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Sacrifice, the Common Good, and the  
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*Fides et Iustitia*

## ARTICLE

# SACRIFICE, THE COMMON GOOD, AND THE CATHOLIC LAWYER

JOHN J. COUGHLIN, O.F.M.\*

For some two decades since I entered law school, the connection between the philosophy of the human person and law has been of comparative interest to me.<sup>1</sup> My interest was stimulated in no small part by the late Pope John Paul II, who urged that canon law reflect the essential elements of what it means to be human.<sup>2</sup> Comparative legal study of the canon law of the Catholic Church with the law of the liberal state has convinced me of the importance of the understanding of the human person that underpins the law. Canon law and the Catholic intellectual tradition of which it is a part reflect a metaphysical conception of the human person and justice. In com-

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\* Professor of Law, University of Notre Dame. This paper is based on remarks at the University of St. Thomas Law School Conference, "Sacrifice and the Common Good in the Catholic Tradition," which was held April 7–9, 2005, in Minneapolis. The conference coincided with the funeral of Pope John Paul II in Rome on April 8.

1. This interest started in law school during the mid-1980s, extended through my doctoral studies in Rome in the early 1990s, and continues to the present time. See John J. Coughlin, *Common Sense in Formation for the Common Good*, 66 St. John's L. Rev. 261, 295–303 (1992); John J. Coughlin, *Administrative Justice at the Supreme Tribunal of the Apostolic Signatura and the United States Supreme Court: A Comparative Study* 249–96 (unpublished Ph.D. Dissertation, Pontificia Universita Gregoriana 1994). Since becoming a law professor, I have had the opportunity to speak about the subject at numerous academic conferences. These presentations have sometimes resulted in published articles. See e.g. John J. Coughlin, *Canon Law and the Human Person*, 19 J.L. & Religion 1 (2003–04); Coughlin, *Pope John Paul II and the Dignity of the Human Being*, 27 Harv. J.L. & Pub. Policy 65 (2003); Coughlin, *The Human Being, Catholic Social Teaching and the Law*, 1 J. of Catholic Soc. Thought 312 (2004); Coughlin, *Law and Theology: Reflections on What It Means to Be Human from a Franciscan Perspective*, 74 St. John's L. Rev. 609 (2000).

2. E.g. Ioannes Paulus Pp. II, "Allocutiones: I. *Ad Rotae Romanae Auditores coram admissos* (Die 5 m. februarii a. 1987)," 79 AAS 1454–58 (1987) (English version available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1987/documents/hf\\_jp-ii\\_spe\\_19870205\\_roman-rot\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1987/documents/hf_jp-ii_spe_19870205_roman-rot_en.html)) (stating that canon law must flow from the essential elements of what it means to be human); "Allocutiones: XII, *Ad Romanae Rotae Auditores simul cum officialibus et advocatis coram admissos, anno forensi ineunte* (Die 25 m. ianuarii a. 1988)," 80 AAS 1178, 1180–81 (1988) (English version available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1988/documents/hf\\_jp-ii\\_spe\\_19880125\\_roman-rot\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1988/documents/hf_jp-ii_spe_19880125_roman-rot_en.html)) (urging that canon law should reflect an "integrated concept of the person" in accord with theological anthropology, which strives to enhance both natural and transcendent values).

parison, law rooted in liberal theory tends to be more restricted to a political conception of the person and justice.<sup>3</sup> My focus in this brief paper is neither on comparative law nor canon law per se. Rather, I have been asked to reflect on the ideas of sacrifice and the common good in relation to legal ethics. Specifically, I shall consider the contribution that the classical conception of the person, which forms the bedrock of the Catholic intellectual tradition, offers to the practice of law. The paper discusses the ideas of sacrifice and the common good as essential elements of the understanding of what it means to be human in the Catholic intellectual tradition. It then suggests that the tradition has much to contribute to the practice of the Catholic lawyer in the United States.

The paper consists of two parts. The first part considers the ideas of sacrifice and the common good from philosophical and theological perspectives. This is not intended as a systematic presentation about the ideas, but as prolegomena. The second part considers three examples of how these ideas from the Catholic tradition apply to the practice of law. Each of the examples is posed as a question and again not as a comprehensive analysis.

#### I. PHILOSOPHICAL AND THEOLOGICAL PERSPECTIVES ON SACRIFICE AND THE COMMON GOOD

The understanding of what it means to be human in the Catholic intellectual tradition, which is sometimes referred to as fundamental anthropology, owes a debt to the thought of Aristotle and St. Thomas Aquinas.<sup>4</sup> To start, it seems helpful to recall two of Aristotle's claims about the nature of the human person. First, Aristotle claimed that the human person tends to become what he or she does.<sup>5</sup> The second Aristotelian claim is that the virtuous person finds happiness in the life of virtue.<sup>6</sup> In other words, the

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3. See Coughlin, *Canon Law and the Human Person*, *supra* n. 1, at 47–57.

