A Catholic Contribution to the Right to Life: An Analysis of Abortion Jurisprudence in the United States and Poland

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ABSTRACT: This paper presents a comparative analysis of the abortion jurisprudence of abortion in both the United States and Poland. It analyzes the constitutions, statutes, and judicial precedents that have affected abortion access in both of those countries. The paper also attempts to show how Catholic Social Teaching, particularly as read through the lens of St. John Paul II in *Evangelium Vitae*, offers a way to accommodate the constitutional values that are articulated in the founding documents of these nations. John Paul II does this by encouraging renewed respect for the human rights of all the members of the human family, support for democratic frameworks that moderate majoritarian impulses, and (when other measures fail) a respect for conscience rights. It is only in protecting both the life and dignity of the woman and her child that nations like these can fulfill the aspirations of their founding documents.

ABORTION IS ONE OF THE SOCIAL QUESTIONS that various constitutional systems have had to confront. Dealing with this issue necessarily involves a multitude of legal, philosophical, ethical, and theological positions. How to navigate between protecting the right to life, on the one hand, and the equality and autonomy of women, on the other, is a question that continues to stir up the passions of both "pro-lifers" and "pro-choicers." This paper will present an pverview of how the United States and Poland – countries

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with very different historical, political, and social environments – have addressed the issue. Specifically, the paper presents a comparative analysis of the constitutionality of abortion in those two countries. It will also give a brief account of how Catholic social teaching, including the teachings of John Paul II in *Evangelium Vitae,*[1] can be put in dialogue with the constitutional development of abortion jurisprudence and offer a way that respects both the human dignity of the mother and her unborn child. The paper will accomplish these goals by giving the constitutional and statutory basis of abortion in the two countries, analyzing the relevant caselaw affecting abortion, and presenting Catholic social teaching's vision for addressing the abortion issue.

Abortion in the United States: Constitutionality

The text, history, and structure of the Constitution of the United States does not contain any explicit references to a right to abortion. The Declaration of Independence mentions that the one of the purposes of government is to secure "unalienable Rights," including those rights to "Life, Liberty and the Pursuit of Happiness."[2] However, the Declaration is not generally considered legally binding or rise to the level of constitutional mandate. The English jurist William Blackstone wrote that abortion was treated similarly to the crime of homicide or manslaughter under the English common law.[3] But common law did not criminalize all abortions and, based on the then-accepted understanding of when an embryo or fetus became "formed" or recognizably human, did not criminalize abortions performed before "quickening" (the first recognizable movement of the unborn child *in utero*, usually between the sixteenth and

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[1] John Paul II, Encyclical Letter *Evangelium Vitae* (25 March 1995), available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [hereinafter EV].

[2] U.S. Government National Archives, "Declaration of Independence: A Transcription" (accessed April 2017), available at https://www. archives.gov/founding-docs/declaration-transcript.

[3] Sir William Blackstone, *Commentaries on the Laws of England*, Chapter I: Of the Absolute Rights of Individuals §1 (Oxford UK: Clarendon Press, originally published in 1765-1769): "For if a woman is quick with child, and by a potion, or otherwife, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child ; this, though not murder, was by the antient law homicide or manflaughter," available at http://avalon. law.yale.edu/18th_century/blackstone_bk1ch1.asp.

eighteenth week of pregnancy).[4] Nevertheless, after independence most of the States in the new United States kept the common law's general prohibitions on abortion and actually criminalized the practice in the nineteenth century.[5]

Towards the middle half of the twentieth century, some States began liberalizing their abortion laws.[6] Decriminalization, however, was not effective across the Union. Abortion was not legalized nationwide until 1973, when the Supreme Court of the United States ruled in *Roe v. Wade* that women had a constitutionally protected (as distinguished from one that is only statutorily protected) right to have an abortion. In that decision the Justices found the constitutional right to abortion to stem from the "right to privacy," a claim first explicated in contraception cases such as *Griswold v. Connecticut*[7] and *Eisenstadt v. Baird.*[8] The Justices in *Roe* construed that right as broad enough to encompass a woman's decision to terminate her pregnancy when they wrote: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[9]

It is important to note that the Supreme Court did not derive a constitutional right to abortion as an outcome of balancing of the constitutional interests of the mother with that of her unborn child, as was the case in some

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[4] *Roe v. Wade*, 410 U.S. 113, 132-33 (1973), hereinafter "Roe."

[5] Ibid. at 129-30: "It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage.... Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century."

[6] See, e.g., *Planned Parenthood: Rocky Mountains, Our History* (accessed April 2017): "In 1967 Colorado becomes the first State to decriminalize abortion in cases of rape, incest, or in which pregnancy would lead to permanent physical disability of the woman," available at https://www.plannedparenthood.org/planned-parenthood-rocky-mountains/who-we-are/our-history.

[7] 381 U.S. 479 (1965), holding that a Connecticut statute forbidding the use of contraceptives by married couples violated the right of marital privacy found within the "penumbra" of specific guarantees of the Bill of Rights.

[8] 405 U.S. 438 (1972), holding that unmarried persons also have the right to use contraception, based on the Equal Protection Clause of the Fourteenth Amendment.

