

**REHABILITATING THE “MYSTERY
PASSAGE”: AN EXAMINATION OF THE
SUPREME COURT’S ANTHROPOLOGY
USING THE PERSONALISTIC NORM
EXPLICIT IN THE PHILOSOPHY OF
KAROL WOJTYŁA**

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Every notion of human liberty rests on an underlying assumption about what it means to be human. In other words, some theory about human nature and some hypothesis about the person’s origin, purpose, and destination are necessary to give substance to the concept of liberty. To borrow from Wojtyła, liberty is “within the domain of the person. It is impossible to understand anything about it without understanding what the person is, its mode of existence, its functioning, its powers.”¹ The shape liberty takes in a given society will depend on that society’s public anthropology.² If a given society has a good grasp of human nature, if it understands the reality of the human

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¹ KAROL WOJTYŁA, *LOVE AND RESPONSIBILITY* 18 (1993) (referring to sexual morality, which deals with a specific type of liberty).

² See John Coughlin, *Law and Theology: Reflections on What It Means to Be Human from a Franciscan Perspective*, 74 ST. JOHN’S L. REV. 609, 610 (2000) (“Every system of law reflects certain foundational assumptions about what it means to be human.”). These can be referred to as “anthropological assumptions.” *Id.*; see also Michael Scaperlanda, *Illusions of Liberty and Equality: An “Alien’s” View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV. 5, 52 (2005); Michael Scaperlanda, *Producing Trousered Apes in Dwyer’s Totalitarian State*, 7 TEX. REV. L. & POL. 175, 196 n.118 (2002) [hereinafter Scaperlanda, *Trousered Apes*]; Michael Scaperlanda, *Realism, Freedom, and the Integral Development of the Human Person: A Catholic View of Education*, 44 J. CATH. LEGAL STUD. 65, 67 (2005) [hereinafter Scaperlanda, *Realism*].

person, it has a firm foundation upon which to build a society where free human beings can flourish. If, however, a society has a flawed understanding of the human person, its concept of freedom is likely to be flawed as well, giving rise to the very real possibility that the “liberty” it offers its denizens will lead to their destruction or diminishment as human beings.³

Suspend disbelief for a moment and engage with me in a simple thought experiment. Suppose one member of a submarine crew gets an acute case of claustrophobia. Subjectively, he intensely experiences an acute lack of freedom as he is confined within a small tube with neither windows nor privacy several hundred feet below the ocean surface. At wits end, and with no thought of suicide, he opens a hatch to escape his life-sustaining prison causing destruction to everyone aboard. This person’s subjective idea of freedom was at odds with the objective order. In his gravely disordered understanding of freedom, he exercised his will and took action in a way that violated clear biological or material laws. In reality, his claustrophobia diminished his capacity for authentic freedom as his reason was subordinated to his senses creating a mirage—an illusion—of freedom from his desperate feeling of suffocation.⁴

At a basic level, freedom for the human person requires recognizing and obeying the objective laws necessary for the human organism’s survival. At a more advanced level, freedom

³ See Scaperlanda, *Trousered Apes*, *supra* note 2, at 214–15 (noting that faulty perceptions about reality—specifically, misunderstandings concerning the truth about the human person—can lead to toxic judgments as the exercise of “misguided compassion . . . remove[s] the human from its life sustaining environment”). In *Realism, Freedom, and the Integral Development of the Human Person: A Catholic View of Education*, *supra* note 2, at 89–90, I recount the story of a former homecoming queen and cheerleader who left children behind to pursue the “free life.” “Homelessness, heroin addiction, and AIDS each unmasked her illusion” of freedom. *Id.*

⁴ Other examples, although not leading to immediate death or destruction, are equally clear. Take, for example, the case of the alcoholic who exercises his “freedom” to continue drinking. In one sense he is free, but in another, deeper sense, we know that he is a slave to his addiction and that continuing to drink will destroy not only his physical health, but his mental, emotional, and spiritual health in addition to the well-being of his family. Or, to take another example, we encourage college-educable teenagers to graduate from high school and go to college. We encourage them to exercise their freedom in a certain direction for their own good, knowing that exercising “freedom” to seek immediate gratification out of youthful rebellion or dislike of school will lead to their own destruction or diminishment.

for the human person requires recognizing and obeying the objective laws necessary for human flourishing.

