cultural change; it is capable of profoundly reinforcing a *status quo*. 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. They fell into neither of the two errors I mentioned, that of believing that legal reform is sufficient to overcome social evils or that of supposing that such reform has no significant role to play in the matter.

The laws invalidated by the Supreme Court in *Brown* were, in the beginning, effects of racism rather than its causes. Segregation *manifested* cultural prejudices, the widespread belief among whites that blacks were inferior. Does anyone doubt for a second, however, that legally required segregation—with blacks consigned to quarters on the far side of the tracks, drinking from "colored only" water fountains, and traipsing past whites to the rear of the bus—*reinforced, perpetuated, and over time helped to create* that culture? Discriminatory laws structured a world of *difference*, a universe demarcated by color that confronted its inhabitants as an ineradicable fact, a given, like a force of nature, for a culture is *second* nature to those who live in it. People, black and white, tended to internalize the norms of laws protecting patterns of racial segregation. The law called forth the ideology that defended it, thus rationalizing and deepening the racism that brought it into being in the first place. Segregation laws grew out of prejudice, but they also perpetuated it. Without the edifice of segregation and Jim Crow laws, the ideology of racism would have atrophied as, mercifully, it seems to be atrophying today.

Another flaw in Davis's argument is this: when it is a question of basic human rights, appeals to culture count for very little. Equal

16. 347 U.S. 483 (1954).

17. *See id.* at 494.

protection of the laws is a basic human right, rooted in the equal dignity of all human persons. Those exercising public authority bear a particular, though not unique, responsibility to establish justice, a responsibility, incidentally, that was denied by Justice Holmes.[18] That Holmes himself, or even the majority of those whom public authorities serve and represent, happens to prefer subjectively what is objectively unjust alters this responsibility not at all. On matters of fundamental justice, even conscientious opposition to what is objectively right must be resolutely resisted and overcome. There were, no doubt, advocates of slavery and segregation who sincerely believed in the inferiority of black persons, and thus in the justice of these monstrous practices. Those who saw these evils for what they were, however, were right to impose the truth upon racists, no matter how sincere they might have been.

Now, if the Supreme Court got the relationship between law and culture right in the case of segregation, it got it tragically wrong on the issue of abortion. In 1972, *Roe v. Wade*[19] created the right to abortion *ex nihilo*. Twenty years later, *Casey v. Planned Parenthood*[20] reaffirmed that right. In *Casey*, the plurality opinion of Justices O'Connor, Kennedy, and Souter stated at its outset that Chief Justice Rehnquist would have decided *Roe* differently.[21] Now, however, it was too late. The Justices in the Casey plurality said much about why overruling Roe at this late date would damage the legitimacy of the court.[22] But why? And what made the date too late?

The answer to both questions is clear. It is, in form, John W. Davis's argument from *Brown*.[23] The Justices in the *Casey* plurality said that "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion. . . ."[24] They asserted that the stakes were highest for women: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[25] According to the

18. ALSCHULER, *supra* note 3, at 89.
19. 410 U.S. 113 (1973).
20. 505 U.S. 833, 845 (1992).
21. *Id.* at 845.
22. *Id.* at 854, 864-69.
23. ARGUMENT, *supra* note 13, at 57-58.
24. *Casey*, 505 U.S. at 856.
25. *Id.*

plurality's reasoning, abortion guarantees that liberty and that equal participation.[26]

Is this not to say that *legal* abortion is the linchpin of our culture, at least of women's role in it? Is a more powerful testimony to law's power to create, or to destroy, a culture imaginable? If so, and also in light of *Brown,* do we not have to attribute to law a culture-forming capacity which is at odds with the anthem of recent liberal political theory which demands that government remain steadfastly neutral about "the good," about what counts as genuine human flourishing?

