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Modesty and Moralism: Justice, Prudence, and Abortion: A Reply to Skeel & Stuntz

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MODESTY AND MORALISM: JUSTICE, PRUDENCE, AND ABORTION—A REPLY TO SKEEL & STUNTZ

JOHN M. BREEN*

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INTRODUCTION

In a recent article, Professors David Skeel and William Stuntz argue in favor of what they describe as a “modest” conception of law from an explicitly Christian and biblical point of view.¹ Briefly put, Skeel and Stuntz assert that the enormous expansion that law has undergone in the last one hundred years—particularly in the area of criminal law—has seriously undermined the rule of law by vesting public officials with an inordinate amount of discretion. They further contend that this expansion has been exacerbated by the practice of “legal moralism,” whereby lawmakers enact laws as a means of expressing certain values, rather than for the purpose of governing society. Moreover, because these largely symbolic laws are not regularly enforced, they are incapable of teaching people the cultural values that they supposedly embody. Instead, the occasional enforcement of such laws through the exercise of official discretion nurtures a pernicious cynicism in the public by teaching people that law is less a matter of commitment to certainty, predictability, and equality, and more a function of individual circumstance and governmental fiat. Because biblical principles strongly support rule-of-law values, Skeel and Stuntz argue that a genuinely Christian conception of law would repudiate the practice of moralism and pursue a more modest course. They conclude that a genuine commitment to legal modesty dictates that law not be used to restrict a number of activities that many Christians currently hope to limit through legal means, including, somewhat surprisingly, the practice of abortion.

Skeel and Stuntz’s article is surely a welcome addition to the burgeoning field of “Christian legal theory.”² By addressing various topics from “specifically and self-consciously Christian

1. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809–13 (2006).

2. The renewed interest in the relationship between Christianity and the law that has taken place over the past fifteen years can be seen in the creation of new journals, such as the *Journal of Catholic Social Thought*, and the reorganization of *The Catholic Lawyer* as *The Journal of Catholic Legal Studies*, as well as the publication of several books on the subject, including *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007) and *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* (John Witte, Jr. & Frank S. Alexander eds., 2006) (2 vols.).

perspectives,"³ this mode of discourse seeks to contribute to the "multifarious conversation"⁴ taking place in the academy regarding both specific legal issues and the nature of law in general. Skeel and Stuntz's contribution is especially welcome because they have both been critical of the way that Christian legal literature has proceeded. For example, in his well-known review of Robert Cochran, Michael McConnell, and Angela Carmella's book, *Christian Perspectives on Legal Thought*, Stuntz criticizes the essays in that volume, and Christian legal scholarship in general, for an absence of what he terms "critical bite."⁵ That is, notwithstanding the radical nature of Christianity, Stuntz finds the examples of Christian legal theory in the book "moderate and familiar," even "comfortable."⁶ Indeed, according to Stuntz, these essays could suggest to others that Christian legal scholars "think about our legal system pretty much the way other legal theorists do."⁷ Likewise, Skeel has written about the lightness of Christian legal scholarship that is made evident, he says, by the near total absence of "reflection in the scholarly legal literature on the relationship between Christian-

3. Patrick McKinley Brennan, Book Review, 16 J.L. & RELIGION 667, 668 (2001) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001)).

4. CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, xviii (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001).

5. William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1709 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001)).

6. *Id.*

7. *Id.*; see also Mark Tushnet, *Distinctively Christian Perspectives on Legal Thought?*, 101 MICH. L. REV. 1858 (2003). What Tushnet found largely missing in the book were essays with "perspectives that derived in some strongly presented way from the authors' understanding of Jesus's distinctive position in religious thought." *Id.* at 1868 n.29. Implicit in Tushnet's review is the claim that Christian legal scholarship is destined to inhabit, at best, the margins of legal academic discourse. He makes this claim by way of a dilemma. On the one hand, Christian legal theory could remain relatively indistinct, presenting ideas that are already widely available in the academy, but without the unnecessary religious baggage that many find objectionable. For Tushnet, the essays in the McConnell, Cochran and Carmella book contain precisely this sort of legal analysis; their attenuated connection to the Christian message renders them indistinct and unremarkable. On the other hand, if Christian legal theory were to speak in a genuinely and decisively Christian voice, then it would be sectarian. By drawing upon the premises that are unique to the Christian story of God's revelation in Jesus Christ, Christian legal theorists would be unable to address legal problems in a way that would be accessible and acceptable in a society defined by religious pluralism. *Id.* at 1868.

ity and the secular law."⁸ Although Skeel provides a useful definition for what should qualify as genuine Christian legal scholarship,⁹ he concludes that, at present, work of this sort can only be found in "scattered outposts" across the landscape of American law.¹⁰

By voicing these criticisms, Skeel and Stuntz invite an examination of their own work to see whether they succeed in avoiding the shortcomings they perceive in the work of others. If "critical bite" means proposing something truly radical and outside the mainstream of American legal thought, then plainly, their article has little "bite" to offer. It is, after all, difficult to imagine anything more conventional or more deeply rooted in the mainstream of American legal discourse than an argument on behalf of rule-of-law values. Still, what the article lacks in "bite" it surely makes up for in "bark." Indeed, Skeel and Stuntz's provocative argument concerning the practice of legal moralism, and their specific identification of pro-life legal efforts with this practice, call for a thorough response.

This Article offers an analysis of the idea of "legal modesty" that informs Skeel and Stuntz's article.¹¹ Because they write from an Evangelical perspective, Skeel and Stuntz's engagement with Christian sources is largely confined to citing passages from sacred scripture.¹² Although the Christian Church "has always venerated the divine Scriptures" and "urges all the Christian faithful . . . to learn by frequent reading" of the Bible,¹³ scriptural exegesis is not the sum total of Christian wisdom accumulated through the centuries. Therefore, while their

8. David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship* 6 (U. Pa. Law Sch. Pub. Law & Legal Theory Working Group, Paper No. 06-37, 2007), available at <http://papers.ssrn.com/abstract=929850>.

9. Skeel posits that genuine Christian legal scholarship must satisfy two criteria. "First, it must provide either a normative theory derived from Christian scripture or tradition[,] or a descriptive theory that explains some aspect of the influence of Christianity on law, or of law on Christianity. . . . Second, it must seriously engage the best secular scholarship treating the same issues." *Id.* at 31.

10. *Id.* at 33–34.

11. See *infra* Parts I–III.

12. See Skeel & Stuntz, *supra* note 1, at 812–18 (repeatedly citing the Hebrew and Christian scriptures).

13. SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON DIVINE REVELATION, *Dei Verbum* ¶¶ 21, 25 (Nov. 18 1965), reprinted in THE DOCUMENTS OF VATICAN II, at 111 (Walter M. Abbott, S.J., ed., Joseph Gallagher trans., 1966), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118_dei-verbum_en.html.

thesis has much to recommend it, their work would have greatly benefited from a fuller engagement with the Christian intellectual tradition, especially as that tradition is reflected in Catholic social teaching and, in particular, the social magisterium of the late John Paul II.¹⁴

Nowhere is the absence of the Christian intellectual tradition more acutely felt than in Skeel and Stuntz's treatment of abortion. Indeed, the Church's social teaching serves as a potent reminder that the point of the rule of law is not simply to guard law's own integrity, but to secure justice for those whom it governs. Justice, properly understood, is the measure of both law's modesty and law's ambition.¹⁵ Moreover, the wider tradition that Skeel and Stuntz ignore offers a sustained reflection on the nature of justice in general and its specific meaning in the context of abortion.

The Christian intellectual tradition also offers an account of the virtue of prudence.¹⁶ Although Skeel and Stuntz's conclusion that law should refrain from regulating abortion seems to be prudential in character, they fail to explain how their judgment fits within the demands of prudence. Above all, prudence requires diligent work to obtain a correct understanding of the facts in a given situation. Inexplicably, however, Skeel and Stuntz rely on a single source, Gerald Rosenberg's *The Hollow Hope*,¹⁷ for their understanding of both the frequency of abortion and the practical effects that legal restrictions on the procedure had before the Supreme Court's decision in *Roe v. Wade*.¹⁸ In doing so, they ignore the substantial literature on the subject that challenges Rosenberg's rather thin empirical claims.¹⁹ In this respect, Skeel and Stuntz's article gives new meaning to the problem of "lightness" in Christian legal theory that Skeel elsewhere diagnoses.²⁰

To their credit, Skeel and Stuntz correctly perceive that the values, institutions, and attitudes that make up a given culture

14. See *infra* Part II.D–E.

15. See *infra* Part II.B.

16. See *infra* Part II.F.

17. See Skeel & Stuntz, *supra* note 1, at 829, 833 (citing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991)).

18. 410 U.S. 113 (1973).

19. See *infra* Part IV.B.

20. See Skeel, *supra* note 8, at 6.

are vastly more important in guiding the lives of individuals than the law could ever hope to be. Indeed, although Skeel and Stuntz do not express the point in precisely the same way, they agree with John Paul II and the Catholic social tradition as a whole in discerning that “culture” enjoys a kind of priority over “law” in the conduct of human affairs.²¹ When combined with their skeptical view of law’s ability to teach and their dubious empirical claims regarding the effectiveness of abortion restrictions, however, this view leads Skeel and Stuntz to conclude that opponents of abortion should eschew legal restrictions on the practice in favor of a cultural witness to the value of life.

In this respect, Skeel and Stuntz share a certain affinity with a number of Catholic commentators who have advocated a similar “culture first” approach.²² These commentators argue that the law should not be used in a coercive fashion, forcing women to carry their pregnancies to term. Instead, law should address the difficult social circumstances that impel many women to choose abortion.²³ These commentators argue that the law can both persuade individuals to choose life and help bring about a change in the culture regarding unwanted pregnancies by rendering material assistance and standing in solidarity with the most vulnerable members of society.

The available data, however, simply does not support the idea that greater social assistance will curb the incidence of abortion to any significant degree, nor that it will help pave the way for a cultural outlook that is more respectful of nascent human life.²⁴ The high incidence of abortion in many European countries with far more generous social service networks than the United States confirms this fact. Instead, programs that provide financial assistance to pregnant women should be supported for their own sake, as a matter of justice, and not simply as a means of changing the cultural landscape.

In addition, the Article argues that Skeel and Stuntz grossly undervalue law’s capacity to teach and influence culture through criminal prohibition.²⁵ Much of this teaching takes place beyond the specific instances in which particular laws are

21. See *infra* Part IV.A.

22. See *infra* Parts V.A–B.

23. See *infra* Part V.C.

24. See *id.*

25. See *infra* Part VII.

enforced. For example, although illegal abortions took place in large numbers prior to *Roe*, social science evidence indicates that the incidence of the procedure underwent a dramatic increase following its legalization.²⁶

The nature of abortion as a social phenomenon is surely such that it cannot be solved through purely legal means. Accordingly, the Article concludes with an historical example of how law and culture can work in tandem to address social problems. Specifically, this Article discusses the remarkable reduction in drunk driving fatalities that followed both the enactment and enforcement of stricter laws and the wide dissemination of cultural messages designed to discourage the practice.²⁷ A wider engagement with the Christian tradition would have shown Skeel and Stuntz that efforts designed to regulate and discourage abortion through legal means fall squarely within the proper boundaries of law, correctly understood. Indeed, such laws could form one component of a larger cultural strategy designed to address the difficult situation faced by women with unwanted pregnancies, and the threat that widely available abortion services pose to the lives of unborn children.²⁸

I. THE SKEEL-STUNTZ THESIS: MODESTY IN LAW AND THE VICE OF LEGAL "MORALISM"

The central claim that Skeel and Stuntz advance in their article is that law, properly understood, should be modest, both in the scope of its application and in the goals that it seeks to realize in social life.²⁹ They argue that this modest approach to law is consistent with what they describe as "the Christian conception of law."³⁰ Modesty, they say, is needed in order to preserve rule-of-law values that are threatened by the excessive role that discretion plays in our legal system. Thus, to uphold these values, law must "pursue a more modest agenda" by avoiding the error of moralism.³¹

26. See *infra* Part IV.B.

27. See *infra* Part V.D.

28. See *infra* Part V.E.

29. Skeel & Stuntz, *supra* note 1, at 809–12.

30. *Id.* at 812.

31. *Id.*

Part of law's virtue can indeed be found in the rule-of-law values that Skeel and Stuntz dutifully rehearse.³² As they note, the rule-of-law requires that state action must primarily be "the consequence of a legal rule, not a discretionary choice";³³ legal rules "must have a reasonable measure of specificity,"³⁴ such that individuals can distinguish between "behavior that is subject to legal penalty and behavior that isn't";³⁵ legal rules "must be defined in advance of the penalized conduct";³⁶ the law "must treat violators at least roughly the same" regardless of class or social status;³⁷ and "the law must not punish intent divorced from conduct."³⁸

Skeel and Stuntz claim that these rule-of-law values "follow naturally from Christian premises."³⁹ For example, they argue that the idea of human equality, from which the principle of equal treatment under the law is derived, finds its source in the biblical revelation that men and women are created in the image of God.⁴⁰ The Bible also makes clear that men and women are fallen creatures "prone to selfishness and exploitation."⁴¹ Thus, from a Christian perspective, law is necessary to prevent the chaos that follows when individuals pursue their own self interest without restraint. At the same time, law must treat individuals made in God's image as worthy of dignity and respect. From this, Skeel and Stuntz conclude that the Bible leads "to the same rule-of-law principles that our legal system purports to honor," such as the reasonable specificity of laws and their general applicability regardless of social class.⁴²

Skeel and Stuntz then contrast these rule-of-law principles with the actual content of divine law set forth in sacred scripture. As they note, divine law is often stated in extremely gen-

32. A classic statement of rule-of-law values can be found in LON L. FULLER, *THE MORALITY OF LAW* 33-41 (rev. ed. 1969).

33. Skeel & Stuntz, *supra* note 1, at 809.

34. *Id.* at 815.

35. *Id.* at 809.

36. *Id.*

37. *Id.* at 810.

38. *Id.*

39. *Id.* at 812.

40. *Id.* at 813-14.

41. *Id.* at 814.

42. *Id.* at 815.

eral terms.⁴³ It also often defines wrongdoing in terms of a person's interior thoughts alone, divorced from any conduct.⁴⁴ Therefore, according to Skeel and Stuntz, "God's law, as Jesus teaches and applies it, violates every single principle that flies under the banner of the 'rule of law.'"⁴⁵ To incorporate God's law into the positive law of the state would invest public officials with "absolute discretion to choose who should be sent to prison and who should go free."⁴⁶ Although God's law should provide guidance to men and women in how they live their lives, it cannot "serve as a code for judges and juries."⁴⁷

The problem with contemporary American law, according to Skeel and Stuntz, is that it aspires to be comprehensive in scope.⁴⁸ In its ambition, the positive law often mimics the moral law found in religious texts, including the Christian Bible. Skeel and Stuntz state that the source of this ambition is political insofar as legislators have an incentive to create countless criminal prohibitions to satisfy the desires of some constituents.⁴⁹ Moreover, legislators have no incentive to curtail this appetite for lawmaking because they "know that the laws they pass will rarely be enforced."⁵⁰ Even if an enacted law sits unused, however, the legislator will still benefit from the symbolic act of "taking a stand against one or another type of crime."⁵¹ Thus, lawmakers "can please constituents who wish to condemn the relevant conduct, without paying either the fiscal or political price of *stopping* that conduct."⁵²

By enacting statutes that they do not expect anyone to enforce, lawmakers fall prey to the vice that Skeel and Stuntz call "moralism." This misuse of the law occurs when laws are enacted, not in order to punish conduct or resolve disputes, but to

43. *Id.* at 816.

44. *Id.*

45. *Id.* at 817.

46. *Id.*

47. *Id.* at 819.

48. *Id.* at 811.

49. *See id.* at 825.

50. *Id.* at 824.

51. *Id.*

52. *Id.* at 825. Skeel and Stuntz contend that this "legal excess is actually self-reinforcing," *id.* at 820, such that the proliferation of new criminal statutes becomes "natural," *id.* at 824.

teach and inspire the public by expressing certain values.⁵³ Laws of this sort are best seen as a “means of sending messages to voters, not sending offenders to prison.”⁵⁴ Even worse, Skeel and Stuntz contend that legislators—and members of Congress in particular—feel free to enact what are in essence extensive moral codes.⁵⁵ As examples of this misuse of law, Skeel and Stuntz refer to such disparate statutes as the Mann Act, enforcement of Prohibition under the 18th Amendment, and the Sarbanes-Oxley Act, as well as statutes designed to regulate abortion.⁵⁶

These measures are problematic for the rule of law because what a legislator may think of as a set of “purely symbolic laws,”⁵⁷ a prosecutor may regard as a generous source of possible charges that may be brought against a defendant.⁵⁸ Because these laws are often “defined in the vaguest possible terms,”⁵⁹ Skeel and Stuntz conclude that these measures undermine the rule of law by giving prosecutors wide discretion to “define the bounds of criminal liability.”⁶⁰ The predictability of law evaporates when its practical existence is a matter of governmental fiat.

Skeel and Stuntz see no way out of this predicament other than to retreat from the practice of adding an endless stream of new statutes to the existing laws. If our society is to avoid the situation in which “the rule of law is honored in theory but widely ignored in practice. . . . [I]t must be a more modest law that rules.”⁶¹ Furthermore, Skeel and Stuntz suggest that the kind of modesty necessary to preserve rule-of-law values would preclude the use of law to regulate abortion.

53. *Id.* at 811. Elsewhere, Stuntz has written that moralism “begins with the claim that law’s highest goal is to identify classes of behavior that are not just socially wasteful or inefficient but *evil*, and then to stamp them out.” Stuntz, *supra* note 5, at 1733.

54. Skeel & Stuntz, *supra* note 1, at 825.

55. *See id.* at 811.

56. *Id.* at 825–26, 829.

57. *Id.* at 828.

58. Here Skeel and Stuntz distinguish the conduct of state and local prosecutors from that of federal prosecutors. With high crime rates and limited budgets, the former abjure the more esoteric crimes and “focus instead on core violent crimes, major thefts, and drug deals.” *Id.* at 821. Federal prosecutors, by contrast, are “free to go after the cases they think matter most or the cases most likely to yield headlines.” *Id.*

59. *Id.* at 822.

60. *Id.* at 828.

61. *Id.* at 811–13.

II. THE PRINCIPLES OF LEGAL MODESTY AND LEGAL AMBITION

Skeel and Stuntz are correct to argue that law is often an inapt means of addressing many types of social ills. They are right to fear that the seemingly endless multiplication of criminal statutes (the enforcement of which no prosecutor's office could competently oversee) leads to the immodest creation of laws that will not be enforced.⁶² They are wrong, however, to claim that the legal regulation of abortion would violate the boundaries of law's modesty, properly understood.

A. *Skeel and Stuntz's Notion of Legal Modesty: An Idea in Search of a Principle*

Although Skeel and Stuntz are emphatic about the need for legal modesty, their article is striking in its failure to offer an account of the principle that informs this allegedly essential virtue of legal order. That is to say, they do not define legal modesty. They fail to distinguish, in a principled fashion, appropriate from inappropriate exercises of state power.

62. I do not share the same concern that Skeel and Stuntz express over the growing use of merely procedural crimes, such as lying to federal investigators and the like. Prosecutors often bring charges involving these relatively minor, technical violations of the law when they are unable to prove or lack confidence in their ability to prove the primary criminal activity under investigation. As examples of the wrongful prosecution of crimes that are almost never pursued, they cite the conviction of Martha Stewart for lying to federal investigators and the investigation of President Bill Clinton for perjury and obstruction of justice. Skeel & Stuntz, *supra* note 1, at 810–11, 821–22, 827. The use of these lesser, procedural crimes is not especially troubling so long as the punishment available for such conduct is proportionately less than the primary offenses under investigation.

On the larger issue of prosecutorial discretion, they do not offer an alternative system in which such discretion would be largely absent, nor could they. Discretion is unavoidable in the operation of any system that depends upon the exercise of human judgment. Furthermore, a large reduction in the number of criminal law statutes is simply not desirable given that our large, complex society boasts, among other things, a diverse and multi-faceted economy in need of regulation and policing. Moreover, such a massive overhaul of our criminal law would not be politically feasible given the inertia that established laws enjoy because of the reluctance of politicians to repeal them. Even if such a change could be brought about, and American criminal law returned to a common law system of a few well-known crimes, this change would not eliminate official discretion. The meaning of the law would still be informed by the discretion of the prosecutors and other law enforcement officials responsible for enforcing it.

Despite their reticence in this regard, Skeel and Stuntz's article does suggest several plausible, though ultimately unconvincing, accounts of legal modesty. For example, Skeel and Stuntz could be understood to say modesty dictates that the law not proscribe conduct that people will continue to perform regardless of its legal status. One could glean this notion of legal modesty from Skeel and Stuntz's references to the continued consumption of alcohol under Prohibition and the practice of abortion prior to *Roe v. Wade*.⁶³ Such an account of legal modesty, however, would prove too much. If it were taken seriously, such a principle would require the elimination not only of the kinds of excessive regulation that Skeel and Stuntz find so troubling, but also virtually every legal prohibition that exists, including even the most basic laws such as those against murder and theft. The fact that people regularly, and in some cases routinely, violate such laws is not an argument for their abolition. The truth is that no law ever enjoys perfect compliance, and indeed, laws are enacted precisely with the expectation that they will be violated.

In addition, Skeel and Stuntz could be understood to say that legal modesty means that the law should refrain from attempting to regulate those areas of life where legal involvement will only inspire creative evasion by those subject to its regulation.⁶⁴ Clearly, those who have greater material resources at their disposal will, as a general matter, enjoy a greater chance of evading detection or conviction. Still, where a person is sufficiently motivated, he will find a way to avoid the law and pursue his desired goals, regardless of means. This will always be the case, whether the conduct in question is smuggling narcotics or complying with the tax code. Accordingly, such a notion of legal modesty likewise proves too much.

The last and most obvious reading that one could give to Skeel and Stuntz's idea of legal modesty is that law should not be employed where those responsible for its enforcement will wield excessive discretion. Plainly, Skeel and Stuntz extol the virtues of

63. See *id.* at 829.

64. See *id.* at 836 (observing that "[r]egulated actors exercise their creativity by looking for ways to *evade* legal norms—like taxpayers filling out their tax forms every April 15, trying all the while to hold on to every penny they can"); see also Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?* 75 VA. L. REV. 561, 575–87 (1989) (discussing the phenomenon of creative interpretation with respect to the provisions of the tax code).

limited discretion and bemoan the fact that “[d]iscretion mostly rules in America’s justice system” such that “[t]he rule of law [has] become[] a veneer” for governmental fiat.⁶⁵ The principle of legal modesty, however, cannot require the wholesale elimination of discretion because, as Skeel and Stuntz rightly concede, discretion is an unavoidable part of every legal system.⁶⁶

B. *Justice Under Law: The Soul of Legal Modesty and Ambition*

What emerges from Skeel and Stuntz’s article is not a principle of legal modesty, but a strong dislike for prosecutorial discretion and didactic legislation. Skeel and Stuntz seem to posit that the purpose of a legal system is to protect itself. It must preserve its own integrity by ensuring that rule-of-law values are respected. Although the rule of law is important and significant in maintaining a well-ordered society, it is not the purpose for which any particular statute or legal system as a whole exists. Instead, the purpose of law, and the principle that animates both legal modesty and legal ambition, is justice.⁶⁷ It is entirely possible for a statute to satisfy all of the requirements of the rule of law and be profoundly unjust.⁶⁸ Indeed, the formal qualities of a given law might be exemplary, yet fail to compensate for its substantive deficiencies. For example, a law that prohibited all acts of religious worship might satisfy the

65. Skeel & Stuntz, *supra* note 1, at 811.

66. *See id.* at 809 (stating that “[o]bviously, discretion exists, and it matters, but the key policy judgments . . . should be made by those who *define* legal rules, not by those who *enforce* such rules”); *id.* at 815 (admitting that “no legal system can define permissible and impermissible behavior in intricate detail, [but] the line between the two should be reasonably clear” and insisting that without “a reasonable measure of specificity,” one leaves the world of law and “[is] right back in the world of unbounded discretion”).

67. This point enjoys wide support among legal theorists who greatly differ from one another on a host of other questions concerning law. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 3 (1971) (“Justice is the first virtue of social institutions, as truth is of systems of thought.”); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 260 (1980) (“The authority of law depends . . . on its justice or at least its ability to secure justice.”).

68. This was, of course, the principal issue lurking in the background of the famous Hart-Fuller debate concerning the definition of law. *Compare* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). This issue remains the eight-hundred pound gorilla sitting in the living room of legal positivism.

formal requirements of specificity, clarity, and consistency of application. At the same time, by denying people the fundamental right of religious liberty, such a law could never serve the ends of justice.⁶⁹

Despite their criticism of the vice of “moralism,” Skeel and Stuntz give some indication that they understand the importance of justice. They insist that the “chief object” of law is not to teach but to rule, and law rules best “when its ambitions are modest . . . [i]dentifying the most destructive wrongs . . . for fair, accurate adjudication.”⁷⁰ They conclude that “law must draw lines not between right and wrong, but between the most destructive and verifiable wrongs, and everything else.”⁷¹

By describing anti-abortion laws as examples of “legal moralism” that should not be enacted, Skeel and Stuntz seem to suggest that they do not believe that justice—the chief object of law—is at stake in the case of efforts to restrict abortion. To their credit, Skeel and Stuntz do not argue that the law would enhance freedom and serve the ends of justice by recognizing the choice of a woman to terminate her pregnancy as a legal right. At the same time, on the basis of their article,⁷² one is left to conclude that Skeel and Stuntz do not believe that the deliberate killing of children *in utero* is one of “the most destructive wrongs” or “one of the most destructive and verifiable wrongs” to which the law must respond.⁷³ Instead, one is left to conclude that, in their view, it would be an exercise of grandi-

69. Cf. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (“The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.”). For a thoughtful discussion regarding the importance of religious freedom and why it must be protected in law, see John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779 (1986). For a discussion of the history behind the special place afforded religious belief in our constitutional order, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

70. Skeel & Stuntz, *supra* note 1, at 830–31.

71. *Id.* at 839.

72. As part of a conference that featured a panel on the Skeel-Stuntz thesis hosted by the Lumen Christi Institute and the Law Professors’ Christian Fellowship, David Skeel made clear his own opposition to abortion and his support for pro-life legal efforts. Although this position is in no way discernable from Skeel and Stuntz’s article, it is nevertheless welcome news.