4. See e.g. Henri de Lubac, *Catholicism, Christ and the Common Destiny of Man* 326 (L. Sheppard & E. Englund trans., Ignatius Press 1988) (suggesting that the social character and unitary nature of Catholic dogma do not diminish but enhance the human person); Bernard J. F. Lonergan, *Method In Theology* 13–20 (Seabury Press 1979) (describing a “transcendental method” as a basic pattern of human consciousness and knowing); Karol Wojtyła, *The Acting Person* 196–97 (A. Potocki trans., D. Reidel Publ. 1979) (describing the integration of the human person through intentional action); Karl Rahner, *Foundations of Christian Faith* 24–115 (W. V. Dych trans., Seabury Press 1978) (focusing on the experience of the human person as essential to communicating revelation in the modern world); Hans Urs von Balthasar, *A Theological Anthropology* 43–102 (Sheed & Ward 1967) (suggesting that the language of God is perfectly expressed in the “human wholeness” of Christ).

5. See Aristotle, *Nicomachean Ethics*, in *The Complete Works of Aristotle* bk. 10, ch. 9, 1179b1 (J. Barnes ed., Princeton U. Press 1984) (observing that the human being is made good by nature, habituation, or teaching, and that practice and habituation are necessary in any case); Aristotle, *Eudemian Ethics*, in *The Complete Works of Aristotle*, *supra*, at bk. 2, ch. 2, 1220b1; Aristotle, *Magna Moralia*, in *The Complete Works of Aristotle*, *supra*, at bk. 1, ch. 11, 1187b1; Thomas Aquinas, *Commentary on Aristotle's “Nicomachean Ethics”* bk. 10, lec. 14, 2144, p. 640 (C.I. Litzinger trans., Dumb Ox Books 1964).

6. Aristotle, *Magna Moralia*, *supra* n. 5, at bk. 1, ch. 4, 1185a1.

more one acts in accord with virtue, the more virtuous one becomes, and the more virtuous one becomes the more one discovers happiness.<sup>7</sup> In this intentional action lies the capacity for human fulfillment and excellence.<sup>8</sup> From a philosophical perspective, St. Thomas Aquinas concurred with Aristotle's claims about human nature. Theologically, systematic reflection on faith led Thomas to recognize the complementary claim that grace builds on nature.<sup>9</sup> These philosophical and theological claims about the human person have a close relationship to the ideas of sacrifice and the common good.

In the Catholic intellectual tradition, the ideas of sacrifice and the common good are aspects of a conceptual framework with philosophical and theological roots far too deep to trace here. Suffice it to say that since Vatican II, there has been a tendency in Catholic thought to rely more heavily on the theological foundation than the philosophical. In an article about the foundation of human rights, Walter Cardinal Kasper advanced solid reasons for the theological preference.<sup>10</sup> Essentially, the preference in the postconciliar Church stems from the recognition that in the Christian community, convictions rooted in faith count as more compelling justifications than those that are based on reason alone. At the same time, Kasper acknowledged that theological faith and philosophical reason are complementary and not exclusive categories.<sup>11</sup>

#### A. *A Philosophical Perspective on Sacrifice and the Common Good*

Given the postconciliar preference for the theological, we ought not lose sight of the philosophical understanding in the Catholic tradition. In Catholic thought, the concept of the common good seems to be one fundamentally drawn from philosophy, and in particular, from natural law theory.<sup>12</sup> The Vatican II document *Gaudium et spes* articulated a philosophical definition of the common good. It is "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily."<sup>13</sup> The notion of the common good remains a fundamental principle of the Catholic philosophy of the human person. A corollary principle of this philosophy holds that sacrifice by individuals and groups is sometimes required to advance the common good.

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7. *Id.* at bk. 1, ch. 3, 1177b1.

8. Aristotle, *Nicomachean Ethics*, *supra* n. 5, at bk. 1, ch. 3, 1184b1; Aristotle, *Magna Moralia*, *supra* n. 5, at bk. 1, ch. 18–19, 1109a1.

9. Thomas Aquinas, *Summa Theologica*, pt. I–II, q. 109, art. 1 (available at <http://www.ccel.org/a/aquinas/summa/FS/FS109.html#FSQ109OUTP1>).

10. Walter Kasper, *The Theological Foundation of Human Rights*, 50 *Jurist* 148, 157–61 (1990).

11. *See id.* at 154 ("The biblical tradition soon allied itself with the ancient doctrine of natural law.")

12. *See generally In Search of the Common Good* (Dennis P. McCann & Patrick D. Miller eds., T & T Clark 2005).

13. *Vatican Council II, the Conciliar and Post Conciliar Documents* 927 (Austin Flannery ed., Costello Publ. 1992).

Both principles are aspects of a philosophical understanding of the human person from which the definition in *Gaudium et spes* is derived. I shall briefly mention five features of this philosophical understanding.