In fact, the comparison to *Brown* is tighter than one might think. In that earlier case, it is true, the Justices were squarely confronted with a conflict between the requirements of justice and the practices of a culture. Attorneys in *Roe* also presented the Court with arguments about the requirements of justice, arguments about the injustice of abortion to unborn human beings, and arguments that implied the constitutional *necessity* of substantial restrictions on feticide: *if* the unborn are "persons" their right to life is guaranteed by the Constitution.[27] The *Roe* court did not accept these arguments.[28] Since *Roe,* the only alternative to the permissive regime affirmed in *Casey* has been federalism: the Constitution, being allegedly "silent" about abortion, consigns the matter to the tender mercies of fifty state legislatures. But it seems to me, admittedly a nonlawyer, that the Constitution is *not* silent. The Constitution expressly protects the right of all "persons" to the equal protection of the laws, including the laws against homicide.[29] If, however, as science discloses, philosophy argues, and faith confirms, unborn human beings *are* "persons," then their rights, too, are protected. Now, I recognize that competent jurists and constitutional scholars disagree about the respective roles of Congress and the federal courts in enforcing the Equal Protection Clause and other Fourteenth Amendment guarantees,[30] but it seems

26. *See id.*

27. Roe v. Wade, 410 U.S. 113, 156-57 (1973).

28. *Id.* at 158.

29. U.S. CONST. amend. XIV, § 1.

30. *See, e.g.*, Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH & LEE L. REV. 1149, 1180-81 (1998) (arguing that "[i]f the court has underenforced the Due Process Clause for institutional and federalism reasons, Congress can prohibit conduct pursuant to Section 5 even if the Court has previously held that due process challenges to that conduct are not actionable in federal court. . . . Along with the power to expand protection of rights through Section 5 of the Fourteenth Amendment, Congress should be able to alter the means for protecting any right overenforced by the Supreme Court."); Ronald D. Rotunda, *The Powers of Congress under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND.

to me that there is no escaping the question of the constitutional rights of the unborn.

Law and culture stand in a complex dialectical relationship. Neither comes first; neither comes last. Law contributes massively to the formation of culture; culture influences and shapes law. Inescapably, inevitably, law and culture stand in a mutually informing, formative, and reinforcing relationship. For this reason and many others, the liberal ideal of governmental "neutrality" on contested cultural-moral issues, allegedly leaving everyone "free" to pursue their own private visions of the good and thus attain personal fulfillment, is an illusion. It amounts either to nonsense, or it masks an ideology of social engineering.

It is simply impossible for law to be "morally neutral" on abortion. The law since *Roe v. Wade* is certainly not neutral. It embodies very definite, controversial, and, in my opinion, manifestly false beliefs about the rights and dignity of the unborn child. However firmly Justice Blackmun in his opinion for the Court in that case insisted that the Justices were taking no position on the question "when life begins,"[31] the effect of their ruling was to decide precisely that question, and to decide it in a way that comports neither with the scientific evidence nor with sound philosophical analysis. Moreover, the lessons taught, day in and day out, by the law's denial of the humanity and equal dignity of the child are anything but neutral; they are tragic. What woman feeling pressure to have an abortion not only from her social or economic circumstances, but perhaps also from a boyfriend, husband, or parent, will not be tempted to think: "Abortion cannot be killing a developing human being; for if it were, then the law would prohibit it."

It is true, of course, that our law compels no woman to have an abortion, but that is no evidence of neutrality. Did the fact that the laws of South Carolina in 1859 compelled no one to own slaves mean that the law of that state was "neutral" on the question of slavery? Would we for a moment credit the claim of a supporter of slave laws to be merely "pro-choice," rather than pro-slavery? Would we accept a pro-slavery politician's assurances that he is "personally opposed" to the practice? Those Catholic politicians and others who today

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L. REV. 163 (1998) (arguing that "a broad reading of congressional power to, in effect, reverse Supreme Court decisions interpreting the meaning of the Constitution, is bad constitutional law and bad policy. To read Section 5 of the Fourteenth Amendment to grant Congress the power to interpret the meaning of the Constitution is to read that Clause incorrectly.").

31. *Roe*, 410 U.S. at 159.

consistently support pro-abortion laws while claiming to be personally opposed to abortion ought to reflect on the ignominy in which Justice Roger Brooke Taney, the author of the Supreme Court's tragic pro-slavery decision in the 1857 case of *Dred Scott v. Sandford*,[32] is held. Justice Taney was a Catholic from Maryland who actually freed his own slaves.[33] He was "personally opposed." His support for the right of others to own slaves and to take their slaves into free territory makes us ashamed today. Yet, on the logic of those who today rationalize their support for legal abortion, he was merely "pro-choice."