73. Skeel & Stuntz, *supra* note 1, at 839.

ose ambition for the law to attempt to ban a procedure that medical science tells us results in the death of a human being.⁷⁴

But this is not the case. With respect to justice, however, it is an exceedingly modest goal for law to seek to prevent the willful extermination of an innocent human being. Although it is true that "immorality and illegality cannot and must not be co-extensive,"⁷⁵ it is also true that law and morality must be coex-

74. See, e.g., KEITH L. MOORE, *BEFORE WE ARE BORN: BASIC EMBRYOLOGY AND BIRTH DEFECTS* 23 (2d ed. 1983) ("Development begins at fertilization when a sperm fuses with an ovum to form a zygote The zygote is the first cell of a new human being." (emphasis omitted)). For a remarkably succinct essay that conveys precisely the scientific understanding of the human embryo as a human being, see William J. Saunders, Jr., *Embryology: Inconvenient Facts*, *FIRST THINGS*, Dec. 2004, at 13. Obviously much more could be said on this subject. Regrettably, many supporters of the abortion license have argued that the entity in the womb is not a human being. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring) (declaring that "there is a fundamental and well-recognized difference between a fetus and a human being"), *overruled on other grounds by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Others have properly chastised these advocates for seemingly having forgotten the basic lessons they were taught in their high school biology classes. See Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 *NOTRE DAME L. REV.* 995, 1017 (2003) ("To claim that the pre-born human embryo is not human life is, from a scientific and medical standpoint, simply absurd. No serious physician or biologist would hold such a view. To so claim is either an act of ignorance or one of willful intellectual dishonesty."). A more intellectually defensible position is to concede, as an empirical matter, that the human embryo is a "human being" but to argue, as a moral and legal matter, that it is not yet a "person." See, e.g., John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 *VA. L. REV.* 437, 444 n.24 (1990) ("The abortion debate has often been confused by loose use of terms such as person, human life, human being, etc. Clearly the fertilized egg, embryo, and fetus are human and are living. The question is whether they merit the moral protection accorded to clearly defined persons.").

75. Skel & Stuntz, *supra* note 1, at 838; see also Stuntz, *supra* note 5, at 1735 (arguing that legal moralism can be legitimate only if immorality and illegality are coextensive, "[y]et they cannot possibly be coextensive"). This proposition enjoys wide support among those who have reflected on the relationship between law and morality. See, e.g., Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 *WM. & MARY L. REV.* 1579 (2007) (arguing that law is a "limited domain" in that the legal reasons that justify legal actions constitute only a subset of the possible moral justifications); Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 *J. CATH. SOC. THOUGHT* 231 (2004). Nevertheless, to say that law and morality are not coextensive is quite different from the extreme positivist position that law and morality are entirely separable. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 136-41 (Wilfrid E. Rumble ed., 1995).

tensive where the fundamental denial of justice is at stake.⁷⁶ It is indeed modest to seek to avoid having the state serve as the vehicle and protector of gross injustice.⁷⁷ It only now seems to be an immodest proposition to set upon this course because of the breadth and tenacity of the Court's decision in *Roe v. Wade* and the culture it has engendered over the past thirty years.

C. *The Road Not Taken: Mainline Protestant Support for Abortion Rights*

Skeel and Stuntz's decision to avoid a serious discussion of the substantive aspects of justice in the context of abortion may reveal their desire to resolve the difficult question of legal regulation on merely formal grounds. Because legal modesty involves justice in both its substantive and procedural dimensions, however, their solution is too neat by half. Indeed, a correct understanding of legal modesty plainly requires a more thorough examination of justice in the context of abortion.

Writing from a self-consciously Christian and Evangelical perspective, Skeel and Stuntz could hardly be unaware of the many claims that self-professed Christians make regarding abortion and the substantive ends of justice. Indeed, if Skeel and Stuntz had wanted to go beyond their Christian defense of the relatively uncontroversial rule-of-law values that they set forth and take up these substantive claims, they could have made use of any number of sources. Many of the mainline Protestant churches have been enthusiastic supporters of the abortion license since the beginning of the abortion reform movement in the late 1960s and early 1970s.⁷⁸ In their policy

76. As discussed in greater detail below, the Catholic social tradition, and in particular the magisterium of the late Pope John Paul II, are especially instructive on this point. See, e.g., Pope John Paul II, Encyclical Letter, *Evangelium Vitae* ¶ 71 (Mar. 25, 1995) [hereinafter *Evangelium Vitae*] (discussing the "need to recover the basic elements of a vision of the relationship between civil law and moral law"), available at http://www.vatican.va/edocs/ENG0141/_index.htm.

77. *Id.* ("While public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause even more serious harm, it can never presume to legitimize as a right of individuals . . . an offence against other persons caused by the disregard of so fundamental a right as the right to life.")

78. See, e.g., Sidney E. Zion, *State Council of Churches to Seek Abortion Law Liberalization*, N.Y. TIMES, Dec. 13, 1966, at 52. Some Protestant ministers went beyond mere advocacy of permissive abortion laws. In 1967, a group of twenty-one New York Protestant and Jewish clergy announced the formation

of the Clergy Consultation Service in an advertisement in the *New York Times*. The group declared that they would provide abortion counseling and referral information to interested women. As its members generated a network of resources for women seeking abortions prior to legalization, the group expanded to other cities. Following the enactment of New York's liberal abortion law in 1970, they directed thousands of women from outside the state to abortion providers operating in New York. See NANETTE J. DAVIS, FROM CRIME TO CHOICE: THE TRANSFORMATION OF ABORTION IN AMERICA 129-155 (1985); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 333-34 (1994); ANDREW H. MERTON, ENEMIES OF CHOICE: THE RIGHT-TO-LIFE MOVEMENT AND ITS THREAT TO ABORTION 51, 56-57 (1981).

For a useful, though incomplete and now somewhat dated, collection of statements by various Christian denominations regarding abortion, see J. GORDON MELTON, THE CHURCHES SPEAK ON ABORTION: OFFICIAL STATEMENTS FROM RELIGIOUS BODIES AND ECUMENICAL ORGANIZATIONS (1989). For an excellent bibliography reflecting many sources on the subject, see GEORGE F. JOHNSTON, ABORTION FROM THE RELIGIOUS AND MORAL PERSPECTIVE: AN ANNOTATED BIBLIOGRAPHY (2003).

That the mainline Christian denominations overwhelmingly gave their support to the abortion rights movement in the early days of abortion reform is really quite remarkable. For example, beginning in 1970, the national governing body of the Presbyterian Church (U.S.A.), the General Assembly, declared that "the artificial or induced termination of a pregnancy is a matter of careful ethical decision of the patient . . . and therefore should not be restricted by law." Presbyterian 101—Abortion Issues, <http://www.pcusa.org/101/101-abortion.htm> [hereinafter *Presbyterian 101—Abortion Issues*] (last visited Jan. 2, 2008) (quoting various meetings of the General Assembly on the issue of abortion).

The United Church of Christ's (UCC) Board for Homeland Ministries voted in 1970 to support a "woman's right to choose the legal option of abortion." In 1971, the General Synod of the UCC, the national deliberative body for the denomination, overwhelmingly approved a proposal entitled "Freedom of Choice Concerning Abortion." In adopting this "proposal for action," the General Synod announced its support for a woman's right to choose abortion in the early months of pregnancy and called upon local congregations to work for the repeal of abortion laws. See UNITED CHURCH OF CHRIST, MINUTES OF THE 8TH GENERAL SYNOD 131-133 (1971).

The United Methodist Church (UMC) was among the first of the Christian churches to lend its support to the view that abortion should be permitted as a moral and legal matter. In 1968 the UMC's General Conference adopted a "Statement on Responsible Parenthood" in which it declared its support for legislation "allowing termination of pregnancy" where "the physical or mental health of the mother is seriously threatened, or where substantial medical evidence indicates that a child will be born grossly deformed in mind or body, or where pregnancy has resulted from rape or incest." United Methodist Church, STATEMENT OF RESPONSIBLE PARENTHOOD (1968), reprinted in MELTON, *supra*, at 162. The UMC adopted a more liberal statement in 1976, which declared that "the path of mature Christian judgment may indicate the advisability of abortion" and encouraged UMC member churches and society as a whole to "[s]afeguard the legal option of abortion under standards of sound medical practice, and make abortions available to women without regard to economic status." United Methodist Church, *Statement on Responsible Parent-*

statements concerning abortion, these churches often refer to the biblical injunction to preserve the "sanctity of life," sometimes even describing abortion as "tragic."⁷⁹ In each case, however, these concerns give way to the imperative of personal autonomy and the dictates of individual conscience.

For example, the Presbyterian Church, U.S.A. believes that "[t]he considered decision of a woman to terminate a pregnancy can be morally acceptable,"⁸⁰ so the right to obtain an abortion "should not be restricted by law."⁸¹ Likewise, the Episcopal Church insists that the law "must take special care to see that the individual conscience is respected," making clear its "unequivocal opposition" to any law that would "abridge[] the right of a woman to reach an informed decision about the ter-

hood (1976), reprinted in MELTON, *supra*, at 163–64. The UMC was also instrumental in the founding of what is now known as the Religious Coalition for Reproductive Choice. See Religious Coalition for Reproductive Choice—A Proud History as a Voice of Conscience, <http://www.rcrc.org/about/history.cfm> (last visited Jan. 2, 2008).

For its part, the Episcopal Church first endorsed the liberalization of laws restricting abortion at its 62nd General Convention held in 1967. There the Episcopal Church announced its support for laws permitting the "termination of pregnancy" for reasons of rape, incest, fetal deformity, or physical health of the mother. Episcopal Church, RESOLUTION ON ABORTION (1967), reprinted in MELTON, *supra*, at 48. Like the UMC, the Episcopal Church subsequently adopted an even more permissive stance. Indeed, at its 65th General Convention held in 1976, the Episcopal Church voted to reaffirm the 1967 resolution on abortion. The Episcopal Church went further, however, "express[ing] its unequivocal opposition to any legislation on the part of national or state governments which would abridge or deny the right of individuals to reach informed decisions in this matter and to act upon them." Episcopal Church, *Resolution to Reaffirm the 1967 General Convention Statement on Abortion*, in JOURNAL OF THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, MINNEAPOLIS, 1976, at C-3 (1977), available at http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=1976-D095.

79. Episcopal Church, *Resolution to Reaffirm the General Convention Statement on Childbirth and Abortion*, in JOURNAL OF THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, INDIANAPOLIS, 1994, at 323–25 (1995) [hereinafter *Episcopal Church Statement 1994*] (stating that all abortion has a "tragic dimension" and that "[a]ll human life is sacred from its inception until death"), available at http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=1994-A054. This is the most recent general statement adopted by the Episcopal Church with respect to abortion. Cf. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH 102 (2004) (stating that "belief in the sanctity of unborn human life makes us reluctant to approve abortion"), available at <http://archives.umc.org/interior.asp?mid=1732>.

80. *Presbyterian 101—Abortion Issues*, *supra* note 78 (discussing the 204th General Assembly in 1992).

81. *Id.* (discussing the 182nd General Assembly in 1970).

mination of pregnancy or that would limit the access of a woman to safe means of acting on her decision."⁸² Although it is uncertain whether the Episcopal Church applies this same criterion in the formulation of its other policy positions, the Church says that its opposition to laws restricting abortion stems in part from the fact that legal prohibitions "will not address the root of the problem."⁸³ The Evangelical Lutheran Church in America (ELCA) opposes not only laws "that would outlaw abortion in all circumstances," but also "laws that [would] deny access to safe and affordable services" for what it terms "morally justifiable abortions."⁸⁴ According to the ELCA, this category is considerably broader than those few especially troubling cases in which the pregnancy threatens the life of the mother or where it is the result of rape or incest.⁸⁵ Indeed, according to the ELCA, "abortion prior to viability should not be prohibited by law or by lack of public funding of abortions by low income women."⁸⁶ Similarly, the United Methodist Church

82. *Episcopal Church Statement 1994*, *supra* note 79.

83. *Id.*

84. The Evangelical Lutheran Church in America ("ELCA") adopted a lengthy statement on abortion in 1991. See EVANGELICAL LUTHERAN CHURCH IN AMERICA, ELCA SOCIAL STATEMENT ON ABORTION 9–10 (1991), available at <http://www.elca.org/socialstatements/abortion/> (last visited Jan. 2, 2008).

85. The ELCA statement provides that "[a]bortion ought to be an option only of last resort." *Id.* at 4. Because "[t]he strong Christian presumption is to preserve and protect life," *id.* at 3–4, the ELCA "in most circumstances, encourages women with unintended pregnancies to continue the pregnancy," *id.* at 6. At the same time, the ELCA "recognizes that there can be sound reasons for ending a pregnancy through induced abortion," among which it includes "a clear threat to the physical life of the woman," pregnancy resulting from rape, incest and other forms of nonconsensual sex, and "circumstances of extreme fetal abnormality, which will result in severe suffering and very early death of an infant." *Id.* at 6–7.

86. *Id.* at 10. In its entirety, the ELCA statement with respect to legal regulation of the procedure provides the following:

The position of this church is that, in cases where the life of the mother is threatened, where pregnancy results from rape or incest, or where the embryo or fetus has lethal abnormalities incompatible with life, abortion prior to viability should not be prohibited by law or by lack of public funding of abortions for low income women. On the other hand, this church supports legislation that prohibits abortions that are performed after the fetus is determined to be viable, except when the mother's life is threatened or when lethal abnormalities indicate the prospective newborn will die very soon.

Beyond these situations, this church neither supports nor opposes laws prohibiting abortion.

Id.

(UMC) "support[s] the legal option of abortion under proper medical procedures."⁸⁷

D. *Justice, Abortion, and the Christian Tradition*

Given the modest role for law concerning abortion envisioned by these various Christian denominations, it is unclear why Skeel and Stuntz chose not to engage these sources. It may have been that they were unimpressed by the fatuous moral and legal reasoning reflected in such statements. Or it may have been that Skeel and Stuntz were underwhelmed by the tenuous relationship between the conclusions asserted in these documents and the biblical foundation they believe is necessary for authoritative Christian teaching. One would like to think, however, that Skeel and Stuntz sensed in these various policy statements a dramatic innovation in Christian moral teaching, and that their decision not to engage these texts reveals a desire for something more than the current deliberations of modern-day American ecclesiastics.

In fact, each of the statements described above represents a decisive break with the Christian past, and an undeniable loss of continuity with the apostolic tradition. That is, in sharp contrast with "the morals of the Greco-Roman world" in which Christianity first took root, "[t]he tradition of the Church has always held that human life must be protected and cherished from the beginning, just as at the various stages of its development."⁸⁸ The prohibition against the intentional destruction of life in the womb is a topic that is addressed in some of the earliest Christian texts. Indeed, although the Hebrew and Christian scriptures do not specifically mention the term "abor-

87. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH 102 (2004), available at <http://archives.umc.org/interior.asp?mid=1732>. Oddly enough, the UMC apparently envisioned that civil laws must provide some level of religious instruction before they can be enacted. Absent such a requirement it is difficult to make sense of the UMC's statement that legal restrictions on abortion are inappropriate because "[g]overnmental laws and regulations do not provide all the guidance required by the informed Christian conscience." *Id.*

88. Sacred Congregation for the Doctrine of the Faith, Declaration on Procured Abortion, *Quaestio de abortu* ¶ 6 (Nov. 18, 1974) [hereinafter *Quaestio de abortu*], reprinted in VATICAN COUNCIL II: MORE POSTCONCILIAR DOCUMENTS 441 (Austin Flannery, O.P., ed., 1982) [hereinafter POSTCONCILIAR DOCUMENTS], available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abotioen.html.

tion,"⁸⁹ some scholars plausibly contend that several oblique references condemning the practice can be found in the New Testament.⁹⁰ Even if this interpretation is incorrect, it is clear

89. Supporters of abortion rights are fond of noting this omission. From this fact they wish to infer that the Church's opposition to abortion is a mere human construct, and that the decision to obtain an abortion can be consistent with a life devoted to Christ. See, e.g., Anne Eggebroten, *The Bible and Choice*, in *ABORTION: MY CHOICE, GOD'S GRACE* 209, 210 (Anne Eggebroten ed., 1994); see also Paul D. Simmons, *Personhood, the Bible and Abortion*, in *THE ETHICS OF ABORTION: PRO-LIFE VS. PRO-CHOICE* 207, 222-23 (Robert M. Baird & Stuart E. Rosenbaum eds., 3d ed. 2001) (concluding that "the claim that the Bible teaches that the fetus is a person from the moment of conception is problematic at best"); GARY WILLS, *HEART AND MIND: AMERICAN CHRISTIANITIES* 526 (2007) ("Abortion is not treated in the Ten Commandments—or anywhere in the Jewish Scripture. It is not treated in the Sermon on the Mount—or anywhere in the New Testament. It is not treated in the early creeds. It is not treated in the early ecumenical councils.").

In his encyclical letter, *Evangelium Vitae*, Pope John Paul II acknowledges that "[t]he texts of *Sacred Scripture* never address the question of deliberate abortion and so do not directly and specifically condemn it." He argues that these texts, nevertheless, "show such great respect for the human being in the mother's womb that they require as a logical consequence that God's commandment 'You shall not kill' be extended to the unborn child as well." *Evangelium Vitae*, *supra* note 76, ¶ 61; see also *id.* ¶ 44 ("Although there are no direct and explicit calls to protect human life at its very beginning, specifically life not yet born, and life nearing its end, this can easily be explained by the fact that the mere possibility of harming, attacking, or actually denying life in these circumstances is completely foreign to the religious and cultural way of thinking of the People of God."); GERMAIN GRISEZ, *ABORTION: THE MYTHS, THE REALITIES AND THE ARGUMENTS* 127 (1970) (arguing that, given that the people of Israel "considered life the paradigm of value, [and] . . . regarded it as a gift of God entirely subject to his dominion" it is likely that "the silence in the Old Testament about induced abortion rather indicates that legislation against abortion was unnecessary than that abortion was tacitly approved").

90. Specifically, Judge John Noonan argues that the term "*pharmakeia*," which appears in the list of moral prescriptions in St. Paul's *Letter to the Galatians*, refers to the use of abortifacient medicines. Likewise, Noonan argues that the *Apocalypse*, attributed to St. John, condemns the *pharmakai* or those who practice the use of such medicines. John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1, 8-9 (John T. Noonan, Jr., ed., 1970) (citing *Galatians* 5:19-21 and *Revelation* 9:21, 21:8, 22:15). According to Noonan, the term "*pharmakeia*" is "best translated as 'medicine' in the sense in which a North American Indian medicine man makes medicine." *Id.* at 8 (citation omitted). Unfortunately, says Noonan, the term is regularly mistranslated as "sorcery," "witchcraft," or "fortune-telling." *Id.* at 8 n.17.

In his history of the Church's treatment of abortion, John Connery agrees with Noonan that *pharmakeia* is often mistranslated as "sorcery," and that the term instead referred to the practice of giving poisonous drugs, including abortifacient drugs. He argues, however, that although a condemnation of *pharmakeia* "might have included an abortion caused by drugs, [it] would not

that the *Didache*, a first century manuscript that gives its readers basic instruction concerning both the Church's liturgical practices and beliefs and her moral teaching, specifically condemns the practice: "do not murder a child by abortion or kill a newborn infant."⁹¹ This same teaching can be found in the works of the early Church Fathers in both the East and the West, and in the disciplinary and penitential canons of a number of early Church councils.⁹² Although the Church's stance on abortion underwent further exposition and refinement in the centuries that followed,⁹³ the Church has consistently taught

affect one caused by some other means" such that "[i]f Paul wanted to condemn abortion as such, this was a very confusing and ineffective way of doing it." JOHN CONNERY, S.J., ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE 34–35 (1977). What Connery fails to note, however, is that Paul's letter was not written for a general audience, but for the local Christian community in Galatia. In this context, the meaning of Paul's condemnation of *pharmakeia* as a condemnation of abortion may well have been unmistakably clear.

91. *The Teaching of the Twelve Apostles, Commonly Called the Didache*, in 1 EARLY CHRISTIAN FATHERS 171, 172 (Cyril C. Richardson ed. & trans., 1953).

92. See Noonan, *supra* note 90, at 7–18, and CONNERY, *supra* note 90, at 33–64, for a more detailed exposition of the subject. Even some who disagree with the Church's position concerning abortion acknowledge the accuracy of this history. See, e.g., DANIEL CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 410–411 (1970). Others, however, contend that the evidence of early Christian opposition to abortion is thin, and that what does exist is not founded on scripture or the values of the Gospel, but is instead a misogynistic invention intended to control the sexual lives of women—a man-made rule buoyed by a hierarchical power structure that is unrepentantly patriarchal. See, e.g., BEVERLY WILDUNG HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION 119–44 (1983). Harrison offers a thoroughgoing revisionist account of early Christian opposition to abortion along these lines. Although her efforts to marginalize the many early Christian sources that speak against abortion may succeed on a rhetorical level (if not as a matter of historical and theological analysis), what she is unable to do is point to any Christian sources, prior to the twentieth century, that support the permissibility, let alone the virtue, of abortion. This failure is due precisely to the fact that abortion—the intentional destruction of a developing human being—is incompatible with the Christian message.

93. See generally CONNERY, *supra* note 90; GRISEZ, *supra* note 89, at 150–55, 165–84; Noonan, *supra* note 90. As Connery and Noonan both make clear, over the centuries the Church has grappled with different theories concerning when the entity developing in the womb is infused with a rational human soul. These theories have sometimes framed the question in terms of the moment of "ensoulment," or whether or not the embryo or fetus is "formed," or whether it undergoes immediate or delayed "animation" or "hominization." Some who do not favor the Church's current teaching on the subject claim that Christianity historically embraced a kind of pluralism with respect to the humanity of the fetus and thus to the morality of its destruction. See, e.g.,

over the course of nearly two thousand years that abortion is “gravely contrary to the moral law.”⁹⁴

E. *The Treatment of Abortion in Catholic Social Thought*

Plainly, although Skeel and Stuntz claim to base their understanding of legal modesty on Christian premises, their article could have benefited from a fuller engagement with the Christian tradition regarding abortion. Instead, their article offers no hint of recognition—let alone appreciation—of what this tradition says about the practice of abortion and the proper legal response to it.

Although a number of different churches and ecclesial communities have faithfully preserved this teaching,⁹⁵ nowhere has

HARRISON, *supra* note 92; DANIEL A. DOMBROWSKI & ROBERT DELTETE, A BRIEF, LIBERAL, CATHOLIC DEFENSE OF ABORTION (2000). At best, these efforts constitute an exercise in poor historical scholarship, projecting onto the past the kind of equivocal treatment of abortion they wish to legitimize in the Church today. See GRISEZ, *supra* note 89, at 145–49 (providing an historically correct reading of St. Augustine consistent with the Church’s historic understanding of abortion); *id.* at 282–83 (critiquing an article by Joseph Donceel, S.J., providing a liberal reading of St. Thomas Aquinas, upon which Dombrowski and Deltete rely); see also Anne Barbeau Gardiner, *For Catholic Dissenters, Abortion is Like Mowing Grass*, NEW OXFORD REV., Oct. 2004, at 40 (reviewing Dombrowski and Deltete’s book and criticizing the authors’ misuse of Augustine and Aquinas). Moreover, as Connery nicely summarizes: “In the Christian tradition the distinction between the formed and unformed fetus (animated and unanimated) played no more than a secondary role” in that it was “mainly used for purposes of legal classification and the grading of penances relative to the reconciliation of sinners.” CONNERY, *supra* note 90, at 305. Although the Church has expressly rejected the notion that ensoulment takes place at birth, see CONNERY, *supra* note 90, at 308, the Church has not definitively taught when ensoulment actually occurs. In some ways, the resolution of this philosophical and theological question is irrelevant to the Church’s moral evaluation of abortion because science confirms that, at the time of fertilization, “a life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth.” *Quaestio de abortu*, *supra* note 88, ¶ 12. At the same time, the magisterium seems to have moved closer to the position of immediate ensoulment. See *Evangelium Vitae*, *supra* note 76, ¶ 60 (noting that “the results . . . of scientific research on the human embryo provide ‘a valuable indication for discerning by use of reason a personal presence at the moment of the first appearance of human life’” (quoting Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*, *Donum Vitae* § 1 (1987))), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

94. CATECHISM OF THE CATHOLIC CHURCH ¶ 2271 (rev. ed. 1999) (“Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable.”).

the Christian response to abortion been more thoroughly sustained in its integrity and carried forward to meet the challenges of the current age than in the body of papal, conciliar, and other magisterial texts known as Catholic social thought.⁹⁶

95. The discussion above concerning the policy positions of several mainline Protestant denominations may have given the misimpression that all the churches in the Reform tradition were united in their support for abortion rights. Thankfully, however, this is not the case. In fact, a number of mainline and Evangelical churches have courageously presented the Church's teaching with integrity, and many Protestant theologians have given eloquent witness to the cause of life in sermons, presentations, and academic papers. See, e.g., MATTHEW EVERHARD, *ABORTION: THE EVANGELICAL PERSPECTIVE* (2007); THE LUTHERAN CHURCH-MISSOURI SYNOD, *ABORTION IN PERSPECTIVE* (1984), reprinted in MELTON, *supra* note 78, at 60; Paul Ramsey, *Abortion: A Review Article*, 37 *THE THOMIST* 174 (1973); Paul Ramsey, *Reference Points in Deciding About Abortion*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 60, 69 (John T. Noonan, Jr., ed., 1970).

96. "Catholic social thought" or the "Catholic social tradition" undoubtedly includes more than the official documents issued by popes, bishops and episcopal conferences. Plainly, given the sacred office of bishops within the hierarchical communion that is the Church, see *SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON THE CHURCH, Lumen Gentium* ¶¶ 18–29 (Nov. 21, 1964), reprinted in *THE DOCUMENTS OF VATICAN II*, *supra* note 13, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html (describing the bishops as successors of the apostles who, through episcopal consecration, are given the authority and the charism to teach, govern, and sanctify the faithful in their charge), the official texts enjoy a kind of primacy and authority that non-magisterial texts cannot enjoy. At the same time, these documents serve as a locus for both the wider and the more particular conversations that take place within the Church as to the meaning of the faith and how it should be lived in specific situations. See Pope Paul VI, *Apostolic Letter, Octogesima Adveniens* ¶ 4 (May 14, 1971) [hereinafter *Octogesima Adveniens*], reprinted in *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* 265 (David J. O'Brien & Thomas A. Shannon, eds., 1992) [hereinafter *CATHOLIC SOCIAL THOUGHT*], available at http://www.vatican.va/holy_father/paul_vi/apost_letters/documents/hf_p-vi_apl_19710514_octogesima-adveniens_en.html. ("In the face of such widely varying situations it is difficult for [the Pope] to utter a unified message and to put forward a solution which has universal validity," therefore "[i]t is up to the Christian communities to analyze with objectivity the situation which is proper to their own country, to shed on it the light of the Gospel's unalterable words and to draw principles of reflection, norms of judgment and directives for action from the social teaching of the Church."). Thus, the Catholic social tradition also includes the many responses generated by Catholic laity interpreting the official texts and suggesting how they might be applied within particular contexts. See Kenneth R. Himes, O.F.M., *Introduction*, to *MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS* 1, 3–4 (distinguishing Catholic social "teaching" from Catholic social "thought"); Richard R. Gaillardetz, *The Ecclesiological Foundations of Modern Catholic Social Teaching*, in *MODERN CATHOLIC*, *supra*, at 72, 86–90 (Kenneth R.

The encyclical letters, exhortations, decrees, and other documents that make up the Catholic social tradition address a variety of social problems, many of which are peculiar to the modern age, such as the rights of workers and the effects of industrialization and urbanization on individuals and families;⁹⁷ the rights and duties that accompany the private ownership of property and the errors of communism;⁹⁸ the harmful effects created by post-war colonialism and the difficulties faced by the developing world;⁹⁹ the evils of racism and ethnic discrimination and the urgent need for social solidarity;¹⁰⁰ the need for peace among nations, especially in the shadow of the threat of nuclear annihilation;¹⁰¹ the duty of the secular state to respect the exercise of religious freedom and to refrain from mandating practices contrary to religious faith;¹⁰² and the nature of the

Himes, O.F.M., ed., 2005) [hereinafter MODERN CATHOLIC] (offering one view of the different levels of authority among magisterial texts).

97. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* (May 15, 1891), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 14, available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_1-xiii_enc_15051891_rerum-novarum_en.html; Pope John Paul II, Encyclical Letter, *Laborem Exercens* (Sept. 14, 1981), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 352, available at http://www.vatican.va/edocs/ENG0217/_INDEX.HTM.

98. *Octogesima Aveniensi*, *supra* note 96, ¶ 3; Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* (May 15, 1931), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 42, available at http://www.vatican.va/holy_fathers/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

99. Pope Paul VI, Encyclical Letter, *Populorum Progressio* (Mar. 26, 1967), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 240, available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html.

100. Pope Pius XI, Encyclical Letter, *Mit Brennender Sorge* (Mar. 10, 1937), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_en.html; Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* (Dec. 30, 1987), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 395, available at http://www.vatican.va/edocs/ENG0223/_INDEX.HTM; NATIONAL CONFERENCE OF CATHOLIC BISHOPS, BROTHERS AND SISTERS TO US (1979), available at <http://www.usccb.org/saac/bishopspastoral.shtml>.

101. Pope John XXII, Encyclical Letter, *Pacem in Terris* (Apr. 11, 1963), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 131 available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html; National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* (1983), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 492, available at <http://usccb.org/sdwp/international/TheChallengeofPeace.pdf>.

102. SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM, *Dignitatis Humanae* (Dec. 7, 1965), reprinted in THE DOCUMENTS OF VATICAN II,

family as an institution and its vulnerability in a culture which often celebrates a kind of sexual licentiousness as the pinnacle of freedom.¹⁰³ The dignity of the human person, including his or her right to life, is at the heart of this tradition in a way that transcends the particular social problems under review. Although the human person may enjoy “other goods, and some are more precious,” the right to life is “fundamental—the condition of all the others.”¹⁰⁴

The primary texts at the heart of the Catholic social tradition offer a unique mixture of scriptural exegesis, theological reflection, and philosophical reasoning. Although each of these components is important, it is this last quality, the capacity of the tradition to speak in terms of human reason and not simply in terms of revealed religion, that gives it the potential to appeal to those outside the Christian community. Thus, with respect to questions of law and public policy, the Catholic social tradition not only conveys the Christian way of thinking about the morality of abortion, it also addresses the question of how this teaching may receive proper juridical expression in a pluralistic society. Put another way, one need not be a believing Christian to subscribe to the premises and conclusions that the tradition offers for consideration.

Perhaps the finest articulation of the Christian teaching on abortion within this tradition¹⁰⁵ is the magisterium of Pope

supra note 13, at 675, ¶ 1, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_exh_19811122_familiaris-consortio_en.html.

103. Pope John Paul II, Apostolic Exhortation, *Familiaris Consortio* (Nov. 22, 1981), available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html; Pope John Paul II, Letter to Families, *Gratissimam Sane* (Feb. 22, 1994), available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_02021994_families_en.html. The topic of the family, as well as virtually every other topic mentioned above, is discussed at some length in the Second Vatican Council's wide-ranging Pastoral Constitution on the Church in the Modern World. SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *Gaudium et Spes* (Dec. 7, 1965) [hereinafter *Gaudium et Spes*], reprinted in THE DOCUMENTS OF VATICAN II, *supra* note 13, at 199, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

104. *Quaestio de abortu*, *supra* note 88, ¶ 11.

105. The modern papacy has addressed the problem of abortion on a number of occasions. In his encyclical letter *Casti Connubii*, Pope Pius XI described the practice of “the taking of the life of the offspring hidden in the mother's womb” as “a very grave crime.” Pope Pius XI, Encyclical Letter, *Casti Connubii* § II, ¶ 63 (Dec. 31, 1930), reprinted in SEVEN GREAT ENCYCLICALS 94 (James P. Sweeney,

S.J., trans., 2d ed. 1963), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti_connubii_en.html. Writing in an era in which abortion was still prohibited by law in most countries, Pius warned the faithful of the demands that abortion “be . . . in no way penalized” and indeed “that the public authorities provide aid for these death-dealing operations.” *Id.* In rejecting these calls for reform, Pius noted that one may well sympathize with a woman who faces a difficult and unwanted pregnancy, but, he asked rhetorically, “what could ever be a sufficient reason for excusing in any way the direct murder of the innocent? This is precisely what we are dealing with here.” *Id.* § II, ¶ 64. Indeed, because the life of both the woman and her unborn child are “equally sacred, . . . no one has the power, not even the public authority, to destroy it.” *Id.*

Pius XII, who succeeded Pius XI in 1939, addressed the topic of abortion on several occasions, most notably in an address he gave to Italian midwives in 1951. There he noted that the unborn child is not partially human, nor is it a being in the process of attaining human status. Instead, “[t]he child is ‘man,’ even if he be not yet born, in the same degree and by the same title as his mother.” Pope Pius XII, *Address to Midwives on the Nature of Their Profession* § 2 (Oct. 29, 1951), reprinted in *THE MAJOR ADDRESSES OF POPE PIUS XII* 163 (Vincent A. Yzermans ed., 1961). Moreover, just as the quality of being a human being is not a status that the child attains by achieving some level of development, so the right to life is not something conferred upon it by others. As Pius XII makes clear, “Every human being, even the infant in the mother’s womb, has the right to life *immediately* from God and not from the parent or any human society or authority.” *Id.* Consequently, there is “no man, no human authority, no science, no medical, eugenic, social, economic or moral ‘indication,’ that can show or give a valid judicial title for direct deliberate disposal of an innocent human life—which is to say, a disposition that aims at its destruction either as an end in itself or as the means of attaining another end that is perhaps in no way at all illicit in itself.” *Id.*

Likewise, Pius XII’s successor, Pope John XXIII, insisted in his encyclical *Mater et Magistra* that “all must regard the life of man as sacred, since, from its inception, it requires the action of God the Creator.” Pope John XXIII, Encyclical Letter, *Mater et Magistra* ¶ 194 (1961), reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 96, at 84, available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html. Individuals who fail to respect the sacredness of human life not only “dishonor themselves and the human race, but they also weaken the inner fiber of the commonwealth.” *Id.*

Moreover, the Second Vatican Council, which John XXIII convoked, addressed the topic of abortion briefly, but in words that leave no doubt as to the Church’s judgment on the matter. In the Council’s Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, the Council fathers cautioned that “from the moment of its conception [human] life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes.” *Gaudium et Spes*, *supra* note 103, ¶ 51. Elsewhere, the Council condemns “whatever is opposed to life itself.” *Id.* ¶ 27. Here it lists abortion together with murder, genocide, euthanasia, and suicide as “infamies indeed” that “poison human society.” *Id.*

John’s successor, Pope Paul VI, confirmed the teaching of the Council in his momentous encyclical, *Humanae Vitae*, in which he reaffirmed the Church’s judgment regarding the illicit nature of artificial contraception. In the letter, Paul also firmly stated that “the direct interruption of the genera-

John Paul II and, in particular, his encyclical, *Evangelium Vitae*.¹⁰⁶ The publication of this book-length document marked the first time that a pope had devoted an entire encyclical letter to the moral analysis of actions involving the intentional destruc-

tive process already begun, and above all, direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of controlling the birth of children." Pope Paul VI, Encyclical Letter, *Humanae Vitae* ¶ 14 (July 25, 1968), reprinted in POSTCONCILIAR DOCUMENTS, *supra* note 88 at 397, 404, available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

In 1971, the Synod of Bishops, a periodic meeting of bishops drawn from around the world for the purpose of strengthening the Church's communion and advising the Holy See on the issues of the day, produced the document *Convenientes ex Universo*, in which they addressed the topic of justice in the world. The document is frequently cited and justifiably celebrated for the bishops' conclusion that "[a]ction on behalf of justice and participation in the transformation of the world fully appear to us as a constitutive dimension of the preaching of the Gospel, or, in other words, of the Church's mission for the redemption of the human race and its liberation from every oppressive situation." SYNOD OF BISHOPS, JUSTICE IN THE WORLD, reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 288, 289. The synodal document is also significant for identifying "[t]he fight against legalized abortion" as a "significant form[] of defending the right to life." *Id.* at 292.

The two most significant Church statements regarding abortion in recent years are *Quaestio de Abortu*, *supra* note 88, and *Evangelium Vitae*, *supra* note 76, both of which are discussed in the text above.

In addition to these Roman sources, the American bishops, through their body, the United States Conference of Catholic Bishops (and its predecessor organizations: the National Catholic Welfare Conference, the United States Catholic Conference, and the National Conference of Catholic Bishops), have generated an impressive number of documents articulating the Church's teaching on the subject and setting forth their own proposed strategies for changing both the law and the culture in the United States. See, e.g., National Conference of Catholic Bishops, *Pastoral Message* (1973), available at <http://uscbb.org/prolife/issues/abortion/roevwade/Feb1973PastoralMessage.pdf>; National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities* (1975), available at <http://uscbb.org/prolife/issues/abortion/roevwade/1975PastoralPlan.pdf>; National Conference of Catholic Bishops, *Resolution on Abortion*, 19 ORIGINS 395 (1989), available at <http://www.usccb.org/prolife/tdocs/resabort89.shtml>; National Conference of Catholic Bishops, *Faithful for Life: A Moral Reflection* (1995), available at <http://www.usccb.org/prolife/tdocs/FaithfulForLife.pdf>; National Conference of Catholic Bishops, *Living the Gospel of Life: A Challenge to American Catholics*, 28 ORIGINS 429 (1998), available at <http://www.usccb.org/prolife/gospel.shtml>; United States Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Campaign in Support of Life* (2001), available at <http://www.usccb.org/prolife/pastoralplan.shtml#intro>. Various state episcopal conferences and individual bishops have also written on the subject on numerous occasions. See, e.g., Catholic Bishops of New Jersey, *In God's Image: A Statement on the Sanctity of Human Life*, 14 ORIGINS 151 (1984); Catholic Bishops of Pennsylvania, *The Church, Public Policy and Abortion*, 20 ORIGINS 14 (1990).

106. *Evangelium Vitae*, *supra* note 76.

tion of human life. More than this, however, *Evangelium Vitae* is especially significant both for its eloquent defense of human dignity in the context of capital punishment, euthanasia, and abortion, and for its searing diagnosis of the social milieu in which these practices have become commonplace.

In contrast to Skeel and Stuntz's reluctance to discuss the matter forthrightly, in *Evangelium Vitae*, John Paul II is refreshingly direct in his analysis of abortion as a moral act and cultural phenomenon. He reminds us that abortion always involves "the deliberate and direct killing . . . of a human being in the initial phase of his or her existence."¹⁰⁷ Thus, society must resist the temptation to engage in obfuscation and denial. Instead, we must "have the courage to look the truth in the eye and to call things by their proper name."¹⁰⁸ The hard truth that abortion calls us to "recognize [is] that we are dealing with murder" because "[t]he one eliminated is a human being at the very beginning of life."¹⁰⁹ John Paul recognizes that a woman's decision to abort may not be made "for purely selfish reasons or out of convenience," but may be made in order to protect other "important values such as her own health or a decent standard of living for the other members of the family."¹¹⁰ Although these values might, under different circumstances, justify other kinds of moral acts, they "can never justify the deliberate killing of an innocent human being."¹¹¹

It should be clear from this discussion that by identifying abortion as a crime—indeed, as murder—the Church believes that more is at stake than simply the Christian injunction to "love one another."¹¹² Although the Christian tradition has always held that abortion is antithetical to the Christian norm of love,¹¹³ it has also held that abortion is incompatible with the

107. *Id.* ¶ 58.

108. *Id.* (emphasis omitted).

109. *Id.*

110. *Id.* (emphasis omitted).

111. *Id.*

112. *John* 13:34–35; see also *Matthew* 5:43–46; *Mark* 12:28–34; *Luke* 6:27–35.

113. See Noonan, *supra* note 90, at 18 (concluding that by 450 A.D., "[a]ll the [Christian] writers agreed that abortion was a violation of the love owed to one's neighbor"); *id.* at 59 (noting that Christians knew "the commandment to love" as exemplified in Christ could demand "sacrifice carried to the point of death" in extreme situations, and in "less extreme cases," such as an unwanted pregnancy, "preference for one's own interests to the life of another seemed to express cruelty or selfishness irreconcilable with the demands of

demands of justice. That is, the decision to abort rather than to carry the child to term represents a failure to render to the unborn child that which is his or her due—to recognize his or her right to life.¹¹⁴ The law cannot compel an act of love, “the free gift of self”¹¹⁵ whereby the human person chooses to bring about the genuine good of another.¹¹⁶ Justice, by contrast, is something that the coercive power of the state can help to realize, albeit in an imperfect fashion.

love”); CALLAHAN, *supra* note 92, at 410 (“The historical source of the Catholic teaching on abortion was the conviction of the early Christian community that abortion is incompatible with and forbidden by the fundamental Christian norm of love, a norm which forbade the taking of life.”).

Writing from a feminist perspective, by contrast, Professor Harrison does not bother engaging in the conceit of trying to explain the right to abortion in terms of Christian love. As Harrison candidly admits, “there is nothing to be gained by pretending that a feminist theological viewpoint is consistent with what other theologians too often call ‘the Christian tradition.’” HARRISON, *supra* note 92, at 117. Thus, notwithstanding a rhetorical nod to Christian *agape*, *id.* at 115, she replaces the norm of love with a new ethic of freedom “understood as the power of creativity [that] achieves its consummate expression in deepened community.” *Id.* at 100. Of course, this creative freedom includes the power to say “no” to community with the developing child in the violent act of abortion. Indeed, according to Harrison, “[f]rom a feminist theological point of view, prohibition of legal abortion involves the effort to deny freedom or centered moral agency, and hence full humanity, to over half the population.” *Id.* at 116. Harrison assures us that, in a society that fully realized the feminist ethic, “power would be experienced as *reciprocity in relation*” such that “our individual power to act would be nourished and enhanced by mutual regard and cocreativity.” *Id.* at 99. She does not, however, explain how the aborted child would experience the power imposed on it, resulting in its own death, as “reciprocity in relation.” Instead, like most other supporters of the abortion right, she denies the humanity of the entity developing in the womb. *Id.* at 214 (claiming that it is “genuinely absurd” to refer to “a conceptus or an early differentiated fetus [as] ‘a human being,’ or even ‘a person’”). By eliminating the developing child from moral consideration, she also eliminates the need to explain how a woman’s unilateral, creative power to exterminate is in fact the manifestation of a benign reciprocity.

114. Cf. JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 43–44 (1966) (discussing the classic definition of justice as “the notion that each man is to be given what is his due”). This well-known formulation of justice enjoys an ancient lineage, appearing in a number of classic sources in the Western canon. See, e.g., 3 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II–II, Q. 58, art. 1 (Fathers of the English Dominican Province trans., 1948); HOMER, *THE ODYSSEY* 188 (bk. xiv, ln. 83–84) (Albert Cook trans., 1974) (“For the blessed gods are not fond of cruel deeds; / No, they reward justice and the righteous needs of men.”).

115. Pope John Paul II, Encyclical Letter, *Centesimus Annus* ¶ 41 (1991) [hereinafter *Centesimus Annus*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 96, at 439, 470, available at http://www.vatican.va/edocs/ENG0214/_INDEX.HTM.

116. See ST. THOMAS AQUINAS, *supra* note 114, at II–II, Q. 23, art. 1.

Clearly this understanding of abortion and justice has implications for the content of law. The legal treatment of the subject must reflect the fact that the practice of abortion realizes a fundamental injustice: the intentional destruction of an innocent human being. As John Paul makes clear, law "can never presume to legitimize as a right of individuals . . . an offence against other persons caused by the disregard of so fundamental a right as the right to life."¹¹⁷ Put another way, "[n]o circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit."¹¹⁸ Thus, precisely because laws that purport to authorize or support abortion are "radically opposed not only to the good of the individual but also the common good," they "are completely lacking in authentic juridical validity."¹¹⁹ Accordingly, John Paul encourages political leaders to take steps that "will lead to the reestablishment of a just order in the defence and the promotion of the value of life."¹²⁰

It should be clear that the desire to legally prohibit abortion is reflected in the Church's teaching does not, as Skeel and Stuntz suggest, spring from "a tendency to confuse God's law with man's"¹²¹ or "to make the statute books mirror the law of God."¹²² As a fundamental matter, pro-life legal efforts are not an attempt to use law as a "tool[] for healing a spiritually dis-

117. *Evangelium Vitae*, *supra* note 76, ¶ 71.

118. *Id.* ¶ 62.

119. *Id.* ¶ 72.

120. *Id.* ¶ 90.

121. Skeel & Stuntz, *supra* note 1, at 832. Although pro-choice partisans frequently try to portray the pro-life position as an attempt by religious zealots to impose a set of narrow sectarian views on an unwilling public, the truth is that "were government to choose to outlaw abortion, it would not have to rely on a religious argument about the requirements of human well-being." MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 70 (1997); *see also* PHILIP E. DEVINE, *THE ETHICS OF HOMICIDE* 206 (University of Notre Dame Press 1990) (1978) (noting that the chief arguments against abortion "do not appeal to the sovereignty of God over human life, notions about the soul, or even quasi-religious notions such as the sanctity of life"). *Cf.* JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 57 (1979) (noting that if there is "no secular criterion by which human life c[an] be determined to exist . . . then *any* position on the beginning of human life [is] 'religious'").

122. Skeel & Stuntz, *supra* note 1, at 835; *see also* Stuntz, *supra* note 5, at 1734 (noting that some believe that opposition to abortion "smacks of theocracy").

eased society."¹²³ As the late Joseph Bernardin neatly summarized in testifying before Congress, "[t]he obligation to safeguard unborn human life arises not from religious or sectarian doctrine, but from universal moral imperatives concerning human dignity, the right to life, and the responsibility of government to protect basic human rights."¹²⁴ Surely Skeel and Stuntz are right to say that it is "abundantly clear that law cannot save souls," and that "salvation must come through other means."¹²⁵ It is also abundantly clear, however, that the goal of legal restrictions on abortion is not salvation in the afterlife but justice in the here and now. These efforts represent a desire to achieve justice from a purely secular point of view—not biblical justice, but the kind of justice that should be found at the heart of a liberal democracy in a pluralistic society.¹²⁶

123. Skeel & Stuntz, *supra* note 1, at 837. From a religious perspective, of course, that the law might help to bring about a kind of spiritual healing would be an added benefit. For a lawmaker to foresee and desire such an ancillary effect would not thereby render the enacted legislation unconstitutional. See McGowan v. Maryland, 366 U.S. 420, 442 (1961) (concluding that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions"); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (insisting that a statute "must have a secular legislative purpose" and that the "principal or primary effect" of the legislation must neither advance nor inhibit religion); see also KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 250 (1988).

124. Proposed Constitutional Amendments on Abortion, 1976: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong. 306 (1976) (testimony of Archbishop Joseph L. Bernardin).

125. Skeel & Stuntz, *supra* note 1, at 831.

126. There exists, in contemporary circles that lean left, a near paranoia that the strict secularism that has been a defining trait of our national politics for the past several generations is about to be overrun by a kind of theocracy. See Ross Douthat, *Theocracy, Theocracy, Theocracy*, FIRST THINGS, Aug./Sept. 2006, at 23 (reviewing KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY (2006); JAMES RUDIN, THE BAPTIZING OF AMERICA: THE RELIGIOUS RIGHT'S PLANS FOR THE REST OF US (2006); MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM (2006); and RANDALL BALMER, THY KINGDOM COME: HOW THE RELIGIOUS RIGHT DISTORTS THE FAITH AND THREATENS AMERICA: AN EVANGELICAL'S LAMENT (2006)). From this perspective, efforts to curb abortion rights feature prominently in the threat of theocratic and antidemocratic rule. See, e.g., Maureen Dowd, *The Red Zone*, N.Y. TIMES, Nov. 4, 2004, at A25 (arguing that President Bush won re-election "by dividing the country along fault lines of fear, intolerance, ignorance and religious rule" and that he "ran a jihad" that drew "a devoted flock of evangelicals . . . to the polls by opposing abortion, suffocating stem cell research and supporting a constitutional amendment against gay marriage"). The questions

F. *The Need for Prudence in the Formulation of Law*

Justice, of course, is not the only principle that should inform the creation of law. Prudence, the “mother” of all the cardinal virtues,¹²⁷ also has an essential role to play in the formation of legal rules. Indeed, prudence enjoys a kind of preeminence in that it makes possible the attainment of justice and the exercise of true fortitude and temperance. Thus, it is no exaggeration to say that “[a]ll virtue is necessarily prudent.”¹²⁸

Prudence is essentially a cognitive faculty that aids the exercise of practical judgment. It enables a person “to obtain knowledge of the future from knowledge of the present or past” and to determine how to act in the future.¹²⁹ The prudent person forsakes rashness and indecision and “above all [possesses] the ability to be still in order to attain objective perception of reality.”¹³⁰ Accordingly, prudence involves “the capacity to estimate, with a sure instinct for the future, whether a particular action will lead to the realization of the goal.”¹³¹ As such, the exercise of prudence is vital to ensuring that law does not exceed the bounds of its competence.

Although Skeel and Stuntz do not mention prudence by name, in many ways it is the dominant theme of their article. If, as they suggest, the legal prohibition of some conduct were to in fact increase its frequency, then obviously the use of law in that case would be imprudent,¹³² because it would not help to advance the social goal for which the law was established.¹³³

that ask whether and to what extent religious views may enter into liberal political discourse and become the basis for legal action have been the subject of serious reflection by a number of commentators. See, e.g., GREENAWALT, *supra* note 123; ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000); MICHAEL J. PERRY, *UNDER GOD: RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003). Although the Establishment Clause of the Constitution surely imposes limits on the kinds of laws that the state may enact, a convincing case has yet to be made that principled opposition to abortion is intrinsically religious, or that legal measures restricting abortion would constitute a kind of theocratic rule.

127. PIEPER, *supra* note 114, at 3–4.

128. *Id.* at 5 (noting that “there is no sort of justice and fortitude which runs counter to the virtue of prudence,” and that “the unjust man has been imprudent before and is imprudent at the moment he is unjust”).

129. ST. THOMAS AQUINAS, *supra* note 114, at II–II, Q. 47, art. 1.

130. PIEPER, *supra* note 114, at 13.

131. *Id.* at 17–18.

132. See John Gardner, *Prohibiting Immoralities*, 28 CARDOZO L. REV. 2613, 2613 (2007) (arguing that the immorality of a thing or act is not sufficient to justify its legal prohibition, but that “the prohibition must be effective, or at

There are, however, many reasons to doubt the prudential judgment that Skeel and Stuntz employ in their discussion of abortion and the law. They suggest that the legal prohibition of abortion can no more stop its practice than the legal regime of Prohibition succeeded in producing “an alcohol free culture” or “contemporary law enforcement crusades have produced a culture that is drug-free.”¹³⁴ Although their empirical claim concerning alcohol and drugs is undoubtedly true, within this claim Skeel and Stuntz implicitly suggest an impossible standard for gauging the success of a law. As noted above,¹³⁵ the failure of a criminal law to achieve perfect deterrence with respect to the conduct in question does not justify its repeal. If that were the case, then murder, rape, and burglary—the uncontroversial “common law” crimes to which Stuntz elsewhere refers¹³⁶—would likewise be subject to repeal. Murders still take place with alarming frequency, yet few would suggest that the laws against homicide should be done away with.¹³⁷ Although absolute deterrence of a defined criminal act may be the ideal, it is hardly the expectation.¹³⁸ Instead, the vital ques-

least not counterproductive; thanks to the prohibition there must be fewer, or at least no more, [occurrences] than there would otherwise be”).

133. To be clear, Skeel and Stuntz do not make the bizarre contention that the legal prohibition of some act leads to an increase in the incidence of the conduct subject to regulation. They do not, for example, contend that Prohibition led to an increase in alcohol consumption, or that statutes outlawing crack cocaine led to an increase in the drug’s popularity. Likewise, they do not suggest that statutes outlawing abortion led to an increase in the number of women seeking to terminate their pregnancies. Instead, they argue that a law contains the seeds of its own demise when it leads to adverse publicity and subsequent public dissatisfaction following its enforcement. Thus, they point to the discriminatory enforcement of Prohibition against working class consumers of alcohol and the death of erstwhile pregnant women from illegal abortions. See Skeel & Stuntz, *supra* note 1, at 829, 832–33; see also William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1874–80, 1886–91 (2000).

134. Skeel & Stuntz, *supra* note 1, at 829.

135. See *supra* Part II.A.

136. See Stuntz, *supra* note 133, at 1897.

137. See Clarke D. Forsythe, *The Effective Enforcement of Abortion Law Before Roe v. Wade*, in *THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE* 179, 195 (Brad Stetson ed., 1996) (“There are tens of thousands of vehicular homicides, rapes, robberies, and burglaries each year. It is never suggested that any of these crimes should be legalized because the law is broken or because so many crimes go unpunished.”).

138. Indeed, that the deterrent effect of the criminal law is imperfect merely highlights the fact that the criminal prohibition of conduct that is harmful to others can serve other important societal interests such as retribution and

tions to ask in this context are whether the incidence of the conduct in question would be even higher in the absence of criminal prohibition, and whether the potentially lower incidence of such conduct would justify the investment in resources necessary to achieve it.

In the case of abortion, the issue might be framed as follows: Skeel and Stuntz assume that one million abortions per year occurred prior to legalization.¹³⁹ According to the Guttmacher Institute, the research arm of Planned Parenthood, nearly 1.3 million abortions now take place each year.¹⁴⁰ If we assume, for the sake of argument, that making abortion illegal today would cause the number of abortions to return to pre-*Roe* levels,¹⁴¹ then the question becomes: would preventing the intentional destruction of over a quarter-of-a-million unborn children every year be worth the cost involved in investigating and prosecuting those who illegally provide abortion services?¹⁴² As

restitution. See, e.g., Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 19–20 (2003).

139. The authors say that “[c]ommon estimates of the number of illegal abortions during the 1960s . . . range from 500,000 to 1.5 million.” Skeel & Stuntz, *supra* note 1, at 829 n.84 (citing GERALD R. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 355 (1991)). Rosenberg himself concludes that “the 1 million figure is probably not a grossly unreasonable estimate.” ROSENBERG, *supra* at 355. Likewise, Stuntz has elsewhere asserted that “[b]y most estimates, there were about a million abortions per year during the 1960s.” Stuntz, *supra* note 133, at 1886. Here again, his sole authority for this figure is Rosenberg. *Id.* at 1886 n.37.

140. For 2003, the most recent year for which data is available, the Guttmacher Institute estimates that 1.287 million abortions took place. LAWRENCE B. FINER & STANLEY K. HENSHAW, *ESTIMATES OF U.S. ABORTION INCIDENCE, 2001–2003* at 5 tbl.1 (2006), available at http://www.guttmacher.org/pubs/2006/08/03/ab_incidence.pdf.