[9] *Roe* at 154.

foreign courts in determining abortion rights.[10] The Court dismissed the possibility that the unborn may have any constitutionally protected interest whatsoever when they declared that they were not "persons" within the meaning of the Fourteenth Amendment.[11] Furthermore, the Court declared that it was beyond its purview to determine when life began: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[12] Through taking a stance of purported neutrality, they essentially ruled out any possibility that the unborn may have any interests of their own for the purposes of constitutional review. At the same time, while the Court did not recognize that unborn children have any independent basis to assert its own rights because they are not "persons,"

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[10] See, e.g., *Abortion I Case*, Federal Constitutional Court (Germany) 39 BVerfGE 1, II-2 (1975): "No balance is possible that would guarantee both the protection of the life of the *nasciterus* and the freedom of the pregnant women [sic] to terminate her pregnancy, for the termination of a pregnancy always means the destruction of unborn life. In the necessary balancing process both constitutional values must be perceived in relation to human dignity as the center of the constitutions' value system," English translation excerpted from *Comparative Constitutionalism,* 3rd ed., ed. Norman, Rosenfeld, Sajo, Baer, and Mancini (West Academic Publishing, 2016), pp. 720-23.

[11] *Roe* at 157-58. This argument, however, is unsatisfactory because, among other reasons, it fails to consider the original public meaning of the word "person" as it would have been understood at the time the Fourteenth Amendment was adopted, when twenty-three of the then thirty-seven States in the Union had explicit recognitions for unborn personhood in their anti-abortion laws. *See* Joshua Craddock, "Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?" in *Harvard Journal of Law & Public Policy* 40 (2017): 539, 552. Additionally, the U.S. Supreme Court has also since held juridical persons (e.g., corporations) can sometimes be considered "persons" under the Fourteenth Amendment or have constitutional rights in various contexts. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014). Finally, at least 38 states have fetal homicide laws that provide for criminal penalties in crimes involving pregnant women that result in the death of their unborn children, arguably recognizing some minimal interest in the life of the unborn child. At least 23 of those states have fetal homicide laws that apply to the earliest stages of pregnancy. See *Fetal Homicide State Laws*, National Conference of State Legislatures (Nov. 16, 2017), available at http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

[12] *Roe* at 159.

it did recognize that the State may have an interest in the "potential" life of the child.[13] This is the realm of statutory regulations of abortion.

Statutory Basis

With the constitutional justification for abortion established, the States were initially quite limited in what laws they could pass to regulate the procedure. The *Roe* ruling specifically struck down a Texas statute that made it a crime to "procure an abortion," except for one procured to "sav[e] the life of the mother."[14] The immediate effect of the *Roe* ruling meant that most State laws regulating abortion were struck down. At the same time that the Court determined that there was a constitutionally protected right to abortion found under the "right to privacy," they also explained that the "right is not unqualified" and must be "considered against important State interests in regulation."[15] In order to determine the permissibility of any future regulations on abortion, the Court adopted a so-called "trimester" test that divided pregnancy into three different phases with increasing levels of permissible regulation as the State's interest in the unborn child's life increased. This was the statutory framework that regulated abortion in the United States for the next three decades:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[16]

While the Court seems to situate the permissibility of abortion within neat

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[13] *Roe* at 150: "In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."

[14] *Roe* at 117.

[15] *Roe* at 154.

[16] *Roe* at 164-65.

trimester periods, the actual effect of the *Roe* ruling potentially legalized abortion throughout the duration of pregnancy. This is because of *Roe's* (less well-known) companion case that was decided on the same day, *Doe v. Bolton*.[17] Depending upon whether one reads the holding broadly or narrowly (i.e., whether *Doe's* holding applied only to the Georgia statute at issue), the "health-exception" that was carved out in that case construed health so comprehensively that, when read together with *Roe*, it put few limits on abortion. In this case the Court gave a broad understanding to physician's understanding of health:

> Medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[18]

The statutory framework for regulating abortion in the United States did not change greatly until 1992, when the U.S. Supreme Court transitioned from the "trimester" framework to a "viability" framework in order to treat abortion under the directives given in *Planned Parenthood v. Casey*.[19] In that case, the Court adjudicated a Pennsylvania abortion statute and upheld *Roe's* central holding but moved towards an "undue burden" standard by which to regulate abortions before viability. The Court defined "viability" as the point in fetal development at which the State's interest in life has "sufficient force that woman's right to terminate her pregnancy may be restricted."[20] The Court said that an undue burden was a regulation that had the "purpose or effect" of putting an obstacle in place of a woman's ultimate choice to have an abortion.[21] Thus, by upholding many of Pennsylvania's challenged abortion regulations, the permissibility of State regulations on abortion became expanded after 1992. The types of regulations that were allowed under the *Casey* regime included: informed consent provisions (to give women information about the procedure and fetal development), 24-hour waiting periods, parental consent requirements

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[17] 410 U.S. 179 (1973).
[18] Id. at 192.
[19] 505 U.S. 833 (1992).
[20] Ibid. at 869.
[21] *Casey* at 877.

(with judicial bypass procedures), and record-keeping and reporting requirements. While there has been other caselaw implicating abortion in the United States since then, that law has dealt with more discrete regulations of abortion procedures or has not set the same kind of overarching constitutional tests that the *Roe-Casey* line of decisions did.[22] It is this framework that regulates abortion to this day in the United States.