First, this philosophy assumes a metaphysical approach by which the human person is characterized by reason and free will. The Catholic philosophy of the human person posits that individuals and groups cannot experience human fulfillment absent an understanding of the common good and a willingness to sacrifice for it. This synthesis of understanding and action for the good is known in natural law theory as “practical reason.”<sup>14</sup>

Second, natural law recognizes the human person not simply as an individual but as a fundamentally social being. Practical reason proposes that individual sacrifice for the common good is an essential element of human fulfillment. Self-sacrifice enables the human person to transcend self and to participate in solidarity with others.<sup>15</sup>

Third, rather than diminish the human person, individual sacrifice increases the human person by deepening his or her capacity to act in a human manner. If Aristotle and Thomas are correct that one becomes what one does, then the more one sacrifices for others the more one becomes a human person. The philosophical paradox is that as one gives oneself away for the other, one actually constitutes the self as more fully human.<sup>16</sup>

Fourth, the philosophical understanding of the human person means that the person enjoys not only individual rights but also concomitant responsibilities to contribute to the common good. Among contemporary natural law theorists the philosophical approach is evident in the works of, among others, John Finnis and Martin Rhonheimer.<sup>17</sup>

Finally, in a pluralist and secularized society, independence from divine revelation counts as a desired feature of natural law theory in discussion about the common good of society. The philosophical autonomy of natural law theory enables it to introduce the ideas of sacrifice and the common good into public discourse without an appeal to faith or revelation.<sup>18</sup>

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14. John Finnis, *Aquinas* 65 (Oxford U. Press 1998) (defining Aquinas’s notion of “practical reason”).

15. See Wojtyla, *supra* n. 4, at 284–85 (discussing solidarity with others and the common good).

16. See Karol Wojtyla, *Love and Responsibility* 125–26 (H. T. Willetts trans., Ignatius Press 1993) (describing self-transcendence that does not impoverish but enlarges the person and its application to betrothed love).

17. See John Finnis, *Natural Law and Natural Rights* (Oxford U. Press 1980); Martin Rhonheimer, *Natural Law and Practical Reason* (Gerald Malsbary trans., Fordham U. Press 2000).

18. See e.g. John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 781 (1997) (asking whether it is even possible “for citizens of faith to be wholehearted members of a democratic society who endorse society’s intrinsic political ideals and values”); see also Patrick Neal, *Political Liberalism, Public Reason and the Citizen of Faith in Natural Law and Public Reason* 171, 177–78 (Robert P. George & Christopher Wolfe eds., Georgetown U. Press 2000) (criticizing Rawls for not recognizing that persons with comprehensive religious worldviews may

B. *A Theological Perspective on Sacrifice and the Common Good*

In contrast to the philosophical notion of the common good, the notion of sacrifice in Catholic thought seems to me to be primarily theological.<sup>19</sup> One may speak of the law of sacrifice as revealed in sacred scripture.<sup>20</sup> It begins with the sacrifices offered in the Hebrew Bible in which one encounters the idea of propitiatory substitution in the shape of bloody or bloodless offerings to atone for sin.<sup>21</sup> One finds the substitution of animals, scapegoats, and first fruits, even to the test of Abraham's willingness to sacrifice his son Isaac. At the same time, the *quid pro quo* of sacrificial substitution may be seen from the perspective of an ontic solidarity. Thus, Noah stands for all his family, the prophet Jeremiah for the community, and King David for his people. In Catholic theology, the sacrifices of the Old Testament culminate in the sacrifice of the Son of God on behalf of all humanity. The theological doctrine of original sin corresponds to the reality of a fallen creation in need of redemption. The Gospels reveal Jesus Christ as the one true sacrifice who offers himself as the redeemer. It seems obvious to me that the theological notion of the self-emptying of the Son of God in the Redemption affords a richer and more compelling understanding of sacrifice than the philosophical requirement of sacrifice as necessary to the common good. For the Christian, Christ's sacrificial love serves as an example to be followed.

Transformation through grace serves as a corrective to the fatalism that may be detected in the ancient idea that one becomes what one does. In the Catholic tradition, the mystery of the Redemption leaves open the possibility of transformation through Christ's love. The theology holds that all are redeemed from sin by Christ, and therefore that salvation is open to all.<sup>22</sup> Salvation is not a matter of achieving moral perfection through one's own efforts. Rather, salvation flows from the purely gratuitous redemptive act of Christ. According to the Catholic belief, personal conversion through grace remains possible until the moment of death, and transformation of culture is a lasting hope until the consummation of history. In the words of Saint Paul, "[W]here sin abounds, grace abounds all the more."<sup>23</sup> Indeed, in the economy of salvation, the reality of evil functions as the deficit yearning for the

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dissent from the doctrines of political liberalism, not on selfish grounds, but because they believe the liberal doctrine to be morally wrong); Paul Weithman, *Citizenship and Public Reason in Natural Law and Public Reason* 156–62 (Robert P. George & Christopher Wolfe eds., Georgetown U. Press 2000) (rejecting John Rawls's position that citizens in the public forum ought not to make appeals to religious comprehensive world views).

19. See generally *The Redemption: An Interdisciplinary Symposium on Christ as Redeemer* (Stephen T. Davis, Daniel Kendall & Gerald O'Collins eds., Oxford U. Press 2004).

20. See William F. Hogan, *Christ's Redemptive Sacrifice* 13–16 (Gerald S. Sloyan ed., Prentice-Hall 1963).

21. *Leviticus* 16:3, 16:5, 16:8, 16:9, 16:20, 16:26.