141. As set forth in greater detail below, there are a number of sound reasons to believe that criminalization of the procedure today would not result in an immediate return to pre-*Roe* levels of abortion. At the same time, it is also surely the case that criminal restrictions on abortion today would have an enormous impact on the frequency with which the procedure is sought and obtained. See *infra* Parts IV.B, V.E.

142. For the reasons stated below, any legal regime outlawing abortion should focus on abortion providers and not on the women who obtain abortions. Such an approach to enforcement would be consistent with the practice prior to *Roe*. See, e.g., Paul Benjamin Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. DET. L. REV. 157, 163 n.31 (1990) (“Although more than one-third of the states . . . have enacted statutes prohibiting a woman from aborting herself or consenting to an abortion performed on her by another, no prosecutions have been reported under any of these statutes. . . . No American court has upheld the conviction of a woman for

self-abortion or consenting to an abortion performed on her by another.”); Forsythe, *supra* note 137, at 184 (“Although some state laws in the nineteenth century allowed the prosecution of aborting women, there is apparently no reported appellate decision in American history upholding the conviction of a woman for self-induced abortion or for submitting to an abortion.”) (citing Linton, *supra* note 142, at 163 n.31). Indeed, even supporters of the abortion license agree that women were not subject to prosecution during the era of criminalization. See Leslie J. Reagan, “About to Meet Her Maker”: Women, Doctors, Dying Declarations, and the State’s Investigation of Abortion, *Chicago 1867-1940*, 77 J. AMER. HIST. 1240, 1243-44 (1991) (conceding that “women were not arrested, prosecuted, or incarcerated for having abortions,” but insisting that “the state nonetheless punished working-class women for having illegal abortions through official investigations and public exposure of their abortions”).

I do not wish to sidestep the difficult question of what, if any, punishment should be imposed on the woman who obtains an abortion. Clearly the woman who terminates her pregnancy is responsible in a proximate fashion for causing the death of her child. Acknowledging this fact, however, does not preclude the state from recognizing that many women seek abortions for reasons that are understandable, even as they remain terribly wrong. The inability to financially support the child, the financial impact the child would have on other family members, the feeling of rejection and sense of isolation and abandonment experienced by women whose husbands or boyfriends threaten to leave, the fear that bearing a child will interfere with the parents’ education or career plans, and the concern that the child will not enjoy the kind of life that he or she should be given are all understandable reasons, even if they do not justify the intentional destruction of a developing human being. Thus, in the legal regulation of abortion, the state could take these factors into account in formulating a legal response to such women. That is, the state could, in part, respond to such women with compassion, as persons who suffer from the ordinary human weakness of trying to find an expedient answer to a difficult situation, often under extraordinary pressure. Cf. M. Cathleen Kaveny, *The Limits of Ordinary Virtue: The Limits of the Criminal Law in Implementing Evangelium Vitae*, in CHOOSING LIFE: A DIALOGUE ON EVANGELIUM VITAE 146 (Kevin Wm. Wildes, S.J., & Alan C. Mitchell eds., 1997) [hereinafter CHOOSING LIFE] (arguing that it should be possible for the law “to consider some such persons to be inculpably ‘ignorant’ of the true wrong caused by abortion in a manner that would render criminal sanctions inappropriate” and to honor “the honest, although mistaken, moral beliefs of others”).

Although their circumstances differ in significant ways, perhaps here the state could draw upon its experience in responding to people addicted to drugs. In that context, the best legal response has often proven not to be long prison sentences for users of contraband, but rehabilitation, counseling, and social assistance. See, e.g., DOUGLAS LIPTON, THE EFFECTIVENESS OF TREATMENT FOR DRUG ABUSERS UNDER CRIMINAL JUSTICE SUPERVISION (1995). In other words, in fashioning a legal response to abortion, what is needed is for society to stand in solidarity with such women, much as Pope John Paul II recommended. See, e.g., *Evangelium Vitae*, *supra* note 76, ¶¶ 87, 90 (asserting that “appropriate and effective programmes of support for new life must be implemented, with special closeness to mothers” and that “the underlying causes of attacks on life have to be eliminated, especially by ensuring proper support for families and motherhood”). Moreover, just as, in the context of drugs, law enforcement resources are best directed at those who produce and

set forth in greater detail below,¹⁴³ although abortions did occur in large numbers prior to legalization, the best scholarly research suggests that the figure of one million abortions per year, upon which Skeel and Stuntz rely, is greatly exaggerated. What if, as some argue, the true annual incidence of abortion prior to legalization was only 500,000 or 100,000? Similarly, what if the criminal prohibition of abortion today would reduce the number of abortions per year from 1.3 million to 500,000 or 100,000? Skeel and Stuntz do not ask these sorts of questions, not only because they uncritically accept the numbers proffered by supporters of abortion, but also because they ignore the central question of justice that the practice of abortion presents. Such studied ignorance is inimical to the real virtue of prudence.¹⁴⁴

Moreover, prudence does not simply demand that one see the concrete effects that both the recognition of abortion as a right and the absence of legal regulation of the procedure will have on the conduct of individuals. It also demands that one see the effect that such an approach will have on law as a whole. Here again, Skeel and Stuntz could have greatly benefited from the work of John Paul II. The late Pope was especially keen in foreseeing the consequences for law in the absence of legal protection for the unborn.

According to John Paul, when the state authorizes the deliberate killing of a certain class of human beings, it undermines the fundamental principle of equality upon which the state is founded. As John Paul makes clear, "[t]his equality is the basis of all authentic social relationships which, to be truly such, can only be founded on truth and justice, recognizing and protecting every man and woman as a person and not as an object to be used."¹⁴⁵ By renouncing the truth of the human person, the legal right to abortion—the legal right to dismember and kill a

distribute narcotics and other banned substances, so in the case of abortion law enforcement should focus on the individuals who are not subject to the pressures of the situation but who freely choose to perform acts that kill nascent human life.

143. See *infra* Part IV.B.

144. As Josef Pieper notes, prudence is the virtue that "informs" the other virtues, including justice. PIEPER, *supra* note 114, at 7. To inform judgments regarding the pursuit of justice, however, one must first take cognizance of justice. In the context of abortion, that is precisely what Skeel and Stuntz fail to do.

145. *Evangelium Vitae*, *supra* note 76, ¶ 57.

developing human being—eviscerates the heart of law, for “[i]f there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people.”¹⁴⁶ In the absence of such truth, the “democratic ideal” of protecting individuals through law “is betrayed in its very foundations” and is replaced by “the tragic caricature of legality.”¹⁴⁷ Despite “[t]he appearance of the strictest respect for legality [being] maintained,”¹⁴⁸ law ceases to be the rational ordering of human affairs designed to protect the dignity of all. In its place, “the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others.”¹⁴⁹

Given that Skeel and Stuntz hope to preserve law’s integrity through modesty, the irony of John Paul II’s diagnosis could not be greater. Legal modesty, as Skeel and Stuntz describe it, turns out to have a decidedly immodest effect. By suggesting that law should not seek to challenge the practice of abortion, they do not steer a course toward a more modest future for law. Instead, by allowing abortion to go unchecked, they abandon the principle that “every innocent human being is absolutely equal to all others”¹⁵⁰ and so chart a course toward law’s intellectual collapse.¹⁵¹ Clearly, the real virtue of prudence would recommend that another path be taken.

III. SKEEL & STUNTZ’S RECIPE FOR SUCCESS: DEFEAT AS THE KEY TO VICTORY

In the midst of their criticism of “legal moralism,” Skeel and Stuntz introduce us to the surprising, novel claim that “[l]egal victory produces cultural and political defeat.”¹⁵² By this they mean that when lawmakers use criminal codes to accomplish

146. *Centesimus Annus*, *supra* note 115, ¶ 44.

147. *Evangelium Vitae*, *supra* note 76, ¶ 20 (emphasis omitted).

148. *Id.*

149. *Centesimus Annus*, *supra* note 115, ¶ 44.

150. *Evangelium Vitae*, *supra* note 76, ¶ 57.

151. For a fuller discussion of this intellectual collapse, see John M. Breen & Michael A. Scaperlanda, *Never Get Out’a the Boat: Stenberg v. Carhart and the Future of American Law*, 39 *CONN. L. REV.* 297 (2006).

152. Skeel & Stuntz, *supra* note 1, at 833.

cultural goals, “the effort usually backfires,”¹⁵³ generating public sympathy for the offenders’ cause. Stuntz has developed this point elsewhere, claiming that Prohibition actually “undercut the norm it sought to enforce.”¹⁵⁴ According to Stuntz, the swift repeal of Prohibition, which had been a widely popular political stance only a few years earlier, was the result of selective enforcement of the law against the poorer and ethnic classes.¹⁵⁵

Although the selective enforcement of Prohibition was undoubtedly a source of frustration for many, there is reason to doubt that this factor was decisive in prompting the relatively quick end of Prohibition and the swift return to the legal consumption of alcohol. That is, the overthrow of Prohibition was not merely a case of “differential enforcement breeding contempt for the law,” as Stuntz contends.¹⁵⁶ Instead, during Prohibition, society also witnessed the rise and worsening of many social problems that state-enforced temperance was designed to curtail. With the flourishing of violent criminal organizations, the increased corruption of law enforcement, and the suffering of women and families, support for Prohibition waned even among those who had been its most ardent supporters.¹⁵⁷

Skeel and Stuntz’s more contemporary example—the substantially harsher federal criminal sentences for offenses involving crack cocaine rather than powder cocaine¹⁵⁸—also fails to prove their point. As they note, crack cocaine is often sold “in poor inner-city neighborhoods,” whereas powder cocaine is often sold “more discretely, usually in wealthier communi-

153. *Id.* at 829.

154. Stuntz, *supra* note 133, at 1874–75.

155. *See id.* at 1874–78.

156. *Id.* at 1878–79.

157. *See* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 116–36 (1979). Although Stuntz cites Kyvig’s work, he does not engage the substance of the text to which he refers. *See* Stuntz, *supra* note 133, at 1874 n.8. That is, although Kyvig makes some passing mention of the effect that Prohibition had on the consumption of alcohol by those in the working classes, *see* Kyvig, *supra* at 24–25, he does not argue that selective enforcement was a significant factor in undermining the social norm embodied in Prohibition. Instead, Kyvig contends that the central arguments employed in the effort to repeal Prohibition involved a federalist interest in “home rule” and against the power of the national government, as well as concerns over the dramatic increase in violent crime, widespread official corruption, political hypocrisy, harm to American business, and general disrespect for the law generated during Prohibition. *See id.* at 36–136.

158. Skeel & Stuntz, *supra* note 1, at 823.

ties.”¹⁵⁹ As a consequence of urban racial demographics, Skeel and Stuntz argue, “many young black men are treated very differently and much more harshly than young white men who commit similar crimes.”¹⁶⁰ Although this sort of disparate treatment calls into question the reasonableness of Congress’s judgment with respect to this matter, it has not undermined support for the norm prohibiting the use of cocaine. The public has not called for the repeal of statutes criminalizing the sale and purchase of crack. Instead, the most common responses have been calls for a more even-handed administration of punishment.¹⁶¹ Thus, the “legal victory” of harsh sentences for crack cocaine has not paved the way for “cultural and political defeat,”¹⁶² if “defeat” means the wholesale rejection of the underlying social norm.

With respect to abortion, Skeel and Stuntz argue that the shift in social norms that led to the end of abortion’s legal prohibition was less the result of selective enforcement and more the result of the publicity given to “the gruesome deaths that women risked when they sought illegal, black-market abortions.”¹⁶³ That is, as Stuntz has elsewhere written, “the legal regime [of abortion prohibition] generated sympathetic cases for the losing side, cases that seemed to highlight the downside of the existing law.”¹⁶⁴ Because opponents of legal abortion have, in turn, focused on the “deaths of almost-born infants in partial birth abortions,”¹⁶⁵ Skeel and Stuntz suggest the law in its current form¹⁶⁶ may hurt the pro-choice cause. For this reason, Stuntz posits that “[p]erhaps *Roe v. Wade* is the pro-life move-

159. *Id.*

160. *Id.*

161. See, e.g., Mary Beth Lipp, *A New Perspective on the “War on Drugs”*: Comparing the Consequences of Sentencing Policies in the United States and England, 37 LOY. L.A. L. REV. 979, 991–1000 (2004) (reviewing the history and criticism of the disparate mandatory sentences for offenses involving powder cocaine and crack); Andrew N. Sacher, Note, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1193–94 (1997) (arguing against the current 100-to-1 crack cocaine penalty ratio and in favor of a 3-to-1 penalty ratio, justified by the fact that crack is three times as addictive as cocaine).

162. Skeel & Stuntz, *supra* note 1, at 833.

163. *Id.* at 832; see also Stuntz, *supra* note 133, at 1887–89 (discussing stories published in popular periodicals in the early 1960s).

164. Stuntz, *supra* note 133, at 1888.

165. Skeel & Stuntz, *supra* note 1, at 832.

166. It should be noted that Skeel and Stuntz’s paper was published prior to the Supreme Court’s decision in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

ment's friend, not its enemy."¹⁶⁷ Indeed, Skeel and Stuntz argue that "[w]hen the relevant legal territory is morally contested, the law's weaponry tends to wound those who wield it."¹⁶⁸ Thus, they contend that cultural warriors should refrain from wielding the arsenal of law and should instead confine their efforts to persuading pregnant women to carry their children to term.¹⁶⁹

An alternate reading of history suggests that the law helps those who hold the legal high ground. It helps those whose position is now reflected in the law to consolidate the culture—to convince the public that their preferred policy position was and is indispensable to the maintenance of a free and orderly society. Moreover, although it is undoubtedly correct that *Roe* helped to galvanize opposition to abortion,¹⁷⁰ it is absurd to suggest that *Roe* has been a benefit to the pro-life movement.¹⁷¹

Instead, *Roe* was so utterly devastating, such an overwhelming defeat for those who favor legal protection for the unborn, that it has confounded pro-life activists since its inception. This difficulty is not a result of either the intellectual rigor of the opinion or its firm basis in the text, structure, or history of the Constitution, as *Roe* plainly lacks these qualities.¹⁷² Rather, it is

167. Stuntz, *supra* note 5, at 1739.

168. Skeel & Stuntz, *supra* note 1, at 833. Others have joined Skeel and Stuntz in making this point and in drawing a superficial comparison to the experience under Prohibition. See WILLS, *supra* note 89, at 535 ("Prohibition demonstrated the difficulty of imposing a moral regime on people who do not agree with the moral principle involved. Prohibition did not stop alcohol consumption, it just drove it underground where it bred corruption, defiance, and death.").

169. See *id.* at 838–39. Of course, such efforts at persuasion may offend the zeal of some supporters of abortions rights who have quite immodestly attempted to restrict these efforts, notwithstanding the First Amendment. See *infra* notes 366–74 and accompanying text.

170. This is a point opponents of the right-to-life movement have long recognized. See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 126–57 (1985); see also STEPHEN M. KRASON, ABORTION: POLITICS, MORALITY AND THE CONSTITUTION 71 (1984); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (stating that the "sweep and detail" of *Roe* "stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures").

171. This would be equivalent to arguing that the Holocaust benefited opponents of anti-Semitism because it ultimately led to the creation of the State of Israel.

172. The literature criticizing the Court's decision in *Roe* is vast, and it includes work both by scholars who support and who oppose abortion as a moral and political matter. For a small sample of this scholarship, see John T.

attributable to the nearly absolute nature of the right created by *Roe* and its status as a constitutional decision. As such, absent a change by the Court, *Roe* cannot be challenged apart from the arduous process of constitutional amendment. Thus, *Roe* has so thoroughly occupied the field that pro-life forces, though galvanized, have been left scratching their heads, looking for a weak spot in the armor of "choice." Meanwhile, the number of unborn children killed under the authority of *Roe* is now approaching 50 million.¹⁷³ Given this staggering death toll, it is exceedingly difficult to make sense of the claim that *Roe* might be "the pro-life movement's friend."¹⁷⁴

IV. LAW, CULTURAL CHANGE, AND ABORTION

Skeel and Stuntz's thesis that law should be modest in its ambitions is in part inspired by a healthy skepticism regarding the law's ability to bring about genuine social change. Although Skeel and Stuntz acknowledge that law has a "role to play in reinforcing healthy moral values,"¹⁷⁵ they do not believe that law can "teach people how to live."¹⁷⁶ Simply put, "[w]hen the relevant legal territory is morally contested,"¹⁷⁷ the state should not adopt "symbolic . . . affirmations of norms that the

Noonan, Jr., Commentary, *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973).

173. GUTTMACHER INST., IN BRIEF: FACTS ON INDUCED ABORTION IN THE UNITED STATES (2006), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf ("From 1973 through 2002, more than 42 million legal abortions occurred."). If the trend of roughly 1.3 million abortions a year has continued through the past five years, then the number of unborn children killed under the legal regime created by *Roe* now exceeds 48 million.

174. See Stuntz, *supra* note 5, at 1739. Although the pro-life political activism and organization spurred on by *Roe* have been of enormous value in the fight against abortion, these features of the movement likely would have taken place even absent *Roe*. That is, if the issue of abortion had remained with the States, it is entirely possible that pro-life organizations across the country would have risen to meet the challenge of efforts to liberalize abortion laws, much as they did in Michigan in 1972. See JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 276–77 (2003) (discussing the defeat of the Michigan abortion reform referendum).

175. See Skeel & Stuntz, *supra* note 1, at 828.

176. *Id.* at 829.

177. *Id.* at 833.

citizenry is unwilling to live by.”¹⁷⁸ If such measures are adopted, they may well serve to undermine the rule of law through discriminatory enforcement, but they will not alter people’s conduct to any significant degree. Thus, where cultural practices are at odds with legal rules, the law will not “teach good morals,”¹⁷⁹ but will instead teach “cynicism about legal institutions.”¹⁸⁰

A. *Law and the Priority of Culture*

Although Skeel and Stuntz do not explore the idea of “culture” in any depth, they do seem to understand that culture enjoys a kind of priority over law in ordering society.¹⁸¹ Here again, Skeel and Stuntz could have benefited from a wider engagement with the Christian intellectual tradition, in particular the social teaching of Pope John Paul II.¹⁸² Indeed, the late Pope clearly recognized “the priority of culture over politics and economics as the engine of historical change”¹⁸³ precisely because “culture” is a given society’s answer to the question of value. The interior dispositions, unspoken norms, habits, attitudes, and institutions that constitute a particular culture receive concrete expression not only in the customs and traditions of a people, but in their language, art, history, commerce, and politics. These attitudes and practices constitute a collective answer to the question of what is truly worth pursuing in life, such that “[d]ifferent cultures are basically different ways of facing the question of the meaning of personal existence.”¹⁸⁴ Viewed from this perspective, law is itself a cultural artifact that tends to reflect rather than challenge the values that define the culture.

178. *Id.* at 838.

179. *Id.* at 828.

180. *Id.* at 829.

181. *See id.* at 838–39.

182. For a more thorough exposition of the idea of “culture” as set forth in Catholic social thought, and in particular the writings of Pope John Paul II, see John M. Breen, *John Paul II, the Structures of Sin and the Limits of Law*, 52 ST. LOUIS U. L.J. 317 (2008).

183. George Weigel, *John Paul II and the Priority of Culture*, FIRST THINGS, Feb. 1998, at 19 (commenting on John Paul II’s understanding regarding the place of culture in social life).

184. *Centesimus Annus*, *supra* note 115, ¶ 24.

As Stuntz suggests elsewhere, "law follows the culture, not the other way around."¹⁸⁵

While Skeel and Stuntz are right to acknowledge both the priority of culture over law and law's limited capacity to bring about fundamental social change, they neglect the many ways in which the law can significantly inform the development of culture. Indeed, culture is not monolithic and unchanging. It is dynamic, and the process by which culture changes over time is not somehow immune from the influence exerted by the emerging forms of behavior that are encouraged or suppressed by the law. Thus, Skeel and Stuntz fail to appreciate the way in which law and culture "stand in a mutually informing, formative, and reinforcing relationship."¹⁸⁶ Likewise, although Skeel and Stuntz acknowledge the possibility that law can teach, they fail to notice how law has in fact taught. Nowhere are these failures more pronounced than in their discussion of abortion and the law.

B. *The Perils of a Single Source—A Hollow Hope Indeed*

Skeel and Stuntz argue that any attempt to use the law to address the problem of abortion or other morally contested issues almost certainly would prove to be ineffective.¹⁸⁷ They contend that such efforts would only serve to drive the practice underground, leading to a pattern of selective enforcement, thereby undermining the rule of law.¹⁸⁸ This argument is premised on the empirical claim that the law was ineffective at reducing the frequency of abortion in the era of criminalization. Simply put, Skeel and Stuntz believe that the social norms that justified recourse to the procedure prior to its legalization continue unabated in the post-*Roe* era. Because the law cannot flow upstream against the cultural current, any effort at criminalization now would be unavailing, and thus harmful to both the legal system and society.

In making this argument, the only source of empirical data on which Skeel and Stuntz rely¹⁸⁹ is Gerald Rosenberg's discus-

185. Stuntz, *supra* note 5, at 1740.

186. Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 9 (2003).

187. See Skeel & Stuntz, *supra* note 1, at 838.

188. *Id.* at 819–32.

189. *Id.* at 829 n.84.

sion of abortion in his book *The Hollow Hope*.¹⁹⁰ Regrettably, on a basic level, the authors do not engage the substance of Rosenberg's arguments. Rather, they merely conclude—citing only Rosenberg's work—that the law can do very little to change the social practice of abortion. Skeel and Stuntz assert that “[c]riminal bans on abortion did not reinforce the social norm against that practice; on the contrary, the norm fell apart while those bans were still in place.”¹⁹¹ A careful reading of Rosenberg's text, however, shows that his empirical data do not provide any support for this contention. Furthermore, in relying on Rosenberg as their sole authority, Skeel and Stuntz ignore the substantial literature that calls into question the empirical claims upon which their normative claims concerning law are predicated.

1. *Skeel and Stuntz's Uncritical Use of Rosenberg's Claims Regarding the Incidence of Abortion Prior to Legalization*

Skeel and Stuntz rely entirely on Rosenberg's assertions regarding the frequency of abortion prior to legalization and in a wholly uncritical manner. They summarize Rosenberg's data as demonstrating that “[c]ommon estimates of the number of illegal abortions during the 1960s . . . range from 500,000 to 1.5 million.”¹⁹² Needless to say, this range covers an enormous span in the frequency of the practice. Rosenberg himself cautions that “one should approach estimates of the number of illegal abortions with care.”¹⁹³ At the same time, he expresses confidence that the figure of one million illegal abortions a year “is probably not a grossly unreasonable estimate.”¹⁹⁴ Writing on the same topic elsewhere, again relying solely on Rosenberg, Stuntz is more emphatic. “By most estimates,” he says, “there were about a million illegal abortions per year during the 1960s.”¹⁹⁵

The baseline figure of one million illegal abortions per year is open to serious challenge. Indeed, there is a substantial litera-

190. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 353–55 (1991).

191. Skeel & Stuntz, *supra* note 1, at 829.

192. *Id.* at 829 n.84 (citing ROSENBERG, *supra* note 190, at 353–55 tbl.A1).

193. ROSENBERG, *supra* note 190, at 355.

194. *Id.*

195. Stuntz, *supra* note 133, at 1886.

ture disputing this estimate concerning the frequency of abortion prior to legalization—a literature Rosenberg does not engage and that Skeel and Stuntz ignore entirely.¹⁹⁶ These sources present a number of reasons to doubt the accuracy of Rosenberg's conclusion that following the state legislative reform efforts in the late 1960s and early 1970s, and the Supreme Court's decision in *Roe v. Wade* in 1973, "in all likelihood the total abortion rate did not change a great deal."¹⁹⁷ That Skeel and Stuntz appear oblivious to the debate surrounding the frequency of abortion prior to legalization does not cast doubt on the sincerity of their efforts to articulate a Christian understanding of legal modesty. It does, however, substantially dull the edge of any "critical bite" their work has as legal scholarship.¹⁹⁸

The very sources on which Rosenberg relies contradict his conclusion concerning the effect of legalization on the rate of abortion. For example, Rosenberg cites a study by researchers at the Guttmacher Institute for data on the number of abortions performed between 1966 and 1985.¹⁹⁹ The same study makes clear that the "abortion rate"—that is, the number of abortions per 1,000 women ages 15 to 44—nearly doubled from 16.3 in 1973, the first year that abortion was legal throughout the United States, to a peak of 29.3 in 1981.²⁰⁰ The abortion "ratio"—that is, the number of abortions per 1,000 pregnancies—

196. For works that dispute the figures upon which Rosenberg, Skeel, and Stuntz rely, see Forsythe, *supra* note 137, at 196–200; GRISEZ, *supra* note 89, at 35–42; CALLAHAN, *supra* note 92, at 132–36; KRASON, *supra* note 169, at 301–03; Barbara J. Syska, Thomas W. Hilgers & Dennis O'Hare, *An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy*, in *NEW PERSPECTIVES ON HUMAN ABORTION* 164, 178 (Thomas W. Hilgers, Dennis J. Horan & David Mall eds., 1981) [hereinafter *NEW PERSPECTIVES*] (stating that a reasonable estimate of the number of illegal abortions that took place annually prior to 1967 "would be from a low of 39,000 (1950) to a high of 210,000 (1961) and a mean of 98,000 per year"). For a recent, extraordinarily well-researched evaluation of the topic, see JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 532–73 (2006). I discuss this literature in greater detail in response to Skeel and Stuntz's claim that anti-abortion laws were not merely ineffective but "purely symbolic" in Breen, *supra* note 182.

197. ROSENBERG, *supra* note 190, at 355.

198. Cf. Stuntz, *supra* note 5, at 1709 (faulting Christian legal scholarship for its lack of "critical bite").

199. ROSENBERG, *supra* note 190, at 180 tbl.6.1, (citing Stanley K. Henshaw, Jacqueline Darroch Forrest & Jennifer Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 *FAM. PLAN. PERSP.* 63 (1987)).

200. Henshaw et al., *supra* note 199, at 64 tbl.1.

also increased during this time.²⁰¹ The most recent Guttmacher study of the incidence of abortion nationwide confirms these increases.²⁰²

Similarly, Rosenberg relies on the Guttmacher Institute's claim that 744,600 legal abortions were performed in 1973.²⁰³ If Rosenberg's estimate of one million abortions per year prior to legalization is correct, then one must suppose one of two scenarios, both of which are, at the very least, counterintuitive. One could conclude that, following *Roe*, nearly a quarter of a million women chose to terminate their pregnancies outside the legal medical establishment, notwithstanding its assurance of greater care and safety. In the alternative, one could conclude that legalization of the procedure resulted in a dramatic decrease in the overall number of abortions performed. That neither alternative is plausible casts substantial doubt on the figure of one million abortions per year prior to legalization.²⁰⁴

201. See *id.* Sometimes the "abortion ratio" is described as the number of abortions per 100 pregnancies as opposed to 1,000 pregnancies. See *infra* notes 316–18 and accompanying text.