Abortion in Poland: Constitutionality

To understand the constitutionality of abortion in Poland, one must understand the unique social, historical, and political factors that have shaped modern Poland's development. Along with many other nations of central and eastern Europe, after subjugation for many centuries, Poland was carved out of the remnants of the old German, Russian, and Austria-Hungarian Empires. As a majority-Catholic nation, it prohibited abortion until 1932. In that year its laws were modified to allow for abortion when a pregnancy endangered the life or health of the mother or resulted from a crime (rape or incest).[23] Poland was subsequently occupied in World War II by the Nazi regime and thereafter by the Soviet Union at the close of the war period. Following the general trend in the communist countries of eastern Europe, abortion was legalized under broad

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[22] See, e.g., *Gonzales v. Carhart*, 550 U.S 1, 28 (2007), upholding Congress's ban on partial birth abortion and ruling that it did not impose an undue burden standard under *Casey*: "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn"; and *Whole Women's Health v. Hellerstadt*, 576 U.S. 1, 2 (2016), striking down a Texas abortion statute that required abortion physician's to have admitting privileges at a nearby hospital and requiring abortion clinics to meet ambulatory surgical center (ASC) standards: "We conclude that neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a pre-viability abortion, each constitutes an undue burden on abortion access...and each violates the Federal Constitution."

[23] See "Poland," Country profile in *World Abortion Policies: A Global Review*, United Nations Population Division, Department of Economic and Social Affairs (2002), available at https://www.un.org/ esa/population/publications/abortion/ (for the full publication). For Poland specifically, see http://www.un.org/esa/population/ publications/abortion/doc/poland.doc, hereinafter "World Abortion Policies."

conditions during the 1960s and 1970s.[24] This state of affairs would remain the case until the hegemony of the Soviet Union was dissolved and Poland regained its independence in 1992. The Solidarity movement influenced these developments,[25] as did the Roman Catholic Church.[26] Soon thereafter Poland began a political transition process that culminated in the finalization of a new constitution in 1997.[27] That Constitution has multiple provisions with implications for abortion.

Chapter II of the Polish Constitution concerns the "freedoms, rights, and obligations of persons and citizens." Article 30 sets out the general principles of the Constitution and enshrines human dignity as a foundational principle of the Polish Constitution: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities." The principle of legal equality is enshrined in Article 32: "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities." That article also contains a provision

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[24] Ibid. at 38: "Although the procedural requirements to be observed in order for a lawful abortion to be performed were amended repeatedly over the years (1956, 1959, 1969, 1981 and 1990), access to abortion after the passage of the 1956 legislation [permitting abortion on medical grounds, if the pregnancy resulted from a criminal act or because of "difficult living conditions"] remained largely constant until 1990 with the election of the first non-Communist Government in Poland since the end of the Second World War."

[25] See Mark Kramer, "The Rise and Fall of Solidarity," *The New York Times* (Dec. 12, 2011), available at http://www.nytimes.com/2011/ 12/13/opinion/the-rise-and-fall-of-solidarity.html: "Solidarity ultimately could not prevent martial law, but the union's mere existence underscored for everyone how bankrupt the Communist system was. And the introduction of military rule put an end to any lingering illusions in both East and West about the nature of communism."

[26] See Brian Porter-Szucs, "Catholic Church in Poland: Introduction, Making the History of 1989 (2007-2017)," available at https://chnm.gmu.edu/1989/exhibits/ roman-catholic-church/introduction: "There is no doubt that the Roman Catholic Church played an enormous social, political, and cultural role in the Polish People's Republic, and the fall of Communism would certainly have played out differently were it not for the Church's involvement."

[27] An official English translated text of the 1997 Constitution can be found at this link from the Polish Sejm (one chamber of the Polish legislature): http://www.sejm. gov.pl/prawo/konst/ angielski/kon1.htm. All citations to the Polish Constitution will be made from this version of the Constitution.

that prohibits discrimination.

Furthermore, men and women are guaranteed equality under Article 33, including the areas of family, political, social, and economic life. Under the heading of "personal freedoms and rights" the Polish Constitution guarantees in Article 38 that it shall ensure the "legal protection of every human being." Article 40 states that no one may be subject to "cruel, inhuman, or degrading treatment or punishment." Article 41 states that "personal inviolability and security shall be ensured to everyone." Article 47 of the Constitution includes a privacy provision: "Everyone shall have the right to legal protection of his private and family life, of his honor and good reputation and to make decisions about his personal life." Of importance in the Polish abortion context is Article 53, which guarantees freedom of conscience and religion. That freedom includes the freedom to profess or manifest such religion in public or in private. From provisions like those Poland provides "conscience" protections for doctors who choose not to participate in abortions.[28] Article 53 provides the constitutional basis of that protection. Because Poland is a part of the European Union and the Community of Europe,[29] it has also acceded to the European Convention on Human Rights[30] and to the jurisdiction of the European Court of Human Rights. That caselaw will be examined further below; however, for the purposes of our review of the Polish Constitution, that document states in Article 9 that Poland shall "respect international law binding upon it."

From the relevant articles of the Polish Constitution mentioned above, we see that there is some tension between the equality and non-discrimination rights of women and the inviolability of life and human dignity principles that

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[28] *World Abortion Policies* at 39: "Enactment of the new law heightened the hostility of pro-life groups to the performance of abortions. Many legislators, religious leaders and health personnel opposed to abortion pledged themselves to counter its effect. At the same time, growing numbers of physicians and hospitals refused to perform abortions, as they were allowed to do under a conscience clause contained in the law."

[29] See generally *Council of Europe, Administrative Entities, Member States: Poland//47 States, one Europe*, noting accession to the COE on 26 November 1991), available at https://www.coe.int/en/web/ portal/poland. A link detailing a list of treaties (Conventions and Protocols) that Poland has signed onto can be found at this page: https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chart Signature/3.