22. Aquinas, *supra* n. 5, at pt. III, q. 19, art. 4; Hogan, *supra* n. 20, at 73.

23. *Romans* 5:20.

gain of Christ's grace.<sup>24</sup> Thus, the Catholic tradition rejects the fatalism of a determined history, and teaches that individuals and culture may be transformed through redemptive grace.<sup>25</sup>

*C. The Complementarity of the Philosophical and Theological*

From the perspective of fundamental anthropology, the philosophical and theological meaning of the ideas of sacrifice and the common good have much to contribute to the understanding of what it means to be human. I agree with Cardinal Kasper that the philosophical and theological understandings contain complementary and not exclusive meanings. As mentioned, Catholic philosophy has developed the notion of the common good, but it could not do so without the corollary notion of individual and group sacrifice. In other words, sacrifice for the common good is a requirement of practical reason applicable to all human persons through the very nature of what it means to be a human being. Theologically, self-sacrifice as exemplified by Christ complements this requirement. The theological approach tends to focus on the understanding that grace does not obliterate nature, but builds upon it in order to perfect it. Catholic theology views human nature as fundamentally good, but also disordered through selfishness. Theological reflection on revelation leads the person of faith to understand Christ's self-sacrifice as paradigmatic of the most complete human. For the believer who accepts the revelation of Christ, self-sacrifice is not merely a requirement of the practical reason written into human nature; at the same time, self-sacrifice joins one to the fullness of Christ's divinity and humanity. Baptism initiates one into the life of Christ, and the sacramental life is believed to offer the possibility for the divinization of the human person. In the Catholic theological tradition, sacrifice for the common good is not just a requirement of practical reason; it is also essential to participation in the fully human, fully divine life of Christ. The philosophical and theological understandings of sacrifice and the common good are mutually reinforcing. Both reason and faith thus invite the human person to act in accord with the duty of sacrifice for the common good.

II. SACRIFICE, THE COMMON GOOD, AND THE PRACTICE OF LAW

In applying the ideas of sacrifice and the common good to the practice of law, I shall raise three questions: (A) Is law more of a profession or business? (B) What function, if any, does moral value play in the practice of law? (C) How do the ideas of sacrifice and the common good relate to the requirement that one lead a balanced life? Prior to proceeding, I must acknowledge that these questions quite obviously pose broad and deep issues

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24. John Behr, *Asceticism and Anthropology in Irenaeus and Clement* 125 (Oxford U. Press 2000).

25. See Urs von Balthasar, *supra* n. 4, at 80–81.



far beyond the modest parameters of this paper. To mention only one issue as an example, Alasdair MacIntyre assists in elucidating the differing conceptions of the human person that underpin various traditions of moral reasoning. He suggests that the classical Aristotelian-Thomistic position posits the human person as having an essential nature and purpose.<sup>26</sup> As already noted, the classical understanding of the human person underpins the Catholic intellectual tradition. Since the time of the Enlightenment, the classical position has been challenged by other traditions of moral reasoning that tend to take a less metaphysical and more functional view of the human person. The Enlightenment critique notwithstanding, the ideas of sacrifice and the common good in the Catholic intellectual tradition remain rooted in the classical understanding of the human person. My purpose here is not to defend the validity of the classical understanding, but simply to illustrate how these ideas might apply to the service of the Catholic lawyer.

A. *Law: Profession or Business?*

My first illustration of sacrifice and the common good in the practice of law poses the question: "Is law a profession or a business?"<sup>27</sup> The traditional view was that the primary goal of the practice of law was service to the common good, with financial gain as incidental to that service. The attorney was also thought to be a fiduciary who placed the interest of the client ahead of self-interest. According to Anthony Kronman, the traditional view envisioned the ideal of the "lawyer-statesman" who was characterized by "prudent wisdom," "public service," and "civic mindedness."<sup>28</sup> The lawyer-statesman ideal reflected a particular manifestation of the basic human excellence described in an Aristotelian-Thomistic philosophy. The ideal also had theological origins: in medieval universities, there was a close association between the vows professed by those entering the religious professions and those entering the legal, medical, and teaching professions.

Today, the practice of law is increasingly viewed more as a business than as a profession in the traditional sense.<sup>29</sup> Twenty-five years ago, the profession/business tension could be detected in two United States Supreme Court decisions that concerned the constitutionality of state regulation of attorney solicitation. The first of these, *Ohralik v. Ohio State Bar Association*, involved a lawyer who had been indefinitely suspended from practice

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26. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 57-59 (2d ed., Notre Dame Press 1984).

27. See generally e.g. Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* 17-38 (Farrar, Straus & Giroux 1994).

28. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 14-52 (Harvard U. Press 1993).

29. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1230 (1995) (suggesting that the paradigm shift from profession to business may prove helpful to the Bar).

for what the Supreme Court described as “ambulance chasing.”<sup>30</sup> Ohralik maintained that his professional activities were protected by the free speech guarantee of the First Amendment. The lawyer’s actions followed an automobile accident between a vehicle occupied by two teenage women and another car driven by an uninsured motorist. These actions included arriving uninvited at the hospital bedside of the teenage woman who had been driving the car, insisting that she enter into an attorney-client relationship, visiting (again uninvited) her parents and examining the uninsured driver’s provision of their insurance policy, meeting with the young lady who was the passenger and her parents to inform them of the uninsured motorist provision, encouraging legal action in the face of client reticence, concealing a tape recorder during these various meetings so as to memorialize any oral agreement about his legal services, persuading one of the women to sign a written contract, informing the insurance company that he was the attorney of record for both young women, and refusing to withdraw from the case after both clients discharged him.<sup>31</sup> The Court found Ohralik’s actions to constitute commercial speech, which is not entitled to the full force of constitutional protection afforded to political speech.<sup>32</sup> The state was thought to have a strong interest in regulating such speech.<sup>33</sup> The sanction against Ohralik was upheld.<sup>34</sup>