202. See FINER & HENSHAW, *supra* note 140, at 5 tbl.1.

203. ROSENBERG *supra* note 190, at 180 tbl. 6.1. Like the Guttmacher Institute, the Centers for Disease Control (CDC) also compiles statistics concerning the incidence of abortion. The figures generated by each of these two organizations frequently differ. For example, whereas the Guttmacher Institute reported that 744,600 legal abortions took place in 1973, and 898,600 in 1974, the CDC reported that 615,831 and 763,476 legal abortions took place for those same years, respectively. Compare Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 8 tbl.1 (Jan.–Feb. 2003), available at <http://www.guttmacher.org/pubs/psrh/full/3500603.pdf>, with Lilo T. Strauss et al., *Abortion Surveillance—United States, 2003*, MORBIDITY AND MORTALITY WKLY. REP., Nov. 24, 2006, at 16 tbl.2, available at <http://www.cdc.gov/mmwr/PDF/ss/ss5511.pdf>. The use of different methods of data collection accounts for the difference in the reported figures. The CDC only reports figures it actually receives from the central health authorities for each of the fifty states plus the District of Columbia and New York City. See Strauss et al., *supra*, at 1–3, 8. By contrast, the Guttmacher Institute directly mails a questionnaire to the abortion providers it identifies. For those providers that fail to respond to either its mailings or to its subsequent efforts at contact, the Guttmacher Institute uses the numbers reported to the various state health authorities. Where such figures are not available, however, the Institute employs its own estimates. See Finer & Henshaw, *supra*, at 6–9.

204. See Forsythe, *supra* note 137, at 200 ("If hundreds of thousands of illegal abortions were performed annually in the United States before legalization, there is no reason why these *illegal* abortions would not be reflected in figures on *legal* abortions after legalization."). Forsythe cites to the experience in California as an example of the seemingly inexplicable disconnect between the

and on Skeel and Stuntz's suggestion that the law is unable to affect the frequency of abortion.

2. *A "Re-Sourceful" Author: Rosenberg's Double Counting of Authorities*

Plainly, Rosenberg can be faulted both for failing to cite the substantial literature that calls into question the figure of one million abortions per year, and for failing to appreciate the full significance of the sources to which he does cite. Beyond this, however, his reasons for supporting the one million per year figure are highly suspect.

In an appendix, Rosenberg lists twenty-three sources that offer various estimates of the annual number of abortions that took place prior to legalization. It is this compilation of estimates that supposedly compels his conclusion regarding the annual figure of illegal abortions. Rosenberg, however, seems to deliberately treat each of these sources as if it were an independent empirical study of the issue, which is plainly not the case. Indeed, many of the works on Rosenberg's list simply cite to another of his sources without offering any additional data to confirm the truth of the original claim.²⁰⁵ What is worse, the

alleged number of illegal abortions per year and the actual figure following legalization. He notes that "California reported only five thousand legal abortions in 1968, the first full year of legalized abortion after the new law became effective in November, 1967." *Id.* He then rhetorically asks, "If there were one hundred thousand illegal abortions annually in California before 1967, why were there only five thousand reported abortions in the first full year of legalization?" *Id.* The most plausible answer for such a great disparity is that the estimate for the number of abortions that Rosenberg asserts, and upon which Skeel and Stuntz rely, is wildly exaggerated.

205. For example, Rosenberg cites both the work of Taussig and the Kinsey Institute's materials on abortion. See ROSENBERG, *supra* note 190, at 354 tbl.A1 (citing FREDERICK TAUSSIG, *ABORTION, SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS* (1936) and PAUL H. GEBHARD, WARDELL B. POMEROY, CLYDE E. MARTIN & CORNELIA V. CHRISTENSON, *INST FOR SEX. RESEARCH, PREGNANCY, BIRTH AND ABORTION* (1958) (also known as "The Kinsey Report")). Rosenberg also cites to a law review article, Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123 (1962), as if it were an independent source. In fact, however, this article simply relies on Taussig's study and the Kinsey materials. See *id.* at 123-24, nn.2, 5.

Rosenberg cites to another law review article, Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968), that likewise cites to the Kinsey materials and Taussig's book as authority for the one million abortions per year figure. See *id.* at 730-31 n.6. Lucas describes Kinsey, Taussig, and a third work, Regine K.

appearance of these duplicative sources in Rosenberg's appendix gives the mistaken impression that an overwhelming amount of empirical evidence favors the estimate of one million abortions per year. As noted above, this figure is in fact highly contested. Although the news articles and opinion pieces Rosenberg cites from the *New York Times*, *Newsweek*, *Time*, and *The New Republic*²⁰⁶ may be of some interest, they do not lend additional credence to the estimate Rosenberg embraces.²⁰⁷

Stix, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND Q. 347 (1935), as "[t]hree independent major studies [that] have set the estimate at 1,000,000." Lucas, *supra*, at 730-31 n.6. However, Stix's article does not make any such estimate. Indeed, because her study is based on interviews of patients at a New York City birth control clinic, she expressly cautions that "any conclusions which may be drawn cannot be considered to have universal application, since they are based on the experience of a small group of women who expressed interest in birth control by attending a birth control clinic" and as such "may be less conservative than the average" and "more fertile than the population at large." *Id.* at 348. Stix acknowledges that "[b]oth these factors might lead them to resort to abortion more readily than would other women." *Id.* Stix does cite Taussig, but again, this is duplicative of other sources Rosenberg cites.

Perhaps most egregious of all, Rosenberg cites a statement by Senator Robert Packwood introducing abortion reform legislation in the Senate. Apparently, Rosenberg would have the reader believe that Packwood's statement should be treated as an independent authority. In fact, however, there is no indication that Packwood conducted any independent research in support of the figures he advances. He merely repeats the one million abortions per year figure that he undoubtedly obtained from another source he fails to cite. See 116 CONG. REC. 12,672-73 (1970) (statement of Sen. Packwood).

206. See, e.g., *Gynecology—More Abortions: The Reasons Why*, TIME, Sept. 17, 1965, at 82 (citing Dr. Harold Rosen, another source included in Rosenberg's appendix); James Ridgeway, *One Million Abortions: "It's Your Problem Sweetheart,"* NEW REPUBLIC, Feb. 9, 1963, at 14 (stating without attribution that between 200,000 and one million illegal abortions are performed each year).

207. Rosenberg's appendix could be faulted in other respects as well. For example, Rosenberg cites to Lawrence Lader, one of the founders of what was then known as the National Abortion Rights Action League (NARAL). Today the organization goes by the name NARAL Pro-Choice America. In the sources Rosenberg cites, Lader states that prior to legalization, approximately one million abortions took place each year. See LAWRENCE LADER, ABORTION II: MAKING THE REVOLUTION 20 (1973).

Rosenberg conveniently ignores Bernard Nathanson's recollection regarding the origins of the one million illegal abortions per year figure. This omission is somewhat surprising given that Nathanson was an important figure in the history of abortion in the United States. Indeed, prior to renouncing the practice of abortion and becoming an eloquent spokesperson on behalf of the unborn, Nathanson was a physician who performed thousands of abortions as the so-called "Abortion King" of New York City. In fact, Nathanson co-founded NARAL with Lader. See DELLAPENNA, *supra* note 196, at 764-65.

3. *The Misuse of Maternal Deaths as a Means of Calculating the Frequency of Illegal Abortion*

One reason Rosenberg believes the figure of one million illegal abortions per year is too low is that the studies upon which this figure is based "are derived, in part, from reported maternal deaths due to illegal abortions, deaths that are notoriously under-reported."²⁰⁸ That is, some women who obtained illegal abortions also experienced septic shock or some other life-threatening complication due to the incompetence of the abortion provider or to the unsanitary conditions under which the procedure was performed.²⁰⁹ Indeed, those who sought to relax the legal restrictions against abortion often cited this phenomenon in support of their cause.²¹⁰ The difficulties involved in calculating the incidence of illegal abortion have led some to extrapolate from the number of maternal deaths an estimate of

With respect to the one million illegal abortions a year, Nathanson candidly states that he and Lader

aroused enough sympathy to sell our program of permissive abortion by fabricating the number of illegal abortions done annually in the U.S. The actual figure was approaching 100,000, but the figure we gave to the media repeatedly was 1 million.

Bernard N. Nathanson, *Confessions of an Ex-Abortinist* (1996), available at <http://www.catholiceducation.org/articles/abortion/ab0005.html>.

208. ROSENBERG, *supra* note 190, at 353.

209. See Russell S. Fisher, *Criminal Abortion*, in *THERAPEUTIC ABORTION: MEDICAL, PSYCHIATRIC, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS* 8–10 (Harold Rosen ed., 1954) (describing the sometimes fatal medical complications that frequently accompany illegal abortions); PATRICIA G. MILLER, *THE WORST OF TIMES* 327–28 (1993) (describing similar illegal abortion complications).

210. See, e.g., Alan F. Guttmacher, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, 23 *CASE W. RES. L. REV.* 756 (1972). To paraphrase John Hart Ely, it is a "strange argument" against the wisdom of a law "that those who evade it suffer." See Ely, *supra* note 172, at 923 n.26.

As John Noonan relates, the true number of maternal deaths was not sufficiently shocking and so not "serviceable" toward the political goal of legalization. Accordingly, a lie had to be invented. "The lie was that 8,000 women per year died from illegal abortions" whereas "[t]he true figure was between 250 and 500." NOONAN, *supra* note 121, at 65 (citing Christopher Tietze & Sarah Lewitt, *Abortion*, 220 *SCI. AM.* 21 (1969)). That the pro-choice movement intended to effect such a strategy of propaganda is confirmed by abortion advocate Marian Faux: "an image of tens of thousands of women being maimed or killed each year by illegal abortions was so persuasive a piece of propaganda that the movement could be forgiven for its failure to double-check the facts." MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 87 (1988). See also Brian W. Clowes, *The Role of Maternal Deaths in the Abortion Debate*, 13 *ST. LOUIS U. PUB. L. REV.* 327 (1993).

the number of abortions that took place during the years prior to legalization.

Unfortunately, estimating the number of maternal deaths prior to legalization has proven almost as controversial as calculating the number of clandestine abortions themselves—a fact that somehow escapes Rosenberg's notice. Rosenberg also fails to acknowledge that abortion-related deaths did not remain constant over time. For example, the number of maternal deaths declined following the widespread introduction of antibiotics in the 1930s and 1940s, even as the practice of illegal abortion continued.²¹¹ It also appears that by the 1950s, most illegal abortions were performed by licensed physicians,²¹² which likely reduced the incidence of maternal death. As Dr. Mary Calderone, then-national medical director for the Planned Parenthood Federation, declared in a journal article in 1960, "[a]bortion is no longer a dangerous procedure."²¹³ Indeed, Calderone believed that progress with respect to maternal mortality was objectively verifiable, noting that "[i]n New York City in 1921 there were 144 abortion deaths, in 1951 there were only 15," and "[i]n 1957 there were only 260 deaths in the whole country attributed to abortions of any kind."²¹⁴

211. See DELLAPENNA, *supra* note 196, at 548 (noting that "[t]he advent of antibiotics . . . reduced the incidence of the heretofore fatal infections and completed a dramatic reduction in the risk of death or injury from an abortion"); LUKER, *supra* note 170, at 74 (noting that "[l]argely because of the increasing use of antibiotic drugs, overall maternal mortality had been steadily declining for many years and had begun to drop dramatically after World War II").

212. See DELLAPENNA, *supra* note 196, at 549 (citing Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948, 949 (1960) (estimating that in 1960 "physicians performed 90 percent of illegal abortions") and Alan Guttmacher, *Abortion Now, in THE CASE FOR LEGALIZED ABORTION NOW* 69, 71-72 (Alan Guttmacher ed., 1967) (estimating that physicians performed 80 percent of illegal abortions in 1967)). Calderone served as the national medical director for the Planned Parenthood Federation, and Guttmacher was a long-time public proponent of abortion. DELLAPENNA, *supra* note 196, at 549; see also DAVIS, *supra* note 78, at 98-106 (discussing the experiences of physician-abortionists); CAROLE JOFFE, *DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER ROE V. WADE* (1995) (describing interviews with numerous abortion physicians "of conscience" and distinguishing them from the stereotypical "back alley butcher"); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 70-73 (1997) (discussing Chicago physicians who performed illegal abortions).

213. Calderone, *supra* note 212, at 949.

214. *Id.*

Given these statistics demonstrating sharp declines in maternal deaths, it is difficult to understand Rosenberg's reliance on Senate hearing testimony that in 1930 "abortion was the 'certified cause of death for almost 2,700 women'"²¹⁵ to bolster his assertions regarding maternal death rates just prior to legalization in 1973. Surely the deaths of these women were a tragedy then and remain so today, but this statistic does not reflect the number of maternal deaths due to illegal abortion just prior to legalization, let alone the incidence of illegal abortion itself. On this point Rosenberg is coy, refusing to offer his own estimate as to the annual number of maternal deaths.²¹⁶ He does, however, approvingly cite a law review article asserting that more than five thousand women may have died as a direct result of illegal abortions performed in 1962.²¹⁷

Here again, Skeel and Stuntz seem unaware of the substantial literature challenging Rosenberg's suggestion that illegal abortion resulted in the deaths of thousands of American women in the years leading up to legalization. Moreover, they seem oblivious to the fact that most of this literature was generated by supporters of legal abortion during the campaign for abortion liberalization.²¹⁸ For example, Christopher Tietze, the leading statistician for the Guttmacher Institute and a longtime advocate of legal abortion, wrote in 1969 that although the figure of 5,000 maternal abortion-related deaths per year was plausible for the 1930s, it "cannot be anywhere near the true rate now."²¹⁹ Indeed, Tietze concluded that "in all likelihood,"

215. ROSENBERG, *supra* note 190, at 353.

216. He begins his concluding sentence on the subject, "Whatever the figure . . ." ROSENBERG, *supra* note 190, at 353-54.

217. *Id.* at 353 n.1 (citing Leavy & Kummer, *supra* note 205, at 124).

218. In a survey of the contemporary literature concerning maternal deaths, Daniel Callahan concludes that, despite being put forth as "the crucial consideration" for abortion reform, "the statistical grounds for that argument seem considerably weakened." CALLAHAN, *supra* note 92, at 132-36.

219. Christopher Tietze & Sarah Lewit, *Abortion*, 220 SCI. AM. 21, 23 (1969). Dellapenna identifies as one source of the 5,000 death figure an undocumented claim made in JEROME BATES & EDWARD ZAWADSKI, CRIMINAL ABORTION 3 (1964). See DELLAPENNA, *supra* note 196, at 552. As Dellapenna explains, Bates and Zawadski "apparently took their figure from the similarly undocumented estimates that Dr. Russell Fisher made in 1954" in which "Fisher estimated 8,000 maternal deaths per year in the 1930s and 5,000 per year in the 1950s." DELLAPENNA, *supra* note 196, at 552 (citing Fisher, *supra* note 209, at 8-9). Fisher's figure is merely an extrapolation from Frederick Taussig's guess. See Fisher, *supra* note 209, at 3 (citing FREDERICK TAUSSIG,

the actual number was "under 1000,"²²⁰ a conclusion that subsequent demographic research tends to support.²²¹

Rosenberg is certainly not alone in turning to inflated estimates of maternal deaths as a way of bolstering estimates of the annual number of abortions prior to legalization. Although discredited, the figure of 5,000 to 10,000 deaths is still routinely cited today,²²² even by those in the legal academy who have a reputation for careful scholarship.²²³

ABORTION, SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS 177 (1936)). See also CALLAHAN, *supra* note 92, at 135 (citing sources that trace the 10,000 figure back to Frederick Taussig). Whatever its precise origin and notwithstanding its dubious basis in fact, Lawrence Lader, one of the co-founders of NARAL, certainly worked to popularize the 10,000 deaths per year figure. See, e.g., LAWRENCE LADER, ABORTION 3 (1966).

220. Tietze & Lewit, *supra* note 219, at 23.

221. Thomas W. Hilgers & Dennis O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in NEW PERSPECTIVES, *supra* note 196, at 69.

222. See DELLAPENNA, *supra* note 196 at 552 n.112 (listing fifteen sources that cite these figures).

223. See, e.g., Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 37 (1992). As authority for this figure, Sunstein cites Lawrence Lader, a journalist who, together with Dr. Bernard Nathanson, co-founded the National Association for the Repeal of Abortion Laws (NARAL). See LADER, *supra* note 207, at 88-97. Sunstein does not cite Nathanson's later edifying remark, made after he abandoned the pro-choice movement and his own abortion practice:

How many deaths were we talking about when abortion was illegal? In N.A.R.A.L. we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000 to 10,000 deaths a year." I confess that I knew the figures were totally false, and I suppose others did too if they stopped to think of it. But in the "morality" of our revolution, it was a *useful* figure, widely accepted, so why go out our way to correct it with honest statistics? The overriding concern was to get the laws eliminated, and anything within reason that had to be done was permissible.

BERNARD N. NATHANSON & RICHARD N. OSTLING, ABORTING AMERICA 193 (1979); see also BERNARD N. NATHANSON, THE HAND OF GOD: A JOURNEY FROM DEATH TO LIFE BY THE ABORTION DOCTOR WHO CHANGED HIS MIND 89-90 (1996).

Indeed, in addition to this oversight, Sunstein seems unaware that Dr. Christopher Tietze, the Guttmacher Institute's longtime statistician, concluded in 1984 that maternal deaths before legalization were only 150 per year. See Christopher Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 FAM. PLAN. PERSP. Jan.-Feb. 1984, at 26 (stating that legalization helped avert 1,500 maternal deaths over ten years); see also DELLAPENNA, *supra* note 196, at 552 (quoting Tietze as saying that the figure of 10,000 abortion-induced deaths prior to legalization is "unmitigated nonsense" (citing Fred Graham, *Fetus Defects Pose Abortion Dilemma*, N.Y. TIMES, Sept. 7, 1967, at 38)). Sunstein is not alone among abortion supporters who, without question,

Skeel is right to insist that Christian legal scholarship “must seriously engage the best secular scholarship treating the same issues.”²²⁴ Regrettably, Skeel and Stuntz have failed to satisfy this very standard. They have not “seriously engaged” the best scholarship on the subject of maternal deaths unless the phrase means nothing beyond a facile and entirely deferential citation to dubious authorities. What is worse, it seems that what many in the legal academy regard as “the best” scholarship on the subject is little more than the repetition of propaganda,²²⁵ or “the partisan projection of a pro-choice perspective onto the past.”²²⁶

4. *The Overlooked Phenomenon of Repeat Abortions*

Furthermore, if, as Rosenberg contends, the number of abortions did not substantially change following legalization, one would expect the number of repeat abortions to also remain roughly the same.²²⁷ The statistical data, however, indicate just the opposite. As the Guttmacher Institute recently reported, “[a]mong U.S. women having abortions in 2002, about one-half had already had a prior abortion.”²²⁸ This marks a dramatic in-

readily embrace the purported statistic of 5,000 to 10,000 maternal deaths per year due to illegal abortion. See Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL'Y & L. 309, 318 (1994) (“Evidence indicates that five to ten thousand women died each year from complications resulting from illegal abortions during the mid-twentieth century.”); see also JOFFE, *supra* note 212, at 29 (“Anywhere from one thousand to five thousand women per year are estimated to have died from illegal abortions in the pre-Roe era . . .”).

224. Skeel, *supra* note 8, at 31.

225. See *supra* notes 211–22 and accompanying text.

226. John Keown, *Abortion Distortion: A Review of Dispelling the Myths of Abortion History* by Joseph Dellapenna, 35 J.L. MED. & ETHICS 325, 328 (2007) (reviewing DELLAPENNA, *supra* note 196).

227. Others have made this observation as well. See Forsythe, *supra* note 137, at 200 (“The great rise in the number of abortions *after* abortion was legalized is confirmed by the rise in the *repeat* abortion rate after legalization.”). As Forsythe notes, “[t]he percentage of repeat abortions (the second or third abortion for the woman aborting) has almost tripled since 1973.” *Id.* (citing Lynn D. Wardle, *Time Enough: Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 985 app. D (1989)).

228. RACHEL K. JONES ET AL., GUTTMACHER INST., REPEAT ABORTION IN THE UNITED STATES 9 (2006), available at <http://www.guttmacher.org/pubs/2006/11/21/or29.pdf>. The incidence of repeat abortion raises a host of public policy issues that many advocates of the abortion license are reluctant to discuss. See Garance Franke-Ruta, *Multiple Choice: Liberal Concerns About Abortion*, NEW REPUBLIC, Nov. 28, 2005, at 14–15 (arguing that, given the incidence of repeat abor-

crease since the end of criminalization. Indeed, the “proportion of women having abortions who were undergoing a repeat procedure increased rapidly in the first years following *Roe v. Wade*, more than doubling between 1974 and 1979 (from 15% to 32%),” while “increas[ing] at a slower pace between 1979 and 1993 (from 32% to 47%),” where it has remained since.²²⁹ If the changed legal status of abortion—from criminal act to constitutional right—did not affect the rate and number of abortions performed, as Skeel and Stuntz (following Rosenberg) maintain, then this phenomenon simply should not have occurred.²³⁰

5. *The Effects of Legalization: “Replacement” and Expansion*

Putting aside the myriad objections to Rosenberg’s methodology and baseline figure, still other serious questions remain. To support his thesis that the Supreme Court’s decision in *Roe* did not substantially alter the frequency of abortion, Rosenberg must show that most of the abortions that took place in a post-*Roe* legal world would have taken place under a legal regime that outlawed the procedure. In support of this contention, Rosenberg cites two substantive studies by abortion-rights supporters asserting that between two-thirds and three-fourths of

229. JONES ET AL., *supra* note 228, at 19.

230. The authors of the report attempt to account for this precipitous rise in repeat abortions by stating that the pattern simply “mirrors the rapid increase in the (legal) abortion rate that occurred after 1973.” *Id.* Indeed, they suggest that the large number of repeat abortions had long been predicted by demographers following legalization of the procedure. *Id.* at 11–13. In support of this assertion, the authors cite Christopher Tietze & Anrudh K. Jain, *The Mathematics of Repeat Abortion: Explaining the Increase*, 9 *STUD. IN FAM. PLAN.* 294 (1978). JONES ET AL., *supra* note 228, at 19, 51. Tietze and Jain contend that “the percent of repeat abortions among all legal abortions is directly associated with the level of the abortion rate.” Tietze & Jain, *supra*, at 294. However, the Guttmacher Institute’s own statistics show that the percentage of repeat abortions continued to rise or remained constant even as the abortion rate declined (a decline beginning in approximately 1982 and continuing on to the present day). See JONES ET AL., *supra* note 228, at 19, 25 chart 4.1; FINER & HENSHAW, *supra* note 140, at 5 tbl.1.

Moreover, the historical premise underlying Skeel and Stuntz’s claim that the law cannot affect the practice of abortion is that the change in the law marked by *Roe* did not bring about an increase either in the annual number of abortions performed or in the abortion rate (that is, the number of women between the ages of 15–44 per thousand who, within a given year, obtain an abortion). The Guttmacher Institute’s figures show, however, that these measures increased dramatically in the years immediately following legalization across the country. See JONES ET AL., *supra* note 228, at 19, 25 chart 4.1; FINER & HENSHAW, *supra* note 140, at 5 tbl.1.

all legal abortions replaced illegal ones.²³¹ In other words, these abortions would have taken place even if the procedure had remained illegal.

There are a number of reasons to doubt the conclusion that Rosenberg draws from these studies. In the first study, published in 1973, Christopher Tietze hypothesizes that the number of illegal abortions in New York City can be calculated by comparing the number of births that took place before and after the State's new abortion law came into effect. Tietze observes that there were approximately 17,300 fewer births in New York City in 1971 than in 1970 (the first year of New York's new permissive abortion law), and that 1972 witnessed a decrease of 16,400 births from 1971.²³² He also estimates that 67,400 legal abortions were performed on New York City residents during the first year after the law was passed, and that 75,100 residents received legal abortions in the statute's second year.²³³ Plainly the figures for legal abortion exceed the drop in live births for each of the years in question by a substantial margin. However, if abortion was not widely practiced prior to the new statute then one would have expected an even greater

231. ROSENBERG, *supra* note 190, at 355. In fact, Rosenberg cites four sources in support of his contention that most legal abortions were replacements for illegal ones. These include *The Buckley Amendment: Hearing Before the Subcomm. on Constitutional Amendments*, 93rd Cong. 244 (1976) (statement of Harriet Pilpel, Senior Partner, Greenbaum, Wolff & Ernst); Judith Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 POP. & DEV. REV. 45 (1977); June Sklar & Beth Berkov, *Abortion, Illegitimacy, and the American Birth Rate*, 185 SCIENCE 909 (1974); and Christopher Tietze, *Two Years' Experience with a Liberal Abortion Law: Its Impact on Fertility Trends in New York City*, 5 FAM. PLAN. PERSP. 36 (1973). Of these four, however, only the papers by Tietze and Sklar and Berkov present serious arguments with which one must contend. Indeed, Blake's article merely cites Tietze's paper, and Pilpel's testimony refers to "a recent study [that indicates] that at the very least, 70 percent of today's abortions which are being performed in proper medical facilities would have been performed anyway." Statement of Harriet Pilpel, *supra*, at 244. Although she does not indicate the specific study she has in mind, given the date of Pilpel's testimony, her affiliation with Planned Parenthood, and the precise figure she cites, it is fair to assume that she is relying on Tietze's paper. See *id.* at 244.

232. Tietze, *supra* note 231, at 40. Tietze also states that the "[a]pplication of age-specific fertility rates of 1970 to age distribution of women in 1971" indicates that the drop in fertility was even greater than the actual birth statistics reveal. *Id.* That is, the application of these rates and the age distribution "generates an expected total of 150,700 births, thus creating an imputed decline of 18,800 births." *Id.*

233. *Id.* at 37 tbl.1.

drop in fertility. That such a decrease in the number of live births did not occur leads Tietze to conclude that recourse to abortion was common in New York City prior to legalization. Indeed, he concludes that virtually all of the legal abortions that took place in 1970 and 1971 "terminated pregnancies which would otherwise have been terminated by illegal abortions in the earlier period."²³⁴ After taking into account other factors influencing fertility during the years in question,²³⁵ Tietze estimates that "70 percent of the legal abortions of resident women performed under the 1970 law replaced illegal abortions—about 50,000 illegal procedures each year."²³⁶

June Sklar and Beth Berkov, the authors of the second study, reach a similar conclusion using a different method. In their paper, published in 1974, Sklar and Berkov focus on the dramatic drop in the incidence of "illegitimate" or out-of-wedlock births that coincided with the passage of liberalized abortion statutes in fifteen states.

Indeed, Sklar and Berkov conclude that "legal abortion was of pivotal importance in the nationwide declines in illegitimacy between 1970 and 1971."²³⁷ They estimate that in 1971 there were "416,000 illegitimate births in the United States and an estimated 272,000 legal abortions performed for unmarried women."²³⁸ They note that if abortion had not been legal during this time, not "every pregnancy terminated by abortion would have resulted in an illegitimate birth," because some would have resulted in illegal abortion, others would have come to term in a "'forced' marriage," and others would have resulted in miscarriage or still-birth.²³⁹ By comparing actual out-of-wedlock births in 1971 to the higher number of projected illegitimate births, Sklar and Berkov conclude that approximately

234. *Id.* at 40.

235. *Id.* at 41 (discussing the possibility that the lower number of births can be accounted for by various social trends such as postponement of marriage, increased contraceptive use, and the decision to delay childbirth).

