Seattle University School of Law Digital Commons

Faculty Articles

Faculty Scholarship

2008

Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor

Russell Powell

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>

Part of the [Law and Society Commons](#)

Recommended Citation

Russell Powell, Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor, 15 *WASH. & LEE J. CIVIL RTS. & SOC. JUST.* 327 (2008).

<https://digitalcommons.law.seattleu.edu/faculty/318>

This Article is brought to you for free and open access by the Faculty Scholarship at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Seattle University School of Law Digital Commons.

Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor

Russell Powell*

Table of Contents

I. Introduction	329
II. The Role of Theology in Public Discourse	334
III. The Preferential Option for the Poor.....	338
A. Core Principles of Catholic Social Thought.....	339
B. Origins of the Preferential Option	340
1. Scriptural Bases	341
2. Tradition through the Second Vatican Council	343
3. Latin American Bishops and the Response	348
4. Liberation Theology	351
a. The Origin of Liberation Theology.....	353
b. Later Development of Catholic Latin American Liberation Theology	354
c. Feminist Theology	356
d. Broader Outsider Views.....	356
i. Modern Papal Teaching	357
ii. Episcopal Teaching.....	359
C. Existing Theoretical Moves to Bridge Theology and Secular Legal Discourse	360
D. Relationship to Secular Normative Structures	364

* The author is an associate professor at Seattle University School of Law and would like to thank Steven Shiffrin and Theodore Myhre for graciously offering to read a draft of this article and for suggesting a range of helpful and insightful comments. Thanks also to Peter Fitzpatrick and Tayyab Mahmud for their questions and comments at the Law, Culture and the Humanities conference at Georgetown Law Center, where an earlier version of this work was presented. Finally, special thanks to my research assistants Lindsay Fisher, Sarah Lysons, Dustin Pearson, and Kyle Sommer.

1. Utilitarian Measures.....	364
a. Pareto Optimality	366
b. Kaldor-Hicks.....	366
2. Rawlsian Social Contract.....	367
3. Human Rights Discourse	368
4. Virtue Ethics	370
5. Environmental Ethics.....	371
6. Critical Approaches/Outsider Analysis	372
E. From Moral to Policy Imperatives	374
1. The Role of Subsidiarity	376
a. Individual Responsibility	376
b. Local Communities.....	377
c. Church.....	377
i. Direct Action	378
ii. Advocacy.....	379
d. Government and Positive Law.....	379
3. The Need for Legal Reform.....	380
4. The Need for a Methodology and Tools	380
IV. Epistemology: Standpoint Theory.....	381
A. Standpoint Theory as a Way of Understanding Preferential Option	386
B. Standpoint as an Essential Element of Solidarity.....	387
C. Developing Standpoints	388
1. Sociology	388
2. Postmodern and Feminist Geography.....	388
3. Hearing Marginalized Voices: Implications for Legal Rules.....	390
V. Effecting Change: The Power of Outsider Methodology.....	390
VI. Law and Economics in Service of the Poor	394
VII. A Mandate for Legal Change	397
A. Electoral Rules	397
B. Legal Distribution of Benefits and Burdens.....	398
1. Benefits Law.....	398
2. Tax Law	398
C. Labor and Employment Law	399
D. Corporate Law.....	399

E. Immigration Law.....401

F. Legal Education.....402

VIII. Conclusion.....403

I. Introduction

There is a strange disconnect between the formal understanding of the separation of religion from government in the United States and the almost ubiquitous use of religious language in political discourse, not to mention the web of complicated religious motivations that sit on or just below the surface of policy debates. This paper presents an argument for the relevance of the principle of the "preferential option for the poor" from Catholic social thought in public reason¹ and legal discourse² in order to explore the possible advantages of making the veil between religion and the secular state more permeable. It does not challenge U.S. Constitutional jurisprudence regarding the establishment of religion, which is presumed to be controlling. As a case study, it proposes dialogue between Catholicism and complementary secular thought, including standpoint theory, outsider methodology, and law and economics, to explore possibilities for more effectively ensuring justice for the poor and marginalized. Although other religious traditions have ethical principles similar to the preferential option,³ this paper will focus on its understanding within Catholic social thought.

1. According to John Rawls, "public reason" is the common reason of all citizens in a pluralist society. Public reason is distinguished from "nonpublic reason" employed by citizens either as members of religious associations or as adherents to particular moral and philosophical doctrines. See JOHN RAWLS, *POLITICAL LIBERALISM* 48–54 (Columbia Univ. Press 2005) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. "Public reason" as used in this article is not presumed to exclude all nonpublic reasons, particularly those rooted in religious premises.

2. For purposes of this article, I use the term "legal discourse" in a sense similar to, although perhaps broader than, "public legal reason," as described by Lawrence Solum. See Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1453 (2006) [hereinafter Solum, *Public Legal Reason*] (defining public reason as "the common or shared reason of citizens in a pluralist or democratic society"). I refer to legal discourse by academics, practitioners, and judges.

3. See, e.g., Mairead Maguire, *Reflections on the Fiftieth Anniversary of Gandhi's Assassination*, 64 FELLOWSHIP 4 (1998) (citing Gandhi as having urged people to "recall the face of the poorest person you have ever seen, and ask yourself if the next step you take will be of any use to that person").

Many modern states have adopted such an impenetrable barrier between religion and public discourse that theology,⁴ the language of religious discourse, has become muted or distorted even when it is powerfully potent in motivating lawmakers and voters. By public discourse I mean the broad category of dialogue, debate, and discourse in the public square, which I consider to capture more reasons than public reason.⁵

Legal scholars have identified the strict separation between religion and public discourse as a potential source of injustice.⁶ Steven Shiffrin proposes that public reason, in the sense described by John Rawls,⁷ ought to be open to theological arguments, even if those arguments ultimately need to be contextualized in secular or universal terms at the level of government (in legal opinions or statutes).⁸ The purpose of this opening is to engage theological arguments, particularly those that support oppression, whether they are overtly theological or veiled in secular language, both so that poor theology can be refuted on its own terms and so that the actual role of

4. Here I mean moral theology, which is a major category of doctrine equivalent to religious ethics. Catholic moral theology encompasses social teaching, medical ethics, sexual ethics, and various doctrines on individual moral virtue and moral theory. It addresses questions regarding "how one ought to act," rather than "what one ought to believe," which is the province of dogmatic theology. Although moral theology is developed by theologians, it tends to be advanced most authoritatively through official statements of doctrine, such as papal encyclicals and the documents of both ecumenical councils (such as the Second Vatican Council) and, to a lesser extent, conferences of bishops.

5. See *infra* Part II (discussing the role of theology in public discourse).

6. See, e.g., Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421, 1425 (1996) (arguing that the free exercise clause of the Constitution permits citizens to present religious arguments in public political debate).

7. John Rawls is a prominent American political philosopher from the late 20th century, whose theory of justice emphasizes fairness, social contract, and overlapping consensus. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE: REVISED EDITION (Harvard Univ. Press 1999) [hereinafter RAWLS, A THEORY OF JUSTICE]; see also *infra* Part III.D.2 (outlining the Rawlsian theory of fundamental fairness and the social contract).

8. See Steven Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1656 (1999) (explaining the role of theology in public reason). Shiffrin states:

Clearly, in a pluralistic society, the state should certainly be free from the influence of an established church But, in a pluralistic society, it is precisely my point that churches and believers should be able to weigh in on controversial public questions. To counsel against their input is to betray the principles of liberalism, not to support them.

Id. For a description of Rawlsian public reason see *infra* Part II (highlighting Rawls' view of public reason, which requires theological arguments to be made using independent secular grounds with respect to the role of theological reasoning in public discourse); see also RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 222–54 (arguing that "public reason," as distinguished from "nonpublic reason," is the reason of all citizens in a pluralist society).

religion in influencing policy can be made more transparent. Similarly, Madhavi Sunder posits that the Enlightenment barrier between religious and public life privileges oppressive patriarchal behavior behind the veil that separates religion from the secular state.⁹ This balkanization has resulted in the energizing of conservative, traditionalist, and, in many cases, fundamentalist religious groups.¹⁰ While Professor Sunder uses the experience of Muslim communities to illustrate her thesis,¹¹ her criticism of the wall of separation applies to contemporary religion generally.

Both Shiffrin and Sunder suggest that the formal commitment to exclude overtly religious discourse (as opposed to the odd category of American civil religion)¹² from public reason is actually problematic. For Shiffrin, separation protects bad theology and the policies that it might promote from honest evaluation on its own, theological, terms.¹³ For Sunder, it privileges oppressive patriarchal behavior within the "religious" sphere.¹⁴ In a similar critique, Michael Perry (whose work provides a strong justification for taking seriously the preferential option) argues for the inclusion of religious premises within public discourse on liberal

9. See Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1409–10 (2003) ("[I]n a modern world in which religious authority is increasingly buttressed by the law, and not internal norms, a legal veil, and not religion itself, will increasingly insulate religious community from modernity and change.").

10. See *id.* at 1462 (stating that "legal norms such as cultural relativism and multiculturalism buttress the power of traditionalists over modernizers" and that "[b]ecause law conceives of religion in fundamentalist terms, religious communities are continually being remade to reflect fundamentalist views").

11. See generally *id.*

12. Sociologist Robert Bellah coined this term. See Robert Bellah, *Civil Religion in America*, 96 DAEDALUS, J. AM. ACAD. ARTS & SCI. 1 (Winter 1967), reprinted in BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD 168 (1970). In addition, Americans embrace a common "civil religion" with certain fundamental beliefs, values, holidays, and rituals, parallel to or independent of their chosen religion. *Id.* This belief system has historically been used to attack nonconformist and liberal ideas and groups. *Id.* Civil religion has been criticized for being neither. *Id.* These foregoing assertions are also reinforced in THE ROAD FROM PARADISE: PROSPECTS FOR DEMOCRACY IN EASTERN EUROPE. There, scholars stated:

Civil religion is neither bona fide religion nor ordinary patriotism, but a new alloy formed by blending religion with nationalism. If civil religions were bona fide religions then one would expect to find a soft side to them, teaching love of neighbor and upholding peace and compassion. But this is not the case.

STJEPAN G. MEŠTROVIĆ ET AL., THE ROAD FROM PARADISE: PROSPECTS FOR DEMOCRACY IN EASTERN EUROPE 125 (Univ. Press of Kentucky 1993).

13. Shiffrin, *supra* note 8, at 1645.

14. Sunder, *supra* note 9, at 1406.

grounds.¹⁵ I propose to explore possibilities for more open theological dialogue in public discourse by examining one of the richest traditions within Catholic social thought—the preferential option for the poor.

The preferential option is one of the key ethical principles within Catholic social thought. It informs individual moral choices, the activities of social institutions like the Catholic Church, and even public policy. Although there is a substantial body of literature within liberation theology that explores the ramifications of the preferential option for the poor, the institutional church has not accepted liberationist understandings.¹⁶ As a result, much of the theological content of the preferential option has been drained to the point that it is at risk of becoming a mere platitude. It leaves open many questions. Who are the poor? What are their needs? What are the politics of implementing actions that would help the poor? Who has responsibility to participate in the endeavor? Do some have greater responsibilities than others? How important is context? Bringing the theological idea of the preferential option into dialogue with secular thought in the realm of public reason and legal discourse can enrich both religious and political communities by deepening the understanding of the principle and creating a more universal or pluralistic vocabulary for articulating its implications for public policy.

Liberation theologian Gustavo Gutierrez coined the term "preferential option for the poor (or the poor and marginalized)," which has become an accepted principle of Catholic social thought.¹⁷ Under the principle, it is a moral imperative to create conditions for marginalized voices to be heard, to defend the defenseless, and to assess lifestyles, policies, and institutions in terms of their impact on the poor and the excluded.¹⁸ To its credit, the Catholic Church has made substantial institutional commitments to this

15. See generally MICHAEL J. PERRY, *UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (Cambridge Univ. Press 2003); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217 (2001); Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421 (1996).

16. See generally SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, *INSTRUCTION ON CERTAIN ASPECTS OF THE 'THEOLOGY OF LIBERATION'* (Vatican 1984) [hereinafter *INSTRUCTION ON CERTAIN ASPECTS OF THE 'THEOLOGY OF LIBERATION'*]; SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, *INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION* (Vatican 1986) [hereinafter *INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION*].

17. GUSTAVO GUTIÉRREZ, *GUSTAVO GUTIÉRREZ: ESSENTIAL WRITINGS* 12 (James B. Nickoloff ed., Orbis Books 1996) [hereinafter *GUSTAVO GUTIÉRREZ: ESSENTIAL WRITINGS*].

18. See *id.* at 12–14; see also GUSTAVO GUTIÉRREZ, *THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION* 108–12 (Orbis Books 1971).

imperative. Catholic Relief Services, Catholic Charities, and the umbrella organization, Caritas, are among the largest nongovernmental service providers for the poor.¹⁹ However, poverty continues to be a massive global problem, and the fracturing of postmodernism makes coordinated responses increasingly challenging. The preferential option might be better understood and more effectively implemented by borrowing epistemological insights from standpoint theory, methodological insights from outsider scholarship, and instrumental tools from law and economics.

From a Catholic perspective, if there is a moral imperative to prioritize the needs of the poor and marginalized, then it is important to identify and understand the viewpoint of excluded groups in order to create conditions that allow needs to be met in ways that are sustainable and neither exploitive nor hegemonic. From a secular perspective, engagement with theology and civic cooperation with religious institutions can provide new and effective options for alleviating poverty and promoting justice. In this paper, I consider a possible role for theology in the frontier between religion and law in the public square. I then develop a normative understanding of the preferential option and show how standpoint theory, outsider methodology, and law and economics can contribute to clearer analysis of the law's impact on the poor and to proposals for better policies compatible with both Catholic and secular thought.

Part II addresses the role of theology in public discourse. Part III provides background on the origin and ramifications of the preferential option, and it concludes by considering how the preferential option is likely to interact with important secular ethical systems. Part IV proposes to incorporate elements of standpoint theory as an epistemology for giving greater meaning to the preferential option. Part V suggests using outsider methodology in order to effect substantive legal and social changes implied by a deeper understanding of the preferential option. Part VI proposes law and economics as a tool for predicting the likely effectiveness of proposals for legal reform, and Part VII considers particular legal and policy questions that using the proposed paradigm can clarify.

19. See, e.g., *The 200 Largest U.S. Charities*, FORBES.COM, Nov. 19, 2008, http://www.forbes.com/lists/2005/14/Revenue_1.html (last visited February 4, 2009) (listing the 200 largest U.S. charities, including Catholic Charities USA and Catholic Relief Services) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

II. The Role of Theology in Public Discourse

The role of theological reasoning in public discourse is highly controversial. Theorists such as Richard Rorty, Robert Audi, Larry Solum, and John Rawls have argued that religion should play little or no overt role in public reason. Rorty prefers privatized religion that is kept out of the public square.²⁰ Audi contends that arguments in public discourse must be framed using concepts that are shared by rational beings.²¹ Solum argues against the use of nonpublic reason (such as religion) when it regards the coercive use of state power.²² All of these positions are generally consistent with a view of Rawls' public reason that theological arguments must be made using plausible independent secular grounds. There is a dispute in the literature about the role of religion and theology in democratic life. On the one hand, Rorty, Audi, Solum, and Rawls have argued for a constricted role. On the other hand, Michael Perry, Christopher Eberle, Nicholas Wolterstorff, and Steven Shiffrin argue that religious arguments properly belong in democratic life. I generally agree with the latter position, because I am persuaded that it better preserves individual, institutional, and policy integrity.

Relying on the work of Perry and Shiffrin, in particular, I maintain that theology has an important, even necessary role to play in public discourse, and arguably public reason. However, my proposal does not require agreement on this point, and I do not suggest that theology ought to be used in ways that conflict with the establishment clause. For those who remain skeptical of including religious premises in public reason, it might be sufficient to bring a discussion of the preferential option into broader public discourse.

20. Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994).

21. See Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 701 (1993) (explaining the relationship between public discourse and the concepts that frame it). Audi states:

I think that sound ethics itself dictates that, out of respect for others as free and dignified individuals, we should always have and be sufficiently motivated by adequate secular reasons for our positions on those matters of law or public policy in which our decisions might significantly restrict human freedom.

Id. Audi goes on to explain, "[i]f you are fully rational and I cannot convince you of my view by arguments framed in the concepts we share as rational beings, then even if mine is the majority view I should not coerce you." *Id.*

22. Lawrence Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 738–39 (1993).

The idea of public reason proposed by Rawls is intended to regulate political discourse and decision-making in the liberal state.²³ He distinguishes between "public reasons" and "nonpublic reasons." Public reasons are truths that are widely accepted,²⁴ premises rooted in a society's conception of political justice²⁵ and "guidelines of inquiry" that establish standards for evaluating competing arguments.²⁶ Nonpublic reasons comprise those that do not fit into these categories—most notably religious reasons—which are often the basis for moral and policy preferences.²⁷

On its face, Rawls' conception of public reason does not seem open to theological argument; Perry,²⁸ Eberle,²⁹ Wolterstorff,³⁰ and Shiffrin,³¹ however, all make cogent arguments for including religious ideas in public

23. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 1, at 222–54 (discussing political discourse and decision-making).

24. See *id.* at 224–25 (discussing this non-normative category).

25. See *id.* at 213 (discussing how a society's conception of political justice is rooted in its view of overlapping consensus).

26. See *id.* at 223–24 (stating that "guidelines of inquiry" include common sense and scientific methods).

27. See *id.* at 220 (explaining that nonpublic reasons are private in that they do not have relevance for pluralistic communities; they do not generate the sort of overlapping consensus presumed to be necessary for public reasons).

28. See generally PERRY, *UNDER GOD: RELIGIOUS FAITH AND LIBERAL DEMOCRACY*, *supra* note 15 (discussing religious ideas in public reason).

29. Eberle argues for including religious ideas in public reason by explaining:

Many theists take their religious convictions to bear directly on all manner of political matters. Consequently, many citizens will arrive at their respective convictions of conscience on religious grounds. And some citizens will arrive at some of their respective convictions of conscience on religious grounds *alone* We should therefore expect religious citizens to employ religiously grounded convictions of conscience to determine which coercive laws merit their support. They shouldn't be discouraged from doing so, much less stigmatized for doing so.

CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* 331 (Cambridge Univ. Press 2002).

30. See Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Persons*, in *RELIGION AND CONTEMPORARY LIBERALISM* 162, 174 (Paul J. Weithman, ed., 1997) ("There's no more hope that all among us who are reasonable and rational will arrive, in the way Rawls recommends, at consensus on principles of justice, than that we all, in the foreseeable future, will agree on some comprehensive philosophical or religious doctrine.").

31. See generally Steven Shiffrin, *Religion and Democracy*, *supra* note 8 (asserting that religion has a constructive role to play in democratic politics); see also Steven Shiffrin, *Religion and Progressive Politics* (2008) ("Religious liberalism is far better equipped to engage with or to combat religious conservatism than is the secular left.") (unpublished manuscript, on file with author).

reason or for creating a new and broader category for public political discourse that would permit consideration of religion. Although I tend to agree that liberal democracies ought to allow for the possibility of religious ideas within public reason, my argument does not necessarily require it as long as there is ample opportunity to air theological arguments within a broader category of public discourse not considered public reason. For example, public engagement between the Catholic principle of the preferential option for the poor and other religious or secular ideas that I propose ought to be allowable, even if expressly theological arguments are ultimately substituted with compatible secular arguments when coercive state power is proposed. I argue that theology ought to play a role in public reason or an inclusive public dialogue in order to maintain the integrity of individuals, religious institutions, and public policy.

Openness to theological reasoning is important for preserving individual integrity. Because many people arrive at moral and ethical conclusions derived from religious assumptions and use expressly religious discourse, a requirement to communicate deeply held values without regard for religion would be inauthentic.³² In an important sense, it encourages self-censorship and translation that conflicts with notions of free expression and limits the availability of potentially compelling arguments in the public square.³³

Including theological arguments within public reason is important for religious communities. It encourages them to craft arguments (religious and nonreligious) in ways that are persuasive to the broader political community.³⁴ Further, it requires communal reflection and prompts religious communities to consider outside intellectual challenges to their assertions. It also brings theology into dialogue with other forms of discourse. These moves provide opportunities to deepen theological understanding within religious communities. One serious concern of theologians is that rich and complex religious principles such as the preferential option cannot be translated into exclusively secular terms

32. See Michael J. Perry, *Why Religion in Politics Does Not Violate La Conception Américaine de la Laïcité*, 13 IND. J. GLOBAL LEGAL STUD. 543, 548–49 (2006) (asserting that a person's moral belief can be grounded in both religious and secular premises and that the two premises are not mutually exclusive).

33. See *id.* at 552 (arguing that denying religious-based moral beliefs as a basis for political choices does not make sense and not only would unfairly deprive religious faith, but also those moral judgments that cannot stand independently of religious faith).

34. See Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 838 (1993) (setting forth several arguments supporting the inclusion of theological discourse in public reason).

without losing considerable moral and persuasive power.³⁵ Even so, such translation remains a useful exercise for the religious person who may come to deeper understandings of her tradition and for a pluralistic community which may not fully apprehend religious discourse.