[30] An English translation of the European Convention on Human Rights (ECHR) can be found at this link: http://www.echr.coe.int/ Documents/Convention_ENG.pdf.

are both enshrined in the Polish Constitution. To adjudicate disputes that arise from various interpretations of the Polish Constitution, Article 79 provides a cause of action: "everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a Statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution." It is important to note that, insofar as there is any "right" to an abortion in Poland, none can be said to specifically derive from the constitutional text. Unlike the United States, abortion was not legalized in Poland under a constitutional interpretation; rather, there was a statutory creation of a right by the legislature. In other words, though its regulation and its scope has been affected by subsequent caselaw and State regulation, the right to abortion in America is a creature of Supreme Court caselaw (e.g., *Roe* and its progeny). In contrast, the Polish government soon after the fall of the Soviet Union circumscribed the permissive abortion regime that was the case during the communist era and limited abortion to specific circumstances. It was only subsequently, in 1997, when the Polish Constitutional Tribunal ruled on the permissibility of its 1993 Family Planning Law. It is to that law and the Tribunal's decision that we now turn.

Statutory Basis

The Polish Constitutional Tribunal took up the question of abortion in its 1997 judgment on an amendment to the Family Planning Act.[31] To understand the context of that judgment, we must first look to the abortion law that was passed in Poland after independence from Soviet hegemony. After years of communist rule, Poland decided to limit abortion to three main circumstances. The relevant portion of the law,[32] beginning at Section 4(a)1 reads:

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[31] Case K. 29/96, Constitutional Tribunal (Poland) (Decision of 28 May 1997), excerpted from pgs. 723-25 of Norma, Rosenfeld, Sajo, Baer, and Mancini's *Comparative Constitutionalism* 3rd. ed. (2016). All references to page numbers of the Tribunal's decision will be from that casebook compilation.

[32] Law on Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of January 7, 1993, as amended as of December 23, 1997. An (unofficial) English translation of the law can be found at this link: https://www.reproductiverights.org/sites/crr. civicactions.net/files/documents/Polish%20abortion%20act–English%20translation.pdf (hereinafter Law on Family Planning).

An abortion can be carried out only by a physician and where
(1) pregnancy endangers the mother's life or health;
(2) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffer from an incurable life-threatening ailment;
(3) there are strong grounds for believing that the pregnancy is the result of a criminal act.

Danger to the mother's life or health, severe fetal abnormality, or cases in which the pregnancy is the result of sexual assault are the only permissible categories under which an abortion may be performed. The law further elaborates that termination of pregnancy shall be permissible under ¶1(2) until the fetus is capable of living independently outside the body of the pregnant woman. In the case of ¶1(3) or ¶1(4), which pertain to the life- or health-exception or to pregnancies that are the result of a criminal act, the law permits abortion if no more than twelve weeks have passed since the beginning of pregnancy. There are also various types of consent requirements, including parental consent in the case of a minor under thirteen years of age.[33] A doctor other than the one seeking to terminate a pregnancy under ¶1(1) or ¶1(2), the statutes dealing with life or health or fetal impairment, has to certify that the circumstances justifying an abortion have occurred and, in the case of an abortion sought for pregnancy that is the result of a criminal act, a public prosecutor also has to ascertain the circumstances.[34] There are also various civil and criminal regulations and penalties governing the abortion context in Poland, including protections for the child developing *in utero*, regulations on prenatal examinations and genetic screenings, and protections against the battering of pregnant women or causing the death of her child.[35]

Additionally, beyond the regulations on the abortion procedure itself, the Family Planning Act also shows the Polish government's commitment to constitutional recognition of the value of life through various provisions that guarantee social service, health, and other support to women facing unplanned pregnancies. For example, the preambular portion of the statute gives the legislative intent for why the law was passed: "Recognizing that life is a fundamental right of a human being, and that life and health care shall be

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[33] Law on Family Planning ¶4.
[34] Ibid. at ¶5.
[35] Ibid. at Articles 6 and 7.

subject to special protection by the State, society, and citizen; recognizing the right of everybody to decide responsibly about having children and to have access to information, education, counseling, and the means that ensure the enjoyment of this right....” The law explicitly states in Article 1 that the right to life shall be subject to protection, which includes in the prenatal phase. Furthermore, the Polish government organizes its government apparatus to promote the protection for the value of life. Article 2 obliges that the public administration and local governments, within the limits of their competencies, “provide medical, social and legal aid to pregnant women.” This aid includes prenatal care for the unborn child and medical care for the pregnant woman, financial support and care for the pregnant woman, access to information in entitlements, benefits, and allowances, and information on institutions and organizations that provide psychological and social support.[36] In additional to governmental support, the law also includes provisions that provide for cooperation with religious groups, social organizations, and (foster) families to contribute to the care for pregnant women and adoption of children.[37]

With the substance and context of the law established, we can now turn to the adjudication of abortion rights with the Constitutional Tribunal. Soon after the 1993 law was passed, there were attempts to challenge the constitutionality of the law because, in addition to the three permissible reasons for abortion, an amended section also included ¶4(A)1(4), which permitted abortion for difficult living conditions or precarious personal situations.[38] That portion of the law was found unconstitutional because the Tribunal found difficultly in determining what constituted such situations.[39] The Court said that without that criteria, the value of human life under the Constitution was not sufficiently protected and amounted to an authorization for abortion on request.[40] The opinion gives various grounds for the Court’s holding, but the heart of it can be traced to how the Court viewed the constitutionally protected

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[36] Law on Family Planning, Article 2.

[37] Ibid. at Article 3(1).

[38] See also *World Abortion Policies* at 39: “Two years later, however, after another election resulted in a new president who was favourable to abortion law reform, the Government again introduced liberalized legislation. Parliament voted to amend the recent law to allow abortions to be performed on the grounds of difficult living conditions or a precarious personal situation up until the twelfth week of pregnancy.”