In the companion case, *In re Primus*, the lawyer, Edna Smith Primus, was sanctioned for her activity aimed at stopping mandatory sterilizations of poor women in South Carolina.<sup>35</sup> The sterilizations were part of a state-administered federal entitlement program. Working in conjunction with the American Civil Liberties Union, Smith Primus sent a letter to certain women who were victims of the state-sponsored mandatory sterilization. Her letter asked the women if they were willing to be part of a lawsuit aimed at stopping the practice.<sup>36</sup> In contrast to its decision in *Ohralik*, the Supreme Court described the lawyer’s activities as enjoying the full extent of the First Amendment’s speech and association protections.<sup>37</sup> The Court held that the state’s interests in enforcing the antisolicitation regulation were not sufficiently compelling to pass constitutional muster.<sup>38</sup> Smith Primus was exonerated.<sup>39</sup>

Apart from the issues of constitutional law that are the basis of the Court’s decisions, I wish to draw attention to the profession/business dis-

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30. 436 U.S. 447 (1978).

31. *Id.* at 449–52.

32. *Id.* at 459.

33. *Id.* at 460–62.

34. *Id.* at 468.

35. 436 U.S. 412 (1978).

36. *Id.* at 414–18.

37. *Id.* at 422, 431.

38. *Id.* at 437–38.

39. *Id.* at 439.

inction. While Ohralik aggressively pursued the attorney's share of a car insurance policy, Smith Primus provided her services pro bono. In other words, Ohralik was primarily involved in a business activity aimed at advancing his own pecuniary interest. Smith Primus, however, was acting as a professional in her attempt to correct the grave state-sponsored injustice of mandatory sterilization.<sup>40</sup>

An application of the Aristotelian-Thomistic tradition suggests that while Ohralik became anxious and began overreaching, Smith Primus constituted herself as a professional willing to sacrifice her self-interest in order to serve the common good. I do not mean to be unduly harsh on lawyers who are so-called "ambulance chasers." There can of course be many extenuating circumstances in an individual's life that cause anxiety about financial interests such as support of children, spouses, and other family members. To be good, the lawyer need not adopt the poverty of St. Francis of Assisi. When the popular imagination begins to view the profession as greedy, however, the Aristotelian-Thomistic tradition may serve as a corrective. Unfortunately, the noble image of the legal profession as comprised of servants of the common good may not be as readily apparent today as the tradition suggests it ought to be. On the natural level, the tradition requires some sacrifice of self-interests to advance the common good. The law of sacrifice rooted in Catholic theology deepens the foundation for such a cause of action. It remains an aspect of the interior life of the Catholic lawyer whose primary vocation flows from baptism.

*B. Is there Any Place for Moral Values in the Practice of Law?*

My second point about the ideas of sacrifice and the common good in the professional life of the attorney concerns the issue of moral values in the practice of law. Almost twenty years ago, Stephen Pepper and David Luban entered into what is now a well-known debate over the issue.<sup>41</sup> I ask your indulgence as I review certain features of the debate in its original form.

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40. I am aware of a growing body of literature expressing concern over a conflict of interest issue posed by so-called "cause lawyering." Lawyers with strong political and ideological commitments may sometimes put their commitments ahead of client wishes in the outcome of a lawsuit. Based on what is available in the record, I do not think that Smith Primus had such a conflict of interest with her client. See generally *Cause Lawyering: Political Commitments and Professional Responsibilities* (Austin Sarat & Stuart Scheingold eds., Oxford U. Press 1998).

41. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613 (1986); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 Am. B. Found. Res. J. 637 (1986). In relying on the debate in its original format, I realize, of course, that Pepper later modified his original position. Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. Tex. L. Rev. 181, 184 (1999) (After summarizing his original 1986 argument that lawyers should be about the business of providing unfettered access to the legal system, not making judgments about how it should be used, he argues, on page 191, that "although the lawyer is not directly morally responsible for assisting the client's wrongful or unjust conduct within the bounds of the law, the lawyer ought to be responsible for ensuring that the client is morally responsible for that conduct, that the client

I believe that the original debate exemplifies the limits that liberal theory established for the inquiry, as well as the need for the fuller anthropological conception that is offered by the Catholic intellectual tradition. Pepper argued that client autonomy and “first class citizenship” depend on the lawyer’s amoral stance.<sup>42</sup> As long as a client does not seek to do anything that is clearly illegal, the lawyer ought to act as a neutral facilitator of the client’s chosen objectives.<sup>43</sup> Otherwise, the lawyer might impose his or her own moral values on the client and thus threaten client autonomy.<sup>44</sup> In response, Luban called for lawyers to act as moral filters in accord with the interests of society as a whole.<sup>45</sup> He argued that Pepper had confused the value of client autonomy with the moral desirability of the client’s autonomous actions.<sup>46</sup> Luban pointed out that not all objectives of a client, even if they fall within the parameters of legality, are necessarily morally desirable. Instead of acting as amoral functionaries, Luban stressed that the lawyer should enter into moral dialogue with the client if the client’s actions conflict with the lawyer’s understanding of moral value.<sup>47</sup> When necessary due