Open consideration of theology in public reason also plays an important role in policy. Religious ideas and assumptions sometimes play insidious roles in the exercise of coercive state power, even when they are never expressed in theological terms. If legislators or judges make decisions fundamentally rooted in their religious convictions but justified with secular arguments, it is unlikely that merely refuting the secular arguments will change the underlying commitment to particular policy positions. If one plausible secular ground becomes untenable, another will be contrived to replace it. Refuting religious assumptions with theological arguments strips away artificial and instrumental discourse, subjecting the core theology to public scrutiny on its own terms. For example, there are many theological arguments that militate against government participation in welfare or poverty alleviation. Certain Christian traditions view wealth as a divine gift and poverty as a punishment.³⁶ Judges or legislators who subscribe to this theology would be less likely to support state action to alleviate poverty, which they would understand as a consequence of divine justice. If lawmakers and the public were encouraged to be more open and honest about their theological assumptions, then what is generally considered bad theology³⁷ might be exposed and rebutted, thus strengthening the integrity of policymaking.

Although I argue for a greater openness to theology in public reason, some elements of legal discourse ultimately require broader contextualization. The constitutional prohibition against the establishment of religion has implications for excluding theology in the legal discourse of the state (in particular, statutory language and legal opinions). Although,

35. See, e.g., JOHN A. COLEMAN, S.J., *AN AMERICAN THEOLOGY* 192–95 (1982) (“The American religious ethic and rhetoric contain rich, polyvalent symbolic power to command commitments of emotional depth, when compared to ‘secular’ language, . . . [which] remains ‘thin’ as a symbol system.”).

36. See E.W. KENYON, *HIDDEN MAN* (Ruth A. Kenyon ed., Kenyon Gospel Publ’g Soc’y 1981) (stating that according to prosperity or word of faith theology in some Pentecostal and charismatic traditions, financial prosperity and wealth in this life are promised to all believers willing to receive them).

37. See, e.g., GORDON FEE, *THE DISEASE OF THE HEALTH AND WEALTH GOSPELS* (Regent Coll. Publ’g 1985) (providing an example of the extensive literature within Protestant theology rejecting these teachings). There is little Roman Catholic treatment of this theology because it was never accepted within Catholic teaching.

secular accounts of theological arguments may lose something in the translation,³⁸ contextualizing theological arguments in broader rational discourse is still important for justifying the use of state power in a liberal and pluralistic state. Using the categories proposed by Solum, I argue for *laissez faire* in the realm of public discourse and public reason outside of legal discourse.³⁹ Within legal discourse, I argue for the *laissez faire* standard for discourse outside governmental institutions and for an inclusive standard within governmental institutions (including the practice of law before courts, the drafting of legislation and the exercise of judicial power). Legal discourse attached to the coercive power of the state such as statutes and legal opinions would theoretically exclude theology, but I am skeptical that any formal exclusion would prevent the covert use of religious premises. The following Part presents my proposal to open public reason to the theology of the preferential option for the poor and for Catholic social thought in order to encourage deeper dialogue with secular ideas that might provide context and vocabulary for this type of public discourse.

III. The Preferential Option for the Poor

Twentieth century liberation theologians developed the preferential option for the poor, but the principle is firmly rooted in Biblical texts and Catholic tradition.⁴⁰ Today it is an accepted principle of Catholic social thought.⁴¹ It was the primary basis for advocating policy and legal reform in the U.S. Catholic Bishops Pastoral Letter *Economic Justice for All* in 1986.⁴²

38. See COLEMAN, AN AMERICAN THEOLOGY, *supra* note 35, at 193 ("The American religious ethic and rhetoric contain rich, polyvalent symbolic power to command commitments of emotional depth, when compared to 'secular' language, especially when the latter is governed by the Enlightenment ideals of conceptual clarity and analytic rigor.").

39. See Solum, *Public Legal Reason*, *supra* note 2, at 1469–78. (discussing several means of integrating the idea of public reason into the context of legal practice).

40. See, e.g., GUSTAVO GUTIÉRREZ: ESSENTIAL WRITINGS, *supra* note 17, at 108–12 (highlighting the importance of liberating the poor and dispossessed because they are the privileged ones in God's kingdom).

41. *Id.*

42. See generally U.S. Catholic Bishops, *Economic Justice for All*, Nov. 13, 1986, §§ 2.31–34, reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 572 (David J. O'Brien & Thomas A. Shannon eds., Orbis Books 2001) [hereinafter CATHOLIC SOCIAL THOUGHT].

This Part will begin by synthesizing key ideas within Catholic social thought. Next, it will develop the principle of the preferential option in its Catholic context. Then it will briefly consider attempts to contextualize the preferential option in secular terms and consider how to engage secular ethics. Finally, it will consider the ethical implications of the preferential option for individuals, institutions, and public policy.

A. Core Principles of Catholic Social Thought

As a theoretical construct, Catholic social thought has developed its own standards for ethical critiques. It has not embraced either liberal capitalism or revolutionary socialism. However, it shares the values of both liberty from liberalism and the common good from socialism. At times, this approach has been called a "Third Way" as a path between the two major competing paradigms for understanding social relationships.⁴³ Even when the idea of a "Third Way" has been rejected, the Vatican has asserted that Catholic social thought provides a unique theoretical alternative to the predominant secular value systems.

The dignity of the human person is a primary value in Catholic social thought rooted in the principle of *imago Dei*—that humans are created in the image of God.⁴⁴ Because human beings are created in the *imago Dei*, they have a special value and deserve respect. This principle is the basis for the Catholic understanding that human life is sacred. If human life is sacred, then suffering and degradation morally require a response by individuals and institutions. *Imago Dei* has also become the justification for supporting civil and human rights discourse in Catholic teaching.⁴⁵ To the extent that the dignity of the human person justifies negative rights,⁴⁶ it tends to support liberal notions of civil and political rights like free speech

43. See generally MICHAEL J. SCHUCK, *THAT THEY BE ONE: THE SOCIAL TEACHING OF PAPAL ENCYCLICALS 1740–1989* (Georgetown Press 1991) (including a significant treatment of the "Third Way").

44. See, e.g., CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 574 ("In our teaching, the human person is not only sacred but also social. How we organize our society—in economics and politics, in law and policy—directly affects human dignity and the capacity of individuals to grow in community.").

45. See *supra* note 44 and accompanying text.

46. I use the term negative rights to mean the civil and political rights to be free from the interference of others, such as free speech, freedom of religion, freedom of assembly, or private property rights. These are distinguished from positive rights, such as education, healthcare, or housing rights, which require the state to take affirmative action rather to refraining from acting.

or religion. To the extent that the same principle provides an argument for positive rights, it supports economic rights such as health, housing, and education and may be in tension with liberal assumptions.

The values of solidarity and the common good both provide some context for understanding the dignity of the human person. People live in communities, which themselves have value. Unity and solidarity within community have ethical value for Catholic social thought and are rooted in a vision of the Church as an ideal community.⁴⁷ Therefore, the value of the individual human person must be understood within the context of the common good of the entire community. This creates a tension with the fulfillment of individual goods when they detract from the common good.⁴⁸ Theologians and ethicists come to various conclusions regarding this conflict depending on their ideological paradigms (left, right, etc.). However, Church teaching in this area has been careful not to endorse either classical liberal or socialist implications for resolving this tension.⁴⁹

B. Origins of the Preferential Option

Although the preferential option for the poor was expressed in the context of liberation theology, it has roots that are much older and broader. Implications for a moral duty owed to the poor are found in Christian and Hebrew scriptures as well as the tradition of Catholic teaching. It finds a clear voice among Latin American liberation theologians as well as a number of contemporary feminist and outsider theologians. This body of work has been considered by the Catholic Magisterium over the past 40 years.⁵⁰

47. See John Paul II, *Sollicitudo Rei Socialis* (On Social Concern) (1987), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 421 (identifying core values of an ideal Catholic community).

48. See *id.* at 422 (describing the dichotomy between self-interest motivations and the community).

49. See generally SCHUCK, *supra* note 43 (describing the Church's neutrality from politically motivated implications).

50. See generally FRANCIS A. SULLIVAN, S.J., MAGISTERIUM: TEACHING AUTHORITY IN THE CATHOLIC CHURCH (Wipf & Stock Publishers 1983) (explaining that the Magisterium refers to the authoritative teaching of the Catholic Church). It is generally construed as including Papal pronouncements as well as the teaching of bishops. *Id.* The highest expressions of authority are documents issued by Ecumenical Councils (including all bishops and the Pope) and the *ex cathedra* teaching of the Pope. *Id.* Theologians may also serve in a magisterial role, but they do not carry the authority of the institutional Church. *Id.*

1. Scriptural Bases

The roots of a preferential option for or a moral obligation owed to the poor are found throughout the Hebrew Bible and Christian New Testament. There are a variety of themes and approaches to the problem of poverty, and both collections of texts contain moral teachings as well as prescriptions for communal living.

Of all of the books of the Hebrew Bible, liberation theologians rely most heavily on Isaiah, but obligations to the poor can also be clearly found in the Mosaic law and the prophets.⁵¹ Isaiah is particularly important in Christian thought because it is presumed to describe a society influenced by the moral authority of the messiah, who shall preach justice for the poor and usher in a period of liberation.⁵² The tone of this literature is utopian, but it provides a vision of a just society.

The Mosaic law itself provides additional concrete examples of social and economic justice. There are repetitive calls to provide justice for foreigners, widows, and orphans.⁵³ There is an expectation that the poor have access to a portion of agricultural resources in the form of gleaning.⁵⁴ There is also a system for equitable land redistribution and debt forgiveness every fifty years via the "Year of Jubilee."⁵⁵

51. See, e.g., FRANK LOEWENBERG, FROM CHARITY TO SOCIAL JUSTICE: THE EMERGENCE OF COMMUNAL INSTITUTIONS FOR THE SUPPORT OF THE POOR IN ANCIENT JUDAISM (2001) (discussing moral obligations to the poor).

52. See *Isaiah* 61. The chapter begins:

The Spirit of the Lord God is upon me, because the Lord has anointed me to bring good tidings to the afflicted; he has sent me to bind up the brokenhearted, to proclaim liberty to the captives and the opening of the prison to those who are bound; to proclaim the year of the Lord's favor . . .

Id. This passage was read by Jesus at the beginning of his public ministry according to Luke 4:16–30. *Id.*

53. See, e.g., *Deuteronomy* 10:19 ("He executes justice for the fatherless and the widow, and loves the sojourner, giving him food and clothing.").

54. See *Deuteronomy* 24:19–22.

When you reap your harvest in your field, and have forgotten a sheaf in the field, you shall not go back to get it; it shall be for the sojourner, the fatherless, and the widow; that the LORD your God may bless you in all the work of your hands. When you beat your olive trees, you shall not go over the boughs again; it shall be for the sojourner, the fatherless, and the widow. When you gather the grapes of your vineyard, you shall not glean it afterward; it shall be for the sojourner, the fatherless, and the widow. You shall remember that you were a slave in the land of Egypt; therefore I command you to do this.

Id.

55. See *Leviticus* 25:10 ("And you shall hallow the fiftieth year, and proclaim liberty

The New Testament provides a number of other teachings that seem to create an option for the poor. In the Gospels, Jesus turns social hierarchy on its head by giving priority to the poor (references to the privilege of the last, the least of these, etc.).⁵⁶ God is specifically identified with the poor.⁵⁷ In the parable of the sheep and goats from Matthew 25, at the final judgment Jesus indicates that whatever good or ill was done to the hungry, the thirsty, the naked or the imprisoned was actually done to him.⁵⁸ In the core Christian moral teaching of the Sermon on the Mount, Jesus' followers are told to give to those who ask of them in a variety of different ways.⁵⁹

The early Christian community described in the New Testament gave priority to the poor in its economic dealings. Those who had money or property gave it to the apostles who then appointed deacons to distribute the proceeds to those most in need within the community.⁶⁰ This communal model goes a step beyond an individual moral imperative and requires the community to create an institutional framework for redistributing wealth from the wealthy to the poor.

throughout the land to all its inhabitants; it shall be a jubilee for you, when each of you shall return to his property and each of you shall return to his family."). This resulted in a cancellation of all debts as well as freedom for the enslaved. *Id.*

56. See, e.g., *Luke* 6:20 ("Blessed are you poor, for yours is the kingdom of God."); *Luke* 18:22 ("One thing you still lack. Sell all that you have and distribute to the poor, and you will have treasure in heaven.").

57. See *2 Corinthians* 8:9 ("For you know the grace of our Lord Jesus Christ, that though he was rich, yet for your sake he became poor, so that by his poverty you might become rich.").

58. See *Matthew* 25:32–46.

Come, O blessed of my Father, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you welcomed me, I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me. Then the righteous will answer him, "Lord, when did we see thee hungry and feed thee . . ." And the King will answer them, "Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me."

Id.

59. See *Matthew* 5:38–42.

I say to you, Do not resist one who is evil. But if any one strikes you on the right cheek, turn to him the other also; and if anyone would sue you and take your coat, let him have your cloak as well; and if any one forces you to go one mile, go with him two miles. Give to him who begs from you, and do not refuse him who would borrow from you.

Id.

60. See *Acts* 2:45–46 ("And all who believed were together and had all things in common; and they sold their possessions and goods and distributed them to all, as any had need.").

Both the Hebrew Bible and the Christian New Testament provide examples of wealth redistribution and aspirations toward utopian communal life that seem to create a preferential option for the poor. However, these distributive and communal impulses have been admittedly less important in the evolution of Jewish and Christian communities than might be indicated by the texts.⁶¹

2. Tradition through the Second Vatican Council

In the Catholic context, scripture is interpreted in light of tradition.⁶² Therefore, any analysis of the scriptural origin of the preferential option for the poor must consider Catholic tradition, most importantly the magisterial or institutional understandings of scripture found in documents such as papal encyclicals.⁶³ Although there is some support for the preferential option in older documents, the contemporary understanding emerged from the tradition of Catholic social thought beginning in the 19th Century. This section will trace the evolution of the major sources of modern Catholic social teaching in order to develop a coherent understanding of the preferential option as it is normatively understood, particularly by institutional Church authorities.

Rerum Novarum is an encyclical issued by Pope Leo XIII on May 15, 1891, addressing the condition of the working class.⁶⁴ It is arguably the first clear institutional attempt by the Catholic Church to develop a body of social thought.⁶⁵ Although it was intended to provide a response to

61. See Maurice F. Wiles, Edward Yarnold, & P.M. Parvis, *A Comparison Between Early Jewish and Early Christian Interpretations*, 34 *STUDIA PATRISTICA* 436, 436–42 (1999) (describing procedures for wealth redistribution according to the Jewish and Christian faiths).

62. See *Dei Verbum*, DOCUMENTS OF VATICAN II § 7 (1965).

But in order to keep the Gospel forever whole and alive within the Church, the Apostles left bishops as their successors, 'handing over' to them 'the authority to teach in their own place.' This sacred tradition, therefore, and Sacred Scripture of both the Old and New Testaments are like a mirror in which the pilgrim Church on earth looks at God, from whom she has received everything, until she is brought finally to see Him as He is, face to face.

Id.

63. See SULLIVAN, *supra* note 50, at 11, 130–31 (explaining that Papal encyclicals, the documents of ecumenical councils such as Vatican II, and teaching by synods or conferences of bishops constitute magisterial sources of authority within Catholicism).

64. Leo XIII, *Rerum Novarum* (*The Condition of Labor*) (1891) [hereinafter *Leo XIII, Rerum Novarum*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 42, at 28.

65. Cf. *CATHOLIC SOCIAL THOUGHT*, *supra* note 42, at 13 ("Leo initiated modern

modernism and burgeoning socialism, it does not unequivocally legitimize the emerging industrial and capitalist order of Western Europe and the United States.⁶⁶ It identifies with the plight of the working poor and reflects on the relationships between the Catholic Church, governments, business, and labor.⁶⁷ It opposes both class struggle and unbridled competition.⁶⁸

Rights must be religiously respected wherever they are found . . . Still, when there is question of protecting the rights of individuals, the poor and helpless have a claim to special consideration.⁶⁹

This is the first step toward the development of the preferential option for the poor, because it shifts the emphasis toward identification with the suffering of the working poor.

Quadragesimo Anno is an encyclical by Pope Pius XI, issued May 15, 1931, 40 years after *Rerum Novarum*.⁷⁰ It contains the first major elaboration of the principle of subsidiarity⁷¹ (discussed specifically in Part III.E.1. below) and introduces the term "social justice" to the lexicon of Catholic thought.⁷² It castigates the form of capitalism viewed as responsible for the Great Depression.⁷³ However, it does support a form of

Catholic discussion of human rights in the economic order.").

66. See *id.* at 20, 22–23, 32 (rejecting class struggle but acknowledging that the contemporary economic order disadvantages the poor and working classes unjustly).

67. See *id.* at 12–13 (describing the economic history that animated the writing of *Rerum Novarum*).

68. *Id.*

69. *Id.* at 28.

70. Pius XI, *Quadragesimo Anno (After Forty Years)* (1931) [hereinafter Pius XI, *Quadragesimo Anno*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 42.

71. JOHN A. COLEMAN, S.J., MAKING THE CONNECTIONS: GLOBALIZATION AND CATHOLIC SOCIAL THOUGHT: PRESENT CRISIS, FUTURE HOPE 16–17 (John A. Coleman & William F. Ryan eds., Novalis 2005) [hereinafter COLEMAN, MAKING THE CONNECTIONS].

The Catholic concept of subsidiarity includes a theory of societal pluralism, envisioning a civil society that does not totally depend on or derive from the state its authoritative actions and power. Subsidiarity stated that higher forms of governance must not co-opt or dissipate the proper roles of more local units. Catholicism assumes, for example, that the ultimate source or authority for the Church and the family comes directly from God, not just from the good graces of the state. Moreover, subsidiarity presumes that the local and grassroots are, ultimately, an important source of creativity and rooted wisdom.

Id.

72. Pius XI, *Quadragesimo Anno*, *supra* note 70, at 62.

73. See *id.* at 65 ("Free competition has [destroyed itself]; economic domination has taken the place of the open market.").

structured corporatist free enterprise.⁷⁴ It can be viewed as promoting a utopian blueprint for civil society that requires significant structural reforms and fairly clearly rejects conservatism that would vindicate the existing social and economic order.⁷⁵ Advocating structural and legal reform moved the Catholic Church much closer to the preferential option for the poor, but it did not make completely clear how this would be effectuated. The emphasis on subsidiarity was intended to keep these reforms at the simplest levels possible, moving from individual moral commitments, to family commitments, to local community commitments, and to higher levels of authority only as necessary.⁷⁶ Even so, it leaves open the possibility for national and international legal reform where lower levels cannot adequately address injustice. *Firmissimum* was issued by Pius XI seven years later.⁷⁷ It went even further than *Quadragesimo Anno* by suggesting that resistance to state authority might be justified in extreme circumstances.⁷⁸ Of the earlier social encyclicals, these two make the most significant moves toward the contemporary understanding of a moral obligation to the poor.

Mater et Magistra and *Pacem in Terris* are encyclicals written by Pope John XXIII engaging the topic of social progress.⁷⁹ They were promulgated

74. See *id.* at 63 (describing the corporative state).

75. *Id.*

76. See *id.* at 60.

[O]ne should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. So, too, it is an injustice and at the same time a grave evil and a disturbance of right order to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies.

Id.

77. Pius XI, *Firmissimam Constantiam* (*On the Religious Situation in Mexico*) (1937), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19370328_firmissimam-constantiam_en.html.

78. See *id.* § 28.

[T]he use of such means and the exercise of civic and political rights in their fullness, embracing also problems of order purely material and technical, or any violent defense . . . appertains the preparation of Catholics to make just use of their rights, and to defend them with all legitimate means according as the common good requires.

Id. (emphasis added).

79. John XXIII, *Mater et Magistra* (*Christianity and Social Progress*) (1961) [hereinafter John XXIII, *Mater et Magistra*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 84; John XXIII, *Pacem in Terris* (*Peace on Earth*) (1961) [hereinafter John XXIII, *Pacem in Terris*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 131.

on May 15, 1961 and 11 April 1963, respectively.⁸⁰ John XXIII seems optimistic about the trend of welfare reforms in Western capitalist societies as a method of reducing poverty.⁸¹ Such reforms require direct state action, so John XXIII affirms the need for governments to establish legal regimes that provide a safety net for those who do not prosper under European or American capitalism.⁸² Because the Catholic Church had historically been reticent to advocate positions that disrupt the established order (since the adoption of Christianity as the official religion of the Roman Empire), this position indicates a major shift toward reconciling the scriptural tradition and solidarity with the poor. *Pacem in Terris* even embraces the evolving human rights discourse of the day within a Christian context.⁸³

The Second Vatican Council (or Vatican II) was a gathering of the world's Catholic bishops called by Pope John XXIII to address questions of leadership, liturgy, community, and poverty among other things in the context of the modern world and a truly global faith community.⁸⁴ It was held between 1963 and 1965, resulting in a number of documents intended to clarify and provide new understandings of Catholic teaching.⁸⁵ There is concern for the poor throughout many of these documents.