[39] Ibid. at 39.

[40] *World Abortion Policies* at 39.

good of life:

> In a democratic state of law a human being and the goods most precious to him or her are of paramount value. Such a good is life. So in a democratic state of law life, in each and every stage of its development, must be protected by the Constitution. The value of the constitutionally protected legal good of human life – including life evolving in the pre-natal stage – cannot be differentiated. This is so, because there are no sufficiently fine and justified criteria for distinguishing the value of human life according to its developmental phase. Human life, therefore, becomes a value protected under the Constitution from the moment it develops.[41]

We should take note here how the Polish Constitutional Tribunal recognizes life as an objective value that is protected by the Constitution. That is, the Court weighs the interests of the unborn child alongside that of his or her mother. The value of life is not dependent upon the subjective value that any other member of the society gives to it but has a weight and gravity of its own that calls for respect. This is precisely the question that was skirted in *Roe* because the U.S. Supreme Court there was unwilling to engage the question of when life began or what value it has. The Polish Tribunal did grant that, in some exceptional circumstances, the constitutional recognition of the value of life may be abrogated "due to the need to protect or realise other constitutional values, rights or freedoms."[42] These rights and freedoms presumably refer to those other values in the Polish Constitution enumerated previously, such as equality, non-discrimination, and privacy rights. But in this case the Court had to weigh between the constitutional recognition of the value of life and the permissibility of abortion for socio-economic reasons. The Court reasoned that, in comparison with the good of life, "living conditions are a secondary issue and may change."[43] In other words, life as a fundamental human good is weighed higher when compared to the transitory and imprecise value of what someone may subjectively accord to be a negative living condition. This is especially in the case where the Polish state seeks to affirmatively provide pregnancy help and support to women in difficult circumstances in other parts of its Family Planning Law. Insofar as the Polish Constitution has permitted abortion with the remaining three provisions of the law in ¶4(a)1(1)-1(3), those

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[41] Case K. 29/96 at 724.
[42] Ibid., 4.3 at 724.
[43] Ibid., 4.3 at 725.

are the situations for which the Polish State has determined that the constitutional recognition of the value of life may give way to other considerations such as a woman's life or health, the unborn child's suffering from a severe fetal impairment, or her mother's psychological well-being in the case of pregnancy resulting from the trauma of sexual assault, and so on. Seen in this regard, the abortion regulations in Poland may construed as trying to achieve a balance between life, on the one hand, and respect for the woman and her freedoms, on the other.

The Family Planning Law and the Constitutional Tribunal are not the only statutes and caselaw affecting abortion. Poland is also party to the European Convention on Human Rights and the European Court of Human Rights (ECtHR). There have been three important cases in the last decades that have addressed the question of abortion rights in Poland. In *Tysiac v. Poland*[44] the ECtHR held that Poland violated Article 8 of the European Convention on Human Rights (i.e., the statute requiring respect for private life) because the Polish statute permitting abortion did not define a course of action and created uncertainty when a visually impaired woman's doctors disagreed on the appropriate medical intervention for her condition.[45] In the case of *R.R. v. Poland* the ECtHR held that Poland violated Article 3 (a provision dealing with freedom from inhumane or degrading treatment) and Article 8 (a section dealing with respect for private life) when a Polish woman was unable to access prenatal genetic testing in Poland to determine if her unborn child had a fetal abnormality or not, a form of testing that would have provided her with information on whether or not to terminate the life of her child.[46] Finally, in *P.*

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[44] Application no. 5410/03, ECtHR (Judgement of 20 March 2007), available at https://www.reproductiverights.org/sites/crr.civic actions.net/files/documents/Tysiac_ decision.pdf.

[45] Ibid. at 124: "The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health."

[46] *R.R. v. Poland*, Application no. 27617/04, ECtHR (Judgment of 26 May 2011) at 208: "The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms which would have enabled the applicant to access a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or

and S. v. Poland[47] the ECtHR held that Poland violated Article 3 (on freedom from inhumane or degrading treatment), Article 5 (on deprivation of liberty), and Article 8 (on respect for private life) of the European Convention. The ECtHR held that a minor who was raped and found it difficult to access abortion and had her rights violated on account of, *inter alia*, doctors' claims of conscientious objection, obstruction and delay, the leaking of medical information as well as the minor's detention at a juvenile center. It is important to note that in each of these cases the European Court of Human Rights did not explicitly propose a "right" to abortion in international law.[48] Indeed, they cited caselaw to suggest quite the opposite, noting that there was no common European "consensus" on abortion as a right and that it was within the "margin of appreciation" of States when it came to defining the protection of unborn life and regulation of abortion.[49] This line of cases from the EctHR, however, does suggest that when a State creates a permissible statutory framework for abortion, it actually must allow women to access the procedure.[50]

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not."

[47] Application no. 573755/08, ECtHR (Judgment of 30 October 2012), available at http://hudoc.echr.coe.int/eng#{"itemid":["001-114098"]}.

[48] With regard to abortion in the international context, a number of prominent pro-life legal scholars signed onto a document, known as *The San Jose Articles*, that declares that abortion is not an internationally protected human right, stating: "There exists no right to abortion under international law, either by way of treaty obligation or under customary international law. No United Nations treaty can accurately be cited as establishing or recognizing a right to abortion." Additionally, they argue that attempts by regional human rights systems or treaty-monitoring bodies to establish it as a right are *ultra vires* acts, insofar as they are not empowered by their respective treaties or the mandate of their human rights instruments to do so. A complete text of the Articles can be found at this link: http://sanjosearticles.com/?page_id=2 (accessed August 2017).