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has chosen it knowing the moral dimension of the choice.” (citation omitted)). On page 193, Pepper notes that “All the good reasons for providing ‘amoral’ access to the law—autonomy, equality, effectuation of and availability of the law—thus suffer a discount to some extent as a result of an obligation on lawyers to confront clients with the gap between law and justice.” He then concludes that lawyers and clients may be able to mutually disclaim responsibility for moral choices; to counteract this problem lawyers should make it clear to the client that the moral choice lies with the client. Luban also commented on aspects of the debate in subsequent articles. David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 *Geo. Wash. L. Rev.* 955 (1995) (arguing that lawyers should balance the duty of zealous advocacy not only against the interests of third parties but also against the interest of society as a whole on a macro level); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *Geo. J. Leg. Ethics* 31 (1995) (arguing that the model rules presuppose good moral judgment and that this judgment is best understood by understanding how it is learned).

42. Pepper, *The Lawyer’s Amoral Ethical Role*, *supra* n. 41, at 615–19; *see also* W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 *U.S.F. L. Rev.* 711, 731 (2002) (arguing that a lawyer’s role is not “amoral” but rather “is justified by a complex moral argument based on the structure and function of political institutions within a society and the necessity of creating classes of experts who can work within those institutions to realize the ends for which they are constituted”).

43. *See* Elizabeth Reilly, *Priest, Minister, or “Knowing Instrument”: The Lawyer’s Role in Constructing Constitutional Meaning*, 38 *Tulsa L. Rev.* 669, 709 (2003) (characterizing the Pepper article as presenting “the standard, or dominant, conception has the great advantage of being easy to state and easy to adhere to as a practicing lawyer—one defers to the client and makes all arguments plausibly legal in dogged pursuit of the client’s perceived interests. Primary justifications rest upon serving client autonomy and the felt necessities (and strengths) of the adversary system.”).

44. Pepper, *The Lawyer’s Amoral Ethical Role*, *supra* n. 41, at 617; *see also* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 *U. Colo. L. Rev.* 1, 79–82 (2003) (discussion of the Pepper/Luban debate and agreeing on balance with Pepper that lawyers exercise too much influence when they talk about morality with clients).

45. Luban, *The Lysistratian Prerogative*, *supra* n. 41, at 641–42.

46. *Id.* at 639.

47. *Id.* at 649; *see also* Robert F. Cochran, Jr. et al., *Client Counseling and Moral Responsibility*, 30 *Pepp. L. Rev.* 591, 617–18 (2003) (arguing that the non-neutral lawyer does not impose values on the client); Paul R. Tremblay, *Moral Activism Manqué*, 44 *S. Tex. L. Rev.* 127, 132

to a failure of the dialogue, Luban went further than Pepper in calling for noncooperation on the part of the lawyer with the client's morally objectionable action.<sup>48</sup>

Both Pepper and Luban were concerned about the impact of legal realism on the practice of law.<sup>49</sup> A legal realist sees the law as open to manipulation rather than reflective of objective or formal principles. Holmes's bad man asks not what the moral responsibilities of a given situation entail but what the material outcome might be for the client. For example, the legal realist lawyer would advise the client to breach a contractual agreement without regard to any moral obligation to honor the contract if a more lucrative opportunity arises and profit from the new arrangement with a third party outweighs the financial consequences of breach. This might happen when the other party to the original contract is in the right but would find the costs of enforcing the contract too expensive. Pepper acknowledged that the amoral role of a lawyer could pose some difficulty in a situation when the client lacks moral direction. The amoral lawyer supplies the client with information about the legal consequences of various possible actions and then implements whatever decision the client reaches as long as it is lawful.<sup>50</sup> The deficiency of the client's ethics in conjunction with the amoral function of the lawyer may well result in action that is lawful but unjust.<sup>51</sup> Luban agreed that realism presented a problem of morality and law.<sup>52</sup>

Arguably, the realist perspective has a valid function in the practice of law. As with the analysis offered by a law and economics approach, legal

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(2002) (discussing Luban and Pepper extensively as background for the thesis that "because the facts of any sophisticated legal dispute tend to be intricate and available only second (or third) hand, lawyers cannot achieve the level of certainty necessary to carry their burden of proof when the question of betrayal [by their client] arises.").

48. Luban, *The Lysistratian Prerogative*, *supra* n. 41, at 642 (thus the allusion to the classic Greek story about the noncooperation of women of the city-states which forced the men to stop the war). For Pepper's part, it must be acknowledged that he allowed for attorney "conscientious objection" in so-called extreme cases.

49. Pepper, *The Lawyer's Amoral Ethical Role*, *supra* n. 41, at 624-28; Luban, *The Lysistratian Prerogative*, *supra* n. 41, at 646-48.

50. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 *Notre Dame L. Rev.* 1, 52-55 (1999) (criticizing Pepper for reducing the lawyer to a mere technician in the context of an argument that ethics ought to be thought of in a way that takes account of pluralistic value systems).