The most important conciliar document for understanding the emergence of the preferential option is *Gaudium et Spes*, which was issued in 1965.⁸⁶ It emphasizes the critical role of justice in addressing the challenges of poverty and peace.⁸⁷ It encourages reform of structures that perpetuate poverty and emphasizes the rights of the poor to access the world's resources.⁸⁸ It acknowledges that the entrenched wealth of

80. John XXIII, *Mater et Magistra*, *supra* note 79.

81. *See id.* at 102–03 (noting the increase in economic growth in these countries that employ "various devices already proven effective . . . [in making the way] easier for widespread private possession of durable goods [and other items]").

82. *Id.* at 116–17.

83. John XXIII, *Pacem in Terris*, *supra* note 79, at 132–35.

84. *See generally* VATICAN COUNCIL II: THE CONCILIAL AND POST CONCILIAL DOCUMENTS (Austin Flannery, O.P. ed., Costello 1992).

85. *See, e.g.*, CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 163–65 (describing the theological and social changes brought by Vatican II).

86. Second Vatican Council, *Gaudium et Spes (Pastoral Constitution on the Church in the Modern World)* (1965) [hereinafter *Gaudium et Spes*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 164.

87. *See id.* at 182–85 (arguing that "the equal dignity of persons demands that a more humane and just condition of life be brought about"); *id.* at 219–24 (summoning "all Christians to cooperate with all men in making secure among themselves a peace based on justice and love, and in setting up agencies of peace").

88. *See id.* at 213–15 ("The distribution of goods should be directed toward providing

individuals and institutions (including the Catholic Church) needs to be placed at the service of the poor if there is to be meaningful justice.

[T]he right to have a share of earthly goods sufficient for oneself and one's family belongs to everyone. The Fathers and Doctors of the Church held this view, teaching that men are obliged to come to the relief of the poor, and to do so not merely out of their superfluous goods. If a person is in extreme necessity, he has the right to take from the riches of others what he himself needs. Since there are so many people in this world afflicted with hunger, this sacred Council urges all, both individuals and governments, to remember the saying of the Fathers: "Feed the man dying of hunger, because if you have not fed him you have killed him." According to their ability, let all individuals and governments undertake a genuine sharing of their goods. Let them use these goods especially to provide individuals and nations with the means for helping and developing themselves.⁸⁹

This position constituted a significant move toward the idea of a preferential option with implications both for personal moral choice and for public policy. However, *Gaudium et Spes* is at times overly optimistic in assuming that Western-style development inevitably results in the devolution of unjust social and economic structures.

Populorum Progressio was issued by Pope Paul VI in 1966, shortly after the end of Vatican II, and focused specifically on problems of development and poverty.⁹⁰ There is deep concern for the widening gap between rich and poor, the destructive impact of Western cultural imperialism, and environmental degradation.⁹¹ Notably, this encyclical highlights the importance of addressing these problems as both national and international.⁹² However, with its emphasis on large institutions, there is little mention of the role of the poor in defining or effecting positive change. Although it acknowledges the power of free enterprise, it anticipates that the destructive aspects of world capitalism will need to be blunted by coordinated international policies.⁹³

Catholic social teaching through Vatican II provided a solid framework for the emergence of the preferential option of the poor as a

employment and sufficient income for the people of today and of the future.").

89. *Id.* § 69.

90. Paul VI, *Populorum Progressio* (*The Progress of Peoples*) (1967) [hereinafter Paul VI, *Populorum Progressio*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 240.

91. *Id.* §§ 53, 57–60.

92. *See id.* §§ 78–79.

93. *Id.* §§ 26, 76–77.

specific ethical principle. At the very least, this teaching was beginning to be affected by theology and the lived experience of Catholics in poorer parts of the world.⁹⁴ Ultimately, it is this ongoing dialogue between poorer communities and church leadership that makes the move possible.

3. *Latin American Bishops and the Response*

Although Vatican II was dominated by bishops from the traditional centers of Catholic power (Western Europe and North America), notable participation by bishops from Africa, Asia, and Latin America made it clear that the Catholic Church had become a world institution that transcended many aspects of culture.⁹⁵ Since Vatican II, there has been a demographic shift to these regions in terms of adherents and priests. Each region has also contributed new understandings to theology and ethics.

Africa, which has become a major supplier of priests for other parts of the world, has contributed to the Catholic conception of theology and has played a role in the development of liberation theology.⁹⁶ A number of Asian countries, including India, Vietnam, Korea, Indonesia, the Philippines, and Japan, have vibrant Catholic communities which range from the very traditional to the very progressive. In a region where Christianity is generally a minority religion, Asian Catholics have been forced to wrestle with the theological implications of the Catholic Church's teaching regarding other faith traditions.⁹⁷ As a result, Asian theologians have emphasized the universality of faith and the importance of dialogue with other traditions.⁹⁸

94. See DONAL DORR, *OPTION FOR THE POOR: A HUNDRED YEARS OF CATHOLIC SOCIAL TEACHING* 167–70 (1992) (discussing the emerging Christian approach to poverty that would serve as a foundation for the Church's formal commitment to the poor).

95. See *id.* at 151 ("As Vatican II progressed, there came to be a growing realisation [sic] that the Church is not just Western and Eastern but also Asian, Latin American and African—and therefore that the Council Documents would have to take serious account of the Third World.").

96. See generally EMMANUEL MARTY, *AFRICAN THEOLOGY: INCULTURATION AND LIBERATION* (1993).

97. See generally FOR ALL THE PEOPLES OF ASIA: *FEDERATION OF ASIAN BISHOPS' CONFERENCES DOCUMENTS FROM 1970 TO 1991* (G. Rosales & C.G. Arevalo eds., 1992).

98. See, e.g., ANTHONY DE MELLO, S.J., *AWARENESS: THE PERILS AND OPPORTUNITIES OF REALITY* (J. Francis Stroud ed., 1990) (compiling De Mello's dialogues on spiritual awakening, which draws deeply on Catholic spirituality in the Jesuit tradition as well as elements of Buddhism and Hinduism). See generally COSIMO ZENE, *THE RISHI OF BANGLADESH: A HISTORY OF CHRISTIAN DIALOGUE* (2002).

Latin America has been a stronghold of Catholicism since the late colonial period; however, Protestants have made significant inroads, particularly among the poor and working poor.⁹⁹ Historically, the Catholic Church in Latin America was largely identified with autocratic state authority. Responding to massive political and economic inequality, theologians developed liberation theology as a way of understanding the core teachings of the Catholic Church in the context of their liberating role.¹⁰⁰ Bishops confronting the problems of poverty and exploitation within their communities recognized the inadequacy of the traditional alliance with state power and began to embrace certain aspects of liberation theology, which is the origin of the term the 'preferential option for the poor' (though perhaps not the defining context for the Catholic Church's understanding of the principle).¹⁰¹

In 1968, the Latin American bishops met in the Columbian city of Medellín to discuss the need to dismantle structures that create and perpetuate poverty in the region.¹⁰² This meeting was motivated in part by the significant moves already made at Vatican II and by Paul VI to encourage engagement with the problems of poverty.¹⁰³ They illumined the massive scale of injustice in their region and committed themselves to giving effective preference to the poor and most needy sectors of society.¹⁰⁴ They proposed education and consciousness-raising as tools for equipping the poor to become instruments of their own liberation.¹⁰⁵ Although they noted that Paul VI had allowed for the possibility of uprisings in the interest of justice, the Latin American bishops committed to using only peaceful

99. See generally DAVID MARTIN, *TONGUES OF FIRE: THE EXPLOSION OF PROTESTANTISM IN LATIN AMERICA* (Wiley, John & Sons, Inc. 1993) (noting especially the appeal of Pentecostalism to the newly urbanized poor).

100. See, e.g., JON SOBRINO, *THE TRUE CHURCH AND THE POOR* 10–21 (1984) (discussing the "liberating" character of theological understanding).

101. *Id.* at 197–200.

102. See generally SECOND GENERAL CONFERENCE OF LATIN AMERICAN BISHOPS, 2 *MEDELLÍN: THE CHURCH IN THE PRESENT-DAY TRANSFORMATION OF LATIN AMERICA IN THE LIGHT OF THE COUNCIL: CONCLUSIONS* (3d ed. 1979) [hereinafter *SECOND GENERAL CONFERENCE OF LATIN AMERICAN BISHOPS*].

103. See DORR, *supra* note 94, at 9 (noting the changing emphasis of Church teachings on social morality).

104. SECOND GENERAL CONFERENCE OF LATIN AMERICAN BISHOPS, *supra* note 102, § 14.9

105. *Id.* §§ 2.18, 14.16.

means in confronting injustice.¹⁰⁶ The bishops were clearly influenced by early works of liberation theology.¹⁰⁷

Paul VI responded in 1971 by issuing the encyclical, *Octogesima Adveniens*. Overall, it is quite sympathetic to Medellín and incorporates a number of liberation themes into papal teaching.¹⁰⁸ Significantly, it acknowledges that structural economic injustice requires political solutions in addition to individual moral commitments.¹⁰⁹ Although the document contains criticisms of liberal capitalism, it is also concerned about any incorporation of Marxist ideology into Catholic teaching.¹¹⁰ There is an interesting shift toward pluralism in the document. By allowing for local approaches to combating injustice, *Octogesima Adveniens* admits that solutions will vary regionally.¹¹¹ This is important because it incorporates the principle of subsidiarity and because it acknowledges that diversity and pluralism will result.

In 1979, the Conference of Latin American Bishops met in Puebla, Mexico to discuss regional challenges confronting the Catholic Church.¹¹² This meeting was of such importance that Pope John Paul II insisted on attending.¹¹³ The key issue before the bishops was whether to develop and continue the theoretical and ethical commitments made in Medellín.¹¹⁴ Although the body was more polarized than it had been eleven years earlier, there was sufficient support to continue, and the final document issued by the Conference at Puebla was entitled "A Preferential Option for the Poor."¹¹⁵ Although some of the more critical influences of liberation

106. *Id.* § 2.19.

107. See discussion *supra* Part III.A.4 (discussing the emergence of liberation theology emphasizing the liberating nature of Catholic scripture and teachings).

108. Paul VI, *Octogesima Adveniens* (A Call to Action on the Eightieth Anniversary of *Rerum Novarum*) (1971) [hereinafter Paul VI, *Octogesima Adveniens*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 265.

109. *Id.* §§ 43–46.

110. See *id.* §§ 26, 33 (criticizing adherence to the atheistic materialism and violence of Marxist ideology).

111. See *id.* §§ 3, 4, 31, 49, 50 (recognizing diversity among regional solutions to overcome social injustice).

112. See generally THIRD GENERAL CONFERENCE OF LATIN AMERICAN BISHOPS, PUEBLA: EVANGELIZATION AT PRESENT AND IN THE FUTURE OF LATIN AMERICA: CONCLUSIONS § 1134 (1980).

113. DORR, *supra* note 94, at 260–61.

114. See *id.* (stating that the "major issue" before the Puebla Conference was "whether it would re-affirm the basic thrust of Medellín or whether it would allow the commitments of Medellín to die the death of a thousand qualifications").

115. THIRD GENERAL CONFERENCE OF LATIN AMERICAN BISHOPS, *supra* note 112,

theology are muted in the document, it created a new space for institutional engagement with and support of some liberationist thought.¹¹⁶

4. *Liberation Theology*

The preferential option emerged as an essential Catholic ethical principle in the writings of liberation theologians. Liberation theology is characterized by its emphasis on the liberating nature of God's promises both in scripture and in the person of Jesus.¹¹⁷ This liberation is understood not only as liberation from sin, but from the structures of sin that are institutionalized in human society.¹¹⁸ Thus, the gospel message is one of liberation from poverty and marginalization as well as sin. The causes of these types of harms are not merely individual sinful acts, but instead are the creation of manifold sin giving rise to sinful social structures that in turn perpetuate alienation or subordination.¹¹⁹ Slavery is a clear example of an institution originating in the individual sin of domination and dehumanization. Once institutionalized, economic and legal forces tended to perpetuate slavery, giving it the sanction of respectability and the state. Liberation theologians theorize that various social, legal, political, and economic structures institutionalize sinful practices that keep large groups of people poor, powerless and marginalized.¹²⁰ International trade policy, exploitive labor practices, sexism, and racism are among the dynamics fostered by structures that sustain dehumanizing practices.¹²¹ A Catholic response requires addressing individual moral choices that support these structures; however, the structures themselves must also be dismantled to create a social environment that allows for the meaningful liberation of

§ 1134.

116. John Paul II, Address to the Bishops of Brazil, §§ 6.9, 10.9 (July 10, 1980).

117. See, e.g., GUTIÉRREZ, THEOLOGY OF LIBERATION, *supra* note 17, at 168–75 (examining the liberating nature of Christ and other aspects of how it has been viewed).

118. See Jose Ignacio Gonzalez Faus, *Sin*, in MYSTERIUM LIBERATIONIS: FUNDAMENTAL CONCEPTS OF LIBERATION THEOLOGY 536–39 (Ignacio Ellacuria & Jon Sobrino eds., 1993) [hereinafter MYSTERIUM LIBERATIONIS] (providing a description of structural sin).

119. *Id.*

120. *Id.*

121. See, e.g., Paul VI, *Octogesima Adveniens*, *supra* note 108, at 267 (describing the changes in society wrought by urbanization and the challenges Christians face); Paul VI, *Populorum Progressio*, *supra* note 90 (describing development of civilization and the responsibility to recognize human dignity).

those who were oppressed so that they can fully participate in community.¹²²

Some, although not all, liberation theology has found the work of Marx and other socialist or critical scholars to be helpful in modeling how the transformation of sinful social structures might look. Critical economic models provide a method for analyzing and quantifying certain forms of exploitation.¹²³ A Marxian understanding of history might be viewed as compatible with a Catholic worldview to the extent that it acknowledges progress and ultimate utopianism. Education and consciousness-raising among the oppressed could put the poor in a position to participate in the dismantling of dehumanizing and oppressive social structures. However, the explicit rejection of truth in religion by Marx is fundamentally incompatible with Catholic thought.¹²⁴ The emphasis on class struggle (not to mention the Leninist view of revolution) is also deeply problematic in view of the Catholic commitment to nonviolence and human solidarity.¹²⁵ In practice, liberation theology gave rise to a movement of base communities throughout Latin America that organized groups of poor people to teach literacy, basic health education, and scripture with the aim of empowering the poor to become instruments of their own liberation. In some regions, there was an emphasis on Marxian or socialist understandings that deeply troubled senior members of the institutional church.¹²⁶

The discussion of liberation theology here is meant to provide a context for the emergence of the preferential option for the poor. It is not intended to argue that the teaching is or ought to be understood in its original context. Regardless of the origin of the preferential option, one aim of this article is to provide concrete ways to develop legal and policy positions that give it meaning. The following sections discuss major

122. See Paul VI, *Octogesima Adveniens*, *supra* note 108, at 267–83 (describing the responsibility of Christians to reform aspects of society).

123. E.g., INSTRUCTION ON CERTAIN ASPECTS OF THE ‘THEOLOGY OF LIBERATION,’ *supra* note 16; INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION, *supra* note 16.

124. See INSTRUCTION ON CERTAIN ASPECTS OF THE ‘THEOLOGY OF LIBERATION,’ *supra* note 16, at 435 (emphasizing that the underlying Atheism in Marxism threatens the truths of the faith); INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION, *supra* note 16, at 436 (explaining the destruction of man when he discards the truth).

125. INSTRUCTION ON CERTAIN ASPECTS OF THE ‘THEOLOGY OF LIBERATION,’ *supra* note 16; INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION, *supra* note 16.

126. INSTRUCTION ON CERTAIN ASPECTS OF THE ‘THEOLOGY OF LIBERATION,’ *supra* note 16; INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION, *supra* note 16.

thinkers and themes within liberation theology that are relevant to acquiring a deeper understanding of the preferential option.

a. The Origin of Liberation Theology

Gustavo Gutiérrez is one of the earliest liberation theologians, and his work is the core of the movement's canon. Significantly, he developed the theory supporting the preferential option for the poor.¹²⁷ He was born in 1928 and continues to write as a member of the Dominican order of Catholic priests and as a professor at the University of Notre Dame.¹²⁸ Gutiérrez began teaching theology in Peru in 1959 and later participated in Vatican II as a theological assistant.¹²⁹ He proposed a "theology of liberation" in 1968 shortly before the Medellín conference, which was profoundly influenced by his work.¹³⁰ Although his earlier writings and speeches provided a basis for liberation theology, *A Theology of Liberation*, published in 1971, was the first major work to establish liberation theology as a new comprehensive approach to theological analysis.¹³¹ It proposed a rethinking of theological method and its content. It viewed the Church as the Church of the poor, speaking prophetically against injustice in the world. The *opción preferencial* or preferential option

[i]mplies the universality of God's love, which excludes no one. It is only within the framework of this universality that we can understand the preference, that is "what comes first."¹³²

The preference is thus a priority that implies an epistemology relying on the viewpoint of the poor, sometimes called the view from below. The option is a "decision to make a commitment."¹³³ Although it requires an act of will, it is not optional. Instead, the preferential option acts as a moral imperative that Catholics ought to make moral choices giving priority to the

127. See Gustavo Gutiérrez, *Option for the Poor* [hereinafter Gutiérrez, *Option for the Poor*], in MYSTERIUM LIBERATIONIS, *supra* note 118, at 235, 235–50 (explaining the commitment to the poor and its biblical meaning as central to liberation theology).

128. GUSTAVO GUTIÉRREZ: ESSENTIAL WRITINGS, *supra* note 17, at 2.

129. *Id.* at 2–4.

130. *Id.* at 3–5.

131. See generally GUTIÉRREZ, THEOLOGY OF LIBERATION, *supra* note 18.

132. GUSTAVO GUTIÉRREZ: ESSENTIAL WRITINGS, *supra* note 17, at 13 (quoting Gutiérrez, *Option for the Poor*, in PROMOTIO JUSTITIAE).

133. *Id.*

poor as a consequence of their commitment to the principles contained within the gospel message and Church tradition.¹³⁴

Gutiérrez remains an important figure in liberation theology, and subsequent scholars have built upon his theoretical foundations. Some, like John Sobrino, have endeavored to refine the understandings of liberation theology. Others have emphasized the need for more specific viewpoints of the poor (whether they be the viewpoints of women, Latinas, African Americans, etc.).

b. Later Development of Catholic Latin American Liberation Theology

Although there are many significant liberation theologians who built on the early work of Gutiérrez and his contemporaries, Jon Sobrino is among the most influential. Originally from Spain, he spent most of his career as a professor at the University of Central America in San Salvador, El Salvador.¹³⁵ He is a member of the Society of Jesus (the Jesuits) and was part of the Jesuit community that was attacked by Salvadoran government forces in 1989 because of its strong advocacy for the poor.¹³⁶

Sobrino refers to the preferential option for the poor throughout his work and insists that it is not merely an individual moral obligation but an obligation of the Church, scholars and the state.¹³⁷ However, the roles of these three are different. The Church must play a prophetic role in its teaching and in its institutional commitments by opposing forces that oppress the poor.¹³⁸ Scholars have a prophetic role to play by thinking for the Church and holding its institutions accountable.¹³⁹ The state is

134. See *id.* (describing the deep roots of the option for the poor in both church history and the church's obligation to the poor).

135. See JON SOBRINO, *THE PRINCIPLE OF MERCY: TAKING THE CRUCIFIED PEOPLE FROM THE CROSS* 3–11 (1991) (describing his time in El Salvador) [hereinafter SOBRINO, *THE PRINCIPLE OF MERCY*].

136. *SYSTEMATIC THEOLOGY: PERSPECTIVES FROM LIBERATION THEOLOGY* vii (Jon Sobrino & Ignacio Ellcuría eds., 1996).

137. *Id.* at 241–52.

138. See JON SOBRINO, *SPIRITUALITY OF LIBERATION: TOWARD POLITICAL HOLINESS* 244–47 (Robert R. Barr trans., 1988) (“[T]he mission of the church consists in a salvific service to the world, a service to be realized ever more concretely as a preferential service to the poor.”).

139. See Jon Sobrino, *Central Position of the Reign of God in Liberation Theology*, in *SYSTEMATIC THEOLOGY: PERSPECTIVES FROM LIBERATION THEOLOGY* 38, 38 (Jon Sobrino & Ignacio Ellcuría eds., 1996) (“It is up to theology to seek out that ultimate element that will give the best account of the totality of the faith . . .”).

ultimately the vehicle for deconstructing oppressive institutions, so it is a critical audience for the Church and scholars.¹⁴⁰

The theological foundation for Sobrino's understanding of the preferential option is rooted in the prophetic ministry of Jesus and in his utopian vision.¹⁴¹ Jesus as a prophet and liberator must be understood as a real historical human person, rather than as only transcendent.¹⁴² One of the chief aims of liberation theology generally has been to deemphasize the historically dominant view of Jesus as transcendent God, and to emphasize his experience as human person—one who identifies with human suffering and frailty.¹⁴³

Jesus' utopianism is found in his teaching on the coming of the "reign of God." This reign is not a political structure but is instead the promise of justice, particularly for the poor.¹⁴⁴ The Gospels then create a moral imperative to oppose forces that prevent the fullness of this justice.