In reaffirming *Roe v. Wade*,⁵ the United States Supreme Court, in *Planned Parenthood v. Casey*,⁶ articulated a vision of liberty, embedding it in our constitutional framework, making it a norm that is binding on our government institutions and providing a culturally powerful sound bite for one vision of liberty.⁷ It said: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁸ And, as the Court made clear in *Casey*, it is not just the right to define one's own concept of existence, but the right to act on that definition.⁹ Some dismissed what Justice Scalia has dubbed the "sweet-mystery-of-life passage"¹⁰ as mere rhetorical flourish,¹¹ but the Ninth Circuit's Judge Reinhardt took it seriously, relying on it to hold that Washington's ban on assisted suicide was unconstitutional.¹²

⁵ 410 U.S. 113 (1973).

⁶ 505 U.S. 833 (1992).

⁷ The *Casey* Court said it was not just interpreting our constitutional law, but speaking before all others with respect to our constitutional ideals. *Id.* at 868 ("Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible."); see also Richard Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1279 (2006) ("[W]e should think of the Constitution as a partly aspirational document, embodying ideals that are not yet and perhaps need not ever be fully realized but that remain constitutional ideals nonetheless.").

⁸ *Casey*, 505 U.S. at 851.

⁹ In *Casey*, the Court upheld Roe's "essential holding" that a woman has a constitutionally protected right to terminate her pregnancy. *See id.* at 846.

¹⁰ *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

¹¹ See Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469, 525 (1998) ("[S]cholars have aptly argued that this passage must be considered within the context of the plurality's entire opinion and its emphasis on stare decisis. Within that context, the passage should be most accurately understood as rhetorical and not as prescriptive of any specific rights.").

¹² *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996). Relying on the "mystery passage,"

The district judge in this case found the Court's reasoning in *Casey* "highly instructive" and "almost prescriptive" for determining "what liberty interest may inhere in a terminally ill person's choice to commit suicide."

We agree.

Like the decision of whether or not to have an abortion, the decision how

When the Supreme Court ignored Reinhardt's reasoning and decided that a person did not have a constitutional right to define himself out of existence through assisted suicide,¹³ it looked as though the mystery passage would be of marginal legal and cultural significance.¹⁴ But, the mystery passage reappeared in Justice Kennedy's majority opinion in *Lawrence v. Texas*¹⁵ providing a cultural/legal foundation for the decision to strike down Texas' ban on homosexual sodomy.¹⁶

This "mystery passage" is the public "creation story" given to us by the high priests of American law. I call it a "creation story" because an implicit anthropology—an implicit understanding of what it means to be human—underlies this view of liberty.¹⁷ Specifically, it might be called a "self-creation" story because it proposes that human beings are creatures capable of creating themselves—pursuing their own life's ends—and worthy of such an endeavor. In this essay, I will examine the Court's "creation story" and attempt to tease out its underlying anthropology.¹⁸

and when to die is one of "the most intimate and personal choices a person may make in a lifetime," a choice "central to personal dignity and autonomy." A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent. How a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.

Id. at 813–14 (citation omitted).

¹³ *Washington v. Glucksberg*, 521 U.S. 702, 727–28 (1997) (addressing *Casey*'s mystery passage, the Court found "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . and *Casey* did not suggest otherwise").

¹⁴ See, e.g., Lynn Marie Kohm & Colleen Holmes, *The Rise and Fall of Women's Rights: Have Sexuality and Reproductive Freedom Forfeited Victory?*, 8 WM. & MARY J. WOMEN & L. 381, 402 (2000) ("[T]he Court distanced itself from this language in *Casey*, and the mystery passage in particular. . . . As *Glucksberg* demonstrates, the Court is clearly uncomfortable with its broad definition of liberty.").

¹⁵ 539 U.S. 558 (2002).

¹⁶ *Id.* at 574.

¹⁷ See Richard W. Garnett, "Everlasting Splendours:" *Death-Row Volunteers, Lawyer's Ethics, and Human Dignity*, in RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW 254, 272 (Michael Scaperlanda & Teresa Collett eds., forthcoming 2007) (referring to *Casey* as an "autonomy-centered anthropology"). *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and *Lochner v. New York*, 198 U.S. 45 (1905), each have their own anthropological foundations, the exploration of which is beyond the scope of this essay.

¹⁸ As of April 28, 2006, there were 58 articles on Westlaw that mentioned the

Where found wanting, I will attempt to rehabilitate it using the personalistic norm developed in Karol Wojtyła's philosophy and expressed in his book *Love and Responsibility*.¹⁹ If the Court has an adequate understanding of the human person, then its creation story will provide a firm basis for protecting the liberty of individuals from the power of the state.²⁰ If, however, the Court's anthropology is faulty, its idea of liberty is likely to be faulty, possibly in dangerous ways. Since it is purporting to speak for all Americans and for the foundation of our common life together, the consequences of getting it wrong (or right) reverberate throughout society.