236. *Id.* at 41.

237. Sklar & Berkov, *supra* note 231, at 911. They estimate that in 1971 there were "416,000 illegitimate births in the United States and an estimated 272,000 legal abortions performed for unmarried women." *Id.* at 912–13.

238. *Id.* at 912–13.

239. *Id.* at 913.

39,000 “births [were] averted by legal abortion.”²⁴⁰ However, this figure accounts for only 14 percent of the 272,000 abortions performed on unmarried women. Of the remaining 86 percent of legal abortions performed in 1971, Sklar and Berkov estimate “that most would have ended as illegal abortions or as legitimate births.”²⁴¹ Indeed, they conclude that “well over half—most likely between two-thirds and three-fourths—of all legal abortions in the United States in 1971 were replacements for illegal abortions.”²⁴²

Although the studies by Tietze and Sklar and Berkov demonstrate that abortions took place in large numbers prior to legalization, they do not support Rosenberg’s far stronger claim, endorsed by Skeel and Stuntz, that the overall incidence of abortion “did not change a great deal” following the Supreme Court’s decision in *Roe*.²⁴³

First, although it is entirely reasonable to believe that some percentage of abortions in the years following legalization would have taken place even absent a change in the law, plainly some percentage of abortions would have been averted. Neither Tietze nor Sklar and Berkov claim that the replacement rate is 100 percent. At most, these studies show that approximately 70 percent of the nearly 486,000 legal abortions reported by the Center for Disease Control and Prevention (CDC) for 1971 likely would have taken place under a regime of legal prohibition.²⁴⁴ Neither study provides evidence that such a percentage remains constant—that a fixed percentage of women with unwanted pregnancies will obtain abortions—regardless of the legal treatment of abortion and the cultural message that this treatment conveys. Specifically, Tietze and Sklar and Berkov have not shown that 70 percent of the 586,000 abortions reported by the CDC in 1972 would have taken place in the ab-

240. *Id.* Sklar and Berkov compare the actual number of 416,000 out-of-wedlock births in 1971 with the projected number of 455,000 illegitimate births, a figure based on the assumption that the upward trend in illegitimate births from 1965-1970 would have continued. *Id.*

241. *Id.* at 915 n.20 (citing a study regarding the normal interruption of pregnancy resulting in fetal death).

242. *Id.* at 915.

243. ROSENBERG, *supra* note 190, at 355.

244. See Strauss et al., *supra* note 203, at 16 tbl.2. Here, I use the figures supplied by the Centers for Disease Control and Prevention, the source of Sklar and Berkov’s numbers. See Sklar & Berkov, *supra* note 231, at 915 nn.1, 17.

sence of a legal regime permitting the practice. Indeed, if one assumes that roughly the same number of unwanted pregnancies occurred in 1972 as in 1971, it would be nonsensical to assume that 70 percent of the abortions performed in each of these years would have occurred regardless of the legal treatment afforded the procedure. The same is true for the 615,000 reported abortions in 1973, the 763,000 reported in 1974, and the nearly 855,000 reported in 1975—not to mention the 1.3 million abortions reported by the CDC in 1981, a decade following the year that was the focus of both studies.²⁴⁵

Second, even if we assume, as Rosenberg contends, that “70 percent” (Tietze) or “between two-thirds and three-quarters” (Sklar and Bekov) of all legal abortions performed in later years would have taken place in any case under a regime of legal prohibition, then the number of abortions still increased by between one-quarter and one-third following *Roe* and the state legislative initiatives preceding it. Again, using Rosenberg’s figure of one million abortions per year prior to legalization, this means that the change in the law resulted in an additional 250,000 to 333,000 children being killed *in utero* each year. According to the Guttmacher Institute, the actual number of abortions rose from 744,600 in 1973 to over 1.55 million in 1980, and then peaked at over 1.6 million in 1990.²⁴⁶ For 2003, the most recent year for which data are available, the Guttmacher Institute estimates that nearly 1.3 million abortions took place.²⁴⁷ Thus, even assuming that the dubious figure of one million abortions per year is correct, legalization of the procedure has, at a minimum, resulted in an increase of well over a quarter-of-a-million abortions per year.

245. See Strauss et al., *supra* note 203, at 16 tbl.2. In order to more clearly understand what Tietze and Sklar and Berkov do not demonstrate, it might be helpful to think in terms of an analogy. Suppose it is easier for a hotel to fill its rooms during a holiday weekend than during a non-holiday weekend, just as it is easier to obtain an abortion under a legal system that permits the practice as opposed to one that does not. If a hotel fills 100 of its rooms on a holiday weekend, it *may* be able to show that it would have filled 70 of those rooms on a non-holiday weekend. Even if this is the case, however, one may not validly conclude that the hotel’s ability to fill 200 rooms on a holiday weekend means that it could have filled 140 rooms on the same non-holiday weekend. Indeed, it may be the case that it could only fill 70 rooms during that time.

246. FINER & HENSHAW, *supra* note 140, at 5, tbl.1.

247. *Id.*

It is hard to square these figures with Rosenberg's conclusions that "in all likelihood the total abortion rate did not change a great deal" following the Court's decision in *Roe*, and that the only change produced by the Court was "removing the need for women to seek dangerous, illegal abortions."²⁴⁸ Because the absence of change is the main conclusion that Rosenberg purports to draw from the data, one would have expected Skeel and Stuntz to have given their sole statistical authority more careful scrutiny.²⁴⁹

6. *Law as an Instrument of Social Change:
Legislative vs. Judicial Action*

The data upon which Rosenberg relies elsewhere in his book actually disprove the very point that Skeel and Stuntz attempt to make. Skeel and Stuntz contend that law should not be used to address the practice of abortion and similar cultural problems because the law, particularly the criminal law, is ill-suited to "teach good morals or promote healthy norms."²⁵⁰ The law should not attempt to fight the existing culture, go against the grain of established norms, or attempt to resolve contested moral claims. The folly of such an approach, according to Skeel and Stuntz, was vividly demonstrated by the failure of Prohibition.²⁵¹ Likewise, a widespread legal ban on abortion failed to stop the practice. Indeed, according to Skeel and Stuntz, the cultural norm against abortion "fell apart while those bans were still in place."²⁵² They argue that the law is therefore un-

248. ROSENBERG, *supra* note 190, at 355. Elsewhere Rosenberg stresses that the single most important aspect of the Court's decision in *Roe* was that, as a constitutional matter, it allowed for the provision of abortion services in clinics, thus giving abortion providers "a way around the intransigence of existing institutions, notably hospitals." *Id.* at 198. Because the reformers paid little attention to the issue of location, the Court itself was responsible for this crucial aspect of the decision. As such, Rosenberg concludes that in this respect the reformers "got very lucky." *Id.* at 201.

249. At least Rosenberg's assertion has the virtue of being direct. By contrast, Skeel and Stuntz hedge their bets by saying that "[c]ommon estimates" of illegal abortions range "from 500,000 to 1.5 million." Skeel & Stuntz, *supra* note 1, at 829 n.84. If the true figure was in fact closer to 500,000, then given the fact that there were 1.6 million abortions in 1990, it is implausible that, as Rosenberg suggests, "the total abortion rate did not change a great deal" following the Court's decision in *Roe*. ROSENBERG, *supra* note 190, at 355.

250. Skeel & Stuntz, *supra* note 1, at 828.

251. *See id.* at 829.

252. *Id.*

able to change settled practices, and that legal prohibition is ineffective in the face of widespread cultural support.

On the contrary, the data cited by Rosenberg prove just the opposite. These data demonstrate law's power to influence public opinion and shape cultural practices. Rosenberg does not address the broader question of law's efficacy as a general matter. Rather, he more narrowly argues that *judicial* action was not decisive in increasing the frequency of abortion. As such, Rosenberg's argument does not support Skeel and Stuntz's central claim. Instead, for Rosenberg, the most significant fact that emerges from a review of abortion history is that the number of legal abortions began to increase rapidly prior to *Roe*.

The largest increase over a two-year period is in 1969–71 with an increase of 463,100 legal abortions. Next is 1970–72 with 393,300, about 26 percent higher than the 1972–74 increase of 311,800. The 1971–73 increase is only 258,800. Even the 1973–75 increase is only 289,600. The largest increase over three years comes in the pre-*Roe* 1969–72 period where there were an additional 564,100 legal abortions. The 1972–75 period saw an increase of 447,400 legal abortions, and between 1973 and 1976 the increase was 434,700.²⁵³

Although Rosenberg mentions it only in passing, the causal explanation behind this enormous increase in the number of legal abortions in the years immediately prior to *Roe* is well known. Between 1967 and 1971, seventeen states either re-

253. ROSENBERG, *supra* note 190, at 179. Skeel and Stuntz cite Rosenberg for this very point. Skeel & Stuntz, *supra* note 1, at 833 n.104. They then cite a study by Finer and Henshaw published in 2003, containing the same data set forth in another study published in 2006. Compare FINER & HENSHAW, *supra* note 140, at 5 tbl.1 with Finer & Henshaw, *supra* note 203, at 8 tbl.1. Skeel and Stuntz incorrectly cite the 2003 study for the proposition that the number of abortions "has declined steeply in the years since 1980." Skeel & Stuntz, *supra* note 1, at 833. Both studies in fact show a marked increase in the number of abortions from 744,600 in 1973 up to a peak of 1.609 million in 1990, followed by a steady decrease to 1.313 million in 2000. See FINER & HENSHAW, *supra* note 140, at 5, tbl. 1. These studies do say that the abortion *rate*—that is, the number of abortions per 1,000 women ages 15–44—has declined, not since 1980, but since 1981. *Id.* In both 1980 and 1981, the abortion rate reached a peak 29.3. *Id.* Since then it has declined, falling to 21.3 in 2000. *Id.* The most recent preliminary data available, published in 2006, include figures up to 2003. *Id.* They indicate that the number of abortions has continued to decline, to 1.287 million, as has the abortion rate, to 20.8. *Id.*

pealed or substantially liberalized their abortion laws.²⁵⁴ The most significant of these changes occurred in New York where, in New York City alone, 402,000 legal abortions were performed between July 1, 1970, when the new permissive law took effect, and June 30, 1972.²⁵⁵ These statistics strongly suggest that the legalization of abortion led to a dramatic increase in its incidence. Indeed, the studies on "replacement" abortions by Tietze and Sklar and Berkov, discussed above, and upon which Rosenberg relies, confirm that legalization in fact increased the incidence of abortion.²⁵⁶ This is the very opposite of what Skeel and Stuntz contend.

Although abortions took place in large numbers prior to legalization, the incidence of abortion rose precipitously in the years immediately following its decriminalization, first in the states that revised their laws and then nationally under *Roe*.²⁵⁷ This is to be expected. Indeed, some have argued that the legalization of abortion was responsible for a 5 to 8 percent drop in birthrates, a rise in women's willingness to engage in inter-

254. See *Legal Abortion: Who, Why and Where*, TIME, Sept. 27, 1971, at 67 (reporting that 17 states had liberalized their laws as of 1971, and that during the first fifteen months after New York's new abortion law became effective in 1970, 200,000 abortions were performed in New York, including 120,000 performed on women from outside the state); Ryan Lizza, *The Abortion Capital of America*, N.Y. MAG., Dec. 12, 2005 at 38, 45 ("In the two and a half years between July 1970, when New York's new abortion law took effect, and January 1973, when the Supreme Court's *Roe* decision legalized the procedure everywhere, 350,000 women came to New York for an abortion, including 19,000 Floridians; 30,000 each from Michigan, Ohio, and Illinois; and thousands more from Canada. By the end of 1971, 61 percent of the abortions performed in New York were on out-of-state residents.").

255. Tietze, *supra* note 231, at 36.

256. That is, the corollary to draw from Tietze's conclusion that "70 percent of the legal abortions of resident women performed under the 1970 law replaced illegal abortions," *Id.* at 41, and Sklar and Berkov's conclusion that "most likely between two-thirds and three-fourths . . . of all illegal abortions in the United States in 1971 were replacements for illegal abortions," Sklar & Berkov, *supra* note 231, at 915, is that between one-third and one-fourth of all abortions performed were not replacements but were "new," adding to the cumulative total of abortions in a given year. In other words, these were abortions that would not have taken place if the procedure had remained illegal.

257. Forsythe, *supra* note 137, at 200 ("As a whole, the most dramatic rise in reported abortions came between 1966 and 1972, as nineteen states loosened their laws, not after *Roe*. The numbers grew as legalization grew."). For estimates of the incidence of abortion prior to legalization, see the authorities cited in note 196, *supra*. For a fuller discussion of the effectiveness of legal restrictions against abortion, both before and after *Roe*, see Breen, *supra* note 182.

course, a drop in men's willingness to marry in the event of an unplanned pregnancy, and a decline in the rate of adoption and the number of "unwanted" children available for adoption.²⁵⁸ It would be odd if the legalization of abortion was responsible for all of these changes but was not responsible for a higher incidence of abortion itself. Moreover, it would defy common sense and experience to suggest that an act will be performed with no greater frequency once the law prohibiting it has been repealed.

Put another way, in the era just prior to the state reform efforts and national legalization under *Roe*, the law was effective not only as a *ruler* that proscribed certain conduct, but also as a *teacher* of important cultural values.²⁵⁹ Because Skeel and Stuntz's normative conclusion about the proper limits of law rests on the empirical claim that law cannot effect a change in this area—that is, that women will continue to seek abortion in the same numbers regardless of the law's treatment of the issue—one is left to wonder why they chose to accept this assertion in such a facile and uncritical manner.

V. THE LAW AS TEACHER AND THE CULTURE OF DEATH

The idea that law can act as a teacher to those whom it governs is not an idea of recent vintage.²⁶⁰ Although Skeel and Stuntz do not entirely reject the notion that law has a pedagogic role to play in society, they wish to restrict this role severely. Skeel and Stuntz are right to assert that "[i]n governance as in life, most people learn by example."²⁶¹ Thus, they

258. All of these phenomena have been attributed to the legalization of abortion. See Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions*, 34 *PERSP. ON SEXUAL AND REPROD. HEALTH* 25, 32 (Jan.-Feb. 2002) (citing authority for each of the propositions set forth in the text above).

259. Cf. Skeel & Stuntz, *supra* note 1, at 812 ("Laws that aspire to teach citizens how to live and at the same time seek to govern the imposition of tangible legal penalties are likely only to teach lessons in arbitrary government and the rule of discretion.").

260. Writing in the thirteenth century, St. Thomas Aquinas made this idea central to his theory of jurisprudence. See M. Cathleen Kaveny, *Toward a Thomistic Perspective on Abortion and the Law in Contemporary America*, 55 *THOMIST* 343, 345 (1991) (referring to "Aquinas's concept of the law as a teacher of virtue").

261. Skeel & Stuntz, *supra* note 1, at 830.

contend that the slogans of “purely symbolic laws”²⁶² are unlikely to teach much of anything other than lessons in legislative gamesmanship. Moreover, they fear that when laws are especially susceptible to selective enforcement, such laws will teach lessons in “cynicism about legal institutions.”²⁶³ This is not, however, an argument against the criminalization of abortion. Rather, it is an argument for the consistent enforcement of such legal prohibitions, regardless of where one lives or how much wealth one possesses. It is an argument against selective enforcement and for the equal application of the law, a point that Stuntz appears to concede elsewhere.²⁶⁴

Nevertheless, any new effort to ban abortion would undoubtedly be the source of substantial social disruption. After all, *Roe* has itself changed the cultural landscape by creating a climate in which many women have come to expect the ready availability of abortion services.²⁶⁵ Indeed, the legacy of *Roe* and its progeny has been “a tragic obscuring of the collective conscience,”²⁶⁶ a loss of the sense of right and wrong that has had a corrosive effect on society as a whole.

This is the phenomenon that Pope John Paul II identified as the “culture of death,” a phenomenon that consists of a collection of attitudes, practices, laws, and beliefs “which encourage an idea of society excessively concerned with efficiency.”²⁶⁷ Under the criteria of efficiency, functionality, and usefulness, human beings “are considered not for what they ‘are,’ but for

262. *Id.* at 828.

263. *Id.* at 829.

264. See Stuntz, *supra* note 5, at 1740 (asserting that even if law is an effective teacher, “law surely teaches best when the relevant legal norms are enforced across the board”); see also Skeel & Stuntz, *supra* note 1, at 830 (concluding that the success of both the Civil Rights Act of 1964 and the Voting Rights Act of 1965 is in part attributable to the fact that each had “direct, tangible consequences that did not depend on discretionary decisions of police officers or prosecutors”).

265. Reliance on the relatively new cultural landscape that *Roe* created was a primary reason given by the Court in *Casey* for not overturning *Roe*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992) (arguing that in the wake of *Roe*, “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 in the event that contraception should fail”).

266. *Evangelium Vitae*, *supra* note 76, ¶ 70.

267. *Id.* ¶ 12.

what they 'have, do and produce.'"²⁶⁸ At its foundation, this view rests upon "a completely individualistic concept of freedom, which ends up becoming the freedom of 'the strong' against the weak who have no choice but to submit."²⁶⁹ Accordingly, from this perspective, anyone who "compromises the well-being or life-style of those who are more favoured tends to be looked upon as an enemy to be resisted or eliminated."²⁷⁰

According to John Paul, these attitudes and beliefs, in turn, lead to the "creat[ion] and consolidat[ion of] actual 'structures of sin' which go against life."²⁷¹ Here the freedom of the strong over the weak is justified by a kind of relativism according to which "only someone present and personally involved in a concrete situation can correctly judge the goods at stake [such that] only that person [is] able to decide on the morality of his choice."²⁷² Concretely, this "*conspiracy against life*"²⁷³ can be seen most vividly in the widespread practice of abortion, and in the elaborate legal regime that sanctions the killing of unborn children *in utero*.²⁷⁴ It can also be seen in the actions of men who encourage women to have abortions—either directly, by pressuring them to seek the procedure, or indirectly "by leaving [them] alone to face the problems of pregnancy."²⁷⁵ It can also be seen in the participation of medical professionals who "place at the service of death skills which were acquired for promoting life."²⁷⁶ The media contributes to this conspiracy by portraying the acceptance of abortion "as a mark of progress and a victory of freedom, while depicting as enemies of freedom and progress those positions which are unreservedly pro-

268. *Id.* ¶ 23.

269. *Id.* ¶ 19.

270. *Id.* ¶ 12.

271. *Id.* ¶ 24.

272. *Id.* ¶ 68.

273. *See id.* ¶¶ 12, 17.

274. *See id.* ¶ 58 ("The acceptance of abortion in the popular mind, in behaviour and even in law itself, is a telling sign of an extremely dangerous crisis of the moral sense, which is becoming more and more incapable of distinguishing between good and evil, even when the fundamental right to life is at stake."). Although I here focus exclusively on abortion, John Paul II also identifies the growing practice of euthanasia and the state's use of capital punishment in criminal convictions as further examples of sinful structures that contribute to the culture of death. *See id.* ¶¶ 55–56, 64–67.

275. *Id.* ¶ 59.

276. *Id.*

life."²⁷⁷ The practice of abortion is also supported by a "network of complicity which reaches out to include international institutions, foundations and associations which systematically campaign for the legalization and spread of abortion in the world."²⁷⁸ All of these social elements show that abortion "goes beyond the responsibility of individuals and beyond the harm done to them, and takes on a distinctly social dimension."²⁷⁹ Taken together, these institutions, practices, and attitudes constitute an immense "'structure of sin' which opposes human life not yet born."²⁸⁰

Where law is part of the "structure of sin" with respect to a particular practice, the cultural influence exerted by law is enormous. Institutions and methods of operation that condone injustice, whether silently or overtly, make the practice of injustice more socially acceptable, even legitimate, insofar as the absence of legal prohibition creates legitimacy. Under the protection afforded by law, the repetition of an act—even a "private" act performed in a doctor's office or clinic—can seduce the conscience with the alluring but mistaken notion that the frequency of a practice can transform its essential character from something wrongful into something advantageous and desirable, perhaps even noble and laudable.²⁸¹ In this way, the law teaches even the unschooled what is and is not acceptable.

277. *Id.* ¶ 17.

278. *Id.* ¶ 59.

279. *Id.*

280. *Id.* For a more elaborate discussion of the concept of "structure of sin" in Catholic social thought, see Breen, *supra* note 182.

281. Pope John Paul II was well aware of the tendency to want to transform one's wrongful act into a sign of virtue in order to avoid the painful consequences of guilt. See Pope John Paul II, Encyclical Letter, *Veritatis Splendor* ¶ 104 (Aug. 6, 1993), available at http://www.vatican.va/edocs/ENG0222/_INDEX.HTM ("It is quite human for the sinner to acknowledge his weakness and to ask mercy for his failings; what is unacceptable is the attitude of one who makes his own weakness the criterion of the truth about the good, so that he can feel self-justified."). Supporters of abortion often claim that having an abortion is not only morally permissible, but that it can in fact be a noble action. See, e.g., Robin L. West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 83 (1990) (contending that "[t]he abortion decision typically rests not on a desire to destroy fetal life but on a responsible and moral desire to ensure that a new life will be borne only if it will be nurtured and loved"); Joan C. Williams & Shauna L. Shames, *Mothers' Dreams: Abortion and the High Price of Motherhood*, 6 U. PA. J. CONST. L. 818 (2003) (arguing in favor of a rhetorical strategy that portrays the decision to abort as often the best thing for a woman's existing and future children).

A. *False Choice: Changing the Culture vs. Changing the Law*

In recommending that law should be modest and so refrain from attempting to restrict abortion, Skeel and Stuntz are not alone. A number of commentators writing from a Catholic perspective have explored the hypothesis that the law should never be used to regulate the practice of abortion,²⁸² or that the law should be employed only after the culture has changed to the point where society will accept some form of legal restriction. Others suggest that the law should only be used in a non-coercive fashion, to support women in their decision to give birth rather than to discourage resort to abortion *per se*. Like Skeel and Stuntz, these authors stress the priority of culture over law and the need to persuade rather than compel those who would seek recourse to the procedure. Margaret O'Brien Steinfels succinctly expresses this point of view, first by confidently declaring that "[n]o Supreme Court is going to overturn *Roe*" because of the doctrine of *stare decisis*.²⁸³ Instead, she in-

282. See Mary C. Segers, Murray, *American Pluralism, and the Abortion Controversy*, in JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION 228 (Robert P. Hunt & Kenneth L. Grasso eds., 1992) (speculating how theologian John Courtney Murray might react to the modern abortion debate). Segers's essay has been subject to blistering critique. See, e.g., Susan J. Stabile, *John Courtney Murray and the Abortion Debate*, 4 J. CATH. SOC. THOUGHT 87 (2007); Todd David Whitmore, *What Would John Courtney Murray Say? On Abortion & Euthanasia*, COMMONWEAL, Oct. 7, 1994, at 16.

283. Margaret O'Brien Steinfels, *Time to Choose: Voting with a Catholic Conscience*, COMMONWEAL, Oct. 22, 2004, at 12. Steinfels gives no hint as to how such a cultural change is to be brought about, or how voting for John Kerry for President (the ultimate point of the article) will help to advance this cultural transformation. It is perhaps Steinfels's confidence in the inability to change the legal landscape surrounding abortion that simplifies her support for Kerry over Bush, notwithstanding the latter's public opposition to abortion. Although the matter is now plainly moot (at least in terms of the 2004 Election), it is telling that in her weighing of the candidates' relative merits, Steinfels seemingly never paused to consider how, given Senator Kerry's unwavering support for an absolute right to abortion, see Senator John Kerry, Address at the NARAL Pro-Choice America Dinner (Jan. 21, 2003) (transcript available at <http://www.gwu.edu/~action/2004/interestg/naral012103/kerr012103spt.html>), a Kerry presidency would have made matters worse by using the law to increase the availability and incidence of abortion simply by executive order, much as President Clinton did in the early days of his first administration. See Robin Toner, *Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES, Jan. 23, 1993, at A1 (describing President Clinton's orders lifting the ban on the use of federal money in family planning clinics that counsel abortion, authorizing the use of federal funds in international programs that provide abortion counseling and abortion related activities, authorizing abortions at U.S. military hospitals, lifting the ban on the use of federal funds in fetal tissue research, and calling for a review of

sists that “[t]he law will only change when the culture changes and women change their minds about abortion.”²⁸⁴

Similarly, Todd David Whitmore argues that because the law “is a bad vehicle” for shaping public opinion, prudence dictates that Christians and others who oppose abortion “should not focus primarily on using coercive law to restrict abortion.”²⁸⁵ Instead, they should “exemplify Christian charity by using [their] resources to assist women who are involuntarily pregnant.”²⁸⁶ Likewise, Kevin Quinn, S.J., argues that opponents of abortion “should not lead with coercive law but with systematic and evangelical efforts to promote the ‘culture of life.’”²⁸⁷ Quinn’s conferee, David Hollenbach, S.J., believes “the appeal to law, whether the matter be race or abortion, must generally follow the cultural consensus rather than lead or form it.”²⁸⁸ Thus, he recommends “the route of education and persuasion” over the “premature reach for law, which remains coercive even when it intends to be educative.”²⁸⁹

It is perhaps stating the obvious to note that cultural transformation and legal change are not mutually exclusive. Indeed, as Francis George has said, “we should not suppose that our choice is between reforming the law and working to change the culture. We must do both.”²⁹⁰ Moreover, efforts to reform the law need not wait, in sequential fashion, for a moral renovation of the culture to be completed. As George makes clear:

the ban on the importation of RU-486). One is left to wonder whether Steinfels will consider these sorts of factors in determining who to endorse in the 2008 campaign.

284. Steinfels, *supra* note 283, at 12. Elsewhere in the article, in discussing embryonic stem cell research, Steinfels fatalistically concludes that “Catholics will never convince their fellow citizens that fertilized eggs are protectible human life (indeed, most Catholics aren’t convinced).” *Id.* at 13.

285. Whitmore, *supra* note 282, at 19 (quoting Segers, *supra* note 282, at 247). Whitmore further developed this thesis in a subsequent essay. See Todd David Whitmore, *Arms Unfolded: The Search for Common Ground on Abortion*, NOTRE DAME MAGAZINE, Summer 2005.

286. Whitmore, *supra* note 282, at 19 (quoting Segers, *supra* note 279, at 247).

287. Kevin P. Quinn, S.J., *Whose Virtue? Which Morality? The Limits of Law as a Teacher of Virtue: A Comment on Cathleen Kaveny*, in CHOOSING LIFE, *supra* note 142, at 153.

288. David Hollenbach, S.J., *The Gospel of Life and the Culture of Death: A Response to John Conley*, in CHOOSING LIFE, *supra* note 142, at 43.

289. *Id.* at 43–44.