Although Sobrino's work has been profoundly important, particularly in Latin America, it has been subject to criticism in some academic circles and within the Catholic hierarchy. Some scholars criticize Sobrino for interpreting texts in such a way that they reinforce his view of the preferential option even when the best scholarship does not support such interpretations.¹⁴⁵ As with many other liberation theologians, the Catholic hierarchy has been concerned with his use of non-Catholic paradigms (particularly Marxian-influenced ones) and with overemphasis on Jesus' humanity over his transcendence.¹⁴⁶

140. See JON SOBRINO, *WHERE IS GOD?: EARTHQUAKE, TERRORISM, BARBARITY, AND HOPE* xix–xxi (Margaret Wilde trans., 2004) [hereinafter SOBRINO, *WHERE IS GOD?*] (addressing the role of states in the present day world conditions); see also JON SOBRINO, *THE PRINCIPLE OF MERCY*, *supra* note 135, at 27–46 (addressing theology and the causes of sufferings).

141. See SOBRINO, *WHERE IS GOD?*, *supra* note 140, at 119–23, 150–52 (addressing Sobrino's worldview and his views on the ministry of Jesus).

142. See JON SOBRINO, *JESUS THE LIBERATOR: A HISTORICAL-THEOLOGICAL READING OF JESUS OF NAZARETH* 47–51 (Paul Burns & Francis McDonagh trans., 1994) [hereinafter SOBRINO, *JESUS THE LIBERATOR*] (describing the historical aspect of Jesus).

143. *Id.* at 60–61.

144. *Id.* at 68–72.

145. See John Meier, *The Bible as a Source for Theology*, 43 CATH. THEOLOGICAL SOC'Y OF AM. PROC. OF THE SIXTIETH ANN. CONV. 1, 3–4 (1988) (criticizing Sobrino's Christology at the Crossroads by saying that "[n]owhere in the book is there any extended, critical discussion of what the phrase 'the historical Jesus' means or what criteria we are to use to discern authentic material").

146. See, e.g., INSTRUCTION ON CERTAIN ASPECTS OF THE 'THEOLOGY OF LIBERATION,' *supra* note 16, at 1–2 (warning Christians against borrowing Marxist ideas and focusing on liberation of the material above liberation from sin); INSTRUCTION ON CHRISTIAN FREEDOM

c. *Feminist Theology*

Sobrino is one of many significant liberation theologians who rose to prominence in the 1980s. The newer generation of scholars has been more diverse and has brought innovative tools and perspectives to analyzing problems of poverty. One of the most important of these movements is feminist theology.

Perhaps the most influential Catholic feminist theologian is Elizabeth Johnson. Addressing scripture, tradition, and theology, she argues that God has been inappropriately gendered in Catholic tradition in such a way that validates the subordination of women.¹⁴⁷ She contends that approaches to scripture, tradition, and public policy must be viewed through the "lens of women's flourishing."¹⁴⁸ That is, a system of hermeneutics, theology, or law that does not encourage the flourishing of women cannot be considered just or desirable. In Johnson's work, the preferential option creates a special obligation to women, who have been oppressed by male-dominated institutions, including the Catholic Church.

d. *Broader Outsider Views*

Latina feminist theology has also emerged as a distinctive discipline. Maria Pilar Aquino is one of its most significant voices and considers her theology to be an outgrowth of the plural movements for liberation that gave rise to Latina/Chicana feminism.¹⁴⁹ Latina feminist theology is anti-

AND LIBERATION, *supra* note 16, at 42–47 (criticizing Marxian tenets such as materialism and revolution).

147. See ELIZABETH JOHNSON, SHE WHO IS: THE MYSTERY OF GOD IN FEMINIST THEOLOGICAL DISCOURSE 33 (1995) ("To even the casual observer it is obvious that the Christian community ordinarily speaks about God on the model of the ruling male human being. Both the images that are used and the concepts accompanying them reflect the experience of men in charge within a patriarchal system.").

148. *Id.* at 18. In full, Elizabeth Johnson writes:

The lens of women's flourishing focuses faith's search for understanding in feminist theology. It does so in the context of myriad sufferings resulting from women's being demeaned in theory and practice in contradiction to the creative power, dignity, and goodness that women appreciate to be intrinsic to their own human identity. When this suffering is brought to consciousness, when its causes are analyzed, when dangerous and therefore suppressed memories of women's agency are brought to light, and the praxis of resistance and hope are begun, then conditions exist for a new interpretation of the tradition.

Id.

149. See ANNE M. CLIFFORD, INTRODUCING FEMINIST THEOLOGY (2002) (surveying

essentialist in rejecting sex as the only axis of oppression. Race, class, ethnicity, national origin, religion, age and other categories create a kaleidoscope through which institutions may be observed and critiqued.¹⁵⁰ It is "a critical framework to analyze systemic injustice, both locally and globally, to determine effective strategies for its elimination and the actualization of authentic justice."¹⁵¹ This movement towards pluralistic and multi-axis analysis is consistent with the trend toward broader outsider scholarship, which would include aspects of feminist theory, critical race theory, Latina-Latino critical theory, queer theory, disability theory and others. The move toward outsider perspectives as a whole is consistent with similar moves in the legal academy in terms of the consolidation of critical and marginalized perspectives.

Although the Catholic Church's theological concerns with liberation theology make it unlikely that the liberationist understandings of the preferential option will be fully embraced institutionally, the internal dialogue between the two remains important. My project, however, is different. I urge that theology, as the discourse of the Church, engage in closer dialogue with secular scholarship and government for their mutual benefit.¹⁵²

i. Modern Papal Teaching

Perhaps more than any other contemporary pope, John Paul II attempted to identify with the poor and provide hope. In his preaching and his more formal statements, there is a deep concern for the suffering of the poor throughout the world.¹⁵³ He became pope at a time when liberation

many of the approaches within Christian feminist theology).

150. See Maria Pilar Aquino et al., *Introduction*, in *A READER IN LATINA FEMINIST THEOLOGY: RELIGION AND JUSTICE* xv (Maria Pilar Aquino et al. eds., 2002) ("As Latina feminists, we are presenting a critical framework from which we analyze the realities of Latinas in the United States of America. In doing this, we examine inequalities along lines of race, class, poverty, citizenship, gender, and religion as they affect us and our communities.").

151. Maria Pilar Aquino, *Latina Feminist Theology: Central Features*, in *A READER IN LATINA FEMINIST THEOLOGY: RELIGION AND JUSTICE* 133, 133–60 (Maria Pilar Aquino et al. eds., 2002) (providing a theoretical framework for Latina Feminist Theology that is grounded in praxis).

152. See Shiffrin, *supra* note 8, at 1656 (arguing for increased involvement from religious organizations in democratic dialogues).

153. CHARLES E. CURRAN, *THE MORAL THEOLOGY OF POPE JOHN PAUL II* 212–15 (Georgetown Univ. Press 2005).

theology was emerging as a powerful transforming force, particularly in Latin America. It was his response to church leaders and theologians that would institutionalize certain elements of liberation theology within mainstream Catholic social teaching.¹⁵⁴ For purposes of developing the preferential option, the most important moves occurred in his preaching at and shortly after the Puebla meeting¹⁵⁵ and in his encyclical, *Laborem Exercens*.¹⁵⁶

In his preaching at Puebla, Pope John Paul II encouraged the bishops to be resolute in their stance against injustice.¹⁵⁷ However, he expressed concern over understanding Christ or the New Testament as politically revolutionary.¹⁵⁸ That concern did not stop him from adopting the term 'preferential option for the poor' within the year.¹⁵⁹ Although identification with Marxian theory in some liberation theology remained problematic for John Paul II, his humanism rooted in a moral commitment to the dignity of every human person probably caused him to consider carefully how the Catholic Church needed to develop a theological and philosophical framework for responding to poverty in the world.¹⁶⁰

Perhaps as a way of providing a Catholic alternative to Marxian thought, John Paul II issued *Laborem Exercens* on May 15, 1981.¹⁶¹ This

154. See *id.* at 214 ("John Paul II invokes the 'preferential option for the poor' to bolster the emphasis on satisfying basic human needs, especially in the material order.").

155. See DORR, *supra* note 94, at 263–70 (discussing the emerging Christian approach to poverty that would serve as a foundation for the Church's formal commitment to the poor).

156. See CURRAN, *supra* note 153, at 208–11 (explaining Pope John Paul II's idea of the role of the church in the economy as discussed in *Laborem Exercens*).

157. JOHN PAUL II, JOHN PAUL II IN MEXICO: HIS COLLECTED SPEECHES 78 (William Collins Publ'g 1979).

158. See *id.* at 69 (explaining that understanding Christ to be a political revolutionary is not consistent with the Church's instruction).

159. John Paul II, *Sermon*, L'OSSERVATORE ROMANO, July 31, 1980, § 6.9. Pope John Paul II stated:

[T]he preferential option for the poor . . . is not an invitation to exclusivism But it is a call to a special solidarity with the humble and the weak, with those who are suffering and weeping, who are humiliated and left on the fringes of life and society, in order to help them to realize ever more fully their own dignity as human persons and children of God.

Id.

160. See John Paul II, *Redemptor Hominis* (1979), § 11 ("The human person is the full truth of his or her existence and personal being and also of their community and social being—in the sphere of their own family, in the sphere of society . . . and in the sphere of the whole of humankind.").

161. See John Paul II, *Laborem Exercens* (On Human Work) (1981) [hereinafter John

encyclical analyzes the role of human work and reflects on how a society ought to treat workers, consistent with human dignity.¹⁶² Blame for structures of injustice is passed on to wealthy managers and consumers who benefit from the exploitation of workers through low prices, even if they do not participate directly in the specific forms of oppression used.¹⁶³ Business people and consumers in the United States, for example, bear responsibility for the exploitation of Mexican workers because they benefit from it. Individuals, the Catholic Church, nations, and international organizations have an ethical obligation to identify these forms of exploitation and to end them, even if it means a lower standard of living for the wealthy.¹⁶⁴ A key value for John Paul II is solidarity with the poor and marginalized.¹⁶⁵ He encourages the poor to struggle to be liberated from poverty and even refers to the role of unions.¹⁶⁶ However, this is characterized as a struggle against injustice not between classes. Confrontation is allowed and even required to better provide for the common good. Although the encyclical defines the human person as a worker in ways that resemble Marx, there is a key difference. From a Catholic perspective, human beings are workers in that they are co-laborers with God in the work of creation.¹⁶⁷

ii. Episcopal Teaching

In 1986, the Catholic bishops of the United States of America issued a joint pastoral letter entitled *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*.¹⁶⁸ The letter was prompted by the challenges of Puebla and *Laborem Exercens* as well as the increasing problems of poverty within the U.S.¹⁶⁹ Significantly, the bishops did not write in a vacuum, but solicited input from social scientists,

Paul II, *Laborem Exercens*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 352 (discussing the church's view on human work as distinct from Marxism and capitalism).

162. *Id.* § 9.

163. *Id.* §§ 16–20.

164. *See id.* (stating that more emphasis should be placed on the common good in economic planning).

165. *Id.* §§ 8, 20.

166. *See id.* (discussing how union membership helps marginalized workers to protect their rights).

167. *See id.* § 25 (discussing how work is God's will and that man is continually working on God's creations).

168. CATHOLIC SOCIAL THOUGHT, *supra* note 42.

169. CATHOLIC SOCIAL THOUGHT, *supra* note 42, §§ 4–11.

theologians and the poor themselves.¹⁷⁰ The final version is actually quite critical of capitalism as it is practiced in the United States.¹⁷¹ However, this criticism tends to limit itself to abuses rather than the system as a whole. This document is also significant because it reflects a serious commitment by the Catholic community of a wealthy nation to embrace many of the recommendations of Medellín and Puebla, allowing for the possibility of greater solidarity with Catholics in poorer communities. Because it addresses the specific problems of the United States, *Economic Justice for All* has more specific policy analysis and recommendations than earlier documents of Catholic social teaching. This crucial move from theory to institutional practice is a primary aim of this article. Namely, how can the preferential option for the poor inform individuals, the Catholic Church and governments so as to provide ways of understanding the underlying problems and methods for addressing them.

C. Existing Theoretical Moves to Bridge Theology and Secular Legal Discourse

In order to move from the individual Catholic or even the Church to the realm of public policy and legal rules, the preferential option for the poor must be expressed in ways that are intelligible in the context of public discourse. Although public reason may arguably include theological reasoning, at some point governments (at least in pluralistic cultures) need to justify policy and legal rules more broadly, so they do not require particular religious commitments or beliefs. Some scholars have attempted to introduce elements of Catholic social thought into public discourse in such a way that it might ultimately be a legitimate basis for law and policy outside of the Catholic or even religious context. Mary Ann Glendon¹⁷² and Alan Gewirth¹⁷³ provide examples of this move.

170. See Archbishop Rembert G. Weakland, O.S.B., *The Economic Pastoral Letter Revisited*, in JOHN A. COLEMAN, ONE HUNDRED YEARS OF CATHOLIC SOCIAL THOUGHT 6 (1991) ("The balance we seek in this volume and in the conference is less one among the various ideological poles . . . than in the make-up of the authors and participants: bishops, pastors, economists, theologians, ethicists . . ."); see also DORR, *supra* note 94, at 335–36 (stating that joint pastor letters are the product of formal and informal consultation and lengthy debate).

171. DORR, *supra* note 94, at 336.

172. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1993).

173. See generally ALAN GEWIRTH, COMMUNITY OF RIGHTS (1996).

Mary Ann Glendon approaches comparative and international law discourse from an admittedly Catholic perspective.¹⁷⁴ However, her public discourse outside of Catholic audiences (which she also addresses) focuses on normative arguments that do not rely on her religious assumptions. Certainly rooted in Bernard Lonergan, though perhaps influenced by John Rawls, Glendon accepts that individuals and political communities adopt various approaches to developing policy and legal rules, all of which might be reasonable within the appropriate geographical, cultural, and historical context.¹⁷⁵ Since there are potentially irreconcilable differences in discourse, she suggests that ultimately there is more benefit to considering our methods for approaching legal problems and the ultimate overlap in conclusions.¹⁷⁶

In Lonerganian terms, this would require consideration of what he calls the transcendental method.¹⁷⁷ Consensus can then ultimately be arrived at by identifying overlapping horizons of understanding. Rawls does not address the underlying method of reasoning, but he does posit that law, particularly international law, has legitimacy when there is overlapping consensus among peoples with different beliefs and traditions.¹⁷⁸ So, in a sense, Rawls¹⁷⁹ describes an approach to developing legal rules with

174. See generally Mary Ann Glendon, *Catholic Thought and Dilemmas of Human Rights* [hereinafter Glendon, *Catholic Thought and Dilemmas of Human Rights*], in ERASMUS INSTITUTE, HIGHER LEARNING AND CATHOLIC TRADITIONS 113 (Robert E. Sullivan ed., 2001).

175. Mary Ann Glendon, *Searching for Bernard Lonergan*, AMERICA, Oct. 1, 2007, at 17.

176. Glendon, *Catholic Thought and Dilemmas of Human Rights*, *supra* note 174, at 119–21; Mary Ann Glendon, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 225–33 (2001) [hereinafter GLENDON, A WORLD MADE NEW].

177. See BERNARD J. F. LONERGAN, S.J., THE LONERGAN READER 445–54 (Mark Morelli & Elizabeth Morelli eds., Univ. of Toronto Press 1977) (stating that theological beliefs are within the transcendental field from which all moral and philosophical notions are formed and, as such, by use of the transcendental method, individuals can draw notions from theology into the human attentiveness, intelligence, reasonableness and responsibility); see also Russell Powell, *Toward Reconciliation in the Middle East: A Transcendental Framework for Christian-Muslim Dialogue Using Natural Law Tradition*, 2 LOY. U. CHI. INT'L L. REV. 1, 4–6 (2005) (stating that the collective experience of gaining insight could be a foundation of solidarity among Christians and Muslims even if there is no agreement regarding articles of faith).

178. See JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 7, at 340 (explaining that in a just society, there can be considerable differences in citizens' conceptions of justice, provided that these conceptions lead to similar political judgments).

179. For a discussion of Rawls, see *infra* Part III.D.2.

legitimacy in a pluralistic world, and Lonergan delves further into the reasons why there might be overlap in the first place and how it might be broadened.¹⁸⁰

With regard to the preferential option, Glendon provides secular arguments rooted in the value of human life and the importance of human dignity to justify a policy imperative that addresses injustices against the poor.¹⁸¹ For her, these values are rooted in the principle of *imago dei*, which is that human beings have special value and dignity because they are created in the image of God.¹⁸² However, this belief is not essential to her public discourse.

Alan Gewirth attempts to create a secular justification for a community based on human rights and committed to the flourishing of all, particularly those who are disadvantaged.¹⁸³ Consistent with the preferential option, Gewirth emphasizes that creating a just system of laws must first address the needs of the poor and marginalized.¹⁸⁴ He calls this a "deprivation focus."¹⁸⁵ His analysis is largely Kantian in its attempt to identify imperatives via rational discourse, and his arguments emphasize the critical role of human agency.¹⁸⁶

Fundamentally, humans have agency as autonomous, rational beings with free will; however, agency for Gewirth is also understood in the context of community.¹⁸⁷ So, like a partnership, human beings are in some sense agents of one another and the community. This is because all human

180. See Powell, *supra* note 177, at 4–5 (stating that teachings in justice and human dignity in Christianity and Islam share common roots).

181. GLENDON, A WORLD MADE NEW, *supra* note 176, at 144–46 (reciting an account of the formulation of Article 1 of the United Nations General Assembly, which established why individuals have rights, without referring to God, and states that individuals have obligations to each other arising from these rights); Glendon, *Catholic Thought and Dilemmas of Human Rights*, *supra* note 174 (stating that the constellation of social and economic ideas commonly found in 20th century constitutions were promoted by various political groups).

182. See Glendon, *Catholic Thought and Dilemmas of Human Rights*, *supra* note 174 (stating that the Catholic Church's shift after Vatican II from a natural law focus to a human rights focus is contingent on the view that humans are made in the image of God).

183. See GEWIRTH, *supra* note 173, at 1–9 (stating that the purpose of his book, *The Community of Rights*, is to show that rights and community have a relation of mutual support, and that this relation can fulfill the rights of deprived members of society).

184. *Id.* at 110.

185. *Id.*

186. *Id.* at 1–2.

187. *Id.* at 13–19.

agents require freedom and certain basic needs necessary for well-being.¹⁸⁸ Gewirth argues that access to these essential goods ought to reasonably be understood as rights by human agents.¹⁸⁹ Even if human beings are purely self-interested, acknowledging a right to those goods that are absolutely essential to human agency would be in the interest of all agents individually according to Gewirth.¹⁹⁰ Rights and community then become mutually supporting. A "community of rights" would establish equality and the relief of suffering as primary obligations of all agents and ultimately the state (Gewirth's "deprivation focus").¹⁹¹

The deprivation focus of a community of rights essentially establishes the preferential option without relying on Catholic tradition. It creates a moral imperative for individuals and the state to privilege the needs of the poor and disadvantaged.¹⁹² Both Gewirth and Glendon succeed to some extent in the attempt to provide rational secular arguments for ethical standards rooted in religious tradition (perhaps a Kantian exercise by definition). However, their ideas compete with other normative arguments that may not come to the same conclusions.

The work of scholars like Glendon and Gewirth are important for contextualizing Catholic social thought so that it might become intelligible and persuasive for those who craft policy and legal rules. However, I propose that there can be a more vital dialogue between Catholic and secular thought that will enrich both. The next section proposes a number of secular perspectives that have relevance for the preferential option, but ultimately I will focus on three bodies of scholarship that I believe are the most fertile: standpoint theory, outsider methodology, and law and economics.

188. *See id.* at 9 (stating that the conception of a right encompasses the notion that there is intrinsic value in avoiding infringement of certain mandatory interests including life, physical integrity, economic security, self-esteem, education and others).

189. *See id.* at 11 (stating that it is an efficient means, and therefore rational, for an individual to claim rights for himself in order to protect certain fundamental interests).

190. *See id.* at 19 (stating that fundamental rights can become generic rights as individuals are individually committed to recognizing those rights as a means of rationally protecting their own fundamental interests).

191. *See id.* at 39–41 (explaining that the result of recognizing the positive rights of others is the admission that one has positive duties to help others attain or maintain freedom and well-being, which results in a supportive state as the community of rights).

192. *Id.* at 59 (stating reasons for the state, and others, to protect the rights of the poor and disadvantaged).

D. Relationship to Secular Normative Structures

Although theological discourse may be a helpful contribution to public reason, its ideas must be contextualized in broader, nonreligious terms at the level of government (e.g., in legal decisions or whereas clauses of legislation).¹⁹³ Even if the preferential option can be justified without resorting to religious faith, it must compete with secular theoretical frameworks and imperatives. Although the following analysis is not exhaustive, it is meant to be illustrative of the way in which the preferential option might engage important nonreligious ethical theories (utilitarianism, Rawlsian social contract, human rights, virtue ethics, and critical approaches). This provides a framework for later discussions in Parts IV, V, and VI regarding the incorporation of certain of these secular theories into an analysis of the preferential option.