[49] *Tysiac* at 74, citing *Vo. v. France* [GC], no. 53924/00 § 82, ECtHR 2004-VIII: "The Court itself had observed that legislative provisions as to when life commenced fell within the State's margin of appreciation, but it had rejected suggestions that the Convention ensured such protection. It had noted that the issue of such protection was not resolved within the majority of the Contracting States themselves and that there was no European consensus on the scientific and legal definition of the beginning of life."

[50] *P. and S. v. Poland* at 99: "The Court has already found in the context of similar cases against Poland that once the State, acting within the limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion. In particular, the State is under positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right to lawful abortion."

Notwithstanding the rulings from the regional body interpreting international law, the legal effect of the rulings on the *domestic* level are uncertain because the current Polish abortion statute remains in force. There have been in recent years attempts to liberalize the abortion law by pro-choice groups, as well as attempts by conservative parties to tighten the restrictions on abortion even further. The latter's attempts have failed to gain ground and thus far the status quo remains.[51]

With this understanding of the constitutional, statutory, and international abortion context now situated, we turn next to Catholic social teaching's analysis of abortion and how it might respond to legalization.

Catholic Social Teaching on Abortion

At the outset, it is important to suggest why we are specifically focusing on the writings of John Paul II and *Evangelium Vitae*. While there are many other writings in the corpus of Catholic social teaching that discuss the value of human life,[52] the first reason why we focus on the thought of the late pope is that he was Polish and lived under both the fascist era and the communist era of recent Polish history. Further, John Paul II chose to focus one of his encyclicals specifically on "life" issues, viz., *Evangelium Vitae* ("Gospel of life"). This was undoubtedly because of his experience with the anti-life

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[51] "Poland Abortion: Parliament Rejects Near-Total Ban," *BBC News Europe* (Oct. 6 2016), accessed April 2017, available at http://www.bbc.com/news/world-europe-37573938: "In the most recent push to tighten the law, a proposal through a citizen's initiative sought to ban all abortions unless the mother's life was at risk. MPs voted to reject the bill by 352 votes to 58." At the time this article is going to print, the Polish government recently proposed a new draft law that would ban abortions for fetal abnormalities. See "Mass protests in Poland against Tightening of Abortion Law," *The Guardian* (March 23 2018), accessed March 2018, available at https://www.theguardian.com/world/2018/mar/23/abortion-poland-mass-protests-against-tightening-of-law.

[52] See, e.g., *The Didache*, translated by M.B. Riddle in *Ante-Nicene Fathers,* Vol. 7, edited by Alexander Roberts, James Donaldson, and A. Cleveland Coxe (Buffalo NY: Christian Literature Publishing Co., 1886., revised and edited for New Advent by Kevin Knight, Chap. 2, available at http://www.newadvent.org/fathers/0714.htm: "[Y]ou shall not murder a child by abortion nor kill that which is begotten." See also *Catechism of the Catholic Church* (CCC) §2270: "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person – among which is the inviolable right of every innocent being to life."

attitudes that were inherent in the communist and fascist conceptions of the human person. These views were built around ideologies that reduced persons along class or racial lines. One need not to look far to see where the end of such ideologies takes a society: either to the concentration camps or to the gulags. His personal experiences under both regimes gave him special insight and a personal stake in upholding Catholic social teaching's affirmation of the inherent dignity of the human person, including the dignity of the unborn child and her mother. Secondly, John Paul II's encyclical on human life was written in 1995. This meant that abortion developments in both the countries discussed above – the *Casey* decision in 1992 and the Polish Family Planning Law of 1993 – immediately preceded that encyclical. Reflecting on such developments in light of his encyclical can give us a glimpse at how he would approach the abortion issue. Thirdly, it is important to note that Catholic social teaching does not have a specific political, economic, or constitutional model that it proposes in a programmatic way to be implemented in society. About this topic John Paul II wrote:

> The Church has no models to present; models that are real and truly effective can only arise within the framework of different historical situations, through the efforts of all those who responsibly confront concrete problems in all their social, economic, political and cultural aspects, as these interact with one another.... The Church...is not entitled to express preferences for this or that institutional or constitutional solution. Her contribution to the political order is precisely her vision of the dignity of the person revealed in all its fullness in the mystery of the Incarnate Word.[53]

Catholic social teaching allows for the possibility that many types of social and political organization can be judged compatible with its commitments to such core principles as human dignity, solidarity, subsidiarity, and a preferential option for the poor, permitting the Church's teachings on human life to take root in a multitude of contexts.

The Church formally addresses the topic of abortion in (among other places) the *Catechism of the Catholic Church*, which was promulgated under John Paul II's papacy. The *Catechism* states: "Human life must be respected and protected absolutely from the moment of conception. From the first

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[53] John Paul II, *Solicitudo Rei Socialis* (30 December 1987) at §43, available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html.

moment of his existence, a human being must be recognized as having the rights of a person – among which is the inviolable right of every innocent being to life."[54] The Church bases this teaching both upon revelation (the Fifth Commandment, not to kill) and upon discernment of the natural law (i.e., that it is wrong deliberately to kill innocent persons). Furthermore, regarding civil and political authorities, it states:

> The inalienable rights of the person must be recognized and respected by civil society and the political authority. These human rights depend neither on single individuals nor on parents; nor do they represent a concession made by society and the state; they belong to human nature and are inherent in the person by virtue of the creative act from which the person took his origin. Among such fundamental rights one should mention in this regard every human being's right to life and physical integrity from the moment of conception until death.[55]

While allowing for a wide diversity in governmental structures, Catholic social teaching on human life requires that social and political organizations be ordered in such a way as to serve the human person and the human community, particularly the fundamental good of life.