290. George, *supra* note 186, at 10.

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.²⁹¹

Not surprisingly, Pope John Paul II articulated a similar view. That is, he argued for "a general mobilization of consciences and a united ethical effort to activate a great campaign in support of life."²⁹² At the same time, John Paul advocated legal change. He recognized that "[a]lthough laws are not the only means of protecting human life, nevertheless they do play a very important and sometimes decisive role in influencing patterns of thought and behaviour."²⁹³ Thus, despite the difficulties involved in "mount[ing] an effective legal defence of life in pluralistic democracies," he urges "all political leaders not to pass laws" which make abortion more widely available.²⁹⁴ Moreover, although "it is not enough to remove unjust laws," where such illegitimate measures already exist, political leaders must take steps that "will lead to the re-establishment of a just order in the defence and promotion of the value of life."²⁹⁵

*B. Legal Change and Recognizing the Moral Virtue
Necessary to Comply*

The proponents of a "culture first" approach to abortion rightly insist that law will not teach men and women how to respect nascent human life if it exceeds their capacity for moral action. It may simply be the case, as Todd David Whitmore reminds us, that "the public may not be ready to receive a law

291. *Id.*

292. *Evangelium Vitae*, *supra* note 76, ¶ 95 (emphasis omitted).

293. *Id.* ¶ 90.

294. *Id.*

295. *Id.*; see also Pope John Paul II, *Address at the Commemoration of the Fifth Anniversary of the Encyclical Evangelium Vitae* ¶¶ 4, 6 (Feb. 14, 2000), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/janmar/documents/hf_jp-ii_spe_20000214_acd-life_en.html ("No effort should be spared to eliminate legalized crime or at least to limit the damage caused by these laws The changing of laws must be preceded and accompanied by the *changing of mentalities and morals* on a vast scale, in an extensive and visible way.").

that simply mirrors what is morally true.”²⁹⁶ Thus, Cathleen Kaveny warns that “[f]orging a pro-life jurisprudence for the United States requires that we take sober, clear-eyed account of the level of virtue our society currently possesses, not only of the virtue we earnestly hope that it will one day manifest.”²⁹⁷ Indeed, Kaveny has long argued that, in formulating a workable legal philosophy, the pro-life movement “needs to discern when criminal sanctions against abortion are inappropriate, because they do not take into account the capabilities of ordinary rather than superhuman virtue.”²⁹⁸ Likewise, Gregory Kalscheur, S.J., notes that “for law to be effective as a moral guide, some level of consent as to the goodness of the law must be obtained.”²⁹⁹ A law that far outstrips the virtue of those whom it governs may lead to contempt for that particular law and disrespect for the legal system as a whole.³⁰⁰

Plainly, in fashioning the rules that will govern society, lawmakers should gauge the virtue of their fellow citizens—the moral capacity of individuals to comply with the law. Although the human person always possesses the freedom necessary to obey a just law, virtue—the interior disposition and discipline necessary to exercise one’s freedom in a responsible manner—is not something that can be imposed. Instead, virtue is something that, for the most part, is either acquired or neglected through culture.³⁰¹ Thus, prudence demands both an appreciation of the relevant cultural setting, as well as a recognition of the values this setting teaches and fails to teach.

Prudence, however, does not simply caution the lawmaker against enacting rules that will not be followed—rules that may become a source of derision, that arouse public contempt for

296. Whitmore, *supra* note 282, at 19.

297. Kaveny, *supra* note 142, at 144.

298. Kaveny, *supra* note 260, at 380.

299. Kalscheur, *supra* note 75, at 257.

300. The idea that a difficult law may breed contempt for law as a whole can be found in Aquinas’s theory of law. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, *supra* note 114, I-II, Q. 96, art. 2; see also Whitmore, *supra* note 282, at 19 (discussing the idea of contempt for law brought about by legal measures that are overly ambitious in the thought of John Courtney Murray).

301. As discussed at length above, this sort of moral education takes place largely through the many constituent institutions that inhabit and make up a given culture, including, for example, the family, the market, schools, places of worship, places of work, and political organizations. See *supra* notes 180–85 and accompanying text; see also Breen, *supra* note 182.

law in general. Prudence also demands that laws should not be overly lax, legitimizing certain conduct through the absence of regulation and promoting a kind of ill-virtue through silence. Indeed, the law must challenge individuals to act in compliance with the rights of others and the common good, even though doing so may prove to be difficult. Thus, the law must strike a balance, in view of those subject to it, between being overly restrictive and unnecessarily indulgent. Knowing in advance that some individuals will fall short of what is expected does not mean that the law must abstain from regulation, because that will always be the case.³⁰²

Moreover, prudence should not be an excuse for doing nothing—for regarding the current incapacity of many to comply with the law as a fixed point that cannot and will not change. Although often invoked as a principle that guides political action in uncertain waters, prudence may instead reflect an all too comfortable accommodation to the status quo. An approach to abortion that treats current public attitudes and individual virtue as fixed points around which the law must revolve ends up demanding too little from people and, in effect, becomes an excuse for doing nothing under the guise of considered restraint.

If, however, laws severely restricting abortion were to again become a reality, then the kind of virtue education necessary for compliance would likely have already taken place.³⁰³ Those who oppose legal restrictions on abortion on prudential grounds often seem to forget the power of the political process to teach. Indeed, when politics fosters genuine dialogue and introspection about the nature of our society and what it might become, politics has enormous potential to help bring about genuine cultural transformation. That, I take it, is the point of Skeel and Stuntz's favorable view of the civil rights move-

302. See Forsythe, *supra* note 137, at 195 (arguing that the absence of perfect compliance with a statute is not a sufficient reason to repeal it).

303. Given the widespread practice of abortion, some women would likely still seek abortions even following a cultural change sufficient to bring about legislation protective of unborn life. As noted above, to refuse to regulate abortion based on the existence of some noncompliance with the law proves too much. It would justify striking down every law that is violated by those opposed to it. See *supra* notes 63, 132–38 and accompanying text.

ment—a movement that ultimately assumed political expression in effective legislation.³⁰⁴

C. *The Non-Coercive Use of Law: Public Assistance and the Incidence of Abortion*

Although some commentators join Skeel and Stuntz in opposing the direct regulation of abortion on prudential grounds, others believe the law can be employed in a non-coercive manner to reduce the incidence of abortion. This, of course, is the position now routinely put forth by a number of avowedly Catholic and otherwise Christian politicians. As then-New York Governor Mario Cuomo argued in his now-famous address at Notre Dame in 1984, even those who unyieldingly support the abortion license can at the same time “support the development of government programs that present an impoverished mother with the full range of support she needs to bear and raise her children, to have a real choice.”³⁰⁵

Unfortunately, these sorts of programs are largely absent from the American legal landscape. In her justly celebrated book, *Abortion and Divorce in Western Law*, Professor Mary Ann Glendon argues that “[a]bortion cannot be disentangled from larger issues of social justice” that surround it.³⁰⁶ Here, drawing on the work of social scientists Shelia Kamerman and Alfred Kahn, Glendon notes that, unlike most European countries, the United States does not guarantee paid parental leave from work following childbirth, does not provide a comprehensive public system of day care for children ages three to five, does

304. See Skeel & Stuntz, *supra* note 1, at 829–30.

305. Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 27–28 (1984). More recently, under the leadership of Rep. Rosa L. DeLauro, a group of fifty-five Catholic, Democratic members of the House of Representatives signed a “Statement of Principles” in which they collectively pledged themselves to “reducing the number of unwanted pregnancies and creating an environment with policies that encourage pregnancies to be carried to term” by “promoting alternatives to abortion, such as adoption, and improving access to children’s healthcare and child care, as well as policies that encourage paternal and maternal responsibility.” Press Release, Rep. Rosa L. DeLauro, House Democrats Release Historic Catholic Statement of Principles (Feb. 28, 2006), available at http://www.house.gov/delauro/press/2006/February/catholic_statement_2_28_06.html. Significantly, the statement studiously avoids the question of whether or not abortion should be legally restricted in any way.

306. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 55 (1987).

not provide cash assistance to parents in addressing the financial burdens of child rearing, and does not provide favorable tax treatment to poor families.³⁰⁷ Thus, Glendon concludes that a stranger might infer “from our abortion and social welfare laws [that] . . . we had deliberately decided to solve the problem of children in poverty by choosing to abort them rather than to support them with tax dollars.”³⁰⁸ Regrettably, the situation has not improved in any appreciable manner since the publication of Glendon’s book.³⁰⁹

The idea that laws governing abortion should eschew the use of coercive force through criminal prohibition, and instead encourage women to continue their pregnancies to term by providing additional financial resources, raises an important empirical question: would such an approach significantly reduce the incidence of abortion? In other words, would a greater allocation of public resources to social services for both married and single women with unwanted pregnancies in fact encourage more women to see their pregnancies to term?³¹⁰

307. *Id.* at 53–55. The works Glendon cites include FAMILY POLICY: GOVERNMENT AND FAMILIES IN FOURTEEN COUNTRIES (Sheila B. Kamerman & Alfred J. Kahn eds., 1978); SHEILA B. KAMERMAN & ALFRED J. KAHN, CHILD CARE, FAMILY BENEFITS, AND WORKING PARENTS: A STUDY IN COMPARATIVE POLICY (1981); ALFRED J. KAHN & SHEILA B. KAMERMAN, INCOME TRANSFERS FOR FAMILIES WITH CHILDREN: AN EIGHT-COUNTRY STUDY (1983); SHEILA B. KAMERMAN, ALFRED J. KAHN & PAUL KINGSTON, MATERNITY POLICIES AND WORKING WOMEN (1983).

308. GLENDON, *supra* note 306, at 55.

309. See, e.g., Sheila B. Kamerman, *Gender Role and Family Structure Changes in the Advanced Industrialized West: Implications for Social Policy*, in POVERTY, INEQUALITY, AND THE FUTURE OF SOCIAL POLICY: WESTERN STATES IN THE NEW WORLD ORDER 231, 253–54 (Katherine McFate, Roger Lawson & William Julius Wilson eds., 1995) [hereinafter FUTURE OF SOCIAL POLICY] (concluding that the United States differs from continental European countries “in its failure to provide direct income transfers . . . to all or almost all families with children” and that “European countries and Canada are far ahead of the United States” in providing an adequate social infrastructure that supports mothers who work).

310. In the course of her book, Glendon discusses the abortion laws in various Western European nations and contrasts both the content of these laws and the manner in which they were created with the Supreme Court’s decision in *Roe v. Wade*. See GLENDON, *supra* note 306, at 15–39. Specifically, commenting on a famous West German decision, Glendon concludes that what was important to the court was “that the *totality* of abortion regulations—that is, all criminal, public health, and social welfare laws relating to abortion—be in proportion to the importance of the legal value of life, and that, as a whole, they work for the continuation of the pregnancy.” *Id.* at 28.

1. *Financial Concerns as a Factor in the Abortion Decision*

Among women who have had abortions, the available data has consistently shown that financial considerations do indeed play a role in the decision to abort. In 2004, researchers at the Guttmacher Institute conducted a structured survey of over 1,100 women who had recently obtained abortions. Significantly, 73 percent of respondents listed “[c]an’t afford a baby now” as one of their reasons for choosing the procedure.³¹¹ A similar study conducted in 1987 revealed similar financial concerns. In this earlier survey, 68 percent of the 1,900 participat-

Aside from whatever influence such policies might have on the frequency of abortion, however, Glendon argues that law unavoidably exercises a pedagogical role, “contribut[ing] in a modest but not a trivial way to that framework of beliefs and feelings” that inform society. *Id.* at 139. It is precisely because law teaches that Glendon sees the value both of laws that provide financial assistance to pregnant women and families and of proposed legal compromises that would only marginally reduce the total number of abortions performed in the U.S. “At a minimum, replacing the right to abortion with a compromise should help to replace strident discord with reasoned discussion about the grounds and conditions under which abortion might be permitted.” *Id.* at 60.

Surely the goal of encouraging “reasoned discussion” on abortion is praiseworthy, and non-coercive laws may well encourage a higher level of public discourse. Still, Glendon’s thesis contains a prediction that should be tested. At the time of her book, the “compromise” positions on abortion adopted by France and Germany had only been in place for about ten years. These measures have now been in place for over thirty years. It now seems appropriate to ask whether the discussion of abortion in these countries has been elevated. Have such measures worked to encourage “reasoned discussion” of abortion in these countries? Is abortion discussed at all? Or is it now a matter of indifference—a question that is thought to have been definitively answered and so need not be re-examined?

Unfortunately, I fear the record shows that, notwithstanding the pro-life cultural messages communicated by the child-friendly legislation in place in many European countries, the prosperous, liberal democracies of Europe have not recoiled from the abyss. Instead, with few misgivings, they have plunged forward, advocating the recognition of abortion as an international human right. For a brief description of recent developments in European abortion law, see E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2005, at 80–82 (2005), available at http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2005_en.pdf.

311. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *PERSP. ON SEXUAL & REPROD. HEALTH* 110, 112–113 (Sept. 2005).

ing women indicated that their inability to afford a child was a factor in their decision to abort.³¹²

In addition, both of these studies reveal that the inability to afford a child was of great importance relative to other factors. The 2004 study reported that 23 percent of participating women listed financial constraints as the most important reason for seeking an abortion, and the 1987 study indicated that 21 percent listed this factor as the most important.³¹³ Indeed, in the 2004 study, only one reason to abort ranked ahead of financial concern. That is, 25 percent of the women surveyed responded they were "not ready" for a child, or another child, or that the timing of the pregnancy was "wrong."³¹⁴

As illuminating as these empirical studies are, however, they do not demonstrate that the high incidence of abortion in this country can be significantly lowered by providing greater financial assistance to women considering abortion. Part of this uncertainty is a result of the studies' indication that the decision to choose abortion is a complex one. In fact, the 2004 study found that "[o]f the 1160 women who gave at least one reason, 89% gave at least two and 72% gave at least three; the median number of reasons given was four, and some women gave as many as eight reasons out of a possible 13."³¹⁵ Although the survey asked the women to indicate what factor was most important to them, the survey did not ask how a different set of circumstances might have influenced their decision. That is, neither the 2004 study nor the 1987 study asked the participants whether, if sufficient financial assistance had been available, they would have taken their pregnancies to term. It is entirely possible that even with such support, a woman's education, career plans, familial circumstances, or relationship with the father would still lead her to choose abortion.

312. *Id.* at 113. The 2005 report states that 69 percent of the respondents in the 1987–1988 study indicated that their inability to afford a baby was a reason for choosing an abortion. Although the discrepancy is not statistically significant, the earlier report in fact states that 68 percent gave this as a reason. See Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP., July–Aug. 1988, at 169, 170.

313. See *Finer et al.*, *supra* note 311, at 114; Torres & Forrest, *supra* note 312, at 170.

314. *Finer et al.*, *supra* note 311, at 114.

315. *Id.* at 113.

2. *Abortion Rates in Countries with More Generous Social Services*

The incidence of abortion in countries that provide greater public assistance to women facing unwanted pregnancies than the United States appears to confirm the inability of non-coercive methods to significantly reduce the number of abortions. For example, a 1999 study, also sponsored by the Guttmacher Institute, reported the frequency of abortion in fifty-nine countries with populations of at least one million where abortion is legal and generally available.³¹⁶ For each country, the study included three important statistics: the actual number of reported abortions within a given year; the "abortion rate," that is, the number of abortions per 1,000 women ages 15 to 44; and the "abortion ratio," that is, the number of abortions per 100 known pregnancies.³¹⁷ Thus, for 1996, the study reported that 1,365,700 abortions were performed in the United States. This means in that year, for every 1,000 women of childbearing age, 22.9 had an abortion, and a staggering 25.9 percent of all known pregnancies were terminated by abortion.³¹⁸

In the same year, Sweden, a country with a much more elaborate social service apparatus,³¹⁹ experienced only 32,100 abortions.³²⁰ Undoubtedly, this relatively small number is, at least in part, a consequence of Sweden's comparatively smaller population. Sweden's more generous support of families and pregnant women cannot, however, explain this lower number.

316. Stanley K. Henshaw, Susheela Singh & Taylor Haas, *The Incidence of Abortion Worldwide*, 25 INT'L FAM. PLAN. PERSP. (SUPPLEMENT) S30 (1999).

317. *Id.* at S34. The report includes a fourth statistic not relevant to the discussion above, namely, the "total abortion rate," which the authors say represents "[t]he number of abortions that would be experienced by the average woman during her reproductive lifetime, given present age-specific abortion rates." *Id.*

318. *Id.*

319. See Sara McLanahan & Irwin Garfinkel, *Single-Mother Families and Social Policy: Lessons for the United States from Canada, France, and Sweden*, in FUTURE OF SOCIAL POLICY, *supra* note 309, at 367 (comparing the incidence of poverty among single-mother families and the effectiveness of different strategies employed by the United States, Canada, Sweden and France); Siv Gustafsson, *Single Mothers in Sweden: Why is Poverty Less Severe?*, in FUTURE OF SOCIAL POLICY, *supra* note 309, at 291 (explaining the history and the policies behind the relatively good economic situation of single mothers in Sweden); Celia Winkler, *Mothering, equality and the individual: feminist debates and welfare policies in the USA and Sweden*, 1 COMMUNITY, WORK & FAM. 149, 149 (1998).

320. Henshaw et al., *supra* note 316, at S34.

If that were the case, one would expect to see a comparable drop in other abortion statistics. On the contrary, the report indicates that in 1996, 18.7 of every 1,000 women ages 15–44 had an abortion, and 25.2 percent of all known pregnancies were terminated by the procedure.³²¹ Thus, notwithstanding the greater social resources devoted to supporting families and pregnant women in Sweden, more than a quarter of all pregnancies ended in abortion, just as in the United States.

Like Sweden, Canada is often heralded as a model for social welfare policy for the United States. Although Canada's generous allocation of resources to public health and income assistance³²² may indeed be worthy of imitation, these policies do not seem to have dramatically lowered the incidence of abortion in that country. According to the study, 106,700 Canadian women obtained abortions in 1995. Again, Canada's significantly smaller population can explain the fact that this figure is significantly lower than the number of abortions performed in the United States. Yet, despite the higher level of social assistance available to Canadian women with unwanted pregnancies, resort to abortion remains alarmingly high. According to the report, in 1995, for every 1,000 Canadian women of child-bearing age, 15.5 had an abortion, and 22 percent of all pregnancies in Canada ended in abortion.³²³

The same study reported similar statistics for other economically advanced countries with well-developed social service policies in place, including Australia, Denmark, England and Wales, Norway, France, and Italy.³²⁴ Granted, the experience of abortion in each of these smaller, more homogeneous countries

321. *Id.*

322. See McLanahan & Garfinkel, *supra* note 319; Ruth Rose, *Lone Parents: The Canadian Experience*, in *FUTURE OF SOCIAL POLICY*, *supra* note 309, at 327 (describing the various benefits available to families with children in Canada, as well as the country's shortcomings with respect education and training and childcare).

323. Henshaw et al., *supra* note 316, at S34.

324. *Id.* at S34. For each of these countries the study reported the following statistics (number of abortions within a given year/ abortion rate/ abortion ratio): Australia (1995–1996) 91,900/ 22.2/ 26.4; Denmark (1995) 17,700/ 16.1/ 20.3; England & Wales (1996) 167,900/ 15.6/ 20.5; Norway (1996) 14,300/ 15.6/ 19.1; France (1995, reporting incomplete) 156,200/ 12.4/ 17.7; Italy (1996, reporting incomplete) 140,400/ 11.4/ 21.1. *Id.* at S34. The authors note that "reporting is incomplete in France and Italy," suggesting that the incidence of abortion may be slightly higher than what these statistics suggest. *Id.* at S34.

may not translate directly into the American context. At the same time, given that each of these countries has an abortion ratio at, above, or approaching 20 percent strongly suggests that the provision of greater financial assistance would not significantly affect the incidence of abortion in the United States. Instead, the data appear to support the frank conclusion of long-time abortion-rights advocate Frances Kissling that “[t]here is absolutely no evidence that better economic benefits, jobs, child care or parental leave would lead to a significant decline in abortion.”³²⁵

This does not mean that measures involving the non-coercive use of law through the provision of greater social services to families and pregnant women should not be pursued. It does, however, mean that these measures should be pursued in their own right—as a means of supporting the disadvantaged people to whom they are directed—and not as a means to some other end. That expanded social services may dissuade some women from choosing abortion should be regarded as a welcome, additional benefit to laws that justice may demand in any case—laws which signify society’s solidarity with those in need.

D. *Culture and Law Working in Tandem:
MADD’s Response to Drunk Driving*

Those who genuinely hope for a reduction in the number of abortions may be forgiven for viewing with a jaundiced eye Kissling’s claim that non-coercive measures will meet with futility. Indeed, based on the data gathered by the Guttmacher Institute from other developed countries, some may still reasonably claim that providing greater financial assistance may help to reduce the incidence of abortion. After all, the two surveys, recounted above, of women who obtained abortions suggest that if adequate financial resources had been made available, some of them might not have chosen the procedure. At the same time, data from other countries suggest that even if such measures were successful, they would not radically alter the practice of abortion in this country. Simply put, non-coercive

325. Frances Kissling, *A Cautionary Tale*, CONSCIENCE, Autumn 2005, at 19, 22; see also Ann Furedi, *Some Messages Can’t Be Massaged*, CONSCIENCE, Winter 2006-07, at 22 (“Better nurseries and better financial support can mitigate some of the consequences of motherhood, but nothing can mitigate the impact of pregnancy itself, which is why women need the means to end it.”).

social welfare laws, no less than coercive measures, are limited in their ability to bring about genuine social transformation.

What is needed is a multifaceted approach that recognizes the dynamic and mutually reinforcing relationship between cultural norms and legal rules. Quite obviously, in a free and democratic society, laws must enjoy widespread support in order to ensure compliance. Thus, legal sanctions can work to underscore and solidify cultural norms and attitudes with respect to a given behavior. Conversely, laws that assume a contrary position can prevent cultural norms, which would otherwise flourish, from taking root.

Accordingly, contrary to those who insist on an exclusively non-coercive use of law, the criminal law has an essential role to play in this multifaceted approach. Indeed, the law must forthrightly prohibit the intentional killing of unborn human life. In its non-coercive dimension, the law should support women in carrying their pregnancies to term and raising their children,³²⁶ or, if they so choose, in placing them for adoption. Under such a regime, women facing unwanted pregnancies would not simply be told that abortion is a crime and warned of the consequences of unlawful behavior. They would also be given practical strategies for avoiding the choice that so many women today see as their only alternative in an otherwise impossible situation. These strategies would include not only financial assistance provided by the state, but also interpersonal advice and support provided by both public agencies and non-governmental mediating institutions. Under this approach, law and culture would work in tandem, teaching a single message of human dignity through word and example.

Fortunately, recent history provides a useful model of how such a comprehensive approach can achieve success, even when confronting a problem long thought to be intractable. The large number of drunk driving-related fatalities has long been regarded as "not only a national crisis, but a national disgrace."³²⁷ Still, the problem went largely unaddressed until the

326. See M. Cathleen Kaveny, *How Views of Law Influence the Pro-Life Movement*, 34 *ORIGINS* 560, 564 (2005) ("We must provide [women] with substantial assistance in meeting the challenge of their pregnancies, including the assistance (if they want it) of the baby's father.").

327. H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES* 48 (1992).

U.S. Department of Transportation in 1968 issued a report, *Alcohol and Highway Safety*, which found that "the use of alcohol by drivers and pedestrians leads to some 25,000 deaths and a total of at least 800,000 crashes in the United States each year."³²⁸ In 1970, the National Highway Traffic and Safety Administration initiated the Alcohol Safety Action Project, which directed \$88 million to thirty-five communities and prompted new efforts in enforcement, rehabilitation, and education. "Nevertheless, a significant reduction of drunk driving could not be confirmed and the program was terminated in 1977."³²⁹

Building on these earlier, incomplete efforts, the contemporary movement against drunk driving began in 1980 with the creation of a grass-roots organization, Mothers Against Drunk Driving (MADD). Founded by Candy Lightner, whose teenage daughter was killed by a drunk driver with a long history of DUI violations, and Cindi Lamb, whose five-and-a-half month old daughter was made a paraplegic by a drunk driver,³³⁰ MADD embodied the outrage of parents who believed that their tragedy was, at least in part, the result of a failure in public policy. Consistent with this view, the organization initially focused on the problem of the "killer drunk," the recidivist DUI driver who had been charged in the past but nevertheless allowed by judges and the law enforcement bureaucracy to continue to drive until his or her conduct resulted in the death of another individual.³³¹ By seeking further punitive measures against such individuals, MADD's legal model emphasized individual responsibility and sought to discourage future drunk driving through simple deterrence. Thus, MADD and its allies³³² encouraged legislatures to enact mandatory sentences

328. JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* xiv (1989) (quoting the report).

329. *Id.* at xv; see also Joseph R. Gusfield, *The Control of Drinking-Driving in the United States: A Period in Transition?*, in *SOCIAL CONTROL OF THE DRINKING DRIVER* 109, 122 (Michael D. Laurence, John R. Snortum & Franklin E. Zimring eds., 1988) ("The ASAP projects were largely efforts to increase enforcement through more and better trained police.").

330. Janice Lord, *Really MADD: Looking Back at 20 Years*, *DRIVEN*, Spring 2000, at 7.

331. See, e.g., ROSS, *supra* note 327, at 176-80.

332. Two other organizations, Remove Intoxicated Drivers (RID) and Students Against Drunk Driving (SADD), share many of the goals of MADD and have pursued similar legal and cultural agendas during roughly the same period of time. GERALD D. ROBIN, *WAGING THE BATTLE AGAINST DRUNK DRIV-*

and more stringent penalties for DUI violations. MADD was also instrumental both in Congress's 1984 decision requiring the States to adopt a mandatory drinking age of twenty-one as a condition for the receipt of federal dollars for highway projects,³³³ and in Congress's 2000 decision requiring the States to adopt a national standard of 0.08 blood alcohol level for drunken driving, also as a condition for the appropriation of federal highway funds.³³⁴

Although the organization's legal reform successes are impressive,³³⁵ MADD has also become a powerful cultural force that has changed the way in which drunk driving is morally perceived and socially discouraged. By raising the visibility of drunk driving as a social problem, MADD and other grassroots organizations have put "a human face on the victims of drunk driving" and so "mobilized the public's attention and sentiment."³³⁶ What is more, MADD and its allies "have been very imaginative in bringing programs to schools and other organizations."³³⁷ Although they maintain an active legislative agenda, on the local level these organizations "have increasingly defined their role in terms of public education."³³⁸

The results of these efforts, both legal and cultural, have been truly remarkable. In 1982, 43,510 people died in all traffic crashes in the United States. Of this total figure, 60 percent, or 26,173 people, were the victims of alcohol-related crashes. In 2005, by contrast, 43,443 people were killed in traffic crashes, but only 17,590, or 40 percent, were fatalities in which alcohol was a factor.³³⁹ This means that even though the number of

ING: ISSUES, COUNTERMEASURES, AND EFFECTIVENESS 11, 111-12 (1991) (describing RID and SADD); ROSS, *supra* note 327, at 177 (describing RID as a slightly older, though smaller, organization than MADD).

333. ROBIN, *supra* note 332, at 113-14. For an account of the federalization of the legal drinking age through the allocation of highway funds, see JACOBS, *supra* note 328, at 173-78.

334. Laurie Davies, *Twenty-Five Years of Saving Lives*, DRIVEN, Fall 2005, at 16.

335. *Id.* (discussing the organization's many legislative victories).

336. JACOBS, *supra* note 328, at 197.

337. *Id.* at 167.