I. Utilitarian Measures

Perhaps the most pervasive ethical basis for legal and policy analysis in the modern liberal state is utilitarianism.¹⁹⁴ Government agencies routinely resort to cost benefit analysis (or CBA) as a method for choosing rules.¹⁹⁵ Law and economics has arguably become a leading approach to specifically utilitarian legal analysis.¹⁹⁶ At the very least, considering economic incentives provides powerful insights into the likely impact of legal rules. The behavioral and socio-economics movements have sought to clarify certain contested assumptions by introducing scholarship that might better explain human behavior.¹⁹⁷ However, other than equating

193. See Shiffrin, *supra* note 8 (asserting that religion has a constructive role to play in democratic politics).

194. See Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563, 571–72 (1980) (stating that, under utilitarian theory, optimality is achieved when happiness is maximized for the subject population. Any move that increases net happiness is therefore an efficient one). There are in fact two distinct utilitarian models: a teleological model, which measures aggregate happiness, and an egalitarian model, which seeks to control for the effects of unequal resource distributions by measuring average happiness. *Id.*

195. See Mathew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 169–87 (1999) (discussing the historical background of the employment of cost benefit analysis in modern economic theory and among governmental agencies).

196. See, e.g., Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 U. CHI. L. REV. 1129, 1138–39 (1997) (stating that law can reduce transaction costs and facilitate specialization and division of labor, essential to efficient production).

197. See generally, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, A

utility or happiness with currency, utilitarian approaches such as law and economics generally do not provide satisfying definitions for the good that they seek to maximize.¹⁹⁸

A utilitarian critique of the preferential option for the poor might begin by dismissing the idea of deontological imperatives. From a Millian point of view, the only clear limit on the pursuit of self-interest is the harm principle.¹⁹⁹ Although a libertarian understanding of the harm principle might consider only individual acts, it is conceivable that a Millian utilitarian could recognize the role of harmful acts compounding upon others creating harmful structures that no longer rely on the harmful acts of individuals. Social norms, legal rules, and tax policies can cause systematic harm. Since these standards and the institutions that enforce them do not rely on the intent of any single individual to harm or oppress and since they have legitimacy, there is no simple way to apply the harm principle to the act of someone who enforces them. There are three ways to address these sorts of harms. First, they might be ignored because they are not attributable to any particular individual and/or because they are sanctioned by the state. Second, arguing for a sort of mandatory conscientious objection, officials who enforce rules that cause inappropriate harm may be subject to sanction themselves for not recognizing that the rule they are charged with enforcing violates the harm principle. Third, a utilitarian might recognize that structures of harm must be dismantled. The second and third approaches are consistent with the preferential option to the extent that they acknowledge the need to prevent harm, even when it is legitimized by institutional structures.

Although utilitarianism is likely to be in tension with Catholic social thought as a moral theory, it has useful non-normative capacities. Law and economics is the dominant strain of utilitarianism in the legal academy. Because of its powerful descriptive and predictive power, a linking of law and economics with the preferential option will be proposed in greater detail in Part VI.

Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471 (1998) (advancing an approach to the concept of human choice and behavior that is more accurate than the rational actor model, commonly assumed in classical economic analysis).

198. See generally Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics*, 64 U. CHI. L. REV. 1197 (1997).

199. See JOHN STUART MILL, ON LIBERTY 5–19 (Oxford Univ. Press 1998) (1859) (setting forth the harm principle as the absolute principle to govern "the dealings of society with the individual").

a. Pareto Optimality

Much of contemporary welfare economics refers to the notion of Pareto optimality.²⁰⁰ That is, a system is optimal if there are no policy changes that can increase utility (resources available) without harming someone.²⁰¹ A Pareto superior move is thus one that increases utility without causing harm to anyone.²⁰² Some law and economics scholars have asserted that any system must be Pareto optimal, because rational actors would make any possible efficient move.²⁰³ Notwithstanding this critique, Pareto optimality is not entirely inconsistent with the preferential option for descriptive or instrumental purposes. However, the preferential option might actually require a decrease in overall utility in order to provide for the essential needs of the poor.

b. Kaldor-Hicks

The Kaldor-Hicks model of efficiency responds to Pareto and is the standard in mainstream law and economics.²⁰⁴ It allows for policy moves that harm people so long as the increase in utility would provide sufficient resources to compensate those harmed.²⁰⁵ Importantly, it does not require that actual compensation be granted.²⁰⁶ Because Kaldor-Hicks specifically legitimates policy moves that harm, and because the poor and marginalized are historically the victims of these sorts of policies, this model is not likely to be compatible with the preferential option. They provide very different visions of the good. For Kaldor-Hicks efficiency, it is maximizing overall utility without compensation for the harm caused.²⁰⁷ For the preferential option, there is an emphasis on the flourishing of all people even if overall

200. See Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 GEO. MASON L. REV. 971, 982 (1988) (discussing Pareto's influence on modern economic theory).

201. *Id.*

202. *Id.*

203. See generally Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991).

204. See generally John R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

205. *Id.*

206. *Id.*

207. *Id.*

utility is decreased.²⁰⁸ Kaldor-Hicks is often understood through the lens of wealth maximization in contemporary law and economics jurisprudence.²⁰⁹ Wealth maximization proposes that all meaningful utility can be quantified in dollar values.²¹⁰

2. Rawlsian Social Contract

John Rawls is probably the most important liberal political philosopher of the 20th century. His core theories are most thoroughly described in *A Theory of Justice*.²¹¹ Rawls posits that justice must fundamentally be fairness.²¹² He proposes that rational persons not knowing the circumstances into which they were born would choose a system in which they would be in the best possible position if they were born into disadvantage.²¹³ That is, if we knew that we might be born into a marginalized group, whether discriminated against because of class, race, ethnicity, gender, religion, orientation, or disability, we would choose a system that would provide opportunities comparable to those who were not disadvantaged.

Rawls proposes that fair legal rules can be developed as a social contract negotiated from the "initial position."²¹⁴ The initial position is a notion similar to the classical "state of nature"; however, it is an artificial position that requires ignoring the actual state of privilege and/or disadvantage into which one is born. It assumes that one cannot make a fair decision regarding the distribution of social goods knowing *a priori* what

208. See discussion *supra* Part III.B.5 (discussing papal teaching concerning ending exploitation of the poor despite negative impact upon the wealthy).

209. See Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979) (explaining wealth maximization theory in such terms). Posner states:

Wealth is the value in dollars or dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up. The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered as a market.

Id.

210. *Id.*

211. See generally RAWLS, *A THEORY OF JUSTICE*, *supra* note 7.

212. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* xvi (Erin Kelly ed., Harvard Univ. Press 2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*].

213. See generally RAWLS, *A THEORY OF JUSTICE*, *supra* note 7.

214. *Id.* at 10–11.

advantages or disadvantages he or she will actually be born into. So, in order to negotiate a fair social contract, we make distributive decisions pretending not to know.²¹⁵ This is called the "veil of ignorance."²¹⁶ As opposed to some other theories of social contract, Rawls' veil of ignorance is thick in that it denies knowledge of any details of life such as gender, race, ethnicity, intelligence, health, disability, or orientation.²¹⁷ Presuming human rationality and risk aversion, Rawls assumes that a person in the original position reasoning behind the veil of ignorance will choose to live in the best possible situation if born into disadvantage even if it means sacrificing economic or social privilege if born into advantage.²¹⁸

The social contract negotiated through a thick veil of ignorance actually argues in favor of the preferential option for the poor. As a matter of choice theory, the thought experiment requires the perspective of the disadvantaged and thus privileges it. However, as an experiment it has serious limitations. Scholars and lawmakers may imagine what it might mean to be poor or marginalized, but they are unlikely to have lived experience of it. The preferential option envisions active participation by the poor in crafting solutions. Although this is not inherent in Rawlsian thought, it is not antithetical to it. In fact, the preferential option may actually contribute to the promotion of the sort of fairness Rawls attempts to reach by including the poor in the thought experiment of the original position.

3. *Human Rights Discourse*

Human rights literature is diverse and sometimes contradictory in its theory. Over the past 60 years, there has been an intentional shift from natural law or at least deontological reasoning to various forms of positivism.²¹⁹ In part, this move attempts to solve the problem of plural understandings of the ethics that justify human rights by decoupling them from "Western" or "Christian" contexts, some of which are themselves

215. *Id.*

216. *Id.* at 118–23.

217. *See generally* RAWLS, A THEORY OF JUSTICE, *supra* note 7.

218. *Id.* at 118–23.

219. *See* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 366–68 (Henry J. Steiner & Philip Alston eds., Oxford Univ. Press 4th ed. 2000) [hereinafter INTERNATIONAL HUMAN RIGHTS IN CONTEXT] (acknowledging such shift to positivism).

highly problematic.²²⁰ Some scholars argue that if law is simply the command of a sovereign and is not universal, then such law is less likely to be a tool of imperialism.²²¹ If there is consensus regarding these commands as they concern "human rights," then they attain legitimacy.²²² However, it might be possible to arrive at consensus without deconstructing the plural rationales for protecting human rights. A Kantian, a utilitarian, an Aristotelian, a Catholic, and a Muslim might arrive at consensus, but it will be the overlap of their actual beliefs or commitments, not something synthetic that lacks meaning for any of the parties. In the formulation of human rights discourse, the preferential option can be presented as an authentically Catholic ethic, but it might be viewed as perfectly compatible with other views for different reasons.

One area of dispute within human rights discourse in the United States is the weight and validity of economic or social rights as opposed to civil and political rights.²²³ A typical argument is to distinguish between costs.²²⁴ Civil and political rights are theoretically costless, while economic rights like rights to education, health, and housing are potentially burdensome.²²⁵ The first fallacy in this argument is that civil and political rights do not drain the economy. Democracy and the rule of law are extremely expensive in the U.S. experience.²²⁶ Economic and social rights require an assessment of what constitutes essential needs, but that does not mean that they are impossible to provide. The preferential option for the poor clearly requires some provision for basic needs in the context of its liberation theology roots. However, there might be room to theorize that civil and political equality (if it is truly authentic in empowering the marginalized) might make the distributive role of economic rights less crucial. From either point of view, the preferential option could be a

220. *Id.*

221. See, e.g., INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 220–22 (Deborah Lucas Schneider trans., 1991) (discussing this theory in reaction to Hitler's commands).

222. See GLENDON, *A WORLD MADE NEW*, *supra* note 176, at 221–33 (explaining that popular support of a sovereign's commands can create legitimacy).

223. See David Beetham, *What Future for Economics and Social Rights*, reprinted in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, *supra* note 219, at 255–59 (discussing the dispute between such rights).

224. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (W.W. Norton & Co. 2000).

225. See generally *id.*

226. See generally *id.* (arguing that all rights are positive rights).

helpful principle within various human rights discourses. It also creates an opportunity for contextualizing Catholic thought in a pluralistic milieu.

4. *Virtue Ethics*

Virtue ethics²²⁷ has grown in influence as a reaction to both Kantian deontology and postmodern fragmentation.²²⁸ It is teleological in that it looks toward an ultimate good, which in the case of a legal system would be justice.²²⁹ Virtues²³⁰ can be imitated by individuals and are ultimately

227. Virtue ethics concerns "the virtues themselves, motives and moral character, moral education, moral wisdom or discernment, friendship and family relationships, a deep concept of happiness, the role of the emotions in our moral life and the fundamentally important questions of what sort of person I should be and how we should live." Rosalind Hursthouse, *Virtue Ethics*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2003) [hereinafter *Virtue Ethics*], available at <http://plato.stanford.edu/archives/fall2003/entries/ethics-virtue/#1>.

228. See Kyron Huigens, *Homicide in Aretaic Terms*, 6 *BUFF. CRIM. L. REV.* 97, 97–99 (2002) (explaining the growth in influence of virtue ethics). Huigens writes:

There is a third major tradition in philosophical ethics, rooted in the writings of Aristotle and revived recently under the name of virtue ethics. The philosophical tradition of virtue has nothing to do with the rigid adherence to moral duty advocated by conservatives in our ongoing culture wars. In its proper, technical sense, the word virtue refers to a capacity for sound practical judgment, both on the occasion of action and in the assembly and maintenance of one's system of ends and standing motivations. Virtue ethics as a philosophical enterprise focuses its inquiry on normative governance at the level of motivation—as opposed to duty as dictated by reason, or prescriptions for optimal social welfare.

Id. at 98.

229. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 244–55 (Univ. of Notre Dame Press 2d ed. 1984) (discussing how virtues seek to define an "ultimate good," although asserting that individualism can create competing views).

230. See *Virtue Ethics*, *supra* note 227.

A virtue such as honesty or generosity is not just a tendency to do what is honest or generous, nor is it to be helpfully specified as a 'desirable' or 'morally valuable' character trait. It is, indeed a character trait—that is, a disposition which is well entrenched in its possessor, something that, as we say 'goes all the way down', unlike a habit such as being a tea-drinker—but the disposition in question, far from being a single track disposition to do honest actions, or even honest actions for certain reasons, is multi-track. It is concerned with many other actions as well, with emotions and emotional reactions, choices, values, desires, perceptions, attitudes, interests, expectations and sensibilities. To possess a virtue is to be a certain sort of person with a certain complex mindset.

Id.

reflected within the community.²³¹ Just individuals contribute to the creation of a just society. While emulable virtues may come from a variety of sources, many virtue ethicists rely heavily on the Nicomachean Ethics of Aristotle, even today.²³² The related field of virtue jurisprudence is an increasingly important strand of legal and constitutional theory.²³³ For example, a virtue ethics analysis of disability law is likely to address the facts of legal dispute rather than the rules.²³⁴ If a result does not seem just, however defined, it is not likely to be just.

The preferential option for the poor ought to be compatible with virtue ethics depending on the virtues. Justice, fairness, charity, and mercy all call for the consideration of the poor and disadvantaged. Alasdair MacIntyre²³⁵ and Martha Nussbaum²³⁶ both propose a system of what might be called virtue ethics rooted in their understandings of Aristotle. However, ultimately the definition of particular ethics will largely determine to what extent the preferential option is compatible or illustrative.

5. Environmental Ethics

As the threat of extinction, pollution, and global climate change has increased, an ethic rooted in stewardship of global resources and sustainable development has emerged as a holistic ethical paradigm for evaluating policy decisions.²³⁷ Environmental ethics can be rooted in utilitarian self-interest²³⁸ or in an imperative to protect the planet.²³⁹ Some

231. See MACINTYRE, *supra* note 229, at 191–93 (explaining how virtues are reflective upon the community).

232. See *Virtue Ethics*, *supra* note 227 ("[A]lmost any modern version [of virtue ethics] still shows that its roots are in ancient Greek philosophy.").

233. See generally, e.g., Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003).

234. See, e.g., Russell Powell, *Beyond Lane: Who Is Protected by the Americans with Disabilities Act, Who Should Be?*, 82 DENV. U. L. REV. 25, 44–45 (2004) [hereinafter Powell, *Beyond Lane*] (arguing that standpoint theory ought to inform judicial interpretation of the Americans with Disabilities Act).

235. MACINTYRE, *supra* note 229, at 244–55.

236. E.g. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (Cambridge Univ. Press 2001).

237. See generally, e.g., JAN HANCOCK, *ENVIRONMENTAL HUMAN RIGHTS: POWER, ETHICS, AND LAW* (Ashgate Publ'g 2003).

238. See generally ROBERT COSTANZA ET AL., *AN INTRODUCTION TO ECOLOGICAL ECONOMICS* (St. Lucie Press 1997).

239. See generally, e.g., WILLIS J. JENKINS, *ECOLOGIES OF GRACE: ENVIRONMENTAL*

environmental ethics are also deeply rooted in spiritual traditions like the preferential option.²⁴⁰

Environmental ethics might be compatible with the preferential option for the poor to the extent that it argues for the curtailment of consumption among the rich (though perhaps not for the same distributive purpose). One inherent tension relates to the nature and extent of development. Current patterns of development result in increased consumption, so that in countries like China, India, or Vietnam, increased affluence has been accompanied by increases in pollution and growing demand for energy.²⁴¹ If the preferential option necessarily results in traditional forms of development without corresponding decreases in consumption by others, it would be inconsistent with environmental ethics. However, environmental ethics and policy is an area where the preferential option must consider the form of development that it seeks. Development that promotes broader justice but compromises the health of the planet (and thus future generations) cannot be consistent with a commitment to the common good which is central to Catholic social thought. At the same time, environmental ethics could also be used as a justification for maintaining unjust power differentials for the ostensible purpose of promoting sustainability.

6. Critical Approaches/Outsider Analysis

In the legal academy, critical theories were influenced by legal realism and critical approaches to philosophy and the social sciences from sources such as the Frankfurt School.²⁴² In practice, they found voice in the civil

ETHICS AND CHRISTIAN THEOLOGY (Oxford Univ. Press 2008).

240. See generally, e.g., Pastoral Letter, U.S. Catholic Conference of Bishops, *Renewing the Earth* (Nov. 14, 1991).

241. See Energy Information Administration, International Carbon Dioxide Emissions and Carbon Intensity, <http://www.eia.doe.gov/emeu/international/carbon dioxide.html> (last visited Mar. 1, 2009) (reporting that China had a 45% increase and India had a 55% increase in greenhouse gas emissions between 1990 and 2004) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

242. The Frankfurt School is a school of critical theory, social research, and philosophy, which emerged at the Institute for Social Research of the University of Frankfurt beginning in the 1930s. They incorporated Marxian analysis when helpful, but they also drew on other schools of thought to fill in Marx's perceived omissions. Max Weber exerted a major influence, as did Sigmund Freud. Herbert Marcuse, Eric Fromm, Theodor Adorno, Jurgen Habermas, and Max Horkheimer were the central figures of the Frankfurt School. See generally ROLF WIGGERSHAUS & MICHAEL ROBERTSON, *THE FRANKFURT SCHOOL* (Michael Robertson trans., MIT Press 1995).

rights and women's liberation movements, but they tended to be more deeply theorized later. Critical Legal Studies²⁴³ (which emphasized class oppression) and feminist jurisprudence²⁴⁴ (which emphasized gender oppression) brought these ideas into the broader legal academy. Critical race theory shifted analysis to race as the primary axis of subordination.²⁴⁵ Queer theory did the same for sexual minorities.²⁴⁶ Newer approaches such as Latina/o critical theory move from single axis analysis to multi-axis (race, gender, class, orientation, disability, etc.) as a way of bringing various streams of scholarship under a single roof.²⁴⁷ In some sense, critical approaches exist on the margins because they challenge dominant oppressive power structures. However, at crucial points they have been able to influence legal rules and the broader cultural narrative.²⁴⁸ Because critical approaches consider the point of view of the marginalized, they have possible applications for deepening understandings of the preferential option.

There are two aspects of critical approaches that are helpful in making the preferential option more concrete and persuasive. First, standpoint theory, which has its origins in feminist theory, may provide an epistemological lens for evaluating policy.²⁴⁹ Second, consciousness-raising, which is found in outsider scholarship generally, provides a methodology for solidarity with the poor, and has implications for legal rules as well.²⁵⁰ These two elements of critical theory will be discussed in greater detail in Parts IV and V below.

243. See generally, e.g., RICHARD W. BAUMAN, *CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE* (Westview Press 1996).

244. See generally, e.g., *FEMINIST LEGAL THEORY: FOUNDATIONS* (D. Kelly Weisberg ed., Temple Univ. Press 1993).

245. See generally, e.g., *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., Temple Univ. Press 2000) (showing a helpful collection of key critical race scholarship).

246. See generally, e.g., WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (Harvard Univ. Press 2001).

247. See generally Berta Hernandez-Truyol et al., *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Practice*, 17 *BERKELEY LA RAZA* L.J. 169 (2006).

248. E.g., *THE VOTING RIGHTS ACT: SECURING THE BALLOT* (Richard M. Valelly et al. eds., Congressional Quarterly Press 2006); *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catharine A. MacKinnon & Reva B. Seigel eds., Yale Univ. Press 2004).

249. See generally, e.g., *THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL AND POLITICAL CONTROVERSIES* (Sandra Harding ed., Routledge 2004).

250. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 854–58 (1990) (defining consciousness-raising in feminist legal thought). Bartlett explains:

E. From Moral to Policy Imperatives

The preferential option for the poor does not exist within a vacuum; it is related to other key principles of Catholic social thought such as the dignity of the human person, the common good, natural law, and subsidiarity.²⁵¹ These principles have implications for individual moral choice as well as public policy and legal rules.

The principle of the dignity of the human person is closely related to the preferential option. The despoiling of human dignity by deprivation and oppression gives rise to a special concern for the poor. The preferential option is also rooted in concern for the common good.²⁵² If some are excluded, suffering, sick or hungry, they cannot contribute to the wellbeing of the community. It is only when all people are able to develop and contribute their skills that the community can flourish.²⁵³ Within scripture and tradition, the human body symbolizes the community.²⁵⁴ When one part of the body hurts, the entire body hurts, and the same is true, by analogy, for communities.