51. David B. Wilkins, *Legal Realism For Lawyers*, 104 *Harv. L. Rev.* 468 (1990) (criticizing Pepper and the traditional view for their conception that the "bounds of the law" provide a reasonable ethical guide); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 *Ohio St. L.J.* 551 (1991) (critiquing Pepper and a number of other proponents of different types of role morality for lawyers and advocating a "boundaries principle" that would force the lawyer to be responsible for advice, choice of client, and tactics but not for the client's ultimate goals).

52. Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 *Geo. J. Leg. Ethics* 547, 562-65 (1998) (explaining that the amoral role mixed with legal realism seems to produce a lawyer with no real moral constraints on their actions, as part of a larger argument that most of the solutions to the decline in professionalism ultimately are reducible to changing engrained personality traits that most lawyers possess).

realism affords a useful tool for predicting the outcomes of cases, assessing legal liabilities, and fully informing the client of all the options and consequences. When a lawyer's perspective is limited to realism alone, however, there is little hope that the ideas of sacrifice and the common good will be honored. Standing apart from moral value, legal realism widens the gap between law and justice.<sup>53</sup> It threatens to reduce the rule of law to a set of arbitrary legal commands that have no basis in justice. Such a reduction is not consistent with the common good. In light of the Aristotelian-Thomistic claims about human nature, a lawyer who limits his or her legal analysis to the realist approach detracts not only from the common good, but poses a danger to self. If it is true that one becomes what one does, then such a lawyer risks becoming Holmes's bad man.

The constitution of self through the practice of law raises the deeper question of fundamental values. Neither Pepper nor Luban was entirely clear about the basis for moral value.<sup>54</sup> For his part, Pepper did not explain why client autonomy is a first-order value that trumps all others.<sup>55</sup> When Luban called for the lawyer to enter into moral dialogue with the client, he did not specify what he thought might constitute the source of the moral values in the dialogue. Luban correctly observed that society reflects many moral values, which are not necessarily encoded in law but are enforced through informal means such as social disapproval and noncooperation.<sup>56</sup> It is illegal, Luban noted, not to declare a bottle of non-duty-free scotch, but most persons, perhaps even most customs agents, are not terribly concerned with a single instance of this technical illegality. Drawing on an example

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53. William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1125 (1988) (criticizing Pepper's libertarian arguments, while advancing the idea that lawyers should have ethical discretion based on a reflective professional analysis of the justice of a given claim).

54. Paul G. Haskell, *Teaching Moral Analysis in Law School*, 66 Notre Dame L. Rev. 1025, 1043-44 (1991) (explaining the amoral lawyer debate in the context of an argument that moral analysis should be taught in law school since moral conclusions provide the basis for many laws); Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L. Rev. 311 (1990) (arguing that a historical moral tradition of lawyering exists though it may not be able to be captured in a code and engaging both Pepper and Luban extensively).

55. W. Bradley Wendel, *Civil Obedience*, 104 Colum. L. Rev. 363 (2004) (distinguishing himself from Pepper on the basis that he thinks that "first-order" values should not be a part of lawyers' ethical deliberation; rather, ethical decisions should be made on the basis of political philosophy, whereas Pepper wants to justify the client-centered approach on the basis of the first-order value of autonomy).

56. See David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 Wm. & Mary L. Rev. 269 (1996) (arguing that role morality rather than personal morality should provide the basis for the few occasions where a lawyer should be authorized to violate the law and engaging Luban extensively); Robert J. Muise, Student Author, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 Notre Dame L. Rev. 771, 795-98 (1996) (explaining why role morality is an understanding that cannot be reconciled with Catholic teaching); Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 Yale L.J. 177 (1995) (citing Pepper extensively and critiquing role morality, arguing for a dialogue-centered approach); W. Bradley Wendel, *Lawyers and Butlers: The Remains of Amoral Ethics*, 9 Geo. J. Leg. Ethics 161 (1995) (citing Pepper extensively in an in depth treatment of role morality for lawyers).

from the thought of Kierkegaard, Luban points out that most people would condemn the seduction of someone based on false promises of love even though such morally unacceptable conduct may be perfectly legal. Luban thus acknowledged that there are important moral values apart from law, but seemed to reduce the basis of such values to societal consensus. Neither Pepper nor Luban suggested that there might exist an objective source of moral value that underpins individual dignity and transcends culture and history.<sup>57</sup>

When Aristotle claimed that a person becomes virtuous by acting in accord with virtue, he obviously had such an objective measure in mind. He thought that practical reason could detect fundamental values written into the nature of what it means to be human.<sup>58</sup> St. Thomas Aquinas also recognized this natural law and agreed that acting in accord with it leads to human fulfillment.<sup>59</sup> The lawyer whose view of professional responsibility is limited to a matter of client autonomy or to values based on societal consensus cannot fully participate in human excellence as the Aristotelian-Thomistic tradition understands it. Pepper's defense of client autonomy is an inadequate account of the human good.<sup>60</sup> It ignores other fundamental goods such as truth, justice, respect for others, participation, and solidarity, to mention but a few.<sup>61</sup> Obviously, an excessive focus on individual autonomy threatens the common good.<sup>62</sup>

Luban's appeal to values based on societal consensus also poses dangers. From the perspective of natural law theory, the common good depends on a complete and balanced account of fundamental goods. This includes the requirements of distributive, commutative, and retributive justice. Distributive justice requires that goods be distributed equitably so that the members of society, and especially those who are disadvantaged, have their basic needs met. Commutative justice respects the individual dignity of

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57. See Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 *Geo. Wash. L. Rev.* 984, 986–91 (1995) (citing Pepper extensively in an explanation of the amoral view, ultimately attempting to forge a middle ground between the amoral view and the ethical counselor view).