Is the mystery passage an adequate creation story upon which to base our nation's concept of liberty? At first blush, there is much to recommend the Court's view because it recognizes, implicitly or explicitly, four fundamental truths about the human being. First, it understands the vital importance of liberty for the human condition, recognizing that the inner structure of the human being yearns for freedom.²¹ To a large

"mystery passage." For expanded reading on the "mystery passage," see Francis J. Beckwith & John F. Peppin, *Physician Value Neutrality: A Critique*, 28 J.L. MED. & ETHICS 67, 69, 72 (2000); Gerard Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 189, 200-03 (2004); John M. Breen, *Justice and Jesuit Legal Education: A Critique*, 36 LOY. U. CHI. L.J. 383, 407-08 n.108 (2005); Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 555-56 (2003); William K. Kelley, *Inculcating Constitutional Values*, 15 CONST. COMM. 161, 178-79 (1998); Stephen B. Presser, *Some Thoughts on Our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., the Unborn, the Senate, and Us*, 1 AVE MARIA L. REV. 113, 113-15 (2003); Charles Rice, *Rights and the Need for Objective Moral Limits*, 3 AVE MARIA L. REV. 259, 272-73 (2005); Patrick Shrake, *Griswold at 40: The State's Compelling Interest in Banning Contraceptives*, 2 U. ST. THOMAS L.J. 475, 487-88 (2005); John Tuskey, *What's a Lower Court To Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy*, 21 TOURO L. REV. 597, 613-32 (2005).

¹⁹ WOJTYŁA, *supra* note 1; see also ROCCO BUTTIGLIONE & KAROL WOJTYŁA, *THE THOUGHT OF THE MAN WHO BECAME POPE JOHN PAUL II* (1997); JOHN PAUL II, *MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY* (2006) (providing an extended theological meditation on the same subject); KAROL WOJTYŁA, *THE ACTING PERSON* (1979).

²⁰ The question of whether it is proper for the judiciary to enforce (create?) unwritten constitutional norms is beyond the scope of this paper. For my thoughts on the issue, see Michael Scaperlanda, *In Defense of Representative Democracy*, 54 OKLA. L. REV. 38, 38-45 (2001).

²¹ This point may be too obvious to footnote, but I thought it interesting that an April 27, 2006 search on Amazon's website revealed more than 150 not-yet-released books listed under the broad subject of "freedom" and over 17,000 books in print addressing this subject.

extent, the story of the Twentieth Century, the story of World War II and the Cold War, is the story of the struggle for freedom against those who would enslave, oppress, and tyrannize.²² At the heart of the human person is the desire for freedom. Second, this recognition of the importance of liberty, coupled with the Court's willingness to attempt to protect the individual's liberty, represents an implicit recognition that the human person has an objective value, a dignity as a person, worth protecting and preserving.²³ Third, it recognizes that human beings, in the exercise of their freedom, yearn for meaning—yearn for answers to life's ultimate questions.²⁴ Fourth, the Court seems to recognize a certain personal and subjective dimension to the answers, understanding that a person will define himself by his own answers to these questions.

The Supreme Court appears to have gotten a lot right in articulating a creation story to express the "heart of liberty."²⁵ Reason and experience testify to these four fundamental truths: human beings possess a dignity that requires respect; essential to this respect is freedom or liberty for the human being; in freedom the human being will search for answers to life's ultimate questions; and the human being will fashion his life—create himself—around the answers that he has found to those questions. But, is the Court's story of self-creation complete? Is it adequate? Or, does it have serious flaws, which endanger the whole enterprise? I will argue that the Court's anthropology, its story of self-creation, is incomplete, leading the Court into serious error about the nature of freedom.

²² See generally GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II (2005).

²³ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005).

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.

Id. at 578 (internal quotation marks omitted).

²⁴ See, e.g., VIKTOR E. FRANKL, MAN'S SEARCH FOR MEANING 84 (2000).

²⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

Although the Court's creation story implies an objective basis upon which to build its case for the "heart of liberty," the Court a) fails to articulate the basis for its objective view of the human being, and b) fails to analyze the subjective liberty of the individual to self-create in light of the objective foundation for that liberty. It asserts that the person must be free to pursue her own ends based upon her own conception "of existence, of meaning, of the universe, and of the mystery of human life."²⁶ But why? Who or what is the human being to be entitled to respect and dignity? Who or what is the human being to be entitled to a certain space to take the stuff of her existence and create a life unique to herself? At one level it is an obvious untruth to suggest that we create ourselves by our own conception of existence.²⁷ We did not conceive ourselves into existence. We found ourselves in existence, and we found ourselves with a certain capacity to wonder about our existence, its origin, purpose, and destination. Either some supernatural intelligence created us or we are the product of the blind processes of nature. We didn't ask to come into existence, and we didn't choose the parents, the culture, or the circumstances in which we were raised. We didn't choose our IQ or our level of athletic ability. To a great degree we are not in control of our lives, although we create great myths to give us the illusion of control. And, unless we choose suicide, which is not among the judicially protected constitutional liberties, we do not choose our own final earthly end. I would also venture to guess that if we surveyed all the cultures throughout history, the idea that each and every human being has an inherent dignity that must be respected by the state and that this respect requires a certain amount of space for self-creation, would be held only by a distinct minority of cultures.

Given this objective material and historical reality, what or who is the human person that he is entitled to dignity, respect, and freedom? The Court doesn't answer the question; in fact, it doesn't even ask the question. Instead, it merely assumes that

²⁶ *Id.* at 851.

²⁷ See, e.g., WOJTYLA, *supra* note 1, at 222–23 (stating that "[t]he concept 'creature' denotes a special form of dependence" on that which brought the creature into "existence ('to be created' means 'to depend for one's existence')"). This leads to a paradox: The human person "is at once his own property (*sui juris*) and as a creature, the property" of that creative life force that brought him into existence. *Id.* at 223.

the human being has an inherent dignity, which requires respect for the individual's subjective freedom,²⁸ but it doesn't tell us why this is true. In other words, the Court's creation story is incomplete because it divorces the pursuit of personal, subjective ends from the objective reality of the person. Self-creation is not and cannot be the whole of the matter. But, without going back further in time and deeper into the person to ask and answer the "why" question, the Court's attempt to develop a thick conception of the individual's liberty rests on a very thin and unstable conception of the individual. Three consequences flow from the Court's failure to fill in the rest of the blanks in its creation story.

First, without a firm foundation, dignity and freedom—the very things that the Court wants to protect—are on precarious ground, threatening the long-term prospects for the whole enterprise of securing liberty for the individual. This problem may not manifest itself in a way that most people will notice in the near term because our culture still employs the term "human dignity" with great frequency, and liberty remains one of our cherished concepts. But, in the long term, the failure to root liberty and dignity in an explicitly-articulated objective reality is bound to have consequences.²⁹ Without a firm foundation rooted in objective truth, we are like frogs in a pot of water as the temperature slowly rises to the boiling point.

Second, the Court will not consistently apply the principle enunciated in the mystery passage. It will not exercise its power to protect the right of each person to act on his own subjective definition of "existence, of meaning, of the universe, and of the mystery of human life."³⁰ The Court will exercise some form of judgment to conclude that some other goals or some other goods trump some exercises of liberty some of the time. Potentially, the Court could employ the "harm principle," allowing each person to freely pursue his own self-defined ends so long as that person does not visit nonconsensual,³¹ tangible, and concrete harm on

²⁸ See *Casey*, 505 U.S. at 851.

²⁹ See, e.g., GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 108–14 (2005) (attributing "the deprivations of the French Reign of Terror, Nazism, and communism" to "radically secularist understandings of the human person, human community, and human destiny" in modern secular European states, in contrast to the Catholic Church's robust commitment to democratic freedoms).

³⁰ *Casey*, 505 U.S. at 851.

³¹ Consensual harm ought to be protected under the Court's purely subjective

another.³² Setting aside the problem of determining what constitutes harm, the Court has not followed this path to date. Ignoring *Casey's* mystery passage, the Court, in *Washington v. Glucksberg*, said that other goods, articulated by the state, trumped the liberty to seek and receive assistance in committing suicide, despite the fact that no tangible or concrete harm would befall a nonconsenting person.³³

Because it has failed to articulate the objective basis upon which to build its concept of liberty, the Court lacks an adequate criterion for deciding when the state has the authority to restrict a person's exercise of liberty in the name of some other good. Without an explicit objective understanding of the human person that can give the Court guidance as to what goods ought to be

understanding of the heart of liberty, provided sufficient safeguards are in place to ensure that the person harmed fully and freely consents. After all, one's "concept of existence, of meaning, of the universe, and of the mystery of human life," might involve receiving or inflicting harm. *Id.* at 851.