There is a tension between the common good and human dignity to the extent that human dignity represents an individualistic ideal. Human dignity is a basis for many of the historical justifications for rights.²⁵⁵ So, if human dignity supports a general right to property but the common good may require some degree of redistribution in order to compensate for past injustice, there is an inevitable tension between the two. Although the early

Consciousness-raising is an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences. . . . [It] creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experiences as personal hurts individually suffered reveal themselves as a collective experience of oppression.

Id. at 863–64.

251. See COLEMAN, MAKING THE CONNECTIONS, *supra* note 71, at 15–20 (describing the underlying principles in Catholic Social Thought).

252. *Id.* at 16.

253. *Id.*

254. See 1 *Corinthians* 12:12, 12:26 ("For just as the body is one and has many members, and all the members of the body, though many, are one body, so it is with Christ. . . . If one member suffers, all suffer together; if one member is honored, all rejoice together.").

255. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 15 (Hackett 1980) (1690) (describing the need to have a life of dignity as a justification for creating politic society).

Christian community practiced a rigorous form of communitarianism,²⁵⁶ the contemporary Catholic Church tends to avoid advocating policies that impinge on individual rights in the interest of communalism—except when such interference is clearly necessary to remove structures of injustice.²⁵⁷

Natural law may support the preferential option despite some tension. In the Catholic tradition, natural law accepts the view of St. Thomas Aquinas that law flows from our nature as beings capable of reason.²⁵⁸ Human beings discover natural law by observing and reflecting on the world and their relationships in it.²⁵⁹ The capacity to understand and act on the principles discovered is a function of reason and free will.²⁶⁰ Natural law was extremely important as a theoretical basis for the idea of universal human rights.²⁶¹

As a key component of human rights discourse (at least historically), natural law supports the idea of a community of rights and the privileged position of the poor, particularly with regard to claims to remedy historic and ongoing inequities. However, if natural law is understood as strongly favoring individualism, it could be used to argue against policy positions supported by the preferential option. Subsidiarity helps to mediate these tensions by supplying a basis for choosing the level at which choices ought to be made from the individual, to the family, to the local community, to the state and to the Church. Decisions, including policy decisions, ought to be made and implemented at the simplest (sometimes, read: lowest) level. So, if a problem can be best solved at the level of individual moral choice, it should not be addressed at more complex levels.

As the previous section demonstrates, the greatest theoretical challenge to understanding the preferential option for the poor and making it relevant within Catholic social thought is its tension with individualism. This is a significant issue because Catholic thought over the past 120 years has maintained deep skepticism of state efforts to correct structural injustices and to redistribute resources, particularly when these efforts are

256. *Acts* 2:45–46 (“And all who believed were together and had all things in common; and they sold their possessions and goods and distributed them to all, as any had need.”).

257. See generally John Paul II, *Laborem Exercens*, *supra* note 161.

258. SAINT THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pts. I–II, question 90 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

259. *Id.* at pt. I–II, question 94, art. 4.

260. *Id.* at pt. I–II, question 8, art. 2.

261. See Martti Koskeniemi, *The Pull of the Mainstream*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, *supra* note 219, at 78–79 (discussing the role natural law has played in protecting human rights).

grounded in ideologies such as Marxism, which can be antagonistic toward the scriptural and magisterial traditions.²⁶² Ultimately, policy imperatives rooted in the preferential option need to address the appropriate institutional level of action (subsidiarity), the appropriateness of legal reform, and the need for effective methodologies and tools.

1. *The Role of Subsidiarity*

Although subsidiarity evolved from assumptions regarding authority and jurisdiction, it has become a standard for efficiency as well.²⁶³ Decisions are made at the simplest level of authority in order to eliminate the costs of transferring information one direction and enforcing policy the other direction.²⁶⁴ As in federal systems of government, local issues that do not require national attention are addressed by state government for purposes of preserving state sovereignty and efficiency. Subsidiarity has important implications for the preferential option because it provides a taxonomy for addressing ethical problems.

a. *Individual Responsibility*

The preferential option for the poor requires that individuals reflect on their participation in oppression, both directly and indirectly.²⁶⁵ So,

262. See, e.g., John Paul II, *Centesimus Annus (On the Hundredth Anniversary of Rerum Novarum)*, reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 42, § 26 (criticizing the exploitative elements of Marxism).

263. See generally Robert K. Vischer, *Subsidiarity as Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001).

264. See *id.* at 128 (explaining three basic principles of subsidiarity). Vischer notes:

Several basic principles emerge from even a cursory reading of subsidiarity and its Catholic social theory roots. First, a meaningful distinction must be drawn between mediating structures and megastructures under any policy that purports to apply subsidiarity. Second, subsidiarity does not call simply for the recognition of mediating structures, but for their empowerment. Third, the localization of societal problem-solving, mandated by subsidiarity, carries with it an obligation to ensure that individuals are equipped to participate fully in collective decision-making regarding issues that affect them and their communities.

Id.

265. See Paul VI, *Octogesima Adveniens*, *supra* note 108 ("In teaching us charity, the Gospel instructs us in the preferential respect due the poor and the special situation they have in society: the more fortunate should renounce some of their rights so as to place their goods more generously at the service of others."); John Paul II, Address to the Bishops of

charging exorbitant rent and exploiting workers cannot be justified, but neither can purchasing products that were made by exploitive means. Affirmatively, it might require choices to lower one's standard of living, to volunteer time to meet the needs of the poor and to give resources to alleviate poverty. If all people or even all Catholics took this principle seriously, it would have a profound impact on the problems of poverty; however, it would not quickly or inevitably dismantle institutionalized structures that create the conditions for and perpetuate poverty.²⁶⁶

b. Local Communities

If the individual is the starting place for decision-making, the family and other smaller relational groups would be the next. But at some point, ethical decision-making consistent with the preferential option requires broader collective action. Consequently, local community groups, including churches, may be best situated to identify and respond to poverty. However, because such groups may lack the size or institutional power to change legal rules that might create the conditions for poverty, some issues must be addressed at more complex levels.

c. Church

Although the Catholic Church does not have legal authority (except within the borders of Vatican City or in cases with ecclesiastical jurisdiction like marriage and annulment),²⁶⁷ it does have substantial resources and influence that can be brought to bear in confronting poverty. It has primarily participated in the organization and sponsorship of direct action. Increasingly, though, large Catholic organizations, bishops and the

Brazil, *supra* note 116, at 135 ("[The preferential option is] a call to have a special openness with the small and the weak, those that suffer and weep, those that are humiliated and left on the margin of society, so as to help them win their dignity as human persons and children of God.").

266. See generally M.D. LITONJUA, *STRUCTURES OF SIN, CULTURES OF MEANING: SOCIAL SCIENCE AND THEOLOGY* (2d ed. 2007).

267. See Russell Powell, *Catharine MacKinnon May Not Be Enough: Legal Change and Religion in Catholic and Sunni Jurisprudence*, 8 GEO. J. GENDER & L. 1, 21–28 (2007) (discussing how Catholic scriptures and tradition shed light on many legal questions). However, the Church itself only has actual jurisdiction in a few areas, such as annulment. *Id.* at 30.

Vatican have advocated for the interests of the poor in the political arena by addressing voters, politicians, and governments.²⁶⁸

i. Direct Action

Catholic institutions have a rich history of commitment to the service of the poor. Religious orders have always played a significant role. Mother Teresa's Missionaries of Charity are perhaps the premiere example by serving the "poorest of the poor" throughout the world—providing direct services like food, medical care and hospice care.²⁶⁹ The Jesuits historically provided service to the poor through its missions and by providing education to the working poor.²⁷⁰ Today, the Jesuits continue some of this work in missions and schools serving at-risk communities even though many older schools have become prestigious and expensive.²⁷¹ There is also a specialty organization called the Jesuit Refugee Service that attempts to address local and strategic issues that impact refugees.²⁷² Various Catholic charities under the umbrella of Catholic Relief Services mobilize vast resources to meet acute food, housing, educational and medical needs throughout the world. By some measures, it is the largest single charitable institution if viewed collectively.²⁷³ Catholic charities receive support from the Church at every level of the hierarchy: local parish, diocese, region, and the Vatican.²⁷⁴ To its credit, the Catholic Church provides significant services consistent with its commitment to the preferential option.

268. Michael Griffin, *New Pope Benedict XVI a Strong Critic of War*, 25 Hous. Cath. Worker (special ed. 2005), available at <http://www.cjd.org/paper/benedict.html>.

269. See KATHRYN SPINK, *MOTHER TERESA: A COMPLETE AUTHORIZED BIOGRAPHY* 52 (HarperCollins 1998) (describing the services provided by the Missionaries of Charity).

270. See GEORGE E. GANSS, *THE JESUIT EDUCATIONAL TRADITION AND SAINT LOUIS UNIVERSITY: SOME BEARINGS FOR THE UNIVERSITY'S SESQUICENTENNIAL, 1818–1968* (St. Louis Univ. 1969) (explaining that Jesuit schools in the U.S. were established to serve poor Catholic immigrants and did not initially charge tuition).

271. See generally, e.g., G.R. KEARNEY, *MORE THAN A DREAM: HOW ONE SCHOOL'S VISION IS CHANGING THE WORLD* (Loyola Press 2008) (describing the Christo Rey movement of Jesuit high schools serving poorer urban communities).

272. For details, see Jesuit Refugee Service Website, <http://www.jesref.org/home.php>.

273. *The 200 Largest U.S. Charities*, *supra* note 19.

274. *Id.*

ii. Advocacy

Direct services are critical, but they do not address the institutional and legal sources of poverty. The Catholic Church has moved into public realms to challenge structures of poverty that might only be changed by governmental action. The Catholic Worker Movement founded by Dorothy Day is committed both to direct service and to advocacy.²⁷⁵ Advocacy takes the form of protesting, lobbying and negotiating with state officials.²⁷⁶ Institutionally, local church leaders, bishops, and Vatican officials also play an increasingly important advocacy role. Throughout his papacy, John Paul II was one of the world's most outspoken critics of war and poverty. He would raise these issues in his teaching and in his meetings with political leaders.²⁷⁷ In some cases, Church authorities have threatened Catholic political leaders with public ostracism for taking stands on issues that are contrary to official teaching.²⁷⁸ Regardless of the appropriateness of such actions in terms of internal governance, they do not tend to lend credibility to Catholic public discourse.²⁷⁹ Today more than ever, the Catholic Church must be a prophetic voice with integrity in the realm of public reason if it hopes to fulfill its mission of justice for the poor.

d. Government and Positive Law

Ultimately, governmental and legal structures contributing to poverty require state action. Extending and defending civil and political rights is essential for empowering all people to choose leaders and policies that

275. See generally DAN MCKANAN, *THE CATHOLIC WORKER AFTER DOROTHY: PRACTICING THE WORKS OF MERCY IN A NEW GENERATION* (Liturgical Press 2008) (discussing the Catholic Worker Movement, founded by Dorothy Day and Peter Maurin in 1933, which is grounded in a belief in the dignity of every human person). Today over 185 Catholic Worker communities remain committed to nonviolence, voluntary poverty, prayer, and hospitality for the homeless, exiled, hungry, and forsaken. *Id.* They continue to protest injustice, war, racism, and violence of all forms. *Id.*

276. *Id.*

277. See, e.g., John Paul II, Address to the Diplomatic Corps (Jan. 13, 2003), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jp-ii_spe_20030113_diplomatic-corps_en.html. John Paul II said: "No to war! War is not always inevitable. It is always a defeat for humanity." *Id.*

278. See Editorial, *Communism Politics*, COMMONWEAL, May 21, 2004, available at http://findarticles.com/p/articles/mi_m1252/is_10_131/ai_n6361487 (discussing the case of Democratic presidential nominee John Kerry).

279. *Id.*

liberate rather than dominate and to pursue their good. But it is not enough. Access to food, housing, medical care, and education are all essential to human flourishing. When they are systematically unavailable, especially to vulnerable groups such as children, the state may be the only party able to take sufficient steps to ensure access to these goods for the well-being of the community. The preferential option provides lawmakers with an ethic for prioritizing legal reform. Although it has suasion for some as religious, it may have value for others as reasonable, virtuous, or pragmatic.

3. *The Need for Legal Reform*

Direct service and nongovernmental action can address many needs of the poor. However, since law is a fundamental building block of oppressive structures, they can only be dismantled through legal and political means.²⁸⁰ Slavery, limits on suffrage, and "separate but equal" are examples of legal regimes that have contributed to poverty in the U.S. experience. The vulnerability of the elderly, exploitive child labor, and lack of access for the disabled are examples of structural problems that were not adequately addressed by market forces or nongovernmental actors and justified legal reform. As a principle, the preferential option for the poor could be used to clarify and prioritize necessary legal reform. However, the current state of Catholic social teaching (the institutional teaching rather than the work of theologians) may not be sufficiently theorized to provide useful tools for either the Church or governments.

4. *The Need for a Methodology and Tools*

Making the preferential option for the poor more than a mere platitude requires a clear framework for identifying problems and a method for solving them. Although the institutional Church has at times resisted adopting the epistemological and methodological approaches of liberation theologians,²⁸¹ I argue that it should consider modes of analysis that are not explicitly or exclusively Catholic for three reasons. First, better tools give the preferential option deeper meaning and would allow the Church to be more focused in its commitment to working for justice. Second, engaging

280. See generally MICHAEL J. HIMES & KENNETH R. HIMES, *FULLNESS OF FAITH: THE PUBLIC SIGNIFICANCE OF THEOLOGY* (Paulist Press 1993).

281. See *supra* note 16 and accompanying text.

ideas from the "secular" world brings the Church into dialogue with those outside. This furthers the Church's commitment to dialogue and justice by providing opportunities for meaningful engagement on issues central to the Gospel. Third, if governments are provided with a principle that furthers the good of the community and is intelligible and realizable with their existing language and tools, they are more likely to consider adopting it. There is a reciprocal relationship here because governments might be more willing to consider new modes of policy analysis if they know that there is likely to be buy-in from large religious institutions and their constituents. Parts IV, V, and VI propose Catholic engagement with standpoint theory, outsider methodology, and law and economics.

IV. Epistemology: Standpoint Theory

Standpoint theory posits that the marginalized are in a privileged position to identify exploitation and the social structures that perpetuate it.²⁸² In its early forms, authors such as Dorothy Smith and Nancy Harstock advocated the construction of a feminist standpoint.²⁸³ Later scholarship acknowledged that problems with essentialism require multiple standpoints.²⁸⁴ So, standpoints might be constructed along a number of axes: gender, race, class, ability, orientation, physical location, etc. Some critics have argued that this atomization of views makes the construction of meaningful standpoints impossible (that is, every person will have a unique standpoint). However, a number of theorists have maintained that there is value in particular identifiable standpoints of the most marginalized (for example, womanist or Latina).²⁸⁵ Employing the tools of social science, multiple overlapping standpoints can be constructed that help nongovernmental organizations and governments to better craft policy that includes and empowers excluded voices. Sociological and geographic data

282. See NANCY C.M. HARSTOCK, *THE FEMINIST STANDPOINT REVISITED AND OTHER ESSAYS* 107–13 (Westview Press 1998) (explaining the nature of a standpoint).

283. See generally *id.*; Dorothy E. Smith, *Women's Perspective as a Radical Critique of Sociology*, reprinted in *THE FEMINIST STANDPOINT THEORY READER* 21 (Sandra Harding ed., Routledge 2004).

284. See generally, e.g., Patricia Hill Collins, *Learning from the Outsider Within: the Sociological Significance of Black Feminist Thought*, 6 SOC. PROBS. 33 (1986); Uma Narayan, *The Project of a Feminist Epistemology: Perspectives from a Nonwestern Feminist*, in *GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING* 256 (Alison M. Jaggar & Susan R. Bordo eds., Rutgers Univ. Press 1989).

285. See *supra* note 284 and accompanying text.

noting various axes of marginalization can represent patterns of exploitation. Combined with narratives and outsider scholarship, standpoints can be constructed giving stronger voice to the poor and marginalized.

The core ethical insights of this philosophy are that the disadvantaged are in a superior position to observe and judge the relative justice or injustice of a system.²⁸⁶ Concomitant to these ideas is the notion that the disadvantaged ought to have a privileged position in modifying systems in order to make them more just.²⁸⁷ This position is not necessarily in conflict with a Rawlsian view, which requires that rational people at least consider what it would be like to be disadvantaged.²⁸⁸ The difference is that the Rawlsian social contract is the product of a thought experiment: What would life be like if I were disabled, poor, etc.?²⁸⁹ Within standpoint theory, notions of justice are actually defined by the disadvantaged themselves.

The earliest standpoint theorist, Dorothy E. Smith, was the first feminist scholar to articulate standpoint theory as an epistemology evaluating knowledge from the point of view of women.²⁹⁰ Within the discipline of sociology, she explores the role of male inspired and dominated institutions in the marginalization of women and considers how sociological inquiry might change if it were to begin from the "point of view of women's traditional place."²⁹¹ She postulates that the values given to different aspects of life and thus sociological analysis would differ from the dominant, male-centered paradigm.²⁹² Her emphasis is the

286. See, e.g., HARTSOCK, FEMINIST STANDPOINT REVISITED, *supra* note 282, at 209 (highlighting that Karl Marx was able to uncover the truth of capitalism by using the perspective of the laborer rather than the owner).

287. *Id.* at 209–10.

288. See RAWLS, A THEORY OF JUSTICE, *supra* note 7, at 140–41 (positing a thought experiment in which a person's lack of knowledge regarding his relative position in the world, either as an advantaged or disadvantaged person, can create justice). Such justice may be attained because that person will have no incentive to enter into bargains in his own self-interest as he must entertain the possibility that he may be disadvantaged and will be hurt by any action that would further harm the disadvantaged. *Id.*

289. *Id.*

290. See Smith, *supra* note 283, at 21 (maintaining that there are serious consequences to looking at sociology from the point of view of women's traditional place).

291. *Id.*

292. See *id.* at 21–22 (noting that sociology is founded within the male social universe and assuming that the female perspective fits within the same framework fails to recognize how women experience and view the world differently from men).

appropriation of her academic discipline by women to better reflect their lived experience.²⁹³

Standpoint theory was more deeply theorized within political philosophy by Nancy Harstock.²⁹⁴ Like many other feminist standpoint theorists, her analysis is influenced by her reading of Marx and later critical scholars.²⁹⁵ Her work brought standpoint theory out of the analytical framework of sociology and recommended it as an epistemological lens for evaluating policy with the goal of transforming unjust societies in which the view of women has largely been ignored.²⁹⁶

The claims of standpoint theory were further developed by scholars like Sandra Harding who elaborates the epistemological implications of standpoint theory within a broader philosophical context.²⁹⁷ Although she avers to the need for situated knowledge, she argues that this does not result in a relativism created by equally valid, yet contradictory truth claims advocated by competing social groups. Instead, she argues that

[s]tandpoint theory provides arguments for the claim that some social situations are scientifically better than others as places from which to start off knowledge projects, and those arguments must be defeated if the charge of relativism is to gain plausibility.²⁹⁸

Harding concludes that standpoint theory can generate strongly objective conclusions by relying on the situated knowledge of oppressed groups, particularly women.²⁹⁹

One of the core critiques within standpoint theory was that it represented the same, arguably problematic, essentialism found in some

293. See *id.* at 32–33 (explaining that women are native speakers regarding their experience of the world and are, therefore, not only the most qualified to speak on this subject but also have a right to claim their perspective on society as wholly theirs).

294. See HARTSOCK, FEMINIST STANDPOINT REVISITED, *supra* note 282, at 7 (stating that her theory plays an important role in political action for social change). See generally, Nancy C.M. Harstock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE 283 (Merrill Hintikka & Sandra Harding eds., 1983).

295. See HARTSOCK, FEMINIST STANDPOINT REVISITED, *supra* note 282, at 1 (stating that "[t]he power of the Marxism critique of class domination stands as an implicit suggestion that feminists should consider the advantages of adopting a historical materialist approach").

296. *Id.* at 15–22.

297. See generally Sandra Harding, *Rethinking Standpoint Epistemology: What is "Strong Objectivity"?* in FEMINIST EPISTEMOLOGIES 49–82 (Linda Alcoff & Elizabeth Potter eds., 1993).

298. *Id.* at 61.

299. *Id.* at 65.

feminist scholarship generally. As in Third Wave Feminism, some standpoint theorists argued that their epistemology must be multivalent in order to address the subordination of people of color, sexual minorities, and the disabled (to name a few).³⁰⁰ Scholars within this tradition, such as Patricia Hill Collins, argue for the importance of considering overlapping identities by articulating a specifically black feminist standpoint.³⁰¹ Collins explores the self-definition and valuation of black women, the interlocking nature of oppression, and the importance of "Afro-American women's culture."³⁰² Her work was an important step toward the development of standpoints along multiple axes of identity that could better articulate the perspectives of oppressed peoples.