In *Evangelium Vitae* we find John Paul II's contribution to this question by his focus on three different areas: his call for governments to acknowledge authentic human rights, to balance democracy's principle of majority rule with respect for human dignity, and to provide a framework for conscience protections in the case of regimes that do permit abortion.

First, John Paul II reflects on the disconnect between contemporary human rights discourse and its lack of implementation in various systems. He states the poverty of current human rights discourses:

> The process which once led to discovering the idea of "human rights" – rights inherent in every person and prior to any Constitution and State legislation – is today marked by a surprising contradiction. Precisely in an age when the inviolable rights of the person are solemnly proclaimed and the value of life is publicly affirmed, the very right to life is being denied or trampled upon, especially at the more significant moments of existence: the moment of birth and the moment of death.[56]

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[54] CCC §2270.
[55] CCC §2273, citing *Donum Vitae* §3.
[56] EV §18.

It seems to be at the very point when modern societies are capable of protecting and respecting the rights of most persons that certain other members of the human community are paradoxically marginalized. He notes the growing "moral sensitivity, more alert acknowledging [of] the value and dignity of every individual" that is accompanied by a "tragic repudiation of them in practice."[57] The growing awareness of human rights that John Paul II speaks of most likely refers to the growing awareness of human rights in the post-World War II period. It was in the decades after the War that documents like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) were promulgated.[58] The subsequent legalization of abortion in many countries disregards an entire segment of the human family from human rights protection. John Paul II sees the contradiction between "rights-talk" and disregard for these very rights in practice.[59] To come to back to a more coherent conception of human rights, constitutions must respond to what declarations of human rights are

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[57] Ibid.

[58] While the UDHR is a declaration and not, technically speaking, legally binding, many commentators have taken the position that the UDHR has the status of customary international law because of the adoption of its norms in the internal or national laws of many States. See generally Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International & Comparative Law* 25 (1995/1996): 287. Notwithstanding the UDHR, the ICCPR and ICESCR that derive from it are binding upon the Member States who have signed onto and ratified those human rights instruments. Collectively, the three documents are known as the "International Bill of Rights." The entire corpus of international human rights treaties can be found at this link of the UN Office of the High Commissioner for Human Rights: http://www.ohchr.org/EN/ ProfessionalInterest/Pages/CoreInstruments.aspx.

[59] Professor Mary Ann Glendon, who has also written extensively on the contribution that Catholic Church and Catholic social teaching have made to the formulation of the post-war human rights instruments, argues: "In the years when the human rights movement was enjoying its greatest successes, Pope John Paul II was one of the first to see that the more the international human rights idea began to show its power, the more intense would become the struggle to capture that power for various ends, not all of which are respectful of human dignity." See Mary Ann Glendon, "The Influence of Catholic Social Doctrine on Human Rights," *Journal of Catholic Social Thought* 10/1 (2013): 69, 74, available at https://www1.villanova.edu/content/dam/villanova/ mission/2015workshop/Glendon%2010-1.pdf.

supposed serve in the first place: the human person. Any inversion of that relationship between rights and dignity for ideological and political reasons will only end up causing the human modern human rights project to fail, for then even these declarations about human rights will turn into a tool to be used by those with the most power, resources, or capacities. The historical experience of the United States and Poland show the outcome of such a course: both of their constitutions are the result of revolutions and resistance against what was seen as oppression and a denial of their legitimate rights. Their drafters saw the problems that were created whenever rights were proclaimed on paper but disregarded in practice. Here, the pope calls us to reconnect fundamental human rights to their realization for all members of the human family.

Second, John Paul II notes the important but limited role of democracy in guaranteeing protections for human life. He writes about this in light of his experiences under both fascism and communism in Poland during WWII and the post-war years:

> Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality. Fundamentally, democracy is a "system" and as such is a means and not an end. Its "moral" value is not automatic, but depends on conformity to the moral law to which it, like every other form of human behavior, must be subject: in other words, its morality depends on the morality of the ends which it pursues and of the means which it employs.[60]

This statement pertains to the question of correlating political structures to appropriate ends. Under Catholic social teaching, democracies should promote participation, self-determination, and accountability. To be morally legitimate forms of government, they must serve the human person and grant respect for those "inviolable and inalienable human rights, and the adoption of the 'common good' as the end and criterion regulating political life."[61] Insofar as democracy does not serve these ends, it is morally deficient and needs to improved so as to promote the protection of human life. In the abortion context, this can be accomplished, at least in part, through governmental policies that provide material support in cases of unplanned pregnancy, family aid, and healthcare to both mother and child, much as what Poland aspires to in its

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[60] EV §89.
[61] Ibid.

Family Planning Law.

Furthermore, John Paul II critiques what he saw as the "majoritarian" impulse to which democracies are susceptible, especially in comparison to other political systems. While the United States and Poland differ on how abortion was legalized in their respective countries (a judicial act versus a legislative act), the pope writes that the objective value of human life cannot be lessened despite what a particular legislative vote or case ruling may say:

> The basis of these values cannot be provisional and changeable "majority" opinions, but only the acknowledgment of an objective moral law which, as the "natural law" written in the human heart, is the obligatory point of reference for civil law itself.[62]

Democracy's valorization of participation must be balanced by an understanding of "truth" and must have an "objective moral grounding."[63] If not built on the "values of the dignity of every individual and solidarity between all peoples," participation is only illusory because that system only gives weight only to one segment of society; in that case "democracy easily becomes an empty word." What are these values? They are the assertions that human rights flow from an inviolable and intrinsic dignity and that rights flow from this dignity: "values which no individual, no majority and no State can ever create, modify or destroy, but must only acknowledge, respect and promote."[64]

In essence, John Paul II calls us to rediscover the vision of relationship between the civil law and the moral law. While respecting the distinction between the two spheres of law, he draws upon Thomas Aquinas's notion of law when he states that any law not in accord with the "fundamental principles of absolute respect for life and of protection of every innocent life" is lacking in juridical validity.[65] On this topic Aquinas wrote:

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[62] EV §70.