338. *Id.*

339. Annual statistics from 1982-2005 for all traffic fatalities and those fatalities involving alcohol are conveniently gathered online by MADD. The organization's source for these statistics is the National Highway Traffic Safety Administration's Fatal Accident Reporting System (FARS) data. MADD, *Total Traffic Fatalities v. Alcohol Related Traffic Fatalities: 1982-2006*, available at <http://www.madd.org/stats/1298> (last visited Oct. 10, 2007).

traffic fatalities remained almost exactly the same over this period of time, the number of fatalities that were alcohol-related decreased by nearly 35 percent. This substantial drop in alcohol related deaths is all the more remarkable given that during the same period of time, the number of licensed drivers, the number of registered vehicles, and the number of vehicle miles traveled continued to increase.³⁴⁰

The dramatic drop in drunk driving fatalities could be attributed to a number of different causes.³⁴¹ The dominant opinion among social scientists, however, is that it would be incorrect to attribute these positive changes primarily to increased fear of criminal prosecution and the possibility of jail time. Empirical studies have shown, with respect to drunk driving, that the deterrent effect of the criminal law is contingent upon not only the severity of the punishment, but also the certainty of apprehension and the swiftness with which justice is administered.³⁴² Stricter legal standards and more severe criminal sanctions concerning impaired driving may, by themselves, "be too subtle to be noticed, too technical to be understood, or too poorly implemented to be effective."³⁴³ The evidence suggests that because deterrence is largely a matter of perception,³⁴⁴ "the success of law enforcement campaigns depends more upon the image than the substance"³⁴⁵ of apprehension. Thus, "the inability of jail threats to deter drunk drivers lies in the very small actual and perceived chances of being caught."³⁴⁶ Moreover, even in those locales where enforcement is more of an actual, rather than merely a perceived, threat, "[m]aintaining

340. Nat'l Highway Traffic Safety Admin., Publ'n No. DOT HS 810 623, at 3 (2005) (providing statistics for these categories for 1995–2005).

341. Cf. JACOBS, *supra* note 328, at 192 ("Traffic fatalities have declined since the early 1970s, but we do not understand why. The fifty-five-mile-per-hour speed limit, safer vehicles, greater seat belt usage, and blunderbuss anti-drunk driving initiatives are all possible contributors, but the specific contribution of each is not known").

342. ROSS, *supra* note 327, at 54–76; JACOBS, *supra* note 328, at 105–122.

343. John R. Snortum, *Deterrence of Alcohol-impaired Driving: An Effect in Search of a Cause*, in SOCIAL CONTROL OF THE DRINKING DRIVER 189, 200 (Michael D. Laurence, John R. Snortum & Franklin E. Zimring eds., 1988).

344. JACOBS, *supra* note 328, at 112.

345. Snortum, *supra* note 343, at 202.

346. ROSS, *supra* note 327, at 61–62; see also *id.* at 73 (concluding that "there is considerable evidence that increasing the actual certainty of punishment for drunk drivers in ways that also ensure adequate publicity can effect reductions in drunk driving").

deterrence is problematic . . . because over time, enforcement efforts invariably wane or become half-hearted and 'predictably, illusory threats do not long prove effective.'"³⁴⁷

The social science literature does not, however, dismiss the significant role the criminal law has played and should continue to play in addressing the social problem of drunk driving and its often tragic consequences. As Mary Ann Glendon has observed, "sometimes a legal norm, even though it seems ineffective, can help to create a climate of opinion which impedes more extensive violations of the norm."³⁴⁸ Thus, although all of the recent positive trends cannot be attributed primarily to stricter laws and renewed efforts at criminal enforcement, "[i]f the police and public are led to believe that the whole legal-moral approach has failed . . . there is the risk that the current momentum will be lost."³⁴⁹ Even those commentators less enamored with the use of criminal law as a strategy for reducing drunk driving have conceded that "[r]easonable and credible threats belong in the arsenal of drunk driving countermeasures, on grounds that they independently reduce drunk driving and that they may interact with and reinforce countermeasures arising from other perspectives."³⁵⁰

This appreciation for the role of law in helping to bring about these positive changes derives from the fact that the law has an educative role beyond simple deterrence. Even though im-

347. ROBIN, *supra* note 332, at 115 (quoting James R. Acker, *Social Sciences and the Criminal Law: A Report on America's War Against Drunk Driving*, 25 CRIM. L. BULL. 385 (1989)).

348. GLENDON, *supra* note 306, at 60. This may also have been the case with Prohibition, Skeel and Stuntz's paradigmatic example of an immodest law. Although people continued to consume alcohol throughout the era of Prohibition, they consumed significantly less than they did prior to the adoption of the Eighteenth Amendment and the Volstead Act. See KYVIG, *supra* note 157, at 21–26 (concluding that Prohibition "caused a substantial drop in aggregate alcohol consumption" but that Prohibition was more effective in reducing the drinking of lower class groups); Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 165 (Mark H. Moore & Dean R. Gerstein eds., 1981).

349. Snortum, *supra* note 343, at 226 (also remarking that, although the confluence of factors is clearly complicated, "we are 'on the right track'").

350. ROSS, *supra* note 327, at 73–74 (arguing that, for example, the use of subsidized taxis "may be enhanced by the presence of a credible threat of punishment if their opportunity goes unused").

paired driving is an exceedingly common occurrence³⁵¹ and the chance of apprehension is slim,³⁵² the law continues to exercise authority beyond the apparent fact of non-compliance. The law stands as a public witness, a reminder to all of what is expected. It acknowledges the moral gravity of the behavior and makes clear what is and is not acceptable.³⁵³ Indeed, the "most important role of deterrence strategies" based on the criminal law "may be symbolic and long-term, contributing over time to new societal norms about the seriousness and wrongfulness of drunk driving."³⁵⁴

All of this is to suggest that the changes that have taken place over the past twenty-five years with respect to drunk driving fatalities have been a function of the complex interaction of law and culture.³⁵⁵ Indeed, as legal and cultural norms reinforce one another, it becomes difficult to say with certainty whether a change in behavior is the result of one or the other.³⁵⁶ Given this

351. *See id.* at 27 (citing empirical reviews that conclude that 20 percent is a "reasonable general estimate" of the number of American drivers who drive while illegally impaired at least once a year).

352. *See id.* at 62 ("Nowhere in the United States is there good reason for a driver to think that a given trip taken while illegally impaired by alcohol is likely to result in apprehension, much less prosecution and conviction, for drunk driving.").

353. *See id.* at 56 ("The importance of jail sentences in current drunk driving policy is that they affirm the seriousness of the offense, the grave criminality of what has been done."). Cf. JACOBS, *supra* note 328, at 121 ("To say that community service is *by itself* an appropriate response to drunk driving is to define drunk driving as a minor offense.").

354. JACOBS, *supra* note 328, at 126; *see also* ROBIN, *supra* note 332, at 117 (acknowledging the view that "the get-tough laws have a moral dimension that, through a very gradual and subtle process, fosters the development of personal attitudes that are intolerant of drinking-driving, and increase the number of role models and peer group members who eschew drinking-driving regardless of the perceived legal risks involved").

355. *See* Snortum, *supra* note 343, at 225–226 (acknowledging as plausible the claim that the reduction was caused by "a diffuse, deterrent influence from [an] assortment of laws" and "the pervasive influence of thousands of news stories that announced the new laws and served to educate and threaten the public about legal consequences to violators" which were in part a consequence of "the moral indignation and the political pressures generated by groups such as MADD and RID").

356. *See, e.g., id.* at 206 (noting that "it becomes more difficult to construe law as a simple independent variable, for law is both a cause and an effect of 'moral climate'"); *id.* at 215 (observing that although "'moral climate' is, undoubtedly, desirable from the standpoint of traffic safety, . . . it creates headaches for the researcher who is responsible for assessing the effects of new laws"); JACOBS, *supra* note 328, at 106 ("As public policy defines drunk driving

sort of interaction, it is highly unlikely that MADD and its allied groups would have been nearly as successful in raising awareness of the problem of drunk driving and encouraging both young people and adults to alter their behavior without the firm moral injunction of the criminal law standing behind such efforts. Therefore, although "[t]he changing of attitudes and norms is the best hope for reducing drunk driving over the long run,"³⁵⁷ the criminal law has an indispensable role to play in helping to bring about this cultural transformation.

E. *Culture and Law Working in Tandem:
Overcoming the Culture of Death*

For precisely the same reasons, the criminal law will have an equally important role to play in reducing the incidence of abortion in the future. Because, as Skeel and Stuntz insist, rule-of-law values are of such great importance, this new law must be applied in an even-handed manner. Moreover, although the enforcement of this law will have real retributive consequences for the purveyors of abortion, the point of the law will not be to punish women.³⁵⁸ Instead, its primary function will be to remind women and society as a whole of the incalculable worth of every human life, most especially the lives of their own offspring.

This is not to say that the practice of abortion would cease to exist in an era of renewed criminalization. It would be naïve to suggest that, during the period of criminalization prior to *Roe* and the state reform efforts that preceded it, there was no incidence of abortion, or that women had no desire to rid themselves of unwanted pregnancies. Clearly, that was not the case.³⁵⁹ Law is not a panacea for this or any other social ill. Ac-

as a more serious offense and a higher priority, the citizenry may form a more negative view of drunk driving, may become more resistant to temptations to drive drunk, and may become more condemnatory of those who do.").

357. JACOBS, *supra* note 328, at 160.

358. See *supra* note 142 and accompanying text.

359. For a collection of personal accounts of women who obtained abortions prior to the time of legalization, see ELLEN MESSER & KATHRYN E. MAY, *BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* (1994) and PATRICIA G. MILLER, *THE WORST OF TIMES* (1993). The stories of women struggling with the burden of unwanted pregnancies and their often harrowing experiences in obtaining illegal abortions are powerful. At the same time, Messer and May's book is deserving of severe criticism for its uniformly negative portrayal of adoption as a fate far worse than the lethal bloodletting recounted in the stories. For the standard history of abortion in the United States, see JAMES C.

cordingly, if abortion were once again criminalized, we can be certain the procedure would still occur, just as drunk driving persists today. Given the vast industry of abortion providers and the network of interests that have taken root around the abortion license—as well as the wide availability of the technology necessary for safe, effective abortion,³⁶⁰ and the deep-seated cultural bias favoring the termination of unwanted pregnancies now ingrained in nearly two full generations of American women—the law faces a monumental task in working to curb the incidence of the procedure.

Because, on its surface, the act of abortion appears to satisfy a natural desire—to offer the realization of freedom from an intolerable burden—no law could ever hope to completely eradicate the practice. Indeed, no culture or legal system, no matter how thoroughly pro-life it may be, will ever completely eliminate the initial desire many women and men will have to “get rid of the problem” when confronted with an unwanted pregnancy. It is a natural human instinct to look for means of escape when one feels trapped and one’s life choices are foreclosed as a result of circumstance. What culture and law can do is discourage people from acting on this initial response. Specifically, laws that prohibit abortion can give many women with unwanted pregnancies the courage to do what they already know is right, to resist the temptation to destroy the life developing within them.³⁶¹

Culture does indeed possess a kind of priority over law in influencing the lives of individuals and the choices they make. Thus, what has been said of drunk driving applies with equal force to abortion: “The changing of attitudes and norms is the best hope of reducing [the incidence of the conduct] over the long run.”³⁶² Still, law has a vital role to play in bringing about

MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900* (1978). Although Mohr’s account of this history has been criticized in the past, it recently has been subjected to a thoroughgoing critique. See DELLAPENNA, *supra* note 196.

360. NATHANSON & OSTLING, *supra* note 223, at 194 (noting that, given the ease and availability of the suction curettage method of abortion, “one can expect that if abortion is ever driven underground again even non-physicians will be able to perform this procedure with remarkable safety”).

361. See David C. Reardon, *Women Who Abort: Their Reflections on the Unborn*, in *THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE*, *supra* note 137, at 135.

362. JACOBS, *supra* note 328, at 160.

this cultural change. Indeed, as the experience of lowering drunk driving fatalities has shown, by reinforcing other social norms, the law can have a profound effect well beyond the particular instances in which it is enforced against specific individuals.³⁶³

The moral confidence people have for engaging in certain types of conduct is undoubtedly buoyed by the law's acquiescence insofar as legality implies some basic level of social approval. This sense of approval is likely even greater in a pluralistic society such as ours, where legal norms often provide a shared language that enables disparate groups to engage in public discourse.³⁶⁴ In *Roe v. Wade*, the highest court in the land declared that the most important document in the land approved of abortion. Indeed, the members of the Court said it was something of vital importance—something sacred—a right as precious in the eyes of the Constitution as the right to free speech or the right to freedom of religion.³⁶⁵ Not even the dullest student could have failed to learn the cultural message *Roe* taught.

VI. A NEW PEDAGOGY: UNLEARNING THE LESSONS OF *ROE*

The law can indeed teach, as it most surely did in the years prior to *Roe*. But *Roe's* pupils have learned a different lesson, a lie, that must be unlearned through an honest conversation about the reality of abortion.³⁶⁶ It is, however, exceedingly diffi-

363. One might add that social scientists studying drunk driving have found that "alcohol-impaired driving is highly resistant to social control." Snortum, *supra* note 343, at 224. Nevertheless, the difficulties encountered have not prompted calls for its decriminalization. Rather, the harmful effects that drunk driving has on both its perpetrators and its victims call for both greater resolve and the use of creative means in addressing the problem. The same could be said for abortion. In the future, society may well find that recourse to abortion is likewise resistant to legal and cultural efforts to curb it. This does not mean that the practice should then be decriminalized. Instead, such a situation would similarly call for greater resolve and creativity.

364. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

365. Cf. Kaveny, *supra* note 326, at 564 (supporting the overturning of *Roe* "as much for pedagogical reasons as for practical reasons" because the Court "effectively denied" that abortion "was morally problematic").

366. Although such efforts are by no means representative of the general nature of conversation on the subject in this country, one should not overlook the sincere efforts of some to at least recognize the need for those with differing points of view on abortion to meet and converse in a spirit of mutual respect. See ABORTION: UNDERSTANDING DIFFERENCES (Sidney Callahan & Daniel Callahan eds., 1984); RUTH COLKER, *ABORTION & DIALOGUE: PRO-CHOICE, PRO-LIFE AND AMERI-*

cult for this conversation to take place while *Roe* still holds court, while it still stands at the podium instructing everyone who disagrees with its holding to shut up.³⁶⁷ As other commen-

CAN LAW (1992); ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993); FAYE D. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* (rev. ed. 1998).

367. The Court has shown its penchant for silencing its critics by, among other things, suggesting that abortion opponents stop mounting challenges to the right it created in *Roe*. See, e.g., *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419 (1983) (expressing frustration that legislative responses to *Roe* continue to be generated a decade after the Court's decision); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (expressing frustration that since *Roe* was decided, "States and municipalities have adopted a number of measures seemingly designed to prevent a woman . . . from exercising her freedom of choice" and insisting that the Constitution demands otherwise); *id.* at 813-14 (White, J., dissenting) (remarking that the Court's overreaction to the law at issue in *Thornburgh* is symptomatic of its "own insecurity over its handiwork in *Roe*" because "there are many in this country who hold that decision to be basically illegitimate"); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 538 (complaining that the plurality "implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding an injunction against pro-life demonstrators at an abortion clinic and denying that the injunction was content based); *Nat'l Org. for Women, Inc. v. Schiedler*, 510 U.S. 249 (1994) (upholding application of RICO statute to pro-life demonstrators); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (striking down part of injunction setting forth 15-foot floating buffer zones within which abortion clinic protestors could be barred, but upholding fixed buffer zones); *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding 8-foot buffer zone prohibiting speech intended to protest, educate, or counsel as a permissible content-neutral restriction on speech). For some, the Court's decision to uphold state restrictions on the speech of pro-life advocates is akin to the Court's entire abortion jurisprudence, which silences the voice of democracy at the ballot box through judicial fiat. See *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) ("Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.").

Perhaps the most glaring example of the Court's desire to silence abortion opponents is that, for nearly 20 years after *Roe* was decided, the Court interpreted the abortion license it created to prohibit a state from giving a woman truthful information about the child developing inside her, the risks involved in abortion, and other available options. See *Akron*, 462 U.S. at 416; *Thornburgh*, 476 U.S. at 747. Much to the dismay of three dissenting justices, the Court in *Casey* upheld the Pennsylvania statute requiring abortion doctors to inform women seeking abortions about the nature of the procedure, the health risks of abortion and childbirth, and the "probable gestational age of the unborn child." The statute also required doctors to provide information concerning medical and financial assistance for childbirth and adoption agencies. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881-887 (1992).

tators have observed, *Roe* has prevented the nation from having a serious dialogue about the moral and legal status of abortion through the normal political process.³⁶⁸ As such, the law in its current state effectively prevents the culture from developing as it should. It makes nearly impossible the very sort of education necessary for the foundation of a truly human culture.³⁶⁹

In place of serious conversation on the subject, silence rules the day, interrupted only intermittently by the shouts of partisans trading slogans. This silence serves the interests of those who support the status quo. Indeed, supporters of abortion, emboldened by the legal regime, have labored mightily to prevent any serious conversation from taking place.³⁷⁰ Here the American public needed little convincing to follow suit and avoid the topic altogether. It is a conversation few people want to have. After all, Americans have grown unaccustomed to thoroughgoing reflection and sustained deliberation.³⁷¹ A serious conversation about something as morally ponderous as abortion would require the participants to confront the very questions that the Catholic social tradition says define the heart of every culture: the meaning of personal existence and the value of birth, love, work, and death.³⁷² Given the national infatuation with entertainment and the other distractions of modern life, the abortion debate is something that most people would just as soon avoid. In light of this vexing situation—a

368. GLENDON, *supra* note 306, at 47 (“A decision leaving abortion regulation basically up to state legislatures would have encouraged constructive activity by partisans of both sides.”); *see also* GINSBURG, *supra* note 170, at 382 (agreeing with Paul Freund that the trend of more liberal abortion legislation might have continued absent *Roe*).

369. *See infra* Part IV.A.

370. *See, e.g.*, RAMESH PONNURU, *THE PARTY OF DEATH: THE DEMOCRATS, THE MEDIA, THE COURTS, AND THE DISREGARD FOR HUMAN LIFE* 206 (2006) (noting that in response to the television ad campaign “Life: What a Beautiful Choice,” which aired in 1992, “[t]he headquarters of Planned Parenthood got phone calls from several affiliates asking ‘whether or not there’s a way of blocking’ the ads”). Many supporters of the abortion license commonly use the rhetorical ploy of expressing indignation at having to defend their position. It is, they say, the sign of a backward society that they should be put in the position of having to defend and argue on behalf of a right which they regard as innate and self-evident, a necessary aspect of full human autonomy. Plainly, this tactic is not designed to foster dialogue. Instead, it is intended to end the conversation before it has begun.

371. This is in part the product of certain structural problems with our media. *See* C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1990).

372. *Centesimus Annus*, *supra* note 115, ¶ 24; *see also* Breen, *supra* note 182.

situation that includes not only the widespread practice of abortion but a media that has proven to be decidedly inhospitable to the pro-life message³⁷³—it is a sure sign of hope that public opinion has shifted away from support for an unlimited right to abortion toward a more restrictive view.³⁷⁴

Because the law in its current state stifles any dialogue on the subject, those commentators who assert the need for cultural transformation to precede legal change³⁷⁵ are promoting a strategy with little chance of success. Instead, the political question of legal reform must begin in order to stimulate the wider cultural conversation. This is not to put the legal cart before the cultural horse, contrary to Pope John Paul II, Skeel and Stuntz, and common sense. It is the case, however, that sometimes a lethargic animal needs to be spurred on from behind in order to begin moving in the right direction. Nothing sharpens the mind better than a question that has consequences. Proposed

373. For a history of the modern media's overwhelmingly favorable coverage of abortion rights, see MARVIN N. OLASKY, *THE PRESS AND ABORTION, 1838–1988*, at 83–151 (1988); see also NOONAN, *supra* note 121, at 69–79 (describing both journalistic support for the abortion license and the media's portrayal of opposition to abortion as religious and specifically Catholic); David Shaw, 'Rally for Life' Coverage Evokes an Editor's Anger, *L.A. TIMES*, July 3, 1990, at A1. Although complete objectivity in reporting is an admittedly difficult ideal to realize, given the passion that some journalists have for the pro-choice cause, perhaps the frustration over media coverage experienced by many pro-life advocates is understandable. See Howard Kurtz, *A Reporter with Lust in Her Hearts*, *WASH. POST*, July 6, 1998, at C01 (commenting on *Time* White House correspondent Nina Burleigh's fondness for President Bill Clinton and quoting her as saying "I'd be happy to give him [oral sex] just to thank him for keeping abortion legal"). For a recent example of how the institutional bias against the pro-life message precludes some media sources from employing certain language in its reporting, see Kenneth L. Woodward, *What's In a Name? The New York Times on "Partial-Birth" Abortion*, 19 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 427 (2005).

374. See, e.g., Carey Goldberg & Janet Elder, *Public Still Backs Abortion, But Wants Limits, Poll Says*, *N.Y. TIMES*, Jan. 16, 1998, at A1 ("[P]ublic opinion has shifted notably away from general acceptance of legal abortion and toward an evolving center of gravity: a more nuanced, conditional acceptance that some call a 'permit but discourage' model."). As Richard John Neuhaus observed shortly after the publication of this poll: "For the pro-abortion lobby, the January 16 headline story is a tacit admission of crushing defeat [precisely because] . . . despite a quarter century of all-out effort by almost every opinion-making establishment in the country, the American people overwhelmingly reject the idea that abortion should be permitted for any reason (or no reason) throughout the entire course of pregnancy." Richard John Neuhaus, *A Tacit Admission of Defeat*, *FIRST THINGS*, April 1998, at 60–61.

375. See *supra* Parts VI.A and VI.B.

legislation would lay the issue on the table in a concrete manner that, if properly presented in the media, would invite real deliberation. Without such a direct challenge to the most conspicuous “structure of sin” in American jurisprudence, people will continue to abstain from public discourse on the issue. Indeed, without the impetus of legal reform, the project of cultural transformation will likely remain only a heuristic ideal.³⁷⁶

Given the cultural milieu of “choice”—the cult of the autonomous self that provides the answers to so many of life’s questions—to propose a prohibition against abortion is surely ambitious. But so long as *Roe* remains good law, ambitious proposals for legal reform and Skeel and Stuntz’s cautionary tale of legal modesty are both beside the point. *Roe* is a dead weight that prevents the process of cultural transformation from ever taking flight. Despite the alarmist and hyperbolic commentary that followed in the wake of *Casey*,³⁷⁷ the central

376. The recent legislative initiative in South Dakota should be seen through the lens of these considerations. On March 6, 2006, Governor Mike Rounds signed into law the South Dakota Women’s Health and Human Life Protection Act, HB 1215. The bill prohibited all abortions except those necessary to save the life of the mother. Although it expressly exempted the mother from criminal penalty, it treated violations of the law by others as a class five felony. After the law’s signing, opponents of the statute made use of another South Dakota law to place the statute as a referendum on the fall ballot. See Peter Slevin, *S. Dakota Becomes Abortion Focal Point*, WASH. POST, Aug. 28, 2006, at A01. The law was defeated in the referendum by ten percentage points, in part, it seems, because of the lack of an exception for pregnancies involving rape and incest. *South Dakota Abortion Ban Rejected*, USA TODAY, Nov. 8, 2006. Even if the referendum had passed, the law would have been immediately challenged in court. Thus, it appears that one purpose of the measure was to start the kind of serious conversation on the issue that has long been lacking. As a spokeswoman for an abortion rights coalition remarked, “It’s an issue that most people weren’t talking about, and are now doing so.” Slevin, *supra*, at A07. South Dakota’s legislative effort drew on the Report of the South Dakota Task Force to Study Abortion. SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), available at <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>. This document contains a wealth of information about both the nature of the abortion procedure and nascent human life that may serve as a common point of departure for further discussions on the subject.

377. See, e.g., Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 FORDHAM URB. L.J. 675, 676 (2004) (asserting that, notwithstanding its purported preservation of the central holding of *Roe*, “*Casey* fundamentally changed the character of the right to abortion in this country, reinventing the right in a form more vulnerable to continued erosion”); April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion:*

holding of *Roe* remains the law of the land. Ironically, reversing *Roe* judicially would not require an enormous cultural shift. Indeed, it would require the change of only a few votes on the Supreme Court. Such a change would be both modest and momentous at the same time. It would allow for a serious national conversation on abortion to begin, a conversation that the *Roe* Court's judicial fiat so severely truncated. One would hope that this sort of change is one Skeel and Stuntz could, upon further reflection, enthusiastically embrace.

CONCLUSION

Modesty is indeed a virtue—admittedly, a virtue that is often in short supply among lawmakers and those responsible for enforcing the law. David Skeel and William Stuntz are right to argue that, in many instances today, the law goes too far, bringing into question the rule of law by investing individuals with excessive discretion. The law also sometimes exceeds the limits of its competence to secure justice and to realize the common good.

When it is misunderstood, however, modesty can be a vice. This, unfortunately, is a quality that Skeel and Stuntz's article exhibits in a number of ways. Modesty, it seems, leads them to emphasize prudence and rule-of-law values over justice as the principles that inspire both legal ambition and legal restraint. Indeed, Skeel and Stuntz are overly modest in their thinking, stressing the importance of the rule of law while ignoring the substantive ends of justice that the law seeks to realize.

They are also exceedingly modest in their research, relying on only a single source in reaching the conclusion that the laws restricting abortion had no effect on the frequency of the prac-

Solely a Matter of Choice?, 10 WIS. WOMEN'S L.J. 161, 191 ("While calling abortion a fundamental right, the Court in *Casey* destroyed the protections it had previously required."); Sylvia Law, *Abortion Compromise: Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 931 ("From a pro-choice point of view, one plausible assessment of the *Casey* decision is that it represents the worst of all possible worlds. The joint opinion affirmed a woman's 'fundamental constitutional right' to abortion, but simultaneously allowed the state to adopt measures that effectively curtail many women's exercise of the abortion right."); Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980 (2002) (stating that the right created in *Roe* "has survived almost three decades," but that in the wake of *Casey* it "is now barely alive, apparently settled into a minimal existence, protected only against the most overwhelming of state incursions").

tice prior to the Court's decision in *Roe v. Wade*. There is, at the very least, a substantial literature that challenges the empirical claims upon which Skeel and Stuntz's normative conclusions rest. That Skeel and Stuntz's modest engagement with the subject matter leads them to ignore this literature while simultaneously proclaiming law's inability to shape cultural practices shows that modesty really can be immodest. Surely this sort of modesty has no place in legal academic scholarship, whether it purports to offer a Christian perspective on law or merely a secular one.

Furthermore, in trying to articulate the proper limits of law, Skeel and Stuntz fall into the trap of false modesty. A fuller engagement with the Christian intellectual tradition would have helped Skeel and Stuntz grasp the point that prudence does not always dictate a modest course. As one famous contributor to that wider tradition warned, justice can be destroyed not only by "the violent act of the man who possesses power" but also "by the false prudence of the sage."³⁷⁸ Law is neither modest nor prudent when it shirks its responsibility to protect innocent human life.

378. ST. THOMAS AQUINAS, ON THE BOOK OF JOB, ch. 8, sec. 1 (quoted in PIEPER, *supra* note 114, at 41).