When it comes to abortion and other sanctity of life issues, we should not suppose that our choice is between reforming the law and working to change the culture. We must do both. The work of legal reform is a necessary, though not sufficient, ingredient in the larger project of cultural transformation. Yes, we must change people's hearts. No, we must not wait for changes of heart before changing the laws. We must do both at the same time, recognizing that just laws help to form good hearts, and unjust laws impede every other effort in the cause of the gospel of life.[34] Teaching and preaching that gospel, reaching out in love and compassion to pregnant women in need, all of this "cultural" work is indispensable. Without it, we will never effect legal reform or, if we do, the laws will not bear the weight we will be assigning to them. Even as these endeavors go forward, though, we must work tirelessly for the legal protection of the right to life of the unborn child. It is not "either/or"—"law or culture"—it is "both/and." Efforts in each sphere presuppose and depend upon the success of efforts in the other.

Let me shift now to another area in which the dialectic of law and culture is exemplified. *Nothing* in our constitutional experience has been so fully given over, by law, to the vicissitudes of culture as religion. Pick any modern Supreme Court treatment of religion, and you will find, usually right there on the surface of the Court's opinion, a dire warning of the potentially destructive impact of law on religion (and, sometimes, of religion on law).[35] Where law, widely defined to

32. 60 U.S. (19 How.) 393 (1857).

33. WALKER LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY 355 (1965).

34. *See* John Paul II, *Evangelium Vitae* [*The Gospel of Life*] (Pauline Books & Media ed. 1995).

35. *E.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) (stating "that a union of government and religion tends to destroy government and to degrade religion" and that the history has shown

include even the non-coercive symbolic acts of public authority, conveys a message of approval, or endorsement, of religion—even of faith in God of the sort embodied in the Declaration of Independence and emblazoned on our coins—constitutional guarantees of religious freedom are allegedly violated.[36] Under this regime of law, the pseudo-religion of secularism becomes, in effect, an established religion and an active threat to the religious liberty it purports to uphold. As Chief Justice Rehnquist has pointed out, the Court has set up a conflict between the Establishment Clause and the Free Exercise Clause of the First Amendment,[37] and thus created, in Fr. Richard John Neuhaus's famous phrase, "the naked public square."[38]

It is instructive, I believe, to compare the Supreme Court's jurisprudence of church and state with the teaching of the Second Vatican Council. In *Dignitatis Humanae,* the Church's declaration on religious freedom, the Council taught that public authority should eschew a putative "neutrality" and favor and foster the religious life of the people.[39] At the same time, law must avoid the coercion of faith (which is, in any event, impossible) and even the coercion of outward acts of religious practice.[40] The prohibition of religious acts of any kind can be justified only when necessary to protect public peace, the rights of others, and the just claims of public morality.[41] In this teaching, the freedom to worship or not to worship and to practice one's religion in accord with one's conscience is protected, yet there is no imposition of secularism or denuding of the public square.

"that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.").

36. *E.g.*, ACLU v. Capitol Square Review and Advisory Bd., 210 F.3d 703 (6th Cir. 2000), *rev'd en banc*, 243 F. 3d 289 (6th Cir. 2001).

37. Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707, 720-22 (1981) (Rehnquist, J., dissenting).

38. *See generally* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA, (2d ed. 1986).

39. Second Vatican Council, *Dignitatis Humanae* [*Declaration on Religious Freedom*] ¶ 3 (1965), *reprinted in* THE SIXTEEN DOCUMENTS OF VATICAN II 395, 399-400 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967).

40. *Id.* ¶ 2, at 398-99 ("This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.").

41. *Id.* ¶ 7, at 403-04 (stating that "society has the right to defend itself against possible abuses committed on the pretext of freedom of religion [and that] [i]t is the special duty of government to provide this protection.").

Religious institutions are treated, as they should be, as institutions of civil society enjoying autonomy from governmental control. Government, however, in its wide range of activities is bound to accommodate, where possible, the free exercise of religion, which is broader than the right to private belief or even the right to public worship. Ironically, the United States now risks adopting the policies of the former Leninist states, all of which reduced freedom of religion to freedom of worship, a religion confined to the sacristy.

Now consider the realm of marriage and family life. As any sociologist or person of common sense knows, the law of any society crucially helps to establish the concrete conditions under which people come to be and are brought to maturity. Nothing could be more crucial to the integrity and vitality of a community and to the success of people's lives, yet in the name of individual "privacy," "autonomy," and "freedom," important protections of family life have been erased from the law. Many of our fellow citizens, especially in the most affluent and highly educated sectors of American life, have apparently persuaded themselves that the erasure of these laws results in greater individual freedom. It does not.