³² The "harm principle" maintains that:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); see, e.g., Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 125, 125 (2006). Lawrence fears that the autonomy generated by following the "harm principle" is under attack today.

America in the early twenty-first century is a place where oppressive state constitutional amendments discriminate against millions of gay Americans; where compassionate end-of-life choice is illegal in 49 states and where the one state where it is legal is being sued by the U.S. government; where hundreds of thousands are arrested yearly and tens of thousands are in prison for private possession or use of marijuana and the federal government successfully sues to prevent a state from allowing the use of medical marijuana; where a woman's right to maintain control over her own reproductive decisions hangs by a thread; and where religious freedom is under relentless attack.

Id.

³³ See *Washington v. Glucksberg*, 521 U.S. 702, 723, 725–27 (1997). In other areas where the "harm principle" would suggest juridical abstinence, it seems unlikely that the Court will interfere with state choices to protect goods other than autonomy. For example, I doubt that the Supreme Court would overturn helmet laws to allow the motorcycle Zen Master the freedom to ride his motorcycle with his locks flowing in the wind. Cf. ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES* 3 (HarperCollins 1999) (1974). It also seems unlikely that the Court would seriously entertain a challenge to animal cruelties laws despite the fact that animals are not rights-bearing creatures.

pursued independent of an individual's own desires, the Court will be hardpressed to explain adequately why actions based upon some conceptions of "existence, of meaning, of the universe, and of the mystery of human life"³⁴ are worthy of protection while others are not. Reading the mystery passage's logic into the Court's substantive due process cases, it becomes apparent that the Court carves out a space for self-creation most often in matters dealing with sex and the consequences of sex.³⁵ By what criterion does the Court find these values worthy of the protection while other values are not?

Third, the harmful consequences of a liberty rooted purely in the subjective desires and preferences of the rights-bearer with no foundation in objective truth have been clearly established in the Supreme Court's jurisprudence. Building on *Casey*, the Court, in *Stenberg v. Carhart*,³⁶ upheld the right to terminate the life of what is undeniably an innocent human being—a child in the process of being born.³⁷ District Judge Richard Casey characterized partial-birth abortion as "a gruesome, brutal, barbaric, and uncivilized medical procedure."³⁸ *Stenberg*, Justice Scalia concluded, is not "a regrettable misapplication of *Casey*," but the "logical and entirely predictable consequence" of that decision.³⁹

I have identified three problems with the Court's anthropology as expressed in the mystery passage: it lacks an explicit objective foundation, it lacks a criterion for judging when the

³⁴ *Casey*, 505 U.S. at 851.

³⁵ *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 564, 578–79 (2003) (adult homosexual conduct); *Casey*, 505 U.S. at 846 (abortion); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 440–43 (1972) (distribution of contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 480–83 (1965) (access to contraceptive information and materials for married couples).

³⁶ 530 U.S. 914 (2000).

³⁷ *See id.* at 920–22, 937–38; John Breen & Michael Scaperlanda, *Never Get Out'a the Boat: Stenberg v. Carhart and the Future of American Law*, 36 CONN. L. REV. 297 (2006).

³⁸ *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004); *see also Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 290 (2d Cir. 2006) (Walker, J., concurring) ("[The *Carhart* Court] effectively held that the deeply disturbing—and morally offensive—destruction of the life of a partially born child cannot be banned by a legislature without an exception for the mother's health (as determined by her doctor)."); *id.* at 312 (Straub, J. dissenting) ("I find the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable.").

³⁹ *Stenberg*, 530 U.S. at 954 (Scalia, J., dissenting).

individual’s pursuit of her own subjective ends ought to be free of state control, and these first two problems have led the Court to sanction a “gruesome, brutal, barbaric, and uncivilized” practice in the name of liberty. The problems with the mystery passage can be resolved—its “creation story” rehabilitated—by completing the story and putting it on an objective basis.⁴⁰ In this essay, I suggest that the personalist norm, which is at the heart of Karol Wojtyla’s philosophy, can guide the way to a firm foundation.