Standpoint theory has been further adapted and critiqued by non-North American scholars such as Uma Narayan, who argues that standpoint theory must abandon certain assumptions in order to be intelligible and helpful to Indian women (and by analogy, to be more universally objective).³⁰³ In particular, Narayan emphasizes the importance of context and pragmatism in addition to identifying ways in which the political implications of earlier standpoint theory pose particular problems for nonwestern feminists.³⁰⁴

For purposes of Catholic social thought, the most helpful theoretical move within standpoint theory is the move away from explicitly Marxian

300. See, e.g., Powell, *Beyond Lane*, *supra* note 234, at 45 (arguing that standpoint theory ought to inform judicial interpretation of the Americans with Disabilities Act).

301. See Collins, *Learning from the Outsider*, *supra* note 284, at S14 (explaining that African American women are uniquely situated in that they have traditionally been entrenched in the day-to-day activity of white families, loved by white families, and yet have still remained outsiders to white culture).

302. *Id.*

303. See generally Uma Narayan, *The Project of a Feminist Epistemology: Perspectives from a Nonwestern Feminist*, in *GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING* 256 (1989).

304. *Id.* at 258–59. Narayan explains:

Confronted with a powerful traditional discourse that values woman's place as long as she keeps to the place prescribed, it may be politically counterproductive for nonwestern feminists to echo uncritically the themes of western feminist epistemology that seek to restore the value cognitive and otherwise of "women's experience." The danger is that, even if the nonwestern feminist talks about the value of women's experience in terms totally different from those of the traditional discourse, the difference is likely to be drowned out by the louder and more powerful voice of the traditional discourse, which will then claim that "what those feminists say" vindicates its view that roles and experiences it assigns to women have value and that women should stick to those roles.

Id. at 259.

assumptions. Importantly, Susan Hekman developed an approach to postmodern feminism not rooted in Marxian historical materialism.³⁰⁵ In later articles, she pointedly challenges key standpoint theory scholars by decoupling the epistemology from Marxian thought and an inherently political emphasis.³⁰⁶ She is also less optimistic about the role of group consciousness in standpoint production of knowledge.³⁰⁷ This sort of work is particularly helpful as a step toward incorporating standpoint theory into the Catholic understanding of the preferential option. First, by explicitly rejecting Marxian thought as a necessary component of standpoint theory, she creates space for alternative philosophical approaches (including Catholic social thought). Second, by deemphasizing the connection between politics and standpoint theory, she opens the door to questions of subsidiarity and the appropriate position for decision-making. Third, her move away from essentialist standpoints rooted in group consciousness (even those that have multiple axes such as a womanist standpoint) acknowledges the diversity of human suffering and preferences. It also touches upon a theoretical challenge within standpoint theory, generally—the problem of false consciousness.

False consciousness is an issue that must be addressed if standpoint theory is to provide meaningful knowledge. If those whose standpoint is to be privileged are so deeply steeped in narratives of subordination, it is possible that they will not, as individuals, be capable of identifying the characteristics of their oppression.³⁰⁸ There are two parallel approaches to this problem. First, some scholars argue that the standpoint is understood from a particular social location but that it does not necessarily adopt the viewpoint of individuals who are not conscious of the instruments of their oppression.³⁰⁹ This approach is helpful to the extent that it accounts for the

305. See SUSAN J. HEKMAN, *GENDER AND KNOWLEDGE: ELEMENTS OF A POSTMODERN FEMINISM* 5–6 (1990) (explaining that once this rejection of a Marxist feminism occurs, it means that the political advantages that we receive from a feminist standpoint must also be reconsidered, now under a postmodern light).

306. See *id.* at 186 (approving of Foucault's position that power, not being localized in any one social sphere, such as economics or politics, must be opposed everywhere).

307. See *id.* at 4, 185 (rejecting group "metanarratives" in favor of more "local and contextual" analysis of dominance and subordination).

308. See Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1777–80 (1990) (considering the possibility that "even if we identify subordinated groups there is no guarantee that they have anything valuable to say about subordination").

309. See *id.* at 1778 ("Thus, if we are to weight pragmatism so that it attends to the perspective of the subordinated, the challenge is to identify the particular voice refined by consciousness-raising.").

disorienting power of oppressive social structures. However, it does not adequately account for the importance of actual human experience and agency in the development of standpoints.

The second approach is to theoretically hold standpoints in abeyance until consciousness-raising has been successful in empowering people to identify oppressive institutions and ideas so that they might be deconstructed. This creates a bit of a chicken and egg problem by requiring the method of consciousness-raising before the generation of reliable knowledge rooted in standpoint theory. In practice, however, it is not insurmountable. By acknowledging the need for understanding the perspective of the poor, liberation theologians promoted the formation of "base communities" which actively practiced consciousness-raising in the form of literacy training, catechesis, and public health education, among other modalities.³¹⁰ As community members developed the tools to decipher the languages of subordination, they could be freed from the false consciousness bred by colonial and postcolonial domination.³¹¹

Standpoint theory, particularly versions that do not rely on Marxian analysis, provides a useful way of understanding the preferential option and may reveal important insights for communicating policy arguments to non-Catholic audiences. Understanding the standpoint of the poor is also essential for fostering solidarity, a chief aim of Catholic social teaching. Contemporary social science provides a number of approaches that might be helpful in constructing meaningful standpoints of the poor.

A. Standpoint Theory as a Way of Understanding Preferential Option

Standpoint theory provides a lens for understanding the needs of the poor and exploring policy solutions. This should be no surprise because both liberation theology and standpoint theory have roots in Marxian historical materialism that shifts the source of epistemology from capital to

310. See, e.g., ANDREW DAWSON, *THE BIRTH AND IMPACT OF THE BASE ECCLESIAL COMMUNITY AND LIBERATIVE THEOLOGICAL DISCOURSE IN BRAZIL* 181 (1999) (tracing Brazil's development of the base ecclesial community which grew out of "an explicit ecclesial reflection upon everyday events and conditions within the local neighborhood, along with the Christian inspiration for, support of, and involvement within localized campaigns for clinics, schools, sanitation facilities, bus routes, and utility provision").

311. See *id.* at 199–200 (noting that this movement enables the poor "to see things as they actually are, thereby motivated into challenging unjust structures and becoming active subjects responsible for the construction of their own history" and form a "counter-hegemony").

workers. Despite these roots, both traditions have developed approaches that do not rely on Marx. Feminist standpoint theorists like Alison Jaggar³¹² and Susan Hekman³¹³ have relied instead on empiricism or post-structuralism, respectively. Similarly, some theologians and the Vatican have severed the connections between the preferential option for the poor and Marxian thought, instead turning to scripture and tradition.³¹⁴ To the extent that Marx and 19th Century socialists were influenced by communitarian Christian utopianism, this is not necessarily an inappropriate or unhelpful move.

By engaging in dialogue with secular standpoint scholarship, the Catholic Church can bring to bear the best social science available to provide answers to the key questions from Part I—who are the poor, what are their needs, what structures contribute to poverty, and what actions are necessary to dismantle those structures? Standpoint theorists benefit if large institutions like the Catholic Church adopt their view—even if conditionally—and provide support for collecting data that helps to construct standpoints, and mobilize resources to empower the marginalized.

B. Standpoint as an Essential Element of Solidarity

Pope John Paul II clearly understood the preferential option for the poor as related to solidarity. Solidarity is defined by him as a duty, a principle, and a virtue:

[It is not] vague compassion or shallow distress at the misfortunes of so many people . . . [But rather] is *a firm and preserving determination* to commit oneself to the *common good*; that is to say to the good of all and of each individual, because we are *all* really responsible *for all*.³¹⁵

Shifting the epistemological locus to the poor, identifying the poor, listening to their voices, empowering them to become agents of their own liberation, and partnering with them to confront oppressive structures all

312. See generally ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 353–93 (1983).

313. See HEKMAN, *GENDER AND KNOWLEDGE*, *supra* note 305, at 189 (arguing that the feminist philosophical movement could benefit from a closer association with the poststructural philosophical movement).

314. See, e.g., John Paul II, *Laborem Exercens*, *supra* note 161, at 352–92 (explicitly rejecting the Marxist idea of the "class struggle" and instead promoting the Catholic Church's concept of work, as derived from both the Bible and tradition).

315. John Paul II, *Sollicitudo Rei Socialis (On Social Concern)*, *supra* note 47, § 38, ¶ 6 (1987), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 42, at 421.

contribute to the kind of solidarity necessary to form the community envisioned by John Paul II.

C. Developing Standpoints

The social sciences provide a number of helpful strategies for giving voice to the perspectives of the poor. Since early standpoint theory was rooted in sociology, that discipline is well-suited for identifying and clarifying standpoints. The related field of geography, especially postmodern and feminist geography, also provides helpful approaches for developing standpoints that generate knowledge relevant to the preferential option. These tools provide greater opportunities for listening to the voices of the poor, which has significant policy implications.

1. Sociology

A number of standpoint theorists, such as Dorothy Smith and Patricia Hill Collins mentioned above, have written within the ambit of broader sociological discourse. It is not insignificant that Smith developed early standpoint theory as a critique of male-dominated sociology.³¹⁶ As the study of social organization, sociology is well suited to analyzing structures that subordinate, particularly when the analysis regards the view of the subordinated.

Catholic sociologist John Coleman, S.J. argues that the Catholic Church ought to use the tools of social analysis in light of its philosophical commitments—including the preferential option for the poor—with the realization that "[i]f the social question [understanding structures of injustice] calls for societal transformations . . . politics is the appropriate arena for imagining alternative structures."³¹⁷

2. Postmodern and Feminist Geography

In the context of developing legal rules consistent with the preferential option, I link standpoint theory to both postmodern and feminist geography (admitting that there is some tension between the two). As a theoretical

316. Smith, *supra* note 283, at 21–22.

317. John A. Coleman, S.J., *Neither Liberal nor Socialist*, in ONE HUNDRED YEARS OF CATHOLIC SOCIAL THOUGHT 39–40 (John A. Coleman, S.J. ed., 1991).

matter, postmodernism is helpful in describing geography broadly in terms of connection and social space as opposed to physical location alone.³¹⁸ This seems to be compatible with a geography that generates standpoints. A particular standpoint can be defined in its relationships, especially those with oppressive power structures. It can describe a view from below, observing dominant systems, and for my purposes, legal systems, revealing what is not apparent to those whose standpoint is "closer" to the dominant system.

Feminist geography is in tension with some postmodern geography to the extent that postmodernism blurs or discounts the lived experience of women.³¹⁹ Although not all feminist geography is expressly "modern," there is generally an emphasis on revealing systems of oppression using the traditional tools of geography such as mapping, demographics and surveys.³²⁰ It is an attempt to transform a tool of male and colonial power into an instrument of consciousness-raising.

A standpoint geography rooted in the preferential option could take advantage of the theoretical flexibility of postmodern geographies while it is grounded in the praxis of the feminist geography tradition. Geography rooted in a commitment to the preferential option for the poor and marginalized could generate standpoints along multiple axes of marginalization to assist legal institutions in identifying oppression and inequity that might not otherwise be readily noticed by those who argue, interpret, and dictate legal rules. More importantly, it would be a tool for

318. See, e.g., Edward W. Soja, *Exploring the Postmetropolis*, in POSTMODERN GEOGRAPHY: THEORY AND PRAXIS 37–56 (Claudio Minca ed., 2001) [hereinafter Soja, *Exploring the Postmetropolis*] (exploring the relationship between spatial and social control); Claudio Minca, *Postmodern Temptations*, in POSTMODERN GEOGRAPHY (Claudio Minca ed., 2001) 223–24.

[R]eadings spaces and territories assume entirely novel meanings—no longer simply the material manifestations of some underlying essence, of some identity to be revealed, they become the scenario and the product of an infinite recontextualization; a context in continual evolution and transformation, guided by the multitude of descriptions that contribute to its narration and construction.

Id.; Giuseppe Dematteis, *Shifting Cities*, in POSTMODERN GEOGRAPHY 113 (Claudio Minca ed., 2001) ("[P]ostmodern geographical praxis necessitates a shift from a physicalist (causal) conception of space . . . to a conception of space as a logical-symbolic operator, suitable for interfacing creative and analytical thought.").

319. See DOREEN MASSEY, *SPACE, PLACE, AND GENDER* 214–18, 238–41 (1994) (stating that feminist geography is one of the many different challenges to modernity from within).

320. *Id.* at 214–38.

raising consciousness among marginalized groups for their own empowerment.³²¹

The notion of social location in critical and postmodern geography provides a theoretical and spatial model for understanding patterns of oppression among groups who share similarities in class, culture, race, religion, language, or any other identifiable demographic category.³²² Developing geographic and demographic data along with collecting narratives of the poor and marginalized would help to give voice to the various experiences of poverty. Such empowered perspectives may help reveal patterns of structural injustice in such a way that policymakers could tailor legal reform to meaningfully respond to the lived experience of the poor and marginalized.

3. *Hearing Marginalized Voices: Implications for Legal Rules*

At a time when bills before Congress are filled with unrelated allocations of federal funds designed to benefit supporters and business interests, it is almost impossible to hear the voices of the marginalized through the din of lavish lobbying and glitzy advertising. Standpoint theory provides a justification for listening to voices from below and along with social science suggests tools for deciphering their stories. Taken seriously, the preferential option ought to prompt lawmakers to pay greater heed to the concerns of the poor.

V. *Effecting Change: The Power of Outsider Methodology*

A number of critical schools of thought have advocated consciousness-raising for empowering the subordinated. It is the core methodology for many feminist scholars, but it has also remained central in critical race theory, Latina/o critical race theory, queer theory and other forms of outsider scholarship.³²³ Consciousness-raising is broadly understood as providing the tools to recognize and oppose structures of oppression.³²⁴ For

321. See discussion *infra* Part V.

322. See LINDA MCDOWELL, GENDER, IDENTITY AND PLACE: UNDERSTANDING FEMINIST GEOGRAPHIES 176–80 (1999) (describing "social location" and its use in discerning patterns among identifiable groups).

323. See generally CRITICAL RACE THEORY, *supra* note 245.

324. See Matsuda, *Pragmatism Modified*, *supra* note 308 at 1778–79 ("By 'consciousness-raising,' I mean a collective practice of searching for self-knowledge through

poor communities this might mean providing literacy, facilitating the building of communities in which members can share ideas and experiences. In the U.S. civil rights and feminist contexts, consciousness-raising ultimately linked to social and political organizing.

Feminist jurisprudence is by no means monolithic. However, the earliest comprehensive paradigmatic proposal is arguably found in Catharine MacKinnon's *Toward a Feminist Theory of the State*,³²⁵ which articulates a consistent and cohesive theoretical approach to law rooted in praxis and the lived experience of women. To the extent that MacKinnon's ideas have led to meaningful change (particularly in the area of sexual harassment claims), her work is a model for consciousness-raising. She worked to raise consciousness regarding the link between sex discrimination and sexual harassment, and her efforts resulted in concrete legal reform.³²⁶ The discussion of specific feminist proposals is limited here to the methodology of consciousness-raising, although there are likely other elements of feminist jurisprudence with important implications for Catholic social thought.

Consciousness-raising as the principal method of feminism seems to indicate an expectation that this process will result in legal change, which in turn may dialectically promote raised consciousness (as in the case of sexual harassment litigation).³²⁷

The idea of consciousness-raising as a method of analysis suggests an approach to social change which recognizes dynamic tension, reflection, and sharing as essential aspects of growth. Feminist theory values this process which starts with experience, generalizes through self-reflection and evaluation, and then returns to experience . . . Feminist theory thus reveals the social dimension of individual experience and the individual dimension of social experience.³²⁸

Although MacKinnon is one of the most prominent feminist scholars, there are many others who approach consciousness-raising from different

close examination of our own circumstances, in conjunction with organized movements to end existing conditions of domination.").

325. See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

326. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1-7 (1979) (advancing the legal argument that sexual harassment should be equated with sex discrimination).

327. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 325, at 237-49.

328. *Id.* at 17.

perspectives. Within the legal academy, regional feminist reading groups provided safe spaces for reading common texts, discussing ideas, sharing scholarship, and strategizing to overcome institutionalized bias embedded in many law school faculties.³²⁹ These groups formed a model for consciousness-raising within the legal academy. Much nonfeminist outsider scholarship adapts feminist methodology in the form of consciousness-raising.

Critical race theory has additional insights for consciousness-raising as a methodology for the preferential option, and Derrick Bell is arguably the most influential critical race scholar in the legal academy. His race and law text was first published in 1973, and he is one of the most published legal scholars.³³⁰ The main themes of his critical race scholarship include racial realism, revisionist history, and the role of white supremacy in the U.S.³³¹ One of his underlying methodologies is consciousness-raising, largely, though not exclusively, through formal education—particularly legal education.³³² He has written consistently regarding the need for greater integrity in teaching, and sacrificed his tenure at Harvard Law School in protest of the faculty's unwillingness to hire and tenure a woman of color.³³³ It is imperative for him that those marginalized by racism understand civil rights history, including its ugliest chapters, in order to be prepared to confront the legal structures that perpetuate marginalization.³³⁴ He was also one of the first in the legal academy to adopt a storytelling style in order to make his writing accessible to the lay reader—again

329. See, e.g., Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861–62 (1987) (explaining the role of legal interpretive activity in creating a "sense of potential community membership without relinquishing struggles over meaning and power"). In her Article, Minow expresses gratitude "to the communities of inquiry created by two wonderful feminist reading groups." *Id.* at 1915 n.d1.

330. See DERRICK BELL, *THE DERRICK BELL READER* 14 (Richard Delgado & Jean Stefancic eds., 2005) ("Easily among the most productive and innovative legal scholars of his generation, Bell has pioneered at least three areas of scholarship: critical race theory, narrative scholarship, and economic-determinist analysis of racial history.").

331. See generally *id.*

332. *Id.* at 232–37.

333. *Id.* at 9–14.

334. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 1–14 (1992) (stating that in order to plan for the future, one must review the experiences of the past by "getting real" about race and the persistence of racism in America); Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 8–9 (1985) (proposing that the myths that have led to racial policy are the 'missing link' between the desire for some goal of racial justice and its realization").

consistent with his commitment to raising consciousness for the purpose of advancing civil rights.³³⁵

The Latina/o critical studies movement (LatCrit), explores the multiple dimensions of Latina/o identity and experience in such a way that various approaches to difference or outsider scholarship can be explored within a single theoretical framework.³³⁶ LatCrit incorporates analysis from more traditional critical race theory, feminist jurisprudence, queer theory and others.³³⁷ It also creates space for exploring the unique role of religious identity. Since the Catholic faith still plays a central role in many Latina/o communities, it is the subject of some LatCrit scholarship.³³⁸ The influence of liberation theology in Latin America has impacted both the method and lexicon of some LatCrit scholarship, in which the preferential option for the poor is viewed as a liberating principle.³³⁹

In the tradition of LatCrit, Richard Delgado and Jean Stefancic explain that racism, along with other brands of oppression, forms part of the dominant narrative and that people will dismiss persuasive counter arguments in the marketplace of ideas until a new narrative is in place.³⁴⁰ Consciousness-raising then becomes critical in debunking oppressive narratives. Like critical race theory generally, LatCrit uses narrative and storytelling to make ideas accessible to those outside the legal academy.³⁴¹

As a method, consciousness-raising takes a variety of forms (feminist reading groups, classroom teaching, scholarship, civil rights organizing, and

335. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411–12 (1989) (describing how Derrick Bell's writings led others to "become more personal in their writing, to inject narrative, perspective, and feeling . . . into their otherwise scholarly, footnoted articles").

336. See Hernandez-Truyol et al., *supra* note 247, at 187–93 (discussing the contributions of Latcrit theory).

337. See generally Francisco Valdés, *Theorizing "Outcrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—Racecrits, Queercrits and Latcrits*, 53 U. MIAMI L. REV. 1265 (exploring LatCrit in relation to other "Outcrit" methodologies and practices).

338. E.g., Reynaldo Anaya Valencia, *Being an "Out" Catholic: Contextualizing the Role of Religion at LatCrit II*, 19 CHICANO-LATINO L. REV. 449 (1998).

339. See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA, Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 396–400 (1993) (explaining that the "preferential option for the poor" is a commitment to structural justice that liberation theology expresses).

340. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1277–81 (1992) ("[W]e only condemn the Old Narrative.").

341. See Hernandez-Truyol et al., *supra* note 247, at 179 (discussing the use and purpose of storytelling in critical race theory).

base communities to name a few). It also has a variety of audiences. Ultimately, outsider scholarship is most concerned with raising consciousness among oppressed groups; however, there is a role for consciousness-raising among potential allies and the general public as well, which might become important in transforming broader narratives and structures of injustice.

VI. *Law and Economics in Service of the Poor*

Without resorting to a notion of the good that is limited to maximizing wealth, law and economics provides powerful tools for evaluating existing and proposed legal rules. There are two ways that law and economics might be employed consistent with the principle of the preferential option for the poor. First, there is a body of law and economics theory that incorporates distributive concerns and attempts to provide theory and tools for confronting poverty.³⁴² Mainstream law and economics theory proposes tools that could tailor legal rules to oppose poverty and the structures that create it, even if such theory is inconsistent with the preferential option.³⁴³ A thick understanding of incentives (even those responding to preferences that are not clearly "rational") can identify policy levers that transform behavior and potentially even neuter structures that perpetuate poverty.