[63] Ibid.

[64] Ibid. §71.

[65] Cf. Rev. Dr. Martin Luther King's "Letter from a Birmingham Jail" (Apr. 16, 1963), available at https://www.africa.upenn.edu/ Articles_Gen/Letter_Birmingham.html: "Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust."

Disregard for the right to life, precisely because it leads to the killing of the person whom society exists to serve, is what most directly conflicts with the possibility of achieving the common good. Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law.[66]

Of course, not all States will recognize this as an appropriate limitation and some may allow for positive law or constitutional provisions that promote or even uphold the right to abortion as a positive good. What to do in such instances? In the sections of *Evangelium Vitae* on the limits of legitimate cooperation with evil, John Paul II argues that a legislator may, in certain instances, vote for a law that regulates abortion. He writes:

In a case like the one just mentioned, when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.[67]

Here John Paul II recognizes the important role of intent and the need to prudentially judge in each political context ways by which to promote the value of human life or, at the least, limit the further spread of abortion. Thus, abortion regulations such as those promoted in *Casey* and similar cases (e.g., informed consent, waiting periods, bans on specific procedures) are consistent with those ideas because they seek to limit and contain the incidences of abortion. Nevertheless, whatever the specific constitutional and statutory schema that regulates abortion in a country, John Paul II notes the inviolability of conscience in §74 of *Evangelium Vitae*:

To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right. Were this not so, the human person would be forced to perform an action intrinsically incompatible with human dignity, and in this way human freedom itself, the authentic meaning and purpose of which are found in its orientation to the true and the good, would be radically compromised.... Those who have recourse to conscientious objection must be protected not only from legal penalties but also from

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[66] EV §72.
[67] EV §73.

any negative effects on the legal, disciplinary, financial and professional plane.

It is one thing to allow for abortion in a country, but it is a different thing altogether to compel those who abhor the practice to perform it or participate in its furtherance. Thus, in countries that have permitted abortion, John Paul II calls for adequate protections of conscience to ensure that the legitimate rights of healthcare professionals and others are adequately considered. As mentioned previously, Poland incorporates conscience protections into its Family Planning Laws. The United States also has various laws that protect the conscience rights of healthcare providers.[68] Incorporating laws like these would go far in ensuring that those tasked with promoting life and safeguarding health are protected in their work.

With these broad strokes written about Catholic social teaching and, more specifically, *Evangelium Vitae's* approach to abortion, we can see that the late pope calls for a promotion of an authentic human rights discourse that is not ideological but that respects all members of the human family and the fundamental value of life, a rediscovery of the relationship between moral law and the civil law that safeguards society's true function to protect life and to serve the human person, and the need to "carve-out" appropriate balances in instances where it is not possible to pass fully pro-life laws by ensuring that legislators limit the evil of abortion or that allow conscience protections to be taken into account.

Conclusion

This paper attempts to show how two very different countries – with

[68] These include the Church Amendments (42 U.S.C. § 300a-7 et seq.), the Public Health Service Act (42 U.S.C. § 238(n)), the Weldon Amendment, and provisions of the Affordable Care Act (ACA). More information on specific conscience protections can be found at this link: https://www.hhs.gov/civil-rights/for-individuals/conscience-protections/factsheet/index.html (accessed August 2017). The appropriations bill in the U.S. Congress of spring 2018 would have strengthened those conscience protections through what was known as the Conscience Protection Act of 2017 (H.R. 644/S. 301). Among other measures, it would have provided medical personnel legal recourse to violations of conscience rights – a remedy long available to other victims of civil rights violations. Unfortunately, that measure was not included in the final bill that was signed by President Trump. For a summary of the CPA, see: http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/CPA-2017-FactSheet.pdf.

varied political, cultural, religious, and historical backgrounds – addressed the same topic of abortion. It analyzed the constitutional and statutory basis of abortion in the United States in *Roe v. Wade* and *Casey v. Planned Parenthood*, as well as statutorily permissible regulations in that framework. It also analyzed Poland's Family Planning Law of 1993 and subsequent caselaw on the domestic and international level regulating abortion in that country. Ultimately, both countries have chosen different paths to regulate abortion. The United States constitutionalized the practice in its caselaw, whereas Poland allowed abortion through statutory regulation. The former gave little weight to the separate interest of the unborn child's life, while Poland's framework recognized competing constitutional interests. Finally, the paper addressed John Paul II's encyclical *Evangelium Vitae* and reflected on the relationship between human rights, the civil law, and moral law as well as appropriate interventions in the abortion context. It is incorporating these concerns that legislators, policy-makers, and other persons of good will can come to a workable framework that respects human life and supports women in the midst of difficult pregnancies. Only in this way can both societies be truly said to support life and human dignity – in fulfillment of the best of the principles and aspirations that gave rise to their founding documents.[69]

[69] I am grateful to Professor Paolo Carozza for reviewing the first draft while I was studying for my LL.M. at Notre Dame.