58. See Aristotle, *Rhetoric*, in *The Complete Works of Aristotle*, *supra* n. 5, at bk. 1, ch. 13, 1373b1.

59. See Aquinas, *supra* n. 5, at pt. I–II, q. 90, art. 2.

60. See Cochran, *supra* n. 47 at 617–18 (arguing that the non-neutral lawyer does not impose values on the client).

61. See Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 *Fordham L. Rev.* 1339, 1342–43 (explaining the amoral lawyer view as grounded in a secularist understanding that comes from political liberalism, and going on to analyze the question of client selection in terms of formal/material cooperation).

62. Paul R. Tremblay, *Shared Norms, Bad Lawyers and the Virtues of Casuistry*, 36 *U.S.F. L. Rev.* 659, 693 (2002) (citing Pepper as a proponent of the hired gun approach in an article that proposes that shared morality within the legal profession is possible); Michael I. Krauss, *The Lawyer as Limo: A Brief History of The Hired Gun*, 8 *U. Chi. L. Sch. Roundtable* 325 (2001) (explaining the hired gun mentality as uniquely modern and citing Pepper as one of its most notable proponents).

each person and calls for the protection of individual rights. Retributive justice addresses the need for public order and security by punishing illegal acts in proportion to their gravity.<sup>63</sup> The lawyer who functions from the perspective of natural law will recognize the requirements of distributive, commutative, and retributive justice as aspects of a transhistorical and objective justice.

All of us who are attorneys find ourselves in the context of the increasing secularization of the public sphere. Liberal theorists such as John Rawls have gone so far as to argue that religious values ought to be excluded from discussions about public policy and law.<sup>64</sup> In this context, it is not an easy task to be faithful to the requirements of nature and grace as the Catholic tradition understands them. It is a situation in which pride, avarice, injustice, and fraud often triumph over humility, prudence, fairness, and honesty. When confronted with approaches to law that deny natural and theological virtues, we all have choices to make. Natural law theory and theological reflection on the mystery of Christ afford the Catholic lawyer with an antidote to approaches—such as legal realism—that separate law from justice. In making choices, the Catholic tradition invites us to be humanized and sanctified.

### C. *Should an Attorney Lead a Balanced Life?*

My third and final point is relatively brief. It recalls the requirements of nature and grace to lead a balanced life. In an insightful article about the work of a lawyer, Patrick Schiltz states that “the single biggest complaint among attorneys is increasingly long workdays with decreasing time for personal and family life.”<sup>65</sup> The Catholic tradition suggests that the lawyer’s willingness to sacrifice for the common good ought to be guided by the virtue of prudence. It is not prudent to neglect one’s family and friends on a regular basis. In addition to natural obligations that arise from family and friendship, one also has the theological obligation to participate in the life of the Church. Whether from the perspective of nature or grace, one’s participation in basic communities such as family and church yields a sense of solidarity that remains an important component of human fulfillment. Writing about the work of lawyers from a theological perspective, Cathleen Kaveny decries “the dominance of the billable hour” as an affront to re-

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63. See Aquinas, *supra* n. 5, at pt. I-II, q. 30, art. 3; see also Finnis, *supra* n. 17, at 187–215.

64. See John Rawls, *Political Liberalism* 147–49, 243 (Columbia U. Press 1996) (In defining public reason as an “overlapping consensus,” and arguing that political power may not be exercised on the basis of religious values, Rawls stated, “What public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of public political values, it being understood by everyone that of course the plurality of reasonable comprehensive doctrines held by citizens is thought by them to provide further and often transcendent backing for those values.”).

65. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *Vand. L. Rev.* 871, 889–90 (1999).



demptive time.<sup>66</sup> A Catholic understanding of nature and grace suggests that the lawyer may sometimes have to sacrifice opportunities for increased wealth and prestige in order to participate in the basic associations of a balanced life. Family and religion remain, after all, as essential constituents of human fulfillment and the common good.

#### CONCLUSION

Prior to election as the successor to Peter, Karol Wojtyla published *The Acting Person*.<sup>67</sup> In this major philosophical work, the future pope elucidated the Aristotelian-Thomistic claim that one becomes what one does. The lawyer as person remains protagonist in the development of his or her professional life. Natural law theory affords all attorneys with reason to value the role of sacrifice in promoting the common good. For the Catholic lawyer, the constitution of self is deepened through actions that reflect the sacrificial love of Christ. With the death of John Paul II, I recall the first time that I met him almost twenty years ago. The brief encounter proved much more than a commoner's brush with celebrity. The beauty of his internal order stunned me. The graced moment left me with the desire to become like him. I realized his soul had been shaped by decades of daily sacrifices for the common good of humanity, the Church, specific communities, and individual souls. In the choices that we make as Catholic attorneys, let us attempt to follow in the example of this great man.

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66. M. Cathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 Loy. U. Chi. L.J. 173, 180 (2001).

67. Karol Wojtyla, *supra* n. 4.