We have long known in the area of economic life that the absence of law does not necessarily advance freedom and may often contract it. The 1905 case of *Lochner v. New York*[42] has come to epitomize the Supreme Court's early failure to understand this. In *Lochner*, the Justices struck down a law preventing the exploitation of laborers who were subjected to excessive working hours in potentially hazardous conditions.[43] Holmes dissented from this opinion, not because the court was failing to protect human rights, but because he believed the court should allow the majority to tailor the law to contemporary social developments.[44] The fact that this decision is today an embarrassment to the Supreme Court and, like *Dred Scott*, a blot on its record, reflects a more sober judgment of the ways in which the *laissez-faire* philosophy it stands for provided a mask for economic oppression. The lesson should be clear, and it clearly applies to cultural life beyond the domain of the marketplace: when law retreats, all one can say for sure is that individuals are "free" to confront the non-legal structures of society, be it an unforgiving system of unregulated exchange that may, in the circumstances,

42. 198 U.S. 45 (1905).

43. *See id.* at 46 n.1.

44. *Id.* at 74-76 (Holmes, J., dissenting).

virtually invite the exploitation of labor, or the vacuum which previously was inhabited by a proper care for public morality. The law's retreat may very well leave upright persons, families, and institutions of civil society vulnerable to a massive, objective framework of settled understandings and expectations: a culture that, though it is destructive and debilitating, they lack the effective resources to resist. For those who can and do resist, there may well be informal (and sometimes, perhaps, formal) sanctions and penalties of ostracism, rejection, and stigma.

Even by its absence, law can shape culture in destructive ways. The law's refusal to interfere with the institution of slavery helped to establish and maintain a culture corrupted by an ideology of racial superiority and inferiority. The law's refusal to protect the unborn similarly shapes and hardens a culture corroded by the treatment of unborn human beings as "nonpersons," lacking the right to life that for the rest of us is protected by law.

It is simply a myth to suppose that the retreat of law necessarily enhances freedom. The cultural structures people sometimes face in the absence of law can leave them anything but "free." Is your teenage daughter truly "free" to engineer her *own* pattern of courtship? Can she call forth a corresponding attitude on the parts of the young men of her acquaintance who are potentially eligible to her as mates? How "free" is she to be the chaste young woman she should be and you want her to be? Would she not be freer in a world in which accepted understandings and expectations supported, rather than hindered, her natural desire to be treated with dignity by young men who present themselves to her as possible romantic partners?

Does anyone seriously doubt that courtship is a *social* institution, one which confronts us with a more or less established set of expectations and understandings? The same is true of marriage. What the philosopher Joseph Raz says of monogamy applies more broadly to all of the constitutive features of marriage (*e.g.*, sexual exclusivity, heterosexuality, permanence of commitment), and even to courtship patterns: "Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions."[45]

The upshot of Professor Raz's observation is that large numbers of people are not effectively free to enter into monogamous (and, I

45. JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986).

would say, permanent) marriages *unless* the culture makes the institution of marriage constituted as monogamous (and permanent) available to people. And the further implication is that *law* has an essential, though subsidiary, role to play in establishing and maintaining a healthy culture of courtship and marriage.

Until a generation or so ago, all of this was taken for granted. Our courts, our legislatures, our legal scholars, and our people in general long agreed that marriage is a social institution, shaped in significant measure by norms settled upon as matters of political choice. In the words of a late nineteenth century Supreme Court opinion, "[marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[46]

But *what* is it about marriage that is "public"? *Which* features of the complex and dynamic unity that we call the married life are selected and settled by political authority and taken under public guardianship? Surely it is not the whole, or even most, of marriage. Law can hardly control the ordinary give and take between spouses or dictate the terms of their daily efforts to live together in harmony and conjugal love. Most of what goes on in any marriage is not susceptible of legal regulation or subject to sanction. The economic life of the couple, for example, is public business only at the edges. We no longer impose an economic template upon the couple, assigning wholesale to the wife a dependent, inferior economic existence. Our law, including our constitutional law, has also long protected the liberty of spouses and, in that sense, their "privacy" with respect to sexual intimacy, and, at least as a matter of black letter law (often observed in the breach), their personal right "to direct the upbringing and education of children."[47] For better or worse, the law does not even restrict the use or availability of contraceptive methods of family planning. In the 1965 case of *Griswold v. Connecticut*, the Supreme Court ruled that no attempt to do so could comport with a right of what some of the Justices called "marital privacy."[48]