Although much of contemporary law and economics holds to the Kaldor-Hicks (KH) model of efficiency and conventional cost benefit analysis (CBA), a number of scholars have responded to criticisms of KH by proposing new approaches that address distributional concerns. Conventional law and economics has been criticized for a variety of reasons, including challenges to conservative bias,³⁴⁴ the exclusion of non-efficiency or non-welfarist concerns,³⁴⁵ and unjustified assumptions regarding human rationality³⁴⁶ and transaction costs.³⁴⁷ KH-CBA does not

342. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 179–84 (2000) (describing a three part system for transferring wealth to the poor).

343. See generally Adler & Posner, *supra* note 195.

344. See, e.g., Baird, *supra* note 196, at 1149 (stating that economists are generally more conservative than others because their understanding of the market causes them to favor a decentralized system).

345. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 527 (1980) (posing the question whether other moral theories may not be more attractive than wealth maximization).

346. See generally Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost Benefit Analysis*, 29 J. LEGAL STUD. 1005 (2000).

distinguish between good values like integrity and bad values such as envy.³⁴⁸ It favors private preferences over public values.³⁴⁹ Most importantly from the point of view of the preferential option, it privileges the wealthy and ignores distributional and fairness concerns.³⁵⁰

In recommending that policy decisions intended to further the preferential option for the poor use the tools of law and economics, I propose the approach of Richard Zerbe. Zerbe acknowledges the weaknesses of the Kaldor-Hicks model and traditional cost-benefit analysis.³⁵¹ He advocates a new model of efficiency he calls Kaldor-Hicks-Moral (KHM), in which legal rights and moral sentiment are factored into Willingness to Pay and Willingness to Accept analysis in cost-benefit analysis (renamed benefit-cost analysis (BCA) in order to distinguish it from mainstream CBA).³⁵²

There are two positions that make Zerbe's approach to BCA a more helpful tool. First, it considers moral sentiment, including distributional concerns.³⁵³ As with any other preference, a desire for distributional fairness can be quantified. Including this concern in BCA by using a KHM standard for efficiency comes to conclusions quite different from those derived from CBA and KH. For example, assume a legal change that adds one million dollars of value for the wealthiest member of the community

347. See, e.g., Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 404–06 (1997) (criticizing the term "zero transaction costs" under the Coase Theorem because "it never arises in the real world").

348. See Nussbaum, *supra* note 346, at 1032 (arguing against cost benefit analysis because it may reward immorality).

349. See generally ELIZABETH ANDERSON, *VALUES IN ETHICS AND ECONOMICS* (1993).

350. See Richard S. Markovits, *A Constructive Critique of the Traditional Definition and Use of the Concept of "The Effect of a Choice on Allocative (Economic) Efficiency": Why the Kaldor-Hicks Test, the Coase Theorem and Virtually all Law-and-Economics Welfare Arguments Are Wrong*, 1993 U. ILL. L. REV. 485, 512–15 (1993) (discussing the deficiencies of the Kaldor-Hicks test).

351. See RICHARD O. ZERBE, JR., *ECONOMIC EFFICIENCY IN LAW AND ECONOMICS* 8–10 (Edward Elgar Publishing, Inc. 2001) (discussing criticisms of Kaldor-Hicks).

352. See generally Richard O. Zerbe, Jr., *The Legal Foundation of Cost-Benefit Analysis*, 2 CHARLESTON L. REV. 93, 114 (2007) [hereinafter Zerbe, *The Legal Foundation of Cost-Benefit Analysis*] (describing how KHM quantifies morality in BCA); Richard O. Zerbe, Jr., *Justice and the Evolution of the Common Law*, 3 J.L. ECON. & POL'Y 81, 83 (2006) [hereinafter Zerbe, *Justice and Evolution*] (discussing how KHM can rectify the divergence between KH efficiency and justice).

353. See Zerbe, *The Legal Foundation for Cost-Benefit Analysis*, *supra* note 352, at 113–19 (discussing how common criticisms of cost-benefit analysis (CBA) can be "vitiating" by adapting a modified version of CBA, called "benefit-cost analysis" that takes into account "moral sentiments, including those of equity, fairness, and income distribution").

and causes \$900,000 of harm to the poorest members of the community.³⁵⁴ Using KH, the change would be efficient even if the poor were not compensated for the harm caused to them. Using KHM, the BCA would consider the distributional preferences of the community. If members of the community would be willing to pay at least \$100,000 in order to avoid the disproportionate harm to the poor, then KHM would conclude that the change is not efficient. Consideration of moral concerns, including distributional effects, makes BCA a more useful tool in the context of Catholic social thought. However, the quantification of moral values is problematic when those values are deontological rather than comparative. Zerbe solves this quandary by admitting that even BCA is not intended to define the good. Instead, it is intended to provide information, so that legal rules can be crafted on an informed basis.³⁵⁵

KHM-BCA provides concrete instrumental tools to assist those committed to the principle of the preferential option in formulating policy positions and proposing legal rules by predicting the impacts of those rules in order to avoid unintended consequences. It is conceivable that certain policy moves will be justified by the preferential option even when they appear to be inefficient according to BCA. The moral concerns addressed by BCA must be sufficiently ingrained in the population in order for them to be calculated.³⁵⁶ If the moral suasion of the preferential option is not felt widely enough to balance self-interest, BCA calculations are not likely to validate the option as efficient. However, BCA may still be helpful as a tool for making "inefficient" rules that do not cause unintended harm. Furthermore, to the extent that law shapes cultural norms, what was once efficient though deontologically immoral may become inefficient from a KHM-BCA perspective once those deontological standards become imbedded in culture as norms. This was arguably what happened with slavery, dueling and segregation.³⁵⁷

354. This hypo is based on one used by Richard O. Zerbe, Jr. in *An Integration of Equity and Efficiency*, 73 WASH. L. REV. 349, 355–58 (1998).

355. See Zerbe, *The Legal Foundation for Cost-Benefit Analysis*, *supra* note 352, at 177 ("Increasingly, the role of BCA is seen as that of providing information to a decision process rather than one of providing the answer.").

356. See Zerbe, *An Integration of Equity and Efficiency*, *supra* note 352, at 361 ("Truly efficient results accord with the notions of fairness imbedded in culture."); see also Zerbe, *Justice and Evolution*, *supra* note 352, at 96 ("Similarly, a change in moral sentiments may make a change in ownership efficient, as when the exercise of a right that harms others is no longer seen as acceptable.").

357. See Zerbe, *Justice and the Evolution of the Common Law*, *supra* note 352, at 107–14 (discussing the economically inefficient ways that the common law changed in order to

VII. A Mandate for Legal Change

Applying standpoint theory, outsider methodology, and law and economics to the preferential option for the poor could have wide-ranging implications for legal reform. Electoral rules, benefits law, tax law, labor, and employment law, corporate law, immigration law and legal education are among the many areas of law and policy that the preferential option might inform.

A. Electoral Rules

All three approaches would likely support the need for vital democratic political institutions, and in particular, equal access to electoral power. Although voting does not privilege the perspective of the poor, it at least solicits input. From a standpoint theory perspective, voting is helpful if it gives voice to the political will of the poor. However, the profound influence of corporate donations to political candidates and the U.S. system of political patronage arguably blurs the landscape to the point that the voices of the poor amount only to a whisper. Standpoint theory would focus on the views of the poor and marginalized as a starting place for electoral reform. Geography, sociology, and related social sciences provide tools for distilling those views. Outsider methodology in the form of consciousness-raising would be firmly committed to educating and empowering the poor to politically organize themselves so that they cannot be ignored. Outsider scholarship provides a wealth of experience related to consciousness-raising, community organizing and voting. Law and economics, hearkening to its utilitarian roots, would also be concerned with assuring that people have meaningful access to the vote. With its libertarian tendencies and an emphasis on political rights and private ordering, even neoclassical law and economics should be able to support the ideal of the preferential option in terms of access to voting. The preferential option might be applied to craft incentives for the marginalized to participate by, for example, limiting corporate political contributions.

respond to slavery, dueling, and segregation).

B. Legal Distribution of Benefits and Burdens

The preferential option for the poor has significant implications for the equitable distribution of resources. Some of this work is done privately by individual giving and through charities. In the last century much of it has been accomplished by state action, which can be divided generally into two categories: benefits and tax.

1. Benefits Law

Benefits law, with the possible exception of healthcare, is the focus of many poverty law scholars. Poverty law scholarship typically adopts a standpoint epistemology in order to understand the impact of legal rules on the poor as a group.³⁵⁸ Outsider methodology and consciousness-raising are also tools of the poverty lawyer and the poverty law scholar as they press for justice for the poor in their writing, teaching, advocacy, and organizing.³⁵⁹ Although poverty law scholarship is often at odds with conventional law and economics because of its competing vision of the good, anyone analyzing or evaluating benefits systems like welfare must employ economic tools to weigh the relative costs and benefits of specific programs and rules to assist in the efficient allocation of finite resources.

2. Tax Law

Tax is perhaps the single most effective incentive that governments have at their disposal in redistributing wealth (tax credits and funding state programs that benefit the poor) and influencing economic behavior (tax credits and deductions). Standpoint theory would imply that taxes must be progressive so that all people have sufficient resources to flourish. Outsider methodology can bring inequities into public consciousness and create an environment in which change is possible.³⁶⁰ Law and economics should be

358. Vincent D. Rougeau, *A Shared Vision to Confront the Problem of Urban Sprawl?*, in *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* 205–19 (Michael M. Scaperlanda & Teresa Stanton Collett eds., 2007).

359. *Id.*

360. See, e.g., Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 819 (2007) (seeking to "use critical race theory as a framework for ending the attack on low-income tax payers").

able to assist in describing incentives created by tax law and predicting the likely impact of proposed rules.

C. Labor and Employment Law

One of the most contentious issues in contemporary U.S. labor and employment law is access to health care. More than 45 million Americans do not have health insurance,³⁶¹ and the great majority of those people have jobs or live in a household with someone who does.³⁶² Major employers such as Wal-Mart have been reticent to offer health insurance because of cost concerns.

The preferential option can focus policy discussions regarding employer provision of health insurance in two helpful ways. It acknowledges that basic needs such as healthcare must be available to the poor.³⁶³ But it also creates a framework for thinking creatively about solutions. "[The preferential option for the poor] offers principles that help shape our views about how the problem [of healthcare] ought to be addressed and how different proposed solutions should be judged."³⁶⁴

D. Corporate Law

Corporate law has largely become the province of law and economics.³⁶⁵ While many scholars assume that maximizing returns is the

361. David Leonhardt, *A Health Fix That Is Not Fantasy*, N.Y. TIMES, Apr. 12, 2006, at C1 (estimating that 46 million people do not have health insurance).

362. Catherine Hoffman, Diane Rowland & Alicia L. Carbaugh, *Holes in the Health Insurance System—Who Lacks Coverage and Why*, 32 J.L. MED. & ETHICS 390, 394 (2004) ("The large majority of the uninsured come from families with at least one member who is working outside the home.").

363. See U.S. Conference of Catholic Bishops, *A Framework for Comprehensive Health Care Reform: Protecting Human Life, Promoting Human Dignity, Pursuing the Common Good* § A (1993) ("The current health care system is so inequitable, and the disparities between rich and poor and those with access and those without are so great that it is clearly unjust."); see also U.S. Conference of Catholic Bishops, *Health Care for the Uninsured* (Feb. 2002), <http://www.usccb.org/sdwp/national/uninsbc.shtml> (last visited Jan. 12, 2009) (discussing the Church's efforts to advocate for adequate health care for all, regardless of ability to pay) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

364. Susan Stabile, "Poor" Coverage: *The Preferential Option for the Poor and Access to Health Care*, 5(1) VILL. J. CATH. SOC. THOUGHT 125, 160 (2007).

365. See Charles R.T. O'Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 763–66 (2006) (describing the Nexus-of-Contracts

end goal of corporate law, some scholars use law and economics in the narrower sense to analyze the overall cost to society of specific legal rules.³⁶⁶ Progressive corporate law scholarship concerns itself with the impact of corporations on the common good, often with an emphasis on less powerful economic actors, like workers.³⁶⁷ Some scholars even privilege the view of workers over that of directors, officers and shareholders in a way that resembles standpoint epistemology.³⁶⁸ Even when this move is not made, some scholars advocate consciousness-raising regarding corporate power, particularly among workers.³⁶⁹ A number of Catholic scholars write about the implications of the Church's social teaching for corporate law. Stephen Bainbridge emphasizes the role of individual rights and the principle of subsidiarity with little regard for moral principles like the preferential option.³⁷⁰ He thus concludes that Catholic social thought is unlikely to have implications for greater regulation within corporate law.³⁷¹ Mark Sargent and Susan Stabile take a more holistic view

Paradigm in corporate law as a part of the re-emergence of law and economics).

366. E.g., Kellye Y. Testy, *What is the "New" Corporate Social Responsibility?: Linking Progressive Corporate Law With Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002).

367. See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 187–204 (2007) (delineating the ramifications of a corporate system that does not protect employees from fraud); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 325 (1999) (describing how shareholder-focused corporate governance comes at the cost of workers); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993) (exploring the conflict between a corporation's need to increase profits and a worker's need for increased pay and proposing the expansion of a director's fiduciary duties to include duties to employees).

368. E.g., GREENFIELD, *supra* note 367; O'Connor, *supra* note 367.

369. *Id.*

370. See Stephen M. Bainbridge, *Catholic Social Thought and the Corporation* 5 (Oct. 22, 2003), <http://ssrn.com/abstract=461100> (unpublished research paper) ("I have argued herein that preserving the economic freedom of corporations to pursue wealth is an essential part of effective means for achieving human freedom. To the extent prudential judgments are required, the Church and the laity should strive to duplicate Russell Kirk's nuanced balancing of freedom and virtue.").

371. See *id.* at 2 ("A persistent error 'in this territory' is the tendency towards what Milton Friedman called 'the collectivist moral strain' in Catholic social thought. Indeed, it is fair to assert that some documents in the social teaching more closely resemble 'the platforms of European social democratic parties' than Biblical exegesis.") Bainbridge goes on to add that, "[e]ven some of John Paul's encyclicals have a statist flavor. In *Laborem Exercens*, for example, his sharp criticism of Marxism is strikingly offset by the statement that 'one cannot exclude the socialization, in suitable circumstances, of certain means of production.'" *Id.*

of Catholic social thought, including the preferential option for the poor.³⁷² They challenge some normative law and economics in this area without denying its power for shaping rules.

E. Immigration Law

Questions of immigration and nationality are critical for drawing the lines between insiders and outsiders. Catholic social teaching has consistently urged lawmakers to consider the impact of immigration policy on the poor. A number of Catholic institutions are committed to supporting refugees and the undocumented and to working to change the legal regimes that enforce marginalization.³⁷³ Scholars like Vincent Rougeau and Michael Scaperlanda incorporate a sort of standpoint epistemology into their work and promote education among migrants and citizens.³⁷⁴ The use of law and economics in this field is complicated by the distortions created by national boundaries. For example, immigration policies that promote heavy immigration of highly-skilled labor and turn a blind eye to massive immigration of unskilled workers who are subject to rampant exploitation draw valuable human resources away from poorer countries and keep the working poor subordinated. In the field of immigration law, national interests are often at odds with world interests. This conflict is clarified by standpoint theory, which would consider first the interests of the poor and working poor, whose populations are concentrated outside of North America and Europe and who constitute a substantial population of the world.

372. See Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEGAL STUD. 35, 35–38 (2005) (describing how the law and economics movement considers rational actors to make choices that further their own objectives without considering others and comparing that understanding with Catholic social thought). See generally Susan Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. FOR SOC. JUST. 181 (2005) (inquiring as to whether there is a place in corporate thought for promoting ethical and moral behavior by corporate actors, as required by Catholic social thought).

373. See, e.g., Catholic Charities' Immigration & Refugee Services, *Mission Statement*, <http://www.cirsorl.org>, (last visited Jan. 12, 2009) (stating the organization's mission to "provide quality resettlement services to newly arrived refugees, ensure families have access to affordable immigration related services, and promote justice, compassion and acceptance for all newcomers") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

374. See generally Michael A. Scaperlanda, *Immigration Justice: A Catholic Christian Perspective*, 1 J. CATH. SOC. THOUGHT 535 (2004); Vincent D. Rougeau, *Immigration and Catholic Social Thought*, 32 SEATTLE U. L. REV. (forthcoming 2009).

F. Legal Education

[The preferential option] means solidarity with the poor, and that means we lawyers have to change sides, because poverty is a zero-sum game, a game in which Americans have taken up sides—and we lawyers are on the wrong side It means entering the world of the exploited in a concrete way; accepting the validity and even the superiority of the perspective of the poor . . . yielding leadership to representatives of the poor (including clients); and abandoning membership in groups that identify with the oppressors of the poor.³⁷⁵

Legal education in the U.S. is an exercise by the rich for the rich or those aspiring to be. American law professors, though perhaps making less than their colleagues in private practice, still earn more than most U.S. citizens, not to mention the rest of the world. Graduates of law schools tend to be affluent or working towards affluence. Even law students have access to resources that are unavailable to most people in the world. Law students typically work hard, and although some enter law school with visions of changing the world, most ultimately succumb to the comfort of relative affluence.

The preferential option has profound implications for legal education. As the primary gatekeepers of law and government, lawyers are in a privileged position to effect positive change and ensure justice for the disadvantaged. To their credit, many work tirelessly for those goals. However, for most of us, our formation in law school prepared us for defending the rich.

The preferential option has implications for the programs we offer and what we do, but it is perhaps more important that it transform our attitudes.³⁷⁶ Bill Quigley identifies seven principles related to the preferential option for the poor that are crucial to this transformation: respect for human dignity, hearing the poor, solidarity with the poor, charity and justice, changing culture, community and acting on behalf of justice.³⁷⁷ If these principles were incorporated into legal education, it would have implications for our pedagogy, the classes we offer, the texts we choose, the size of our classes, who is admitted, financial aid and a host of other issues. Although some schools have attempted to move in this direction, market

375. Thomas L. Shaffer, Speech at Catholic University of America: The Preferential Option for the Poor (Jan. 4, 2003).

376. See generally William Quigley, *Seven Principles for Catholic Law Schools Serious About a Preferential Option for the Poor*, 1 U. ST. THOMAS L.J. 128 (2003).

377. *Id.*

forces and the current obsession with rankings militate against a broader shift. Perhaps the preferential option can provide an ethical basis for working against current trends, particularly in Catholic law schools.

VIII. Conclusion

This article has two primary audiences. First are non-Catholic legal scholars, lawyers and lawmakers. Ideally, this work has made a case for greater constructive engagement with religious thought and institutions where such engagement facilitates achievement of policy goals such as the eradication of poverty. Most states have large religious communities with a rich heritage of moral and ethical reasoning that might contribute to public reason even in a pluralistic society that values the nonestablishment of religion. Those traditions, whether Catholic, Islamic, Buddhist or Navajo, may provide clarity for the development of policies and legal rules that are more likely to be accepted by their respective communities even when legal analysis is ultimately recast in more pluralistic and universal terms at the level of government and law.

Catholic understandings of the preferential option for the poor provide a framework for analyzing and prioritizing legal reform in a way that is more likely to address both the causes and conditions of poverty. In a nation that is 23.9% Catholic and majority Christian, policies justified with the theology of those communities are more likely to have legitimacy.³⁷⁸ The dark side of this opening is the possibility that oppressive policies might be legitimated in the language of theology, (which would not be a new experience). However, since theology is already at play motivating legal and policy decisions, openness to theological arguments subjects bad theological reasoning to refutation within the domain of public reason and rational disputation when the arguments are removed from their religious contexts within legal discourse.

The second audience is Catholics and others who have a religious commitment to the preferential option for the poor or something like it. It is my hope that members of these communities, especially leaders and scholars will be more open to dialogue with "secular" thought that might provide clarifying insights (standpoint epistemology), helpful methodologies (consciousness-raising) and effective tools for policymaking (law and economics). Such constructive engagement and openness creates

378. THE PEW FORUM ON RELIGIOUS AND PUB. LIFE, UNITED STATES RELIGIOUS LANDSCAPE SURVEY 10 (2008).

new opportunities for furthering justice goals rooted in religious traditions. It also serves as a sign to other communities that religious commitment to justice is more than a mere platitude. Even if engaging secular thought does not alter the internal understanding of theology, it provides a lexicon for framing moral and ethical arguments that might be persuasive to those outside the religious community. Ultimately, Congress is unlikely to pass legislation requiring employers to provide health insurance simply because the U.S. Catholic Bishops argue that the preferential option makes it a moral and religious imperative. Lawmakers might, however, respect those arguments even if they are ultimately convinced by fairness, virtue or utility arguments that do not rely on religion. Engaging and understanding nonreligious reasoning gives lawmakers the opportunity to seriously consider religious ideals of justice like the preferential option for the poor.