What is the human being? Why does it have a dignity worthy of respect? Why does this respect require liberty—space for the individual to pursue her own subjective ends? Wojtyla begins his analysis by noticing that in the world of objects, the human being is a “somebody” and not a “something.”⁴¹ “Implicit in this simple, elementary distinction is the great gulf which separates the world of persons from the world of things.”⁴² He continues: “The term ‘person’ has been coined to signify that a man cannot be wholly contained within the concept ‘individual member of the species’, but that there is something more to him, a particular richness and perfection in the manner of his being”⁴³ The individual human being is a “person” or a “somebody” because “he is a rational being,” an object with “the ability to reason.”⁴⁴ This makes the person a unique subject in all the world of subjects. As Wojtyla says, “[s]peaking figuratively, we can say that the person as a subject is distinguished from even the most advanced animals by a specific inner self, an inner life, characteristic only of persons.”⁴⁵ He continues:

Inner life means spiritual life. It revolves around truth and goodness. And it includes a whole multitude of problems, of

⁴⁰ Rehabilitating the mystery passage is no panacea. The basic institutional question—does the Court have constitutionally-granted authority to enforce unwritten norms?—remains. And, the interpretative task (whether or not it includes unwritten norms) will at times be difficult even when applying a rehabilitated anthropology.

⁴¹ WOJTYLA, *supra* note 1, at 21.

⁴² *Id.*

⁴³ *Id.* at 22.

⁴⁴ *Id.* “Hence Boethius’s famous definition of a person as simply an individual being of a rational nature (*individua substantia rationalis naturae*). This differentiates a person from the whole world of objective entities, this determines the distinctive character of a person.” *Id.*

⁴⁵ *Id.*

which two seem central: what is the ultimate cause of everything and—how to be good and possess goodness at its fullest. The first of these central problems of man's interior life engages cognition and the second desire or, rather, aspiration. Both of these functions, though, seem to be more than that, to be rather what might be called natural tendencies of the whole human entity. Significantly, it is just because of his inner being, his interior life, that man is a person, but it is also because of this that he is so much involved in the world of objects, the world 'outside' . . .⁴⁶

This leads Wojtyla to conclude: "A person is an objective entity, which as a definite subject has the closest contacts with the whole (external) world and is most intimately involved with it precisely because of its inwardness, its interior life."⁴⁷

The Supreme Court's anthropology, its story of the right to subjective self-creation, implies that the human individual has inherent dignity. Here, Wojtyla supplies the basis for that conclusion. This basis provides an objective foundation for the proposition that the person ought to be free, that the human person has an inalienable right to liberty. Wojtyla develops the argument by noticing that it is inherent in "the nature of his being" for the person to strive "to assert himself, his 'I'" in the world around him.⁴⁸ The human person's "nature . . . includes the power of self-determination, based on reflection, and manifested in the fact that a [person] acts from choice. This power is called free will."⁴⁹ A subject that "possesses free will" is in some sense "his own master."⁵⁰ As Wojtyla says:

The Latin of the philosophers defined it in the assertion that the personality is *alteri incommunicabilis*—not capable of transmission, not transferable. . . . The incommunicable, the *inalienable*, in a person is intrinsic to that person's inner self, to the power of self determination, free will. *No one else can want for me.* No one can substitute his act of will for mine. It does sometimes happen that someone very much wants me to want what he wants. This is the moment when the impassable frontier between him and me, which is drawn by free will, becomes most obvious. I may not want that which he wants me

⁴⁶ *Id.* at 23.

⁴⁷ *Id.*

⁴⁸ *Id.* at 23.

⁴⁹ *Id.* at 23–24 (distinguishing our nature further from that of animals).

⁵⁰ *Id.* at 24. "[S]ui juris as the Latin phrase has it." *Id.*

to want—and in this precisely I am *incommunicabilis*. I am, and I must be, independent in my actions. All human relationships are posited on this fact. All true conceptions about education and culture begin from and return to this point.⁵¹

Like the Court, but on a clearly articulated objective basis, Wojtyla holds that persons as persons must be free to pursue their own subjective ends. And, like the Court, he knows that the ends pursued will be directed by explicit or implicit answers given by the person to life's ultimate questions, the "mystery of the universe" questions. As pope, he framed it this way: the "questions *Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life[,] . . .* have their common source in the quest for meaning which has always compelled the human heart."⁵² And, "the answer given to these questions decides the direction which people seek to give to their lives."⁵³

But a problem immediately arises. Human beings are not only subjects, but also objects of action.⁵⁴ "At every step acts occur which have, as their object, other human beings."⁵⁵ Given the inherent dignity of each and every person, what are the obligations of "Person A" toward "Person B" when "Person B" is an object of the acts of "Person A?" "Is it permissible to regard a person as a means to an end and to use a person in that capacity?"⁵⁶ Wojtyla's answer is an emphatic no. In *Love and Responsibility*, he makes this point by reformulating Kant's imperative:

[W]henever a person is the object of your activity, remember that you may not treat that person as only the means to an end, as an instrument, but must allow for the fact that he or she, too, has, or at least should have, distinct personal ends. This principle, thus formulated, lies at the basis of all the human

⁵¹ *Id.*

⁵² JOHN PAUL II, ENCYCLICAL LETTER *FIDES ET RATIO* ¶ 1 (1998).