Still, the courts, even in *Griswold*, affirm that marriage is inherently social and necessarily governed by norms put into place by

46. Maynard v. Hill, 125 U.S. 190, 211 (1888).

47. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

48. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

political authority.[49] In a 1948 dissent, Justice Robert Jackson made this point in another case:

> If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that . . . tell whether they are married and, if so, to whom. . . . The uncertainties that result are not . . . trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals.[50]

In 1961, Justice John Harlan, though writing in support of the result finally achieved four years later in *Griswold,* said:

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.[51]

Putting aside Jackson's reference to property titles, we have here testimony that both of the central aspects of marriage stand vitally in need of the protections of law: the unitive aspect of marriage in chaste sexual congress and its procreative aspect.[52] But we have spent the last thirty years "privatizing" sexual conduct and procreation. Can the "privatization" of marriage itself be far behind?

The answer, of course, is that the privatization of marriage is already upon us. Exploiting the logic of earlier decisions, advocates of same-sex "marriage" have come to courts demanding, in the name of "equality," the redefinition of marriage to accommodate homosexual partnerships. Such a move would obliterate, at a stroke, the traditional conception of marriage in our law and culture as a one-flesh union of sexually complementary spouses ordered to the generation, nurture, and education of children. It would remove any

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49. *Id.* at 486, 495.

50. Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

51. Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

52. *See* THE CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1643-1654 (2d ed. 1997); *see also id.* ¶ 1664 ("Unity, indissolubility, and openness to fertility are essential to marriage.").

logical basis for insisting on monogamy, fidelity, or permanence of marital commitment. Effectively, it would, as Professor Gerard Bradley has argued, abolish the already bruised and battered institution of marriage in our culture.[53] Yet, the highest courts of Hawaii[54] and Vermont[55] have sought to impose same-sex marriage by judicial fiat, and the Supreme Judicial Court of Massachusetts may be on the verge of doing the same.[56] In Hawaii, the people of the state responded by amending the state constitution to grant to the legislature "the power to reserve marriage to opposite-sex couples."[57] In Vermont, where amending the state constitution is procedurally difficult, the people have not been able to do that. It appears increasingly to many that the best way to save marriage from privatization and effective abolition in our culture is for pro-family forces to unite across denominational and racial lines to work for a federal constitutional amendment to protect marriage from judicial redefinition.[58]

Culture does not exist in a legal vacuum, as if there is, or could be, some pure culture, defined as what happens without law, for law is necessary to civilization. Even the absence of law—the choice to omit or remove legal regulation in some area of cultural life—shapes culture, for better or for worse. Apart from the most doctrinaire libertarians, no one believes that the unregulated market yields pure economic freedom, nor should anyone imagine that the retreat of the law from family life and related areas of culture yields personal liberation or fulfillment. Injustice and oppression can certainly come from the presence of laws that should not exist, but they can also result from the absence of laws that should.

What have we argued today? We started with the assertion that Justice Oliver Wendell Holmes 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. We argued that, if Catholic faith

53. Gerard V. Bradley, *Marriage Penalty*, NAT'L REV., Jan. 26, 1998, at 33.

54. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding, on equal protection grounds, that the state of Hawaii's refusal to grant marriage licenses to same-sex couples must meet the burden of "strict scrutiny.").

55. *See* Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that, under the common benefits clause of state constitution, same-sex couples may not be excluded from the benefits and protections of marriage).

56. *See Appeal Set on Same-Sex Marriage Ruling*, BOSTON GLOBE, May 22, 2002, at B2.

57. HAW. CONST. art. I, § 23 (1998).

58. *See, e.g.*, Robert P. George, *The 28th Amendment*, NAT'L REV., Jul. 23, 2001, at 32.

and American culture are to dialogue, the law's relation to culture in America must be appreciated, for law is the primary carrier of culture in this pluralistic society; law is the forger of our national identity and of our collective sense of right and wrong. The intersection between law and morality is therefore a synaptic point in the dialogue between faith and culture.

In that intersection, what can law do? Alone, it cannot cure moral defects in a people. It can, however, change people's sense of their hierarchy of values and of what finally falls out of the realm of acceptable behavior. Law teaches more than it prevents. In working to create a culture open to the transcendent truths of faith, therefore, 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.

This is, as I understand it, part of the purpose of Ave Maria School of Law. I thank you for this initiative, and I pray that God will bless all those involved in it.