These are the questions which we find in the sacred writings of Israel, as also in the Veda and the Avesta; we find them in the writings of Confucius and Lao-Tze, and in the preaching of Tirthankara and Buddha; they appear in the poetry of Homer and in the tragedies of Euripides and Sophocles, as they do in the philosophical writings of Plato and Aristotle.

Id.

⁵³ *Id.*

⁵⁴ See WOJTYLA, *supra* note 1, at 24.

⁵⁵ *Id.*

⁵⁶ *Id.* at 26.

freedoms, properly understood, and especially freedom of conscience.⁵⁷

The personalistic norm can be stated in both the negative and the positive. “[I]n its negative aspect,” the norm “states that the person is the kind of good which does not admit of use and cannot be treated as an object of use and as such the means to an end.”⁵⁸ Stated positively, the “norm confirms this: the person is a good towards which the only proper and adequate attitude is love.”⁵⁹ And, “love for a person must” at least “consist in affirmation that the person has a value higher than that of an object for consumption or use.”⁶⁰ This, Wojtyla says, is a matter of justice, because “[a] person’s rightful due is to be treated as an object of love, not as an object for use.”⁶¹ This type of love, Wojtyla argues, “depends on [a person’s] willingness consciously to seek a good together with others, and to subordinate himself to that good for the sake of others, or to others for the sake of that good.”⁶² In a simplified example, he gives the case of an employer-employee relationship, suggesting that inherent in that relationship,

is a serious danger that the employee may be treated as a mere instrument. . . . If, however, the employer and employee so arrange their association that the common good which both serve becomes clearly visible, then the danger of treating a person as someone less than he really is will be reduced almost to nothing.⁶³

⁵⁷ *Id.* at 28.

⁵⁸ *Id.* at 41. In his conclusion, but for very different reasons, Wojtyla follows Kant. See MICHAEL WALDSTEIN, INTRODUCTION, IN JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY 52 (2006) (quoting Kant’s *Groundwork of Morals*) (“Act in such a way that at all times you treat human nature in your own person as well as in the person of every other human being simultaneously as a purpose, never as a means.”). Waldstein’s *Introduction* explores Kant’s influence on Wojtyla’s thought. *Id.* at 34–63. “In the end, however, [Wojtyla] stands Kant on his head, based on his Carmelite personalism and his richer understanding of nature.” *Id.* at 63 (stating that Wojtyla embraces an integral personalism, rejecting Kant’s dualistic understanding of the human being).

⁵⁹ *Id.*

⁶⁰ *Id.* at 42.

⁶¹ *Id.*

⁶² *Id.* at 29.

⁶³ *Id.* For an attempt to live out these principles in the corporate context, see Philip Preville, *For God’s Sake*, CANADIAN BUS., June 25, 1999, at 58 (noting the tools that J. Robert Ouimet, a successful Canadian businessman, has instituted in his factories to ensure better lives for his employees, and, as a result, increased productivity).

This brings us back around to the problem with the "mystery passage," the story of self-creation as told by the Court. Taken at face value, the Court seems to be saying that society ought to leave a person alone to determine for himself a hierarchy of values and to pursue his own private ends based on these values, with the possible proviso that he cannot exercise his ends to inflict tangible and concrete harm on another. This leaves the person completely free to pursue purely utilitarian ends if the person concludes that the meaning of life is to maximize pleasure. But, as Wojtyla says,

[i]f I accept the utilitarian premise I must see myself as a subject desirous of as many experiences with a positive affective charge as possible, and at the same time as an object which may be called upon to provide such experiences for others. I must then look at every person other than myself from the same point of view: as a possible means of obtaining the maximum pleasure.⁶⁴

The critical point is that

utilitarianism introduces into [human] relationship[s] a paradoxical pattern: each of the persons is mainly concerned with gratifying his or her own egoism, but at the same time consents to serve someone else's egoism, because this can provide the opportunity for such gratification—and just as long as it does so. This paradoxical pattern . . . means that the person—and not only 'the other person', but the first person too—sinks to the level of a means, a tool. There is an ineluctable, an overwhelming necessity in this: if I treat someone else as a means and a tool in relation to myself I cannot help regarding myself in the same light.⁶⁵

By choosing to pursue his own subjective utilitarian ends, the individual is denying his own personhood, the objective basis for his dignity and freedom, and the personhood of those he would exploit, whether by consent or not. In short, he is acting unjustly toward himself and his neighbor.

"Justice is universally recognized as a cardinal and fundamental virtue, since without it human beings can have no ordered communal life."⁶⁶ Therefore, society, through education, the development of culture, and, in appropriate places, through

⁶⁴ WOJTYLA, *supra* note 1, at 37.

⁶⁵ *Id.* at 39.

⁶⁶ *Id.* at 245.

law,⁶⁷ has a right to “demand from a person, as a thinking individual, that his or her ends . . . be genuinely good, since the pursuit of evil ends is contrary to the rational nature of the person.”⁶⁸ Since “the personalistic norm lays down the rights of the person,”⁶⁹ at a minimum, the state ought to be free to promote this norm, which provides the objective basis for the freedom to pursue one’s own subjective ends. In promoting this norm, the state may, at times, deem it prudent to proscribe certain behaviors that violate this norm.⁷⁰ The state, through its lawmaking bodies, should be free to do so without judicial interference, unless the law would violate a specific constitutional provision.

This analysis points toward the conclusion that embedded within the structure and logic of the “mystery passage” is an inherent limitation on the use and direction of freedom. It is unjust to use another person merely as an object for one’s own pleasure, as a tool for one’s own project, or as an instrument for one’s own ends. The Court’s recognition that a person’s dignity includes the liberty “to define one’s own concept of existence”⁷¹ and to pursue her own ends based upon that definition cannot justly include a constitutionally protected liberty to use another human being instrumentally. This is so because the subjective right to self-definition rests upon the objective value of the human person. To sanction the instrumental use of one person by another is to deny the objective value of that person, thereby destroying the very thing the Court says is “at the heart of liberty.”⁷²

To put its vision of liberty on firm footing, the Court must make explicit the objective basis for the subjective right to self-create. Although there is much to be gained by putting its jurisprudence on an objective basis, such a move comes at a cost.

⁶⁷ The extent to which law ought to be used as a tool to encourage or command goodness is beyond the scope of this essay.

⁶⁸ *Id.* at 27. “This is also the purpose of education, both the education of children, and the mutual education of adults; it is just that—a matter of seeking true ends, i.e. real goods as the ends of our actions, and of finding and showing to others the ways to realize them.” *Id.*; see also *id.* at 196–97 (noting the importance of one’s self-mastery and control).

⁶⁹ *Id.* at 245.

⁷⁰ The prohibition of assisted suicide is one recently-litigated example. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁷¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

⁷² *Id.*

After all, recognizing objective truth about the human person and the nature of freedom requires subordinating subjective preferences and desires to the objective reality. This is easily seen in the material world of gravity and oxygen. The desire to exit a submarine, a spaceship, or an airplane must be subordinated to an objective material reality, with gratification delayed until such time as the environment surrounding the craft is hospitable to human life. The same logic applies equally to the nonmaterial world. Freedom must be ordered toward truth. Therefore, to consciously embrace the objective basis for protecting the person's freedom to pursue subjective ends requires the Court to respect the truth about the person and about freedom. It is beyond the scope of this short essay to review the panoply of ways that this might affect the Court's jurisprudence, but let me suggest that at least some of the cases granting a sexual license would have to be rethought because much of the sex that the Court has licensed over the last few decades violates the personalistic norm. In other words, even though much of the sex licensed by the Court takes place between consenting adults and causes no tangible or concrete harm as defined by a utilitarian ethic, it harms the participants in their very personhood, because each treats the other as an object for one's own sensual or sentimental pleasure.⁷³ Or, at least that is what I glean from popular culture by watching movies, sitcoms, dramas, and commercials. Perhaps there is some other arguable objective basis upon which to build the right to subjectively self-create that comes without this cost to judicial precedent, but I have not seen it.

⁷³ A detailed analysis is beyond the scope of this essay. Sex for merely recreational or relaxation purposes is a clear example:

I want to experience sexual pleasure and want to use you and your body as the object by which I reach sexual gratification. As the price for this experience, I am willing to become an object, a thing, for your use so that you too may achieve sexual satisfaction.

In this all-too-common situation, neither party treats the other as a subject, a person valuable in his or her own right, but merely as a tool for maximizing one's own personal pleasure. Without a committed relationship between persons, and when the cost of obtaining pleasure from the other rises past a certain point, the relationship will be ended, the other discarded, so that the person can go seek less costly alternatives to pleasure.